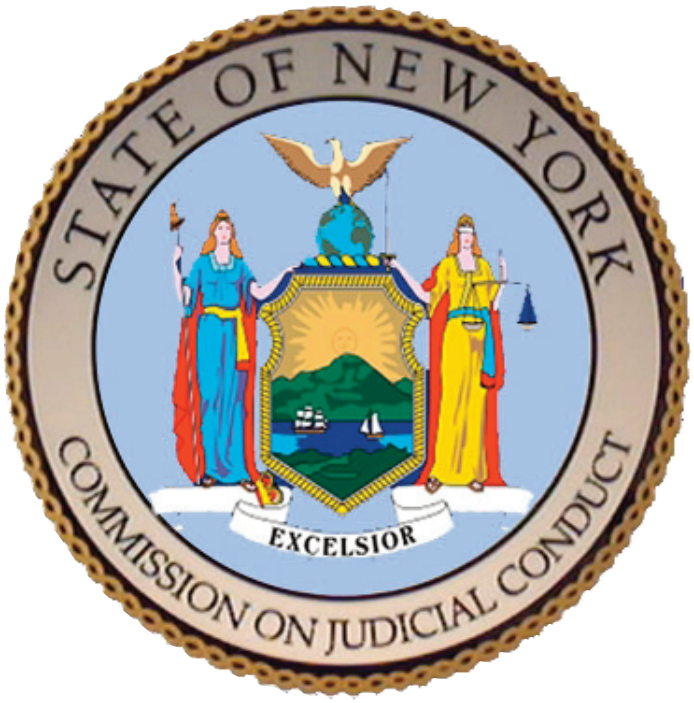
NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT



ANNUAL REPORT

2010

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NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

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*Denotes staff who left in 2009

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

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March 1, 2010

To Governor David A. Paterson,
Chief Judge Jonathan Lippman, 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, 2009.

Respectfully submitted,

Robert H. Tembeckjian, Administrator
On behalf of the Commission

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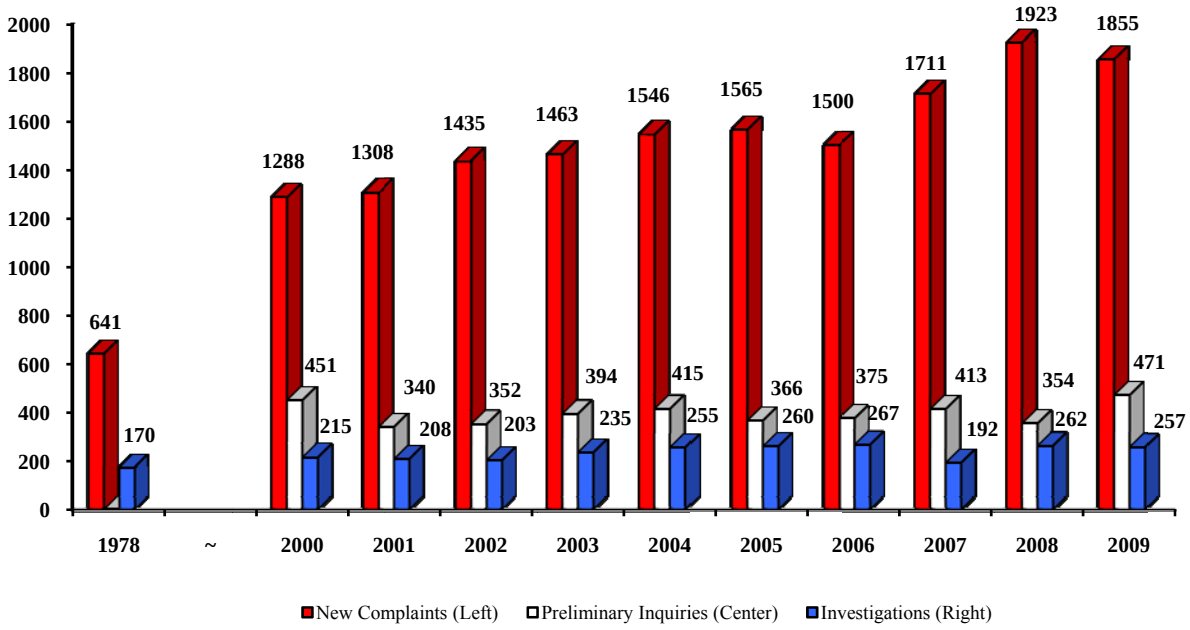
INTRODUCTION TO THE 2010 ANNUAL REPORT

The New York State Commission on Judicial Conduct is the independent agency designated by the State Constitution to review complaints of misconduct against judges and justices of the State Unified Court System and, where appropriate, render public disciplinary determinations of admonition, censure or removal from office. There are approximately 3,500 judges and justices in the system.

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 should they commit misconduct. The text of the Rules Governing Judicial Conduct, promulgated by the Chief Administrator of the Courts on approval of the Court of Appeals, is annexed.

The number of complaints received annually by the Commission in the past 18 years has substantially increased compared to the first 17 years of the Commission's existence. Since 1992, the Commission has averaged over 1,500 new complaints per year, 415 preliminary inquiries and 215 investigations. Last year, 1,855 new complaints were received, the second highest number ever, after last year's 1,923. Every complaint was reviewed by investigative and legal staff and an individual report was prepared for each complaint. All such complaints and reports were reviewed by the entire Commission, which then voted on which complaints merited opening full scale investigations. As to these new complaints, there were 471 preliminary reviews and inquiries and 257 investigations.

This report covers Commission activity in the year 2009.



COMPLAINTS, INQUIRIES & INVESTIGATIONS IN THE LAST TEN YEARS

ACTION TAKEN IN 2009

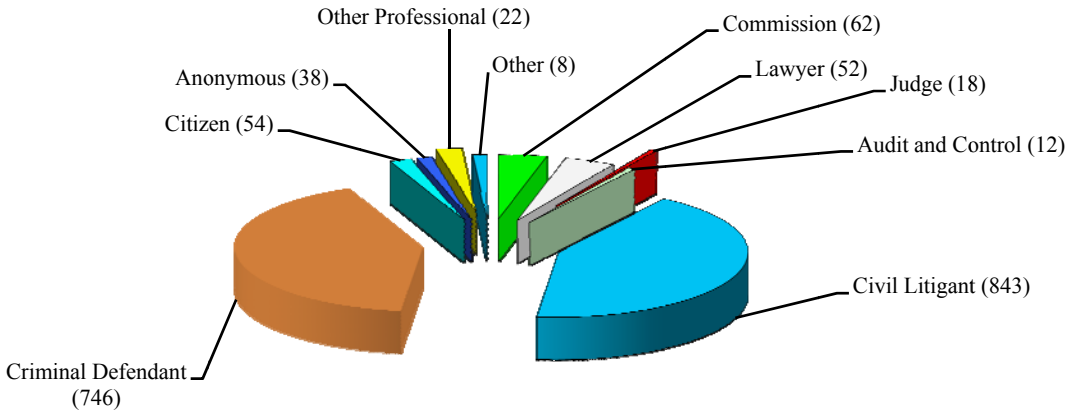
Following are summaries of the Commission's actions in 2009, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

COMPLAINTS RECEIVED

The Commission received 1,855 new complaints in 2009. All complaints are summarized and analyzed by staff and reviewed by the Commission, which decides whether to investigate.

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 non-judges, 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 2009 appears in the following chart.



COMPLAINT SOURCES IN 2009

PRELIMINARY INQUIRIES AND INVESTIGATIONS

The Commission's Operating Procedures and Rules authorize "preliminary analysis and clarification" and "preliminary fact-finding activities" by staff upon receipt of new complaints, to aid the Commission in determining whether an investigation is warranted. In 2009, staff conducted 471 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

In 257 matters, the Commission authorized full-fledged investigations. Depending on the nature of the complaint, an investigation may entail interviewing witnesses, subpoenaing witnesses to

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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.

During 2009, in addition to the 257 new investigations, there were 169 investigations pending from the previous year. The Commission disposed of the combined total of 426 investigations as follows:

- 99 complaints were dismissed outright.
- 55 complaints involving 44 different judges were dismissed with letters of dismissal and caution.
- 15 complaints involving 14 different judges were closed upon the judge's resignation, one of them becoming public by stipulation.
- 10 complaints involving nine different judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 42 complaints involving 27 different judges resulted in formal charges being authorized.
- 205 investigations were pending as of December 31, 2009.

FORMAL WRITTEN COMPLAINTS

As of January 1, 2009, there were pending Formal Written Complaints in 39 matters involving 25 different judges. In 2009, Formal Written Complaints were authorized in 42 additional matters involving 27 different judges. Of the combined total of 81 matters involving 52 judges, the Commission acted as follows:

- 32 matters involving 21 different judges resulted in formal discipline (admonition, censure or removal from office).
- Three matters involving two different judges were closed upon the judge's resignation from office, becoming public by stipulation.
- Two matters involving one judge were closed upon the judge's departure from office upon the expiration of the judge's term, becoming public by stipulation.
- Three matters involving three different judges resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- Three additional complaints involving three different judges were closed upon the judge's resignation.
- 38 matters involving 22 different judges were pending as of December 31, 2009.

SUMMARY OF ALL 2009 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 – 2,250,* ALL PART-TIME

	Lawyers	*Non-Lawyers*	*Total*
Complaints Received	105	211	316
Complaints Investigated	37	95	132
Judges Cautioned After Investigation	5	22	27
Formal Written Complaints Authorized	5	14	19
Judges Cautioned After Formal Complaint	1	1	2
Judges Publicly Disciplined	3	9	12
Judges Vacating Office by Public Stipulation	0	3	3
Formal Complaints Dismissed or Closed	0	3	3

NOTE: Approximately 400 town and village justices are lawyers.

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

TABLE 2: CITY COURT JUDGES – 385, ALL LAWYERS

	Part-Time	*Full-Time*	*Total*
Complaints Received	57	257	314
Complaints Investigated	14	17	31
Judges Cautioned After Investigation	3	4	7
Formal Written Complaints Authorized	1	1	2
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	1	4	5
Judges Vacating Office by Public Stipulation	0	0	0
Formal Complaints Dismissed or Closed	0	0	0

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

TABLE 3: COUNTY COURT JUDGES – 129 FULL-TIME, ALL LAWYERS*

Complaints Received	242
Complaints Investigated	13
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	3
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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

TABLE 4: FAMILY COURT JUDGES – 127, FULL-TIME, ALL LAWYERS

Complaints Received	168
Complaints Investigated	25
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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

Complaints Received	20
Complaints Investigated	6
Judges Cautioned After Investigation	2
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

TABLE 6: COURT OF CLAIMS JUDGES – 86, FULL-TIME, ALL LAWYERS

Complaints Received	55
Complaints Investigated	2
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

TABLE 7: SURROGATES – 82, FULL-TIME, ALL LAWYERS*

Complaints Received	39
Complaints Investigated	7
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	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 – 335, FULL-TIME, ALL LAWYERS*

Complaints Received	321
Complaints Investigated	40
Judges Cautioned After Investigation	5
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	1
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	1
Formal Complaints Dismissed or Closed	0

* Includes 14 who serve as Justice of the Appellate Term.

TABLE 9: COURT OF APPEALS JUDGES – 7 FULL-TIME, ALL LAWYERS; APPELLATE DIVISION JUSTICES – 67 FULL-TIME, ALL LAWYERS

Complaints Received	46
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Vacating Office by Public Stipulation	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	334

* 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 2009. The actual texts are appended to this Report in Appendix F.

OVERVIEW OF 2009 DETERMINATIONS

The Commission rendered 21 formal disciplinary determinations in 2009: two removals, ten censures and nine admonitions. In addition, four matters were disposed of by stipulation made public by agreement of the parties. Twelve of the 25 respondents were non-lawyer trained judges and 13 were lawyers. Fifteen of the respondents were town or village justices and ten were judges of higher courts.

DETERMINATIONS OF REMOVAL

The Commission completed two formal proceedings in 2009 that resulted in a determination of removal. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Joseph S. Alessandro

On February 11, 2009, the Commission determined that Joseph S. Alessandro, a Justice of the Supreme Court, Westchester County, should be removed from office for attempting to defraud the campaign manager of his 2003 campaign for County Court out of a $250,000 loan by altering the repayment terms of the loan and for engaging in a "pattern of egregious misbehavior" related to the transaction. Judge Alessandro gave misleading and evasive testimony about the transaction and filed a materially incomplete financial disclosure statement for 2004 with the Ethics Commission for the Unified Court System. The judge also submitted several loan applications in 2004 and 2005 that omitted various assets and liabilities, including the $250,000 loan. Judge Alessandro requested review by the Court of Appeals, which accepted the Commission's determination.

Matter of Francis M. Alessandro

On February 11, 2009, the Commission determined that Francis M. Alessandro, a Judge of the New York City Civil Court, Bronx County, should be removed from office for filing materially incomplete financial disclosure statements for 2003 and 2004 with the Ethics Commission for the Unified Court System, and for submitting several loan applications in 2004 and 2005 that omitted various assets and liabilities. Judge Alessandro requested review by the Court of Appeals, which in part affirmed the Commission's findings of misconduct but reduced the sanction to admonition.

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DETERMINATIONS OF CENSURE

The Commission completed ten formal proceedings in 2009 that resulted in public censure. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Phillip D. O'Donnell

On February 5, 2009, the Commission determined that Phillip D. O'Donnell, a Justice of the Herkimer Village Court, Herkimer County, should be censured for failing to schedule hearings or to dispose of 28 criminal cases for periods up to six and a half years. He also neglected to file mandatory case disposition reports to the State Comptroller in a timely manner and, until the Commission began investigating, failed to disqualify himself in a case in which his daughter's friend was a defendant. Judge O'Donnell, who is a lawyer, did not request review by the Court of Appeals.

Matter of Dandrea L. Ruhlmann

On February 9, 2009, the Commission determined that Dandrea L. Ruhlmann, a Judge of the Family Court, Monroe County, should be censured for misusing court resources by repeatedly requiring her confidential secretary to provide child care services during court hours and to perform personal typing duties for the judge's husband. The judge also required her secretary to access a confidential database to get information for the judge's husband, an attorney. Judge Ruhlmann did not request review by the Court of Appeals.

Matter of Walter J. Schurr

On March 23, 2009, the Commission found that Walter J. Schurr, a Justice of the Friendship Town Court, Allegany County, should be censured for reducing Speeding charges in five cases without the consent of the prosecutor as required by law, and for reducing a Speeding charge in another case based on an *ex parte* discussion with a co-worker, the defendant's friend. Judge Schurr, who is not an attorney, did not request review by the Court of Appeals.

Matter of Howard M. Aison

On March 26, 2009, the Commission found that Judge Howard M. Aison, a Judge of the Amsterdam City Court, Montgomery County, should be censured for attempting to circumvent the prohibition against practicing law in his own court by arranging to have charges filed against his client in a court which did not have original jurisdiction. He also failed to disqualify himself or disclose the conflict in a case in which he had previously represented the complaining witness, violated a statutory prohibition by representing defendants in three cases that had originated in his own court, and practiced law in his own court by drafting papers for his client, without identifying himself as the client's attorney. Judge Aison did not request review by the Court of Appeals.

Matter of Arthur S. Miclette

On July 1, 2009, the Commission found that Arthur S. Miclette, a Justice of the Crown Point Town Court, Essex County, should be censured for failing to make timely deposits and to remit funds to the State Comptroller in a timely manner. The judge also filed a small claims action in his own court, presided over the case and failed to transfer it to another court. Judge Miclette, who is not an attorney, did not request review by the Court of Appeals.

Matter of Michael M. Feeder
On November 18, 2009, the Commission found that Michael M. Feeder, a Justice of the Hudson Falls Village Court, Washington County, should be censured. The judge identified himself as a judge while confronting a motorist, used his judicial power to cause the arrest of the motorist and commented publicly about the case while it was pending. He also had an improper out-of-court conversation with a defendant's mother and presided over cases filed by members of the Hudson Falls Police Department without disclosing his close friendship with the Assistant Chief of Police. Judge Feeder, who is not an attorney, did not request review by the Court of Appeals.

Matter of Bonnie Simpson Burke
On December 15, 2009, the Commission found that Bonnie Simpson Burke, a Justice of the Perth Town Court, Fulton County, should be censured for driving while under the influence of alcohol, resulting in her conviction for Driving While Ability Impaired, and for presiding over two cases involving a friend. Judge Burke, who is not an attorney, did not request review by the Court of Appeals.

Matter of Paul J. Herrmann
On December 15, 2009, the Commission found that Paul J. Herrmann, a Justice of the Saranac Lake Village Court, Franklin County, should be censured. The Commission found that Judge Herrmann erred in refusing to accept a plea agreement because he wanted a disposition that would bring revenue to the Village, and that he engaged in improper political activity by nominating a candidate for trustee at a party caucus. Judge Herrmann, who is an attorney, did not request review by the Court of Appeals.

Matter of James H. Ridgeway
On December 15, 2009, the Commission found that James H. Ridgeway, a Justice of the Richland Town Court and Acting Justice of the Pulaski Village Court, Oswego County, should be censured. The Commission found that due to poor administrative practices, Judge Ridgeway failed to deposit, report and remit court funds in a timely manner, accumulating a deficiency of approximately $20,000 over two years. The money was eventually accounted for and there was no evidence of misuse of funds. Judge Ridgeway, who is not an attorney, did not request review by the Court of Appeals.

Matter of Larry M. Himelein
On December 17, 2009, the Commission found that Larry M. Himelein, a Judge of the County Court, Family Court and Surrogate's Court, Cattaraugus County, should be censured. The Commission found that Judge Himelein improperly disqualified himself in 11 cases involving State legislators or their law firms as a "tactic" or "weapon" in order to further the judiciary's interest in achieving legislative approval for a pay raise. Judge Himelein's actions were aggravated by the fact that he sent numerous mass e-mail messages to other judges strongly encouraging them to join him in making similar recusals. He also made inappropriate public comments about legislators and, in particular, Assembly Speaker Sheldon Silver, a party to pending litigation on the pay-raise issue. Judge Himelein did not request review by the Court of Appeals.

DETERMINATIONS OF ADMONITION

The Commission completed nine proceedings in 2009 that resulted in a determination of public admonition. The cases are summarized as follows and the full texts can be found in Appendix F.

Matter of Monroe B. Bishop

On March 18, 2009, the Commission found that Monroe B. Bishop, a Justice of the Hinsdale Town Court, Cattaraugus County, should be admonished for ruling against the defendant in a summary proceeding for eviction and back rent based upon an improper *ex parte* communication with the secretary of the defendant's attorney. Judge Bishop, who is not an attorney, did not request review by the Court of Appeals.

Matter of James P. Gilpatric

On June 5, 2009, the Commission found that James P. Gilpatric, a Judge of the Kingston City Court, Ulster County, should be admonished for failing to render decisions in a timely manner in 47 cases notwithstanding that he had previously been issued a letter of dismissal and caution for delays. The judge failed to issue decisions promptly even after being contacted about the delays by the litigants in four cases and by his administrative judge. Judge Gilpatric requested review by the Court of Appeals, which affirmed that the Commission has jurisdiction to investigate complaints of delay in the rendering of decisions and, where appropriate, to pursue formal disciplinary proceedings and impose discipline for inexcusable delay. The Court remitted the matter to the Commission for a hearing so that the record could be developed more fully.

Matter of Matthew J. Turner

On June 30, 2009, the Commission found that Matthew J. Turner, a Judge of the Troy City Court, Rensselaer County should be admonished for failing to render decisions in a timely manner in 29 cases and failing to report some of the delays to his administrative judge as required by law. Judge Turner did not request review by the Court of Appeals.

Matter of Charles G. Banks

On July 16, 2009, the Commission found that Charles G. Banks, a Justice of the Bedford Town Court, Westchester County, should be admonished for imposing fines that exceeded the maximum permitted by law in more than 200 cases. Judge Banks, who is an attorney, did not request review by the Court of Appeals.

Matter of Conrad D. Singer

On July 1, 2009, the Commission found that Conrad D. Singer, a Judge of the Family Court, Nassau County, should be admonished for improperly exercising the contempt power in a custody matter and for making an inappropriate *ex parte* hospital visit to a youth who was being held for a mental evaluation. Judge Singer did not request review by the Court of Appeals.

Matter of David M. Trickler

On September 30, 2009, the Commission found that David M. Trickler, a Justice of the Birdsall Town Court, Burns Town Court and Grove Town Court, Allegany County, should be admonished for failing to remit fines and fees to the State Comptroller in a timely manner, failing to report convictions in traffic cases, neglecting to record and issue fine and fee receipts,

and failing to use available means to punish defendants who had failed to appear or pay fines in traffic cases. Judge Trickler, who is not an attorney, did not request review by the Court of Appeals.

Matter of Bret Carver
On September 30, 2009, the Commission found that Bret Carver, a Justice of the Fremont Town Court, Steuben County, should be admonished for administrative derelictions over a six-month period in 2008. The Commission found that the judge failed to deposit court funds within the required 72 hours and failed to report and remit these funds to the Office of the State Comptroller each month as mandated by law. Judge Carver, who is not an attorney, did not request review by the Court of Appeals.

Matter of Robert W. Engle
On November 9, 2009, the Commission found that Robert W. Engle, a Justice of the Madison Town Court, Madison County, should be admonished for "serious administrative errors that were prejudicial to the parties and the proper administration of justice." The judge sent fine notices to three defendants without a trial or guilty plea, sent payment notices to two other defendants who had already paid their fines, and improperly initiated the suspension of defendants' driver's licenses in six cases. Judge Engle, who is not an attorney, did not request review by the Court of Appeals.

Matter of Margaret Chan
On November 17, 2009, the Commission found that Margaret Chan, a Judge of the New York City Civil Court, New York County, should be admonished. The Commission found that Judge Chan's campaign literature misrepresented that she had been endorsed by the *New York Times* and displayed a pro-tenant bias. The judge's campaign also sent a letter signed by the judge personally soliciting campaign contributions, in violation of the ethical rules. Judge Chan did not request review by the Court of Appeals.

OTHER PUBLIC DISPOSITIONS

The Commission completed four other proceedings in 2009 that resulted in public dispositions. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Frank R. Sphon
On February 2, 2009, pursuant to a stipulation, the Commission discontinued a proceeding involving Frank R. Sphon, a Justice of the French Creek Town Court, Chautauqua County, who resigned from office after being charged *inter alia* with failing to properly administer the court, failing to supervise his court clerk, and neglecting to keep adequate records resulting in late deposits of court funds. Judge Sphon, who is not an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Stephen H. Brown
On June 18, 2009, pursuant to a stipulation, the Commission discontinued a proceeding involving Stephen H. Brown, a Justice of the Junius Town Court, Seneca County, who resigned from office after being charged with handling a small claims action involving a long-time friend despite lacking subject matter jurisdiction over the defendant. The judge also issued separate judgments to each party in the action and awarded unlawful equitable relief in favor of his friend.

Judge Brown, who is not an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Joseph G. Makowski
On June 18, 2009, pursuant to a stipulation, the Commission closed its investigation of a complaint involving Joseph G. Makowski, a Justice of the Supreme Court, Erie County, upon the judge's resignation from office. The complaint against the judge concerned his publicly reported off-the-bench actions in assisting an acquaintance. Judge Makowski affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Debra M. Whiteman
On December 10, 2009, pursuant to a stipulation, the Commission discontinued a proceeding involving Debra M. Whiteman, a Justice of the Cherry Valley Town Court, Otsego County, who agreed to leave office upon the expiration of her term. The judge had been charged, *inter alia,* with failing to deposit court funds within 72 hours of receipt as required by law; altering court records in 22 cases and destroying documents in eight of those cases; and failing to notify the Department of Motor Vehicles in a timely manner so that the agency could remove suspensions placed on defendants' drivers' licenses. Judge Whiteman, who is not an attorney, affirmed that she would neither seek nor accept judicial office at any time in the future.

OTHER DISMISSED OR CLOSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of six Formal Written Complaints in 2009 without rendering public discipline or dispositions. Three 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. Three Complaints were closed without public stipulation when the respondent-judges resigned.

MATTERS CLOSED UPON RESIGNATION

Nineteen judges resigned in 2009 while complaints against them were pending at the Commission. Fourteen resigned while under investigation, and five resigned while under formal charges by the Commission. Three of these resignations were pursuant to a public stipulation and are summarized in "Other Public Dispositions" above. 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 2009, the Commission referred 52 matters to other agencies. Thirty-three 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. Seven matters were referred to an attorney grievance committee. Seven matters were referred to a District Attorney's office. Three matters were referred to the State Comptroller. One matter was referred to the Attorney General's office, and one matter was referred to a county sheriff.

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(1) 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 2009, the Commission issued 44 Letters of Dismissal and Caution and three Letters of Caution. 29 town or village justices were cautioned, including 6 who are lawyers. Eighteen judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct as indicated below.

Improper *Ex Parte* Communications. Six judges were cautioned for engaging in improper out-of-court communications with one party in the absence or without permission of the other, on such subjects as modification of an order of protection or releasing a defendant from jail.

Political Activity. Four judges were cautioned for engaging in improper political activity, such as making payments to a political party without documentation that the amount represented the judge's share of campaign expenses.

Demeanor. Eight judges were cautioned for being discourteous or making inappropriate comments to litigants, attorneys, witnesses, or the press. One judge scolded a defendant for making unflattering public comments about the judge. Another judge made inappropriate comments about a defendant's physical appearance.

Audit and Control. Nine judges were cautioned for various administrative lapses, including failing to issue duplicate receipts and failing to report cases and remit funds to the State Comptroller in a timely manner. One judge failed to properly track and process pleas, telephone calls and correspondence relating to vehicle and traffic matters, which resulted in the suspension of some drivers' licenses.

Delay. Seven judges were cautioned for delay in scheduling or disposing of cases. For example, one judge took seven months to decide a motion after it was fully submitted and failed to report the delay on the required administrative report.

Violation of Rights. Nine judges were cautioned for relatively isolated incidents of violating the rights of parties appearing before them, *e.g.*, by failing to administer oaths to witnesses and

failing to fully advise a defendant of his rights before accepting a guilty plea. One judge imposed fines in some traffic cases that exceeded the legal maximum. Another judge inappropriately applied the bail in one case to cover fines on unrelated charges. Two judges required defendants to retain an attorney in order to participate in plea bargaining in traffic cases.

Conflict of Interest. Eleven judges were cautioned for various conflicts of interest. For example, one part-time judge who was also engaged in a private business presided over a case involving an employee of his company.

Assertion of Influence. Four judges were cautioned for improperly asserting the prestige of judicial office, for example by writing an unsolicited letter of recommendation on judicial stationery for a friend.

Miscellaneous. One judge improperly excluded spectators from court proceedings. Another failed to file timely revisions to the required financial disclosure statement filed with the Ethics Commission for the Unified Court System. A third was cautioned for not complying with mandated procedures regarding fiduciary appointments.

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 a 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 2009, the Court decided the following three Commission matters.

Matter of Joseph S. Alessandro and Matter of Francis M. Alessandro
On February 11, 2009, the Commission determined that Joseph S. Alessandro, a Justice of the Supreme Court, Westchester County, should be removed for attempting to defraud his former campaign manager by altering the repayment terms of a $250,000 loan and for engaging in a "pattern of egregious misbehavior" with respect to the transaction. Although he had agreed to repay the loan in full within nine months, he failed to do so, and engaged in a series of deceitful acts to delay repayment and conceal his liability. The judge gave misleading and evasive testimony about the transaction to the Commission, displaying "a level of dishonesty which is unacceptable for a member of the judiciary." He also failed to disclose the loan, as well as other liabilities, in his financial disclosure statement and loan applications.

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In a separate determination issued on the same day, the Commission determined that Francis M. Alessandro, a Judge of the New York City Civil Court, Bronx County, who had co-signed the original note reflecting the $250,000 loan from his brother's campaign manager, should be removed for filing materially incomplete financial disclosure statements and for submitting various loan applications that omitted a number of assets and liabilities.

In an opinion dated October 20, 2009, the Court of Appeals accepted the Commission's determination as to Joseph Alessandro and modified the determination as to Francis Alessandro, reducing the sanction to admonition. Stating that judges are held to "the highest standards of honesty and integrity," the Court found that Joseph Alessandro failed to provide "truthful and complete" information about the loan and that his failure to do so was "consistent with an ongoing pattern of shirking his obligation to repay [his campaign manager]." 13 NY3d 238, 248, 249 (2009). As to Francis Alessandro, the Court found that while his actions were "careless," his "careless omissions from a financial disclosure statement are not the type of 'truly egregious' conduct that warrants removal from judicial office." *Id.* at 249.

Matter of James P. Gilpatric

On June 5, 2009, the Commission determined that James P. Gilpatric, a Judge of the Kingston City Court, Ulster County, should be admonished for failing to render decisions in a timely manner in 47 cases, notwithstanding that he had previously been cautioned by the Commission for delays and that his administrative judge and several litigants had inquired about the delays. The Commission found that such delays constitute "serious misconduct because of the adverse consequences on individual litigants, who are deprived of the opportunity to have their claims resolved in a timely manner, and on public confidence in the administration of justice."

In an opinion dated December 15, 2009, the Court of Appeals affirmed that the Commission has jurisdiction to investigate complaints of delay in the rendering of decisions and, where appropriate, to pursue formal disciplinary proceedings and impose discipline for inexcusable delay. *Matter of Gilpatric*, 13 NY3d 586 (2009).

In an earlier case, *Matter of Greenfield*, 76 NY2d 293, 298 (1990), the Court had held that decisional delays generally "can and should be resolved in the administrative setting" and that the Commission could impose discipline where the judge "has defied administrative directives or has attempted to subvert the system by, for instance, falsifying, concealing or persistently refusing to file records indicating delays."

In *Gilpatric*, the Court stated: "after nearly twenty years of experience with *Greenfield*, we think it is not workable to exclude completely the possibility of more formal discipline for [delays], in cases where the delays are lengthy and without valid excuse." 13 NY3d 586, 589-90 (2009). The Court held that "lengthy, inexcusable delays may…be the subject of disciplinary action, particularly when a judge fails to perform judicial duties despite repeated administrative efforts to assist the judge and his or her conduct demonstrates an unwillingness or inability to discharge those duties." *Id.* at 590. The Court remitted the case to the Commission for further proceedings to determine "whether these delayed decisions were inexcusable and whether the problem could have been, or was, adequately dealt with administratively." *Id.*

OBSERVATIONS AND RECOMMENDATIONS

PUBLIC DISCIPLINARY PROCEEDINGS

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 admonition, censure, removal or retirement from office is rendered and filed with the Chief Judge pursuant to statute – or, when the accused judge waives confidentiality.[1]

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 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.

In 2009, the State Senate Judiciary Committee held two public hearings (in Albany and New York City) on the operations and procedures of the Commission and the attorney disciplinary committees of the Appellate Division. Senator John L. Sampson, who chairs the Judiciary Committee and presided over the hearings, thereafter introduced a bill (S6264) that would make public the Commission's formal disciplinary proceedings.

The Commission urges that the Legislature take up the matter and pass legislation that would make its formal disciplinary proceedings public.

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)

[1] The Commission has conducted over 700 formal disciplinary proceedings since 1978. Ten judges have waived confidentiality in the course of those proceedings. Two others waived confidentiality as to investigations.

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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 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 occasionally happen. In 2008, a newly-elected Surrogate's Court Judge was indicted for allegedly violating campaign finance laws, and was suspended by the Court of Appeals pending trial.

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 Appellate Divisions 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:

- 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
- a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or
- other uncontested evidence of professional misconduct.

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

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

[2] See also, Rules of the Appellate Division, Second Department, §691.4(*l*)(1), Rules of the Appellate Division, Third Department, §806.4(f)(1), and Rules of the Appellate Division, Fourth Department, §1022.20(d)(3)(d).

- 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 integrity of that judge was probably irretrievably compromised, thus requiring removal. There was also concern about the effect on court administration and public finances, especially in less populous counties and in the town and village courts, where it would be difficult to arrange and pay for temporary replacements, and where case management would be uprooted both when the temporary judge arrived and left.

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 several recent cases – *Matter of Cathryn M. Doyle* in 2007, *Matter of William A. Carter* in 2006, *Matter of Ira J. Raab* in 2003 – the Commission explicitly stated that it chose to censure the judge because it lacked the power to suspend.

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.

COURT OF APPEALS REVIEW OF COMMISSION DETERMINATIONS

Both the Constitution and the Judiciary Law permit a disciplined judge to seek review by the Court of Appeals of any Commission determination of admonition, censure, removal or retirement. The law does not authorize the Court to review Commission determinations on its own motion. In the vast majority of jurisdictions throughout the country, the state's highest court has such authority. While the procedure varies from state to state – in some jurisdictions, for example, all judicial disciplinary decisions are filed with the high court as reviewable recommendations – the underlying principle is that in matters as sensitive as judicial discipline, the state's highest court should have the final authority. This serves important principles of both governmental checks and balances, and the independence of the judiciary.

There is no greater advocate for judicial independence than the New York State Court of Appeals. The Court's authority over the Commission is a great safeguard to the fairness not only of the Commission's decisions but of its operating procedures.

Of the approximately 700 public disciplinary decisions rendered by the Commission since 1978, the Court has entertained 91 reviews, all at the initiation of the disciplined judge, according to law. The Court has accepted 75 Commission determinations and modified 16 others. While on 12 occasions it reduced and on two occasions it increased the discipline imposed by the Commission, only once did the Court reject a Commission determination outright – in *Matter of Greenfield*, 76 NY2d 293 (1990), involving unreasonable delay in rendering decisions. However, that decision was effectively reversed by the Court's ruling in *Matter of Gilpatric*, 13 NY3d 586 (2009), which held that the *Greenfield* doctrine was "not workable" and affirmed the Commission's jurisdiction in delay cases. (*Gilpatric* was remitted and is pending.)

On various occasions, the Court has addressed the viability and fairness of Commission procedures. For example, in *Matter of Seiffert*, 65 NY2d 278 (1985), the Commission's standard of proof ("preponderance of the evidence") was affirmed. In *Nicholson v. Commission* 50 NY2d 596 (1980) and *Matter of Doe*, 61 NY2d 56 (1984), the Commission's authority to investigate matters bearing a "reasonable relation to the subject matter under investigation" was affirmed. *Id.* at 61. In *Matter of Petrie*, 54 NY2d 807 (1981), the Commission's procedure for summary determination was upheld.

Under present law, if the disciplined judge chooses to accept a determination, the Court of Appeals cannot review it, even if it disagrees with the Commission's decision. While one might speculate as to whether the Court, on its own motion, would be inclined to review many or any of the Commission's 25 or so determinations each year, authorizing it to do so would affirm the principle that the state's highest court is the ultimate authority on matters of judicial discipline. The Commission recommends that the Legislature amend the Judiciary Law to permit such *sua sponte* review by the Court of Appeals.

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 court staffs exclude from the courtroom all but those whose cases are being heard. 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. In one instance last year, a senior Commission investigator was confronted both by a court employee and by the judge, who called her up to the bench and interrogated her on the stenographic record as to her purpose in attending court. 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 an 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.

The Commission censured a judge in 1997 for *inter alia* improperly conducting proceedings in chambers on several occasions, excluding the public from matters which, by law, were public.[3]

Numerous other incidents have come to the Commission's attention, either through complaints, newspaper reports or petitions filed by newspapers or interested parties, in which such proceedings as arraignments or arguments on motions were conducted in police facilities, chambers or otherwise nonpublic 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.[4]

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,

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[3] *See, Matter of Westcott* (1997), *Matter of Cerbone* (1996) and *Matter of Burr* (1983). Commission decisions are available online at www.scjc.state.ny.us. *See also*, the discussion in the Commission's 1997 Annual Report about the improper practice of automatically barring children from courtrooms.

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

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. While it is appropriate to set certain reasonable parameters (such as limiting access to regular business hours), making it difficult for people to view public court records undermines public confidence in the administration of justice and may impede access to justice by individual litigants.

On various occasions, 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 tends to delay 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, the Office of Court Administration from time to time reminds the judiciary in memoranda of the requirement to make public records available. The Commission joins OCA in urging 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.

TRAINING FOR TOWN AND VILLAGE COURT CLERKS

Section 20 of the Town Law provides that town justices shall be elected, that all other officers and employees of the court shall be appointed by the town board, but that the clerk of the court shall be employed and discharged from employment only upon the advice and consent of the town justice or justices.

It is a mandatory qualification of the town justice position for the justice to successfully complete a course of training prescribed by the Administrative Board of the Judicial Conference

and provided under the auspices of the Chief Administrative Judge.[5] There is no such requirement for town court clerks, notwithstanding that many of the clerk's responsibilities involve sophisticated records keeping and financial management and accounting. Although training opportunities are available – for example, the New York State Association of Magistrates Court Clerks, in conjunction with the Association of Towns, offers continuing education and training to town and village court clerks throughout the state – such programs are optional.

In most towns, the local justice(s), court clerk and town board act cooperatively on matters of court administration. Occasionally, the Commission becomes aware of circumstances in which this is not the case. The Commission has, for example, publicly disciplined or confidentially cautioned several town justices for failing to exercise appropriate supervision over their court clerks. On occasion, court-collected funds were not timely deposited or remitted, and related case reports were not timely submitted, to the State Comptroller, resulting in at least the temporary suspension of the judge's salary. While many judges may rely upon their court clerks to fulfill such administrative and fiduciary duties, especially where the judge serves part-time and the clerk serves full-time, the judge is the individual ultimately responsible.

Court clerks employed by the full-time courts must meet certain professional qualifications or requirements. Requiring some professional training for town and village court clerks, to help assure that certain minimal administrative and financial/accounting qualifications are met, would enhance public confidence in the administration of justice. The Commission recommends that the Legislature, with participation from the State Comptroller and the Office of Court Administration, mandate some degree of training and certification for town and village court clerks.

THE COMMISSION'S BUDGET

In 2007, for the first time in more than a generation, after a downward budgetary trend of nearly 30 years, the Commission's budget was significantly increased by the Legislature, commensurate with its constitutional mandate and ever increasing caseload. Since then, the Governor and the Legislature have followed through on that commitment, ensuring that a sufficient level of resources are appropriated to the Commission.

In the three years since 2007, the Commission has received and processed a record number of new complaints: 5489 (878 more than in any other three-year period). It also authorized 711 full-scale investigations (second highest in any three-year period). Last year, 471 preliminary reviews and inquiries were conducted (the most ever). At the same time, from 2008 to the proposed budget for 2010, the Commission's appropriation has ranged from between $5.2 million and $5.4 million annually. While it would have required an overall increase of approximately 12% in that time frame simply to meet contractual and other mandated obligations (such as rent escalations), the Commission has carefully managed its resources and, like all government agencies, made sacrifices in stressful economic times, trying to do more with less.

[5] Const Art 6 § 20(c), UJCA § 105, Town L § 31, and 22 NYCRR 17.2.

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[1]	NEW COMPL'NTS[1]	NEW INVEST'NS	PENDING YEAR END	PUBLIC DISCIPLINES	STAFF ATT'YS[2]	INVES'RS FT/PT	TOTAL STAFF
1978	1.6m	641	170	324	24	21	18	63
1988	2.2m	1109	200	141	14	9	12/2	41
1992	1.7m	1452	180	141	18	8	6/1	26
1996	1.7m	1490	192	172	15	8	2/2	20
2000	1.9m	1288	215	177	13	9	6/1	27
2006	2.8m	1500	267	275	14	10	7	28½
2007	4.8m	1711	192	238	24	17	10	51
2008	5.3m	1923	262	208	21	19	10	49
2009	5.2m	1855	257	243	25	18	10	48
2010	5.4m[3]					18	10	48

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

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,

HON. THOMAS A. KLONICK, *CHAIR*
STEPHEN R. COFFEY, ESQ., *VICE CHAIR*
JOSEPH W. BELLUCK, ESQ.
RICHARD D. EMERY, ESQ.
PAUL B. HARDING, ESQ.
ELIZABETH B. HUBBARD
HON. JILL KONVISER
NINA M. MOORE
HON. KAREN K. PETERS
HON. TERRY JANE RUDERMAN

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APPENDIX A: 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 App'ted	Expiration of Present Term
Thomas A. Klonick	Chief Judge Jonathan Lippman	2005	3/31/2013
Stephen R. Coffey	(Former) Senate President Pro Tem Joseph L. Bruno	1995	3/31/2011
Joseph W. Belluck	Governor David A. Paterson	2008	3/31/2012
Richard D. Emery	(Former) Senate Minority Leader Malcolm A. Smith	2004	3/31/2012
Paul B. Harding	(Former) Assembly Minority Leader James Tedisco	2006	3/31/2013
Elizabeth B. Hubbard	Governor David A. Paterson	2008	3/31/2011
Jill Konviser	(Former) Governor George E. Pataki	2006	3/31/2010
Nina M. Moore	Governor David A. Paterson	2009	3/31/2013
Hon. Karen K. Peters	(Former) Chief Judge Judith S. Kaye	2000	3/31/2010
Terry Jane Ruderman	(Former) Chief Judge Judith S. Kaye	1999	3/31/2012
Vacant	Assembly Speaker Sheldon Silver		3/31/2014

Honorable Thomas A. Klonick, *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., *Vice Chair of the Commission*, 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.

Joseph W. Belluck, Esq., graduated *magna cum laude* from the SUNY-Buffalo School of Law in 1994, where he served as Articles Editor of the Buffalo Law Review and where he was an adjunct lecturer on mass torts. He is a partner in the Manhattan law firm of Belluck & Fox, LLP, which focuses on asbestos, consumer, environmental and defective product litigation. Mr. Belluck previously served as counsel to the New York State Attorney General, representing the State of New York in its litigation against the tobacco industry, as a judicial law clerk for Justice Lloyd Doggett of the Texas Supreme Court, as staff attorney and consumer lobbyist for Public Citizen in Washington, D.C., and as Director of Attorney Services for Trial Lawyers Care, an organization dedicated to providing free legal assistance to victims of the September 11, 2001 terrorist attacks. Mr. Belluck has lectured frequently on product liability, tort law and tobacco control policy. He is an active member of several bar associations, and serves on the Boards of the New York State Trial Lawyers Association and the SLAPP Resource Center, an organization dedicated to protecting the right to free speech. He is a recipient of the New York State Bar Association's Legal Ethics Award.

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 New York State Commission on Public Integrity. He is also active in the Association of Trial Lawyers of America and the Municipal Arts Society Legal Committee, 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.

Elizabeth B. Hubbard is a graduate of Smith College (B.A. *summa cum laude*) and the Johns Hopkins School of Advanced International Studies, where she earned a masters degree. She served as Executive Director of the Committee for Modern Courts and is presently a member of the Modern Courts Board of Directors. She served previously as President and Judicial Director of the New York State League of Women Voters, President of the League of Women Voters of Huntington, Founding Chairperson of the Huntington Township Chamber Foundation, a recent President of the Huntington Township Housing Coalition, and a member of her Village Planning Board. Ms. Hubbard has also served as a member of the Dominick Commission to reform the State court system, two gubernatorial judicial screening panels, the State Bar Association's Committee on Courts and the Community and the American Judicature Society. Ms. Hubbard also worked on improving prison conditions when she served as Chair of the Correctional and Osborne Associations.

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.

Nina M. Moore received her B.A. from Knox College (*Magna Cum Laude, Phi Beta Kappa*) and her M.A. and Ph.D. in political science from the University of Chicago. She is an Associate Professor of Political Science at Colgate University, where she has been on the faculty since 1998 and has chaired the Research Council and the Faculty Development Council. She previously held teaching positions at DePaul University, the University of Minnesota and Loyola

University of Chicago. Professor Moore is the author of *Governing Race: Politics, Policy and the Politics of Race* (Praeger 2000) and various articles and papers on the Supreme Court, Congress and public policy matters. She is on the editorial board of the *Ralph Bunche Journal of Public Affairs.*

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 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 President of the New York Association of Women Judges, 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.

RECENT MEMBERS

Marvin E. Jacob, Esq., served on the Commission from April 1, 2006 until September 23, 2009. He 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.

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APPENDIX B: 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 the Editorial Board of the Justice System Journal. Mr. Tembeckjian has served on various ethics and professional responsibility committees of the New York State and New York City Bar Associations, and has published numerous articles in legal periodicals on judicial ethics and discipline.

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.

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.

Edward Lindner, *Deputy Administrator for Litigation*, is a graduate of the University of Arizona and Cornell Law School, where he was a member of the Board of Editors of the Cornell International Law Journal. Prior to joining the Commission's staff, he was an Assistant Solicitor General in the Division of Appeals & Opinions for the New York State Attorney General. He has been a Board Member and volunteer for various community organizations, including Catholic Charities, The Children's Museum at Saratoga, the Saratoga Springs Public Library and the Saratoga Springs Preservation Foundation.

Jorge Dopico, *Deputy Administrator in Charge of the Commission's New York Office*, is a graduate of the State University of New York at Purchase (Honors) and the Georgetown University Law Center (Honors). Prior to joining the Commission's staff, he was Deputy Chief Counsel to the Departmental Disciplinary Committee of the Appellate Division, First Department, where he had also served as Principal Attorney. He previously served as Associate Attorney with the Division of Tax Investigations in the New York State Department of Taxation and Finance, and as an Assistant District Attorney in Kings County.

Melissa R. DiPalo, *Administrative Counsel*, 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.

Jean Joyce, *Senior Attorney*, graduated *cum laude* from New York Law School, where she was Executive Notes and Comments Editor of the *Law Review,* and received a B.A. in Russian Studies from Hamilton College. She was previously the Senior Principal Law Clerk to Chief Judge Judith S. Kaye of the New York State Court of Appeals, and served as an Assistant District Attorney in the Bronx County District Attorney's Office. She also served as a Law Assistant to the Honorable Robert P. Patterson, Jr., Chair of the Attorney Grievance Committee for the United States District Court, Southern District of New York. Ms. Joyce is currently a member of the New York City Bar Association's Professional Responsibility Committee and from 2003-2006 was a member of the Association's Criminal Advocacy Committee. She is also a member of the Historical Society of the Courts of the State of New York, the Association of Judicial Disciplinary Counsel and the Brooklyn Bar Association. Ms. Joyce has been a CLE panelist on criminal procedure and capital punishment issues and is the author of *Francis Miles Finch*, in *The Judges of the Court of Appeals: A Biographical History*, edited by the Honorable Albert M. Rosenblatt.

M. Kathleen Martin, *Senior Attorney*, is a graduate of Mount Holyoke College and Cornell Law School (*cum laude*). Prior to joining the Commission's staff, she was an attorney at the Eastman Kodak Company, where among other things she held positions as Legal Counsel to the Health Group, Director of Intellectual Property Transactions and Director of Corporate Management Strategy Deployment. She also served as Vice President and Senior Associate Counsel at Chase Manhattan Bank, and in private practice with the firm of Nixon, Hargrave, Devans & Doyle.

Roger J. Schwarz, *Senior Attorney*, is a graduate of Clark University (*Phi Beta Kappa*) and the State University of New York at Buffalo Law School (*honors*), where he served as editor of the *Law and Society Review* and received the Erie County Trial Lawyers' award for best performance in the law school's trial practice course. For 23 years, Mr. Schwarz practiced law in his own firm, with an emphasis on criminal law and criminal appeals, principally in the federal courts. Mr. Schwarz has also served as an associate attorney for the Criminal Defense Division of the Legal Aid Society in New York City, clerked for Supreme Court Justice David Levy (Bronx County) and was a member of the Commission's staff from 1975-77.

Jill S. Polk, *Senior Attorney*, is a graduate of the State University of New York at Buffalo and the Albany Law School. Prior to joining the Commission staff, she was Senior Assistant Public Defender in Schenectady County. Ms. Polk has also been in private practice, served as Senior Court Attorney to two judges, and was an attorney with the Legal Aid Society of Northeastern New York.

David M. Duguay, *Senior Attorney*, is a graduate of the State University College at Buffalo (*summa cum laude*) and the University at Buffalo Law School. Prior to joining the Commission's staff, he was Special Assistant Public Defender and Town Court Supervisor in the

Monroe County Public Defender's Office. He served previously as a staff attorney with Legal Services, Inc., of Chambersburg, Pennsylvania.

Thea Hoeth, *Senior Attorney*, is a graduate of St. Lawrence University *(cum laude)* and the Albany Law School. Prior to joining the Commission staff, she managed various not-for-profit organizations and most recently served as executive director of *To Life!*, a regional breast cancer education and support organization. Ms. Hoeth served previously in a number of senior state government positions, including executive director of the NYS Ethics Commission (1991 – 94) and the cabinet-level post of executive director of the New York State Office of Business Permits and Regulatory Assistance. She was also in private practice, has lectured and written on topics related to public sector ethics and was an adjunct professor of legal ethics for The Sage Colleges.

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.

Kathy Wu, *Staff Attorney*, is a graduate of New York University and Queens Law School at the City University of New York. Prior to joining the Commission staff, she served as an Assistant District Attorney in Kings County, among other things prosecuting felony gun cases, and was in private practice at Paul Weiss Rifkind Wharton & Garrison, LLP.

Kelvin S. Davis, *Staff Attorney*, is a graduate of Yale University and the University of Virginia Law School. Prior to joining the Commission staff, he served as an Assistant Staff Judge Advocate in the United States Air Force and as Judicial Law Clerk to a Superior Court Judge in New Jersey.

Charles F. Farcher, *Staff Attorney*, is a graduate of the College of St. Rose and the Albany Law School. Prior to joining the Commission staff, he served as an Appellate Court Attorney with the Appellate Division of Supreme Court, Third Department.

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Karen Kozac, *Chief Administrative Officer*, is a graduate of the University of Pennsylvania and Brooklyn Law School. Prior to re-joining the Commission staff in June 2007, she was an administrator in the nonprofit sector. She previously served as a Staff Attorney at the Commission, as an Assistant District Attorney in New York County, and in private practice as a litigator.

Beth S. Bar, *Public Information Officer*, is a graduate of Brandeis University, the Newhouse School of Communications at Syracuse University and the Syracuse University Law School. Prior to joining the Commission staff in April 2008, she was a reporter for the New York Law Journal, the Journal News (Westchester) and the Observer-Dispatch (Utica).

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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.

APPENDIX C: REFEREES WHO SERVED IN 2009

Referee	City	County
Mark S. Arisohn, Esq.	New York	New York
William I. Aronwald, Esq.	White Plains	Westchester
Hon. Frank J. Barbaro	Watervliet	Albany
Peter Bienstock, Esq.	New York	New York
A. Vincent Buzard, Esq.	Pittsford	Monroe
William T. Easton, Esq.	Rochester	Monroe
Robert L. Ellis, Esq.	Scarsdale	Westchester
Vincent D. Farrell, Esq.	Mineola	Nassau
Paul Feigenbaum, Esq.	Albany	Albany
Edward B. Flink, Esq.	Latham	Albany
Maryann Saccomando Freedman, Esq.	Buffalo	Erie
David Garber, Esq.	Syracuse	Onondaga
Douglas S. Gates, Esq.	Rochester	Monroe
Ronald Goldstock, Esq.	Larchmont	Westchester
Victor J. Hershdorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
H. Wayne Judge, Esq.	Glens Falls	Warren
Matthew J. Kelly, Esq.	Albany	Albany
Nancy Kramer, Esq.	New York	New York
Gregory S. Mills, Esq.	Clifton Park	Saratoga
James C. Moore, Esq.	Rochester	Monroe
Gary Muldoon, Esq.	Rochester	Monroe
Steven E. North, Esq.	New York	New York
Edward J. Nowak, Esq.	Penfield	Monroe
Philip C. Pinsky, Esq.	Syracuse	Onondaga
John J. Poklemba, Esq.	Saratoga Springs	Saratoga
Roger W. Robinson, Esq.	New York	New York
Hon. Eugene M. Salisbury	Buffalo	Erie
Hon. Richard D. Simons	Rome	Oneida
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

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APPENDIX D: 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

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

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)
Joseph W. Belluck (2008-present)
*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 (2001-05)
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 (2004-08)
Richard D. Emery (2004-present)
Hon. Herbert B. Evans (1978-79)
*Raoul Lionel Felder (2003-08)
*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)
Elizabeth B. Hubbard (2008-present)
Marvin E. Jacob (2006-09)
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 (2002-03)
Nina M. Moore (2009-present)
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 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, 41,312 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 33,723 were dismissed upon initial review or after a preliminary review and inquiry, and 7,589 investigations were authorized. Of the 7,589 investigations authorized, the following dispositions have been made through December 31, 2009:

- 1,007 complaints involving 775 judges resulted in disciplinary action. (See details below and on the following page.)
- 1,521 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1,406, 85 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 622 complaints involving 440 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 486 complaints were closed upon vacancy of office by the judge other than by resignation.
- 3,710 complaints were dismissed without action after investigation.
- 243 complaints are pending.

Of the 1,007 disciplinary matters against 775 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.) These figures take into account the 91 decisions by the Court of Appeals, 16 of which modified a Commission determination.

- 158 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);
- 313 judges were censured publicly;
- 238 judges were admonished publicly;
- 59 judges were admonished confidentially by the temporary or former Commission;
- 1 matter was dismissed by the Court of Appeals upon the judge's request for review; and
- 1 matter was remitted by the Court to the Commission and is pending.

Court of Appeals Reviews

Since 1978, the Court of Appeals, on request of the respondent-judge, has reviewed 91 determinations filed by the present Commission. Of these 91 matters:

- The Court accepted the Commission's sanctions in 75 cases (66 of which were removals, 6 were censures and 3 were admonitions);
- The Court increased the sanction from censure to removal in 2 cases;
- The Court reduced the sanction in 13 cases:
  - 9 removals were modified to censures;
  - 1 removal was modified to admonition;
  - 2 censures were modified to admonitions; and
  - 1 censure was rejected and the charges were dismissed.
- The Court remitted 1 matter to the Commission for further proceedings, which are pending.

