NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

ANNUAL REPORT

2012

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

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HON. KAREN K. PETERS

RICHARD A. STOLOFF, ESQ. (APPOINTED 4-28-11)

♦ ♦ ♦

JEAN M. SAVANYU
Clerk of the Commission

CORNING TOWER
SUITE 2301
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223
(518) 453-4600
(518) 486-1850 (Fax)

61 BROADWAY
SUITE 1200
NEW YORK, NEW YORK 10006
(PRINCIPAL OFFICE)
(646) 386-4800
(646) 458-0037 (Fax)

400 ANDREWS STREET
SUITE 700
ROCHESTER, NEW YORK 14604
(585) 784-4141
(585) 232-7834 (Fax)

WWW.CJC.NY.GOV

COMMISSION STAFF

Robert H. Tembeckjian
Administrator and Counsel

ADMINISTRATION
Edward Lindner, *Deputy Admin'r, Litigation*
Karen Kozac, *Chief Administrative Officer*
Mary C. Farrington, *Administrative Counsel*
Melissa R. DiPalo, *Administrative Counsel**
Shouchu (Sue) Luo, *Finance/Personnel Officer*
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Amy Carpinello, *Asst Admin Officer*
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Magenta Ranero, *Administrative Assistant*
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Stacy Warner, *Receptionist*

NEW YORK CITY OFFICE
Mark Levine, *Deputy Administrator*
Pamela Tishman, *Principal Attorney*
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Jean Joyce, *Senior Attorney**
Brenda Correa, *Staff Attorney*
Kelvin Davis, *Staff Attorney*
Alan W. Friedberg, *Special Counsel*
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Frank DeBiase, *Investigator*
Joanna Kliger, *Investigator*
Lee R. Kiklier, *Senior Admin Asst*
Laura Archilla-Soto, *Asst Admin Officer*
Kimberly Figueroa, *Secretary*
Daphny Lazarus, *Secretary*

ALBANY OFFICE
Cathleen S. Cenci, *Deputy Administrator*
Jill S. Polk, *Senior Attorney*
Thea Hoeth, *Senior Attorney*
S. Peter Pedrotty, *Staff Attorney*
Charles F. Farcher, *Staff Attorney**
Donald R. Payette, *Senior Investigator*
David Herr, *Senior Investigator*
Ryan Fitzpatrick, *Investigator*
Lisa Gray Savaria, *Asst Admin Officer*
Linda Dumas, *Asst Admin Officer*
Letitia Walsh, *Administrative Assistant*
Emily Taaffe, *Secretary*

ROCHESTER OFFICE
John J. Postel, *Deputy Administrator*
M. Kathleen Martin, *Senior Attorney*
David M. Duguay, *Senior Attorney*
Stephanie A. Fix, *Staff Attorney*
Rebecca Roberts, *Senior Investigator*
Betsy Sampson, *Investigator*
Vanessa Mangan, *Investigator*
Linda Pascarella, *Senior Admin Asst*
Terry Scipioni, *Secretary*
Kathryn Gaudioso, *Secretary*
Michael O'Neill, *Intern*

*Denotes staff who left in 2011

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

ROBERT H. TEMBECKJIAN
ADMINISTRATOR & COUNSEL

61 BROADWAY
NEW YORK, NEW YORK 10006

646-386-4800 TELEPHONE
646-458-0037 FACSIMILE
www.cjc.ny.gov

March 1, 2012

To Governor Andrew M. Cuomo,
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, 2011.