APPENDIX E: RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR § 100 *et seq.* (2006)

Rules of the Chief Administrator of the Courts Governing Judicial Conduct

Preamble

The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statues, 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.

Section 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 more than a *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

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

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

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.

Section 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.

Section 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 fourth 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 fourth degree of relationship of either the judge or the judge's spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the Appointment of relatives of judges. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(D) Disciplinary Responsibilities.

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

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

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

(E) Disqualification.

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

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

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

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

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

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

(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 or is likely to be a material witness 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 fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

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

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

Historical Note
Sec. filed Aug.1, 1972; amd. Filed Nov. 26, 1976; renum. 111.3, new added by renum. and amd. 33.3, filed Feb. 2, 1982; amds. filed: Nov. 15, 1984; July 14, 1986; June 21, 1988; July 13, 1989; Oct. 27, 1989; replaced, new filed Feb. 1, 1996 eff. Jan. 1, 1996.
Amended 100.3 (B)(9)-(11) & (E)(1)(f) - (g) Feb. 14, 2006
Amended 100.3(C)(3) and 100.3(E)(1)(d) & (e) Feb. 28, 2006

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

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

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

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

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

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

(C) Governmental, Civic, or Charitable Activities.

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

(2)

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

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

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

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

(i) will be engaged in proceedings that ordinarily would come before the judge, or
(ii) if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

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

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

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

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

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such an organization. Use of an organization's regular letterhead for fund-raising or membership

solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

(D) Financial activities.

(1) A judge shall not engage in financial and business dealings that:

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

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

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

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

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

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

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

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

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

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

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

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

(c) ordinary social hospitality;

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

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

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

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

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

(E) Fiduciary Activities.

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

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

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

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

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

(H) Compensation, Reimbursement and Reporting.

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

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

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

(c) No full-time judge shall solicit or receive compensation for extra- judicial activities performed for or on behalf of: (1) New York State, its political subdivisions or any office or agency thereof; (2) 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), 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).

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

(A) Incumbent judges and others running for public election to judicial office.

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

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

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

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

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

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

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

(g) attending political gatherings;

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

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

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

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

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

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

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

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, provided that the cost of the ticket to such dinner or other function shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is $250 or less. A candidate may not pay more than $250 for a ticket unless he or she obtains a statement from the sponsor of the dinner or function that the amount paid represents the proportionate cost of the dinner or function.

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

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

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

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

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

(d) shall not:

(i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;
(ii) 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;
(iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent; but

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

(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.

(g) shall file with the Ethics Commission for the Unified Court System a financial disclosure statement containing the information and in the form, set forth in the Annual Statement of Financial Disclosure adopted by the Chief Judge of the State of New York. Such statement shall be filed within 20 days following the date on which the judge or non-judge becomes such a candidate; provided, however, that the Ethics Commission for the Unified Court System may grant an additional period of time within which to file such statement in accordance with rules promulgated pursuant to section 40.1(t)(3) of the Rules of the Chief Judge of the State of New York (22 NYCRR). Notwithstanding the foregoing compliance with this subparagraph shall not be necessary where a judge or non-judge already is or was required to file a financial disclosure statement for the preceding calendar year pursuant to Part 40 of the Rules of the Chief Judge. This requirement does not apply to candidates for election to town and village courts.

(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 25.39 of the Rules of the Chief Judge (22 NYCRR 25.39).

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; 100.5(A)(4)(g) Sept. 1, 2006.

Section 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 section 100.4(C)(1), 100.4(C)(2)(a), 100.4(C)(3)(a)(ii), 100.4(E)(1), 100.4(F), 100.4(G), and 100.4(H);

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

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

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

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

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

(E) Relationship to Code of Judicial Conduct. To the extent that any provision of the Code of Judicial Conduct as adopted by the New York State Bar Association is inconsistent with any of these rules, these rules shall prevail.

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

APPENDIX F:

TEXT OF 2009 DETERMINATIONS RENDERED BY THE COMMISSION

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **HOWARD M. AISON**, a Judge of the Amsterdam City Court, Montgomery County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Cheryl L. Randall, Of Counsel) for the Commission
Ackerman, Wachs and Finton, P.C. (by F. Stanton Ackerman) for the Respondent

The respondent, Howard M. Aison, a Judge of the Amsterdam City Court, Montgomery County, was served with a Formal Written Complaint dated November 13, 2007, containing three charges. The Formal Written Complaint alleged that respondent, while a part-time judge, arranged to have charges against his client filed in a court which did not have jurisdiction in order to circumvent the prohibition against practicing law in his own court (Charge I); failed to disqualify himself in a case notwithstanding that he had previously represented the complaining witness, and held the defendant in summary contempt without complying with proper procedures (Charge II); and represented defendants in three cases that had originated in his own court (Charge III). Respondent filed an amended Answer dated May 19, 2008.

By Order dated April 23, 2008, the Commission designated Philip C. Pinsky, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 9, 2008, in Albany. The referee filed a report dated December 16, 2008.

On January 9, 2009, the Administrator of the Commission, respondent's counsel and respondent entered into a Stipulation recommending that the Commission accept the proposed findings of fact and conclusions of law contained in the referee's report, determine that

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Charges I through III are sustained insofar as they are consistent with the referee's findings and conclusions, and determine that respondent be censured, waiving further submissions and oral argument.

On January 28, 2009, the Commission accepted the Stipulation and made the following determination.

1. Respondent has been a Judge of the Amsterdam City Court since 1997. He served as a part-time judge until April 1, 2007, when he became a full-time judge of the court.

2. Respondent is an attorney. He practiced law from 1973 to 1985, served as Montgomery County District Attorney from 1979 to 1985, and served as County Court judge from 1986 to 1995. He then resumed the practice of law as a sole practitioner and continued to practice law while serving as a part-time City Court judge.

As to Charge I of the Formal Written Complaint:

3. On or about January 25, 2000, respondent was retained as an attorney by Julie Taylor, who had learned that charges would be filed against her for allegedly defrauding the City of Amsterdam Housing Authority by receiving more than $9,000 in overpayments of housing subsidies. Respondent accepted a fee from Ms. Taylor.

4. Upon being retained by Ms. Taylor, respondent called the Chief Clerk of the Amsterdam City Court and was informed that there was no charge against Ms. Taylor in that court. Respondent then telephoned Montgomery County District Attorney Jed Conboy and set up a meeting at the District Attorney's office to discuss the Taylor matter. Mr. Conboy had been an assistant district attorney when respondent was District Attorney.

5. At their meeting, respondent told Mr. Conboy that he could not represent Ms. Taylor in the Amsterdam City Court and suggested that the charge against her be filed in the Amsterdam Town Court. Respondent told Mr. Conboy that Ms. Taylor was willing to plead guilty to a misdemeanor and could pay the restitution immediately.

6. The Amsterdam Town Court did not have original jurisdiction over the Taylor matter since the crime arose in the City of Amsterdam.

7. On February 3, 2000, an Information was filed in the Amsterdam Town Court charging Ms. Taylor with Petit Larceny, a class A misdemeanor, with a return date of February 10, 2000. Respondent testified that the charge was filed in that court because Mr. Conboy had "said that it's okay."

8. Respondent represented Ms. Taylor in Amsterdam Town Court through the disposition of her case on February 10, 2000, when she was sentenced to a one-year conditional discharge and $9,236 in restitution.

9. On the same date, respondent sent a cashier's check to the Amsterdam Housing Authority in the amount of the restitution. In his cover letter respondent stated: "Both Julie and I deeply appreciate the consideration that both you, the Court and the District Attorney gave Julie regarding this matter."

10. Respondent was aware of the ethical prohibition barring him from practicing in his own court, and he was attempting to circumvent that prohibition when he arranged with Mr. Conboy to have the charge against Ms. Taylor filed in the Town Court.

11. Respondent has acknowledged that he should not have represented Ms. Taylor in the matter and "should have known better" than to represent her.

As to Charge II of the Formal Written Complaint:

12. On April 21, 2003, respondent met with and agreed to represent Melissa Weller in a Workers' Compensation matter. Ms. Weller signed a Notice of Appearance and Retainer, which respondent filed with the Workers' Compensation Board. When respondent met with her, Ms. Weller had no papers with her, and respondent asked her to bring them in. He never saw her again. There is no evidence that Ms. Weller ever pursued the case or that the Workers' Compensation Board took any action on the Weller case, other than assigning a case number. Respondent reasonably believed that his representation of Ms. Weller did not extend beyond April 2003.

13. On May 10, 2005, respondent accepted a guilty plea from Miguel Carmona to Harassment in the Second Degree and sentenced him to a conditional discharge and time served. Mr. Carmona is the father of Ms. Weller's children.

14. On July 12, 2005, respondent signed an order of protection against Mr. Carmona in favor of Ms. Weller, in connection with Mr. Carmona's conviction for Harassment. At that time, respondent had notice of the relationship between Mr. Carmona and Ms. Weller.

15. On April 4, 2006, respondent arraigned Mr. Carmona on charges of Criminal Contempt in the First Degree and Criminal Mischief in the Third Degree, both felonies, and Aggravated Harassment in the Second Degree, a misdemeanor, as well as an alleged violation of the 2005 conditional discharge. The charges arose out of allegations that Mr. Carmona had left threatening messages on Ms. Weller's answering machine and had damaged the windshield of her vehicle. Respondent set bail and issued a temporary order of protection on the Criminal Contempt charge and released Mr. Carmona on his own recognizance on the other charges. Respondent knew that Mr. Carmona is the father of Ms. Weller's children by reason of her supporting deposition accompanying the felony complaint.

16. On April 25, 2006, Mr. Carmona pled guilty to a misdemeanor in satisfaction of all the charges and was promised a sentence of nine months plus a fine, consistent

with the recommendation of the District Attorney. Sentencing was adjourned to June 20, 2006, and a presentence report was requested. Respondent issued a temporary order of protection directing Mr. Carmona to stay away from Ms. Weller. Bail was ordered in lieu of the previous release on recognizance.

17. On June 20, 2006, Mr. Carmona appeared before respondent for sentencing. During the proceeding, Mr. Carmona made offensive, threatening statements to respondent, and respondent held him in summary contempt and sentenced him to 30 days in jail and a $1,000 fine. Mr. Carmona then withdrew his plea to the misdemeanor and requested respondent's recusal due to a "conflict of interest" based on respondent's prior "dealings" with him and Ms. Weller "on a personal level." Respondent adjourned the matter to August 15, 2006.

18. There were no further proceedings in the case in City Court. On July 14, 2006, Mr. Carmona was indicted by a grand jury, and he later pled guilty to a felony.

19. Respondent did not disclose that Ms. Weller had been his client at any of the above court appearances in *Carmona*. Respondent testified that at the time of those proceedings, he did not recall that he had represented Ms. Weller and that if he had remembered doing so, he would have made such a disclosure.

As to Charge III of the Formal Written Complaint:

20. On November 22, 1998, in *People v. James A. Kenna*, the defendant was arraigned by respondent's co-judge in the Amsterdam City Court on a charge of Driving While Intoxicated (second offense), a felony.

21. On December 14, 1999, by letter to the clerk of the County Court, respondent requested a meeting with the County Court and the District Attorney's office concerning a waiver of indictment and the filing of a Superior Court information on the DWI felony against Mr. Kenna and another pending felony charge.

22. On or about April 26, 2000, the *Kenna* case was transferred from the Amsterdam City Court to County Court. Respondent represented the defendant, who pled guilty to the felony DWI on April 26, 2000, and was sentenced on November 16, 2000.

23. In *People v. Michael Waldynski*, the defendant was arrested on May 17, 1999, on a charge of Burglary in the First Degree, a felony, and was arraigned in the Amsterdam City Court by respondent's co-judge. On September 22, 1999, the case was transferred to County Court. Respondent represented the defendant in County Court, where the defendant pled guilty to Burglary in the Second Degree on March 29, 2000, and was sentenced to a term of imprisonment on May 9, 2000.

24. In *People v. Ronald Holt*, the defendant was charged on March 26, 2000, in the Amsterdam City Court with Aggravated Unlicensed Operation of a Motor Vehicle in the

First Degree, a felony, and Driving While Intoxicated. He was arraigned on that date by respondent's co-judge.

25. On that same date, respondent accepted a retainer for purposes of representing Mr. Holt.

26. On or about March 27, 2001, respondent's co-judge transferred the case to County Court, where it remained until July 30, 2001, when the County Court judge returned it to City Court. On August 7, 2001, respondent's co-judge again transferred the case to County Court, stating that "Mr. Aison said he will enter a plea in County Court."

27. On October 24, 2001, the defendant, represented by respondent, pled guilty in County Court to two misdemeanors, Driving While Intoxicated and Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree, and was sentenced to a one-year conditional discharge and revocation of his driver's license.

28. While the case against Mr. Holt was in the Amsterdam City Court, respondent rendered the following legal assistance to his client:

(A) Respondent composed a letter dated March 26, 2001, for Mr. Holt's signature, addressed to respondent's co-judge, which, in part, waived a preliminary hearing.

(B) Respondent composed an affidavit for Mr. Holt's signature and submission to the Court. Respondent sent a copy of the affidavit and the March 26, 2001 letter to the District Attorney under cover of a letter dated March 29, 2001, two days after the matter had been transferred to County Court.

(C) On or about August 7, 2001, respondent informed his co-judge that his client would enter a plea in County Court, which resulted in the co-judge determining to send the case to the County Court for disposition.

(D) On or about October 24, 2001, respondent caused a waiver of a preliminary hearing on behalf of his client to be filed in Amsterdam City Court. The record does not reflect why this document was prepared and filed in the City Court since the *Holt* case had been transferred on August 7, 2001, to the County Court, where the defendant entered a plea on October 24, 2001.

29. With respect to the March 26, 2001, letter drafted by respondent, which did not disclose that he was representing Mr. Holt, respondent testified at the hearing that he did not "want anybody in City Court to think that I am representing someone… I conceal all my clients from the City Court personnel. I don't want them to know who I represent."

30. At the hearing, respondent testified that he knew that as a part-time Amsterdam City Court judge he could not practice law in the City Court but felt it was

permissible to prepare documents for his client to sign in the client's own name, "because the only purpose of the letter was to take it out of the City Court."

31. Respondent acknowledged at the hearing that he should not have represented Mr. Kenna, Mr. Waldynski or Mr. Holt since the cases had originated in his court.

Supplemental finding:

32. At the hearing, respondent was contrite, cooperative and forthright. He candidly recognized and acknowledged the impropriety of his behavior.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(A), 100.3(B)(1), 100.3(B)(6), 100.3(E)(1), 100.4(A)(3), 100.4(D)(1)(a) and 100.6(B)(2) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

A part-time judge may practice law subject to certain statutory and ethical restrictions designed to eliminate conflict and the appearance of any conflict between the exercise of judicial duties and the private practice of law. *See*, *Matter of Miller*, 2003 Annual Report 140 (Comm on Judicial Conduct). Every lawyer-judge must scrupulously observe the applicable rules in order to avoid conduct that may create an appearance of impropriety and impugn the integrity of judicial office. While serving as a part-time judge of the Amsterdam City Court, respondent violated these standards in his representation of clients in four matters between 1999 and 2001.

Section 16 of the Judiciary Law prohibits a judge from practicing law in the judge's court or "in an action, claim, matter, motion or proceeding originating in [the judge's] court." In *People v. Taylor*, respondent, with the assistance of the District Attorney, arranged to have a charge against his client filed in the Amsterdam Town Court, which did not have original jurisdiction, rather than in the Amsterdam City Court, where he knew himself to be barred, in order to circumvent the prohibition against practicing law in his own court. Since the crime arose in the City of Amsterdam, it is clear that the case would have been filed in the City Court but for respondent's intervention. Respondent's arrangement with the District Attorney – who had been respondent's assistant when respondent served as District Attorney – conveys the appearance of favoritism, which undermines the administration of justice and "created the impression that the courts were being manipulated to benefit respondent's private law practice, to the possible inconvenience of the parties and to the burden of other courts that had to assume an additional caseload." *See*, *Matter of Feeney,* 1988 Annual Report 159, 161 (Comm on Judicial Conduct).

In choosing to represent Ms. Taylor, respondent, as the referee concluded, "put

his private practice of law above his judicial obligations, for his own pecuniary gain" (Referee's report, p. 4). By doing so, respondent failed to ensure that his judicial duties took precedence over his private practice of law and failed to conduct his private practice of law in a manner compatible with his judicial office, contrary to Sections 100.3(A) and 100.4(A)(3) of the Rules.

In the *Kenna*, *Waldynski* and *Holt* cases, respondent violated Section 16 of the Judiciary Law by representing the defendants in County Court notwithstanding that the cases had originated in the Amsterdam City Court. In each of the cases, the defendants were arraigned in the City Court by respondent's co-judge, who transferred the cases to County Court since the defendants were charged with a felony. Although respondent never presided over those cases in the City Court, the statutory prohibition precluded him from representing the defendants after the cases were transferred. *See*, *Matter of Miller*, *supra*; *Matter of Feeney*, *supra*; *Matter of Bruhn*, 1988 Annual Report 133 (Comm on Judicial Conduct); *see also* Adv Op. 88-50, 99-34.

In one of the cases, *People v. Holt*, respondent also provided legal assistance to his client in the brief period while the case was still pending in the Amsterdam City Court, in contravention of clear statutory and ethical prohibitions. A judge may not act as an attorney in a case pending in the judge's court (Jud Law §16; Rules, §100.6[B][2]). While respondent did not physically appear in the City Court in connection with the *Holt* case and, indeed, acknowledged that he was attempting to conceal from City Court personnel that he was representing the defendant, his actions violated the ethical prohibitions and constituted an impermissible intermingling of his roles as a lawyer and judge. In this regard, we agree with the referee that the defendant's letter (drafted by respondent) to the City Court judge waiving a preliminary hearing was "hardly a ministerial act, since it requires an informed tactical judgment by an attorney" (Referee's report, p. 15).

In addition, it was improper for respondent to preside over *People v. Carmona* in 2005 and 2006 without disclosing that the complaining witness was a former client of his law practice. A judge's disqualification is required in any matter where the judge's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]). Under guidelines provided in numerous opinions of the Advisory Committee on Judicial Ethics, disqualification in matters involving a judge's former law client is required if the representation occurred within the past two years; thereafter, at the very least, disclosure is required for a significant period (Adv. Op. 97-85, 94-71, 92-14, 92-01). *See also, Matter of Bruhn*, *supra; Matter of Feeney*, *supra; see also*, *Matter of Filipowicz*, 54 AD2d 348 (2d Dept 1976).

Since respondent had briefly represented Ms. Weller more than two years before the *Carmona* matter first came before him, his disqualification was not mandatory provided that he believed that he could be impartial. Nevertheless, disclosing the relationship was required under the ethical guidelines. As we have previously stated, "There can be no substitute for making full disclosure on the record in order to ensure that the parties are fully aware of the pertinent facts and have an opportunity to consider whether to seek the judge's recusal" (*Matter of Merrill*, 2008 Annual Report 181 [Comm on Judicial Conduct]). By failing to disclose his prior attorney-client relationship with the complaining witness, respondent did not act "in a

manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules, §100.2[A]).

As the referee found, it is no excuse that respondent did not recall his brief representation of Ms. Weller. Judges who practice law should maintain appropriate records and implement appropriate controls in order to ensure that their conduct complies with the ethical restrictions.

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

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

Judge Klonick, Mr. Coffey, Mr. Harding, Ms. Hubbard, Judge Konviser and Judge Ruderman concur.

Mr. Belluck, Mr. Emery, Mr. Jacob and Judge Peters dissent and vote to reject the stipulation on the basis that the disposition is too lenient and that respondent should be removed.

Dated: March 26, 2009

DISSENTING OPINION BY MR. EMERY, IN WHICH MR. BELLUCK, MR. JACOB AND JUDGE PETERS JOIN

It is out of character for this Commission not to remove a part-time judge who manipulates his clients, co-judges, brethren County judges and the District Attorney's office in a series of cases that comprise a pattern of rule breaking for the purpose of securing financial benefit for that judge's private practice of law. The Commission's decision in this case would be an aberrant precedent were it not for the long delay in sanctioning these events and the fact that Judge Aison is now a full-time judge who can no longer engage in such practices. Notwithstanding these mitigating facts, I must dissent and vote for removal because this sort of mitigation, in my view, is irrelevant to sanction in the face of Judge Aison's calculated disregard of the prohibitions that apply to judges who practice law and his overt and covert manipulations of the court system he is sworn to uphold.

The Commission has accurately and fully set forth the pattern of Judge Aison's misconduct. Two of the cases at issue particularly and starkly make the point. In *Holt*, Judge Aison forthrightly admits that despite knowing that he could not practice in his own court, he agreed to represent a defendant whose case was before that court. Rationalizing that he could represent the defendant if his role was sufficiently disguised, the judge attempted to conceal the representation by preparing documents for his client's signature for submission to Judge Aison's

City Court co-judge under the guise of *pro se* written submissions. He later abandoned his subterfuge, informing his co-judge that his client would enter a plea in County Court, thereby causing his co-judge to transfer the case to County Court. *See* Finding 28(C). At that point, Judge Aison arranged a guilty plea and acceptable disposition for his client with the District Attorney's office. The judge himself had led that office as District Attorney some years earlier.

Of course, his client paid Judge Aison a fee for these services. And Judge Aison has proffered no explanation for these manipulations other than his intent to earn a living. He was simply oblivious to the fact that this conduct was, on its face, deceptive and in clear violation of the Judiciary Law which he is sworn to uphold.

That he was the former District Attorney takes on an even more prominent role in the second troubling case. Knowing that he could not represent the defendant in *People v. Taylor*, a case which involved a potential felony with preliminary jurisdiction in the City Court, Judge Aison convinced his former assistant district attorney – by that time the County District Attorney – to file the charge as a misdemeanor in the Amsterdam Town Court, where no original jurisdiction existed but where Judge Aison was permitted to practice. This cozy relationship avoided the uncomfortable possibility that Judge Aison might be disqualified and deprived of a fee. Perhaps the District Attorney was consoled by the favorable plea disposition that was reached. Perhaps, as well, the judge's client was pleased by the favorable disposition.

This corrosion of the judicial, defense and prosecutorial functions for pragmatic and personal benefit is simply too much to tolerate. Recently, we publicly disciplined two full-time City Court judges for condoning similarly pragmatic manipulations of their colleague, a part-time judge whose law firm practiced before the court where he sat. *Matter of Lehmann*, 2009 Annual Report ___; *Matter of Pelella*, 2009 Annual Report ___ (Comm on Judicial Conduct). The colleague, who – like Judge Aison – flouted the restrictions on the practice of law by part-time judges for his own and his firm's financial benefit, avoided discipline only by agreeing to vacate office when his term expired and not to hold judicial office in the future (*Matter of Murphy*, 2009 Annual Report ___).

I understand the Commission's consideration of Judge Aison's expressions of contrition. However, his distortion and compromise of fundamental legal precepts that inhere in his misconduct are simply too severe to warrant a sanction less than removal. *Lehmann* and *Pelella* clearly require as much.

The fact that most of these events occurred some time ago should not mitigate removal. When a judge uses deceit and subterfuge by practicing law in his own court – and the facts are established by incontrovertible proof – the lapse of time in prosecuting the case should not be relevant to sanction. This is precisely why there is no statute of limitations for judicial misconduct. Nor should it inure to Judge Aison's benefit in evaluating the Commission's response to his earlier misconduct that he is now a full-time judge.

It is contrary to logic and precedent to leave a judge on the bench who has so

egregiously violated the trust of judicial office by manipulating the very system in which he is a judge for his personal benefit and the benefit of a private client. *See*, *Matter of Gibbons*, 98 NY2d 448 (2002) (judge notified an attorney, whose firm was the judge's former employer and referred cases to the judge, that he had just signed a search warrant for the premises of the attorney's client). Respondent should be removed.

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **FRANCIS M. ALESSANDRO**, a Judge of the New York City Civil Court, Bronx County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Edward Lindner and Melissa DiPalo, Of Counsel) for the Commission
Marvin Ray Raskin for Respondent

The respondent, Francis M. Alessandro, a Judge of the New York City Civil Court, Bronx County, was served with an Amended Formal Written Complaint dated February 19, 2007, containing two charges. The charges alleged that respondent filed two financial disclosure statements with the Ethics Commission for the Unified Court System that were materially incomplete (Charge I) and submitted loan applications to mortgage brokers that omitted various assets and liabilities (Charge II). Respondent filed a verified Answer dated February 22, 2007.

By Order dated January 31, 2007, the Commission designated Mark S. Arisohn, Esq., as referee to hear and report proposed findings of fact and conclusions of law. On March 9, 2007, the Commission directed that the hearing in the matter be consolidated with the hearing in a pending proceeding against Supreme Court Justice Joseph S. Alessandro. A joint hearing was held on June 18, 19, 20, 2007, and February 14, 15 and 22, 2008, in New York City. The referee filed a report dated July 21, 2008.

The parties submitted briefs with respect to the referee's report and the issue of

sanctions. Commission counsel recommended the sanction of removal, and respondent's counsel recommended the sanction of admonition or censure.

On December 11, 2008, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the Civil Court of the City of New York, Bronx County, since 1990. As a Civil Court Judge, respondent deals with cases involving mortgages, notes and indentures.

2. Prior to assuming the bench, respondent and his brother, Joseph S. Alessandro, maintained a private practice of law concentrating in, *inter alia,* real estate law.

3. In 2003 Joseph Alessandro was a candidate for election to the Westchester County Court. He was elected to County Court in November 2003 and became a Supreme Court Justice in January 2006.

4. In late August 2003 respondent and Joseph Alessandro co-signed a mortgage note reflecting a $250,000 loan to Joseph Alessandro's campaign by Barbara Battista, a 71-year-old registered nurse who was the campaign manager and treasurer. The handwritten note, dated August 31, 2003, was prepared by Joseph Alessandro and was secured by a mortgage on his residence located in Valhalla, New York (the "Valhalla property"). Respondent and Joseph Alessandro owned the Valhalla property as joint tenants with a right of survivorship.

5. The note signed by respondent and Joseph Alessandro had a term of 30 days, with the principal due and payable on September "31 [sic]," 2003. Despite the 30-day term contained in the note, Ms. Battista and Joseph Alessandro agreed that he would repay the loan by July 2004.

6. Respondent testified that he signed the note and mortgage "as an accommodation" to his brother and that he believed that the $250,000 loan was his brother's responsibility, although he acknowledged that as a signatory he was legally obligated on the note.

7. Thereafter, a promissory note dated November 3, 2003, reflecting the original $250,000 loan was signed by Ms. Battista and Joseph Alessandro, which provided for a 15-year term. A mortgage dated October 23, 2003, and signed on November 3, 2003, by Joseph Alessandro, but not respondent, purported to secure the loan with the Valhalla property. Despite the 15-year term contained in this note, Ms. Battista and Joseph Alessandro understood that he would repay the loan by July 2004, as they had originally agreed. Ms. Battista recorded this mortgage on November 5, 2003. Respondent testified at the hearing that he was unaware of this promissory note and mortgage until early 2005.

8. In 2004 Joseph Alessandro did not repay any portion of the $250,000 loan

from Ms. Battista. In January 2005 Ms. Battista recorded the handwritten mortgage, and on February 25, 2005, Ms. Battista commenced a lawsuit against respondent and Joseph Alessandro in Supreme Court, Westchester County, to foreclose on the handwritten mortgage note.

9. In February 2006 respondent, Joseph Alessandro and Ms. Battista entered into a settlement agreement pursuant to which Ms. Battista received $273,000.

As to Charge I of the Formal Written Complaint:

10. On July 7, 2004, respondent filed with the Ethics Commission for the Unified Court System a financial disclosure statement for the calendar year 2003. Respondent failed to disclose fully his assets and liabilities for 2003, in that he: (a) failed to disclose the note and mortgage held by Ms. Battista against the Valhalla property; (b) failed to disclose a mortgage held by GreenPoint against a property at 1472 Hammersley Avenue in the Bronx, which respondent jointly owned with Joseph Alessandro; (c) failed to disclose that he owned a one-half interest in the Valhalla property; and (d) failed to disclose that he owned a one-half interest in a property at 895 James Street in Pelham.

11. On April 14, 2005, respondent filed with the Ethics Commission for the Unified Court System a financial disclosure statement for the calendar year 2004. Respondent failed to disclose fully his assets and liabilities for 2004, in that he: (a) failed to disclose the note and mortgage held by Ms. Battista against the Valhalla property; (b) failed to disclose the mortgage held by GreenPoint against the property at 1472 Hammersley Avenue; (c) failed to disclose that he owned a one-half interest in the Valhalla property; and (d) failed to disclose that he owned a one-half interest in the property at 895 James Street.

12. Respondent testified at the hearing that he was "negligent" in failing to disclose the mortgage held by Ms. Battista on his financial disclosure statements, but also testified that he omitted the Battista mortgage from his financial disclosure statements because he felt that it was his "brother's obligation" and because it was an "unrecorded" instrument. This testimony establishes that respondent intentionally failed to disclose the Battista mortgage on his financial disclosure statements.

As to Charge II of the Formal Written Complaint:

13. During 2004, respondent and Joseph Alessandro jointly submitted three loan applications to Global Equity Funding ("Global Equity"), as described below. Respondent located Global Equity on the internet and gave the mortgage broker, Jack McDowell, the information for the applications over the telephone. Mr. McDowell returned the applications to respondent for his signature, and respondent gave them to Joseph Alessandro to sign.

14. On or about April 1, 2004, respondent and Joseph Alessandro submitted an application to Global Equity for a $350,000 loan on property at 21 Hamilton Avenue in New Jersey, which they jointly owned. This application, which was signed by respondent and Joseph

Alessandro, contained a number of false statements and omissions, including:

(a) Three properties jointly owned by respondent and Joseph Alessandro were omitted: (i) 1472 Hammersley Avenue; (ii) 895 James Street; and (iii) 2711 SE 27th Way in Florida.

(b) One property individually owned by respondent, 2715 SE 27th Way, was omitted.

(c) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Joseph Alessandro was not disclosed.

(d) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had co-signed a $250,000 note to Ms. Battista which had not been repaid.

15. On or about May 27, 2004, respondent and Joseph Alessandro submitted a loan application to Global Equity to refinance 23 Hamilton Avenue, which they jointly owned, for $350,000. This application, which was signed by respondent and Joseph Alessandro, contained a number of false statements and omissions, including:

(a) Five properties jointly owned by respondent and Joseph Alessandro were omitted: (i) 1464 Hammersley Avenue; (ii) 895 James Street; (iii) 24 Franklin Avenue in New Jersey; (iv) 28 Franklin Avenue; and (v) 2711 SE 27th Way.

(b) One property individually owned by respondent, 2715 SE 27th Way, was omitted.

(c) The mortgage held by Ameriquest on respondent's Bronx residence was not disclosed; the application shows a mortgage on the property, but Ameriquest is not identified.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Joseph Alessandro was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had co-signed a $250,000 note to Ms. Battista which had not been repaid.

16. On or about July 22, 2004, respondent and Joseph Alessandro submitted an undated application to Global Equity for a $266,000 loan on property at 26 Franklin Avenue, which they jointly owned. This application, which was signed by respondent and Joseph Alessandro, contained a number of false statements and omissions, including:

(a) Six properties jointly owned by respondent and Joseph Alessandro were omitted: (i) 1464 Hammersley Avenue; (ii) 895 James Street; (iii) 21-23 Hamilton Avenue; (iv) 24 Franklin Avenue; (v) 28 Franklin Avenue; and (vi) 2711 SE 27th Way.

(b) One property individually owned by respondent, 2715 SE 27th Way, was omitted.

(c) The mortgage held by Ameriquest on respondent's Bronx residence was not disclosed; the application shows a mortgage on the property, but Ameriquest is not identified.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Joseph Alessandro was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had co-signed a $250,000 note to Ms. Battista which had not been repaid.

17. Respondent testified at the hearing that he did not disclose the mortgage held by Ms. Battista on the loan applications because it was "unrecorded." This testimony establishes that respondent intentionally failed to disclose the Battista mortgage on the applications.

18. In the summer of 2005, as described below, respondent and Joseph Alessandro completed three loan applications with Moses Rambarran, who acted as a mortgage broker. Joseph Alessandro met with Mr. Rambarran and provided the information for the applications. Each of these loan applications was granted.

19. On or about August 25, 2005, respondent and Joseph Alessandro submitted an application to Mr. Rambarran for a $550,000 loan on property at 895 James Street, which they jointly owned. The application, which was signed by respondent and Joseph Alessandro, contained a number of false statements and omissions, including:

(a) Five properties jointly owned by respondent and Joseph Alessandro were omitted: (i) 21-23 Hamilton Avenue; (ii) 24 Franklin Avenue; (iii) 26 Franklin Avenue; (iv) 28 Franklin Avenue; and (v) 2711 SE 27th Way.

(b) One property individually owned by respondent, 2715 SE 27th Way, was omitted.

(c) The mortgage held by Ameriquest on respondent's Bronx residence was not disclosed; the application shows a mortgage on the property, but Ameriquest is not identified.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Joseph Alessandro was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had co-signed a $250,000 note to Ms. Battista which had not been repaid.

(f) Respondent misrepresented that he was not a party to a lawsuit, when in fact he was a defendant in a foreclosure action brought by Ms. Battista in February 2005.

20. On or about August 25, 2005, respondent and Joseph Alessandro signed a second application to Mr. Rambarran for a $300,000 loan on property at 1464 Hammersley Avenue, which they jointly owned. The application, which was signed by respondent and Joseph Alessandro, contained a number of false statements and omissions, including:

(a) Five properties jointly owned by respondent and Joseph Alessandro were omitted: (i) 21-23 Hamilton Avenue; (ii) 24 Franklin Avenue; (iii) 26 Franklin Avenue; (iv) 28 Franklin Avenue; and (v) 2711 SE 27th Way.

(b) One property individually owned by respondent, 2715 SE 27th Way, was omitted.

(c) The mortgage held by Ameriquest on respondent's Bronx residence was not disclosed; the application shows a mortgage on the property, but Ameriquest is not identified.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Joseph Alessandro was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had co-signed a $250,000 note to Ms. Battista which had not been repaid.

(f) Respondent misrepresented that he was not a party to a lawsuit, when in fact he was a defendant in a foreclosure action on the Valhalla property brought by Ms. Battista in February 2005.

21. On each of the above loan applications, which require the borrower to list assets and all outstanding liabilities, respondent signed an acknowledgment stating that the information provided in the applications was true and correct and that he understood that he could be subject to criminal penalties if the information provided was false. Respondent claimed that he did not review the applications prior to signing them.

22. On August 25, 2005, respondent and Joseph Alessandro submitted an application to Mr. Rambarran to refinance the Valhalla property for $275,000.[1] The application contained a number of false statements and omissions, including:

(a) Seven properties jointly owned by respondent and Joseph Alessandro were

[1] The copy of this loan application in evidence (Ex. FF) is undated and unsigned. Joseph Alessandro testified that this application was filed, that the loan was granted and that the proceeds were used to repay Ms. Battista in early 2006 (Tr. 1219-20).

omitted: (i) 1464 Hammersley Avenue; (ii) 1472 Hammersley Avenue; (iii) 21-23 Hamilton Avenue; (iv) 24 Franklin Avenue; (v) 26 Franklin Avenue; (vi) 28 Franklin Avenue; and (vii) 2711 SE 27th Way.

(b) One property individually owned by respondent, 2715 SE 27th Way, was omitted.

(c) The mortgage held by Ameriquest on respondent's Bronx residence was not disclosed; the application shows a mortgage on the property, but Ameriquest is not identified.

(d) The mortgage held by Ms. Battista on the Valhalla property was not disclosed; the application shows a $250,000 mortgage or lien on the property, but Ms. Battista is not identified.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had co-signed a $250,000 note to Ms. Battista which had not been repaid.

(f) Respondent misrepresented that he was not a party to a lawsuit, when in fact he was a defendant in a foreclosure action on the Valhalla property brought by Ms. Battista in February 2005.

23. By filing numerous mortgage applications containing material omissions and misstatements regarding the Battista notes, mortgages and foreclosure action, respondent attempted to conceal, or created the appearance that he was attempting to conceal, the obligation to repay Ms. Battista.

24. By filing numerous mortgage applications containing material omissions and misstatements about his assets and liabilities, respondent attempted to influence, or created the appearance that he was attempting to influence, the lending institutions' decision whether to extend a loan.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.4(I) 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 Amended Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Over a two-year period respondent engaged in a course of deceitful and dishonest behavior that renders him unfit to serve as a judge. He intentionally withheld information on his mandatory financial disclosure statements and on multiple loan applications. In its totality, respondent's conduct demonstrates "a pattern of injudicious behavior and inappropriate actions which cannot be viewed as acceptable conduct by one holding judicial office." *Matter of*

VonderHeide, 72 NY2d 658, 660 (1988).

In 2004 and 2005 respondent filed two financial disclosure statements with the Ethics Commission for the Unified Court System that were materially incomplete, and submitted multiple loan applications that contained materially false information concerning his financial status. None of these documents disclosed the outstanding $250,000 loan from Ms. Battista, which respondent had co-signed with his brother in August 2003. The evidence, including respondent's own testimony, establishes conclusively that these omissions were intentional.

Respondent testified at the hearing that he was "negligent" in failing to disclose the mortgage held by Ms. Battista on these statements, but also testified that he omitted the Battista mortgage because he felt that it was his "brother's obligation" and because it was an "unrecorded" instrument. This testimony establishes that respondent intentionally failed to disclose the Battista mortgage.

Respondent's omission of the Battista mortgage on his 2004 financial disclosure form, which was filed in April 2005, is particularly noteworthy since just two months earlier, Ms. Battista had filed a lawsuit against respondent and his brother based on the $250,000 liability, and one day earlier, the defendants had moved to dismiss her claim. Even if, as respondent claims, he did not communicate with his brother as to the status of the Battista loan, he certainly knew in early 2005, when Ms. Battista commenced a lawsuit against him, that the loan had not been repaid.

We have commented previously on the importance of judges' annual financial disclosure statements, which are required by the Rules of the Chief Judge (22 NYCRR §40.1).[2] The information provided on these forms is open to public scrutiny so that, for example, lawyers and litigants can determine whether to request a judge's recusal. It is unacceptable for a judge to provide information that is incomplete or inaccurate; doing so deliberately is manifestly improper. Moreover, respondent's statements also fail to disclose another mortgage he owed and his part-ownership of two properties. His negligence in this regard compounds his misconduct and demonstrates an unacceptable carelessness and inattention to his ethical responsibilities.

Over the same period, respondent submitted multiple loan applications that contained materially false information concerning his financial status. In 2004 he filed three applications (co-signed by his brother) with Global Equity, a mortgage broker and lender. After providing information to the broker by telephone, respondent signed the applications. On each application, which specifically requires the borrower to list all outstanding liabilities, respondent

[2] The Commission's 2008 Annual Report states: "As noted on the official website of the Unified Court System, the Ethics in Government Act of 1987 was enacted 'in order to promote public confidence in government, to prevent the use of public office to further private gain, and to preserve the integrity of governmental institutions. The Act accomplishes those goals by prohibiting certain activities, requiring financial disclosure by certain State employees, and providing for public inspection of financial statements'" (p. 23).

failed to disclose the $250,000 mortgage held by Ms. Battista and executed a year earlier. Respondent also failed to list as assets numerous properties he owned individually and jointly with his brother. In addition, on each application, respondent checked a box stating, untruthfully, that he was not a co-maker or endorser on a note, although the $250,000 Battista note he had signed the previous year was still unpaid.

The following year, respondent submitted three more loan applications that contained inaccurate and incomplete information. Again, the applications fail to disclose the $250,000 Battista mortgage as a liability[3] and state that respondent was not a co-maker on a note. By checking a box on each application, respondent also stated affirmatively that he was not a party to a lawsuit, although he was then a party to the foreclosure action Ms. Battista had commenced a few months earlier.

While insisting that he and his brother had provided all the relevant information to the brokers who completed the loan applications, respondent also testified that he did not list the Battista mortgage on his loan applications because it was "unrecorded." This explanation makes no sense, since it obviously has nothing to do with the validity of his liability and the loan application made no distinction between recorded and unrecorded mortgages. As with his failure to list the loan on his financial disclosure statements, this constitutes a deliberate effort to conceal the liability.

By failing to disclose a significant liability and by failing to disclose that he was a party to a foreclosure action, respondent withheld information from the lenders that might have adversely affected his loan applications. His failure to disclose numerous assets was also significant, since such assets could be available to the lender in the event of a default. The pattern of omitting such information constituted the intentional concealment of material information about his financial status while attempting to obtain loans based on false information.

Reflecting the seriousness of such conduct, regardless of whether it is intentional or negligent, all the loan applications signed by respondent state that "any intentional or negligent misrepresentation" of the information contained therein "may result in civil liability…and/or in criminal penalties" under Title 18, United States Code, section 1001 *et seq.* *See also*, NY Penal Law §155.05(2)(a); *People v. Termotto*, 81 NY2d 1008 (1993) (defendant convicted of larceny based on false representations to banks as to his financial status to obtain loans).

Such impropriety reflects adversely on respondent's integrity and on the judiciary as a whole. *See*, *e.g.*, *Matter of Collazo*, 91 NY2d 251 (1998); *see also*, *Matter of Boulanger*, 61

[3] One application (Ex. 25) lists a **$**104,138 mortgage on the Valhalla property, which appears to be an error since that amount is listed elsewhere as the mortgage on a different property (*see* Ex. 26). The last application, seeking to refinance the Valhalla property, lists a $250,000 lien or mortgage on the property, with no other information and no mention of Ms. Battista (Ex. FF).

NY2d 89, 91 (1984) (judge filed a false financial affidavit in his matrimonial action for the purpose of concealing assets from his former wife and also failed to file timely gift tax returns; such conduct, even if negligent, was "unacceptable"); *Matter of Steinberg*, 51 NY2d 74, 82 (1980) (judge filed fraudulent income tax returns that reflected "deliberate falsification").[4] It jeopardizes the public's respect for the judiciary, which is essential to the administration of justice. As the Court of Appeals stated in *Matter of Mazzei*, 81 NY2d 568, 571-72 (1993):

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

In its totality, respondent's dereliction of his ethical responsibilities constitutes a departure from the high standards of conduct required of every judge, both on and off the bench.

We reject respondent's attempts to minimize his responsibility for these transgressions, including his insistence that he and his brother provided all the pertinent financial information to the brokers who completed the loan applications, that he relied on his brother's assurances that he (Joseph) "would take care of" the Battista obligation, and that he signed the incomplete and inaccurate applications without reading them. None of these assertions in any way excuses or mitigates respondent's transgressions. Respondent has acknowledged that, as a signatory, he was legally obligated on the Battista note. As an experienced judge and former real estate practitioner, he was certainly familiar with loan applications and with the importance of reading documents before signing them. We also reject respondent's argument that the omission of liabilities and assets on the loan applications was of minor significance since his net worth was more than ample. A loan applicant cannot make that determination since, on its face, the form requires complete disclosure, subject to criminal penalties.

Nor are we persuaded that respondent's personal circumstances during this period, as described in the dissent, are relevant to or otherwise mitigate his misconduct. Despite these circumstances, respondent was, by his own account, a productive, accomplished jurist; he was also able, throughout this period, to manage an extensive roster of investment properties and to buy additional property. In this regard, we note that providing truthful, complete information on financial disclosure forms, which is of paramount importance among a judge's duties, is not an unduly demanding or time-consuming obligation.

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[4]*Matter of Garvey*, 1982 Annual Report 103 (Comm on Judicial Conduct), in which the Commission dismissed a charge that the judge understated his liabilities and overstated his assets on financial statements filed in connection with four bank loan applications, presents significant mitigating factors that are not present here. In *Garvey*, the Commission stated that its dismissal of that charge was based in significant part on the testimony of the bank's president that the financial statements were ministerial and were not a determining factor in granting the loans to a long-time customer in good standing whom he knew personally.

We reject the argument that the sanction of removal is excessive because many of respondent's derelictions, as depicted in this record, were the result simply of carelessness, sloppiness and inattention to his ethical responsibilities. As we have noted, it is clear that respondent in several instances intentionally provided incomplete information and made statements that were patently untrue (*e.g.*, stating on loan applications that he was not a party to a lawsuit). A pattern of providing incomplete, inaccurate information about his financial status on financial disclosure statements, coupled with similar derelictions on multiple loan applications, is unacceptable (*see Matter of Boulanger*, *supra*, 61 NY2d at 91).

The Court of Appeals has determined that removal was warranted for a single instance of "deliberately deceptive conduct," since such behavior is "antithetical to the role of a judge who is sworn to uphold the law and seek the truth" (*Matter of Heburn*, 84 NY2d 168, 171 [1994], quoting *Matter of Myers*, 67 NY2d 550, 554) (judge falsely subscribed a designating petition as a witness, despite a "fair and clear warning" that a false statement would subject the signatory to penalties for false swearing). Manifestly, a pattern of such behavior requires the sanction of removal. This record of repeated derelictions has irretrievably damaged respondent's ability to carry out his constitutionally mandated duties and renders him unfit for judicial service.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser and Judge Peters concur.

Ms. Hubbard dissents as to the sanction and votes that respondent be censured.

Judge Ruderman did not participate.

Dated: February 11, 2009

DISSENTING OPINION BY MS. HUBBARD

While I concur that respondent should be disciplined for the misconduct established in this record, I respectfully dissent as to the sanction of removal and vote to impose a public censure. Based on the totality of the record, I believe that the sanction of removal is unduly severe, especially in view of the mitigating circumstances presented.

Providing incomplete, misleading or inaccurate information on financial disclosure statements and mortgage applications constitutes serious misconduct and warrants a severe sanction without doubt. But in this case, I find several compelling factors which persuade me that the extreme sanction of removal is too harsh.

First and foremost is respondent's belief that the Battista loan, the most important debt not disclosed, was in reality his brother's obligation to repay. Although respondent

acknowledged that as a signatory he was legally liable for this debt, the evidence is compelling that he relied on his brother Joseph's assurances that he (Joseph) would repay the loan. To the extent that respondent understood that the short-term note he signed would be repaid by his brother, his failure to disclose this liability, even if intentional, had a rational basis that does not necessarily reflect an improper motive.

It is also significant to me that, contrary to the charge that respondent omitted the Battista loan "for the purpose of concealing and/or avoiding" this liability, failing to list the loan on his financial disclosure statements and loan applications would not, as I see it, in any way affect or avoid his liability to her.

Finally, I note respondent's testimony as to the circumstances in his household throughout this period involving the deteriorating health of his spouse and the death of his parents, who lived with him and his wife. While I understand that a judge's professional obligations must take precedence over his extra-judicial activities, it appears to me that respondent's negligence should be considered in view of those personal circumstances.

The Court of Appeals has stated: "Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances" (*Matter of Cunningham*, 57 NY2d 270, 275 [1982]). I believe that the record as to respondent does not reflect "truly egregious circumstances," and thus a sufficient basis for removal is lacking. Accordingly, I respectfully dissent from the determined sanction and vote to censure respondent.

Dated: February 11, 2009

♦ ♦ ♦

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

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Edward Lindner and Melissa DiPalo, Of Counsel) for the Commission

DerOhannesian & DerOhannesian (by Paul DerOhannesian, II, and Jennifer C. Zegarelli) for Respondent

The respondent, Joseph S. Alessandro, a Justice of the Supreme Court, Westchester County, was served with an Amended Formal Written Complaint dated February 19, 2007, containing four charges. The charges alleged that respondent attempted to defraud an individual out of a $250,000 loan and/or failed to repay the loan (Charge I); gave false testimony during the Commission investigation (Charge II); filed a financial disclosure statement with the Ethics Commission for the Unified Court System that was materially incomplete (Charge III); and submitted loan applications that omitted various assets and liabilities (Charge IV). Respondent filed a verified Answer dated March 5, 2007.

By Order dated August 28, 2006, the Commission designated Mark S. Arisohn, Esq., as referee to hear and report proposed findings of fact and conclusions of law. On March 9, 2007, the Commission directed that the hearing in the matter be consolidated with the hearing in a pending proceeding against New York City Civil Court Judge Francis M. Alessandro. A joint hearing was held on June 18, 19, 20, 2007, and February 14, 15 and 22, 2008, in New York City. The referee filed a report dated July 21, 2008.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of removal, and respondent's counsel recommended the sanction of admonition or censure.

On December 11, 2008, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Supreme Court, Westchester County, since January 2006. From January 2004 through December 2005 he served as a Judge of the County Court.

2. Prior to assuming the bench, respondent and his brother, Francis Alessandro, maintained a private practice of law. Their practice concentrated in, *inter alia*, real estate law. Respondent holds a real estate broker's license.

As to Charge I of the Formal Written Complaint:

3. Respondent was a candidate for election to County Court in 2003. Barbara Battista, a 71-year-old registered nurse who had prior experience working on election campaigns, served as his campaign manager and treasurer at the suggestion of Salvatore LoBreglio, a friend of respondent and Ms. Battista. Ms. Battista had previously prepared respondent's application for an interim appointment to County Court. Mr. LoBreglio, an experienced political operative, was the director of the Westchester Independence Party. In 2005 he was convicted of misprision of a felony.

4. In late August 2003, after respondent had spent more than $140,000 of his personal funds on his campaign, the campaign needed $250,000 in additional funds in order to produce and mail campaign literature.

5. When respondent told Ms. Battista that he was not prepared to put more of his personal funds into the campaign, Ms. Battista offered to lend him $250,000.

6. Respondent agreed to accept the loan of $250,000 from Ms. Battista and to pay her back by July 2004.

7. Respondent prepared and delivered to Ms. Battista a handwritten mortgage note reflecting his $250,000 indebtedness to her and secured by a mortgage dated August 31, 2003 on his personal residence, located in Valhalla, New York (the "Valhalla property"). Respondent and Francis Alessandro owned the Valhalla property as joint tenants with a right of survivorship.

8. Respondent and Francis Alessandro signed the handwritten note and mortgage.

9. The handwritten note and mortgage provided a fixed annual interest rate of 1.5 percent and a term of 30 days, with the principal due and payable on September "31 [sic]," 2003.

10. Despite the 30-day term contained in the handwritten note and mortgage, Ms. Battista and respondent agreed that the loan was not due and payable until July 2004.

11. Respondent instructed Ms. Battista not to record this mortgage. She did not do so until January 2005.

12. Using money she had borrowed against her retirement funds in a brokerage account, Ms. Battista made the following payments drawn against her personal account totaling $242,000: payments of $50,000 on August 28, 2003, and $135,000 on September 2, 2003, to Strategic Political Group ("SPG") on behalf of respondent's campaign towards the cost of campaign literature, and payments of $15,000 on September 2, 2003, and $42,000 on September 15, 2003, to respondent's campaign account. In addition, Ms. Battista reimbursed herself for $8,000 for undocumented cash payments she had advanced for campaign expenses.

13. The payments made by Ms. Battista from her personal funds to SPG and to the campaign constituted "in kind" contributions, which, if not repaid by Election Day, would be deemed a contribution and a violation of campaign contribution limits under the Election Law.

14. Prior to Election Day, the attorney for the campaign, John Ciampoli,

advised respondent, Ms. Battista and Mr. LoBreglio that to avoid potential illegality by the campaign and by Ms. Battista, respondent should personally assume the campaign's debt to Ms. Battista.

15. Mr. Ciampoli prepared and provided loan instrument forms to the campaign committee and advised the committee to use them to document the "in kind" loans that Ms. Battista had made to the campaign. Mr. Ciampoli also prepared a typewritten promissory note which he provided to the campaign both in print and electronically so that any adjustments needed could be made.

16. A typewritten promissory note dated November 3, 2003, was signed by respondent and Ms. Battista, which acknowledged respondent's indebtedness to Ms. Battista in the amount of $250,000 and provided for a 15-year term and a variable interest rate equal to the interest rate charged by her brokerage account that was initially set at 2.86 percent.

17. Mr. Ciampoli did not know who suggested or selected the 15-year term contained in the typewritten promissory note, but he believed that the interest rate came from Ms. Battista.

18. Mr. Ciampoli anticipated that there would be a mortgage prepared to secure the typewritten promissory note, but he did not prepare such a mortgage.

19. A typewritten mortgage dated October 23, 2003, and signed by respondent only (not Francis Alessandro) on November 3, 2003, purported to secure Ms. Battista's loan with the Valhalla property and referenced a "Note of Mortgagor of even date," presumably the typewritten promissory note dated October 23, 2003.

20. Ms. Battista understood that the typewritten mortgage replaced the handwritten mortgage. She recorded the typewritten mortgage on November 5, 2003.

21. Both Ms. Battista and respondent claimed that they did not notice or consider the 15-year term in the typewritten instrument. The 15-year term was inconsistent with respondent's and Ms. Battista's agreement and understanding that the loan would be repaid by July 2004.

22. In November 2003 respondent was elected as County Court Judge. For the next year, he paid Ms. Battista the monthly variable interest as required under the typewritten promissory note, although he may have missed one interest payment. After November 2004, Ms. Battista stopped accepting the interest payments from respondent on the advice of her attorney since the loan had not been repaid by that date.

23. Respondent did not pay any portion of the principal of the $250,000 that he owed to Ms. Battista until February 2006, after she had commenced a lawsuit against him. As of July 2004, respondent had a net worth of approximately $3.5 million comprised mostly of real

estate.

24. In June 2004, using personal funds from a loan taken against a joint brokerage account, respondent and Francis Alessandro paid more than $300,000 in cash to purchase a property in Seaside Heights, New Jersey. This property was contiguous to properties on either side and behind it owned by the Alessandro brothers.

25. Both before and after July 2004, respondent repeatedly reassured Ms. Battista that he was attempting to obtain financing to repay her. In September 2004 respondent told Ms. Battista that he had a "mortgage guy" working to obtain a loan, and he showed her what appeared to be an unsigned mortgage application or commitment. In October 2004 respondent left several telephone messages for Ms. Battista in which he claimed he had provided certain papers to a "mortgage guy."

26. In October 2004 Ms. Battista sought the assistance of an attorney, Harvey Kaminsky, to recover the loan from respondent. In a telephone conversation with Mr. Kaminsky, respondent acknowledged his debt to Ms. Battista and told Mr. Kaminsky that he had applied for a mortgage and expected to have the money available within two to three weeks.

27. In late October, respondent told Mr. Kaminsky that to obtain a mortgage, he needed a letter stating that he was current on the interest payments due on the mortgage on the Valhalla property held by Ms. Battista. In response, Mr. Kaminsky sent a letter to respondent under a facsimile cover sheet dated October 27, 2004, which stated: "Enclosed is the letter that you require from Barbara Battista. If more information is needed in the letter pleas[e] advise." The attached letter from Ms. Battista dated October 27, 2004, stated that "[t]he borrowers listed in this note and mortgage are Joseph Alessandro and Francis Alessandro" and that "all interest payments due and owing on this mortgage are current and there are no interest payments outstanding."

28. Respondent claims that someone who reviewed the October 27th Battista letter questioned whether there were two mortgages on the Valhalla property since previously there had been discussion about a mortgage in respondent's name only but the Battista letter referred to a mortgage made by both Joseph and Francis Alessandro. As detailed in the findings of fact as to Charge II (*infra*), respondent's testimony as to the identity of the person who supposedly questioned whether there were two mortgages was misleading and evasive.

29. Thereafter, respondent told Mr. Kaminsky that he could not obtain financing because the letter provided by Ms. Battista was "not sufficient" and that he needed something from Ms. Battista clarifying that there was only a single mortgage on the Valhalla property, namely the typewritten mortgage, and that the handwritten mortgage was "null and void."

30. Mr. Kaminsky told respondent that his request for such a document put him in a difficult position because the two mortgages were not identical. Mr. Kaminsky believed

that the handwritten mortgage afforded Ms. Battista more protection than the typed mortgage in that it had a 30-day term and contained the signature of both property owners, whereas the typewritten mortgage had a 15-year term and, in Mr. Kaminsky's view, the fact that it was signed only by respondent would prevent Ms. Battista from foreclosing on the property.

31. Nonetheless, pursuant to respondent's request, Mr. Kaminsky prepared an affidavit for Ms. Battista to sign. In the affidavit dated November 30, 2004, Ms. Battista stated that the handwritten mortgage had not been recorded and had been "replaced" by the typewritten mortgage, and that the typewritten and handwritten mortgages referenced "one and the same obligation."

32. Mr. Kaminsky sent the affidavit to respondent under cover of a memorandum dated December 1, 2004. The memorandum stated in part:

> We have drafted another affidavit which Barbara has executed and which appears to comply with the requirements you told me that the bank insisted upon with respect to resolving the issue of the number of mortgages currently on the property. The enclosed affidavit makes it clear that both mortgages relate to one single obligation and that the total obligation on the property is $250,000 plus accumulated interest.

33. When Mr. Kaminsky called respondent after sending the affidavit, respondent told Mr. Kaminsky to speak to his attorney, Edward Koester. Respondent may have provided an incorrect spelling of the attorney's last name. Mr. Kaminsky had difficulty locating Mr. Koester until he ascertained the correct spelling of the attorney's name. Mr. Kaminsky testified that he was unsuccessful in reaching Mr. Koester, but Mr. Koester testified that he spoke with Mr. Kaminsky twice. Mr. Kaminsky referred Ms. Battista to another attorney for potential litigation against respondent.

34. Ms. Battista recorded the handwritten mortgage on January 12, 2005. Because she had earlier recorded the typewritten mortgage, Ms. Battista thereby created a $500,000 lien on the Valhalla property.

35. On February 25, 2005, Ms. Battista commenced an action in Supreme Court, Westchester County, against respondent and Francis Alessandro to foreclose on the handwritten mortgage.

36. In papers dated April 13, 2005, respondent filed a motion to dismiss the Battista lawsuit. Respondent's motion relied entirely upon Ms. Battista's affidavit stating that the typewritten mortgage had "replaced" the handwritten mortgage. In arguing for dismissal, respondent asserted, *inter alia,* that the earlier note and mortgage were "null and void" because "the plain and unambiguous language of the Battista Affidavit makes clear that the August 31, 2003 Mortgage and Note were replaced and superseded by the November 3, 2003 Promissory

Note and Mortgage dated October 23, 2003."

37. Respondent's affidavit in support of his motion to dismiss did not mention his actual agreement to repay Ms. Battista by July 2004 and did not indicate how he had obtained Ms. Battista's affidavit. Respondent's affidavit falsely conveyed, and was intended to convey, that his actual agreement with Ms. Battista was to repay her $250,000 loan in monthly installments over 15 years.

38. After respondent's motion to dismiss was denied, respondent filed a verified answer in which he relied on Ms. Battista's affidavit to raise the affirmative defense that the "action may not be maintained upon the grounds that a defense founded upon documentary evidence exists."

39. Respondent's verified answer denied all the material allegations of the complaint, including that Francis Alessandro resided at the address where he had lived for 40 years, that respondent had executed the handwritten note and mortgage for the purpose of securing a loan of $250,000 from Ms. Battista, and that respondent had delivered the handwritten note to Ms. Battista. The verified answer further denied that, as of the date of the complaint, respondent and Francis Alessandro owed Ms. Battista $250,000 under the terms of the handwritten note and mortgage. At the Commission hearing, respondent testified that his denial of the allegation as to Francis Alessandro's address was an inadvertent error in that the denial was intended to refer to a different paragraph.

40. Respondent's verified answer also raised collateral estoppel as an affirmative defense. Respondent testified at the hearing that that defense was based on what he told his attorney and that he did not know what that doctrine meant. Respondent's attorney in that proceeding, Harry Nicolay, Jr., testified that he "was sure [he] had a reason" for asserting that defense, although he was unaware of any other action or proceeding by or between Ms. Battista and the Alessandro brothers.

41. In February 2006 respondent, Francis Alessandro and Ms. Battista entered into a settlement agreement pursuant to which Ms. Battista received $273,000.

As to Charge II of the Formal Written Complaint:

42. On September 14, 2005, and December 2, 2005, during the Commission investigation, respondent gave testimony under oath that was misleading and evasive concerning requests he had received for a letter and affidavit from Ms. Battista and his dealings with GreenPoint Bank, as set forth below.

43. At his September 14, 2005 appearance before the Commission, respondent testified that he had spoken with a loan underwriter from GreenPoint concerning the letter and affidavit that he obtained from Barbara Battista, which are referenced in Findings 27 to 32 under Charge I, *supra*.

44. Specifically with respect to the affidavit, respondent testified before the Commission that he did not recall which bank he had the conversation with, but "I think it was GreenPoint."

45. At his December 2, 2005 appearance before the Commission, respondent testified that he did not know who had requested the documentation evidencing that the mortgage payments on the Valhalla property were current, that he "guess[ed] it was GreenPoint or whatever" and that he did not recall if the person he spoke to was the underwriter at GreenPoint. When reminded by counsel to the Commission that he had previously testified it was the underwriter at GreenPoint who had asked for the documentation, respondent confirmed "that's who it was then."

46. Later during his December 2, 2005 appearance, when confronted with Commission counsel's representation that the GreenPoint underwriter denied speaking to him, respondent stated that he "guess[ed] then the underwriter was Global [Equity] or the broker was Global." When confronted with Commission counsel's representation that the Global loan originator denied having any conversations with him, respondent then testified, "If he said he had no conversation with me, obviously, I had no conversation with him, but I did have a conversation with somebody pertaining to this information from one of these mortgage companies."

47. At the hearing, respondent testified that the conversations he had regarding the letter and the affidavit were not with GreenPoint or Global Equity but were with his attorney, Edward Koester, or with a bank Mr. Koester was working with, but he was unable to specify the name of anyone.

48. On September 14, 2005, and December 2, 2005, during his investigative appearances at the Commission, respondent gave misleading and evasive testimony concerning an alleged loan commitment that he received, as set forth below.

49. At both appearances, respondent testified that by the time he received the affidavit from Ms. Battista his GreenPoint loan commitment had expired, that Francis Alessandro had informed him that the commitment "was expired," and that the commitment expired because he failed to submit the necessary documents. At the hearing, respondent acknowledged that he never received a loan commitment from GreenPoint. Francis Alessandro denied that GreenPoint had issued a mortgage commitment and denied that he told respondent that the commitment from GreenPoint had expired.

As to Charge III of the Formal Written Complaint:

50. On April 14, 2005, respondent filed with the Ethics Commission for the Unified Court System a financial disclosure statement for the calendar year 2004. Respondent failed to disclose fully his liabilities for 2004, in that he: (a) failed to disclose the mortgage held by Ms. Battista against the Valhalla property; (b) failed to disclose a mortgage held by

GreenPoint against a property at 1472 Hammersley Avenue in the Bronx, which respondent jointly owned with Francis Alessandro; and (c) failed to disclose a mortgage held by Countrywide against a property at 1030 East 213th Street in the Bronx owned by respondent.

51. Respondent testified at the hearing that he omitted the mortgage held by Ms. Battista from his financial disclosure statement because he used his brother Francis Alessandro's financial disclosure statement (which also omitted the Battista mortgage) as "a template" and "copied" from his brother's statement, and also because he believed he would get a mortgage and repay Ms. Battista. This testimony establishes that respondent intentionally failed to disclose the Battista mortgage. Respondent also described the omission of the Battista mortgage from his disclosure statement as "a complete oversight."

52. Respondent testified that he failed to disclose the GreenPoint mortgage because his parents made the monthly payments and that he failed to disclose the Countrywide mortgage because those payments were "taken care of" by the manager of the property.

53. On September 14, 2005, after testifying before the Commission concerning his failure to list the mortgage held by Ms. Battista on his 2004 financial disclosure statement, respondent filed an amended disclosure statement on which he included the mortgages held by Ms. Battista, GreenPoint and Countrywide.

As to Charge IV of the Formal Written Complaint:

54. During 2004, respondent submitted five loan applications to Global Equity Funding ("Global Equity"), three of which were submitted with Francis Alessandro, as described below. Francis Alessandro located Global Equity on the internet, dealt with the mortgage broker, Jack McDowell, by telephone, and gave him the information for the applications; respondent testified that he also spoke to Mr. McDowell. Mr. McDowell returned the applications for signature to Francis Alessandro, who gave them to respondent to sign.

55. On or about April 1, 2004, respondent and Francis Alessandro submitted an application to Global Equity for a $350,000 loan on property at 21 Hamilton Avenue in New Jersey, which they jointly owned. This application, which was signed by respondent and Francis Alessandro, contained a number of false statements and omissions, including:

(a) Three properties jointly owned by respondent and Francis Alessandro were omitted: (i) 1472 Hammersley Avenue; (ii) 895 James Street in Pelham; and (iii) 2711 SE 27th Way in Florida.

(b) Five properties individually owned by respondent were omitted: (i) 1030 East 213th Street; (ii) 1457 Knapp Street in the Bronx; (iii) 421 Elkwood Drive in New Jersey; (iv) 120 Largo Drive in Florida; and (v) Lighthouse Point in Florida.

(c) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Francis Alessandro was not disclosed.

(d) A mortgage held by Countrywide on respondent's property at 1457 Knapp Street was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had signed two notes to Ms. Battista.

56. On or about May 27, 2004, respondent and Francis Alessandro submitted a loan application to Global Equity to refinance 23 Hamilton Avenue, which they jointly owned, for $350,000. This application, which was signed by respondent and Francis Alessandro, contained a number of false statements and omissions, including:

(a) Five properties jointly owned by respondent and Francis Alessandro were omitted: (i) 1464 Hammersley Avenue; (ii) 895 James Street; (iii) 24 Franklin Avenue in New Jersey; (iv) 28 Franklin Avenue; and (v) 2711 SE 27th Way.

(b) Five properties individually owned by respondent were omitted: (i) 1030 East 213th Street; (ii) 1457 Knapp Street; (iii) 421 Elkwood Drive; (iv) 120 Largo Drive; and (v) Lighthouse Point.

(c) The mortgage held by Countrywide on respondent's property at 1457 Knapp Street was not disclosed.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Francis Alessandro was not disclosed.

(e) Respondent did not answer the question whether he was a co-maker or endorser on a note.

57. On or about July 22, 2004, respondent and Francis Alessandro submitted an undated application to Global Equity for a $266,000 loan on 26 Franklin Avenue, which they jointly owned. This application, which was signed by respondent and Francis Alessandro, contained a number of false statements and omissions, including:

(a) Six properties jointly owned by respondent and Francis Alessandro were omitted: (i) 1464 Hammersley Avenue; (ii) 895 James Street; (iii) 21-23 Hamilton Avenue; (iv) 24 Franklin Avenue; (v) 28 Franklin Avenue; and (vi) 2711 SE 27th Way.

(b) Five properties individually owned by respondent were omitted: (i) 1030 East 213th Street; (ii) 1457 Knapp Street; (iii) 421 Elkwood Drive; (iv) 120 Largo Drive; and (v) Lighthouse Point.

(c) The mortgage held by Countrywide on respondent's property at 1457 Knapp Street was not disclosed.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Francis Alessandro was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had signed two notes to Ms. Battista.

58. On or about August 21, 2004, respondent submitted two applications to Global Equity for loans totaling $299,250 on 26 Franklin Avenue. The applications, which were signed by respondent, contained a number of false statements and omissions, including:

(a) Six properties jointly owned by respondent and Francis Alessandro were omitted: (i) 1464 Hammersley Avenue; (ii) 895 James Street; (iii) 21-23 Hamilton Avenue; (iv) 24 Franklin Avenue; (v) 28 Franklin Avenue; and (vi) 2711 SE 27th Way.

(b) Five properties individually owned by respondent were omitted: (i) 1030 East 213th Street; (ii) 1457 Knapp Street; (iii) 421 Elkwood Drive; (iv) 120 Largo Drive; and (v) Lighthouse Point.

(c) The mortgage held by Countrywide on respondent's property at 1457 Knapp Street was not disclosed.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Francis Alessandro was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had signed two notes to Ms. Battista.

59. Respondent testified that while his brother gave Mr. McDowell all the information for the Global Equity applications, respondent also spoke to Mr. McDowell. Asked at the hearing why he did not list the Battista mortgage on the applications, respondent testified that it was because he "was under the impression that it would have shown up in [his] credit report." This testimony establishes that respondent intentionally failed to disclose the Battista mortgage on the applications.

60. In the summer of 2005, as described below, respondent and Francis Alessandro completed three loan applications with Moses Rambarran, who acted as a mortgage broker. Respondent had known Mr. Rambarran for a few years. Respondent and Mr. Rambarran met in person, and Mr. Rambarran asked respondent questions in order to complete the applications. As respondent answered the questions, Mr. Rambarran entered the information into a computer; he then printed the applications. Respondent testified that he signed the applications without reading them. Each of these loan applications was granted.

61. On or about August 25, 2005, respondent and Francis Alessandro

submitted an application to Mr. Rambarran for a $550,000 loan on property at 895 James Street, which they jointly owned. The application, which was signed by respondent and Francis Alessandro, contained a number of false statements and omissions, including:

(a) Five properties jointly owned by respondent and Francis Alessandro were omitted: (i) 21-23 Hamilton Avenue; (ii) 24 Franklin Avenue; (iii) 26 Franklin Avenue; (iv) 28 Franklin Avenue; and (v) 2711 SE 27th Way.

(b) Five properties individually owned by respondent were omitted: (i) 1030 East 213th Street; (ii) 1457 Knapp Street; (iii) 421 Elkwood Drive; (iv) 120 Largo Drive; and (v) Lighthouse Point.

(c) The mortgage held by Countrywide on respondent's property at 1457 Knapp Street was not disclosed.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Francis Alessandro was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had signed two notes to Ms. Battista.

62. On or about August 25, 2005, respondent and Francis Alessandro signed a second application to Moses Rambarran for a $300,000 loan on property at 1464 Hammersley Avenue, which they jointly owned. The application, which was signed by respondent and Francis Alessandro, contained a number of false statements and omissions, including:

(a) Five properties jointly owned by respondent and Francis Alessandro were omitted: (i) 21-23 Hamilton Avenue; (ii) 24 Franklin Avenue; (iii) 26 Franklin Avenue; (iv) 28 Franklin Avenue; and (v) 2711 SE 27th Way.

(b) Four properties individually owned by respondent were omitted: (i) 1030 East 213th Street; (ii) 421 Elkwood Drive; (iii) 120 Largo Drive; and (iv) Lighthouse Point.

(c) The mortgage held by Countrywide on respondent's property at 1457 Knapp Street was not disclosed.

(d) The mortgage held by Ms. Battista on the Valhalla property owned by respondent and Francis Alessandro was not disclosed.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had signed two notes to Ms. Battista.

(f) Respondent misrepresented that he was not a party to a lawsuit, when in fact he was a defendant in a foreclosure action brought by Ms. Battista in February 2005.

63. On each of the above loan applications, which require the borrower to list assets and all outstanding liabilities, respondent signed an acknowledgment stating that the information provided in the applications was true and correct and that he understood he could be subject to criminal penalties if the information provided was false. Respondent claimed that he did not review the applications prior to signing them.

64. In 2005 respondent and Francis Alessandro submitted an application to Mr. Rambarran to refinance the Valhalla property for $275,000.[1] The application contained a number of false statements and omissions, including:

(a) Seven properties jointly owned by respondent and Joseph Alessandro were omitted: (i) 1464 Hammersley Avenue; (ii) 1472 Hammersley Avenue; (iii) 21-23 Hamilton Avenue; (iv) 24 Franklin Avenue; (v) 26 Franklin Avenue; (vi) 28 Franklin Avenue; and (vii) 2711 SE 27th Way.

(b) Five properties individually owned by respondent were omitted: (i) 1030 East 213th Street; (ii) 1457 Knapp Street; (iii) 421 Elkwood Drive; (iv) 120 Largo Drive; and (v) Lighthouse Point.

(c) The mortgage held by Countrywide on respondent's property at 1457 Knapp Street was not disclosed.

(d) The mortgage held by Ms. Battista on the Valhalla property was not disclosed; the application shows a $250,000 lien or mortgage on the property, but Ms. Battista is not identified.

(e) Respondent misrepresented that he was not a co-maker or endorser on a note, when in fact in 2003 he had signed two notes to Ms. Battista.

(f) Respondent misrepresented that he was not a party to a lawsuit, when in fact he was a defendant in a foreclosure action on the Valhalla property brought by Ms. Battista in February 2005.

65. By filing numerous mortgage applications containing material omissions and misstatements regarding the Battista notes, mortgages and foreclosure action, respondent attempted to conceal, or created the appearance that he was attempting to conceal, his obligation to Ms. Battista.

66. By filing numerous mortgage applications containing material omissions

[1] The copy of this loan application in evidence (Ex. FF) is undated and unsigned. Respondent testified that this application was filed, that the loan was granted and that the proceeds were used to repay Ms. Battista in early 2006 (Tr. 1219-20).

and misstatements about his assets and liabilities, respondent attempted to influence, or created the appearance that he was attempting to influence, the lending institutions' decision whether to extend a loan.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.4(A)(2), 100.4(A)(3) and 100.4(I) 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 IV of the Amended Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Over a two-year period respondent engaged in a course of deliberately deceptive and injudicious behavior that renders him unfit to serve as a judge. After accepting a $250,000 loan from his campaign manager, he contrived to delay repayment and conceal his liability in a series of deceitful acts. He gave misleading and evasive testimony concerning the matter during the Commission investigation. He intentionally withheld information about the loan on his mandatory financial disclosure statement and on multiple loan applications. This pattern of egregious misbehavior "cannot be viewed as acceptable conduct by one holding judicial office." *Matter of VonderHeide*, 72 NY2d 658, 660 (1988).

The record establishes – and respondent concedes – that after borrowing $250,000 for campaign expenses from Barbara Battista, his 71-year old campaign manager, in August 2003 and orally promising to repay the debt by the following summer, respondent did not repay Ms. Battista until February 2006, after she had commenced a lawsuit against him and after the Commission had begun an investigation. Although the original mortgage note contained a 30-day term and a typewritten instrument executed two months later contained a 15-year term, the parties understood, and respondent has acknowledged, that he agreed to repay the loan by July 2004. While it is unclear who prepared the typewritten instrument – respondent denies doing so and, incredibly, denies reading it before he signed it or even knowing that the term was 15 years – it is clear that that instrument was considerably less favorable to Ms. Battista than the original note. The typewritten document not only changed the term of the loan from 30 days to 15 years, but was not co-signed by respondent's brother, who co-owned the mortgaged property.

In the ensuing months, while repeatedly assuring Ms. Battista that he would repay her shortly, respondent failed to do so (although during the same period he and his brother borrowed more than $300,000 from a brokerage account to purchase an investment property). In the fall of 2004, when Ms. Battista enlisted the assistance of an attorney, respondent assured the attorney that he was attempting to obtain a mortgage in order to repay the loan but stated that the bank needed a statement from Ms. Battista stating that the typewritten mortgage (with a 15-year term) had replaced the earlier note. After procuring such an affidavit, respondent then told the attorney that his loan commitment had expired because he could not obtain the necessary documents. When questioned about these matters during the Commission investigation a year

later, respondent gave testimony that was evasive and inconsistent. His testimony as to who had requested information about the two mortgages shifted repeatedly when he was confronted with contrary evidence; eventually he testified that he could not recall who had made the request. At the hearing, he suggested for the first time that the request might have come from his attorney, whose hearing testimony did not support this claim. He also conceded that, contrary to his investigative testimony, he never had a loan commitment in the fall of 2004.

Finally, respondent used the Battista affidavit he had procured as the basis for his motion to dismiss Ms. Battista's lawsuit when she moved to foreclose on the handwritten mortgage in February 2005. His affidavit in support of the motion obfuscated the fact that he had promised to repay Ms. Battista by July 2004; it falsely conveyed, and was plainly intended to convey, that the parties' agreement was to repay the loan in 15 years. Also deceptive in numerous respects was respondent's verified answer to the Battista complaint, in which, being duly sworn, he made patently untrue denials (*e.g.*, denying that he had executed the mortgage note for the purpose of securing a loan of $250,000) and asserted with no basis the defense of collateral estoppel. Asked at the hearing about the basis for asserting that defense, respondent testified lamely that he did not know what collateral estoppel meant.

Respondent's misbehavior with respect to the Battista loan clearly transcends the failure to pay a lawful debt. Both his deceptive dealings with Ms. Battista and her attorney, and his evasive testimony about those matters before the Commission, were characterized by a level of dishonesty which is unacceptable for a member of the judiciary. Judges are held to stricter standards than "the morals of the market place" and are required to observe "[s]tandards of conduct on a plane much higher than for those of society as whole…so that the integrity and independence of the judiciary will be preserved" (*Matter of Spector*, 47 NY2d 462, 468 [1979], quoting *Meinhard v Salmon*, 249 NY 458, 464; *Matter of Kuehnel*, 49 NY2d 465, 469 [1980]).

Significantly, respondent also failed to disclose the $250,000 Battista loan on his financial disclosure statement filed with the Ethics Commission for the Unified Court System in 2005 and on multiple loan applications he submitted to brokers over the same period. The evidence, including respondent's own testimony, establishes conclusively that these omissions were intentional.

Respondent's failure to disclose the Battista loan on his financial disclosure statement is particularly noteworthy. Although respondent has claimed that this omission was "a complete oversight," he also testified that he did not disclose the loan because he intended to repay it shortly. Most significantly, respondent filed this incomplete disclosure form just two months after Ms. Battista had filed a lawsuit against him based on the $250,000 liability, and one day after he had moved to dismiss her claim. Even as respondent was aggressively attempting to avoid his liability to Ms. Battista, he concealed it on his financial disclosure statement.

We have commented previously on the importance of judges' annual financial

disclosure statements, which are required by the Rules of the Chief Judge (22 NYCRR §40.1).[2] The information provided on these forms is open to public scrutiny so that, for example, lawyers and litigants can determine whether to request a judge's recusal. It is unacceptable for a judge to provide information that is incomplete or inaccurate; doing so deliberately is manifestly improper. Moreover, respondent's statement also failed to disclose the mortgages on two other properties he owned. His negligence in this regard compounds his misconduct and demonstrates an unacceptable carelessness and inattention to his ethical responsibilities.

Finally, over the same period, respondent submitted multiple loan applications that also omitted the Battista mortgage and contained materially false information concerning his financial status. In 2004 he filed five applications (three of which were co-signed by his brother) with Global Equity, a mortgage broker and lender. While Francis Alessandro initiated these applications, respondent testified that he too spoke to the broker, and he signed each of the applications. On each application, which specifically requires the borrower to list all outstanding liabilities, respondent failed to disclose the $250,000 mortgage held by Ms. Battista and executed a year earlier. Respondent also failed to disclose other liabilities, including a mortgage on an investment property, and failed to list as assets numerous properties he owned individually and jointly. In addition, on each application, respondent checked a box stating, untruthfully, that he was not a co-maker or endorser on a note, although the $250,000 Battista note was still unpaid.

The following year, respondent submitted three more loan applications that contained inaccurate and incomplete information. As to these applications, respondent met personally with the broker and supplied the required information. Again, the applications fail to disclose the $250,000 Battista mortgage as a liability,[3] as well as another mortgage owed by respondent, and also fail to disclose his ownership of several properties. On each of the applications, respondent stated that he was not a co-maker on a note, and on two applications he stated that he was not a party to a lawsuit, although he was then a party to a foreclosure action Ms. Battista had commenced a few months earlier.

While insisting that he and his brother provided all the relevant information to the brokers who completed the loan applications, respondent also testified that he did not list the

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[2] The Commission's 2008 Annual Report states: "As noted on the official website of the Unified Court System, the Ethics in Government Act of 1987 was enacted 'in order to promote public confidence in government, to prevent the use of public office to further private gain, and to preserve the integrity of governmental institutions. The Act accomplishes those goals by prohibiting certain activities, requiring financial disclosure by certain State employees, and providing for public inspection of financial statements'" (p. 23).

[3] One application (Ex. 25) lists a $104,138 mortgage on the Valhalla property, which appears to be an error since that amount is listed elsewhere as the mortgage on a different property (*see* Ex. 26). The last application, seeking to refinance the Valhalla property, lists a $250,000 lien or mortgage on the property, with no other information and no mention of Ms. Battista (Ex. FF).

Battista mortgage on the applications because he was "under the impression that it would have shown up in [his] credit report." As with his failure to list the loan on his financial disclosure statement, this constitutes a deliberate effort to conceal the liability.

By failing to disclose significant liabilities and by failing to disclose that he was a party to a foreclosure action, respondent withheld information from the lenders that might have adversely affected his loan applications. His failure to disclose numerous assets was also significant, since such assets could be available to the lender in the event of a default. The pattern of omitting certain liabilities constituted the intentional concealment of material information about his financial status while attempting to obtain loans based on false information.

Reflecting the seriousness of such conduct, regardless of whether it is intentional or negligent, all the loan applications signed by respondent state that "any intentional or negligent misrepresentation" of the information contained therein "may result in civil liability…and/or in criminal penalties" under Title 18, United States Code, section 1001 *et seq.* *See also*, NY Penal Law §155.05(2)(a); *People v. Termotto*, 81 NY2d 1008 (1993) (defendant convicted of larceny based on false representations to banks as to his financial status to obtain loans).

Such impropriety reflects adversely on respondent's integrity and on the judiciary as a whole. *See*, *e.g.*, *Matter of Collazo*, 91 NY2d 251 (1998); *see also*, *Matter of Boulanger*, 61 NY2d 89, 91 (1984) (judge filed a false financial affidavit in his matrimonial action for the purpose of concealing assets from his former wife and also failed to file timely gift tax returns; such conduct, even if negligent, was "unacceptable"); *Matter of Steinberg*, 51 NY2d 74, 82 (1980) (judge filed fraudulent income tax returns that reflected "deliberate falsification").[4] It jeopardizes the public's respect for the judiciary, which is essential to the administration of justice. As the Court of Appeals stated in *Matter of Mazzei*, 81 NY2d 568, 571-72 (1993):

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

In its totality, respondent's dereliction of his ethical responsibilities constitutes a departure from

[4]*Matter of Garvey*, 1982 Annual Report 103 (Comm on Judicial Conduct), in which the Commission dismissed a charge that the judge understated his liabilities and overstated his assets on financial statements filed in connection with four bank loan applications, presents significant mitigating factors that are not present here. In *Garvey*, the Commission stated that its dismissal of that charge was based in significant part on the testimony of the bank's president that the financial statements were ministerial and were not a determining factor in granting the loans to a long-time customer in good standing.

the high standards of conduct required of every judge, both on and off the bench.

In considering an appropriate sanction, we note the pattern of respondent's deliberate falsifications in his dealings with Ms. Battista's attorney and his testimony before the Commission, as well on his financial disclosure statement and loan applications. As we have found, respondent intentionally and repeatedly failed to disclose his liability to Ms. Battista when he was required to do so. Although he contends that those omissions were inadvertent, his protests "lack the ring of truth" (*Matter of Steinberg*, *supra*, 51 NY2d at 81).

We reject respondent's attempts to minimize his responsibility for these transgressions, including his insistence that he and his brother provided all the pertinent financial information to the brokers who completed the loan applications; that he signed the incomplete and inaccurate applications without reading them; that he used his brother's financial disclosure form "as a template" in completing his own statement; that Ms. Battista was not trustworthy; that he stopped talking to Ms. Battista's lawyer because the lawyer was "huffy." None of these assertions in any way excuses or mitigates respondent's transgressions. As a judge and as a former real estate practitioner, respondent was certainly familiar with mortgages and loan applications and with the importance of reading documents before signing them. We also reject respondent's argument that the omission of liabilities and assets on the loan applications was of minor significance since his net worth was more than ample. A loan applicant cannot make that determination since, on its face, the form requires complete disclosure, subject to criminal penalties. Nor are we persuaded that the stresses in respondent's personal life are relevant to his misbehavior.

We reject the argument that the sanction of removal is excessive because many of respondent's derelictions, as depicted in this record, were the result simply of carelessness, sloppiness and inattention to his ethical responsibilities. As we have noted, it is clear that respondent in several instances intentionally provided incomplete information and made statements that were patently untrue (*e.g.*, stating on loan applications that he was not a party to a lawsuit). A pattern of providing incomplete, inaccurate information about his financial status on his financial disclosure statement, coupled with similar derelictions on multiple loan applications, is unacceptable (*see Matter of Boulanger*, *supra*, 61 NY2d at 91).

The Court of Appeals has determined that removal was warranted for a single instance of "deliberately deceptive conduct," since such behavior is "antithetical to the role of a judge who is sworn to uphold the law and seek the truth" (*Matter of Heburn*, 84 NY2d 168, 171 [1994], quoting *Matter of Myers*, 67 NY2d 550, 554) (judge falsely subscribed a designating petition as a witness, despite a "fair and clear warning" that a false statement would subject the signatory to penalties for false swearing). Manifestly, a pattern of such behavior requires the sanction of removal. This record of repeated derelictions has irretrievably damaged respondent's ability to carry out his constitutionally mandated duties and renders him unfit for judicial service.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser and Judge Peters concur.

Judge Ruderman did not participate.

Dated: February 11, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **CHARLES G. BANKS**, a Justice of the Bedford Town Court, Westchester County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Kelvin S. Davis, Of Counsel) for the Commission
Scalise & Hamilton, LLP (by Deborah A. Scalise)

The respondent, Charles G. Banks, a Justice of the Bedford Town Court, Westchester County, was served with a Formal Written Complaint dated February 26, 2009, containing one charge. The Formal Written Complaint alleged that in numerous cases respondent imposed fines that exceeded the maximum authorized by law.

On May 13, 2009, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On June 17, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Bedford Town Court since

November 1995. His current term of office ends on December 31, 2009. Respondent was admitted to the practice of law in New York in 1966.

2. From in or about October 2006 through December 2006 and from in or about October 2007 through December 2007, in 209 traffic cases adjudicated in his court, respondent imposed $11,281 in fines in excess of the maximum amounts authorized by the Vehicle and Traffic Law, as set forth below.

3. In 99 traffic cases between October 25, 2006 and December 8, 2006, respondent imposed $5,855 in fines not authorized by law, as set forth in Schedule 1 annexed to the Agreed Statement of Facts. The excess fines imposed by respondent in these cases ranged from $5 to $150.

4. In 110 traffic cases between October 10, 2007 and December 27, 2007, respondent imposed $5,426 in fines not authorized by law, as set forth in Schedule 2 annexed to the Agreed Statement of Facts. The excess fines imposed by respondent in these cases ranged from $1 to $100.

5. Respondent concedes that if the Commission examined his court records for the first nine months of both 2006 and 2007, the Commission would find excessive fines in proportion to the amount of the excess fines it discovered in the last three months of 2006 and 2007.

6. Respondent was not aware of the formula for distribution of funds between the state and the town and was not provided with such information between September 1, 2006 and December 31, 2007. It was not his practice to obtain the breakdown of fund distribution figures for each of his monthly submissions to the Bureau of Justice Court Funds (hereinafter "JCF"), and it was the responsibility of JCF to calculate the distribution of funds. Each year, as provided by law, respondent gave the town a report of total fines and fees he had reported. He did not advise the town of how the total funds were distributed.

7. Respondent believed it was his responsibility to impose a fine appropriate to the offense and circumstances of the case, without regard to what percentage of that fine would ultimately accrue to the town, and that it was therefore not necessary for him to know the formula that would determine how such fines would be divided between the state and the town.

8. In the 209 cases at issue, respondent unintentionally imposed a fine for Section1229 of the Vehicle and Traffic Law in excess of the statutory maximum. However, once respondent learned of the mistake as a result of the Commission's inquiry into the matter, he immediately undertook an audit of the court's records and took steps to ensure that his mistake would not be repeated, such as follows.

9. When respondent learned that he had imposed fines above the amount authorized by law, he promptly initiated refunds to those defendants who overpaid fines.

Respondent has processed refunds for all defendants identified in the schedules attached to the Formal Written Complaint.

10. Respondent understands that the Commission will refer to the State Comptroller (Department of Audit and Control) the issue involving excess fines collected during 2006 and 2007. Respondent agrees that he will cooperate with the Comptroller's Office and take action to provide refunds to all the remaining defendants in cases in 2006 and 2007 where excess fines were imposed.

11. Respondent has served 14 years on the bench and has practiced law for 42 years, with no prior disciplinary history. He is an active participant in community activities for his church and the local volunteer ambulance corps, including the provision of *pro bono* services to both.

12. Respondent will be concluding his term on the Bedford Town Court in December 2009 and has stipulated that he will not run for reelection. Respondent's current term as a judge expires on December 31, 2009.

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

It is the responsibility of every judge to "respect and comply with the law," to be faithful to the law and to maintain professional competence in it (Rules, §§100.2[A], 100.3[B][1]). Respondent violated these standards in numerous cases in 2006 and 2007 by imposing fines that exceeded the maximum amount authorized by law. In 203 identified cases in which defendants were convicted of a seat belt violation, respondent imposed fines that ranged from $51 to $200, although the maximum fine permitted by law was $50 (*see* V&T §1229-c, subd. 5). In six cases in which defendants were convicted of speeding, where the maximum fine permitted was $150 (V&T 1180[d]), respondent imposed fines ranging from $200 to $300. In total, the fines imposed by respondent in these cases were $11,281 in excess of the maximum authorized by law. This constitutes misconduct warranting public discipline. *See Matter of Pisaturo*, 2005 Annual Report 228 (judge imposed fines based on the original charges for defendants who pled guilty to reduced charges)*; see also*, *Matter of Christie*, 2002 Annual Report 83 (Comm on Judicial Conduct).

Respondent's wrongful practice resulted in financial detriment to the defendants and in significant financial benefit to his town since the fines collected would ultimately go to the town. Although he did not know how the fines he imposed were distributed between the State and the town, he was certainly aware that the amounts were substantial and that at least some of these amounts would go to his town. While it has been stipulated that respondent acted unintentionally in imposing fines in amounts that exceeded the legal maximum, his conduct was

harmful to individual defendants and creates at least an appearance that he was imposing excessive amounts in order to increase the town's revenues.

In mitigation, we note that upon learning as a result of the Commission's inquiry that the fines he had imposed were contrary to law, respondent immediately undertook an audit of the court's records and has made considerable efforts to initiate and process refunds for defendants who paid fines in excessive amounts. Respondent has agreed to cooperate with the State Comptroller's office to ensure that refunds will be processed for all defendants who overpaid fines in 2006 and 2007 and has taken steps to ensure that his mistake will not be repeated. Respondent's conduct since learning of his error suggests a sincere effort to comply with the law, to mitigate the effects of his erroneous conduct and to avoid such conduct in the future.

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

Judge Klonick, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Coffey dissents in an opinion and votes to reject the Agreed Statement of Facts on the basis that the proposed disposition is too lenient.

Mr. Belluck and Mr. Jacob were not present.

Dated: July 16, 2009

DISSENTING OPINION BY MR. COFFEY

The majority concludes that respondent should only be admonished despite the fact that in hundreds of cases over two years, he imposed illegal, excessive fines. Apparently the majority feels that despite respondent's rampant disregard of the law, admonition – the most lenient public reprimand – is warranted in view of his previously unblemished record in 14 years as a judge, his after-the-fact remorse, his "unintentional" transgressions and his impending retirement. Because I believe his misconduct warrants a stiffer penalty, I disagree.

I believe that the analysis in this case should focus on the flagrant indifference by respondent to the law he was supposed to know and apply. In addition, I am concerned about both the precedential effect of the Commission's decision and the message it imparts to those magistrates who cannot help but shake their collective heads at the lenient disposition imposed in this case.

As shown by the stipulated facts, in 209 identified cases over four months in 2006 and 2007 respondent improperly imposed over $11,000 in excessive fines. Since respondent has admitted that his court records for all of those two years would show excessive fines that were proportionate to those amounts, it appears that the actual numbers could total more than $60,000

in excessive fines in about 1,200 cases. Despite this staggering batting average, the majority concludes that respondent's conduct is mitigated by the fact that his improper sentences were "unintentional," as well as the fact that he has never previously been sanctioned and is now apologetic – as if he had a choice.

No one can dispute that the lawless and patently reckless conduct by respondent over this period was extensive and, on its face, simply punitive. Thus, even allowing for judicial discretion in continuously and mindlessly imposing the maximum sentences allowable under the Vehicle and Traffic Law, here the judge uniformly and cavalierly determined that he would impose even higher fines, sometimes as much as four times in excess of the authorized maximum.

Frankly, it is mystifying how the Commission can announce to the other judges in this state that this kind of conduct is only subject to the most lenient public reprimand. While respondent apparently has an otherwise unblemished record and is going to retire at the end of the year, that does not excuse conduct that on its face is inexcusable. He had a duty to understand the law, and his indifference or unwillingness to do so has not only, to put it mildly, caused great damage to a substantial number of motorists in this state, but brings the judiciary into disrepute. I would not be so forgiving to the respondent in this case since I do not believe that his misconduct has been mitigated in any meaningful way, particularly considering his own callous behavior when he acted with unbridled discretion. The public should be reassured that this kind of abhorrent behavior not only will not be tolerated, but will be condemned. Accordingly, I vote to reject the stipulated disposition and would censure respondent.

Dated: July 16, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MONROE B. BISHOP**, a Justice of the Hinsdale Town Court, Cattaraugus County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman
APPEARANCES:
Robert H. Tembeckjian (Kathleen Martin, Of Counsel) for the Commission

Honorable Monroe B. Bishop, *pro se*

The respondent, Monroe B. Bishop, a Justice of the Hinsdale Town Court, Cattaraugus County, was served with a Formal Written Complaint dated October 6, 2008, containing one charge. The Formal Written Complaint alleged that in a summary proceeding for eviction and back rent, respondent ruled against the defendant based upon an improper *ex parte* communication. Respondent filed an answer dated November 13, 2008.

On February 23, 2009, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On March 12, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Hinsdale Town Court from May 1995 through December 2001 and from January 2003 to the present. He is not an attorney.

2. On or about July 25, 2007, Scott Witzigman commenced a summary proceeding for eviction and a claim for back rent against Shelly Dunning in the Hinsdale Town Court. The property at issue was located at 4329 Whitehouse Road, Hinsdale, New York.

3. Mr. Witzigman was represented by attorney J. Michael Shane. Ms. Dunning was represented by attorney Jay Carr during negotiations between the parties for her attempted purchase of the property. Mr. Carr did not represent Ms. Dunning in connection with the eviction proceeding.

4. From August 8, 2007, to October 31, 2007, respondent presided over *Witzigman v. Dunning*. The plaintiff was represented by Mr. Shane. The defendant appeared *pro se*.

5. During separate court appearances on August 8, 2007, and September 5, 2007, Ms. Dunning told respondent that she was in the process of obtaining financing for the purchase of the property from Mr. Witzigman. Ms. Dunning indicated to respondent that she wished to allow her daughter to continue in the same school district and that she was in the process of obtaining grants and financing from Neighborhood Works, a community action program, that would enable her to purchase the home. Ms. Dunning also told respondent that she had difficulty reaching her attorney about the financing of the property. Respondent advised Ms. Dunning to go to Mr. Carr's office to learn the status of the grants. Respondent adjourned the summary proceeding twice in order to provide the parties with time to finalize a purchase agreement for the property, with the last court appearance scheduled for October 31, 2007.

6. On October 25, 2007, respondent visited Mr. Carr's office, intending to speak to him regarding Ms. Dunning's attempts to obtain financing for the purchase of the Witzigman property. Respondent did not have the consent of Ms. Dunning, Mr. Witzigman or Mr. Shane to speak with Mr. Carr, and none of them was present when respondent went to the office.

7. At Mr. Carr's office, respondent spoke with Mr. Carr's secretary and learned that Mr. Carr was not present. Respondent told Mr. Carr's secretary that he had come to the office to see how many grants had been obtained for Ms. Dunning, stating that Ms. Dunning was scheduled to return to court in a few days and respondent wanted to ensure that she had obtained the funding to purchase the Witzigman property. Mr. Carr's secretary informed respondent that there was no record of any grant money in Ms. Dunning's file folder. On the basis of this discussion, respondent concluded that Ms. Dunning had not obtained financing.

8. On October 31, 2007, during the final court appearance in the *Witzigman* case, respondent told Ms. Dunning and Mr. Witzigman that he had spoken with Mr. Carr regarding Ms. Dunning's finances, when in fact he had spoken only to Mr. Carr's secretary. Respondent said he knew Ms. Dunning had not obtained the funds with which to purchase the property.

9. Based on his unauthorized *ex parte* conversation with Mr. Carr's secretary, respondent then ruled in favor of Mr. Witzigman and issued an order of eviction against Ms. Dunning.

10. Respondent has been candid and cooperative throughout this proceeding. Respondent acknowledges that his conversation with Mr. Carr's secretary constituted an improper *ex parte* communication concerning a pending matter and that he should have based his determination only on a proper record of testimony and submissions to the court. Respondent promises in future cases neither to initiate nor consider unauthorized substantive communications outside the presence of the parties, unless the parties consent in advance.

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)(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.

In the course of a summary eviction matter, respondent initiated a prohibited *ex parte* communication by visiting the office of an attorney who represented the defendant in a related matter and questioning the attorney's secretary about the defendant's finances. Thereafter, based on the information he obtained in that unauthorized *ex parte* conversation, respondent ruled against the defendant and issued an order of eviction. Respondent's out-of-court conversation, without the knowledge or consent of the parties, was contrary to well-

established ethical principles.

Section 100.3[B][6] of the Rules explicitly prohibits a judge from initiating or considering unauthorized *ex parte* communications. Such conduct, which deprives the parties of the right to have their cases decided based upon a proper record of testimony and submissions to the court, warrants public discipline. *See, e.g*., *Matter of Williams,* 2008 Annual Report 101 (Comm on Judicial Conduct) (after reserving decision in a Harassment case, judge spoke to the arresting officer concerning a matter affecting the defendant's credibility); *Matter of More*, 1996 Annual Report 99 (Comm on Judicial Conduct) (judge disposed of three cases based on *ex parte* communications and dismissed charges in three traffic cases without notice to the prosecutor); *Matter of Racicot*, 1982 Annual Report 99 (Comm on Judicial Conduct) (judge contacted a defendant's employer, co-workers, neighbors and others to obtain information about disputed evidentiary issues).

Respondent's in-court disclosure of the *ex parte* communication did not cure the adverse effects of his misconduct. Although he apparently recognized that he was obligated to disclose his out-of-court conversation, respondent's statement that he had spoken to the attorney, when in fact he had only spoken to the attorney's secretary, compounded the patent unfairness of his reliance on the information he received. Clearly his belated, misleading disclosure did not rectify the improper *ex parte* communication that he had initiated.

In imposing sanction, we note respondent's previous discipline in 2000 for presiding over his niece's case and for using a criminal summons in a small claims case to secure the defendant's presence in court (*Matter of Bishop*, 2001 Annual Report 83 [Comm on Judicial Conduct]).

We also note that respondent has acknowledged the impropriety of his conduct as described herein and has pledged to avoid such misconduct in the future.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: March 18, 2009

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **STEPHEN H. BROWN**, a Justice of the Junius Town Court, Seneca County.

DECISION AND ORDER

BEFORE:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel) for the Commission
John P. Porter for Respondent

The matter having come before the Commission on June 17, 2009; and the Commission having before it the Formal Written Complaint dated February 12, 2009, and the Stipulation dated June 1, 2009; and respondent having resigned from judicial office on April 15, 2009, effective May 31, 2009, and having affirmed that he will neither seek nor accept judicial office 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 Stipulation is accepted and that the pending matter closed based upon the Stipulation; and it is

SO ORDERED.

Dated: June 18, 2009

STIPULATION

Subject to the approval of the Commission on Judicial Conduct ("Commission"):

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission, and Honorable Stephen H. Brown ("respondent"), who is represented in these proceedings by John P. Porter, Esq., as follows.

1. This Stipulation is presented to the Commission in connection with the Formal Written Complaint pending against respondent.

2. Respondent has served as a Justice of the Junius Town Court since January 1, 2006. His current term of office expires on December 31, 2009. He is not an attorney.

3. Respondent was served by the Commission with a Formal Written Complaint dated February 12, 2009, a copy of which is attached as Exhibit A . The Formal Written Complaint alleged *inter alia* that respondent handled a small claims action involving a neighbor and long-time friend despite lacking subject matter jurisdiction over the defendant, that respondent issued separate judgments to each party of the action awarding different money damages, and that respondent granted unlawful equitable relief in favor of his neighbor claimant.

4. Respondent has waived the opportunity to submit a Verified Answer.

5. Respondent tendered his resignation from judicial office on April 15, 2009, effective May 31, 2009, and has submitted copies to the Junius Town Court, the Junius Town Board, the Office of the Administrative Judge the Honorable John Rivoli and the Office of Court Administration. A copy of the letter is attached as Exhibit B.

6. Pursuant to Section 47 of the Judiciary Law, the Commission's jurisdiction over a judge continues for 120 days after resignation from office.

7. Respondent hereby affirms that he will neither seek nor accept judicial office or a position as a Judicial Hearing Officer at any time in the future.

8. In view of the foregoing, all the parties to this Stipulation respectfully request that the Commission close the pending matter based on 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.

s/ **Honorable Stephen H. Brown**
Respondent

John P. Porter, Esq.
Attorney for Respondent

Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(**John J. Postel and David M. Duguay,** Of Counsel)

EXHIBIT A: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.

EXHIBIT B: LETTER OF RESIGNATION: Available at www.scjc.state.ny.us.

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **BONNIE SIMPSON BURKE**, a Justice of the Perth Town Court, Fulton County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Jill S. Polk, Of Counsel) for the Commission
Abdella Law Offices (by Robert Abdella) for the Respondent

The respondent, Bonnie Simpson Burke, a Justice of the Perth Town Court, Fulton County, was served with a Formal Written Complaint dated August 12, 2009, containing three charges. The Formal Written Complaint alleged that respondent drove a motor vehicle under the influence of alcohol and pleaded guilty to Driving While Ability Impaired, and that she presided over two cases without disclosing her friendship with the complaining witness or the witness' spouse. Respondent filed an answer dated September 17, 2009.

On October 28, 2009, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On November 5, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Perth Town Court, Fulton County, since January 1, 2004. She is not an attorney. Respondent's current term expires on December 31, 2011.

As to Charge I of the Formal Written Complaint:

2. On January 26, 2008, respondent operated a motor vehicle in the Town of

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Perth while under the influence of alcohol, crossed the double-yellow line on the roadway and collided with another vehicle. As a result, respondent was charged with Driving While Intoxicated ("DWI"), a violation of Sections 1192(2) and (3) of the Vehicle and Traffic Law, and Failure To Keep Right, a violation of Section 1120(a) of the Vehicle and Traffic Law. Respondent's blood alcohol content (BAC) registered .11% shortly after her arrest.

3. On February 27, 2008, respondent pleaded guilty in the Gloversville City Court to Driving While Ability Impaired ("DWAI"), a violation of Section 1192(1) of the Vehicle and Traffic Law, in full satisfaction of all charges. The court sentenced respondent to a one-year conditional discharge, a 90-day license suspension and a $300 fine. The court also ordered respondent to make restitution for damages to the other vehicle and to attend a victim impact panel, a drinking driver program, and a substance abuse screening/assessment. Respondent underwent a substance abuse evaluation, which determined that no treatment was necessary.

As to Charge II of the Formal Written Complaint:

4. Respondent, a part-time judge, owned Route 30 Hair Salon in the Town of Perth from 2004 to June 2006, and has since rented booths in two other hair salons in the area.

5. Respondent has been friends with Edward Vickers since 2005. Respondent cut Mr. Vickers' hair at her beauty salon once a month, and Mr. Vickers plowed snow and performed odd jobs at the salon. Mr. Vickers frequently visited respondent at her salon to talk, and they spoke on the telephone several times a month. Respondent described Mr. Vickers as "like my son."

6. On September 26, 2006, Edward Vickers signed a Criminal Information filed by the Fulton County Sheriff's Department, charging Donald Sobkowicz with Petit Larceny. Mr. Sobkowicz was issued an appearance ticket returnable in the Perth Town Court on October 9, 2006.

7. Respondent and her co-judge, Wayne McNeil, regularly hold court on Monday night. The judges arranged a rotating schedule whereby one judge presides for three consecutive weeks. An assistant district attorney is present in court on the first Monday of every month, and one judge presides while the other does paperwork.

8. On October 9, 2006, respondent presided over the arraignment in *People v. Donald Sobkowicz*. Respondent adjourned the matter to November 6, 2006, to allow Mr. Sobkowicz to appear with counsel.

9. On November 18, 2006, respondent issued a temporary Order of Protection against Mr. Sobkowicz on behalf of Mr. Vickers.

10. On December 4, 2006, Mr. Sobkowicz appeared with counsel and

respondent adjourned the matter to January 8, 2007.

11. On January 8, 2007, on consent of the district attorney, respondent accepted Mr. Sobkowicz's guilty plea to a reduced charge of Disorderly Conduct. Respondent imposed a $100 surcharge and issued a one-year Order of Protection requiring Mr. Sobkowicz to stay away from Mr. Vickers.

12. Respondent did not disclose her friendship with Mr. Vickers to the parties or offer to disqualify herself from the matter.

13. On February 26, 2008, respondent disqualified herself from presiding over another matter, in which Mr. Vickers was a defendant, because her impartiality might be reasonably questioned in view of their friendship.

As to Charge III of the Formal Written Complaint:

14. On May 7, 2008, the Fulton County Sheriff's Department filed a Criminal Information against Michael Hilts, charging him with Unauthorized Use of a Motor Vehicle in the Third Degree. The Information alleged that Mr. Hilts operated an all-terrain vehicle without the consent of its owner, Edward Vickers. Mr. Vickers' wife, Crystal Vickers, was the complaining witness and signed a supporting deposition filed with the Information. The defendant was issued an appearance ticket returnable in the Perth Town Court on June 2, 2008.

15. On November 3, 2008, on consent of the district attorney, respondent accepted Mr. Hilts' guilty plea to a reduced charge of Attempted Unauthorized Use of a Motor Vehicle in the Third Degree. Respondent sentenced Mr. Hilts to 30 days in jail, ordered him to make restitution to Mr. Vickers in the amount of $387.18, and issued a one-year Order of Protection requiring Mr. Hilts to stay away from Mr. Vickers.

16. Respondent did not disclose her friendship with Mr. Vickers to the parties or offer to disqualify herself from the matter.

17. On February 26, 2008, respondent had previously disqualified herself from presiding over another matter, in which Mr. Vickers was the defendant, because her impartiality might be reasonably questioned in view of their friendship.

Supplemental findings:

18. As to Charge I, respondent was cooperative during her arrest and did not assert her judicial office. Respondent complied with the conditions of her sentence, and the one-year period of conditional discharge expired on February 27, 2009.

19. As to Charges II and III, in *People v. Sobkowicz* and *People v. Hilts*, respondent did not participate in plea negotiations, and she accepted the defendants' guilty pleas pursuant to the agreements reached by the assistant district attorney and the defendants'

attorneys.

20. Notwithstanding that respondent's conduct in presiding over two cases involving her friend conveyed an appearance of impropriety, there is no evidence of favoritism or bias in her decisions.

21. Respondent has been cooperative with the Commission and its staff throughout the investigative and adjudicative proceedings in this matter.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(E)(1) and 100.4(A)(2) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A judge who operates a motor vehicle while under the influence of alcohol violates the law and imperils public safety. *Matter of Pajak*, 2005 Annual Report 195 (Comm on Judicial Conduct). Respondent's conduct resulted in a collision with another vehicle and in her conviction for Driving While Ability Impaired. By failing to abide by laws that she is called upon to apply in court, respondent undermined her effectiveness as a judge and brought the judiciary as a whole into disrepute. Such conduct has resulted in public discipline even where, as here, the judge was cooperative with the arresting officers and did not seek special treatment during the arrest.