Respectfully submitted,

Robert H. Tembeckjian, Administrator
On Behalf of the Commission

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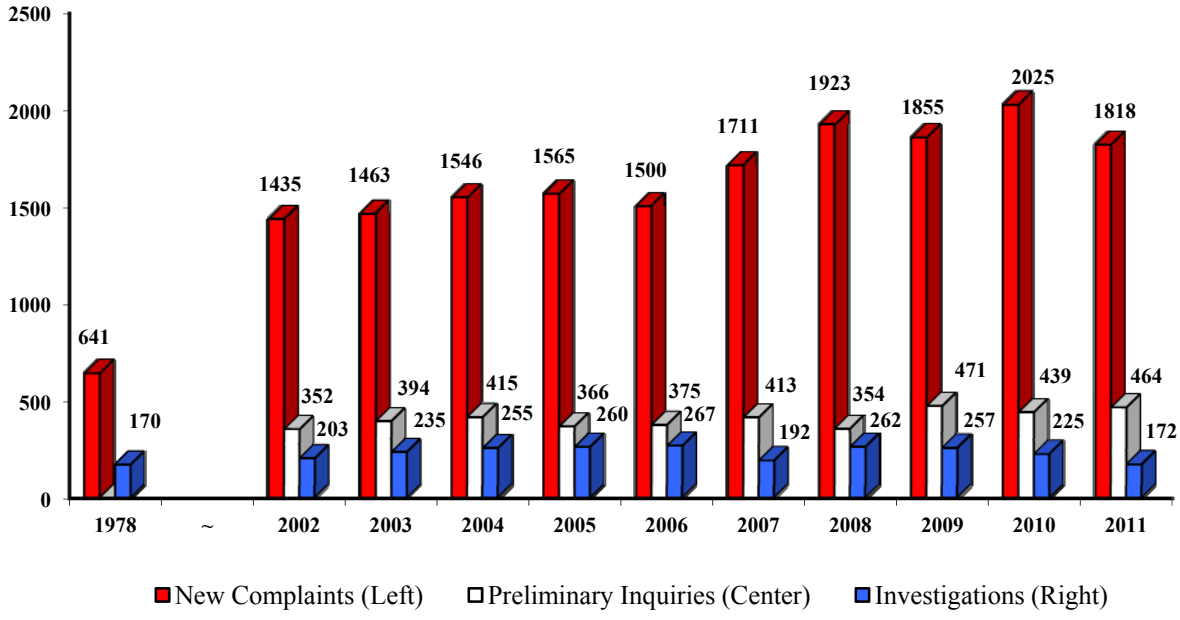
INTRODUCTION TO THE 2012 ANNUAL REPORT

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 10 years has substantially increased compared to the first two decades of the Commission's existence. Since 2002, the Commission has averaged 1,684 new complaints per year, 404 preliminary inquiries and 233 investigations. Last year, 1,818 new complaints were received. 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 464 preliminary reviews and inquiries and 172 investigations.

This report covers Commission activity in the year 2011.



COMPLAINTS, INQUIRIES & INVESTIGATIONS IN THE LAST TEN YEARS

ACTION TAKEN IN 2011

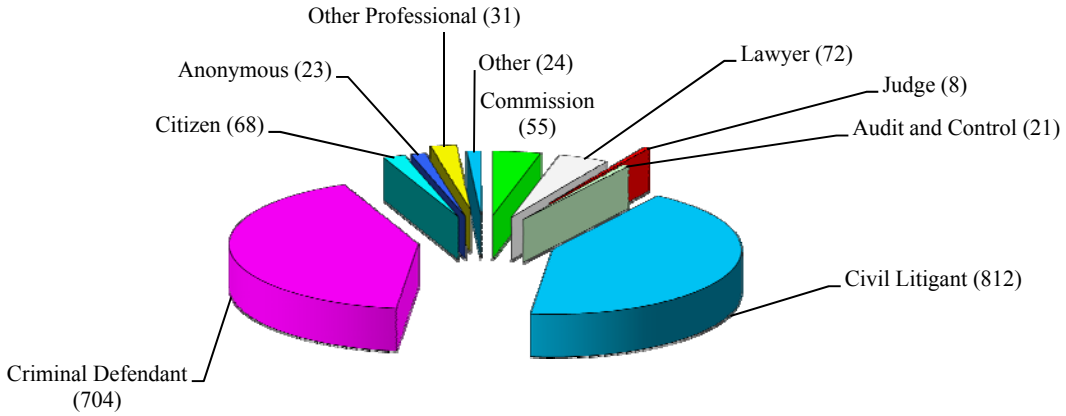
Following are summaries of the Commission's actions in 2011, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

COMPLAINTS RECEIVED

The Commission received 1,818 new complaints in 2011. All complaints are summarized and analyzed by staff and reviewed by the Commission, which votes 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 2011 appears in the following chart.