In determining an appropriate disposition in such cases, the Commission has considered mitigating and/or aggravating circumstances, including the level of intoxication, whether the judge's conduct caused an accident or injury, whether the conduct was an isolated instance or part of a pattern, the conduct of the judge during arrest, and the need and willingness of the judge to seek treatment. *See, e.g., Matter of Mills*, 2006 Annual Report 218 (though acquitted of DWI, judge admitted operating a motor vehicle after consuming alcoholic beverages, "vehemently" protesting her arrest and making offensive statements to the arresting officers [censure]); *Matter of Pajak*, *supra* (judge was convicted of DWI after a property damage accident [admonition]); *Matter of Stelling*, 2003 Annual Report 165 (DWI conviction following a conviction for DWAI [censure]); *Matter of Burns*, 1999 Annual Report 83 (DWAI conviction [admonition]); *Matter of Siebert*, 1994 Annual Report 103 (DWAI conviction after causing a three-car accident [admonition]); *Matter of Henderson*, 1995 Annual Report 118 (DWAI conviction; judge referred to his judicial office during the arrest and asked, "Isn't there anything we can do?" [admonition]); *Matter of Innes*, 1985 Annual Report 152 (DWAI conviction; judge's car caused damage to a patrol car while backing up [admonition]); *Matter of Barr*, 1981 Annual Report 139 (judge had two alcohol-related convictions, asserted his judicial office and was abusive and uncooperative during his arrests, but had made "a sincere effort to rehabilitate himself" [censure]).

In recent years, in the wake of increased recognition of the dangers of Driving

While Intoxicated and the toll it exacts on society, alcohol-related driving offenses have been regarded with particular severity. We conclude that, under the circumstances here, a severe sanction is appropriate. Such a result not only underscores the seriousness of such misconduct, but also serves as a reminder to respondent and to the public that judges are held to the highest standards of conduct, both on and off the bench (Rules, §§100.1, 100.2[A]).

It was also improper for respondent to preside over two criminal cases in which Edward Vickers, with whom she had a close relationship, or his spouse was the complaining witness. Disqualification is required when the judge's impartiality might reasonably be questioned (Rules, §100.3[E][1]). In view of her friendship with Mr. Vickers, which prompted her recusal in a case in which he was the defendant, respondent should have recognized that her impartiality might reasonably be questioned in a case in which he or his spouse was the complaining witness. At the very least, she should have disclosed the relationship and given the parties an opportunity to be heard on the issue before proceeding (*see* Rules, §100.3[F]; *Matter of Merkel*, 1989 Annual Report 111 [Comm on Judicial Conduct]). By failing to do so, she did not act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Rules §100.2[A]). While it has been stipulated that there is no evidence of favoritism in her decisions in these cases, her conduct conveyed an appearance of impropriety (*Id.*).

The totality of respondent's misconduct, both on and off the bench, shows a disregard for the high ethical standards required of judges and warrants censure.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck dissents in an opinion and votes to reject the Agreed Statement of Facts on the basis that the proposed disposition is too lenient.

Dated: December 15, 2009

DISSENTING OPINION BY MR. BELLUCK

I dissent from the sanction of censure in this case because I believe that the judge's acknowledged unlawful conduct – resulting in her conviction for driving while impaired by alcohol – is extremely serious and requires the sanction of removal. In my view, a judge who engages in drunk driving,[1] especially where the judge causes property damage or physical injury, putting the safety of the public at serious risk and violating the very law the judge is sworn to

[1] I use this term to include not only the crime of Driving While Intoxicated ("DWI"), which is based on a blood alcohol content (BAC) of .08% or higher, but Driving While Ability Impaired by alcohol ("DWAI"), the reduced charge to which Judge Burke pled guilty (VTL §1192[1], [2]).

uphold, violates the public's trust and should be removed from office. Only a "zero tolerance" policy towards such behavior can assure the public that the Commission views this conduct with appropriate severity and can fulfill the Commission's mandate to insure to the public a judiciary beyond reproach. At a time when the New York State Legislature and Governor are increasing the penalties for drunk driving, and establishing some of the toughest sanctions for drunk driving in the nation, the Commission should send a strong message that conduct by a judge that threatens the safety of the public will not be tolerated. Imposing a censure here, a sanction which permits the respondent to continue to serve as a judge, and the same sanction the Commission has imposed for conduct that is far less egregious (including *Matter of Ridgeway*, decision issued today), seems wholly inadequate and disproportionate.

As the majority acknowledges, in recent years there has been increased recognition of the dangers of drunk driving and the enormous toll it exacts on society. This is not a victimless offense, but "deeply affect[s] the safety and welfare of the public." *In re Connor*, 124 NJ 18, 21 (1991). According to statistics published by the National Highway Traffic Safety Administration (www.nhtsa.dot.gov*)* and Mothers Against Drunk Driving (www.madd.org), about 13,000 people each year are killed in alcohol-related traffic accidents across the country, and more than half a million people are injured in crashes where police reported that alcohol was present – an average of one person injured almost every minute. Three in every ten Americans will be involved in an alcohol-related crash in their lives. Alcohol-related crashes in the United States cost the public billions of dollars each year. By any measure, drunk driving is a serious crime that cannot be viewed with benign indulgence.

As a judge who hears these types of cases, Judge Burke was certainly aware of what tragedy drunk drivers can inflict and of the serious consequences of drunk driving from a legal perspective. She was certainly cognizant of the fact that this behavior is illegal, of the threshold alcohol levels involved, and of the strict legal consequences imposed by our system of justice. Yet she chose to engage in this dangerous, unlawful activity, operating a vehicle with a blood alcohol level (measured at .11%) well over the legal limit and thereby presenting a significant risk to innocent lives. Driving in an impaired condition, she then crossed a double-yellow line and collided with another vehicle. Although fortunately no one (it appears) was injured as a result of her behavior, she caused property damage. Her conduct posed a very real, deadly risk to others, specifically endangered the individuals in the vehicle she struck, and appropriately resulted in her arrest, conviction and punishment in a court of law. Under these circumstances, I believe that Judge Burke has irreparably damaged her ability to be a judge.

In considering the appropriate disciplinary sanction, I have reviewed the Commission's previous dispositions for such behavior, as well as the sanctions imposed in other states, which range from confidential dispositions to public censure or suspension. While the sanctions in recent years have been relatively more severe, it appears that this Commission – at least in the past decade – imposes admonition for an alcohol-related driving conviction in the absence of so-called aggravating factors (such as a very high level of intoxication, an accident or injury caused by the judge's conduct, the assertion of judicial office during the arrest, or multiple

incidents of such behavior)[2]; where such factors are present or where there are other charges of misconduct, censure may result[3]; but the decisions are inconsistent and the distinction between censure and admonition is somewhat blurred. Other states generally follow a similar approach by imposing either a private reprimand or public admonition for a first offense, and censure or suspension where there are aggravating factors.[4]

This approach, I believe, is unduly lenient. The Commission has repeatedly stated that judges are held to the highest standards of personal conduct, both on and off the bench, and that certain actions which may be acceptable for others cannot be condoned in a member of the judiciary. The Court of Appeals has found that a judge who was involved in repeated alcohol-related driving incidents was "unfit" for judicial office, despite the absence of any evidence that his drinking interfered with the performance of his judicial duties (*Matter of Quinn*, 54 NY2d 386, 389, 392 [1981] [sanction of removal reduced to censure in view of the judge's resignation]). As the Court has stated:

> Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function [citations omitted]. As the Referee aptly noted, throughout this entire incident petitioner, "although off the bench remained cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others." *Matter of Kuehnel*, 49 NY2d 465, 469 (1980)

Clearly, if a minor transgression "impair[s] the usefulness of the individual judge to carry out his or her constitutionally mandated function," committing a serious, unlawful act irreparably

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[2] *E.g.*, *Matter of Burns* (DWAI conviction) (1998); *but see Matter of Pajak* (2004) (DWI conviction after a property damage accident); *Matter of Henderson* (1994) (DWAI conviction; judge referred to his judicial office during the arrest and asked, "Isn't there anything we can do?"); *Matter of Siebert* (1993) (DWAI conviction after causing a three-car accident); *Matter of Winkworth* (1992) (DWAI conviction; during the arrest judge was uncooperative, asserted his judicial office and threatened the arresting officer).

[3] *E.g.*, *Matter of Mills* (2005) (though acquitted of DWI, judge admitted operating a motor vehicle after consuming alcoholic beverages, "vehemently" protesting her arrest and making offensive statements to the arresting officers); *Matter of Stelling* (2002) (two alcohol-related driving convictions); *Matter of Purple* (1997) (DWI conviction after the judge drove his car into a tree and was injured; judge also presided in court under the influence of alcohol).

[4] C. Gray, "*Discipline for Driving While Intoxicated*," 24 Judicial Conduct Reporter 2 (Winter 2003).

compromises a judge's ability to serve with any level of moral authority or credibility. No judge can flout the laws the judge is sworn to uphold and expect to sustain the confidence and trust of the public in whose name he or she administers justice. At that point, the inquiry should turn to whether there are any extenuating or aggravating circumstances. Here, the judge's decision to drink enough alcohol to register a high level of alcohol in her blood and then drive an automobile led to a collision with another car. In my opinion, the collision escalates the drunk driving conduct. Since the collision was the result of the drunk driving and there are no compelling mitigating circumstances presented, I would remove the judge from office.

In 2007 the Commission removed a judge who had been convicted of a felony[5] and three misdemeanors for tampering with the utility meter at his home, which led to a theft of electrical services for some months (*Matter of Myles*, 2008 Annual Report 189). The Commission made clear that its determination of removal was based not on the judge's conviction (in which an appeal was pending), but on the underlying conduct, which "demonstrates his lack of fitness for judicial office," "is unacceptable in one who holds a position of public trust and irreparably damages respondent's ability to serve as a judge." Notwithstanding that the judge had resigned, the Commission removed the judge as a statement of condemnation for the judge's behavior and to ensure that he was ineligible to hold judicial office in the future. Yet no one's life was endangered by the judge's actions – unlike Judge Burke's conduct. In my judgment, Judge Burke's unlawful behavior is more of a threat to the public and is at least as serious as the crime of stealing electricity from a utility company, warranting a sanction no less severe. *See also*, *Matter of Bailey*, 67 NY2d 61 (1986) (judge removed for conviction of a misdemeanor in connection with a scheme to illegally hunt deer).

Moreover, the Commission has imposed the sanction of censure in numerous cases for behavior which I regard as far less egregious than the conduct here. It is inexplicable to me that a censure – the same sanction the Commission imposes today in *Matter of Ridgeway* for a judge's administrative shortcomings – should be imposed for a judge convicted of drunk driving. As I stated in my dissent in that case: "The continued use of censure for wrongdoing that is relatively minor… undermines the significance of this sanction when it is appropriately imposed and undermines public confidence in the Commission's ability to properly distinguish between serious wrongdoing and less serious misbehavior." The disparity of these results is inconsistent with the fair and proper administration of justice.

Finally, while censure is considered to be a harsher public rebuke than admonition, there is no real practical difference between the two sanctions and, apart from perhaps some personal embarrassment to the judge arising out of a public chastisement, no meaningful adverse consequences for a judge for either sanction. In particular, both sanctions permit a judge – even, as here, one who has been convicted of unlawful behavior – to continue to hold a position of high public trust and to sit in judgment on the conduct of others. Further

[5] Although a judge convicted of a felony is automatically removed by the Court of Appeals when the conviction becomes final ((NY Const art VI, §22[f]; Jud Law §44[8][b]), that did not occur here because the judge resigned upon his conviction.

complicating the situation here is that the judge's behavior raises questions about her ability to adjudicate cases involving drunk driving. As a censured judge, Judge Burke may return to the bench and preside over DWI and DWAI cases, as well as offenses less serious than her own unlawful conduct. As a practical matter, it is inconceivable to me that the public could have confidence in her ability to hear such matters impartially and to pass sentence on similar offenders.[6] I cannot vote for such an incongruous result.

I would also suggest to the Commission that, at the very least, the scale of penalties for these types of cases should be recalibrated and ratcheted upward so that a first-time drunk-driving offense, standing alone, without any aggravating factors, should result at least in public censure – the most severe sanction short of removal – and that such conduct with aggravating factors would result in removal. Even under this standard – which is harsher than the current standard, though more lenient than I would favor – I would conclude that Judge Burke's conduct warrants removal. The aggravating circumstance here was the collision, which certainly caused some property damage and presented a heightened risk of injury to others.

I am also concerned that this is being considered by the Commission on an agreed statement. As a result of the stipulated agreement, the Commission does not have access to the police report, interviews with the arresting officers, interviews with the owner of the vehicle hit by Judge Burke or any historical information to determine, for example, what she said to the police at the time of her arrest, whether she identified herself as a judge to the police, and whether she has engaged in this type of behavior previously.

Accordingly, I believe that the sanction of removal is required here. Since public confidence in the judiciary is seriously damaged when a judge engages in this type of behavior, only an appropriately severe disciplinary response can assure the public that such misconduct will not be tolerated and can fulfill the Commission's mandate to safeguard the bench from incumbents who violate the public's trust. Part of the role of the Commission is to protect the public. Only by sending a strong message to judges about drunk driving can we deter this behavior.

Therefore, I vote to reject the Agreed Statement of Facts.

Dated: December 15, 2009

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[6] I note that in *Matter of Barr*, 1981 Annual Report 139, in which the Commission censured a County Court judge who had two alcohol-related driving convictions, the judge agreed not to preside over contested felony DWI charges in the future.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **BRET CARVER**, a Justice of the Fremont Town Court, Steuben County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Kathleen Martin, Of Counsel) for the Commission
Honorable Bret Carver, *pro se*

The respondent, Bret Carver, a Justice of the Fremont Town Court, Steuben County, was served with a Formal Written Complaint dated June 18, 2009, containing two charges. The Formal Written Complaint alleged that respondent failed to deposit, report and remit town court funds within the time required by law. Respondent filed an answer dated July 27, 2009.

On September 10, 2009, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On September 23, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Fremont Town Court, Steuben County since January 1, 2007. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. From March 2008 to August 2008, as set forth below, respondent failed to deposit approximately $7,685 in court funds within 72 hours of receipt, as required by Section 214.9(a) of the Uniform Civil Rules for the Justice Courts (22 NYCRR §214.9[a]).

3. From March 3, 2008 to March 24, 2008, respondent received $1,830 in

court funds. Respondent deposited $1,680 on March 28, 2008; he did not deposit the remaining $150 until September 2008.

4. From March 29, 2008 to March 30, 2008, respondent received $450 in court funds that he did not deposit until September 2008.

5. In April 2008 respondent received $1,295 in court funds that he did not deposit until September 2008.

6. In May 2008 respondent received $2,850 in court funds that he did not deposit until September 2008.

7. In June 2008 respondent received $2,190 in court funds that he did not deposit until September 2008.

8. From July 6, 2008 to July 14, 2008, respondent received $2,015 in court funds. Respondent deposited $1,925 on July 15, 2008; he did not deposit the remaining $90 until September 2008.

9. From July 21, 2008 to July 28, 2008, respondent received $640 in court funds that he did not deposit until September 2008.

10. In August 2008 respondent received $20 in court funds that he did not deposit until September 2008.

11. Respondent does not have a court clerk. Respondent himself receives court funds, issues receipts, marshals funds for deposit, prepares bank deposit tickets and deposits funds into the court bank account.

12. Between March 2008 and August 2008, the cumulative deficiency of undeposited court funds reached $7,685. Respondent kept these undeposited funds in a metal cash box in a locked file cabinet in his office at the court. No one else has access to this cabinet.

13. Respondent eventually deposited all of the funds referred to above, and there is no indication that funds were missing or used for inappropriate purposes.

14. Respondent was aware from the time he assumed his position as Fremont Town Court Justice that he was required by law to deposit court funds within 72 hours of receipt. He acknowledged during the Commission's investigation that he was responsible for properly handling and depositing court funds and that he did not perform these duties in an adequate manner.

As to Charge II of the Formal Written Complaint:

15. From March 2008 through August 2008, as set forth in Exhibit 1 to the Agreed Statement of Facts, respondent failed to report and certify receipt of court funds to the Office of the State Comptroller and failed to remit approximately $11,290 in court funds to the chief fiscal officer of the Town of Fremont within ten days of the month succeeding collection, as required by Sections 2020 and 2021(1) of the Uniform Justice Court Act, Section 1803 of the Vehicle and Traffic Law, and Section 27(1) of the Town Law.

16. Respondent acknowledges that his monthly obligation to report and remit court funds is not complete until: (i) a check for the funds has been delivered to the chief fiscal officer, (ii) the report has been received by the State Comptroller, and (iii) a certification of the report, signed by the judge, is received by the State Comptroller.

17. On July 28, 2008, the State Comptroller issued a notice to the Fremont Town Supervisor to suspend respondent's salary pending the filing of reports, certifications and remittances for the months of March, April and May 2008.

18. On August 4, 2008, respondent electronically filed his report for the month of March 2008 with the State Comptroller, in which he reported that he had collected $2,280 in court funds. On the same date, respondent faxed a certification to the State Comptroller that certified that he had collected $2,655 in court funds for the month of March 2008.

19. Respondent filed his reports for the months of April, May, June, July and August 2008 on September 22, 2008. Respondent submitted certifications with his reports for April and May 2008, but failed to submit certifications with his reports for June, July and August 2008.

20. Respondent faxed his certifications for the months of June, July and August 2008 to the State Comptroller on January 28, 2009, one day after he appeared and testified before the Commission. He filed a corrected certification for the month of March 2008 on January 29, 2009. Respondent's certification to the State Comptroller for March 2008 was received on January 29, 2009, 294 days beyond the time provided by the statutory requirement.

21. Respondent remitted court funds for March 2008 in the amount of $2,280 to the chief fiscal officer on February 17, 2009, 313 days beyond the time provided by the statutory requirement.

22. Respondent's certification to the State Comptroller for the month of April 2008 was received on September 22, 2008, 135 days beyond the time provided by the statutory requirement. Respondent remitted court funds for April 2008 in the amount of $1,135 to the chief fiscal officer on September 29, 2008, 142 days beyond the time provided by the statutory requirement.

23. Respondent's certification to the State Comptroller for the month of May 2008 was received on September 22, 2008, 104 days beyond the time provided by the statutory requirement. Respondent remitted court funds for May 2008 in the amount of $2,690 to the chief fiscal officer on September 29, 2008, 111 days beyond the time provided by the statutory requirement.

24. Respondent's certification to the State Comptroller for the month of June 2008 was received on January 28, 2009, 222 days beyond the time provided by the statutory requirement. Respondent remitted court funds for June 2008 in the amount of $2,415 to the chief fiscal officer on September 29, 2008, 81 days beyond the time provided by the statutory requirement.

25. Respondent's certification to the State Comptroller for the month of July 2008 was received on January 28, 2009, 171 days beyond the time provided by the statutory requirement. Respondent remitted court funds for July 2008 in the amount of $2,655 to the chief fiscal officer on September 29, 2008, 50 days beyond the time provided by the statutory requirement.

26. Respondent's certification to the State Comptroller for the month of August 2008 was received on January 28, 2009, 140 days beyond the time provided by the statutory requirement. Respondent remitted court funds for August 2008 in the amount of $20 to the chief fiscal officer on November 28, 2008, 79 days beyond the time provided by the statutory requirement.

27. The State Comptroller ordered payment of respondent's salary resumed on January 30, 2009.

28. Respondent failed to make timely deposits and to report, certify and remit court funds in a timely manner as a result of a new job as an emergency medical technician in the health and safety field at a private company, volunteer commitments with the town's ambulance and fire department, and his efforts to start an online medication management system company. Respondent regrets and apologizes for his conduct and recognizes that his judicial duties take precedence over all other activities.

29. Respondent commits himself in the future to deposit court funds within 72 hours of receipt and to submit his monthly reports and certifications to the State Comptroller, and make remittances to the chief fiscal officer, within the first ten days of the succeeding month.

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

The handling of official monies is one of a judge's most important responsibilities. Depositing, reporting and remitting such monies promptly, in strict compliance with the statutory mandates, is essential to ensure public confidence in the integrity of the judiciary. The failure to comply with these mandates constitutes misconduct, even if there is no evidence that monies were missing or used for inappropriate purposes. *See Matter of Minogue,* 2009 Annual Report 138 (Comm on Judicial Conduct); *Matter of Hrycun,* 2002 Annual Report 109 (Comm on Judicial Conduct); *Matter of Ranke*, 1992 Annual Report 64 (Comm on Judicial Conduct)*; see also Bartlett v. Flynn*, 50 AD2d 401, 404 (4th Dept 1976).

All monies received by the court are required to be deposited "as soon as practicable" and no later than 72 hours after receipt, and reported and remitted to the appropriate authorities by the tenth day of the month following collection (Uniform Civil Rules for the Justice Courts §214.9[a]; Uniform Justice Ct Act §2021[1]; Town Law §27; Vehicle and Traffic Law §1803).

Over a six-month period in 2008, respondent failed to deposit, report and remit court funds in a timely manner as required by law. Over that period, respondent received $11,290 in official monies but deposited only $3,605, resulting in a cumulative deficiency of $7,685 by September 2008. In four of those months, he made no deposits at all, although he had collected a total of $6,355. During this time, the undeposited funds were kept in a locked file cabinet in respondent's office.

Over the same period, respondent also failed to report and remit these funds to the appropriate officials on a monthly basis, as required by law. The electronic filing procedures, which are intended to make the process more efficient and give localities access to their revenues sooner, require a judge to transmit reports electronically to the Office of the State Comptroller, to submit an appropriate, signed certification, and to send a check for the total amount reported to the chief fiscal officer of the town. Here, the record indicates significant delays by respondent in performing each of these tasks. These derelictions, which led to a six-month suspension of respondent's salary by order of the State Comptroller, resulted in significant delays in processing the monies collected by the court.

Respondent's neglect of these important duties is not excused by the demands of his employment or other activities. A judge's official duties, including the judge's administrative responsibilities, "take precedence over all the judge's other activities" (Rules, §100.3[A]).

In considering the sanction, we note that all the monies collected by respondent have been accounted for and that there is no indication that any monies were missing or used for inappropriate purposes. We also note that respondent has acknowledged his misconduct and commits himself in the future to performing these important duties in a timely manner as required by law.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck was not present.

Dated: September 30, 2009

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MARGARET CHAN**, a Judge of the New York City Civil Court, New York County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Brenda Correa, Of Counsel) for the Commission
Godosky & Gentile, PC (by Richard Godosky) for the Respondent

The respondent, Margaret Chan, a Judge of the New York City Civil Court, New York County, was served with a Formal Written Complaint dated January 26, 2009, containing three charges. The Formal Written Complaint alleged that respondent personally solicited campaign contributions during her campaign for judicial office and that her campaign literature (i) misrepresented that she had been endorsed by the *New York Times* and (ii) displayed a pro-tenant bias.

On June 18, 2009, 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 September 23, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Civil Court of the City of New York since January 2007. She was admitted to the practice of law in New York in 1994.

2. Respondent was a candidate in the Democratic Party's primary election held on September 12, 2006, for Civil Court Judge in Manhattan's Second Municipal Court District. There were two other Democratic candidates for the single vacancy: David Cohen and Andrea Masley. The winner of the Democratic primary would run unopposed in the general election because the other major political parties did not nominate candidates for the seat.

3. Respondent established a campaign committee for this election named the Friends of Margaret Chan (the "Chan Committee"). The treasurer of the committee was Stacy Lee.

4. Respondent had never run for judicial office before.

As to Charge I of the Formal Written Complaint:

5. In August 2006 the *New York Times* endorsed David Cohen for Civil Court Judge in the Second Municipal Court District. Respondent was not endorsed by the *New York Times*.

6. In August 2006 the *New York Times* also endorsed Ken Diamondstone, who was running for State Senate in District 25.

7. Prior to the primary election, the Chan Committee prepared and widely disseminated a piece of campaign literature that included pictures of respondent and Diamondstone, described both respondent and Diamondstone as "Progressive Democrats," and used the words "Endorsed by the *New York Times*" in such a manner as to make it appear that both respondent and Diamondstone had been so endorsed, when only Diamondstone had.

8. Respondent approved the literature described above. Respondent acknowledges that such literature could appear confusing to the average reader and may have led prospective voters to believe that she received the *New York Times* endorsement.

9. The State Board of Elections certified the results of the primary election as follows: Margaret Chan received 5,278 votes; David Cohen received 5,133 votes; and Andrea Masley received 2,352 votes. Thereafter, respondent ran unopposed in the general election on November 7, 2006. Respondent was sworn into office in January 2007.

As to Charge II of the Formal Written Complaint:

10. During her 2006 campaign for election to the New York City Civil Court, respondent and/or her campaign committee prepared and distributed campaign literature that advertised a lecture respondent planned to give with "Tenant Attorney and Activist Steven DeCastro." The literature stated that "Margaret Chan and Veteran Tenant Attorney Steven DeCastro will show you how to stick up for your rights, beat your landlord, … and win in court!"

11. Respondent acknowledges that she is responsible for the campaign literature described above, that she handed out the literature, and that the literature may have led a prospective voter to conclude that respondent would favor tenants over landlords if elected to the Civil Court. Respondent further acknowledges that the literature did not comport with the Rules and that the language implying partiality should have been omitted.

As to Charge III of the Formal Written Complaint:

12. While a candidate for Civil Court Judge, respondent signed a letter dated August 24, 2006, announcing her candidacy and seeking contributions to her campaign. The letter stated in part: "Running for elected office means I have to get my message out to voters through costly mailings and advertising. Your financial support will help me establish an effective campaign and deliver my message to the people that count, the constituents of the 2nd Judicial District." The Chan Committee sent the letter to members of the Women's Bar Association.

13. Respondent acknowledges that the letter should not have been sent in her name and that she should not have signed it.

14. Respondent took immediate remedial measures upon being made aware that the letter violated the Rules. Respondent instructed her campaign treasurer that her campaign committee could not accept any contributions that were received as a result of this impermissible solicitation and to return any such contributions that were received.

Additional finding:

15. Respondent acknowledges as to Charges I, II and III that it is the candidate's obligation pursuant to the Rules to ensure that his or her campaign committee adheres to the relevant laws and rules.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(4)(a), 100.5(A)(4)(d)(i), 100.5(A)(4)(d)(ii), 100.5(A)(4)(d)(iii) and 100.5(A)(5) 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 Formal Written Complaint are sustained, and respondent's misconduct is

established.

Judicial candidates are held to higher standards of conduct than candidates for non-judicial office, and the campaign activities of judicial candidates are significantly circumscribed in order to maintain public confidence in the integrity and impartiality of the judicial system. Among other requirements, a judicial candidate may not "make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office," or "make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office…with respect to cases, controversies or issues that are likely to come before the court" (Rules, §100.5[A][4][d][i], [ii]). Nor may a judicial candidate knowingly misrepresent facts about the candidate or an opponent (Rules, §100.5[A][4][d][iii]).

Respondent's campaign literature was clearly inconsistent with these ethical requirements. Certain literature, which respondent herself handed out, advertised a lecture she planned to give with a "tenant attorney and activist" on how to "beat your landlord…and win in court!" As the Court of Appeals has stated, "candidates need not preface campaign statements with the phrase 'I promise' before their remarks may reasonably be interpreted by the public as a pledge to act or rule in a particular way if elected" (*Matter of Watson*, 100 NY2d 290, 293 [2003]). Respondent has acknowledged that her literature may have given prospective voters the impression that she would favor tenants over landlords in housing matters, which are often the subject of Civil Court proceedings. By distributing such literature, which appeared to commit herself with respect to issues likely to come before her court, she compromised her impartiality. *See*, *Matter of Watson*, *supra*; *Matter of Birnbaum*, 1998 Annual Report 73 (Comm on Judicial Conduct).

Other campaign literature, which respondent specifically approved, was deceptive in that it conveyed the erroneous impression that respondent had been endorsed by the *New York Times*. This literature, which was prepared and widely disseminated by respondent's campaign committee, juxtaposed her photograph with that of another candidate and positioned the language "Endorsed by the *New York Times*" in such a way that it could be construed as referring to both candidates, when in fact respondent did not have the *Times*' endorsement. Such deceptive practices have no place in campaigns for judicial office. It is especially important for judicial candidates to adhere to the highest standards of integrity and honesty 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, 554 (1986). Judicial candidates are expected to be, and must be, above such tactics.

Although it cannot be ascertained whether this literature played a significant role in respondent's successful campaign, a judge's election is tarnished by campaign practices which are contrary to the ethical rules. *See, Matter of Watson*, *supra*; *Matter of Hafner*, 2001 Annual Report 113 (Comm on Judicial Conduct).

Judicial candidates are strictly prohibited from personally soliciting campaign

contributions (Rules, §100.5[A][5]). By signing a letter addressed to "Dear Friend" that was an explicit appeal for campaign contributions, respondent violated this prohibition. Although the letter was mailed by respondent's campaign committee, this letter appeared to be, and was in fact, a personal appeal for contributions. We note that upon being made aware that this letter did not comport with the Rules, respondent instructed her campaign treasurer that any contributions that were received as result of this impermissible solicitation could not be accepted and should be returned.

Every candidate for judicial office has the obligation to be familiar with the relevant ethical standards and to ensure that his or her campaign literature and practices are consistent with these standards.

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

Judge Klonick, Mr. Harding, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Emery dissent and vote to reject the Agreed Statement and to dismiss the charges. Mr. Emery files a dissenting opinion.

Mr. Belluck and Judge Konviser were not present.

Dated: November 17, 2009

DISSENTING OPINION BY MR. EMERY

The Agreed Statement the majority accepts in the case of Civil Court Judge Margaret Chan is defective on its face and punishes the judge for constitutionally protected conduct. To condone the judge's acquiescence to this disposition degrades the Commission. Notwithstanding that the agreed sanction of admonition allows Judge Chan to continue to wear her robes and allows her to avoid further expensive and onerous Commission proceedings, I believe that we should refuse to strike this pragmatic bargain when basic ethical principles of judicial conduct are at stake. Because the alleged misconduct is factually and legally unsupported by the Agreed Statement, I must dissent and vote to dismiss the charges.

Each of the Commission's charges relates to Judge Chan's campaign activities in her run for Civil Court in Manhattan. Charge I accuses her of distributing a flyer showing her picture alongside another candidate in a way that implies that she is endorsed by the *New York Times* when only the other candidate actually was. Factually, whether the flyer is misleading is highly debatable, given the placement of the *Times* endorsement on the flyer. But we do not have to reach this dicey question because Judge Chan in the Agreed Statement only "acknowledges that such literature *could* appear confusing to the average reader and *may have*

led prospective voters to believe that she received the *New York Times* endorsement" (par. 8) (emphasis added). This limited "acknowledgment," by its terms, is insufficient to satisfy violation of Rule 100.5(A)(4)(d)(iii), which requires, according to the Agreed Statement itself, a "*knowing*[] misrepresent[ation]" of facts about the candidate (par. 10) (emphasis supplied). Judge Chan simply has not conceded facts which constitute a knowing attempt to confuse voters. Her concession merely states the obvious: the flyer *could have* confused somebody. Plainly, that is not enough.[1]

Charge II is similarly suspect. Because Judge Chan's literature advertised her participation in a lecture during the campaign that described legal tactics tenants can use "to stick up for your rights, beat your landlord…and win in court," she is accused of making a "pledge or promise" and a "commitment" that are "inconsistent with the impartial performance of the adjudicative duties of the office" in violation of Rule 100.5(A)(4)(d)(i) and (ii) (Agreed Statement, par. 13). However, once again, Judge Chan only agreed that this flyer for the lecture "*may have* led a prospective voter to conclude that [Judge Chan] would favor tenants over landlords" (par. 12) (emphasis added). This too is not enough to establish that she pledged, promised, or committed to anything.[2]

Not only are Judge Chan's concessions inadequate, but it is highly doubtful that advertisements for such a lecture, let alone the lecture itself, constitute misconduct. Candidates for judicial office (and judges) are plainly permitted to write articles, give lectures and express views even on controversial legal issues so long as they do not violate specifically defined prohibitions in the misconduct rules, such as the bans on pledges and promises, commitments and comments on pending cases. Speculation as to the future bias of a judge based on campaign or other speech is not a constitutional basis to ground misconduct.

As the United States Supreme Court has observed, "judges often state their views on disputed legal issues outside the context of adjudication -- in classes that they conduct, and in books and speeches," and the Model Code of Judicial Conduct "not only permits but encourages this" (*Republican Party of Minnesota v. White*, 536 US 765, 779 [2002]; *see*, §§100.4[B] ["A judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Part"] and 100.4[C][1] [permitting judges to speak publicly on "matters concerning the law, the legal system (and) the administration of justice"]). And they plainly can advertise such activities. The fact that Judge Chan's campaign chose a tactic which appeals to tenant voters is an inescapable outgrowth of this right. After all, an election campaign by necessity must be designed to appeal to voters based on the candidate's history and activities. A

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[1] To further confuse the issue, paragraph 7 of the Agreed Statement states: "…the Chan Committee prepared and widely disseminated a piece of campaign literature that…used the words 'Endorsed by the *New York Times*' in such a manner as to make it appear that both respondent and [the other candidate] had been so endorsed, when only [the other candidate] had." In light of Judge Chan's quite specific contradictory statement in paragraph 8, quoted in the text above, this equivocal acknowledgment muddies the issue even further. It certainly does not qualify as an admission of a "knowing" misrepresentation.

[2] Unlike Charge I, the Agreed Statement with respect to Charge II contains no further gloss on Judge Chan's speculation.

lecture on a controversial subject is no exception. If certain constituents feel they can predict a judicial candidate's views on controversial subjects that s/he may have to someday face in court, that is part of the price we pay for the free flow of information critical to the electoral choice of judges. It is not, however, misconduct for a judicial candidate to express views, even controversial ones.

As I have repeatedly written, punishing campaign activity of this sort treads on the First Amendment. *Matter of Yacknin*, 2009 Annual Report 176 (Dissenting Opinion); *Matter of King*, 2008 Annual Report 145 (Concurring Opinion); *Matter of Spargo*, 2007 Annual Report 107 (Opinion Concurring in Part and Dissenting in Part); *Matter of Farrell*, 2005 Annual Report 159 (Concurring Opinion); *Matter of Campbell*, 2005 Annual Report 133 (Concurring Opinion). In *Republican Party of Minnesota v. White*, *supra*, the Supreme Court drastically narrowed the judicial campaign activity which can be proscribed, pretty much limiting it to *explicit* pledges and promises. The Court recognized that when states choose to elect their judges, they sacrifice decorum for judges and buy into sometimes unseemly judicial campaigns that, for the most part, are protected speech. 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*. (*Supra*, 536 US at 792) (Emphasis added.)

The New York Court of Appeals, in *Matter of Raab*, 100 NY2d 305 (2003), bridled at the breadth of the Supreme Court's dictate and narrowly construed its reach to struggle to keep judicial campaigns within some semblance of propriety. Rejecting a constitutional challenge to Rule 100.5 in the wake of the *White* decision (which had struck down a Minnesota rule prohibiting a judicial candidate from "announc[ing] his or her views on disputed legal or political issues"), the New York Court refrained from applying *White* to other aspects of campaign activity, stating:

> The [Supreme] Court did not declare, however, that judicial candidates must be treated the same as nonjudicial candidates or that their political activity or speech may not legitimately be circumscribed. To the contrary, the Court distinguished Minnesota's announce clause from other rules restricting the speech of judicial candidates, taking no position on the validity of other judicial conduct provisions (*see Republican Party of Minn. v White*, 536 US at 770, 773 n 5). (*Id*. at 313-14)

Similarly, in *Matter of Watson*, 100 NY2d 290, 301 (2003), the Court declared:

> *White* itself distinguished the announcements at issue in that case from "pledges or promises," which are covered by another Minnesota rule [*White*, 536 US at 770]. Thus, *White* does not compel a particular result here.

Consequently, I recognize that our Court of Appeals has held, in tension with *White*, that *implied* promises of future conduct by a judicial candidate may be the basis for discipline (*Matter of Watson*, *supra*, 100 NY2d at 298). Stating that a candidate's statements "must be reviewed in their totality and in the context of the campaign as a whole" to determine whether they constitute a prohibited pledge or promise, the Court declared: "[C]andidates need not preface campaign statements with the phrase 'I promise' before their remarks may reasonably be interpreted by the public as a pledge to act or rule in a particular way if elected" (*Id*.). And, of course, I am bound by that decision.

However, even under the *Watson* standard, Judge Chan's campaign statements do not at all resemble the expressions of pro-police affinity by candidate Watson (*e.g.*, "we need a judge who will work with" and "assist" police and other law enforcement personnel "as they aggressively work towards cleaning up our city streets") that were held to be improper. Judge Watson's statements *committed* to harshly sentence out-of-town law violators. This was a far cry from general expressions of predispositions as part of campaigning, such as fairness for defendants in criminal cases, right to life, or respect for the rights of tenants. *See*, *e.g.*, *Matter of Shanley*, 98 NY2d 310, 313 (2002) (not misconduct for a judicial candidate to refer to herself as a "law and order" candidate since there was no showing that the phrase "compromises judicial impartiality" or constituted a prohibited pledge, promise or commitment); *see also* Adv Op 93-52.

Therefore, notwithstanding the Court of Appeals' reluctance to embrace the breadth of *White*, neither *Raab* nor *Watson* supports a misconduct finding based on an advertisement -- even one distributed in support of a judge's campaign -- for a lecture teaching tenants their rights. Nothing in *Raab* or *Watson* deprives a judicial candidate of the right to address issues -- all kinds of provocative issues. Can it possibly be argued that by appearing with a tenants' advocate and urging voters to know their rights against landlords, the candidate made an actual pledge, promise or commitment to decide a future case in favor of tenants? It is inconceivable that on these facts the Supreme Court would uphold the constitutionality of an application of a misconduct rule that prohibited Judge Chan's advertisement for her appearance. By finding misconduct for such statements, the Commission is adding a gloss on *White* that cannot be justified by any reading of that decision.

Notably, some federal courts have declared the pledges, promises and commitment prohibitions unconstitutional (*Family Trust Foundation of Kentucky v. Wolnitzek*, 345 FSupp2d 672 [ED Ky 2004]; *North Dakota Family Alliance v. Bader*, 361 FSupp2d 1021 [ND 2005]). Other jurisdictions, in upholding the prohibitions, have underscored that only *express* promises or commitments as to future rulings can be prohibited. A Pennsylvania court,

concluding that the *Watson* interpretation of the rule failed to satisfy constitutional overbreadth concerns, held that to withstand a constitutional challenge, the "pledges and promises" and "commit" rules must be narrowly construed to prohibit judicial candidates "from promising [or]… committing themselves to particular rulings once elected" (*Pennsylvania Family Institute v. Celluci*, 521 FSupp2d 351, 378, 379-30 [ED Pa 2007]). A Wisconsin court declared: "A promise, pledge or commitment typically includes one of those three words or phrases like 'I will' or 'I will not'," and "Absent a statement committing the speaker to decide a case, controversy or issue in a particular way, the speaker can be confident that the rule is not violated" (*Duwe v. Alexander*, 490 FSupp2d 968, 976 (WD Wisc 2007). Because of constitutional concerns, in 2006 New York eliminated the prohibition against statements that "*appear to* commit" the candidate with respect to controversies and issues (former Rule 100.5[A][4][d]), thereby, at least by negative inference, limiting misconduct to an *express* commitment.

While it is plain to me that application of the misconduct rules which prohibit *implicit* commitments or promises cannot pass constitutional muster, even *Watson* is readily distinguishable from the facts here. There the candidate made implicit promises, pledges and commitments. Here, Judge Chan's implicit criticism of landlords was not a pledge, promise or commitment that she would rule against them. In any event, the Agreed Statement concedes only that the allegedly offending advertisement for Judge Chan's lecture "*may* have" caused a voter to believe that she would favor tenants. As such, she has only conceded a non-proscribed "appearance" of bias which is the essence of what *White* and the 2006 New York amendments to Rule 100.5[A][4][d] protects.

The fact that most judicial candidates in New York run campaigns that avoid discussion of issues that may come before their courts does not mean that they do not have free speech rights under *White* that permit them to discuss such issues. If a candidate makes a statement during a campaign that is not a pledge, promise or commitment, but, nevertheless, may be construed by the cognoscenti to favor a particular class of litigants, that is the price we pay for judicial election campaigns and the candidate may not be disciplined.

Regrettably, too often the Commission has become a peripatetic watchdog of judicial campaign activity. *E.g., Matter of Yacknin*, *supra*; *Matter of King*, *supra*; *Matter of Spargo*, *supra*; *Matter of Farrell*, *supra*; *Matter of Campbell*, *supra*; *Matter of Raab*, *supra*; *Matter of Watson*, *supra*; *Matter of Schneier*, 2004 Annual Report 153; *Matter of Crnkovich*, 2003 Annual Report 99; *Matter of Shanley*, *supra*; *Matter of Mullen*, 2002 Annual Report 199; *Matter of Williams*, 2002 Annual Report 175; *Matter of Hafner*, 2001 Annual Report 113; *Matter of Fiore*, 1999 Annual Report 101; *Matter of Herrick*, 1999 Annual Report 102; *Matter of Polito*, 1999 Annual Report 129. In my view, our role is hands off except in the clearest cases. This is not one of those. This is a case of misconduct charges that cannot be supported on the facts or the law. We should not abide such a result even if the judge agrees.

Our purpose is not to monitor all literature, all campaign activity and impose discipline if the statements or actions during a campaign are confusing, unclear or may suggest

certain conclusions. Our task is to determine whether this candidate *knowingly* misrepresented facts to the voters or *stated* an improper pledge, promise or commitment. When the staff and a judge present an agreed statement of facts to us in lieu of a referee's report, the agreed facts need to be unequivocal. We need a basis to impose discipline. That basis is absent on the record before us.

Finally, a word about Charge III, which accuses Judge Chan of personally soliciting members of the Women's Bar Association for contributions. She admits signing a letter that solicited funds and admits that it was improper for her to have done so since Rule 100.5(A)(5) prohibits judicial candidates from "personally" soliciting or accepting contributions. As soon as she realized that she had erred by not having her surrogates make the plea (even though her personal letter was sent by her committee and it appears that donations were returnable to the committee), she apologized and arranged to return all the funds that had been contributed as the result of her improper importuning (Agreed Statement, par. 16). Her technical violation of the ban against personal solicitations was effectively mitigated. In such cases of unwitting transgressions that are timely admitted, corrected and apologized for, the Commission's general practice is to issue a private caution or to dismiss outright.

The decisions in *Watson* and *Raab* do not address the prohibition on personal solicitation of contributions. In the wake of *White*, however, several federal courts in other jurisdictions, including two appellate courts, have struck down such a ban (*Weaver v. Bonner*, 309 F3d 1312 [11th Cir 2002]; *Yost v. Stout*, Memorandum and Order [District of Kansas 11/16/08]; *Carey v. Wolnitzek*, Opinion and Order [ED Ky 10/15/08]; *Republican Party of Minnesota v. White*, 416 F3d 738 [8th Cir 2005]; *Siefert v. Alexander*, 597 FSupp2d 860 [WD Wisc 2009]). As these decisions make clear, "[t]he impartiality concerns, if any, [raised by soliciting contributions] are created by the State's decision to elect judges publicly" (*Weaver*, *supra*, 309 F3d at 1322), and "only a system of public financing or a change in the method of judicial selection" can eliminate such concerns (*Seifert*, *supra*, 597 FSupp2d at 888).

Since judicial candidates can easily ascertain the identity of their contributors notwithstanding the prohibition, and since solicitations by a committee may be no less coercive than a personal solicitation, the personal solicitation ban has been viewed as both ineffectual and antiquated:

> In the end, it appears that [the personal solicitation ban] furthers no interest at all, except perhaps one of saving judicial candidates from the unseemly task of asking for money. [Citation omitted.] There is almost a nostalgic quality about it, harkening back to the days of early America when candidates for office thought it was in bad taste to campaign on their own behalf, instead letting their surrogates do all the dirty work. (*Id*.)

Interestingly, after the ban on personal solicitations was struck down in Minnesota, that state revised its rule to permit a candidate, *inter alia*, to sign a letter for distribution by the candidate's

campaign committee, provided that contributions were returned to the committee[3] – which appears to be the exact conduct that occurred here. However doubtful the constitutionality of a general ban on personal solicitations, it is even more unlikely that such a ban could be upheld as applied in Judge Chan's circumstances – a letter signed by the judge and sent by the judge's committee with contributions returnable to the committee. Like the application of the "misrepresent" and "pledges and promises" rules in this case, the "solicitation" rule, as applied here, serves only to stifle protected core campaign conduct rather than any realistic or legitimate ethical concern.

Because Charges I and II are defective and the Agreed Statement inadequate, and because the violation in Charge III should never have been charged, I dissent and vote to dismiss.

Dated: November 17, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROBERT W. ENGLE**, a Justice of the Madison Town Court, Madison County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel and Kathleen Martin, Of Counsel) for the Commission
Honorable Robert W. Engle, *pro se*

The respondent, Robert W. Engle, a Justice of the Madison Town Court, Madison County, was served with a Formal Written Complaint dated August 3, 2009, containing five charges. The Formal Written Complaint alleged that respondent sent fine notices to defendants

[3] Canon 5(B)(2) of the Minnesota Code of Judicial Conduct provides in part: "A candidate may (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate."

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without a trial or guilty plea, sent fine notices to other defendants who had already paid their fines, improperly initiated the suspension of defendants' driver's licenses, and, in two cases, disqualified himself and his co-justice without his co-justice's knowledge or consent. Respondent filed an answer dated September 17, 2009.

On October 27, 2009, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On November 5, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Madison Town Court, Madison County since January 1990. His current term expires on December 31, 2009. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. In three cases between 2004 and 2007 respondent failed to advise defendants of trial dates upon receipt of not guilty pleas, as required by Section 1806 of the Vehicle and Traffic Law, and instead imposed fines and surcharges without either a trial or a guilty plea.

People v. Matthew A. French

3. On October 17, 2006, Matthew A. French was charged with Driving Across a Hazard Marking and Operating Out of Class. Mr. French appeared before respondent on November 6, 2006, and pleaded not guilty to both charges. At that time, respondent gave Mr. French a charge reduction application to submit to the Madison County District Attorney's office, but did not set an adjourned date or schedule a trial.

4. On April 27, 2007, respondent sent Mr. French a fine notice stating that fines and surcharges totaling $190 were due by April 30, 2007, and that Mr. French must appear on that date to explain why he had ignored the two charges.

5. On April 28, 2007, Mr. French met with respondent's co-judge, Michael P. Hynes, concerning respondent's fine notice. Judge Hynes sent a fax cover sheet to the District Attorney's office stating the case belonged to respondent and that Mr. French had "not pled guilty to any charge yet," along with copies of Mr. French's undated application to the District Attorney, the two tickets and the fine notice.

6. On May 5, 2008, respondent convicted Mr. French on the charge of Operating Out of Class and dismissed the charge of Driving Across a Hazard Marking.

Respondent did not suspend Mr. French's driver's license while the charges were pending.

7. Respondent recognizes that it was improper to send Mr. French a fine notice imposing the fines and surcharges without first conducting a trial or obtaining a guilty plea. When respondent sent the fine notice to Mr. French, he did not realize that he had failed to schedule further proceedings in the matter. He has apologized to Mr. French.

People v. William G. Meyer

8. On September 20, 2004, William G. Meyer was charged with Speeding. Mr. Meyer's attorney sent a facsimile to respondent entering a not guilty plea on behalf of Mr. Meyer and requesting a four-week adjournment. Respondent granted the adjournment, but did not set an adjourned date or schedule a trial.

9. Sometime between October 12, 2004, and November 2, 2004, respondent sent Mr. Meyer a letter stating that he accepted his guilty plea and imposing a fine and a surcharge totaling $110.

10. On November 2, 2004, Mr. Meyer's attorney wrote a letter to respondent stating that Mr. Meyer had pleaded not guilty and that she was requesting a recommendation from the District Attorney that the Speeding charge be reduced.

11. On December 9, 2004, Mr. Meyer pleaded guilty to a reduced charge and paid a $30 fine.

People v. Deborah J. Smith

12. On March 22, 2006, Deborah J. Smith was charged with Use of Mobile Telephones. The case was originally returnable before respondent's co-judge, Michael P. Hynes. Judge Hynes disqualified himself and the case came before respondent.

13. On April 20, 2006, Ms. Smith's attorney sent a letter to Judge Hynes, with a copy of the District Attorney's recommendation and consent to dismiss the charge.

14. On August 20, 2006, respondent sent Ms. Smith a "Notice to Defendant of Failure to Pay Fine," which stated that Ms. Smith had failed to answer the court's previous fine notice and that the $75 fine was imposed by the court "as a result of [her] guilty plea." The letter further stated that respondent would notify the Commissioner of Motor Vehicles to suspend Ms. Smith's driver's license if she did not respond to his letter by August 26, 2006.

15. On August 24, 2006, Ms. Smith's attorney sent a letter to respondent with a copy of the District Attorney's recommendation and consent to dismiss the charge.

16. Respondent dismissed the charge against Ms. Smith. He later apologized to Ms. Smith for sending the fine notice.

17. Respondent does not recall receiving the District Attorney's recommendation to dismiss the charge.

As to Charge II of the Formal Written Complaint:

18. In two cases between 2005 and 2007, respondent sent notices to defendants demanding payment of fines and surcharges that had previously been paid in full.

People v. Charles E. Ireland

19. On October 4, 2006, Charles E. Ireland was charged with No Inspection. Mr. Ireland appeared before respondent on October 30, 2006, pleaded guilty to a reduced charge and paid a $70 fine.

20. On July 17, 2007, respondent sent a notice to Mr. Ireland stating that he owed a fine and a surcharge totaling $90 and warning that he would notify the Commissioner of Motor Vehicles to suspend his driver's license if the amount was not paid by July 27, 2007.

21. On July 23, 2007, Mr. Ireland paid the additional $90 fine. He then provided copies of this receipt and his initial receipt for $70 to the Madison Town Board. On November 16, 2007, the Madison Town Attorney sent a letter to respondent concerning the double fines that Mr. Ireland paid for the same ticket. Respondent sent a refund to Mr. Ireland on November 21, 2007, and later apologized to Mr. Ireland.

22. Respondent sent Mr. Ireland a fine notice because he wrongly believed that a second No Inspection charge had been filed against Mr. Ireland and that Mr. Ireland had pleaded guilty to that charge.

People v. Allen E. Smith

23. On September 18, 2005, Allen E. Smith was charged with No Seat Belt. Mr. Smith pleaded guilty by mail on September 28, 2005.

24. On October 8, 2005, respondent sent a "Notice of Fine Due" to Mr. Smith imposing a $45 fine and a $55 surcharge. Sometime between October 8, 2005 and October 17, 2005, Mr. Smith paid respondent $100 in full satisfaction of the fine and surcharge.

25. Sometime between October 17, 2005 and January 31, 2007, respondent sent a second, undated notice to Mr. Smith directing payment of the outstanding fine and surcharge within ten days of receipt of the letter.

26. On January 31, 2007, Mr. Smith sent a letter to respondent stating that he had previously paid his fine. The matter was concluded with no additional payments by Mr. Smith.

27. Respondent sent the second fine notice because he wrongly believed that Mr. Smith was another defendant with the same last name who had the same charge pending.

As to Charge III of the Formal Written Complaint:

28. In four cases between 2003 and 2006, respondent notified the Commissioner of Motor Vehicles to suspend a defendant's driver's license for failure to appear or answer charges or failure to pay a fine imposed by the court, notwithstanding that each defendant had previously pleaded guilty and paid his or her fine and surcharge.

People v. Justin M. Graham

29. On October 31, 2003, Justin M. Graham was charged with Speeding and Facilitating Aggravated Unlicensed Operation of a Motor Vehicle. On March 1, 2004, Mr. Graham pleaded guilty to a reduced charge in satisfaction of the Speeding charge and paid a $65 fine and a $55 surcharge. Respondent dismissed the Unlicensed Operation charge.

30. Sometime between March 4, 2005 and August 5, 2005, respondent notified the Commissioner of Motor Vehicles to suspend Mr. Graham's driver's license for failure to appear or answer charges or failure to pay a fine imposed by the court.

31. Sometime between August 5, 2005, and September 10, 2005, Mr. Graham's mother wrote to respondent stating that her son had paid his ticket, and Judge Hynes lifted the suspension before it went into effect.

32. Respondent sent the notice to the Commissioner of Motor Vehicles because he wrongly believed that Mr. Graham was another defendant who shared the same last name and had a pending case.

People v. Lawrence F. Griffo, Jr.

33. On February 17, 2003, Lawrence Griffo was charged with Speeding. Mr. Griffo appeared before respondent on June 2, 2003, pleaded guilty to a reduced charge and paid a $25 fine.

34. Sometime between June 2, 2003 and August 5, 2005, respondent notified the Commissioner of Motor Vehicles to suspend Mr. Griffo's driver's license for failure to appear or answer charges or failure to pay a fine imposed by the court.

35. On August 16, 2005, Mr. Griffo contacted respondent's court, and Judge Hynes lifted the suspension before it went into effect.

36. Respondent sent the notice to the Commissioner of Motor Vehicles because he did not notice that the "Certificate Concerning Disposition" was missing from the ticket packet, which would indicate that the matter had been resolved and information regarding the disposition had been sent to the Commissioner of Motor Vehicles.

People v. Jamison G. Mills

37. On October 16, 2004, Jamison G. Mills was charged with Speeding. Mr. Mills pleaded guilty to a reduced charge on November 9, 2004. On December 9, 2004, Mr. Mills paid respondent a fine and a surcharge totaling $70.

38. Sometime between December 9, 2004, and August 5, 2005, respondent notified the Commissioner of Motor Vehicles to suspend Mr. Mills' driver's license for failure to appear or answer charges or failure to pay a fine imposed by the court.

39. On August 16, 2005, Mr. Mills contacted respondent's court, and Judge Hynes lifted the suspension before it went into effect.

People v. Margaret S. Peer

40. On May 27, 2005, Margaret S. Peer was charged with Unregistered Motor Vehicle. Ms. Peer pleaded guilty by mail on May 28, 2005.

41. On June 4, 2005, respondent sent Ms. Peer a notice imposing a fine and a surcharge totaling $95.

42. Sometime between June 4, 2005 and June 17, 2005, respondent received Ms. Peer's payment and issued her a fine receipt in the amount of $95.

43. Sometime between June 17, 2005 and May 1, 2006, respondent notified the Commissioner of Motor Vehicles to suspend Ms. Peer's license for failure to appear or answer charges or failure to pay a fine imposed by the court.

44. On May 4, 2006, respondent recognized his error after he received a phone message that Ms. Peer had paid her ticket and lifted Ms. Peer's suspension before it went into effect.

45. Respondent sent the notice to Commissioner of Motor Vehicles because he wrongly believed that Ms. Peer had a second charge pending in his court.

As to Charge IV of the Formal Written Complaint:

46. In 2004 respondent notified the Commissioner of Motor Vehicles to suspend the driver's licenses of two defendants for failure to appear or answer charges or to pay a fine imposed by the court, notwithstanding that his co-judge, Michael P. Hynes, had previously disposed of the defendants' cases.

People v. Janet Brooks

47. On April 9, 2004, Janet Brooks was charged with Failure To Obey a Stop Sign. Ms. Brooks appeared before Judge Hynes on April 26, 2004, pleaded guilty and paid a fine and a surcharge totaling $90.

48. Sometime between April 26, 2004 and October 16, 2004, respondent notified the Commissioner of Motor Vehicles to suspend Ms. Brooks' driver's license for failure to appear or answer charges or failure to pay a fine imposed by the court.

49. On September 27, 2004, Ms. Brooks contacted respondent's court and Judge Hynes lifted the suspension before it went into effect.

People v. Heidi Enslow

50. On March 6, 2004, Heidi Enslow was charged with No Seat Belt. Ms. Enslow appeared before Judge Hynes on April 21, 2004, and he dismissed the charge.

51. Sometime between April 21, 2004 and October 16, 2004, respondent notified the Commissioner of Motor Vehicles to suspend Ms. Enslow's driver's license for failure to appear or answer charges or failure to pay a fine imposed by the court.

52. On September 27, 2004, Ms. Enslow contacted respondent's court, and Judge Hynes lifted the suspension before it went into effect.

As to Charge V of the Formal Written Complaint:

53. In 2007, in *People v. Sarah M. Swartfiguer* and *People v. Jason W. Swartfiguer*, respondent notified the Madison County Court that both he and his co-judge, Michael P. Hynes, were recusing themselves from presiding over the matters and requested that the matters be "sent to an adjoining court." Respondent made such representations to the Madison County Court notwithstanding that he had no authority to speak for Judge Hynes and did so without Judge Hynes' knowledge or consent.

54. On April 23, 2006, Jason W. Swartfiguer was issued a ticket for Operating Without a License. On August 12, 2006, Sarah M. Swartfiguer was issued a ticket for Operating Without a License and Unregistered Motor Vehicle. The tickets were returnable before

respondent.

55. Sometime between April 23, 2006 and May 9, 2007, respondent arraigned Mr. Swartfiguer, who pleaded not guilty. Ms. Swartfiguer never appeared before respondent.

56. Sometime between April 23, 2006 and May 9, 2007, respondent asked Judge Hynes to take the *Swartfiguer* cases. Judge Hynes informed respondent that he had called the State Police over Mr. Swartfiguer firing assault weapons in the woods near his home.

57. On May 9, 2007, respondent submitted a letter to the Madison County Court: (1) stating that Judge Hynes had "had run ins" with Mr. Swartfiguer, "feared for his well being" and "gave" the *Swartfiguer* cases to him, (2) advising that he had done some carpentry work for Mr. Swartfiguer and was recusing himself and (3) requesting the transfer of both cases to another court.

58. Prior to sending the letter to the Madison County Court, respondent did not inform Judge Hynes that he was notifying the County Court that both he and Judge Hynes had recused themselves from the *Swartfiguer* matters, nor did he obtain Judge Hynes' consent to do so.

59. On May 30, 2007, County Court Judge Biagio J. DiStefano signed an Order of Transfer, granting a change of venue in the *Swartfiguer* matters from the Town of Madison Justice Court to the Town of Eaton Justice Court.

60. The *Swartfiguer* matters were concluded on May 13, 2008, with both defendants being convicted of the original charges of Operating Without a License.

Supplemental finding:

61. As to Charges I through IV, respondent acknowledges that he mishandled the matters, in part due to his reluctance to use a computer and other available record-keeping technology. As a result of the Commission's inquiry, respondent has taken steps to improve his court's record-keeping procedures, including obtaining a computer, using a local courts' administrative program, and hiring a court clerk after several years of not having one.

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

In eleven traffic cases respondent made serious administrative errors that were prejudicial to the parties and the proper administration of justice. In three cases, he failed to

advise defendants who had pleaded not guilty of trial dates, and instead imposed a fine without a trial or a guilty plea. In two cases, he sent notices to defendants demanding payment of fines that had previously been paid. In six cases, he notified the Commissioner of Motor Vehicles to suspend the defendants' driver's license for failure to appear or to pay a fine, although five of the defendants had paid their fines and the other defendant's case had been dismissed. As a result of respondent's derelictions, at least two defendants consulted an attorney; one defendant paid a fine he had already paid; and in each case the defendant had to contact the court to resolve the error in order to avoid further adverse consequences. Collectively, these errors, apparently caused by deficiencies in record-keeping and case management, indicate respondent's neglect of proper court administration and, thus, constitute misconduct warranting public discipline. *Matter of Spiehs*, 1988 Annual Report 222 (Comm on Judicial Conduct) (judge committed a series of legal and administrative errors that adversely affected due process and showed inattention to proper procedures); Rules, §100.3(C)(1) (requiring a judge to diligently discharge the judge's administrative responsibilities).

It has also been stipulated that respondent transferred two cases from his court, disqualifying both himself and his co-justice, without his co-justice's knowledge or consent. In transferring cases, judges are obliged to adhere to the appropriate procedures (s*ee Matter of Hooper*, 2004 Annual Report 113 [Comm on Judicial Conduct]), and respondent did not do so here. We note that prior to transferring the matters, respondent had spoken to his co-justice about the cases, and his co-justice advised him of an out-of-court conflict he had involving the defendant. Given the particular circumstances presented here, we find respondent's conduct in this regard to be *de minimis*.

Respondent should have been especially sensitive to the ethical mandates since he was censured by the Commission in 1997 for using his judicial prestige to assist a defendant who was awaiting sentencing in another court. *Matter of Engle*, 1998 Annual Report 185 (Comm on Judicial Conduct).

In considering the sanction, we note that as a result of the Commission's investigation, respondent has taken corrective action to improve his court's administrative operations, including learning to use the computerized case management program available to town and village courts and working with a newly-hired clerk to improve administrative procedures. These steps should enable respondent to avoid similar misconduct in the future. We also note that the administrative derelictions reflected in the charges affected only 13 cases out of more than 9,000 cases handled by respondent.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Dated: November 9, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MICHAEL M. FEEDER**, a Justice of the Hudson Falls Village Court, Washington County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Cathleen S. Cenci and Cheryl L. Randall, Of Counsel) for the Commission
Kindlon Shanks & Associates (by Lee C. Kindlon) for the Respondent

The respondent, Michael M. Feeder, a Justice of the Hudson Falls Village Court, Washington County, was served with a Formal Written Complaint dated April 19, 2006, containing four charges. The Formal Written Complaint alleges that respondent: (i) used his judicial power to effect the arrest of a motorist and then took action in the case; (ii) made improper public statements supporting stronger penalties for curfew violations; (iii) promised a defendant's mother *ex parte* that he would not sentence the defendant to jail; and (iv) granted an adjournment in contemplation of dismissal without notice to or the consent of the prosecution. A second Formal Written Complaint dated October 9, 2007, was served, containing one charge. The second Formal Written Complaint alleged that respondent presided over cases filed by members of the Hudson Falls Police Department without disclosing his close friendship with the Assistant Chief of Police.

By notice of motion dated January 7, 2008, counsel to 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 Complaints. Respondent did not file a response to the motion. By Decision and Order dated January 29, 2008, the Commission granted the motion for summary determination and determined that the charges were sustained and that respondent's misconduct was established.

By stipulation dated March 5, 2008, the parties agreed that the summary determination should be vacated, that respondent be permitted to file an answer to the

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Complaints, and that if respondent vacated judicial office before the Commission rendered a determination on the merits, the stipulation would be public and respondent would not seek or accept judicial office in the future. The Commission accepted the stipulation by Decision and Order dated March 13, 2008.

By Order dated January 29, 2007, the Commission designated Michael J. Hutter, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 18 and 19, 2008, in Albany. The referee filed a report dated June 29, 2009.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of removal, and respondent's counsel argued that misconduct was not established. By letter to the Commission dated September 22, 2009, Commission counsel withdrew Charge II of the Formal Written Complaint.

On September 23, 2009, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Hudson Falls Village Court since October 1999. From January 1, 1998, to December 31, 2005, he was also a Justice of the Kingsbury Town Court. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about December 31, 2004, while driving his own vehicle in the Village of Hudson Falls, respondent observed motorist Fred Kennison as he allegedly failed to yield the right of way to a pedestrian in a crosswalk. Respondent telephoned the local police dispatcher and provided local police with the license plate number and a description of the vehicle.

3. Respondent pursued Mr. Kennison's vehicle for more than a mile. Respondent's intent was to make a citizen's complaint or a citizen's arrest. Throughout his pursuit of Mr. Kennison, respondent maintained phone contact with the Village of Hudson Falls police.

4. Signaling with his high beams, respondent induced Mr. Kennison's vehicle to pull over. Respondent then approached Mr. Kennison's vehicle and identified himself as a judge, displaying a badge bearing the words "Town Justice, Town of Kingsbury." Respondent told Mr. Kennison that he had committed a traffic infraction.

5. Mr. Kennison denied that he had committed an infraction. Faced with a member of the judiciary in direct contact with the police, Mr. Kennison agreed to return to the Hudson Falls Village Police Department, and he and respondent drove their vehicles there.

6. At the Police Department, respondent spoke with Sergeant Mark LaFay and signed a complaint against Mr. Kennison. Based on respondent's statement, Sergeant LaFay issued a citation to Mr. Kennison for Failing to Yield to a Pedestrian in a Crosswalk, and based

on his own observation, he issued a citation for Operating a Motor Vehicle While Using a Cell Phone. The charges were filed in the Hudson Falls Village Court.

7. Mr. Kennison retained an attorney, who contacted the court and requested an adjournment and a supporting deposition. On or about January 6, 2005, respondent granted the requested adjournment and ordered the production of a supporting deposition. On the same date, respondent recused himself from the case. The case was transferred to another court.

8. Following his recusal but while the *Kennison* case was still pending, on or about January 6, 2005, respondent met with a reporter for the *Post Star* newspaper and spoke with him about Mr. Kennison's case. Respondent was accurately quoted in a January 7, 2005, *Post Star* article as having said, "I think anyone who saw [Mr. Kennison] would have reported him." Around the same time, respondent spoke about the incident with a reporter for WTEN Channel 10 news, who accurately quoted respondent as having said, "It bothers me that he gets to say whatever he wants and I can't respond. At some point my side will be heard."

9. The case was disposed of in the Fort Ann Town Court, where Mr. Kennison pled guilty to a charge and was fined $25.

As to Charge II of the Formal Written Complaint:

10. The charge was withdrawn and therefore is dismissed.

As to Charge III of the Formal Written Complaint:

11. On December 24, 2004, Tanya Looney was arrested and charged with Driving While Intoxicated ("DWI"), Unlawful Possession of Marijuana and an equipment violation.

12. Within the previous five years, Ms. Looney had been convicted of DWI and Driving While Ability Impaired and had twice completed a mandatory drug court program supervised by respondent. During those programs, Ms. Looney was returned to jail at least twice following violations of the drug court protocols.

13. Sometime prior to Ms. Looney's appearance in court on the December 24, 2004 charges, her mother, Linda Looney, approached respondent after a court session. In an *ex parte* conversation, Mrs. Looney asked respondent not to impose a sentence in her daughter's case that included incarceration. Mrs. Looney told respondent that she was ill and that if her daughter were incarcerated, there would be no one to care for Tanya's children. Respondent told Mrs. Looney to have her daughter "come in and see what we could do about that." At the time of this conversation, respondent knew that he was scheduled to hear Tanya Looney's case.

14. On January 26, 2005, Tanya Looney, represented by counsel, appeared before respondent. The assistant district attorney said that because of the defendant's prior

convictions, the DWI misdemeanor charge should have been charged as a felony, but she was amenable to a guilty plea to all the charges, with a sentence within the judge's discretion. For a misdemeanor conviction, the defendant faced a possible sentence of up to one year of incarceration. Respondent accepted the plea from Ms. Looney and sentenced her to a conditional discharge and a series of fines. Respondent did not disclose his *ex parte* conversation with the defendant's mother.

15. In sworn testimony during the Commission investigation on November 29, 2005, respondent stated that he did not recall speaking to Mrs. Looney about her daughter's case. At the oral argument before the Commission, respondent acknowledged that Mrs. Looney had spoken to him *ex parte* about her daughter's case and had asked him not to impose a jail sentence. Respondent also stated that he had told Mrs. Looney to "have Tanya come in," by which he meant that she should come to court and he would be fair. Respondent acknowledged that he had erred in speaking to Mrs. Looney and in not disclosing the conversation to the attorneys.

As to Charge IV of the Formal Written Complaint:

16. In February 2005 Raymond Camp was served with a criminal summons, signed by respondent, for a village code violation for having two unregistered vehicles on his property.

17. A few days later, after Mr. Camp had the unregistered vehicles removed from his property, he contacted Terry Root, the officer named on the summons, and informed him that the violation had been remedied. At the Commission hearing, Mr. Camp testified that Mr. Root told him that respondent had "asked [him] to go out and look for code violations."

18. Mr. Camp asked Mr. Root to speak with respondent about having the matter "settled" that day, and shortly thereafter Mr. Camp was called to appear before respondent.

19. On February 16, 2005, Mr. Camp appeared before respondent without counsel. No representative for the prosecution was present. Sometime prior to Mr. Camp's appearance, Mr. Root advised respondent that the violation had been remedied.

20. Mr. Camp told respondent that he had been given a criminal summons for a code violation, that he should have been given an opportunity to remedy the violation, and that the vehicles had been removed. Respondent's arraignment memorandum shows that Mr. Camp pleaded guilty.

21. Respondent imposed an adjournment in contemplation of dismissal ("ACD") without the consent of the defendant or the prosecution notwithstanding that section 170.55(1) of the Criminal Procedure Law requires the consent of both parties to such a disposition.

22. In his investigative testimony, respondent stated that Mr. Camp had pled guilty while explaining that he had remedied the violation. Respondent acknowledged that he knew that an ACD requires the consent of the prosecution; he testified that he may have intended to impose an unconditional discharge and recorded the disposition in error.

As to Charge V of the Second Formal Written Complaint:

23. Randy Diamond has been a police officer with the Hudson Falls Police Department for over 22 years. He served as Assistant Chief of Police from in or about 2004 until June 2008, when he was promoted to Chief of Police.

24. As Assistant Chief, Diamond had supervisory authority over all the patrol officers, detectives and drug task force operations in the Hudson Falls Police Department. He supervises approximately 23 officers in the department.

25. Respondent and Diamond have been close personal friends for at least ten years. They and their wives socialize several times per year, sometimes at each other's homes. In or about July 2006, respondent and Diamond and several other people vacationed together in Florida. For a few weeks in 2001, respondent resided in Diamond's home.

26. Since 2004, Assistant Chief Diamond and members of the Hudson Falls Police Department have filed numerous criminal and traffic charges in respondent's court and have testified in matters over which respondent has presided. In one case, Diamond himself appeared before respondent as a witness. Respondent presided over such matters without disqualifying himself or disclosing to any of the parties his relationship with Diamond.

27. By failing to disclose his close personal friendship with Diamond, respondent deprived the parties of the opportunity to consider whether his disqualification in proceedings involving the local police would be appropriate.

Supplemental finding:

28. At the hearing before the referee, respondent did not testify or offer any evidence to dispute the charges. In light of respondent's failure to testify or offer any contrary evidence, a negative inference can be drawn from respondent's silence with respect to the charged misconduct.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1), 100.3(B)(6), 100.3(B)(8), 100.3(E)(1), 100.3(E)(1)(a)(ii) and 100.4(A)(1), (2) and (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, III and IV of the Formal Written Complaint and Charge V of the Second

Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge II was withdrawn by Commission counsel and, therefore, is dismissed.

At all times, a judge remains "cloaked figuratively" with the robes of judicial office. *Matter of Kuehnel v Comm on Judicial Conduct*, 49 NY2d 465, 469 (1980). Thus, even off the bench, judges are required to avoid conduct that casts doubt on the judge's impartiality, interferes with the proper performance of judicial duties or detracts from the dignity of judicial office (Rules, §§100.4[A][1], [2], [3]). By pursuing a motorist for a perceived traffic violation, displaying a badge and identifying himself as a judge to the motorist, and filing a complaint against the motorist in the court where he is a judge, respondent undertook law enforcement duties and thereby compromised his impartiality. Such activities are inherently incompatible with judicial office. *Matter of Rones*, 1995 Annual Report 126 (Comm on Judicial Conduct) (judge followed or confronted motorists for purported traffic infractions on numerous occasions).

A judge cannot be perceived as neutral and detached if he or she acts as a law enforcement officer; indeed, the law prohibits a judge from being a peace officer of any kind (UJCA §105[c]; Rules, §100.4[C][2][b]). Since respondent had provided the license number and vehicle description to the police, it was unnecessary for him to pursue the motorist further, to confront him while identifying himself as a judge, and to lead him to the police station. Even if respondent believed that he was acting in the public interest, he should have recognized that acting as a traffic enforcer is inconsistent with his role in presiding over such cases as a judge.

Respondent compounded his misconduct a week later by taking judicial action in the case, which was filed in his court, and by commenting about the case to the press. Instead of immediately disqualifying himself, respondent issued a notice for a supporting deposition in the case and granted an adjournment at the request of the defendant's attorney. Although he disqualified himself that same day, respondent should have realized that it was improper to take any action as a judge in a case that he himself had initiated (Rules §100.3[E][1][a][ii]; *Matter of Barnes*, 2005 Annual Report 81 [Comm on Judicial Conduct]). Respondent also should have realized the impropriety of commenting to the press about the case, and publicly criticizing the motorist, while the case was pending (Rules §100.3[B][8]). In fact, respondent's statements ("It bothers me that he gets to say whatever he wants and I can't respond") show that he was mindful of the ethical prohibition even as he made the inappropriate comments.

In another matter, respondent granted an adjournment in contemplation of dismissal without the consent of the prosecution or the defendant, contrary to the procedures mandated by law (CPL §170.55[1]). Judges must be faithful to the law and maintain professional competence in it (Rules, §100.3[B][1]; *Matter of Barringer*, 2006 Annual Report 97 [Comm on Judicial Conduct]). While not every error of law constitutes a violation of the ethical rules, respondent's conduct here, especially when viewed together with his other actions, adds to the appearance that he was deliberately acting both as judge and prosecutor.

In the *Looney* case, respondent engaged in an *ex parte* conversation with the mother of a defendant charged with Driving While Intoxicated, who asked him not to impose a

jail sentence in her daughter's case. Notwithstanding that the defendant had previously been convicted of two alcohol-related driving offenses and had twice completed drug court under respondent's supervision, respondent imposed a notably lenient disposition in the case – a conditional discharge and a series of fines – without disclosing the *ex parte* request. Regardless of whether he was influenced by his conversation with the defendant's mother, his conduct conveyed the appearance of favoritism and prejudgment. *See Matter of LaBombard*, 11 NY3d 294 (2008) (after engaging in an *ex parte* conversation with the defendant's mother, judge vacated a bail order he had issued, compounding the appearance of favoritism). Respondent's actions were inconsistent with his obligation to avoid even the appearance of impropriety, both on and off the bench, and to avoid improper *ex parte* communications (Rules, §§100.2[A], 100.3[B][6]). Public confidence in the impartiality and independence of the judiciary is seriously diminished by such conduct.

While we view such misconduct as serious, we note that there was no testimony that respondent "promised" the defendant's mother that he would be lenient, as stated by the dissent. Although the sentence he imposed was consistent with her *ex parte* request – contributing to the appearance of impropriety – judges have broad discretion on sentencing, and the sentence was a lawful one.

Finally, over several years respondent presided over numerous cases filed by members of the local police department without disclosing his close personal friendship with then-Assistant Chief of Police Randy Diamond. In view of respondent's relationship with Diamond – which included socializing, vacationing with him, and living for a few weeks in Diamond's home in 2001 – his impartiality in cases involving the police department might reasonably be questioned (Rules, §100.3[E][1]); certainly this was so when Diamond personally appeared in respondent's court, as he did in one case. At the very least, respondent should have disclosed the relationship, subject to remittal (Rules, §100.3[F]; *see*, *Matter of Robert*, 89 NY2d 745 [1997]; *Matter of Merkel*, 1989 Annual Report 111 [Comm on Judicial Conduct][without disclosure, judge issued a warrant and disposed of a case in which her court clerk was the complaining witness]).

While this series of misdeeds, which are essentially undisputed,[1] shows insensitivity to the high ethical standards required of judges and warrants a severe sanction, we are unpersuaded that the record establishes that respondent's continued performance in judicial office threatens the proper administration of justice or that he is unfit to serve as a judge. Removal is the ultimate sanction and should be imposed only in the event of truly egregious circumstances (*Matter of Steinberg*, 51 NY2d 74, 83 [1980]; *Matter of Cunningham*, 57 NY2d 270, 275 [1982]). While serious, the misconduct described herein does not rise to the level of "egregious" misbehavior which has been held to warrant the sanction of removal (*compare*, *e.g.*, *Matter of LaBombard*, *supra*; *Matter of VonderHeide*, 72 NY2d 658 [1988]; *see also*, *Matter of F. Alessandro*, ___ NY3d ___, No. 126 [Oct. 20, 2009]). We also note that at the oral argument,

[1]At the hearing, respondent did not testify or offer any contrary evidence, permitting a negative inference to be drawn as to the allegations (*Matter of Reedy*, 64 NY2d 299, 302 [1985]).

respondent expressed remorse, acknowledged that he had exercised poor judgment with respect to these matters and stated that he is committed to ensuring that his conduct in the future is consistent with the ethical standards. Accordingly, we conclude that censure is appropriate.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur, except as follows.

Mr. Coffey, Ms. Hubbard and Judge Konviser dissent as to Charge IV and vote to dismiss the charge.

Judge Klonick, Mr. Emery and Ms. Moore dissent as to the sanction and vote that respondent be removed. Mr. Emery files an opinion, in which Judge Klonick and Ms. Moore concur.

Mr. Belluck was not present.

Dated: November 18, 2009

DISSENTING OPINION BY MR. EMERY, IN WHICH JUDGE KLONICK AND MS. MOORE JOIN

A majority of the Commission finds Hudson Falls Village Justice Michael Feeder to have committed misconduct in the context of four charges that, in the majority's opinion, warrants censure. In fact, the four counts of misconduct really comprise seven serious acts of misconduct because the first charge comprised three violations and the third charge comprises two. With respect to Charge I, Judge Feeder (1) misused his judicial powers to effectuate the arrest of a motorist he claimed failed to give way to a pedestrian; (2) acted as a judge in the same case in which he initiated the arrest; and (3) commented to the press about his vigilante arrest while the case was pending and implied that the defendant was not credible. On Charge III, the majority finds two acts of misconduct when Judge Feeder implicitly promised a mother in an *ex parte* conversation not to jail her defendant daughter notwithstanding two prior drunk-driving convictions, and then, in fact, carried through on the promise. Finally, in Charges IV and V, the majority finds misconduct as a result of Judge Feeder granting a defendant an Adjournment in Contemplation of Dismissal without consulting the District Attorney whose consent is required by law, and presiding in numerous criminal cases without revealing that he had a close, longstanding personal relationship with the Assistant Chief of Police.

Notwithstanding this veritable rampage of serious misconduct, Judge Feeder escapes with a censure. Under normal circumstances I might quietly assent to the majority's lenience, even though I disagree, for fear that to dissent would highlight a precedent which likely

will give comfort to other wayward judges. But in this case I cannot for a singular reason: when Judge Feeder came before the Commission at the oral argument, he misrepresented his earlier sworn testimony and calculatedly changed his presentation of the events to conform to the testimony of other witnesses.

Appearing before the full Commission, Judge Feeder conceded that he spoke *ex parte* with the mother of the drunk-driving defendant about her daughter's case. He tried to minimize the significance of the conversation but he clearly admitted it:

> "Tanya's mother came in and asked that I not put her daughter in jail. What I said to Mrs. Looney is, 'You know me better, you know I'm fair, have your daughter come in, have Tanya come in.' I never made a promise about keeping her out of jail; the only promise I did make was being fair. My error was allowing her to come in, and as my counsel did say, this is not a big, fancy courtroom. It's a room a fraction of the size of this room, probably more like the size of that office. My clerk wasn't there; I was there in the office and Mrs. Looney came right in. My error was not disclosing that to the district attorney. My error was not disclosing to her attorney regardless of what I said to Mrs. Looney."
>
> (Oral argument, pp. 61-62)

The Commission's Vice Chair then asked the judge whether the statement he had just made at the oral argument about that incident was consistent with his testimony during the Commission's investigation, and the judge declared that it was:

> "MR. COFFEY: …[W]ere you asked questions, if you recall at the IA, about the conversation that you had with the mother that's the subject of this complaint? Do you recall being – I don't know what the IA –
>
> JUDGE FEEDER: – I believe I was questioned and I believe I answered exactly as I –
>
> MR. COFFEY: – So your statement today in your recollection is consistent with that?
>
> JUDGE FEEDER: Yes, sir."
>
> (Oral argument, p. 63)

After the judge made this statement at the oral argument, staff counsel, on rebuttal, read from the transcript of the judge's investigative testimony, which was in evidence (Resp. Ex. C). As recounted by staff counsel, Judge Feeder, under oath, had testified earlier that

he had no recollection of speaking with Linda Looney about her daughter's case:

> "MS. CENCI: …At page 117 he testified in this manner:
> 'Question: Well, do you have a recollection of Linda Looney coming to court to speak with you prior to Tanya Looney's appearance on the most recent charge?
> Answer: Yes. My clerk had left me a note that Mrs. Looney – when I say Mrs. Looney, Linda Looney had come in requesting to speak to me –'
>
> * * *
>
> 'Question: Did you then have a conversation with Linda Looney?
> Answer: Not to my knowledge. I don't believe I did, because it was a pending case. Question' –
>
> JUDGE PETERS: – So he denied the conversation?
>
> MS. CENCI: 'So, you don't recall telling her that she did not want -- telling you that she did not want Tanya to go to jail because she, Linda Looney, has Crohn's disease and would be left with the care of Tanya's children?
> Answer: I don't recall that conversation. My impression was that -- I am aware that Linda Looney has -- I thought she had cancer but I am not sure what her ailment is.
> Question: Well, does my telling you that refresh your recollection as to any conversation that you had with Linda Looney concerning her daughter, Tanya?
> Answer: I don't recall having a conversation about Tanya specifically.'"
>
> (Oral argument, pp. 72, 74)

Judge Feeder's investigative appearance took place on November 29, 2005, only eleven months after the events at issue. Of course, the critical change in circumstances between Judge Feeder's two statements was the mother's testimony which corroborated the allegation that the *ex parte* conversation took place.

Similarly disingenuous was Judge Feeder's claim that his good friend, the Assistant Police Chief, never actually appeared before him and that that was the reason he did not reveal their relationship in criminal cases. But the Assistant Chief had, in fact, appeared before Judge Feeder, according to reliable otherwise uncontested testimony – by an attorney and, notably, by the Assistant Chief himself. Judge Feeder did not reveal the relationship even though he had vacationed with his friend and had lived at the friend's home when the judge was

having marital difficulties.

This sort of convenient "truth-telling," as recently as at his appearance before us, along with the array of the proven misconduct that Judge Feeder denied, reveals to me that Judge Feeder continues to be a danger to the public, who trusts us "to safeguard the Bench from unfit incumbents" (*Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [lll] [Ct. on the Judiciary 1975]**)**. When he committed this misconduct and then lacked candor when the Commission questioned him about it, he forfeited his privilege to judge others on behalf of the State of New York. He should be removed. Therefore, I dissent.

Dated: November 18, 2009

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JAMES P. GILPATRIC**, a Judge of the Kingston City Court, Ulster County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Nina M. Moore[1]
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
James E. Long for the Respondent

The respondent, James P. Gilpatric, a Judge of the Kingston City Court, Ulster County, was served with a Formal Written Complaint dated August 8, 2008, containing one charge. The Formal Written Complaint alleged that respondent failed to render decisions in a timely manner in 47 cases notwithstanding that he had previously been issued a letter of dismissal and caution for delayed decisions. Respondent filed a verified answer dated September 8, 2008.

[1] Ms. Moore was appointed to the Commission on April 17, 2009. The vote in this matter was taken on January 28, 2009.

By notice of motion dated September 8, 2008, respondent moved to dismiss the Formal Written Complaint. On October 6, 2008, the administrator of the Commission opposed respondent's motion and cross-moved for summary determination and a finding that Charge I of the Formal Written Complaint was sustained. Respondent replied in papers dated October 31, 2008, and the administrator filed a letter in response dated November 5, 2008. By decision and order dated December 16, 2008, the Commission denied the motion to dismiss, granted the cross-motion for summary determination and scheduled oral argument and briefs on the issue of sanctions.

Each side submitted memoranda as to sanctions. Commission counsel recommended censure, and respondent's counsel recommended a confidential disposition. On January 28, 2009, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has served as a Judge of the Kingston City Court since 1994. Until April 1, 2007, that position was part-time and respondent maintained a private law practice. Since April 1, 2007, respondent has been a full-time judge of the court.

2. From July 2004 to March 2008, in 43 cases as set forth on the annexed Schedule A, respondent failed to render decisions within 30 days of final submission as required by Section 1304 of the Uniform City Court Act. Most of the cases were small claims actions; three were summary proceedings. In 25 of the matters, decisions were issued from two to six months after final submission; 16 decisions were issued from seven months to one year after submission; one decision was issued after 14 months; and in *Quick v. Viviani*, a consolidated civil case, respondent issued a decision approximately 31 months after final submission.

3. From March 2005 to February 2008, in four cases as set forth on the annexed Schedule A, respondent failed to render decisions on motions within 60 days of final submission as required by Section 1001 of the Uniform City Court Act and Section 4213(c) the Civil Practice Law and Rules. In three cases respondent's decisions were issued from four to five months after submission, and in one case respondent issued a decision eleven months after final submission.

4. In four cases, litigants or their attorneys wrote to respondent inquiring about the delayed decisions in their cases, as set forth below.

(A) In *Riviello v. Timeout Hair Salon*, which was fully submitted on February 3, 2006, the claimant sent a letter dated August 14, 2006, to respondent inquiring about the delayed decision. When respondent did not reply, the claimant contacted respondent's administrative judge, Honorable George B. Ceresia, Jr., who sent two letters to respondent inquiring about the case (*see* Finding 5[C]). Respondent issued a decision in the case on November 3, 2006.

(B) In *Fabrico v. Eaton*, which was fully submitted on May 10, 2006, the

defendant's attorney sent a letter dated July 10, 2006, to respondent inquiring about the delayed decision. Respondent issued a decision in the case on February 2, 2007.

(C) In *Nace v. Klein*, which was fully submitted on February 23, 2007, the claimant's attorney sent a letter dated July 23, 2007, to respondent inquiring about the delayed decision. Respondent issued a decision in the case on October 30, 2007.

(D) In *Rosenbaum v. Miller*, which was fully submitted on March 9, 2007, the claimant's attorney sent a letter dated February 18, 2008, to respondent inquiring about the delayed decision. Respondent issued a decision in the case on February 26, 2008.

5. In three cases, litigants wrote to respondent's administrative judge, Judge Ceresia, about the delayed decisions in their cases, and Judge Ceresia wrote to respondent inquiring about the delays, as set forth below.

(A) In *Morales v. Lopez*, which was fully submitted on November 5, 2004, Judge Ceresia sent a letter to respondent on June 22, 2005, inquiring about the status of the matter. Respondent did not reply to the letter from his administrative judge, and Judge Ceresia sent a second letter dated August 1, 2005. Respondent finally replied to Judge Ceresia by letter dated August 10, 2005, and issued a decision on that date.

(B) In *Austin v. Tota*, which was fully submitted on November 25, 2005, Judge Ceresia sent a letter to respondent on March 30, 2006, inquiring about the status of the matter. Respondent issued a decision on April 5, 2006, and sent a letter to Judge Ceresia advising him of the decision.

(C) In *Riviello v. Timeout Hair Salon*, which was fully submitted on February 3, 2006, Judge Ceresia sent a letter to respondent on September 7, 2006, inquiring about the status of the matter. Respondent did not reply to the letter from his administrative judge, and Judge Ceresia sent a second letter dated October 2, 2006. A month later, on November 3, 2006, respondent issued a nine-page decision. This case was a small claims action which involved a $90 claim.

6. Respondent delayed in rendering decisions as set forth above notwithstanding that on February 5, 2004, the Commission issued a confidential letter of dismissal and caution to him for failing to render timely decisions in two cases and failing to report one delayed case as required to his administrative judge. The letter of dismissal and caution advised respondent that the letter "may be used in a future disciplinary proceeding based on a failure to adhere to the terms of the letter" and that the "Commission may also consider the letter…in determining sanction in any future disciplinary proceeding, in the event formal charges are sustained and misconduct is established."

Supplemental Findings:

7. Respondent reported all of the delayed matters on his quarterly reports to his administrative judge as required by the Rules of the Chief Judge (22 NYCRR §4.1).

8. All but two of the delayed cases were submitted to respondent while he was serving as a part-time judge. Respondent attributes the delays primarily to a lack of adequate resources afforded to him while he was a part-time judge.

9. Respondent states that upon becoming a full-time judge on April 1, 2007, he addressed the backlog of cases and decided all the delayed matters, and that he now has no delayed decisions pending. The record indicates that in the eleven matters pending on April 1, 2007, respondent issued decisions in three cases in April 2007 and issued decisions in the remaining eight cases between August 2007 and February 2008. The record also indicates that respondent had delays in two new matters after April 2007; in a small claims case, *Robles v. Anson*, which was fully submitted to respondent in June 2007, he did not issue a decision until nine months later.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(A), 100.3(B)(1) and 100.3(B)(7) 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.

Within 18 months of receiving a confidential letter of dismissal and caution from the Commission in February 2004 for failing to issue decisions in a timely manner, respondent developed a sizeable backlog of delayed cases that persisted over several years. Respondent's failure to render timely decisions in 47 cases over a period of three and a half years constitutes a pattern of "persistent or deliberate neglect of his judicial duties" (*Matter of Greenfield*, 76 NY2d 293, 295 [1990]), which is aggravated by numerous factors, including that: (1) respondent failed to heed the Commission's previous cautionary warning about such delays; (2) respondent received numerous letters from litigants or their attorneys inquiring about the delayed decisions; (3) in three cases in which litigants or their attorneys had written to him about the delays, respondent did not issue a decision until several months after receiving such letters; (4) respondent received letters from his administrative judge inquiring about the delayed decisions in three cases; (5) in two of the cases in which he was contacted by his administrative judge, respondent failed to issue a decision promptly after receiving such letters or even to respond to his administrative judge's inquiry, which necessitated a follow-up letter from the administrative judge; and (6) respondent did not eliminate his persistent backlog of delayed cases and continued to have delays in subsequent cases after his administrative judge's intervention. These persistent delays evidence deliberate neglect that warrants public discipline.

Respondent's delays were contrary to ethical standards and statutory mandates. A judge is required to "dispose of all judicial matters promptly, efficiently and fairly" (Rules, §100.3[B][7]). In 43 cases respondent failed to issue decisions within 30 days of final

submission as required by Section 1304 of the Uniform City Court Act.[2] Contrary to the 30-day time limit imposed by law, respondent's decisions in 25 cases were issued from two to six months after final submission; 16 decisions were issued from seven months to one year after submission; one decision was issued after 14 months; and in *Quick v. Viviani*, a consolidated civil case, respondent issued a decision approximately 31 months after final submission. In four additional cases, in which statutory mandates required decisions on motions to be issued within 60 days of final submission (CPLR §4213[c])[3], respondent issued decisions from four to eleven months after final submission.

Decisions in these 47 cases were issued an average of five to six months beyond the statutorily mandated period. Throughout this period, from November 2004 to March 2008, it appears that respondent had an average of six delayed matters pending at a given time, ranging from as few as two to as many as 13 cases.

We view such delays as serious misconduct because of the adverse consequences on individual litigants, who are deprived of the opportunity to have their claims resolved in a timely manner, and on public confidence in the administration of justice. Most of the delayed matters were small claims actions, which generally involve relatively simple issues. The "informal and simplified" procedures for small claims are intended to provide litigants with an efficient and just resolution to their legal disputes (Uniform City Court Act §1804). This goal is thwarted and litigants are adversely affected when decisions are unduly delayed. Litigants in such matters, who are often unrepresented and are hoping to receive a prompt adjudication of their claims, have little recourse when months pass without a decision; understandably, they may be concerned that if they complain about the delay, they risk antagonizing the judge who will be deciding their case.

The cases depicted in this record offer a vivid cross-section of the kinds of disputes that the "informal and simplified" procedures of small claims are intended to resolve expeditiously: tenants seeking the return of security deposits, landlords seeking damages for apartments left in poor condition, a homeowner seeking compensation for a "botched" bathroom renovation, a website designer who was unpaid after performing the contracted work, a car owner unhappy with repairs that were done. In cases where the law required a decision to be issued within 30 days, a tenant had to wait 14 months to recover $200 on a claim against his former landlord; an unhappy customer had to wait four months for a decision awarding her $2,000 for slipcovers that did not fit; a man owed $1,400 by a relative had to wait seven months for a judgment. To the litigants who filed these claims, the sums at issue were significant and the delays onerous. Moreover, for some litigants such cases may represent their only personal

[2] "Time for rendering judgment or decision. If a jury trial is not demanded or directed as provided in §1303, the court must render judgment within thirty days from the time when the case is submitted for that purpose, except when further time is given by the consent of the parties."

[3] "Time for decision. The decision of the court shall be rendered within sixty days after the cause or matter is finally submitted or within sixty days after a motion under rule 4403, whichever is later, unless the parties agree to extend the time."

involvement with the courts, and an unduly delayed resolution of their dispute would necessarily have the effect of leaving them with the impression that our judicial system is inefficient and insensitive to their concerns.

Here, the record indicates that in several cases litigants or their attorneys who finally wrote to respondent inquiring about the delayed decisions did not receive any response from the court and still had to wait months for a decision. In three cases, litigants in delayed matters were constrained to contact respondent's administrative judge, who wrote to respondent; yet, in two of these cases, even after hearing from his administrative judge, respondent did not issue a decision or even reply to the administrative judge's letter, and a follow-up letter from the administrative judge was required before respondent finally issued a decision. While one litigant who complained received a decision a short time thereafter, others who complained – and many who did not complain – had to wait for longer periods. Significantly, the inquiries from respondent's administrative judge, which occurred in the summer of 2005 and in the spring and fall of 2006, had no apparent effect in reducing respondent's persistent backlog of cases over that period; nor did they spur respondent to avoid delays on the new matters he handled.

Although respondent attributes these delays primarily to a lack of sufficient resources available to him as a part-time judge, this does not excuse the pattern of persistent delay depicted in this record. "The judicial duties of a judge take precedence over all the judge's other activities" (Rules, §100.3[A]). Every judge, whether part-time or full-time, is obligated to perform his or her duties appropriately with the resources provided and to establish priorities to ensure that decisions are not unduly delayed. "The law is a learned profession but it is also a practical one" (*Matter of Greenfield*, *supra*, 76 NY2d at 298). A judge's desire to produce a lengthy, detailed decision must be balanced against the need to issue timely decisions on a consistent basis and the litigants' desire for a prompt adjudication of their claims. Moreover, most of the delayed cases were small claims actions, involving relatively simple issues that did not require a lengthy analysis. In this case, the record of delayed decisions speaks for itself and rises to a level of misconduct that cannot be condoned.

In making this determination, we are mindful of *Matter of Greenfield*, *supra*, in which the Court of Appeals rejected a Commission determination that a Supreme Court justice had engaged in misconduct by failing to render timely decisions in eight civil cases. Although the judge's delays were "lengthy and inexcusable," the Court in *Greenfield* dismissed the misconduct charge, stating that "ordinarily delays do not constitute misconduct" and that generally such matters "can and should be resolved in the administrative setting" (*Id*. at 297, 298). Citing recently adopted rules designed to identify delays and emphasizing the role of court administrators in addressing such problems, the *Greenfield* decision makes clear that in most cases involving delays, administrative correction would likely be sufficient and, thus, delayed decisions should not form the basis for a misconduct finding. In that context, the Court warned the Commission against "interven[ing] in the administrative process whenever it believes that a judge has failed to dispose of pending matters within unspecified time limits in an unspecified number of cases and on a case-by-case basis" (*Id*. at 297).

Despite such language, the Court in *Greenfield* recognized that in some cases involving delays, disciplinary action may be both appropriate and necessary. For example, if a judge "fails to comply with administrative orders, his conduct must necessarily be deemed an appropriate subject for disciplinary action" (*Id*. at 298). The Court indicated certain situations in which disciplinary sanctions might be required, including instances "when the judge has defied administrative directives or has attempted to subvert the system by, for instance, falsifying, concealing or persistently refusing to file records indicating delays" (*Id*.). *See also*, *Matter of Washington*, 100 NY2d 873 (2003) (judge was removed for failing to render timely decisions despite repeated administrative intervention, failing to report the delays to court administrators and failing to cooperate with the Commission).[4]

In light of these guidelines, we have carefully considered the facts presented in this case. Based on the number of delayed decisions as well as the factors noted above (*i.e*., respondent's failure to heed the Commission's cautionary warning, his failure to issue a decision promptly even after litigants had contacted his court about the delays, his failure in two cases to issue a decision promptly after receiving a letter from his administrative judge or even to respond to the administrative judge's inquiry, and his inability to eliminate his persistent backlog of delayed cases or to avoid further delays after his administrative judge's intervention), we find that respondent's behavior falls within the parameters of misconduct established in *Greenfield*.

In *Greenfield*, which involved delayed decisions in eight cases (some of which included delayed decisions on several motions), the Court found that there was "no persistent or deliberate neglect" of judicial duties and that "[i]n the context of [the judge's] over-all performance these were isolated incidents" (*Id*. at 295, 299). In sharp contrast, the instant case involves a sustained pattern of delayed decisions in 47 cases over a period of three and a half years. Those delays were neither isolated nor inadvertent. There is no claim that respondent was unaware of the delayed matters; indeed, he reported all of the delayed cases, as he was required to do, on his quarterly reports to his administrative judge. Yet, notwithstanding that he had identified the delayed cases, respondent permitted numerous cases to linger for an additional three-month reporting period – and, in some cases, for several such periods – before finally disposing of the matters. This pattern of neglect persisted for more than three years, in disregard of the specific time limits imposed by law.

Further, as we have noted, most of the delayed matters here were small claims actions, involving relatively simple issues. In contrast, the cases in *Greenfield* were complex real estate and admiralty cases with multiple parties.

Of particular significance is respondent's failure to heed a Commission letter of dismissal and caution for similar misconduct, which was issued in February 2004. The Commission's directive addressed not only respondent's failure to render timely decisions in two cases, but also his failure to report a delayed case as required on his administrative reports. The

[4] In response to the dissent's view that the Commission lacks jurisdiction even to investigate delays, we note that in *Washington*, as the Court observed, the Commission's investigation began with an inquiry into an allegation that the judge had a single 16-month delay in issuing a decision.

letter of dismissal and caution specifically warned respondent that the letter "may be used in a future disciplinary proceeding based on a failure to adhere to the terms of the letter." Thereafter, although respondent did comply with the cautionary warning by reporting delays as required, he failed to adhere to the same specific statutory guidelines for issuing decisions that were cited in the Commission's letter, *i.e*., the requirements that decisions be issued within 30 days and that motions be decided within 60 days of final submission. A judge's disregard of a prior warning in a letter of dismissal and caution that his or her conduct was contrary to the Rules is a significant aggravating factor in disciplinary proceedings. *Matter of Cerbone*, 2 NY3d 479 (2004); *Matter of Assini*, 94 NY2d 26, 30-31 (1999) ("[r]ather than scrupulously following the letter and spirit of the Commission's caution, [the judge] continued the [prohibited activity]"); *Matter of Robert*, 89 NY2d 745, 747 (1997).

As the majority in *Greenfield* recognized, the circumstances in that case were "unique" since "the reporting rules were in their infancy when most of the delays occurred" (*Id*. at 299). The Court made clear its view that in the future, those requirements would be consistently applied and enforced in order to avoid persistent, unacceptable delays. Those requirements have now been in effect for more than twenty years. Indeed, the Commission in its letter of dismissal and caution drew respondent's attention to the reporting rules and the statutory time limits for rendering decisions. Despite these circumstances, despite receiving numerous inquiries from litigants about delays and despite the involvement of his administrative judge, respondent continued to have persistent delays that evidence deliberate neglect. Therefore, based on the particular facts presented here, we conclude that respondent's conduct was contrary to the ethical rules and warrants a disciplinary sanction.

In considering an appropriate sanction, we note that some months after receiving the Commission's letter of dismissal and caution, respondent suffered a relapse of the disease of alcoholism, which required extended treatment (*see*, *Matter of Gilpatric*, 2006 Annual Report 160 [Comm on Judicial Conduct]). While the record indicates that some delays began soon after respondent returned to the bench after a three-week absence in October 2004 and that by the following summer he had at least eleven cases pending in which decisions were overdue, we note that by early 2006 respondent had reduced the backlog to just two cases. Then, inexplicably, the number of delayed matters increased again. He did not decide nine cases heard in March 2006 until July and August 2006, and he did not decide four cases heard in July 2006 until February 2007. Thus, it is clear that his three-week absence in 2004 cannot excuse the three years of delays that followed.

Further, we note that respondent's administrative judge was compelled to intervene in three cases by inquiring about the delays and, in two cases, was constrained to send a second letter a month later since respondent neither replied to the initial inquiry nor issued a decision. In one case in which the administrative judge's second letter had requested a response "immediately," respondent did not issue a decision until a month later, nine months after final submission of the case.

We have also considered several mitigating factors. Significantly, respondent

reported all the delayed matters as required on his quarterly reports. Thus, there is no indication that he attempted to conceal the delays or to subvert the efforts of court administrators to monitor the delayed matters. Compare, *Matter of Washington*, *supra*.

We also note that during this period it appears that respondent assumed additional adjudicative responsibilities, including instituting a domestic violence court, and eliminated a backlog of cases that had accrued in the vehicle and traffic part, which averaged 5,300 filings a year.

Finally, we note that respondent states that upon becoming a full-time judge, he addressed the backlog of delayed cases, disposed of all the delayed matters and no longer has any delayed decisions.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Ms. Hubbard, Mr. Jacob, Judge Konviser and Judge Ruderman concur. Mr. Emery files a concurring opinion.

Mr. Harding dissents only as to the sanction and votes that respondent be issued a letter of caution.

Mr. Belluck dissents and votes to dismiss the charge in an opinion.

Ms. Moore and Judge Peters did not participate.

Dated: June 5, 2009

SCHEDULE A

SMALL CLAIMS CASES

Case	Final Submission	Date of Decision	How Long Pending
Quick v. Viviani (civil case consolidated with small claims)	6/10/04	1/31/07	31.5 months
Aluminum House v. Renfrow	10/29/04	10/28/05	1 year
Morales v. Lopez	11/5/04	8/10/05	9 months
Little v. Herdman	1/28/05	4/22/05	3 months

Leong v. Scilabro	2/18/05	8/10/05	6 months
Rosacker v. Lightfoot	3/11/05	10/15/05	7 months
McCausland v. Sands and Rizzo	3/18/05	8/10/05	5 months
Colden v. Fowler	4/14/05	10/15/05	6 months
Hanowitz v. Troeger	4/15/05	8/10/05	4 months
Moshonas v. Prokopuk	4/15/05	10/15/05	6 months
Faircloth v. Monroe	4/29/05	10/28/05	6 months
Peppers v. Mehl	9/30/05	1/31/06	4 months
Mathis v. Olen	1/20/06	3/21/06	2 months
McMahon v. Wilke	1/27/06	3/21/06	2 months
Riviello v. Timeout Hair Salon	2/3/06	11/3/06	9 months
Sullivan v. Leonard	3/3/06	8/16/06	5.5 months
Rogers v. Ellenridge	3/10/06	7/14/06	4 months
Horowitz v. Chernick	3/10/06	7/17/06	4 months
Bohan v. Koltz	3/24/06	8/11/06	4.5 months
Miller v. Terpening	3/24/06	8/8/06	4.5 months
Cammarata v. Malik	3/31/06	7/17/06	3.5 months
Clarke v. White	3/31/06	7/14/06	3.5 months

Dinoris v. Vandermark	3/31/06	7/14/06	3.5 months
Puffer v. Gokey	4/12/06	7/13/06	3 months
Fabrico v. Eaton	5/10/06	2/2/07	9 months
Guido v. Hinson	7/7/06	2/2/07	7 months
Guido v. Holmes	7/7/06	2/2/07	7 months
Woitasek v. Rucci	7/7/06	2/16/07	7 months
Lawson v. Tim's Automotive	7/28/06	2/2/07	6 months
Goralewski v. Brewer	11/24/06	4/6/07	4.5 months
Goralewski v. Kingston Pontiac	11/24/06	4/6/07	4.5 months
Hamberger v. Winkler	12/1/06	3/29/07	4 months
Kapilevich v. E3, Inc.	12/6/06	4/30/07	5 months
Tripp v. Meehan	12/8/06	2/8/08	14 months
Glass v. Krakle	2/23/07	11/1/07	8 months
Nace v. Kline	2/23/07	10/30/07	8 months
Velez v. Birchwood	3/7/07	1/30/08	11 months
Rosenbaum v. Miller	3/9/07	2/26/08	11.5 months
Rose v. Lockwood	3/12/07	10/30/07	7.5 months
Robles v. Anson	6/14/07	3/28/08	9.5 months

SUMMARY PROCEEDINGS

Case	Final Submission	Date of Decision	How Long Pending
Ford v. Novick	3/18/05	10/28/05	7 months
Kingston Housing v. Faggins	4/7/06	2/2/07	10 months
Malik v. Pease	2/07	8/6/07	6 months

MOTIONS

Case	Final Submission	Date of Decision	How Long Pending
Boyd v. Oakley	1/14/05	6/7/05	5 months
Ulster Credit Union v. Baker	3/7/06	8/9/06	5 months
Rieker v. Encompass Insurance	3/16/07	2/11/08	11 months
Fairjohn Realty v. IPE	6/25/07	10/25/07	4 months

CONCURRING OPINION BY MR. EMERY

The debate between the dissent and the Commission's determination focuses on the niceties of the almost 20 year-old *Greenfield* decision and engages in an exhaustive comparison between the facts underlying Judge Gilpatric's misconduct and Justice Greenfield's excused neglect. Both analyses miss the forest for the trees. The issue posed by this case is whether the Court of Appeals will adhere to its *Greenfield* proclamation that even long delays of sub judice decisions, absent defiance of administrative directives or nondisclosure of pending delayed cases, are NOT judicial misconduct. It seems clear that *Greenfield's* holding is too broad and not in service of the canon of judicial ethics that requires every judge to "dispose of all

judicial matters promptly, efficiently and fairly" (22 NYCRR §100.3[B][7]).

One need not be a strict constructionist to see clearly that Judge Simons' dissent in *Greenfield* is correct that the *Greenfield* majority expanded on the plain words and meaning of the rule:

> The rule is not violated, [the majority] holds, unless there is delay coupled with other derelictions [citations omitted]. The rule contains no such qualifying conditions and nothing should be added to it. To require delay plus some other misconduct, such as falsification of records or insubordination, is to proscribe the other conduct, not to proscribe delay. (76 NY2d at 304-05)

But delay is itself proscribed by the rule. Therefore, the issue should not be, as the Commission's determination and the dissent exhaustively debate, whether administrative actions or disclosure requirements or even prior private cautionary warnings talismanically obviate the prejudicial effect of delays which are not de minimis. Rather, the issue for the Court of Appeals and the Commission, 20 years after *Greenfield*, is what is de minimis or harmless delay as opposed to delay which rises to the level of misconduct.

I understand that we are saddled with *Greenfield* and that is why this obtuse debate is unavoidable. But to carry on this debate without recognizing that it is ultimately irrelevant is too Talmudic for me.

The challenge is straightforward. The Commission, the Court of Appeals and all parties agree that not every delay is misconduct. It should not be an elusive task to define when delay is misconduct. We know that this does not depend on how administrative judges react or whether judges disclose their delayed matters. We know that applicable statutes and rules define deadlines for decisions on motions and matters submitted to the courts for rulings. We know that especially complicated matters warrant flexibility. We know that exigencies such as illness are valid excuses. Obviously, the judicial canon is subject to reasonable objective exceptions. The Court of Appeals should define them to guide us and the judiciary.

What is plainly not tolerable is unexplained, persistent patterns of delayed decision-making which eviscerate any perception of fairness and confidence the public, litigants and counsel are promised by the constitutional guarantees of meaningful access to the courts. Judges who cannot or will not decide, should not. Each judge has this responsibility first. And no rationalization or deflection of that responsibility can shift the focus away from an appropriate finding of misconduct. In the end, if judges are to preserve their independence and respect, they must do their job and accept the burden of judging. If they do not, it is the Commission's and the Court of Appeals' constitutional responsibility to protect the public from this corrosive form of neglect and to impose disciplinary sanctions that are appropriate.