COMPLAINT SOURCES IN 2011

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 2011, staff conducted 464 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

In 172 matters, the Commission authorized full-fledged investigations. Depending on the nature of the complaint, an investigation may entail interviewing witnesses, subpoenaing witnesses to

testify and produce documents, assembling and analyzing various court, financial or other records, making court observations, and writing to or taking testimony from the judge.

During 2011, in addition to the 172 new investigations, there were 195 investigations pending from the previous year. The Commission disposed of the combined total of 367 investigations as follows:

- 107 complaints were dismissed outright.
- 28 complaints involving 28 different judges were dismissed with letters of dismissal and caution.
- 11 complaints involving ten different judges were closed upon the judge's resignation.
- Eight complaints involving five different judges were closed upon vacancy of office due to reasons other than resignation, such as the expiration of the judge's term.
- 29 complaints involving 19 different judges resulted in formal charges being authorized.
- 184 investigations were pending as of December 31, 2011.

FORMAL WRITTEN COMPLAINTS

As of January 1, 2011, there were pending Formal Written Complaints in 31 matters involving 18 different judges. In 2011, Formal Written Complaints were authorized in 29 additional matters involving 19 different judges. Of the combined total of 60 matters involving 37 judges, the Commission acted as follows:

- 16 matters involving 12 different judges resulted in formal discipline (admonition, censure or removal from office).
- One matter involving one judge resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- Eight matters involving five different judges were closed upon the judge's resignation from office, two becoming public by stipulation and three that were not public.
- Two additional matters involving one judge were closed due to the expiration of the judge's term.
- One matter involving one judge was dismissed outright.
- 32 matters involving 17 different judges were pending as of December 31, 2011.

SUMMARY OF ALL 2011 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	94	184	278
Complaints Investigated	37	70	107
Judges Cautioned After Investigation	8	10	18
Formal Written Complaints Authorized	3	11	14
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	1	7	8
Judges Vacating Office by Public Stipulation	0	2	2
Formal Complaints Dismissed or Closed	2	3	5

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	64	225	289
Complaints Investigated	8	11	19
Judges Cautioned After Investigation	3	2	5
Formal Written Complaints Authorized	1	0	1
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	2	1	3
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	236
Complaints Investigated	13
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

* 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	183
Complaints Investigated	11
Judges Cautioned After Investigation	2
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
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	22
Complaints Investigated	3
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

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

Complaints Received	72
Complaints Investigated	1
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

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

Complaints Received	43
Complaints Investigated	3
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
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	322
Complaints Investigated	11
Judges Cautioned After Investigation	3
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

* 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	69
Complaints Investigated	4
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	304

* 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 2011. The actual texts are appended to this Report in Appendix F.

OVERVIEW OF 2011 DETERMINATIONS

The Commission rendered 12 formal disciplinary determinations in 2011: two removals, six censures and four admonitions. In addition, two matters were disposed of by stipulation made public by agreement of the parties. Nine of the 14 respondents were non-lawyer trained judges and five were lawyers. Ten of the respondents were town or village justices and four were judges of higher courts.

DETERMINATIONS OF REMOVAL

The Commission completed two formal proceeding in 2011 that resulted in a determination of removal. The cases are summarized below and the full text can be found in Appendix F.