Because the record in this case clearly demonstrates that respondent failed to

uphold his end of his vocational bargain, I concur in the result.

Dated: June 5, 2009

DISSENTING OPINION BY MR. BELLUCK

"Delay is preferable to error" (Thomas Jefferson, Letter to George Washington, May 16, 1792).

I respectfully disagree with the determination to admonish Judge Gilpatric and therefore dissent. Absent specific aggravating circumstances, the handling and correction of judicial delays should be an administrative function of the courts. The Court of Appeals made this clear in *Matter of Greenfield* by holding in unambiguous language that this Commission does not have jurisdiction to discipline judges for delays in rendering decisions – unless, as an aggravating factor, the judge "has defied administrative directives or has attempted to subvert the system" (76 NY2d 290, 298 [1990]). From my personal examination of this entire record, there is no evidence of any such conduct here. The majority's reliance on a prior letter of dismissal and caution as a bootstrap for finding misconduct is inconsistent with both the letter and spirit of *Greenfield*, which plainly states that it is the role of court administrators, not the Commission, to monitor a judge's delays in disposing of cases and to intervene when necessary to address delays. By admonishing Judge Gilpatric, the Commission ignores the clear dictates[5] of *Greenfield* and disciplines a judge for conduct for which the Court of Appeals has made clear we have no jurisdiction.

In *Greenfield*, the Court rejected the Commission's effort to discipline a judge for delays, stating emphatically that the Commission's urging of discipline for such matters was an impermissible intrusion into the administrative functions of the courts:

> Basically [the Commission's argument] would permit the Commission to intervene in the administrative process whenever it believes that a Judge has failed to dispose of pending matters within unspecified time limits in an unspecified number of cases and on a case-by-case basis.
> In our view a clearer line must be drawn between the role of the Commission and court administrators in order to avoid confusion and provide adequate notice to members of the judiciary as to when and under what circumstances delays in disposing pending matters ceases to be a purely administrative concern and becomes a

[5]In dissenting, I distinguish the circumstance here, where, on a more egregious record of delays, the Court of Appeals concluded that the Commission had no jurisdiction over the subject matter, from instances where I believe we should refrain from disciplining judges who violate rules and laws that place unconstitutional or unreasonable restrictions on judges.

> matter warranting punitive sanctions. **We have concluded that generally these matters can and should be resolved in the administrative setting and that the more severe sanctions available to the Commission should only be deemed appropriate and necessary when the Judge has defied administrative directives or has attempted to subvert the system** by, for instance, falsifying, concealing, or persistently refusing to file records indicating delays. (*Id*. at 298) (Emphasis added.)

Notably, while stating that "the more severe sanctions available to the Commission" should be reserved for instances involving aggravating circumstances, the Court, having concluded that no such factors were present, did not impose a reduced sanction, but dismissed the charge outright. The holding in *Greenfield* could not be clearer: delays in issuing decisions – even "inexcusable" delays of up to nine years in deciding motions, even when there was administrative intervention, and even when, in four separate cases, litigants were constrained to initiate Article 78 proceedings to compel a decision – do not constitute misconduct and are a matter for court administrators, not the Commission.

Following the *Greenfield* decision, the Commission, as evidenced by its annual reports and disciplinary decisions, has attempted to chip away at the Court's holding that the Commission's exercise of its disciplinary function does not extend to delayed decisions. The Commission has continued to investigate allegations of delays. According to the Commission's annual reports, in the last five years 99 complaints alleging delays were investigated and 14 judges were issued cautionary letters for delays in disposing of cases. In several cases the Commission has held that delays in issuing decisions constitute misconduct warranting discipline (*e.g.*, *Matter of Scolton*, 2008 Annual Report 209 [delays in issuing decisions in two small claims cases as well as in scheduling hearings]; *Matter of Baldwin*, 2009 Annual Report 88 [delays in three small claims cases, in which the judge never issued a decision]).[6] Perhaps significantly, in *Scolton* and *Baldwin* the discipline was the result of a negotiated disposition in which the unrepresented respondents concurred. Commission Counsel relies on those cases in arguing that, notwithstanding *Greenfield*, delays in issuing decisions can constitute misconduct. This is, in my view, misleading and disingenuous.

Since the Court of Appeals has held that delays, standing alone, do not constitute misconduct, in my view the Commission lacks jurisdiction to investigate allegations of delay, let

[6] In two other cases, *Matter of Washington*, 100 NY2d 873 (2003) and *Matter of Robichaud*, 2008 Annual Report 205, the Commission found misconduct for delays that were squarely within the parameters of *Greenfield* since the judges, *inter alia*, had concealed the delays from court administrators by failing to report the delayed cases as required. Notably, in *Washington* the Court underscored its holding in *Greenfield*, stating: "Unquestionably, delays in deciding pending cases should be addressed administratively" (*Id*. at 877).

alone to issue cautionary letters, absent aggravating factors.[7] The incremental steps taken by the Commission to expand its jurisdiction in this area, I believe, are completely contrary to *Greenfield*. First, investigating allegations of delay to determine whether aggravating factors exist is a fishing expedition unless the Commission, prior to investigation, has direct *prima facie* information of concealment or failure to follow administrative directives. (By the same logic, the Commission could investigate every judge who reports any delayed cases on his or her reports to court administrators.) Second, issuing cautionary letters to judges for simple delays in issuing decisions is contrary to *Greenfield*, which, in stating that delays should be addressed administratively and not in a disciplinary framework, makes no exception for confidential cautionary letters. In this case, the Commission is using a cautionary letter as an aggravating factor to ratchet subsequent delays to the level of misconduct.

In my view, this is a most uncompelling case for the Commission to assert that a case for misconduct can be made under the *Greenfield* guidelines. The facts here provide absolutely no evidence that the judge "defied administrative directives" or "attempted to subvert the system," which would provide a basis for disciplinary action under *Greenfield*. Over a period of four years, Judge Gilpatric, who, according to his counsel's statements during oral argument, handled at least 3,000 cases during this period, had delays in issuing decisions in only 47 cases. In 28 of those cases, decisions were issued in six months or less (some decisions were only a month or two late). In 17 matters, decisions were issued from seven months to a year after final submission. In only two cases were the delays longer than one year: in one case, the decision was issued after 14 months, and in the other case – a consolidated civil case which involved numerous counterclaims and had a 1,000-plus page record – there was a 31-month delay. In sum, it appears that the judge had some delays in issuing decisions in about a dozen cases out of 700-800 cases per year, and the average delay in those 12 cases was less than six months. This pales beside the egregious delays in *Greenfield*, which were held not to constitute misconduct (including a seven-year delay in issuing a decision after a trial and delays ranging from five to nine ***years*** in issuing decisions on seven motions [in total, Judge Greenfield had 15 delayed decisions]). While no delays at all would be preferable, it is simply not realistic to expect there to be no judicial delays given the heavy workload of most judges.

Most significantly, perhaps, Judge Gilpatric reported all of the delayed cases as required on his quarterly reports to his administrative judge. Reporting delays to court administrators permits those officials to monitor a judge's caseload and, when necessary, to take appropriate corrective action. Indeed, the requirement that judges report delayed matters to court administrators on a regular basis (22 NYCRR §4.1) indicates that the system recognizes that some delays, although regrettable, do occur. In this case, there was no concealment of the delays, no falsifying of reports, and no indication whatsoever that respondent tried to subvert administrative monitoring of his delayed cases. To the contrary, the record indicates that the

[7] On these issues, I respectfully disagree with the majority. These differences may remain unresolved until the Court of Appeals has an opportunity to address whether the Commission has authority to investigate allegations of delay in issuing decisions without *prima facie* evidence of aggravating factors, to issue confidential letters of dismissal and caution in such circumstances, and to discipline a judge for delays in issuing decisions in the absence of the aggravating factors cited in *Greenfield*.

system implemented and overseen by court administrators worked precisely as it was designed to do. Judge Gilpatric's delays were fully disclosed and monitored; beyond the inquiries by his administrative judge in three cases, there is no indication in the record of any remedial action or corrective measures by court administrators – perhaps because, in their view, none were necessary. Moreover, as noted below, the record reflects that the issues that contributed to Judge Gilpatric's delays, including insufficient support staff while he was a part-time judge, no longer exist, and he no longer has delays.

Mindful of the *Greenfield* holding that delayed decisions do not constitute misconduct in the absence of specific aggravating factors, the Commission finds that several aggravating factors exist in this case, most notably: (1) the intervention of respondent's administrative judge in three cases, and respondent's alleged failure to timely decide cases despite these administrative inquiries; (2) the fact that the judge had previously been issued a letter of dismissal and caution for delays in two cases; and (3) the judge's purported "persistent neglect" of his duties. Upon close scrutiny, none of these claims provides a convincing basis for a finding of misconduct.

With respect to the administrative judge's intervention, the Court of Appeals stated in *Greenfield* that litigants who face delays should seek the assistance of an administrative judge, which is precisely what happened in this case. The record shows that in response to inquiries from litigants in three cases, respondent's administrative judge wrote to him inquiring about the status of the matters, and thereafter respondent issued decisions – in one case within a week, and in two cases within two months. (When respondent did not reply to the administrative judge's inquiry in two cases, a follow-up letter was sent; the record indicates that in response to one follow-up letter, respondent advised the administrative judge that he had been on vacation and had misplaced the first letter, and he issued a decision a week later.) From this record, it certainly cannot be concluded that Judge Gilpatric "defied administrative directives" or was not responsive to administrative intervention. Rather, it appears that he was entirely cooperative with court administrators and that the system of administrative oversight worked precisely as the Court of Appeals anticipated it would work in most instances.

The Commission's conclusion that the intervention of the administrative judge, by itself, is a sufficiently aggravating factor to elevate this case to misconduct is completely contrary to the letter and spirit of *Greenfield*, which encourages active administrative oversight. Indeed, in *Greenfield*, the Court of Appeals found no misconduct despite finding that court administrators had spoken to the judge on numerous occasions about his delays in rendering decisions (*Id*. at 296; *see also*, *Id*. at 303).[8] (*Compare*, *Matter of Washington*, decided after *Greenfield*, in which the Court, in removing the judge for delays, found that in addition to filing "late, incomplete and false" reports of delayed cases, the judge had defied the strenuous efforts of her administrative judge to assist her in reducing a persistent backlog of delayed matters

[8] The Commission had found that Judge Greenfield's administrative judges "spoke to him six to twelve times concerning delays" (*Matter of Greenfield*, 1990 Annual Report 104).

[*supra*, 100 NY2d at 877].) The argument here that any delays that occurred subsequent to the administrative judge's inquiries constitute a defiance of court administrators is simply another attempt at bootstrapping.

Nor does the fact that four litigants or their attorneys[9] sent letters to respondent inquiring about the delays constitute an aggravating factor that distinguishes this case from *Greenfield*. In *Greenfield*, the record indicates that the judge ignored repeated inquiries from litigants about the delays – one litigant communicated with the judge's chambers 24 times to request a decision! Four litigants in *Greenfield* commenced Article 78 proceedings to compel a decision. By those measures, Judge Gilpatric's case is far less egregious than *Greenfield*, where no misconduct was found.[10]

With respect to the prior letter of dismissal and caution, I respectfully submit that it should not be considered an aggravating factor under *Greenfield*, for the reasons stated above. The misconduct referred to in the letter of dismissal and caution was that the judge delayed issuing decisions in two cases and failed to report one delayed case as required to his administrative judge. Notably, after receiving the cautionary letter, the judge assiduously reported every case that exceeded the applicable time limits. To focus solely on the issue of delays and to allow the Commission to create an aggravating circumstance by first issuing a cautionary letter for one or two delays and then using the letter to circumvent *Greenfield* when the judge has delays in the future is completely circular. By such logic, a judge who has even one delayed decision might be cautioned, and then any future delays could be deemed as violating or ignoring the caution, in order to bring the delay to the level of misconduct. Moreover, since the Court of Appeals has stated that "unquestionably" delays should be addressed administratively, it seems clear that the Commission has no jurisdiction to caution a judge for delays without aggravating circumstances in the first place. By issuing cautionary letters for delays (and then arguing that subsequent delays constitute a "defiance" of its "directives" that warrants discipline), the Commission in my view is usurping the role that, according to the *Greenfield* court, is the domain of court administrators.

Finally, Commission counsel argues that in contrast to Judge Greenfield, who had "no persistent or deliberate neglect of his judicial duties rising to the level of misconduct" (76 NY2d at 294), Judge Gilpatric's neglect was "persistent," as evidenced by the numbers of delayed matters. As noted above, that argument is simply not borne out by the numbers of cases that were delayed. Moreover, in *Greenfield* the Court expressly warned the Commission against "interven[ing] in the administrative process" by deciding arbitrarily that a particular number of delays in issuing decisions, or delays of a particular length, constitute misconduct (*Id*. at 297). Equally important, there is no indication in this record that Judge Gilpatric was anything other than a hard-working, conscientious judge, that he was not devoting sufficient time to his judicial

[9] Many of the parties in these cases were represented by counsel; indeed, some parties were corporations or municipal agencies.

[10] Nor is it a distinguishing factor in this case that Judge Gilpatric's delays were contrary to statutorily mandated time periods for issuing a decision. In *Greenfield*, as the dissent noted, the judge's delays were also contrary to a specific statutory mandate (CPLR 2219[a]) (*Id*. at 301).

duties or that he was indifferent to his responsibilities as a judge. To the contrary, it appears that he is a dedicated, productive jurist whose administrative judge assigned him additional responsibilities during this same period (including establishing a domestic violence part).

Several other factors are compelling in this case. In each of the delayed cases, Judge Gilpatric issued a written decision, and his opinions averaged three pages in length. Faced with a heavy caseload and minimal support staff during most of this period, he could have quickly disposed of all the delayed matters simply by issuing a one-sentence decision. Instead, it appears that he attempted in each case to write a thoughtful, detailed opinion that would give the parties a sense that their concerns were carefully and fully considered. Also, a review of Judge Gilpatric's decisions indicates that almost all of the cases involved multiple exhibits, testimony by witnesses, and, in many cases, complex or novel legal claims requiring citation to statutes and codes.

To be sure, as the majority points out, delays are unfair to litigants, and perhaps the litigants would have preferred a shorter decision if it were issued more promptly. But as the Court of Appeals stated in *Greenfield*, in an eloquent twist on Jefferson's statement quoted herein: "Litigants should not be put to the added expense of having to appeal erroneous decisions hastily made when the court could have prevented the error if it had devoted additional time to reviewing the case and researching the applicable law" (*Id*. at 298).

The majority, in an attempt to support its discipline of Judge Gilpatric, points out that litigants had to wait for judicial decisions that were of great importance to the litigants. I would certainly never trivialize any delay that a litigant has to endure -- any time a litigant is involved in the legal system, it is important that decisions are made as timely as possible and that the burdens of the judicial process are minimized. Every case is important to the litigants involved. However, the fact that certain litigants were forced to encounter delays does not in and of itself translate into misconduct that we should be disciplining. I also note that while the record indicates that in six of the 47 cases litigants or their attorneys contacted Judge Gilpatric or the administrative judge to inquire about the delay, there is scant evidence in the record as to the particular impact of the delays on parties. In twelve of the small claims cases, the claims were ultimately dismissed.

The evidence in the record is that during most of the relevant time period, when Judge Gilpatric's position was part-time, he had minimal support staff, had no assistant or law clerk, was forced to work in a courthouse undergoing renovation, and operated out of temporary facilities at a former jail. At one point, the Chief Clerk and Deputy of his court retired and no replacements were immediately appointed. No secretarial staff was available to type, copy or distribute his decisions. Upon becoming full-time, Judge Gilpatric addressed the backlog of cases and decided all the delayed matters. The judge maintains that he now has no delayed matters pending.

Although there is no detailed evidence in the record as to the judge's total caseload during the period at issue, it appears to be substantial. During oral argument, Judge

Gilpatric's attorney indicated that the judge handled at least 3,000 cases over the period at issue.

Finally, as the majority points out, near the start of this period the judge had a relapse of the disease of alcoholism, for which he was treated in an in-patient facility. Throughout this period, his recovery was no doubt a priority.

In light of all these factors, even if the majority believed that there were aggravating factors in addition to delays – and I find no such factors in this record – they should be mitigated significantly by the above circumstances.

The preamble to the Rules Governing Judicial Conduct underscores that the "rules of reason" should be applied in disciplinary proceedings:

> The rules governing judicial conduct are rules of reason...
> It is not intended … 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.

Applying these principles, I believe Judge Gilpatric's delays do not warrant disciplinary action and that the harsh result here is unjust and incorrect as a matter of law. I respectfully dissent and vote to dismiss.

Dated: June 5, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **PAUL J. HERRMANN**, a Justice of the Saranac Lake Village Court, Franklin County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard

Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Charles F. Farcher and Thea Hoeth, Of Counsel) for the Commission
Corrigan, McCoy & Bush, PLLC (by Scott W. Bush) for the Respondent

The respondent, Paul J. Herrmann, a Justice of the Saranac Lake Village Court, Franklin County, was served with a Formal Written Complaint dated September 15, 2008, containing two charges. The Formal Written Complaint alleged that respondent attempted to dispose of a case in a manner intended to raise funds for the Village and that he engaged in improper political activity. Respondent filed an answer dated October 3, 2008.

By Order dated January 22, 2009, the Commission designated David M. Garber, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 18 and 20, 2009, in Albany. The referee filed a report dated September 15, 2009.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended that the judge be censured, and the judge's attorney recommended that the charges be dismissed. On November 5, 2009, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a Justice of the Saranac Lake Village Court and has served in that capacity since April 2006. He previously served in that position in 1990 to 1991. He is an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about October 15, 2004, the Saranac Lake Village Police Department charged Chad Amell with Driving While Intoxicated ("DWI"), a misdemeanor; Open Container, a traffic infraction; and Unlawful Possession of Marijuana ("UPM"), a violation.

3. In December 2004 Mr. Amell's then-attorney, Gregory D. LaDuke, and Chief Assistant District Attorney John D. Delehanty negotiated a plea arrangement whereby Mr. Amell agreed to plead guilty to a reduced charge of Driving While Ability Impaired ("DWAI") in satisfaction of all the charges. Under the plea arrangement, Mr. LaDuke and ADA Delehanty agreed that Mr. Amell would be sentenced to a conditional discharge and the fine amount would be determined by then-Saranac Lake Village Justice Thomas Glover.

4. The proposed plea arrangement was never presented to Judge Glover for approval. The *Amell* case remained pending until respondent, who had succeeded Judge Glover as Village Justice, calendared it for September 6, 2006.

5. On that date, Mr. Amell appeared before respondent with his new counsel, Virginia Morrow. Ms. Morrow advised respondent of the plea arrangement and Mr. Amell's desire to plead guilty to DWAI in satisfaction of the original charges as well as a subsequent Open Container charge.

6. Respondent refused to accept the plea arrangement because, under applicable law, none of the fines imposed for a DWAI conviction are paid to the Village, and respondent believed that the Village should receive some money for its work in the *Amell* proceeding. Respondent stated, in substance, "We get no money back from DWI cases" and "someone has to generate money for the Village to support the expensive police department" because otherwise, taxes would go up. Respondent informed Ms. Morrow and ADA Delehanty that he would accept Mr. Amell's guilty plea to DWAI only if accompanied by a plea to the Open Container charge and the imposition of a maximum fine which, under applicable law, would be paid to the Village.

7. The Saranac Lake Village Board had previously advised respondent that the Village Court had a revenue-generating function and must be self-sustaining through the imposition and collection of fines. The Board occasionally had chastised respondent when, in its view, he failed to carry out the court's revenue-generating function. On occasion, pressured by the Board to generate monies for the Village, respondent supported his requests to the Board for supplies and equipment by emphasizing the court's revenue-generating function.

8. Ms. Morrow and ADA Delehanty objected to respondent's rationale for rejecting the plea arrangement and argued that the Village Court should not be a revenue-generating arm of the Village. Respondent was unpersuaded by their arguments and granted Ms. Morrow's request for an adjournment in order to discuss respondent's proposed plea with the defendant.

9. On the adjourned date, September 20, 2006, Mr. Amell and his attorney again appeared before respondent. Prior to ADA Delehanty's arrival, Ms. Morrow advised respondent that the defendant would accept respondent's proposed plea by pleading guilty to DWAI and the Open Container charge. Respondent mentioned that Mr. Amell had been charged with a new Open Container violation and told the attorney, "Why would the cop take the time to write the ticket [for the Open Container] if it weren't true?" and "the time for 'allegedly' is gone." These statements were inconsistent with the presumption of innocence to which the defendant was entitled.

10. Upon ADA Delehanty's arrival, respondent proposed a revised plea arrangement that would include a guilty plea not only to DWAI and Open Container but also to the UPM charge, with the maximum fines permitted by law; in the alternative, respondent stated,

Mr. Amell could plead guilty to DWAI alone and, if he did so, respondent would sentence him to a 15-day term of incarceration.

11. Explaining his new proposed plea arrangement, respondent said that the Village of Saranac Lake would derive revenue from fines imposed for Mr. Amell's pleas to the Open Container and UPM charges and that, because the Village would not receive any money from a fine for a DWAI charge, incarceration would replace a fine as a penalty if the defendant pleaded to that charge alone. Respondent again referred to the "expensive police department" and said that he "wanted to be able to have some money go to the village rather than have it all go to the state."

12. Ms. Morrow and ADA Delehanty reiterated their objections to respondent's statements about generating revenue for the Village and said that that "should not be the primary concern of the court."

13. On September 20, 2006, Mr. Amell pleaded guilty to DWAI only, and, as promised, respondent sentenced him to a 15-day term of incarceration in the Franklin County Correctional Facility.

14. On September 21, 2006, Mr. Amell's attorney filed a Notice of Appeal from respondent's Judgment of Conviction and Sentencing Order. On the same date, ADA Delehanty applied to Supreme Court Justice David Demarest for an Order releasing Mr. Amell pending his appeal, and the application was granted, staying Mr. Amell's sentence pending appeal and directing his release from custody.

15. In his Answer dated September 22, 2006, to the ADA's application, respondent stated that the Village received no money from fines for DWI or DWAI and that "[t]he Village should receive some money for its work" in the *Amell* case. Respondent's Answer commented upon his disagreement with Ms. Morrow and ADA Delehanty over the plea arrangement, insisted that Mr. Amell "would have to plead guilty to the Marijuana violation and the Open Container infraction if he wanted to plea[d] to DWAI," and stated that "given the time that had past [sic] between [Amell's] arrest and plea, he should pay the maximum fines" on the DWAI, UPM and Open Container charges.

16. Following the filing of the Notice of Appeal, radio station WNBZ News Director Christopher Knight sent respondent a copy of the ADA's application to release Mr. Amell and asked to interview respondent about the *Amell* case. Respondent agreed to be interviewed and sent Mr. Knight a copy of his Answer to the ADA's application.

17. In his interview with Mr. Knight on or about September 25, 2006, respondent defended his conduct in the *Amell* case, stating, "I don't have to take a plea proposal…I think [Ms. Morrow and Mr. Delehanty are] used to having their plea proposals rubber stamped by the court." According to the article posted on the WNBZ website, respondent told Mr. Knight that "he wanted to collect more fine money from Amell because of the amount

of work police had to do in the case."

18. Respondent was also interviewed about the *Amell* case by Jacob Resnick, a reporter for the *Adirondack Daily Enterprise*. As reported in an article published on September 26, 2006, respondent told Mr. Resnick that Chad "got quite a deal, quite a break," and "[a]fter negotiating a misdemeanor down to an infraction, I think Mr. Amell should have to pay the fines." Respondent also informed Mr. Resnick, in substance, that the Saranac Lake Village Court had to pay for itself and should not be supported by Village taxpayers, that the court had a revenue-generating function, and that respondent did not want to incarcerate Mr. Amell but only wanted him to pay fines that would be paid to the Village.

19. On September 26, 2006, respondent wrote a letter to the editor of the *Adirondack Daily Enterprise* responding to statements attributed to Mr. Amell's grandfather in the Resnick article. Respondent's letter, *inter alia*, corrected the article's description of the amount of the maximum fine that could have been imposed and the distribution between the State and Village of the fine amounts.

20. When respondent agreed to be interviewed by Mr. Knight and Mr. Resnick, he knew or should have known that Mr. Amell had filed a Notice of Appeal of respondent's Judgment of Conviction and Sentencing Order.

21. By Decision and Order dated June 1, 2009, County Court Judge Robert G. Main, Jr. dismissed the appeal on the basis that it was not perfected.

22. At the Commission hearing before the referee, respondent acknowledged that in exercising his judicial discretion with respect to the proposed December 27, 2004 plea arrangement, he considered whether the fines would be paid to the Village, and that he should not have done so.

As to Charge II of the Formal Written Complaint:

23. On January 29, 2008, respondent attended and participated in the Village of Saranac Lake Democratic Party caucus. At the caucus, respondent nominated John Sweeney as the Party's candidate for the Saranac Lake Village Board of Trustees, and he asked Mr. Sweeney and another candidate to speak about themselves.

24. At the time he nominated Mr. Sweeney at the Democratic Party caucus, respondent was generally aware of the Rules prohibiting a judge from engaging in partisan political activity other than the judge's own campaign for judicial office.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(8) and 100.5(A)(1)(c), (d), (e) and (f) 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 conclusions, and respondent's misconduct is established.

The record establishes that in *People v. Amell* respondent refused to accept a plea agreement and attempted to coerce a plea to additional charges because he wanted a disposition that would bring revenue to the Village. By so doing, respondent misused his judicial discretion and impaired the independence of his court, conveying the impression that its primary function is to generate revenue rather than "to apply the law in each case in a fair and impartial manner" (*Matter of Tracy*, 2002 Annual Report 167 [Comm on Judicial Conduct]).

Presented with a negotiated agreement that included a plea to DWAI alone, respondent expressed concern that the Village derives no revenue from such charges. At the very least, respondent's statements in rejecting the proposed plea – including, "Someone has to generate money for the Village to support the expensive police department" – created the appearance that his primary if not sole consideration in the disposition was the resulting revenue for the locality. While that in itself would be highly inappropriate, the judge's emphasis on supporting "the expensive police department" compounded the impropriety and the appearance of bias. Ignoring the attorneys' protests that such concerns were inconsistent with an independent judiciary, respondent proposed a plea to an additional charge of an Open Container violation with a maximum fine, which would be returned to the Village; the alternative, respondent made clear, was a plea to DWAI alone with a 15-day jail sentence. Two weeks later, when the defendant was prepared to accept respondent's plea proposal, respondent insisted on including an additional plea to marijuana possession, with an additional fine, and he reiterated his interest in having some money go to the Village. Rejecting respondent's plea proposal, the defendant pleaded guilty to DWAI only, and, accordingly, respondent sentenced him to 15 days in jail. The assistant district attorney, who testified that he believed the plea had been coerced, immediately filed an application for the defendant's release pending the appeal.

Respondent has acknowledged that he considered the revenue implications of the proposed plea in *Amell* and that it was improper to do so. While there is some indication that respondent felt pressure from the Village with respect to the amount of revenues produced by the court, no judge should permit such considerations to influence the decision or sentence in a particular case, as respondent did here. "Defendants and the public should never have to wonder if a high fine was imposed, even in part, to increase local revenues" (*Matter of Tauscher*, 2008 Annual Report 217 [Comm on Judicial Conduct][judge admonished for suggesting he could exercise his authority in imposing fines to raise revenue to pay for a salary increase]).

It is striking here that respondent, in an attempt to impose the maximum possible fine that would benefit the Village, essentially offered the defendant the alternatives of a large fine ($1,000+) or a 15-day jail sentence, and that the defendant's refusal to accede to the large fine under these circumstances cost him his liberty. Respondent's repeated insistence that he did not want to send Mr. Amell to jail only underscores his intransigence and bewildering insensitivity to the impropriety of his actions. It is also noteworthy that in defending his

position, respondent cited the amount of time that had passed from the start of the proceedings to the defendant's plea of guilty. It is improper for a judge to consider that as a factor in imposing a fine and determining that the amount collected should enure to the benefit of the judge's municipality.

Significantly, respondent persisted in his efforts to obtain the disposition he wanted despite the vehement protests, both at the initial appearance and again two weeks later, of both the prosecutor and the defendant's attorney, who told respondent that his stated purpose of generating revenue for the Village was inconsistent with a judge's proper role. Instead of availing himself of the opportunity to reconsider his position, respondent ignored the attorneys' objections and rationalized that the attorneys were simply unused to having a judge reject a negotiated plea. He maintained that position even in the face of the district attorney's successful attempt to obtain the defendant's release. Respondent's persistence in misconduct even after the attorneys' warnings compounds the impropriety. *See, Matter of Blackburne*, 7 NY3d 213, 221 (2006); *see also, Matter of Restaino*, 10 NY3d 577 (2008).

Respondent's public comments about the *Amell* case while the appeal was pending were also improper. *See, Matter of McGrath*, 2005 Annual Report 181 (Comm on Judicial Conduct) (judge admonished for discussing in the press a case in which he had just imposed sentence, since he knew or should have known that an appeal was likely). A judge may not make "any public comment about a pending or impending proceeding" (Rules, §100.3[B][8]). The prohibition against such comments is clear and makes no exception for responding to criticism about the judge's actions in a particular case or explaining the judge's "decision-making process" (*Matter of O'Brien*, 2000 Annual Report 135 [Comm on Judicial Conduct]; Adv. Op. 94-22, 96-142).

In addition, respondent engaged in prohibited political activity by nominating a candidate for Village Trustee at a local party caucus. "Judges must hold themselves aloof and refrain from political activity, except to the extent necessary to pursue their candidacies during the public election campaigns" (*Matter of Maney*, 70 NY2d 27, 30 [1987][removing a town justice who knowingly violated the restrictions on political activity by taking an active role in an effort to oust the local party chairman and nominating the temporary chairman at a party caucus]; Rules, §§100.5[A][1], [2]). Among other requirements, a judge may not participate in the campaign of another candidate, endorse a candidate or make a speech on behalf of a candidate (Rules, §100.5[A][1][c], [d], [e], [f]). By nominating a candidate at the caucus, respondent violated these prohibitions.

We reject respondent's argument that nominating a candidate does not constitute an endorsement, which is specifically barred by the rules (§100.5[A][1][e]). While a judge is permitted to attend and vote publicly at a caucus (*see* Adv. Op. 09-180), a nomination represents a much higher degree of political involvement than a vote and squarely places the judge's prestige behind the candidacy of another, which *a fortiori* constitutes a prohibited endorsement. Since judges are also barred from making a speech on behalf of a candidate and participating in another's candidacy, respondent certainly should have recognized the impropriety of such

conduct.

We also reject the argument that this conduct was a proper exercise of constitutional rights. The political activities of judges are significantly circumscribed in order to maintain public confidence in the integrity and impartiality of the judicial system. These restrictions, including the specific rules cited here, have been upheld by the Court of Appeals, which found that the rules are "narrowly constructed to address the interests at stake, including the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary." *Matter of Raab*, 100 NY2d 305, 316 (2003).

In considering the sanction, we note that respondent states that as a result of these disciplinary proceedings, he will refrain from such political activity and improper public comments in the future and that he is more sensitive to the proper role of a judge.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur, except that Mr. Coffey, Mr. Belluck and Mr. Emery dissent as to Charge II and vote to dismiss the charge. Mr. Emery files an opinion, in which Mr. Belluck joins.
Dated: December 15, 2009

OPINION BY MR. EMERY DISSENTING AS TO CHARGE II, IN WHICH MR. BELLUCK JOINS

An explanation is required for my dissent from the majority's determination of misconduct for Judge Herrmann's nomination of a candidate for the Saranac Lake Village Board of Trustees.

Judge Herrmann is indisputably permitted to attend a political caucus, as the majority concedes, citing Advisory Opinion 09-180, at p.12 *supra*. The majority further concedes that the judge may publicly vote at such a political caucus. *Id*. Therefore, the particular facts of this case – the nomination of a candidate, apparently unadorned by any speech, endorsement or campaign support (*see* par. 23, Determination) – compels the conclusion that the judge's conduct is not materially different from the activities that the majority concedes are proper.

The majority's explanation for its leap to a misconduct finding is that "a nomination represents a much higher degree of political involvement than a vote and squarely places the judge's prestige behind the candidacy of another, which *a fortiori* constitutes a prohibited endorsement" (Determination, p. 12).

I would say that, *a fortiori*, in this case the opposite is just as likely true. The "nomination" in this case, as cryptically described by the record we have – the Determination, par. 23 – appears to have been much less "political involvement" than the judge's *public* vote which "place[d] the judge's prestige behind the candida[te]." A public vote is an overt, meaningful expression of political support, whereas a nomination, and no more, could be far less politically overt than a public vote. It seems just as likely as not, on this anemic record, that Judge Herrmann nominated this candidate without throwing his prestige behind him. We do not even know whether the judge voted for the candidate he nominated. As anyone knows who has ever attended any sort of meeting where nominations are offered, participants often nominate people they do not support for a variety of reasons. Among them are respect, a request from the candidate, tactical maneuverings and more. By contrast, irrefutable evidence of *political* support is a public vote. Yet, the majority concedes that the Rules allow that. A vote, especially a public one, is a quintessential political act and really all that matters. Talk is cheap; a vote is precious.

The majority's finding on this charge once again highlights the folly of this Commission's myopic attempts to regulate judges who have no choice but to engage in political activities in a system that requires them to run for office and raise campaign funds from the lawyers and their clients who appear before them. I will not recite all the times that I have railed, apparently in the wilderness, about this stupidity. But I will continue to do so because this Commission is forced to decide whether to punish judges who, through no fault of their own, face specious misconduct charges that often have no factual support (*see Matter of Chan,* dissent), such as those Judge Herrmann confronts here.

Were it only specious, I might be less vehement. Under any circumstance, a charge of misconduct is profoundly destabilizing to any serious jurist. But to level *misconduct* charges in political cases is a grave insult to honest, principled and dedicated public servants who work too hard and are paid too little in pursuit of a most idealistic profession that mandates them to stoop to be political to get and keep their jobs. Worse, the charge in this case, as with the many I have previously criticized, is a perpetration of a continuing violation of this judge's First Amendment right not to be punished for speech that is no less corrosive to the judicial function than other expressive activities that the Rules clearly authorize. This paradox of disciplining jurists on an *ad hoc* basis of underinclusive, haphazard, arcane political regulations, such as the endorsement rule at issue in this case, while, in the same breath, authorizing and even encouraging truly unethical conduct – *e.g.*, receiving contributions from the lawyers and parties who appear before the judge – is intolerable.

This case also illustrates the patchwork enforcement tableau that has been painted by the Advisory Committee. We are not bound by that Committee's rulings except insofar as a judge asks the Committee for a ruling in advance and follows it. As should be the case, under such circumstances, we may not discipline the judge even if we disagree with the Advisory Committee (Jud Law §212[2][l][iv]). As a result, a parallel body of decisions exists that we often cite and respect, especially when judges have followed or known about them.

The problem is that, in the field of judicial political activity, the Advisory

Committee has carved numerous exceptions to the basic rule that a judge should remain free of politics. The Committee frequently recognizes, as it must, that the realities of judicial elections require judges to be political. Its rulings, as well as a number of explicit regulatory exceptions created by the Rules of the Chief Administrator of the Courts, purportedly regulate the separation of judges from politics. But the patchwork approach has created a byzantine scheme that, inevitably, triggers underinclusiveness analysis. (It violates the First Amendment to prohibit expression less harmful to a public policy, if other forms of speech that are more harmful to that policy are permitted. *See Republican Party of Minnesota v. White*, 536 US 765 [2002].) How could a judge be allowed attend a caucus and publicly vote and yet be forbidden from endorsing? What if the judge simply announced his/her vote before casting it? What if the vote were secret and the judge announced his/her vote? Don't these hypotheticals clearly reveal a judge lending prestige to the candidate? Other examples of underinclusive political prohibitions abound and I have written about several of them. *See, Matter of Yacknin*, 2009 Annual Report 176 (Emery Dissent), noting that judicial candidates are prohibited from "personally solicit[ing] or accept[ing] campaign contributions" (§100.5[A][5]) but are permitted to seek "support" (whatever that means) from attorneys who appear before the judge, to ask lawyers to serve on the judge's campaign committee (Adv. Op. 92-19) and, most importantly, to preside over cases in which a lawyer appears who openly supported the judge's candidacy (Adv. Op. 90-182, 90-196, 03-64, 03-77), even if the judge knows that the lawyer contributed to the judge's campaign (Adv. Op. 04-106); and noting further that judicial candidates are *advised* that they must be shielded from knowing the identity of their contributors (Adv. Op. 02-06; *Judicial Campaign Ethics Handbook*, p. 8), but they are permitted to attend their own fund-raising events (§100.5[A][2][i]; Adv. Op. 07-88, 97-41) where they can readily glean who is contributing. *See also*, *Matter of Farrell*, 2005 Annual Report 159 (Emery Concurrence), noting that the judge was prohibited from making phone calls on behalf of a local party leader (§100.5[A][1][c], [d]), but was not prohibited from soliciting and accepting (through an appropriate campaign committee) non-anonymous campaign contributions *from the very party leader the Commission admonished the judge for assisting* (§100.5[A][5]).

The upshot is confusion, *ad hoc* results and unintended, yet staunchly defended, hypocrisy. *See Matter of Raab*, 100 NY2d 305 (2003), and *Matter of Watson*, 100 NY2d 290 (2003). In these cases, the Court of Appeals struggled to make sense of the non-sensical. When judges cannot even figure out what political activity is misconduct, how can a realistic scheme be enforced? The distinctions the Rules and their interpretations rely on are so fine that they are, at best, meaningless. At worst they suffer from the looming reality of the pervasive fact of life that judges have to generate campaign contributions from the very people they judge. As long as this profoundly unethical activity resides at the heart of judicial elections, all other "political" activity pales by comparison. As previously noted, no rule forbids judges from benefitting from such contributions and no rule prevents them from attending their own fund-raising events and knowing who contributed to them (§100.5[A][2][i]; Adv. Op. 07-88). Given this, the palliatives offered by the Rules and the Advisory Committee will inevitably raise serious constitutional questions.

New York's judiciary is in a state of extremis. Judges are as cynical about their

exalted work as are the litigants who are judged. Feeding this cynicism by engaging in official hypocrisy over so-called "political activity" misconduct is a joke. Regrettably, the situation does not call for humor.

We have compelling issues of misconduct that need this Commission's attention. This is not one of them.

Dated: December 15, 2009

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **LARRY M. HIMELEIN**, a Judge of the County Court, Family Court and Surrogate's Court, Cattaraugus County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel) for the Commission
Connors & Vilardo, LLP (by Terrence M. Connors) for the Respondent

The respondent, Larry M. Himelein, a Judge of the County Court, Family Court and Surrogate's Court, Cattaraugus County, was served with a Formal Written Complaint dated March 3, 2009, containing one charge. The Formal Written Complaint alleged that in connection with pending litigation and other efforts by judges to secure enactment by the Legislature of a pay raise for the judiciary, respondent: (A) disqualified himself from cases in which parties were represented by law firms that include members of the Legislature, not because he could not be impartial but as a tactic intended to force the Legislature to pass a judicial pay raise, (B) encouraged other judges to recuse themselves from cases involving legislators or their law firms, without regard to their ability to be impartial, as a "weapon" in the effort to secure a pay raise, and in doing so denigrated those judges who refused, (C) made public comments concerning the pay raise litigation, and (D) made denigrating comments about legislators and, in particular, Assembly Speaker Sheldon Silver. Respondent filed a verified Answer dated April 23, 2009.

By order dated May 20, 2009, the Commission designated the Honorable Richard D. Simons as referee to hear and report findings of fact and conclusions of law. A hearing was held on July 22, 2009, and a schedule was set for the submission of post-hearing briefs.

On December 4, 2009, prior to the issuance of a report by the referee, 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 December 9, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the County Court, Family Court and Surrogate's Court, Cattaraugus County, since 1993. He served as an Acting Justice of the Supreme Court intermittently between 1997 and 2004, and continuously from 2004 to the present. Respondent served as District Attorney of Cattaraugus County from January 1, 1982, through December 31, 1992. He was admitted to the practice of law in 1976.

Respondent's General Practice as to Recusals

2. Over the years, respondent has recused himself in several cases where he was familiar with a party or otherwise felt his impartiality might reasonably be questioned.

3. For example, in 1993 respondent presided over a criminal case in which two defendants were charged with stealing from Bush Industries, a company located in Western New York. Respondent disclosed that he owned 100 shares of Bush Industries stock. The defense asked respondent to recuse for that reason. Respondent believed that Judiciary Law Section 14 required his recusal and granted the request.

4. In June 2009 respondent recused himself from a criminal case because the defendant is the son of a court clerk with whom respondent works.

As to Charge I of the Formal Written Complaint:

5. In April 2005 the New York State Legislature considered but failed to enact legislation that would increase the salaries of the so-called "state-paid judges."[1]

6. On January 2, 2007, certain members of the New York State judiciary commenced *Maron v. Silver,* an Article 78 proceeding to compel the New York State Comptroller to disburse funds for a judicial pay raise. Respondent was not a party to this litigation. The matter is still pending.

[1] "State-paid judges" refers to all judges of the state unified court system except town and village court justices.

7. In March 2007 the Legislature and then-Governor Eliot Spitzer considered but failed to reach agreement on proposed legislation to increase the salaries of the state-paid judges.

8. By June 2007, respondent had developed strong personal feelings about the Legislature's failure to enact judicial pay raise legislation and began considering whether to recuse himself from cases involving lawyer/legislators or members of their law firms.

9. On June 22, 2007, respondent sent a letter to two law firms – Hiscock & Barclay and Harris Beach – referring to the pay raise litigation, advising of his intention to contribute to the litigation, and announcing his decision to disqualify himself from litigation involving the two firms because of their affiliation with legislators. The letter read as follows:

> As I am sure you are aware, several judges and judicial organizations have commenced lawsuits against the governor, the state senate and the state assembly contesting what many believe is the unlawful reduction of judicial salaries during a term of office. I intend to make a contribution to that litigation and thus, I have an economic interest in its success. It is my belief that because I have a financial interest in litigation against the New York State Legislature, the ethical rules mandate my disqualification in any case in which a legislator is a member of one of the firms.
>
> Accordingly, because you have a legislator affiliated with your firm, I write to inform you that I am disqualifying myself from any litigation in which your firm is involved.

10. At the time respondent sent the June 22, 2007 letter, he was familiar with Opinion 89-93 of the Advisory Committee on Judicial Ethics ("Advisory Committee"), holding that a judge need not recuse where a legislator or a member of a legislator's firm appears because of the legislator's role in setting the judge's salary. Respondent was also aware of Opinion 07-25, in which the Advisory Committee stated that it would not be consistent with the Rules Governing Judicial Conduct for a judge to recuse in cases involving legislators or their law firms because of the longstanding dispute over judicial salary increases.

11. Prior to sending his letter of June 22, 2007, no legislator had ever appeared before respondent representing a party. Consequently, respondent had never disqualified himself from a case involving a legislator or a legislator's firm.

12. On July 10, 2007, respondent sent a so-called "blast" e-mail[2] to numerous

[2] A "blast" e-mail is an electronic mailing sent simultaneously to a large mailing list. Blast lists of judges are available on the court system's e-mail server system.

judges throughout New York State, by hitting "reply all" to a prior e-mail. Respondent's e-mail stated in part:

> Does anyone really think that banding together or lobbying together or doing anything together will have any effect on those people in Albany?? I remain convinced that the only weapon in our arsenal is recusal on all cases where a firm has a legislator or a relative of a legislator in a firm … Some of us may not want to poke our fingers in the eyes of the politicians (some of us, however, might like to do exactly that) but I firmly believe that [recusal] is the only weapon we have that has any likelihood of making some of those clowns suffer for their actions...

13. On July 11, 2007, respondent sent a blast e-mail to numerous judges throughout New York State in which he explained that he was disqualifying himself from cases involving lawyer/legislators' law firms, stating:

> My feeling is that I would not be recusing because I could not be impartial. I would be recusing because it is mandatory. I view it this way: I made a contribution to a lawsuit where the legislature is a named defendant. I have a direct interest in the plaintiffs' success in the lawsuit, a direct financial interest.

He further stated:

> Once the lawsuit is over, the reasons for the recusal are also over. It has nothing to do with whether I could be impartial. I really believe this is the only weapon we have ... there are enough lawyers in the senate who would be very unhappy if their cases could not be heard and their firms started letting them go…

14. On September 12, 2007, several judges, including respondent's co-Judge Michael L. Nenno, commenced *Larabee v. Spitzer*, an action seeking a judgment declaring that the Legislature's failure to provide judicial pay raises violated the state constitution. Respondent was not a party to this litigation. The matter is still pending.

15. On September 21, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> I am sending my check this weekend to support the litigation and will send a letter to all firms in our area that have a legislator affiliated with the firm recusing myself from their cases as long as the litigation is pending. I continue to view this as an automatic

recusal. Not until these firms start letting their legislators go will we have any standing at all with those clowns…

16. On September 24, 2007, respondent sent a check for $100 to Steven Cohn, P.C., the attorney for the petitioners in *Maron v. Silver*, to support the cost of litigation.

17. Respondent's $100 contribution did not make him a party in *Maron*, did not underwrite the action and did not affect the continuation of the action.

18. On September 25, 2007, respondent sent a letter to the law firms of Harris Beach and Hiscock & Barclay. In his letter, respondent stated that he had contributed to a lawsuit against the Legislature, that he stood to benefit financially from a successful outcome, and that he believed the Code of Judicial Conduct required his recusal from any litigation involving their firms because they were affiliated with a member of the Legislature.

19. Michael Nozzolio, Esq., has served in the New York State Senate since 1993 and is a member of the law firm Harris Beach. Neil Breslin, Esq., has served in the New York State Senate since 1997; William Barclay, Esq., has served in the New York State Assembly since 2003; both Mr. Breslin and Mr. Barclay are members of the law firm Hiscock & Barclay.

20. From September 25, 2007, to July 16, 2008, respondent recused himself from eleven cases involving legislators or members of a legislator's law firm.

21. Before recusing himself from these cases, respondent was aware of Advisory Opinion 89-93, Advisory Opinion 07-25 and Advisory Joint Opinion 07-84 and 07-140, which hold that a judge is not required to exercise recusal when a legislator, or a member of the legislator's firm, appears before the judge, notwithstanding that the New York State Legislature sets judicial salaries or that a judge or judges' association has filed a lawsuit against the Legislature seeking a judicial pay raise. He was also aware of other opinions relevant to this issue, Joint Opinion 88-17(b) and 88-34, and Opinion 88-41.

22. On September 25, 2007, respondent recused himself from *H. John Wild v. Betty Clarke, et al. (Passenger Bus Corp.*), a civil action for damages commenced on October 30, 2006, in Supreme Court, Cattaraugus County, in which Hiscock & Barclay represented the defendant.

23. On September 25, 2007, respondent recused himself from *Niagara Mohawk Power Corporation, d/b/a National Grid v. Town of Machias Assessor, et al.,* a real property tax certiorari commenced on July 17, 2007, in Supreme Court, Cattaraugus County, in which Hiscock & Barclay represented the petitioner.

24. On September 25, 2007, respondent recused himself from *Niagara Mohawk Power Corporation, d/b/a National Grid v. Town of New Albion Assessor, et al.,* a real property tax certiorari commenced on or about July 17, 2007, in Supreme Court, Cattaraugus

County, in which Hiscock & Barclay represented the petitioner.

25. Sheldon Silver has served in the New York State Assembly since 1977. Mr. Silver has been Speaker of the Assembly since 1994. He is an attorney and a member of the law firm Weitz & Luxenberg.

26. On October 15, 2007, respondent recused himself from *Estate of Raymond J. Dombek*, a probate proceeding in the Cattaraugus County Surrogate's Court, commenced on October 15, 2007, in which Weitz & Luxenberg represented the petitioner.

27. On October 15, 2007, respondent sent a letter to Weitz & Luxenberg, stating that he had contributed to a lawsuit against the Legislature, that he stood to benefit financially from a successful outcome, and that he believed that the Code of Judicial Conduct required his recusal from any litigation involving the firm because of its affiliation with a member of the Legislature. Respondent further stated, **"**Because your firm is counsel to a party in the [*Dombek*] case, the case will have to be re-assigned to a judge able to hear your case."

28. On December 3, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating in reference to the *Maron* case:

> Given that decision, and assuming that we will get boned by the legislature again, is there anyone who still believes we shouldn't recuse?

29. On January 3, 2008, respondent recused himself from the *Estate of Joseph E. Zynczak*, a probate proceeding commenced on June 25, 2004, in Surrogate's Court, Cattaraugus County, in which Harris Beach represented the estate.

30. On January 3, 2008, respondent wrote to the attorneys in the *Zynczak* matter stating that he believed that he was "mandatorily recused" from any case involving Harris Beach because he had contributed to litigation against the Legislature and Harris Beach employed a legislator. Respondent further stated, "I believe Judge Nenno, the only other judge in our county, has also recused so you will probably have to contact the administrative judge to find a non-self respecting judge to hear your case."

31. Judge Michael Nenno had recused himself from cases involving state legislators or their law firms because he was a party to *Larabee v. Spitzer*. Prior to his own recusal from such cases, respondent was the only Cattaraugus County judge hearing cases involving legislators and their law firms. After respondent's recusal, all cases involving legislators and their law firms had to be transferred to judges in adjoining counties.

32. On January 18, 2008, respondent recused himself from *Jason R. Clemons v. Olean General Hospital, et al.,* a medical malpractice action commenced on or about January 26, 2007, in Supreme Court, Cattaraugus County, in which Hiscock & Barclay represented the

defendant.

33. On February 28, 2008, respondent recused himself from the *Estate of Robert J. Wagner*, a probate proceeding commenced on or about February 27, 2008, in Surrogate's Court, Cattaraugus County, in which Weitz & Luxenberg represented the petitioner.

34. On April 10, 2008, then-Chief Judge Judith Kaye commenced a lawsuit, *Kaye v. Silver*, seeking *inter alia* an order retroactively adjusting the salaries of state-paid judges.

35. On April 24, 2008, the Advisory Committee issued Joint Opinion 08-76, 08-84, 08-88 and 08-89, holding *inter alia* that state-paid judges are not parties to the Chief Judge's lawsuit and are not required to recuse when a legislator or a member of the legislator's firm appears. Respondent was aware of Joint Opinion 08-76, 08-84, 08-88 and 08-89.

36. On May 6, 2008, respondent recused himself from the *Estate of Eloise J. Fall*, a probate proceeding commenced on May 5, 2008, in Surrogate's Court, Cattaraugus County, in which Harris Beach represented the petitioner.

37. On July 1, 2008, respondent recused himself from the *Estate of Henry G. Ruth*, a probate proceeding commenced on June 4, 2008, in Surrogate's Court, Cattaraugus County, in which Weitz & Luxenberg appeared for the petitioner.

38. On July 16, 2008, respondent recused himself from the *Estate of Donald C. Bliven*, a probate proceeding commenced on March 7, 2005, in Surrogate's Court, Cattaraugus County, in which Weitz & Luxenberg represented the petitioner.

39. On July 16, 2008, respondent recused himself from the *Estate of Claude F. Glenn*, a probate proceeding commenced on or about August 16, 2007, in the Surrogate's Court, Cattaraugus County, in which Weitz & Luxenberg represented the petitioner.

40. Respondent's decision to recuse himself from cases involving the law firms of Hiscock & Barclay, Harris Beach and Weitz & Luxenberg was unrelated to his ability to be impartial with respect to the litigants represented by those firms or the individual lawyers who appeared on their behalf.

41. Respondent did not attempt to obtain a remittal of disqualification in any of the eleven cases in which he exercised recusal due to the involvement of a legislator's law firm.

42. Respondent disqualified himself from cases involving the law firms of Hiscock & Barclay, Harris Beach and Weitz & Luxenberg because of his own interpretation of the Rules, while also expressing his opinion that recusal was proper as a tactic in furtherance of the judiciary's interest in having the Legislature approve pay raises for the judiciary.

43. Between July 10, 2007, and April 23, 2008, respondent sent eleven blast e-mails to numerous judges throughout New York State, concerning the failure of the Legislature and the Governor to enact pay raise legislation. In each instance, respondent hit "reply all" to respond to a prior e-mail, without knowing who, or how many people, would receive his e-mail.

44. On November 9, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> Both of us in Cattaraugus County have recused ourselves (I even got a case from the speaker's firm from which I could gleefully recuse myself). Why doesn't every judge in the state immediately recuse? Grow some stones people. It will always be the only weapon we have. Use it or lose it!

45. On December 19, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating *inter alia*:

> How can any self respecting judge even consider sitting on a case with a legislator in a firm? When Shelley's firm can't get a divorce heard or will probated or a trial date, see if that doesn't spur some action. And maybe some of his contributors could ask for their money back…

46. On December 20, 2007, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> The problem is that most of the NYC judges are too gutless to recuse themselves from that firm's cases … [R]ecusal is the best weapon we have but it requires every judge in the state in order to be successful. I would hope that Judge Kaye would simply mandate it.

In another blast e-mail to numerous judges on the same date, respondent listed the counties in which Speaker Silver's law firm, Weitz & Luxenberg, had cases pending, and asked, "How about everyone recuses by 5:00 today???"

47. On January 4, 2008, respondent sent a blast e-mail to numerous judges throughout New York State, in reply to an e-mail from then-Chief Judge Kaye and Chief Administrative Judge Ann Pfau, stating:

> The ONLY way anything will happen is if you exercise some leadership and commence a lawsuit and MANDATE that all judges in the state recuse themselves from any civil cases where a law firm has any connection to a legislator … If you don't mandate

it, the wimp judges in the city won't recuse.

48. On April 1, 2008, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> [Recusal] should NOT be personal. It should be mandated in all cases. If its personal, its useless.

49. On April 3, 2008, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> [W]e would need the chief judge to mandate recusal. If left to the individual judges, too many wouldn't do it. Some would recuse only for one house or the other and the lackies in the city would be afraid to offend the powers that be.

50. On April 23, 2008, respondent sent a blast e-mail to numerous judges throughout New York State, stating:

> [M]ost of the judges in the city are absolute wusses … I now know why so many upstaters would like nyc to become a separate state. The upstaters would get a raise and the ones in the city could stay being toadies for the politicians.

51. Respondent's e-mails were an attempt to encourage other judges to recuse in lawyer/legislators' law firm cases, not because they could not be impartial but as a litigation tactic in the judiciary's ongoing battle for a pay raise.

52. Respondent intended to use recusal as a "weapon" to create a hardship for lawyer/legislators by causing their clients to discharge them, forcing them to find alternative venues for their litigation, creating difficulties for them within their law firms, and otherwise causing the lawyer/legislators to suffer financially and perhaps lose their law firm jobs.

53. Respondent intended that these financial hardships would bring "pressure to bear upon" the lawyer/legislators to enact a judicial pay raise.

54. Respondent stood to gain thousands of dollars per year were pay-raise legislation to be enacted.

55. In 2007 respondent sent a blast e-mail to numerous judges throughout New York State in which he referred to Mr. Silver as a "slug." Respondent defines the term slug as a distasteful creature that is large, slimy and worm-like.

56. In April 2008, Bruce Golding, a reporter for the *New York Post*, called

respondent at his chambers, identified himself as a reporter, and asked respondent whether he planned to recuse himself from cases involving Weitz & Luxenberg. Respondent acknowledged that he was recusing himself from Weitz & Luxenberg's cases. Respondent confirmed to Mr. Golding that he had written an e-mail to fellow judges. In that e-mail he referred to Speaker Silver as a "slug." Respondent made no effort to retract, temper or otherwise persuade Mr. Golding not to report his reference to Speaker Silver as a "slug."

57. On April 27, 2008, in both its print and website editions, the *New York Post* published Mr. Golding's article on his conversation with respondent. The article included a picture of respondent, which respondent had provided on Mr. Golding's request.

58. On April 29, 2008, Erin Billups, a reporter for *News 10 Now*, called respondent. Ms. Billups identified herself as a reporter and asked respondent about judicial recusal from cases involving law firms associated with members of the New York State Legislature.

59. Respondent told Ms. Billups that he believed that when then-Chief Judge Kaye filed her lawsuit, she should have made recusal mandatory for all judges when a legislator or a legislator's firm appears on behalf of a party. He also told Ms. Billups that there were a number of judges, especially upstate, who will continue to recuse themselves until they get a pay raise.

60. On April 29, 2008, an article written by Ms. Billups was published on *www.capitalnews9.com*, and her report ran on television Channel 10 in Albany.

61. Ms. Billups' article quoted respondent as saying, "I think it's unfair, I think it's a conflict of interest. I think it's always been a conflict of interest and the legislature has no one but themselves to blame for having brought it up now." The article also quoted respondent as saying:

> The judges in NYC, who by in large are appointed by the politicians don't have the guts to do it, and that's where most of the lawyer legislature is from … What we're saying is you'll have to get a different lawyer. That doesn't do anything to the merits of the person's case.

62. Respondent made the statements attributed to him in Ms. Billups' article.

63. Respondent had prior experience as a judge dealing with reporters, and he was aware that the Rules Governing Judicial Conduct prohibited judges from making public comments on pending cases.

64. Respondent knew that the *Maron* case, the *Larabee* case and the Chief Judge's case were pending when he spoke to Mr. Golding and Ms. Billups.

65. Respondent knew that he could have ended the conversations with Mr. Golding and Ms. Billups at any point.

Facts in Mitigation

66. On reflection and after the hearing before the referee in this matter, respondent recognizes that it was wrong for him to use recusal as tactic in furtherance of his interest in achieving legislative approval of a judicial pay raise, that it was wrong for him to encourage other judges to use recusal for the same purpose, and that it was wrong for him to disparage those judges who did not recuse themselves from cases as he did for that purpose, and that it was wrong for him to refer to a party to the judicial compensation litigation, Assembly Speaker Sheldon Silver, as a "slug" in a widely circulated e-mail.

67. As to the cases at issue involving clients of Hiscock & Barclay, Harris Beach and Weitz & Luxenberg, although other judges had to preside over such cases after respondent recused himself, there is no evidence in the record of detriment to the litigants or lawyers, whose cases were heard by other judges in Cattaraugus County.

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)(4), 100.3(B)(6), 100.3(B)(8), 100.4(A)(1), 100.4(A)(2) and 100.4(A)(3) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

The record establishes that respondent disqualified himself from numerous cases involving legislators' law firms, and urged other judges to do the same, not because recusal was required by the ethical rules but for a strategic, selfish purpose: as a retaliatory "tactic" and a "weapon" to further the judges' interests in achieving legislative approval for a pay raise. He did so for reasons that had nothing to do with his ability to be impartial, and despite knowing that the Advisory Committee on Judicial Ethics had specifically advised judges that recusal on that basis, standing alone, was not proper. His recusals, which had no adequate legal basis, were inconsistent with the fair and proper administration of justice and placed an unnecessary burden on court administration. Respondent has stipulated that his conduct was contrary to the ethical rules[3] and warrants censure.

Disqualification is mandated in any proceeding "in which the judge's impartiality might reasonably be questioned" (Rules, §100.3[E]). As early as 1989, the Advisory Committee had advised judges that the State Legislature's authority to set the salaries of state-paid judges does not, in itself, require recusal when a lawyer-legislator appears before the judge (Adv Op 89-93). In 2007, in light of the longstanding dispute over the lack of judicial pay raises and the

[3] It has also been stipulated that respondent's comments to two reporters about the subject were inappropriate.

pending litigation commenced by certain judges with respect to the issue, the Advisory Committee reiterated and underscored that view. In a series of opinions, the Advisory Committee again declared that recusal in cases involving legislators or their law firms is not required provided that the judge believes that he or she could be impartial; further, the Committee stated, opting for disqualification on that basis alone would "erode public confidence in the integrity, impartiality and independence of the judiciary," and a "judge should not consider recusal unless he or she believes that he or she could not be impartial" (Adv Op 07-25 [issued 2/22/07]; *see also*, 07-84 and 07-140 [issued 9/6/07], 07-190 [issued 12/6/07]).

Over a ten-month period beginning in September 2007, respondent disqualified himself from eleven cases involving legislators or members of their law firms as a "weapon" in an attempt to force a pay raise by creating economic hardship for legislators and their firms. The record is clear that respondent's recusals were unrelated to whether he could be impartial – indeed, in an e-mail message to other judges, he bluntly acknowledged, "It has nothing to do with whether I could be impartial." Rather, respondent viewed recusal as a tactic to put pressure on legislators to enact a judicial pay raise. Recusal would (he hoped) create difficulties for the legislators within their firms, cause their clients to discharge them, and cause the legislators to suffer financially. He reiterated this theme in numerous e-mail messages to other judges (***e.g.***, "[Recusal] will always be the only weapon we have"; it "is the only weapon we have that has any likelihood of making some of those clowns suffer for their actions").

Although respondent rationalized at various times that his recusal was required because of the pending lawsuits about judicial pay raises, in which he had "a direct financial interest," and/or because of a $100 contribution he had made to the litigation, it is clear that from the beginning, the driving reason for his recusals was strategic, not ethical. As numerous Advisory Opinions had made clear, neither the pay raise controversy nor the pending litigation (to which respondent was not a party) required recusal, and respondent's modest financial contribution to the litigation did not materially elevate his interest in the matter or in itself provide a basis for recusal (*see*, ***e.g.***, Adv Op 04-140, 95-131 [making a contribution to the Legal Aid Society does not require recusal from the Society's cases]). Indeed, if respondent believed that making a contribution *per se* would require his recusal, he should not have made it, since a judge must conduct extra-judicial activities so as to minimize the risk of conflict with judicial obligations and not interfere with the proper performance of judicial duties (Rules, §100.4[A][1], [3]).

Section 100.3 of the Rules provides that "the judicial duties of a judge," which include "all the duties of a judicial office prescribed by law," "take precedence over all the judge's other activities." Implicit in this mandate is the duty not to disqualify unnecessarily, for reasons of personal convenience or based on personal pique. There is clearly no justification for refusing to discharge one's judicial duties for a retaliatory purpose or as a tactic to achieve a pecuniary or political aim. *See Matter of Leff*, 1983 Annual Report 119 (Supreme Court justice censured for refusing to hear any cases for six months as a protest against his reassignment from a criminal to a civil part).

Respondent's behavior is aggravated by his wide dissemination of e-mail

messages encouraging other judges to join him in recusing from the cases of legislators' law firms as a litigation tactic. His messages made plain that the purpose for recusing was to "spur some action" ("We either take serious action or we will forever be in the same position we are today"). Chiding, browbeating and insulting judges who did not recuse (calling them "wusses," "non-self-respecting," "gutless," and "wimp[s]"), denigrating downstate judges in particular ("lackies" and "toadies for the politicians") and telling them to "grow some stones," respondent repeatedly urged his judicial colleagues to recuse en masse ("How about everyone recuses by 5:00 today???"). Referring to Assembly Speaker Sheldon Silver as a "slug," he also told his judicial colleagues that if Silver's firm could not get its cases heard because of mass recusals, that would "spur some action" on the pay raise issue, and that once a pay raise was enacted, the need for such disqualifications would end. By encouraging other judges to abrogate their professional duty by engaging in conduct that was patently improper, respondent compounded his misconduct.

It is stipulated that respondent sent these so-called "blast" or mass e-mails to other judges by hitting "reply all" in response to messages he had received on the court system's e-mail server, without knowing who or how many people would receive his messages. Arguably, because of the unknown but presumably large number of recipients, these comments were not made with a reasonable expectation of privacy, but were intended to be and were in fact widely disseminated. *See Matter of Fiechter*, 2003 Annual Report 110 (censuring judge, *inter alia*, for sending copies of a letter containing inaccurate, unsubstantiated allegations denigrating another judge to 89 judges and 12 State senators). The message respondent conveyed – widely and repeatedly – was highly prejudicial to the proper administration of justice. His stated aim – to deprive lawyer-legislators of their livelihood and to deprive their clients of access to the courts until judges received a pay raise – was inconsistent with a judge's obligation to refrain from conduct that interfered with the proper performance of judicial duties, to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and to 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 (Rules, §§100.2[A], 100.3[B][4], 100.4[A][3]).

In its totality, respondent's conduct reflected adversely on the judiciary as a whole. Accordingly, we accept the stipulated sanction of censure.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck did not participate.

Dated: December 17, 2009

♦ ♦ ♦

In the Matter of the Investigation Pursuant to Section 44, subdivisions 1 and 2, in Relation **JOSEPH G. MAKOWSKI**, Justice of the Supreme Court, Erie County.

DECISION AND ORDER

BEFORE:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Harris Beach PLLC (by Richard T. Sullivan) for Judge Joseph G. Makowski

The matter having come before the Commission on June 17, 2009; and the Commission having before it the Stipulation dated May 21, 2009; and Judge Makowski having resigned from judicial office by letter dated February 20, 2009, effective March 5, 2009, and having affirmed that he will neither seek nor accept judicial office or a position as a Judicial Hearing Officer in the future, and 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 Stipulation is accepted and that the pending matter closed based upon the Stipulation; and it is

SO ORDERED.

Mr. Belluck and Mr. Jacob were not present

Dated: June 18, 2009

STIPULATION

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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 G. Makowski ("respondent") and his attorney, Richard T. Sullivan, Esq.

1. Respondent was admitted to the practice of law in New York in 1979. He is 55 years of age. He was elected as a Justice of the Supreme Court, Erie County, for a 14-year term that commenced on January 1, 1999.

2. The Commission is investigating a complaint concerning respondent's publicly reported off-the-bench action in assisting an acquaintance, which, *inter alia*, involved allegations that he failed to uphold the integrity and independence of the judiciary, in violation of section 100.1 of the Rules; failed to respect and comply with the law and failed to act in a manner that upholds public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; allowed a social relationship to influence his judicial conduct, in violation of Section 100.2(A) of the Rules; lent the prestige of judicial office to advance the private interest of another and voluntarily provided evidence, in violation of Section 100.2(C) of the Rules, and acted in a manner that detracted from the dignity of his judicial office in violation of Section 100.4(A)(2) of the Rules.

3. Respondent submitted his resignation as a Supreme Court Justice by letter dated February 20, 2009, to Justice Sharon S. Townsend, Administrative Judge of the Eighth Judicial District. Respondent's resignation became effective on March 6, 2009. A copy of the resignation letter is appended as Exhibit 1.

4. Pursuant to Section 47 of the Judiciary Law, the Commission's jurisdiction over a judge continues for 120 days after resignation from office, and the Commission is authorized to render a determination that the judge be removed from office. Removal bars a judge from holding judicial office in the future.

5. Respondent affirms that he will neither seek nor accept judicial office or a position as a Judicial Hearing Officer at any time in the future.

6. In view of the foregoing, 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.

s/ **Honorable Joseph G. Makowski**
Respondent

Richard T. Sullivan, Esq.

Attorney for Respondent

Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(**John J. Postel,** Of Counsel)

EXHIBIT 1: LETTER OF RESIGNATION: Available at www.scjc.state.ny.us

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ARTHUR S. MICLETTE**, a Justice of the Crown Point Town Court, Essex County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Charles F. Farcher, Of Counsel) for the Commission
Honorable Arthur S. Miclette, *pro se*

The respondent, Arthur S. Miclette, a Justice of the Crown Point Town Court, Essex County, was served with a Formal Written Complaint dated March 3, 2009, containing two charges. The Formal Written Complaint alleged that respondent failed to make timely deposits and to report and remit funds to the State Comptroller in a timely manner (Charge I) and filed a small claims action in his own court, presided over the case and failed to transfer it to another court (Charge II).

On May 21, 2009, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On June 17, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has served as a Justice of the Crown Point Town Court, Essex County, since January 2000. His current term expires in December 2011. He is not an attorney.

2. Respondent is the only justice of the Crown Point Town Court.

3. Respondent, who is also a mechanic, owns and operates Village Auto, a car repair shop in Crown Point.

As to Charge I of the Formal Written Complaint:

4. As set forth more fully on Schedule A annexed to the Formal Written Complaint, from November 2006 until July 2007 respondent failed to deposit court funds within 72 hours of receipt as required by Section 214.9 of the Uniform Civil Rules for Justice Courts.

5. During that time respondent made sporadic deposits, allowing weeks and/or months to elapse in the interim, notwithstanding the collection of significant court funds.

6. An analysis of respondent's court account reflected a cumulative deficiency of $350 as of August 2007.

7. Respondent failed to timely file reports or remit court funds to the State Comptroller for the months of December 2006 and February 2007, as required by Section 27 of the Town Law, Section 1803(8) of the Vehicle and Traffic Law and Section 2021(1) of the Uniform Justice Court Act.

8. On June 6, 2007, the State Comptroller issued a notice to the Crown Point Town Supervisor to suspend respondent's salary, pending the filing of reports and the remittal of court funds for the months of December 2006 and February 2007.

9. Respondent thereafter brought his filings and remittances up to date, and in July 2007 the State Comptroller withdrew the notice to suspend respondent's salary.

10. Respondent delegated the task of receiving, depositing, remitting and reporting court funds to his original part-time court clerk, who contemporaneously held multiple part-time jobs that at times distracted her from her court duties.

11. Respondent acknowledges his failure to supervise his court clerk adequately and recognizes that he is ultimately personally responsible for all court funds. Respondent has since retained a new court clerk and deposits appear to be made regularly.

12. The $350 deficiency appears to have resulted from poor record-keeping. There is no indication that the money was misappropriated.

As to Charge II of the Formal Written Complaint:

13. On July 5, 2007, respondent filed a small claim against Edward Hargett, seeking to recoup an unpaid debt of $600 for auto repair services rendered by respondent at his Village Auto shop. Respondent paid the appropriate filing fees and the claim was filed in the Crown Point Town Court, the appropriate court of jurisdiction.

14. Without discussing the matter or its scheduling with respondent, respondent's court clerk issued a standard court notice to Edward Hargett.

15. Edward Hargett appeared before respondent in the Crown Point Town Court on August 16, 2007, as the defendant in both *Arthur S. Miclette v. Edward Hargett* and another unrelated matter, *Crown Point Citgo v. Edward Hargett*.

16. At the call of the *Crown Point* case, respondent, from the bench, disclosed his own impending small claim against Edward Hargett, returnable that same evening, and obtained the consent of both parties before presiding over *Crown Point Citgo v. Hargett*. Respondent has no business connection to Crown Point Citgo.

17. Crown Point Citgo presented receipts endorsed by Edward Hargett, evincing his indebtedness in the amount of $341.41, and Edward Hargett acknowledged the debt, as well as his willingness to repay Crown Point Citgo. Respondent rendered an oral ruling in favor of Crown Point Citgo in the amount of $341.41 and the matter was concluded. No judgment was ever entered.

18. Respondent subsequently addressed his own case, *Miclette v. Hargett*, informing Edward Hargett, from the bench, that he could not hear the matter in his own court, but that if the $600 debt was not satisfied he would transfer the matter to another court for further proceedings.

19. Edward Hargett acknowledged the debt and agreed to repay respondent, requesting additional time in which to do so. Respondent agreed to the request. There was no formal ruling or return date set, nor was the case transferred to another court.

20. Notwithstanding the understanding in court between respondent and Mr. Hargett on August 16, 2007, nothing further has happened in the case. Respondent took no further action to collect the unpaid debt from Edward Hargett or otherwise pursue his claim following the court appearance of August 16, 2007.

21. Since respondent's court had jurisdiction over the car repair matter, respondent was required to file his small claim in his own court, even though he serves without a co-judge.

22. Respondent understands that where he disqualifies himself or his impartiality otherwise might reasonably be questioned, arrangements must be made to transfer the case to another judge or court, especially since he is the only judge of his own court.

Supplemental finding:

23. Respondent has been cooperative and contrite throughout the Commission's proceedings.

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(A), 100.3(C)(1), 100.3(C)(2) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The handling of court monies is one of a judge's most important responsibilities, and a town or village justice is personally responsible for all monies received by the court (NYS Compt Op No 83-174). Such monies must be deposited within 72 hours of receipt 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; Uniform Civil Rules for the Justice Courts §214.9[a]). Although these important responsibilities may be delegated, a judge is required to exercise supervisory vigilance to ensure the proper performance of these functions. *See*, *Matter of Burin*, 2008 Annual Report 97; *Matter of Jarosz*, 2004 Annual Report 116 (Comm on Judicial Conduct). Judges are required to diligently discharge their administrative responsibilities and to require court staff "to observe the standards of fidelity and diligence that apply to the judge" (Rules, 100.3[C][1] and [2]).

Here the record indicates that as a result of respondent's inadequate supervision of his part-time court clerk, to whom he had delegated these tasks, deposits and remittances were not made in a timely manner. Over a nine-month period, deposits were made sporadically and sometimes not for weeks or months, resulting in a cumulative deficiency of $350; further, for two months, timely reports and remittances were not made to the State Comptroller. As a consequence of these derelictions, respondent's salary was suspended in June 2007. Although there is no indication that any money was misappropriated, public confidence in the courts is jeopardized when monies are not scrupulously handled as required by law.

We note that a month after his salary was suspended, respondent brought his filings and remittances up to date, that he has since retained a new court clerk, and that it appears that these administrative tasks are now being properly performed.

Respondent also acted improperly with respect to *Miclette v. Hargett*, a small claims action which he filed in his own court. While it is not improper for a judge to commence an action in the judge's own court, the judge must promptly recuse and take appropriate steps to ensure that the case is assigned to another judge (*see* Adv Op 07-108, 90-11). Here, since there was no co-judge to hear the case, respondent should have immediately transferred the case to another jurisdiction. Instead, on August 16, 2007, after hearing another case involving the same

defendant, Edward Hargett (and issuing an oral ruling against the defendant), respondent addressed his own case and announced that he would transfer the case unless Mr. Hargett agreed to satisfy the debt. In effect, respondent engaged in settlement discussions in his own court, from the bench, in a case in which he was a party.

It is no excuse that respondent disclosed the conflict, obtained the consent of the parties before presiding over Mr. Hargett's first case, and offered to transfer his own case involving Mr. Hargett. Under the circumstances, it was patently improper for respondent to have any dealings in his court with the defendant, with whom he had an adversarial relationship.

In mitigation, the record indicates that following the court appearance described above, respondent took no further action to collect the debt from the defendant. Respondent has acknowledged his misconduct, and it has been stipulated that he now understands that when he is recused, arrangements must be made promptly to transfer the case.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Jacob were not present.

Dated: July 1, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **PHILLIP D. O'DONNELL**, a Justice of the Herkimer Village Court, Herkimer County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Jill S. Polk, Of Counsel) for the Commission
Corrigan, McCoy & Bush, PLLC (by Scott W. Bush) for the Respondent

The respondent, Phillip D. O'Donnell, a Justice of the Herkimer Village Court, Herkimer County, was served with a Formal Written Complaint dated September 2, 2008, containing three charges. The Formal Written Complaint alleged that respondent failed to schedule hearings in or dispose of 28 criminal cases in a timely manner and failed to keep accurate records of the proceedings, failed to report dispositions to the State Comptroller, and failed to disqualify himself in a case notwithstanding that his daughter was a friend of the defendant. Respondent filed a verified answer dated September 30, 2008.

On January 20, 2009, 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 January 28, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has served as a part-time Justice of the Herkimer Village Court since April 1, 1989. He was admitted to practice law in New York State in 1989 and maintains a private law practice in Herkimer.

As to Charge I of the Formal Written Complaint:

2. In the 28 criminal cases listed on Schedule A of the Formal Written Complaint and as set forth more fully in the Agreed Statement of Facts, respondent failed to schedule hearings or dispose of the cases for up to six years and five months, and failed to keep complete and accurate records of the proceedings. In four cases, respondent failed to render decisions on motions to dismiss for periods ranging from two and a half to 17 months.

3. Respondent failed to supervise his court clerk and otherwise administer the court in an appropriate manner, resulting in, among other things, poor record keeping and poor case management. Most of the files for the 28 cases were kept in unorganized stacks on the clerk's desk and atop a file cabinet, or were misfiled. Case records did not include such important information as appearance dates or the reasons for adjournments. As a result, it is difficult to reconstruct complete case histories and status reports as to the matters.

4. For each of the 28 cases, there are no court notes or minutes contained in the file. The file contains no records whatsoever as to the arraignment procedure, or any document, record or notation which would confirm that the defendant was advised of his/her constitutional rights and that charges were read at arraignment. The file jackets contain several dates written on the cover which are crossed off, without notation as to the reason for the date or the cross out. It is not possible to determine from the contents of the files which, if any,

attorneys or defendants appeared or what transpired, on many of the dates listed on the file jackets and Case History Reports. Many of the dates on the file jackets fail to correspond to the dates on the Case History Reports.

As to Charge II of the Formal Written Complaint:

5. In *People v. Dennis Harrigan*, in which the defendant was charged with Assault in the Third Degree, respondent arraigned the defendant in 2003 and neither disqualified himself nor disclosed that his daughter was a friend and schoolmate of the defendant. From 2003 to 2007, respondent granted the defendant at least 15 adjournments for purposes of calculating restitution, allowing the matter to languish in his court without disposition.

6. Respondent did not believe there to be a conflict with his presiding over this case until the Commission inquired into the matter. Upon having an opportunity to re-examine his daughter's relationship with the defendant, respondent determined that he should recuse himself from the matter. In or about September 2007, after the Commission's inquiry, respondent disqualified himself. Although a defendant's friendship with a judge's child is not a specifically enumerated criterion for disqualification, on reflection respondent concluded that his impartiality might reasonably be questioned and there was an appearance of impropriety in his presiding over this matter.

As to Charge III of the Formal Written Complaint:

7. In the following six cases listed on Schedule A to the Formal Written Complaint, respondent delayed reporting final dispositions to the Office of the State Comptroller for periods ranging from eight months to three and a half years: *People v. Matthew O. Lambert, People v. Angela Celi, People v. Jeremy Robellard, People v. Clayton Sheffler, Sr., People v. Mary Jane Reinhardt* and *People v. Vincent Pawlyshyn.*

Supplemental Findings:

8. As of October 2008, respondent had taken affirmative action on each of the cases cited above and most of the cases have now been finally disposed of.

9. Herkimer Village Court is a high volume court, and the total number of delayed cases represents less than two percent of the entire volume of cases handled by the court during the applicable time period.

10. Many of the files at issue had been misplaced or misfiled by the court clerk and became lost for court control purposes. Respondent acknowledges that it is his responsibility to supervise court staff and insure that the files are effectively monitored and that cases are disposed of in a timely fashion.

11. As a result of the Commission's inquiry, respondent has undertaken a

review of his court's administrative procedures and has implemented case management controls aimed at eliminating the problems identified herein.

12. Respondent agrees with the Administrator's recommendation that the Office of Court Administration be asked to review respondent's case management procedures and make additional recommendations as may be appropriate to improve the administration of the court.

13. Respondent is remorseful and assures the Commission that lapses such as occurred in the cases here will not recur and agrees that, if the Commission accepts this Agreed Statement of Facts, Commission staff shall review his court records and files and report to the Commission approximately six months following the Commission's determination in this case.

14. Respondent has been cooperative and forthright with the Commission and its staff throughout the investigative and adjudicative proceedings in this matter.

15. The parties to this Agreed Statement of Facts note that town and village court justices do not maintain or file regular administrative reports of all pending matters. Respondent therefore lacked a useful tool that may have identified some of the delays herein and alerted him to the dimension of the case management problem in his court.

16. The parties to this Agreed Statement of Facts also note that the cases herein are all criminal matters and that there were apparently no speedy trial issues raised by any defendant in any proceeding and apparently no applications or objections raised by a prosecutor regarding undue delay.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(1), 100.3(B)(7), 100.3(C)(1), 100.3(C)(2) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The record establishes that respondent had significant delays in disposing of criminal cases in his court. These delays were attributable in large part to respondent's failure to administer the court in an appropriate manner and to properly supervise court staff, resulting in misplaced files, poor record-keeping and poor case management. As respondent has acknowledged, it is his responsibility to supervise court staff and to insure that files are effectively monitored and that cases are disposed of in a timely fashion (Rules, §§100.3[B][7], 100.3[C][2]). In four cases, respondent also had significant delays in ruling on motions to dismiss.

The record also indicates a pervasive failure to maintain complete and accurate records of cases, making it difficult to reconstruct case histories and status reports as to the

matters. Sections 107 and 2019 of Uniform Justice Court Act require a judge to keep legible and suitable records of all civil and criminal proceedings. Section 200.23 of the Recordkeeping Requirements for Town and Village Courts (22 NYCRR §200.23) requires the court to maintain case files that *inter alia* include papers filed, minutes or notes made by the court, and a record of the arraignment proceeding, including whether the defendant was advised of his or her rights and whether counsel was assigned. Respondent's disregard of these record-keeping requirements is a violation of his administrative responsibilities and, standing alone, constitutes misconduct. Rules, §100.3(C)(1); *see*, *Matter of Petrie*, 54 NY2d 807, 808 (1981); *Matter of Schiff*, 83 NY2d 689, 694 (1994).

In addition, respondent failed to disqualify himself in an Assault case in which his daughter was a friend of the defendant. While a defendant's friendship with a judge's child is not a specifically enumerated criterion for disqualification (Rules, §100.3[E][1]), respondent himself concluded, after the Commission had inquired into the matter, that in view of the relationship his impartiality might reasonably be questioned, and he eventually disqualified himself. *See*, *Matter of Robert*, 89 NY2d 745 (1997) (judge presided over cases involving his friends); *Matter of Fabrizio*, 65 NY2d 275 (1985) (judge presided over case in which the defendant was his dentist). Prior to his disqualification, respondent had adjourned the case at least 15 times over four years and allowed the case to languish in his court, thereby creating the appearance of special consideration.

In considering the sanction, we note that respondent has been contrite and cooperative throughout the proceedings, has taken action in or otherwise disposed of all the delayed cases, and has assured the Commission that such lapses will not recur. Respondent has also taken steps to improve his procedures, including implementing case management controls aimed at eliminating the problems identified herein. We trust that these measures will insure that such problems will not recur in the future.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: February 5, 2009

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JAMES H. RIDGEWAY**, a Justice of the Richland Town Court and Acting Justice of the Pulaski Village Court, Oswego County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair

Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel) for the Commission
James K. Eby for the Respondent

The respondent, James H. Ridgeway, a Justice of the Richland Town Court and Acting Justice of the Pulaski Village Court, Oswego County, was served with a Formal Written Complaint dated February 13, 2009, containing four charges. The Formal Written Complaint alleged that respondent failed to deposit, report and remit court funds within the time required by law and failed to issue duplicate receipts as required by law. Respondent filed an answer dated March 31, 2009.

On September 30, 2009, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On November 5, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Richland Town Court since January 2000 and an Acting Justice of the Pulaski Village Court since April 2001. He is not an attorney.

2. Respondent's wife worked as his court clerk in the Richland Town Court between January 2005 and January 2008. Before hiring his spouse, respondent received the unanimous approval of the Richland Town Board. Respondent was unaware of his need to obtain the prior approval of the Chief Administrator of the Courts as required by Section 100.3(C)(3) of the Rules.[1]

As to Charge I of the Formal Written Complaint:

[1] This provision, which prohibits a judge from appointing a relative, states: "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."

3. From March 26, 2005 through May 1, 2007, as set forth in Exhibit 1 to the Agreed Statement of Facts, respondent failed to deposit tens of thousands of dollars in Richland Town Court funds within 72 hours of receipt, as required by Section 214.9(a) of the Uniform Civil Rules for the Justice Courts.

4. During a four-month period between September 29, 2006, and January 24, 2007, the cumulative deficiency in the court account was continuously more than $10,000 and, for more than 30 days in that period, exceeded $20,000. As of May 1, 2007, the cumulative deficiency in respondent's court account was still $5,125.98.

5. Respondent's court clerk placed the undeposited funds in various unsecured locations, including inside of case files or stapled to receipts in a receipt book kept in a non-theft resistant wooden filing cabinet.

6. Respondent has now deposited all of the court funds. There is no evidence of conversion or misuse of the funds.

7. Respondent acknowledges his failure to supervise his court clerk and recognizes that he is personally responsible for all court funds. As a result of the Commission's investigation, respondent obtained a theft and fire-resistant metal filing cabinet in which he locks all collected monies pending deposit.

As to Charge II of the Formal Written Complaint:

8. From October 2006 through February 2007, as set forth in Exhibit 2 to the Agreed Statement of Facts, respondent failed to file reports to the State Comptroller and to remit $26,560 in town court funds to the Chief Fiscal Officer of the Town of Richland "(Chief Fiscal Officer") within ten days of the month succeeding collection, as required by Sections 2020 and 2021(1) of the Uniform Justice Court Act, Section 1803 of the Vehicle and Traffic Law and Section 27(1) of the Town Law.

9. On February 22, 2007, the State Comptroller issued notice to the Richland Town Supervisor to stop payment of respondent's judicial salary pending the filing of reports and the remittal of funds for the months of October, November and December 2006.

10. Respondent's report and remittance for the month of October 2006, in the amount of $3,105, was received on March 13, 2007, 123 days beyond the time provided by the statutory requirement.

11. Respondent's report and remittance for the month of November 2006, in the amount of $7,300, was received on March 13, 2007, 93 days beyond the time provided by the statutory requirement.

12. Respondent's report and remittance for the month of December 2006, in the amount of $6,055, was received on April 11, 2007, 91 days beyond the time provided by the statutory requirement.

13. Respondent's report and remittance for the month of January 2007, in the amount of $5,375, was received on April 6, 2007, 55 days beyond the time provided by the statutory requirement.

14. Respondent's report and remittance for the month of February 2007, in the amount of $4,725, was received on April 6, 2007, 27 days beyond the time provided by the statutory requirement.

15. On April 12, 2007, the State Comptroller notified the Town Supervisor that respondent was current in his monthly reporting and directed that payment of respondent's salary be resumed.

As to Charge III of the Formal Written Complaint:

16. From February 2005 through March 2007, as set forth in Exhibits 5 and 6 to the Agreed Statement of Facts, respondent failed to report to the State Comptroller and remit to the Chief Fiscal Officer $2,797.50 in court funds he received in 34 cases in the Richland Town Court, as required by Sections 2020 and 2021 of the Uniform Justice Court Act, Section 1803 of the Vehicle and Traffic Law and Section 27(1) of the Town Law.

As to Charge IV of the Formal Written Complaint:

17. From January 2005 through March 2007, as set forth in Exhibit 7 to the Agreed Statement of Facts, respondent failed to issue duplicate receipts for $2,444 in court funds he received in 26 cases in the Richland Town Court, as required by Section 31(1)(a) of the Town Law and Section 99-b of the General Municipal Law.

Supplemental findings:

18. In January 2005, after respondent lost the services of his court clerk, his wife, Tammy Ridgeway, filled the position. Mrs. Ridgeway worked part-time and was the sole clerk for the Richland Town Court.

19. Mrs. Ridgeway received minimal, informal training concerning her duties and responsibilities as a court clerk and was unfamiliar with the required procedures for recording, depositing and reporting court funds.

20. In April 2005 Mrs. Ridgeway began experiencing serious health problems. On the recommendation of her doctor, Mrs. Ridgeway resigned her position as court clerk in December 2007. In January 2008 respondent hired a new court clerk, who attended paralegal school and received training from the Office of Court Administration.

21. As a result of the Commission's investigation, respondent has taken steps to ensure that his reports and remittances are timely and accurate and that all court funds are deposited within 72 hours of receipt, including regularly reviewing court records, books and reports and conducting monthly reconciliations.

22. Respondent acknowledges that he failed to diligently discharge his administrative responsibilities and to supervise his court clerk, and commits that his administrative and financial shortcomings will not be repeated.

23. Respondent has not experienced similar reporting, remitting and depositing deficiencies as Acting Justice of the Pulaski Village Court, where his caseload is significantly lighter and he has had a trained clerk assisting him since assuming the bench.

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

The handling of official monies is one of a judge's most important responsibilities. Depositing, reporting and remitting such monies promptly, in strict compliance with the statutory mandates, is essential to ensure public confidence in the integrity of the judiciary. The failure to comply with these mandates constitutes misconduct, even if there is no evidence that monies were missing or used for inappropriate purposes. *See Matter of Minogue,* 2009 Annual Report 138 (Comm on Judicial Conduct); *Matter of Hrycun,* 2002 Annual Report 109 (Comm on Judicial Conduct); *Matter of Ranke*, 1992 Annual Report 64 (Comm on Judicial Conduct)*; see also Bartlett v. Flynn*, 50 AD2d 401, 404 (4th Dept 1976). Although these important functions may be delegated, a judge is required to exercise supervisory vigilance over court staff to ensure the proper performance of these responsibilities. *See*, *Matter of Burin*, 2008 Annual Report 97 (Comm on Judicial Conduct); *Matter of Jarosz*, 2004 Annual Report 116 (Comm on Judicial Conduct); Rules, §§100.3(C)(1) and (2) (judge must require court staff "to observe the standards of fidelity and diligence that apply to the judge").

All monies received by the court are required to be deposited "as soon as practicable" and no later than 72 hours after receipt, and must be reported and remitted to the appropriate authorities by the tenth day of the month following collection (Uniform Civil Rules for the Justice Courts §214.9[a]; Uniform Justice Ct Act §2021[1]; Town Law §27; Vehicle and Traffic Law §1803). Additionally, all monies received and disbursed by the court must be properly recorded, and duplicate receipts must be issued (Town Law §31[1][a]; Gen Mun Law §99-b).

Over a two-year period, respondent failed to deposit tens of thousands of dollars in court monies in a timely manner as required by law. Over that period, deposits were made on

a sporadic basis – weekly, biweekly or even less frequently – and the amounts deposited were often less than the amounts collected by the court. As a result, there was a cumulative deficiency in the court account that, at one point, was more than $20,000. During this time, undeposited funds were kept in various unsecured locations in the court office.

Over the same period, respondent also failed to report and remit all court monies to the appropriate authorities on a monthly basis, as required by law. Funds totaling $2,797.50, which the court had collected in 34 cases between February 2005 and March 2007, were unreported over that period. For five months, respondent made no reports and remittances, notwithstanding that his court had collected $26,560 over that period: his remittances for October and November 2006 (totaling $10,405) were not filed until March 2007, and his reports and remittances for December 2006 through February 2007 (totaling $16,155) were not filed until April 2007. These derelictions, leading to a suspension of respondent's salary by order of the State Comptroller, resulted in significant delays in processing the monies collected by the court. In addition, contrary to the statutory requirements, in 26 cases no duplicate receipts were issued for $2,444 in court funds that were collected.

It appears that these deficiencies were attributable to respondent's inadequate supervision of his court clerk, his spouse, who was hired for that position after the departure of the previous clerk in January 2005. It has been stipulated that respondent's wife received "minimal, informal" training for her clerical duties and that for most of the period at issue she had serious health problems. These factors do not mitigate respondent's responsibility for these serious lapses; indeed, these circumstances should have put him on notice of potential problems in connection with the performance of the clerk's responsibilities and should have prompted him to personally review the court's financial records and to take such other action as necessary to ensure the appropriate handling of court monies.

In considering the sanction, we note that there is no indication that any monies were used for inappropriate purposes. We also note that a new court clerk has been hired and that respondent is committed to avoiding these administrative and financial lapses in the future. As a result of the Commission's investigation, respondent has taken significant steps, including regularly reviewing court records and reports and conducting monthly reconciliations, to ensure that in the future these responsibilities are performed in a timely and accurate manner. In view of these factors, we accept the recommended sanction of censure.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck dissents in an opinion and votes to reject the Agreed Statement of Facts on the basis that the proposed disposition is too harsh.

Dated: December 15, 2009

DISSENTING OPINION BY MR. BELLUCK

I write with the dual purpose of explaining my dissent from the majority's decision to accept the recommended sanction of censure in this case, and expressing my concern about the incongruity of sanctions imposed by the Commission, which this case and *Matter of Burke* (decision issued today) exemplify.

In accepting the Agreed Statement of Facts, the Commission censures Judge Ridgeway for administrative deficiencies over a two-year period, in which the judge failed to make timely deposits of court monies, failed to report the monies he collected on a timely basis to the State, and failed to issue duplicate receipts in some cases. It is stipulated that the judge's problems began when he lost the services of his court clerk, whose position, with the approval of the Town Board, was filled by the judge's wife. (Such employment is specifically permitted by the Rules [§100.3[C][3].) It is also stipulated that upon her employment the judge's wife received minimal formal training in the appropriate record-keeping, depositing and reporting procedures and that, within a short time, she also developed serious health problems. Within this context, it seems clear that the administrative and financial shortcomings that ensued in the court were the result of an unfortunate series of circumstances and were, at worst, managerial lapses, not intentional or willful wrongdoing.

Most importantly, it has been stipulated that there is no evidence whatsoever of conversion or any inappropriate use of court monies. No monies were missing, and all the monies have been accounted for and have now been deposited. In such instances, as I have indicated previously (*Matter of Roller*), it is my view that public discipline is unwarranted. Moreover, the record here indicates that the judge's wife resigned as clerk nearly two years ago; a new clerk was hired; and, as the majority states, the judge "is committed to avoiding these administrative and financial lapses in the future" and "has taken significant steps" to ensure that his administrative responsibilities are properly performed. Given these circumstances, any public discipline, let alone the sanction of public censure – the most severe sanction short of removal the Commission can impose – seems unduly harsh. Such conduct, I believe, warrants at most a confidential caution or even outright dismissal, perhaps with a proviso that the Commission will review the judge's records in a year to ascertain whether there has been any recurrence of these administrative problems.

I recognize that Judge Ridgeway, represented by counsel, has agreed to the sanction of censure. In my view, the judge's assent to this result, negotiated with Commission counsel, does not make it fair, appropriate or acceptable. With the weight of Commission proceedings bearing down on him for several years, it is not surprising that a judge is willing to conclude the proceedings in any way that permits him to keep his judgeship and move forward. But I cannot vote to accept such a draconian result based on the facts presented here.

Further, it is apparent to me that the negotiated sanction here – a public censure – is completely out of proportion with the dispositions the Commission has imposed in other cases. In recent years, the Commission has censured judges for, *e.g.*, sending an unrepresented, almost certainly incompetent defendant to prison for 90 days absent even a modicum of due process (*Matter of Dunlop*, 2008); allowing a co-judge's law partners to appear before her in dozens of cases and allowing her personal attorney's law firm to appear before her (*Matter of Lehmann,* 2008); fixing a Speeding ticket for a friend's wife based on *ex parte* communications (*Matter of Lew,* 2008); a series of acts which showed bullying, intemperate, retaliatory behavior on the bench (*Matter of Hart,* 2008); abusing the contempt power on three occasions, all of which resulted in the incarceration of litigants (*Matter of Griffin,* 2008); interceding in two matters in Family Court to advance a friend's interests, persisting in doing so despite being warned about such conduct, and telling a supervising judge, "Everybody does it" (*Matter of Horowitz*, 2005); and, most recently, operating a vehicle under the influence of alcohol, resulting in a conviction for Driving While Ability Impaired, and sitting on a friend's cases (*Matter of Burke*, 2009). Although the misconduct in the above-cited cases is exponentially more serious than the administrative lapses of Judge Ridgeway, the Commission imposes the same sanction – censure. Indeed, on the very day that the Commission voted to censure Judge Ridgeway for administrative shortcomings resulting in delays in depositing and remitting money, it voted to censure a judge for hitting another vehicle while driving under the influence of alcohol (*Matter of Burke*, *supra*). In my mind, there is simply no way that drunk driving – unlawful behavior that threatens the safety of other people's lives – warrants the same sanction as what Judge Ridgeway admitted doing here. Moreover, the continued use of censure for wrongdoing that is relatively minor, as in this case – simply because the parties have agreed to the sanction – undermines the significance of this sanction when it is appropriately imposed and undermines public confidence in the Commission's ability to properly distinguish between serious wrongdoing and less serious misbehavior.

Other judges have been accorded a more lenient sanction – admonition – for misconduct which I view as significantly more serious than Judge Ridgeway's. *E.g.*, *Matter of Shkane* (2008) (judge was abusive to two police officers who had lawfully arrested a litigant outside the court); *Matter of Pajak* (2004) (judge was convicted of Driving While Intoxicated after a property damage accident). I also note that, according to the Commission's annual reports, numerous judges have been issued a confidential letter of dismissal and caution for "not ensuring that fines and other court funds were properly and timely recorded, deposited and disbursed" (*e.g.*, 2009 Annual Report, p. 13) – the same conduct for which Judge Ridgeway is now censured. In my view, the disparity of these results is inconsistent with the fair and proper administration of justice.

Accordingly, I vote to reject the Agreed Statement of Facts.

Dated: December 15, 2009

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

Relation to **DANDREA L. RUHLMANN**, a Judge of the Family Court, Monroe County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Trevett Cristo Salzer & Andolina P.C. (by Lawrence J. Andolina) for the Respondent

The respondent, Dandrea L. Ruhlmann, a Judge of the Family Court, Monroe County, was served with a Formal Written Complaint dated June 24, 2008, containing four charges. The Formal Written Complaint alleged *inter alia* that respondent required and/or permitted her confidential secretary to perform babysitting services for respondent's children and personal typing duties for respondent's husband during court hours and that, at respondent's direction, her secretary reviewed a confidential court database to obtain information based on an *ex parte* personal request by respondent's husband. Respondent filed a verified answer dated September 9, 2008.

On December 12, 2008, 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 January 28, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Family Court, Monroe County, since January 2004. Her current term of office expires in 2013.

2. Respondent's husband is Raymond Ruhlmann, III. They have two children, a daughter who was eight years old at the time of the incidents herein, and a son who was three years old at the time.

3. Kimberly Keskin and respondent had been very close friends since childhood, and their close friendship continued for 37 years, up to the time of the events herein.

4. Ms. Keskin also had a close relationship with respondent's two children, who called her "Aunt Kimmy." As a consequence of this close relationship, Ms. Keskin had provided uncompensated babysitting services to respondent's children on numerous prior occasions. Prior to respondent's election as a judge, Ms. Keskin had done typing for Mr. Ruhlmann.

5. After assuming office on January 1, 2004, respondent appointed Ms. Keskin as her confidential secretary. Prior thereto, Ms. Keskin was employed as a legal secretary in the Family Court Division of the Monroe County Law Department.

6. In appointing Ms. Keskin as her secretary, respondent wrongly believed that because Ms. Keskin was appointed by and served at the pleasure of respondent, Ms. Keskin's duties included providing respondent with assistance on personal matters. Respondent understood that Ms. Keskin was a governmental employee paid by New York State but wrongly believed that the position of confidential secretary to a judge included being the judge's personal assistant and that such duty was a part of her employment. Respondent was familiar with the Office of Court Administration's job description for Confidential Secretary.

7. As a consequence of her mistaken understanding of Ms. Keskin's duties and responsibilities and the limits on her authority over Ms. Keskin's actions during the work day, respondent wrongly had Ms. Keskin perform a variety of personal assignments for her and her husband Raymond over an eight-month period.

As to Charge I of the Formal Written Complaint:

8. On Monday, January 26, 2004, respondent brought her daughter to her office in the courthouse at about 9:00 AM because she was sick and unable to attend school and respondent was unable to make alternate day care arrangements. Respondent had Ms. Keskin watch and attend to the child in the court office. At about 12:00 PM, respondent had Ms. Keskin take the child to the child's doctor, wait for the child to be examined, drive the child to a pharmacy to obtain medicine and, thereafter, drive the child to the home of respondent's parents. Ms. Keskin spent about four hours, intermittently, including the lunch hour, assisting respondent with her daughter. During that period respondent was attending to court business in chambers or was on the bench.

9. At about 9:00 AM on Friday, January 30, 2004, respondent had Ms. Keskin babysit respondent's son in the court office for more than an hour, and then had her transport and deliver the child to his regular day care provider, which took about 30 minutes. Respondent had intended to transport her son personally to day care that morning, but before she could do so, she was called to the office to complete an adoption proceeding on behalf of another judge who had taken ill.

10. On Friday, April 9, 2004, in the morning, respondent brought her daughter

to her office in the courthouse because she was ill and unable to attend school and respondent was unable to make alternate care arrangements. When respondent went on the bench, her daughter remained in chambers, where Ms. Keskin was responsible for watching her intermittently for about two hours. During the time specified in paragraphs 8, 9 and 10, Mr. Ruhlmann was out of town and unavailable.

11. During business hours on two other business days between May and August 2004, respondent had Ms. Keskin watch and attend to respondent's son in the court office for no more than a half hour each day while respondent was on the bench.

12. On Monday, June 7, 2004, respondent was out of town attending a judicial conference. During the afternoon, Ms. Keskin was contacted at her court office by Mr. Ruhlmann, who advised her that respondent's daughter had cartwheeled into a tree and may have broken her hand. Mr. Ruhlmann, who was working as a Monroe County assistant district attorney and was engaged in a jury trial, had Ms. Keskin pick up respondent's daughter at the child's home and drive the child to the doctor for examination and x-rays. Ms. Keskin was out of the office for about three hours attending to the matter.

13. During the afternoons of Tuesday and Wednesday, July 12-13, 2004, for a total of three hours, respondent had Ms. Keskin watch and attend to respondent's daughter and two of her daughter's friends, who were approximately nine and seven years old, in the court office and the courtroom. Respondent did so because she had previously agreed to provide afternoon care on those days to the children as part of an arrangement with the children's mother, who is respondent's friend, to attend and view the workings of the court.

14. Following the lunch hour on Tuesday, August 31, 2004, respondent had Ms. Keskin watch and attend to her daughter in the court office for about three hours while respondent was presiding on the bench. Mr. Ruhlmann, who was prosecuting a criminal case that morning, had brought the child to court with him. When he realized there would be testimony unsuitable for a child to hear, Mr. Ruhlmann brought the child to respondent's chambers during the lunch break.

15. With regard to all of the above occasions, respondent made no arrangements to compensate Ms. Keskin personally in lieu of her court-paid salary. As Ms. Keskin's supervisor, respondent signed her weekly attendance/leave accrual sheets covering the foregoing dates and times, in effect confirming that Ms. Keskin was entitled to her court salary for periods in which she was performing personal services for respondent.

16. In signing the attendance/leave accrual sheets, respondent considered that Ms. Keskin would occasionally begin work earlier than 9:00 AM and leave work after 5:00 PM and that Ms. Keskin performed some of the personal services during her lunch hour. In signing the attendance/leave accrual sheets, respondent believed that Ms. Keskin's personal services had neither detracted from the performance of her court related work each week nor significantly infringed on the 35-hour work week.

17. Respondent acknowledges that it was improper for her to have used Ms. Keskin repeatedly to perform personal child care services during the business day for her and her husband and on one occasion her friend. Respondent now realizes that from January 2004 to September 2004, she grossly misunderstood the role of a judge's personally appointed confidential secretary. While respondent did not believe she was taking substantial time away from Ms. Keskin's discharge of her court duties, she now realizes that she created at least the appearance of using public resources for her personal benefit. Respondent apologizes to the Commission and to Ms. Keskin for her conduct.

As to Charge II of the Formal Written Complaint:

18. From February 2004 to May 2004, respondent had Ms. Keskin perform personal typing duties during business hours for Mr. Ruhlmann, limited to the following simple documents:

A. a one-page letter, dated February 27, 2004, submitted to the Office of Court Administration;

B. minor updates to revisions in Mr. Ruhlmann's pre-existing resume;

C. three substantially similar cover letters, all dated March 1, 2004, that Mr. Ruhlmann submitted in connection with an application for employment at Monroe Community College;

D. a short paragraph describing Mr. Ruhlmann's teaching philosophy that he used in connection with his application for employment at Monroe Community College;

E. a short e-mail communication on March 3, 2004, from Mr. Ruhlmann to Bill Reyes regarding Mr. Ruhlmann's application for the Marine Corps award;

F. two pages of the five-page summary of Mr. Ruhlmann's career achievements prepared in connection with his application for a personal award relating to his service as a Colonel in the United States Marines; and

G. three forms listing 16 one-word categories for the compilation of basic personal information arising from Mr. Ruhlmann's duties while a Marine.

19. On March 1, 2004, Ms. Keskin objected to respondent that the work she was doing in the office for Mr. Ruhlmann was interfering with her ability to complete a specific court work assignment. Respondent told Ms. Keskin that since she was close to completing the task that she was working on for Mr. Ruhlmann that day, she should finish that work first before

moving on to her court work assignment.

20. Respondent now realizes it was improper for her to have had Ms. Keskin perform secretarial work for her husband as part of her court duties, let alone put such work ahead of court business, since Mr. Ruhlmann was not a court employee and his typing work was unrelated to court business.

As to Charge III of the Formal Written Complaint:

21. In June 2004, in a conversation in their home, Mr. Ruhlmann asked respondent how to obtain certain Family Court records which might exist relating to a defendant in a pending criminal case. Mr. Ruhlmann, who was a Monroe County assistant district attorney at the time, explained to respondent that he was responsible for prosecuting "JK" on charges of Sexual Abuse in the First Degree and Assault in the Third Degree in the Greece Town Court, and he believed that Mr. K may have had a prior Family Court case that was relevant in the criminal proceeding. Respondent advised Mr. Ruhlmann that pursuant to 22 NYCRR Section 205.5(d)(2), the District Attorney's office was entitled to obtain such records and that they could be obtained either by subpoena or by an *ex parte* request if the criminal case was related to a Family Court matter in which an order of protection had been issued. Mr. Ruhlmann provided respondent with the defendant's name and asked her to check the Family Court database to determine if there were records available for the defendant so that the District Attorney's office might obtain them by subpoena or request.

22. Respondent agreed to do as her husband asked. She thereafter told Ms. Keskin to check the Family Court database for the defendant's name. Ms. Keskin checked the records and determined that there was no case for the defendant and no order of protection had been issued against him. Respondent thereafter told her husband only that there was no order of protection against "JK." Respondent did not tell Mr. Ruhlmann that there were no records for the defendant. She did say that Mr. Ruhlmann could issue a subpoena if he chose to do so. Mr. Ruhlmann did not issue a subpoena for any Family Court file relating to the defendant.

23. Respondent realizes in retrospect that it was improper for her to access confidential court records as the result of an *ex parte* personal request by her husband. Respondent also realizes that her conduct is not mitigated by the fact that her husband was at the time a public official who, through appropriate channels, could have obtained the information at issue, *ex parte*, from Family Court.

As to Charge IV of the Formal Written Complaint:

24. Prior to September 9, 2004, respondent and Ms. Keskin had an ongoing disagreement over Ms. Keskin's requests to take Fridays off from work during the summer. Respondent denied her requests.

25. On Thursday morning, September 9, 2004, in the court office, respondent

provided to Ms. Keskin a handwritten course syllabus prepared by Mr. Ruhlmann that he intended to use in connection with his new job as a teacher at a local high school. Respondent directed Ms. Keskin to type the syllabus. Ms. Keskin objected and said she was busy with court work. Respondent replied that Ms. Keskin should first prepare the syllabus for Mr. Ruhlmann and then continue with her court work. Ms. Keskin became distressed at this and a short time thereafter left the office because she was distressed. Respondent prepared the syllabus for her husband.

26. On Monday, September 13, 2004, Ms. Keskin met with respondent and renewed her objection to being told to place Mr. Ruhlmann's personal work before her court duties. Ms. Keskin also objected to having to spend time at the office attending to respondent's children. Respondent reiterated that Ms. Keskin was required as part of her job to perform work as instructed by respondent and if told to do so she must give priority to respondent's personal work over her court duties. Ms. Keskin surreptitiously recorded this conversation.

27. Sometime between September 13 and September 20, 2004, Ms. Keskin advised Supreme Court Justice Thomas Van Strydonck, Administrative Judge for the Seventh Judicial District, about the child care and other personal services respondent had her provide and the surreptitious recording she had made of her conversation with respondent. Ms. Keskin advised Judge Van Strydonck that she was considering commencing legal action against respondent.

28. Judge Van Strydonck conferred with other administrative judges about the matter.

29. On Monday, September 20, 2004, respondent conferred with Judge Van Strydonck about Ms. Keskin. Judge Van Strydonck told respondent among other things that she should not have used Ms. Keskin for child care and that it was inappropriate for Ms. Keskin to have surreptitiously recorded the September 13th conversation. Later that day, respondent fired Ms. Keskin, effective immediately, and issued a termination letter to her to that effect.

30. On or about November 5, 2004, Ms. Keskin commenced an action for unspecified money damages in the United States District Court for the Western District of New York against both the Unified Court System and respondent for, *inter alia*, alleged violations of New York Civil Service Law, Section 75-b (retaliatory action by public employers) and New York Labor Law Section 740 (retaliatory personnel action by employers). Respondent's position is that she fired Ms. Keskin for cause related to the surreptitious taping of the September 13th conversation and Ms. Keskin's having accessed respondent's office computer and deleted documents.

31. On or about March 19, 2007, a Stipulation and Order of Discontinuance and Settlement Agreement was filed in the federal court. The Unified Court System reached financial and employment terms with Ms. Keskin. No finding of liability was made with regard to respondent. She paid no damages and the action against her was discontinued.

32. Respondent commits to refrain scrupulously from asking court staff to perform personal work for her, her husband or others.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(4), 100.3(B)(6), 100.3(B)(6)(e), 100.3(C)(2) and 100.4(A)(2) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

By using her court secretary to provide repeated personal services during court business hours, respondent misused court resources and failed to diligently discharge her administrative responsibilities. "The public is entitled to expect that judges will conscientiously use resources paid for by the taxpayers only for the purpose for which those resources were intended" (*Matter of Watson*, Public Admonishment by California Commission on Judicial Performance [2006], citing Rothman, California Judicial Conduct Handbook §3.33 [2d ed. 1999]).[2] Respondent's repeated use of her court staff for personal, non-governmental purposes without a compelling reason violated her obligation to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules, §100.2[A]).

Over an eight-month period, respondent repeatedly used her secretary, Kimberly Keskin, to provide child care services during court hours. It is clear from the record that such services were not limited to situations where there were exigent or compelling reasons.

Over the same period, Ms. Keskin frequently did personal typing for respondent's husband during the work day. The repeated nature of these extra-judicial assignments leaves no doubt that these services were not *de minimis*, but were considered by respondent to be a part of her secretary's job. This was a misuse of court resources.

Even when Ms. Keskin told respondent on several occasions that such personal tasks were interfering with her ability to perform her court duties, respondent failed to recognize the impropriety of such behavior. Instead, respondent insisted and reiterated that Ms. Keskin should give respondent's personal tasks priority if told to do so. Respondent has acknowledged that she "grossly misunderstood" the role of a judge's secretary.

It has been stipulated that respondent's actions arose out of her "mistaken" belief

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[2] *See also* Alfini *et al*., *Judicial Conduct and Ethics* §6.06 (4th ed. 2007) ("A judge may not misuse the administrative resources available to the judge. To accomplish a judge's varied administrative responsibilities…a judge has individuals, equipment, and facilities at his or her command. Among a judge's administrative responsibilities is the duty to insure that these resources are utilized primarily in connection with the judge's judicial responsibilities and secondarily in matters related to the judicial function").

that her secretary's duties included providing the judge with assistance on personal matters. Such a "mistaken" view is neither mitigating nor excusable, since judges should know that such conduct is wrong. Each time respondent signed her secretary's time sheets attesting that her employee had worked a 35-hour week and should be paid for such time from public funds, respondent should have recognized the manifest impropriety that some of that time – in some weeks, several hours – was spent providing purely personal services for the judge and the judge's husband.

Routinely using court staff for extra-judicial purposes is improper regardless of whether the employee consents or performs such tasks without protest. It is disruptive to court administration and sets a poor example for court personnel. It is a breach of the public trust and damages public confidence in the integrity of the judiciary. *See*, Adv. Op. 88-78 (prohibiting a judge from hiring an employee who works under the judge's supervision to do extra-judicial work after court hours since "it would be impossible to avoid completely the possible 'appearance of impropriety'…even if there is no coercion, expectation of benefits, interference with court work, or other actual impropriety").

Repeatedly requiring a court employee to perform personal tasks also changes the nature of the employment relationship, complicates any evaluation of the employee's job performance and has adverse consequences when, as here, the judge decides to discharge the employee. Notwithstanding respondent's position that her decision to terminate Ms. Keskin's employment was based on unrelated grounds, given Ms. Keskin's complaints about being required to perform personal tasks for respondent, there was at least the appearance that her discharge was retaliatory.

Respondent also compromised her office by directing her secretary to check a confidential Family Court database for information about a defendant based on an *ex parte*, personal request by her husband, an assistant district attorney. Based on the unauthorized search of the database, respondent advised her husband that no order of protection had been issued against the defendant. The District Attorney's office had resources available and protocols to follow for obtaining such information through appropriate channels (22 NYCRR §205.5[d][2]). By short-circuiting this process to assist her husband, respondent again misused court resources for personal purposes.

In determining the sanction, we note that respondent has acknowledged that her conduct was improper and commits to refrain scrupulously in the future from asking court staff to perform personal work for her or her husband. We have also considered that for 37 years predating these events, respondent had a close friendship with Ms. Keskin, which included a close relationship with respondent's children.

Based on the foregoing, it is clear that a severe public sanction is appropriate. We believe that a public censure reflects the seriousness with which we view such misconduct, and we will not hesitate to consider the sanction of removal in the future if such conduct is repeated.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: February 9, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **WALTER J. SCHURR**, a Justice of the Friendship Town Court, Allegany County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel) for the Commission
Richardson & Pullen, P.C. (by David T. Pullen) for the Respondent

The respondent, Walter J. Schurr, a Justice of the Friendship Town Court, Allegany County, was served with a Formal Written Complaint dated September 9, 2008, containing two charges. The Formal Written Complaint alleged that respondent reduced Speeding charges in five cases without notice to or the consent of the prosecutor, and reduced a Speeding charge in another case based on an *ex parte* discussion with a co-worker, who was the defendant's neighbor and friend. Respondent filed a verified answer dated October 22, 2008.

On January 20, 2009, 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 12, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent was appointed as the Friendship Town Court Justice on January 3, 2006, and took the bench on May 9, 2006, after completing his judicial educational and training requirements. He is not an attorney. He is also employed at Friendship Dairies in the Town of Friendship.

As to Charge I of the Formal Written Complaint:

2. In the following five cases, respondent permitted defendants charged with Speeding to plead guilty to the reduced charge of Failure To Obey a Traffic Control Device in full satisfaction of the original charge, without notice to or the consent of the Allegany County District Attorney's Office or the New York State troopers who issued the tickets, in violation of Section 220.10(3) of the Criminal Procedure Law.

People v. Christopher Sam

3. In *People v. Christopher Sam*, the defendant pleaded guilty by mail to a Speeding ticket issued by New York State Trooper Anthony Dubin on August 4, 2006. With the plea, the defendant sent an *ex parte* letter to respondent dated August 5, 2006, requesting leniency in assessing points to his driver's license. Respondent has no relationship with the defendant. Respondent did not notify the District Attorney or Trooper Dubin about this communication.

4. In view of Mr. Sam's letter, respondent did not accept his guilty plea to the Speeding charge. Instead, respondent sent him a letter dated August 8, 2006, informing him that he would accept a guilty plea to a lesser charge, a violation of Section 1110(a) of the Vehicle and Traffic Law, Failure To Obey a Traffic Control Device. In the letter, respondent explained to Mr. Sam that by reducing the Speeding charge, Mr. Sam saved four points on his license and up to $150 on the assessed fine. Respondent told Mr. Sam that he had until August 23, 2006 to pay the $150 fine and $55 surcharge if he agreed with the reduction offer. Mr. Sam was instructed to contact the court to obtain a trial date if he disagreed with the reduction. Respondent did not send a copy to the District Attorney or the arresting trooper.

5. Respondent made the offer and reduced Mr. Sam's Speeding charge without notice to or the consent of the Allegany County District Attorney's Office or Trooper Dubin.

6. Respondent accepted Mr. Sam's plea to the reduced charge of Failure To Obey a Traffic Control Device without notice to or the consent of the prosecution. Respondent issued Mr. Sam a receipt on August 17, 2006, after receiving payment from him of the fine and surcharge.

People v. David Dougherty

7. In *People v. David Dougherty,* the defendant appeared before respondent on September 26, 2006, to answer a Speeding ticket issued by New York State Trooper Timothy Pompeo on August 16, 2006. Respondent has no relationship with the defendant. Trooper Pompeo was not present in respondent's court on September 26, 2006.

8. Respondent told Mr. Dougherty that he had spoken with Trooper Pompeo, who had consented to offering Mr. Dougherty the reduced charge of Failure To Obey a Traffic Control Device, in satisfaction of the Speeding charge, provided that Mr. Dougherty pleaded guilty. No such conversation between respondent and Trooper Pompeo had occurred.

9. Respondent made the offer to Mr. Dougherty without notice to or the consent of the Allegany County District Attorney's Office or Trooper Pompeo.

10. Respondent accepted Mr. Dougherty's plea to the reduced charge of Failure To Obey a Traffic Control Device on September 26, 2006, without notice to or the consent of the prosecution. Respondent imposed a $150 fine and $55 surcharge.

11. On October 2, 2006, after the court received Mr. Dougherty's payment of the fine and surcharge, respondent issued him a receipt.

People v. Dalton Martello

12. In *People v. Dalton Martello,* the defendant appeared before respondent on December 12, 2006 to answer a Speeding ticket issued by New York State Trooper Kevin Prince on October 8, 2006. Respondent has no relationship with the defendant. Trooper Prince was not present in respondent's court on December 12, 2006.

13. Respondent told Mr. Martello that he had spoken with Trooper Prince, who had consented to offering Mr. Martello the reduced charge of Failure To Obey a Traffic Control Device, in satisfaction of the Speeding charge, provided that Mr. Martello pleaded guilty. No such conversation between respondent and Trooper Prince had occurred.

14. Respondent made the offer to Mr. Martello without notice to or the consent of the Allegany County District Attorney's Office or Trooper Prince.

15. Respondent accepted Mr. Martello's plea to the reduced charge of Failure To Obey a Traffic Control Device on December 12, 2006, without notice to or the consent of the prosecution. Respondent imposed a $150 fine and $55 surcharge.

16. On January 30, 2007, after the court received Mr. Martello's payment of the fine and surcharge, respondent issued him a receipt.

People v. Frank Kwakye-Berko

17. In *People v. Frank Kwakye-Berko*, the defendant appeared before

respondent on or about January 30, 2007, to answer a Speeding ticket issued by New York State Trooper Timothy Pompeo on November 14, 2006. Respondent has no relationship with the defendant. Trooper Pompeo was not present in respondent's court on January 30, 2007.

18. Respondent told Mr. Kwakye-Berko that he had spoken with Trooper Pompeo, who had consented to offering the defendant the reduced charge of Failure To Obey a Traffic Control Device, in satisfaction of the Speeding charge, provided that the defendant pleaded guilty. No such conversation between the respondent and Trooper Pompeo had occurred.

19. Respondent made the offer to Mr. Kwakye-Berko without notice to or the consent of the Allegany County District Attorney's Office or Trooper Pompeo.

20. Respondent accepted Mr. Kwakye-Berko's plea to the reduced charge of Failure To Obey a Traffic Control Device on January 30, 2007, without notice to or the consent of the prosecution. Respondent imposed a $150 fine and $55 surcharge.

21. On February 7, 2007, after the court received Mr. Kwakye-Berko's payment of the fine and surcharge, respondent issued him a receipt.

People v. William Redfield

22. In *People v. William Redfield*, the defendant pleaded not guilty by mail to a Speeding ticket issued by New York State Trooper Timothy Pompeo on September 6, 2006. With the plea, the defendant sent an *ex parte* letter to respondent dated October 6, 2006, indicating that he had a clean driving record and requesting the opportunity to plead to a lesser charge. Mr. Redfield further wrote that he would appreciate handling the matter by mail since he lived in Utica, New York, and traveling to respondent's court would pose a hardship. Respondent has no relationship with the defendant. Respondent did not notify the District Attorney or Trooper Pompeo about this communication.

23. In response to Mr. Redfield's letter, respondent telephoned him on October 10, 2006, and engaged in an *ex parte* communication about the Speeding charge. Respondent told Mr. Redfield that he had spoken with Trooper Pompeo, who had consented to offering the reduced charge of Failure To Obey a Traffic Control Device, in satisfaction of the Speeding charge. No such conversation between respondent and Trooper Pompeo had occurred.

24. Respondent made the offer to Mr. Redfield without notice to or the consent of the Allegany County District Attorney's Office or Trooper Pompeo.

25. Respondent accepted Mr. Redfield's guilty plea to the reduced charge of Failure To Obey a Traffic Control Device during their *ex parte* telephone conversation on October 10, 2006, without notice to or the consent of the prosecution.

26. Respondent fined Mr. Redfield $150 with a $55 surcharge, for which the court issued a receipt on January 28, 2007, after it was paid.

As to Charge II of the Formal Written Complaint:

27. Joseph Hollister was issued a Speeding ticket in the Town of Friendship on September 9, 2006, which directed him to appear on the charge in Friendship Town Court on September 26, 2006.

28. Mr. Hollister was a neighbor and friend of Lee Evans, who was a co-worker of respondent at Friendship Dairies in or about 2006.

29. Prior to Mr. Hollister's court appearance, Mr. Evans approached respondent at work and spoke to him about Mr. Hollister's Speeding ticket. Mr. Evans told respondent that Mr. Hollister was a member of the clergy, that he was a very nice man who would do anything for anyone, and that he was a great help to the community.

30. Shortly thereafter, and prior to Mr. Hollister's appearance date, respondent had a private conversation with Friendship Police Officer Kevin Brisbee, who had issued the ticket to Mr. Hollister. The conversation took place in respondent's chambers at the courthouse. Respondent asked Officer Brisbee if Mr. Hollister was a problem at any time during the traffic stop, and the officer replied that Mr. Hollister was very polite and respectful during the traffic stop. Respondent then asked whether Officer Brisbee would consider reducing the Speeding charge to a Failure To Obey a Traffic Control Device, a violation of Section 1110(a) of the Vehicle and Traffic Law. Officer Brisbee indicated that he would not object to such a reduction.

31. On September 24, 2006, subsequent to his conversation with Officer Brisbee, respondent spoke with Mr. Evans while they were working at Friendship Dairies. Respondent told Mr. Evans that he was considering reducing Mr. Hollister's Speeding charge to Failure To Obey a Traffic Control Device.

32. On September 26, 2006, Mr. Hollister appeared in court and pleaded guilty to the reduced charge of violating Section 1110(a) of the Vehicle and Traffic Law, Failure To Obey a Traffic Control Device, in satisfaction of the original Speeding charge. Respondent imposed a $150 fine and $55 surcharge, which the court received on October 2, 2006.

33. Respondent recognizes that his actions in Mr. Hollister's case created the appearance of favoritism on behalf of a co-worker's personal friend, and respondent is committed to preventing any similar situation from arising in the future. To that end, he is vigilant in avoiding any attempted *ex parte* communication and has adopted the practice of immediately informing anyone who approaches him outside of the courtroom that he can only address court business in appropriate circumstances in court.

Supplemental Findings:

34. Respondent first sat on the bench as a Justice of the Friendship Town Court on May 9, 2006, and within approximately a month assumed responsibility for all the cases in the court, as well as all the administrative and record-keeping duties, because his co-justice and court clerk abruptly left their positions.

35. From May 2006 through December 2007, David Dougherty, Dalton Martello, Frank Kwakye-Berko and William Redfield were the only defendants in respondent's court to plead not guilty to Speeding charges issued by New York State troopers. All four defendants answered their tickets after September 1, 2006, the effective date of the order by the New York State Police Superintendent precluding troopers from appearing in court for the purpose of negotiating plea reductions in traffic cases. Respondent believed at the time that it was his responsibility to negotiate pleas as a way of disposing of contested Vehicle and Traffic Law vehicle charges.

36. It was not until December 4, 2007, that respondent learned that the Allegany County District Attorney's Office had instituted new procedures for negotiating plea reductions in traffic cases commenced by the New York State Police. Since that date, respondent has diligently adhered to a policy consistent with law.

37. Respondent has been fully cooperative and forthright with regard to this proceeding.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(1), 100.3(B)(4), 100.3(B)(6), 100.3(B)(9)(a) and 100.3(C)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The record establishes that in five cases respondent permitted defendants charged with Speeding to plead guilty to a reduced charge without the consent of the prosecutor. Such conduct was contrary to the statutory mandate requiring the prosecutor's consent for such reductions (CPL §220.10[3]). Respondent's conduct also violated ethical principles requiring a judge to afford to all parties the right to be heard according to law (Rules, §100.3[B][6]).

It has been stipulated that respondent, who had no personal relationship with the defendants, reduced the charges on his own based upon the erroneous belief that it was his responsibility to negotiate pleas as a way of disposing of contested traffic charges. At the time of these cases, respondent was new to the bench, and a recent directive by the State Police Superintendent, which precluded troopers from engaging in plea bargaining, may have created some uncertainty as to the appropriate procedures for disposing of such matters. Nonetheless, it was respondent's obligation to know the law and to comply with the statutory requirements (Rules, §100.3[B][1]), and his failure to do so constitutes misconduct. *Matter of Cook*, 2006 Annual Report 119 (Comm on Judicial Conduct). Not until a year later did respondent become

aware of the new procedures instituted by the Allegany County District Attorney's office for negotiating plea reductions in traffic cases commenced by the State Police.

Inexplicably, respondent also told the defendants in four of the cases that he had spoken to the trooper who issued the ticket and that the trooper consented to the reduction. It has been stipulated that, in fact, no such conversations had occurred. Respondent's statements appear to suggest that he knew that the consent of the prosecutor was required for such reductions and that he attempted to conceal that his actions were contrary to law. Such deception "is antithetical to the role of a judge, who is sworn to uphold the law and seek the truth." *Matter of Myers*, 67 NY2d 550, 554 (1986).

It was also misconduct for respondent to grant a reduction in the *Hollister* case based upon an *ex parte* discussion with a co-worker, the defendant's friend and neighbor, who spoke to the judge about his friend's Speeding ticket and told the judge that the defendant was a clergyman and "a very nice man." The record establishes that based on that conversation, respondent circumvented the normal judicial process in order to grant special consideration to the defendant. After the conversation with his co-worker, respondent reached out to the local police officer who issued the ticket and ascertained that the officer would not object to the reduction respondent proposed. Such conduct conveyed the appearance that the lenient disposition accorded to this defendant was based not on the merits of the case, but on the fact that the defendant had a friend who knew the judge. This constitutes ticket-fixing, which is a form of favoritism that has long been condemned.

In *Matter of Byrne*, 47 NY2d (b), (c) (1979), the Court on the Judiciary declared that "a judicial officer who accords or requests special treatment or favoritism to a defendant in his court or another judge's court, is guilty of *malum in se* misconduct constituting cause for discipline"; such conduct, the Court stated, "is wrong, and has always been wrong." *See also, e.g., Matter of Bulger*, 48 NY2d 32 (1979). By granting such special consideration, respondent engaged in conduct that subverts the entire system of justice, which is based on the impartiality and independence of the judiciary. Such behavior undermines respect for the judiciary as a whole.

In the late 1970s, the Commission uncovered a widespread pattern of ticket-fixing in New York State. As the Commission stated in a special report about the assertion of influence in traffic cases, ticket-fixing results in "two systems of justice, one for the average citizen and another for people with influence." The report noted: "While most people charged with traffic offenses accept the consequences, including the full penalties of the law … some are treated more favorably simply because they are able to make the right 'connections'" ("*Ticket-Fixing: The Assertion of Influence in Traffic Cases*," Interim Report, 6/20/77, p. 16). By the early 1980s, the Commission had publicly disciplined over 140 judges for the practice of ticket-fixing. With the benefit of a significant body of case law, every judge should be well aware that such conduct is prohibited.

The Court of Appeals has stated that even a single incident of ticket-fixing "is

misconduct of such gravity as to warrant removal" (*Matter of Reedy v. Comm on Judicial Conduct*, 64 NY2d 299, 302 [1985]), although mitigating factors may warrant a reduced sanction (*see*, *Matter of Edwards*, 67 NY2d 153 [1986] [censure]; *see also Matter of Cook*, *supra*, and *Matter of Bowers*, 2005 Annual Report 125 [Comm on Judicial Conduct] [censure in both cases based on a joint recommendation]).

Certain factors in this case indicate that censure, rather than removal, is appropriate. As noted previously, respondent was new to the bench during this period and it appears that he was unfamiliar with the appropriate procedures for reducing traffic charges, especially in light of the 2006 State Police directive. While these factors do not excuse respondent's actions, they mitigate his misconduct under the circumstances presented here. Significantly, respondent had no personal relationship with the defendants in the five cases cited in Charge I, and thus it appears that, in reducing the charges *sua sponte* in those cases, he was not motivated by favoritism. We also note that respondent has acknowledged his misconduct, that he has been fully cooperative, and that since learning in December 2007 of the appropriate procedures he has diligently adhered to a policy consistent with law.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: March 23, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **CONRAD D. SINGER**, a Judge of the Family Court, Nassau County.
THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Roger J. Schwarz, Of Counsel) for the Commission

Michael S. Ross for the Respondent

The respondent, Conrad D. Singer, a Judge of the Family Court, Nassau County, was served with a Formal Written Complaint dated January 29, 2009, containing two charges. The Formal Written Complaint alleged that respondent: (i) improperly exercised the contempt power in a case and (ii) after he had ordered a child hospitalized for a mental evaluation, visited the child in the hospital without the knowledge or consent of the parties.

On May 4, 2009, 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 May 14, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Family Court, Nassau County, since January 2007. Prior to that he was a Justice of the Great Neck Plaza Village Court, Nassau County. Respondent was admitted to the practice of law in New York in 1990, and while engaged in private practice for approximately 14 years, he appeared in Family Court on a regular basis.

As to Charge I of the Formal Written Complaint:

2. On January 17, 2007, respondent presided over *Tracy Schmidlin v. Robert Schmidlin,* a Family Court custody matter that also involved allegations of domestic violence.

3. In the course of presiding over the *Schmidlin* matter, respondent ordered Tracy Schmidlin to disclose the address of the shelter where she was then residing. Counsel for Tracy Schmidlin, Nancy Mullen-Garcia, indicated that "My client cannot disclose the address of the shelter." Respondent replied that if Tracy Schmidlin failed to provide her address to the court, he would hold her in contempt.

4. When Ms. Mullen-Garcia once again declined to reveal her client's address, respondent directed her to bring her supervising attorney, Lois Schwaeber, to court by 11:00 AM that morning.

5. When the case was recalled later that morning, respondent threatened to hold Ms. Mullen-Garcia in contempt if she refused and persisted in refusing to disclose the location of the shelter where her client then resided. Ms. Mullen-Garcia's supervisor similarly declined to reveal such address, stating:

> … we are by statutory law, New York State statutory law, the federal statutory law, several of them, prohibited from

revealing the address of our shelter.[1]

6. Despite having been placed on notice that counsel's refusal was grounded in law, respondent persisted in demanding disclosure of Tracy Schmidlin's address and grew increasingly impatient, discourteous and otherwise intemperate toward Ms. Schmidlin and her attorney, Ms. Mullen-Garcia.

7. When Ms. Mullen-Garcia still refused to reveal her client's address, respondent held her in contempt and imposed a fine of $1,000 upon her.

8. In connection with holding Ms. Mullen-Garcia in contempt, respondent:

(A) did not warn or admonish Ms. Mullen-Garcia that her conduct was deemed contumacious, as was required by Section 701.4 of the Rules of the Appellate Division, Second Department ("Second Department Rules");

(B) did not give Ms. Mullen-Garcia a reasonable opportunity to make a statement in her defense or in extenuation of her conduct, as was required by Section 701.2(c) of the Second Department Rules; and

(C) did not issue a written order in support of his contempt ruling against Ms. Mullen-Garcia, as required by Section 755 of the Judiciary Law.

As to Charge II of the Formal Written Complaint:

9. On February 28, 2008, respondent presided over the case of *Larry McCloud, Sr. v. Mamie Small*, a custody matter. At the request of counsel for LaDaniel M., a 14 year old non-party who was the son of Larry McCloud, Sr. and Mamie Small, respondent ordered the hospitalization of LaDaniel for evaluation pursuant to Family Court Act Section 251. In open court, in the presence of the parties and counsel, respondent told LaDaniel that he would personally visit him at the hospital on Monday, March 3, 2008, and leave the hospital with him if he did not want to remain there or if the report of the ordered evaluation was not completed by then.

10. On March 3, 2008, in the early evening hours, without giving the interested parties notice of the meeting, without seeking or obtaining the consent or presence of counsel for LaDaniel, without the knowledge, approval or consent of the mental health staff at the court and at the facility where LaDaniel was being confined, and without any means of recording the meeting, respondent met with and had a conversation lasting several minutes with LaDaniel in a recreation room in which other children and staff were present.

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[1] Family Court Act §154-b(2)(b) provides: "Notwithstanding any other provision of law, if a party and a child has resided or resides in a residential program for victims of domestic violence as defined in section 459-a of the Social Services Law, the present address of such party and of the child and the address of the residential program for victims of domestic violence shall not be revealed."

11. Respondent took no action to effectuate the release or departure of LaDaniel from the facility. Although he was motivated by an interest in the well-being of the minor, respondent now recognizes the impropriety and the appearance of impropriety in conducting unauthorized, *ex parte* communications in general and the potential for suspicion and misunderstanding in particular associated with a judge visiting a minor in circumstances such as these.

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), 100.3(B)(6) and 100.3(B)(9)(b) of the Rules Governing Judicial Conduct ("Rules"); Sections 700.5(a), 700.5(e), 701.2(a), 701.2(c) and 701.4 of the Second Department Rules; and Section 755 of the Judiciary Law, and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The exercise of the enormous power of summary contempt should be exercised "only in exceptional and necessitous circumstances" and requires strict compliance with procedural safeguards, including giving the accused a warning and an opportunity to desist from the supposedly contumacious conduct and to make a statement in his or her defense, and further requiring the court to prepare an order "stating the facts which constitute the offense," thus enabling appellate review (Jud Law §755; Appellate Division Rules, §§701.2[a], [c], 701.4; *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]; *Matter of Hart*, 7 NY3d 1 [2006]). Respondent did not comply with these standards in *Schmidlin v. Schmidlin*, a custody case that included allegations of domestic violence, when he threatened to hold a litigant and her attorney in contempt, and then did hold her attorney in contempt, for not disclosing the address of the shelter where the litigant was residing.

After directing the litigant to disclose that information under a threat of contempt and after the litigant's attorney declined to provide the information, respondent directed the litigant's attorney to summon her supervisor to court. Then, even after the attorney's supervisor had placed respondent on notice that the refusal to disclose the litigant's address was supported by statutory authority, respondent persisted in demanding that information, grew increasingly impatient and intemperate when the attorney would not provide the requested information, and ultimately held the attorney in contempt, imposing a $1,000 fine. Even if – or especially if – he was unfamiliar with the applicable law, respondent should have given the attorney an opportunity to provide the court with the specific authority supporting her conduct, or he himself should have researched the law in the interval before the attorney's supervisor appeared. Having been placed on notice as to the issue, respondent should have determined whether the law provided such protection for a victim of domestic violence, as the attorney had suggested, before summarily punishing the attorney for her principled refusal to provide the information. Clearly there were no "necessitous" or urgent circumstances justifying respondent's peremptory imposition of contempt against an attorney who was simply attempting to protect her client's interests and who had a sound legal basis for her position.

It has also been stipulated that prior to the contempt citation, respondent did not issue an appropriate warning or provide the attorney with an opportunity to make a statement in her defense, as required by the Appellate Division Rules; nor did he prepare an appropriate mandate, which would enable appellate review. Respondent's abuse of the contempt power and his failure to adhere to mandated contempt procedures constitutes misconduct warranting public discipline. *See*, *e.g*., *Matter of Griffin,* 2009 Annual Report 90 (Comm on Judicial Conduct); *Matter of Van Slyke*, 2007 Annual Report 151 (Comm on Judicial Conduct); *Matter of Lawrence*, 2006 Annual Report 206 (Comm on Judicial Conduct).

It was also improper for respondent to make an *ex parte* hospital visit to a 14-year old youth, a non-party in a custody matter who was being held for a mental evaluation respondent had ordered, and to speak to the youth in the absence of counsel. Although respondent had announced in court that he would make such a visit on that date, he did not give specific notice of the time of his visit; nor did the youth's attorney or the parties consent to his private meeting and unrecorded conversation with the youth. Notwithstanding that respondent was motivated by an interest in the youth's well-being, such an *ex parte* visit, however well-intentioned, was completely inappropriate and showed a serious misunderstanding of the role of a judge.

Even respondent's initial statement that he would visit the youth in the hospital and personally escort him from the premises if he did not wish to remain showed extremely poor judgment and overstepped the appropriate boundaries between a judge and a minor involved in a pending proceeding (Rules, §100.3[B][9][b]). Having served as a Family Court judge for more than a year and having practiced in the court for many years prior to that, respondent should have realized that a judge is not a social worker and that such an extra-judicial meeting with a litigant's child would seriously compromise his impartiality and create the potential for suspicion and misunderstanding. By actually engaging in such ill-conceived conduct several days later, despite having had the opportunity to consider the implications of his actions, respondent showed extraordinary insensitivity to his ethical obligations. At all times a judge's conduct must not only be, but appear to be, beyond reproach if respect for the court is to be maintained (Rules, §100.2[A]). *See*, *e.g.*, *Matter of Friess*, 1982 Annual Report 109 (judge, who was "motivated by compassion," permitted a female defendant to spend the night at his home after an arraignment) (censure); *Matter of Clark*, 2007 Annual Report 93 (after a woman told the judge that she wanted to file a criminal complaint against her former boyfriend, judge, *inter alia*, accompanied her to the boyfriend's home to retrieve her belongings, and to the sheriff's department when she filed a criminal complaint) (censure).

Respondent has acknowledged that his actions were inconsistent with the high ethical standards required of judges and warrant public rebuke. While we believe that these two incidents, which occurred during his first 14 months as a Family Court judge, show a serious lapse of judgment, we conclude that they have not irreparably damaged respondent's capacity to serve as a judge. Accordingly, we accept the stipulated sanction of admonition.

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

Judge Klonick, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Ms. Moore did not participate.

Mr. Coffey was not present.

Dated: July 1, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **FRANK R. SPHON**, a Justice of the French Creek Town Court, Chautauqua County.

DECISION AND ORDER

BEFORE:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel) for the Commission
James P. Subjack for the Respondent

The matter having come before the Commission on January 28, 2009; and the Commission having before it the Formal Written Complaint dated September 4, 2008, respondent's Answer dated October 24, 2008, and the Stipulation dated January 13, 2009; and respondent having resigned from judicial office on December 31, 2008, effective January 31, 2009, and having affirmed that he will neither seek nor accept judicial office 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

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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 2, 2009

STIPULATION

Subject to the approval of the Commission on Judicial Conduct ("Commission"):

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission on Judicial Conduct ("Commission"), the Honorable Frank R. Sphon ("respondent"), and his attorney, James P. Subjack, Esq., as follows.

1. Respondent has served as a Justice of the French Creek Town Court since 1992. He is not an attorney. His current term of office expires on December 31, 2009. Respondent is 76 years old.

2. Respondent was served by the Commission with a Formal Written Complaint dated September 4, 2008, which alleged that from in or about January 2006 to in or about October 2006, respondent failed to properly administer the French Creek Town Court, supervise his court clerk, and maintain adequate records resulting in court funds not being timely deposited; and that respondent, on one occasion, on a weekend night, removed $20 cash from the court bank bag, which was used to store court funds pending their deposit to the court account, which he then used for a personal purpose. (At the time he withdrew the money from the bank bag, respondent placed his personal check for $20 into the court bank bag in lieu of the money he had removed, and thereafter deposited the check along with court funds). A copy of the Formal Written Complaint is appended hereto as Exhibit 1.

3. Respondent submitted an Answer dated October 24, 2008 in which he admitted all factual allegations related to the first charge but denied that his conduct was violative of any of the Rules Governing Judicial Conduct. Respondent in his Answer to the second charge of misconduct denied any conversion of court funds. A copy of the Answer is appended hereto as Exhibit 2.

4. Respondent tendered his resignation from judicial office on December 31, 2008, effective January 31, 2009, and has submitted copies to the French Creek Town Court and the Office of Court Administration. A copy of respondent's resignation letter is appended hereto as Exhibit 3.

5. Pursuant to Section 47 of the Judiciary Law, the Commission's jurisdiction over a judge continues for 120 days after resignation from office.

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

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

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

s/ **Honorable Frank R. Sphon**
Respondent

James P. Subjack, Esq.
Attorney for Respondent

Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(**John J. Postel and David M. Duguay,** Of Counsel)

EXHIBIT 1: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.

EXHIBIT 2: ANSWER: Available at www.scjc.state.ny.us.

EXHIBIT 3: LETTER OF RESIGNATION: Available at www.scjc.state.ny.us.

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DAVID M. TRICKLER**, a Justice of the Birdsall Town Court, Burns Town Court and Grove Town Court, Allegany County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard

Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel) for the Commission
Joseph G. Pelych for the Respondent

The respondent, David M. Trickler, a Justice of the Birdsall Town Court, Burns Town Court and Grove Town Court, Allegany County, was served with a Formal Written Complaint dated August 8, 2008, containing four charges. The Formal Written Complaint alleged that from 2004 to 2006 respondent failed to perform certain administrative responsibilities with respect to numerous cases as required by law. Respondent filed an answer dated September 22, 2008.

On July 31, 2009, 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 September 23, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Burns Town Court since November 1980, a Justice of the Grove Town Court since November 1994 and a Justice of the Birdsall Town Court since January 2002. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. From on or about January 24, 2004, to on or about August 10, 2006, respondent failed to notify the Commissioner of the Department of Motor Vehicles to order the suspension of the driver's licenses of 15 defendants in the Burns Town Court who did not pay fines imposed by respondent totaling $1,585, as set forth in Schedule A annexed to the Agreed Statement of Facts, notwithstanding that the defendants had not paid their fines for more than 60 days. Respondent was familiar with the requirements of Section 514(3) of the Vehicle and Traffic Law and his obligation to notify the Department of Motor Vehicles. Two defendants were charged with misdemeanors, Driving While Intoxicated and Driving While Ability Impaired by Drugs.

3. In response to the Commission's investigation, respondent has taken appropriate corrective action regarding the cases identified in Schedule A by collecting $725 in fines owed by defendants and properly notifying the Commissioner of the Department of Motor

Vehicles to order the suspension of the drivers' licenses of nine defendants who have failed to pay their fines.

4. From on or about May 21, 2004, to on or about June 11, 2006, respondent failed to notify the Commissioner of the Department of Motor Vehicles to order the suspension of the drivers' licenses of 43 defendants in the Burns Town Court who failed to appear or answer in respondent's court to 45 charges, as set forth in Schedule B annexed to the Agreed Statement of Facts, notwithstanding that the defendants had failed to appear or answer within 60 days of the court date set for their traffic charges. Respondent was familiar with the requirements of Section 514(3) of the Vehicle and Traffic Law and his obligation to notify the Department of Motor Vehicles. Five defendants were charged with the misdemeanor of Aggravated Unlicensed Operator in the Third Degree.

5. In response to the Commission's investigation, respondent has taken appropriate corrective action regarding the cases identified in Schedule B by obtaining dispositions in 22 cases, collecting $1,410 in fines, and properly notifying the Commissioner of the Department of Motor Vehicles to order the suspension of the driver's licenses of 23 defendants who failed to appear in respondent's court to answer charges.

As to Charge II of the Formal Written Complaint:

6. From on or about July 15, 2004, to on or about April 8, 2006, respondent failed to certify to the Commissioner of the Department of Motor Vehicles that 16 defendants in the Burns Town Court had been convicted by respondent of 21 violations of the Vehicle and Traffic Law, as set forth in Schedule C annexed to the Agreed Statement of Facts. Respondent was familiar with the requirements of Section 514(1) of the Vehicle and Traffic Law and his obligation to notify the Department of Motor Vehicles. Two defendants were charged with misdemeanors, Driving While Intoxicated and Driving While Ability Impaired by Drugs.

7. In response to the Commission's investigation, respondent has taken appropriate corrective action regarding the cases identified in Schedule C by reporting the case dispositions to the Department of Motor Vehicles.

As to Charge III of the Formal Written Complaint:

8. From on or about June 24, 2004, to on or about March 18, 2006, respondent failed to report and remit to the State Comptroller fines and fees in 20 vehicle and traffic cases in the Burns Town Court totaling $1,980.35 as set forth in Schedule D annexed to the Agreed Statement of Facts, notwithstanding that respondent was familiar with the requirements of Sections 2020 and 2021 of the Uniform Justice Court Act, Section 1803 of the Vehicle and Traffic Law and Section 27 of the Town Law.

9. In response to the Commission's investigation, respondent has taken appropriate corrective action regarding the cases identified in Schedule D by properly reporting fines and fees and remitting appropriate funds to the State Comptroller's Office.

As to Charge IV of the Formal Written Complaint:

10. From on or about January 3, 2004, through on or about September 10, 2006, respondent failed to record and issue fine and fee receipts to defendants in seven cases in the Burns Town Court, totaling $760, as set forth in Schedule E annexed to the Agreed Statement of Facts, notwithstanding that respondent was familiar with the requirements of Sections 99-b and 99-1 of the General Municipal Law and Section 214.11(a)(3) of the Uniform Civil Rules for the Justice Courts.

Supplemental Findings:

11. From in or about January 2004 through in or about September 2006, respondent performed all administrative duties in the Birdsall Town Court, Burns Town Court and Grove Town Court without the assistance of any court clerk.

12. From in or about January 2004 through in or about September 2006, respondent reported to the State Comptroller's office presiding over 332 cases in the Burns Town Court. During the approximate same period, respondent presided over a total of 27 cases in the Birdsall Town Court and 26 cases in the Grove Town Court. There were no accounting deficiencies observed in respondent's administration of the Birdsall and Grove Town Courts.

13. As a result of the Commission's investigation of the matters herein, the Town of Burns has hired a court clerk and purchased a computer and printers to assist respondent with recordkeeping and financial management. Additionally, respondent has sought additional training in recordkeeping and financial management from the State Comptroller's Office.

14. Respondent has been forthright and cooperative with the Commission's investigation and has demonstrated a sincere commitment to rectifying past deficiencies by properly reporting defendants who failed to pay fines and fees or failed to answer traffic charges, and by working closely with his newly hired court clerk to implement appropriate policies and procedures to ensure compliance with timely and accurate reporting.

15. As a result of the Commission's investigation of the matters herein, respondent has begun electronic reporting to the Department of Motor Vehicles and the State Comptroller's Office.

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

Over a two and a half-year period, respondent failed to properly perform important administrative responsibilities. In numerous cases he failed to remit monies to the state in a timely manner, failed to report convictions in traffic cases, failed to record and issue fine and fee receipts to defendants, and failed to use available means to punish defendants who had failed to appear or pay fines in traffic cases, thereby depriving the state of funds that should have been collected. Such derelictions, which violate statutory and ethical mandates, constitute misconduct warranting public discipline.

A town or village justice is personally responsible for monies received by the court (1983 Op. of the State Compt., No. 83-174). Fines and fees received by the court must be properly recorded and receipts issued for all such payments (Gen Mun Law §§99-b, 99-l; Uniform Civil Rules for the Justice Courts §214.11[a][3] [22 NYCRR §214.11(a)(3)]). In addition, fines and fees collected must be reported and remitted to the State Comptroller within the first ten days of the month succeeding collection (Uniform Justice Court Act §§2020, 2021; Vehicle and Traffic Law ["VTL"] §1803; Town Law §27), and convictions must be reported to the Department of Motor Vehicles (VTL §514[1]). In 43 cases respondent failed to perform one or more of these administrative duties, notwithstanding that, as a judge for more than two decades, he was aware of his obligations under the respective statutes.

In addition, respondent neglected 58 motor vehicle cases pending in his court by failing to use the legal means available to compel defendants to answer the charges or to pay fines totaling $1,585 he had imposed. Section 514(3) of the Vehicle and Traffic Law requires a judge to notify the Department of Motor Vehicles of such derelictions so that the defendants' drivers' licenses can be suspended. By failing to do so, respondent permitted defendants to avoid legal process by ignoring the summonses they were issued or the fines levied against them. Such neglect is unacceptable since it promotes disrespect for the administration of justice, deprived state and local authorities of monies that should have been collected, and enabled defendants whose licenses should have been suspended to continue to drive for months or years. *See*, *Matter of Roller*, 2009 Annual Report 165; *Matter of Brooks*, 2008 Annual Report 89; *Matter of Ware*, 1991 Annual Report 79 (Comm on Judicial Conduct).

In considering an appropriate sanction, we note that respondent's lapses appear to be a result of poor management and there is no indication in the record that any monies were not properly deposited, were missing or were otherwise mishandled. The record also indicates that as a result of the Commission investigation, respondent has taken appropriate corrective action in the cases cited herein, and all monies have been accounted for. We also note that respondent has shown a commitment to avoiding such deficiencies in the future by seeking additional training in recordkeeping and financial management from the State Comptroller's Office and by working with his newly hired court clerk to implement appropriate policies and practices to ensure that his procedures are in compliance with the relevant mandates.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Judge Konviser were not present.

Dated: September 30, 2009

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MATTHEW J. TURNER**, a Judge of the Troy City Court, Rensselaer County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
Anderson, Moschetti & Taffany, PLLC (by Peter J. Moschetti, Jr.) for the Respondent

The respondent, Matthew J. Turner, a Judge of the Troy City Court, Rensselaer County, was served with a Formal Written Complaint dated March 3, 2009, containing two charges. The Formal Written Complaint alleged that respondent failed to render timely decisions and failed to report delayed matters to his administrative judge. Respondent filed a verified answer dated March 11, 2009.

On April 15, 2009, 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 May 14, 2009, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Troy City Court, Rensselaer County,

since 1999. From January 1999 until January 1, 2003, respondent's judicial position was half-time. Since January 1, 2003, respondent's position has been three-quarter time. Respondent was admitted to practice law in New York State in 1991. At all times while he has been a judge, respondent has maintained a private law practice.

As to Charge I of the Formal Written Complaint:

2. From December 2004 to December 2007, as set forth more fully on Schedule A annexed to the Agreed Statement of Facts, in seven small claims actions and one civil suit, respondent failed to render judgments for periods of up to 27 months, notwithstanding that Section 1304 of the Uniform City Court Act requires a judgment to be rendered within 30 days after a hearing or final submission.

3. From November 2001 to December 2007, as set forth more fully on Schedule A annexed to the Agreed Statement of Facts, in 15 civil actions, four summary proceedings and two small claims actions, respondent failed to render decisions on submitted motions for periods of up to six years, notwithstanding that Section 1001 of the Uniform City Court Act and Section 4213(c) of the Civil Practice Law and Rules require decisions to be rendered within 60 days of final submissions.

As to Charge II of the Formal Written Complaint:

4. From April 2006 to October 2007, as set forth more fully on Schedule A annexed to the Agreed Statement of Facts, for periods ranging from two to six quarters, respondent failed to report to his administrative judge ten cases that were pending longer than 60 days, notwithstanding the requirements of Section 4.1(a) of the Rules of the Chief Judge (22 NYCRR §4.1[a]).

Supplemental Findings:

5. Respondent is one of two judges of the Troy City Court, which is a high volume court.

6. There is no evidence that respondent's delays and reporting deficiencies were intentional or the result of anything other than poor management.

7. Respondent has implemented new case-tracking procedures to help assure his compliance with statutory and administrative requirements.

8. Respondent is remorseful and has been cooperative and forthright with the Commission throughout its inquiry in this matter.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(A), 100.3(B)(1), 100.3(B)(7) and 100.3(C)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for

cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The ethical standards require every judge to dispose of court matters "promptly, efficiently and fairly," and further provide that "the judicial duties of a judge take precedence over all the judge's other activities" (Rules, §§100.3[B][7], 100.3[A]). Here, over a six-year period, respondent failed to render timely decisions in 29 cases, including small claims, civil actions and summary proceedings. Respondent's delays in issuing decisions, coupled with his failure to report some of the delayed cases as required to court administrators, constitute a dereliction of his responsibilities as a judge.

In eight matters (seven small claims and one civil action), respondent failed to render judgments within 30 days, as required by law (Uniform City Court Act §1304). Respondent's decisions in these cases were issued from six months to 27 months after final submission; in two of the cases, the delays were more than two years. In addition, in 21 cases (15 civil actions, four summary proceedings and two small claims), he failed to issue decisions on motions within the required 60 days (CPLR §4213[c]). The delays ranged from two months up to six years; in 15 matters the delays were a year or more, and in four matters, decisions were issued more than three years after final submission.

Respondent compounded his misconduct by failing to report ten of the delayed matters as required to his administrative judge. *See, Matter of Washington*, 100 NY2d 873 (2003); *compare*, *Matter of Greenfield*, 76 NY2d 293 (1990). The reports, which must be filed on a quarterly basis pursuant to Section 4.1(a) of the Rules of the Chief Judge, require a judge to list all matters pending decision longer than 60 days after submission. Respondent failed to disclose five delayed matters on at least four consecutive reports, including two cases that were omitted on six consecutive reports. Filing reports that are inaccurate or incomplete is significant since it prevents court administrators from "assess[ing] the reasons for the delay and tak[ing] appropriate action." *Matter of Greenfield*, *supra*, 76 NY2d at 299.

It has been stipulated that there is no evidence that respondent's delays and reporting deficiencies were intentional or the result of anything other than poor management. Nevertheless, such negligence is inexcusable and constitutes a serious neglect of his administrative responsibilities (Rules, §100.3[C][1]).

We view such delays as serious misconduct because of the adverse consequences on individual litigants, who are deprived of the opportunity to have their claims resolved in a timely manner, and on public confidence in the administration of justice. Our decision in this case should not be interpreted to suggest that delays can never rise to a level warranting censure or removal. We will not hesitate to impose sanctions in such cases to ensure that the public is protected from the deleterious effects of unwarranted delays. *See also*, *Matter of Robichaud*, 2008 Annual Report 88; *Matter of Scolton*, 2008 Annual Report 100 (Comm on Judicial Conduct).

In considering an appropriate sanction here, we note that respondent, who has served as a judge since 1999, has acknowledged his misconduct and has implemented new case-tracking procedures to help ensure that his decisions will be timely and his quarterly reports will be accurate in the future.

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

Judge Klonick, Mr. Belluck, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser, Ms. Moore and Judge Ruderman concur.

Mr. Emery and Judge Peters were opposed and vote to reject the Agreed Statement on the basis that the facts as presented are insufficient for the Commission to make a determination.

Mr. Coffey was not present.

Dated: June 30, 2009

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DEBRA M. WHITEMAN**, a Justice of the Cherry Valley Town Court, Otsego County.

DECISION AND ORDER

BEFORE:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian Charles F. Farcher, Of Counsel) for the Commission
Dennis B. Laughlin for the Respondent

The matter having come before the Commission on December 9, 2009; and the Commission having before it the Formal Written Complaint dated October 29, 2009, respondent's Answer dated November 19, 2009, and the Stipulation dated December 4, 2009; and respondent having affirmed that she is leaving office upon the expiration of her term on December 31, 2009, and that she 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 matter closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: December 10, 2009

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 Debra M. Whiteman, the respondent in this proceeding, and her attorney, Dennis B. Laughlin Esq.

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

2. Respondent is not and never has been an attorney. She has been a Justice of the Cherry Valley Town Court, Otsego County, since November 1, 1997. Respondent's current term as Town Justice expires on December 31, 2009.

3. Respondent was served with a Formal Written Complaint dated October 29, 2009, which contained four charges. A copy of the Formal Written Complaint is annexed as Exhibit A.

4. Respondent filed an Answer dated November 19, 2009, in which she admitted the material allegations of Charge I and acknowledged her inability to produce court financial records for the years 2003 and 2004, but denied the remainder of the allegations. A copy of respondent's Answer is annexed as Exhibit B.

5. Respondent affirms that she is leaving judicial office upon the expiration of her term on December 31, 2009, and that she will neither seek nor accept judicial office at any time in the future.

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 this stipulation will be made public if accepted by the Commission.

s/ **Honorable Debra M. Whiteman**
Respondent

Dennis B. Laughlin, Esq.
Attorney for Respondent

Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(**Charles F. Farcher**, Of Counsel)

EXHIBIT A: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.
EXHIBIT B: ANSWER: Available at www.scjc.state.ny.us.

COMPLAINTS PENDING AS OF DECEMBER 31, 2008

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		12	12	6	2	2	7	41
DELAYS		5	0	6	2	2	2	17
CONFLICT OF INTEREST		9	11	4	0	0	4	28
BIAS		1	5	1	0	0	2	9
CORRUPTION		1	6	0	2	0	3	12
INTOXICATION		0	0	0	0	0	1	1
DISABILITY/QUALIFICATIONS		0	0	0	0	0	0	0
POLITICAL ACTIVITY		10	2	3	3	0	3	21
FINANCES/RECORDS/TRAINING		6	4	5	1	1	3	20
TICKET-FIXING		1	1	1	0	0	1	4
ASSERTION OF INFLUENCE		7	3	2	1	0	2	15
VIOLATION OF RIGHTS		8	7	11	6	2	4	38
MISCELLANEOUS		0	1	1	0	0	0	2
TOTALS		60	52	40	17	7	32	208

*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 2009

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	959							959
NON-JUDGES	334							334
DEMEANOR	91	56	15	2	0	3	0	167
DELAYS	66	15	2	5	0	0	0	88
CONFLICT OF INTEREST	21	22	3	2	0	0	0	48
BIAS	29	6	2	0	0	0	0	37
CORRUPTION	24	11	2	0	0	1	0	38
INTOXICATION	1	3	0	0	0	0	0	4
DISABILITY/QUALIFICATIONS	1	0	0	0	0	0	0	1
POLITICAL ACTIVITY	9	15	7	2	2	1	0	36
FINANCES/RECORDS/TRAINING	18	13	5	1	2	0	0	39
TICKET-FIXING	0	2	2	0	0	0	0	4
ASSERTION OF INFLUENCE	8	9	3	2	0	0	0	22
VIOLATION OF RIGHTS	23	31	6	4	0	0	0	64
MISCELLANEOUS	14	0	0	0	0	0	0	14
TOTALS	1598	183	47	18	4	5	0	1855

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ALL COMPLAINTS CONSIDERED IN 2009: 1855 NEW & 208 PENDING FROM 2008								
SUBJECT OF COMPLAINT	**DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY**	**STATUS OF INVESTIGATED COMPLAINTS**						**TOTALS**
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	959							959
NON-JUDGES	334							334
DEMEANOR	91	68	27	8	2	5	7	208
DELAYS	66	20	2	11	2	2	2	105
CONFLICT OF INTEREST	21	31	14	6	0	0	4	76
BIAS	29	7	7	1	0	0	2	46
CORRUPTION	24	12	8	0	2	1	3	50
INTOXICATION	1	3	0	0	0	0	1	5
DISABILITY/QUALIFICATIONS	1	0	0	0	0	0	0	1
POLITICAL ACTIVITY	9	25	9	5	5	1	3	57
FINANCES/RECORDS/TRAINING	18	19	9	6	3	1	3	59
TICKET-FIXING	0	3	3	1	0	0	1	8
ASSERTION OF INFLUENCE	8	16	6	4	1	0	2	37
VIOLATION OF RIGHTS	23	39	13	15	6	2	4	102
MISCELLANEOUS	14	0	1	1	0	0	0	16
TOTALS	1598	243	99	58	21	12	32	2063

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ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	16,616							16,616
NON-JUDGES	5376							5376
DEMEANOR	3274	68	1161	316	117	118	246	5300
DELAYS	1362	20	159	86	32	18	24	1701
CONFLICT OF INTEREST	649	31	455	153	54	23	126	1491
BIAS	1851	7	264	56	27	18	33	2256
CORRUPTION	462	12	113	14	`39	22	37	699
INTOXICATION	55	3	36	7	11	3	26	141
DISABILITY/QUALIFICATIONS	56	0	32	2	18	14	6	128
POLITICAL ACTIVITY	315	25	268	179	19	24	46	876
FINANCES/RECORDS/TRAINING	277	19	282	185	126	85	100	1074
TICKET-FIXING	26	3	88	160	42	62	165	546
ASSERTION OF INFLUENCE	200	16	148	74	21	9	57	525
VIOLATION OF RIGHTS	2435	39	456	208	87	50	84	3359
MISCELLANEOUS	769	0	248	81	29	40	57	1224
TOTALS	33,723	243	3710	1521	622	486	1007	41,312

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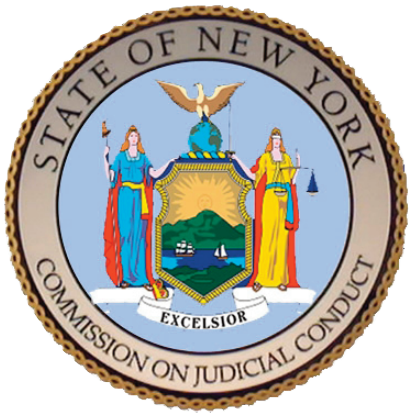

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