Matter of Edie M. Halstead

On January 27, 2011, the Commission determined that Edie M. Halstead, a Justice of the Davenport Town Court, Delaware County, should be removed from office for failing to deposit and remit court funds in a timely manner, filing false and/or inaccurate financial reports with the State Comptroller and engaging in impropriety with respect to various traffic violations with which she was charged. The Commission determined that her failure to deposit court funds in a timely manner resulted in a cumulative deficiency of as much as $5,098 in the court's bank account, and her reports to the State Comptroller were inaccurate and incomplete in that they failed to disclose over $2,200 in court funds she had collected. The judge compounded this misconduct, the Commission found, by acting improperly with respect to a series of traffic violations by her. She failed to appear in court in response to a summons; failed to pay fines and surcharges imposed for two traffic violations, resulting in her license being suspended; failed to maintain vehicle liability insurance; and was convicted of a misdemeanor for driving with a suspended license. In its totality, the Commission said, the judge's misconduct "showed a pervasive disregard for the ethical and administrative responsibilities of her judicial office, which establishes that she is unfit to serve as a judge." Judge Halstead, who is not an attorney, did not request review by the Court of Appeals.

Matter of Lafayette D. Young, Jr.

On October 7, 2011, the Commission determined that Lafayette D. Young, Jr., a Justice of the Macomb Town Court, St. Lawrence County, should be removed from office for presiding over

eight cases involving his girlfriend's relatives without disclosing the relationship and for engaging in out-of-court communications about several of the matters with his girlfriend and her relatives. In one case, Judge Young failed to disclose that the complaining witness was his girlfriend's daughter, and only recused himself when the defendant's attorney threatened to file a complaint with the Commission. In another matter, the judge sentenced his girlfriend's nephew to 45 days in jail and three years' probation after engaging in out-of-court discussions with the defendant's relatives. The Commission concluded that such misconduct undermines public confidence in the integrity and impartiality of the judiciary. The Commission dismissed a charge that Judge Young engaged in improper political activity by serving as chair of a local Democratic Party caucus. Judge Young, who is not an attorney, filed a request for review with the Court of Appeals, and the review is pending.

DETERMINATIONS OF CENSURE

The Commission completed six formal proceedings in 2011 that resulted in public censure. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Gary P. Allen

On January 4, 2011, the Commission determined that Gary P. Allen, a Justice of the Newfield Town Court, Tompkins County, should be censured for intervening in his son's complaint that a hunter had trespassed on his property. The Commission found that the judge contacted the local Department of Environmental Conservation Officer handling the matter and arranged for the case to be brought before him. He then arraigned the defendant, accepted a guilty plea and transferred the case to his co-judge for sentencing, with a note suggesting that a fine be imposed. The Commission said Judge Allen's conduct was "patently improper" since, under the ethical standards, he was obliged to refrain from any involvement in his son's case and, in particular, to avoid any conduct that used or appeared to use his judicial prestige to advance his son's private interests. Judge Allen, who is not an attorney, did not request review by the Court of Appeals.

Matter of Andrew G. Tarantino, Jr.

On March 28, 2011, the Commission determined that Andrew G. Tarantino, Jr., a Judge of the Family Court, Suffolk County, should be censured for taking a young man whose case was pending before him in the Suffolk County Treatment Court on an impromptu trip to a state park during the lunch recess. Neither the youth's attorney, the Assistant County Attorney assigned to the case, the Treatment Court team, nor anyone else was aware of, or consented to, this out-of-court excursion. The Commission said that, having served as a Family Court judge for more than two years at the time, Judge Tarantino should have realized that this extra-judicial meeting with the youth not only would compromise the judge's impartiality at a time when he wielded considerable power over this defendant, but would create a potential for suspicion and misunderstanding. Judge Tarantino did not request review by the Court of Appeals.

Matter of David P. Daniels

On March 25, 2011, the Commission determined that David P. Daniels, a Justice of the Guilford Town Court, Chenango County, should be censured. The Commission found that Judge Daniels, who is also a school transportation official, improperly intervened on behalf of a co-worker whose traffic ticket was returnable before another Chenango County judge. (The charge was later dismissed). The Commission said that these actions were inconsistent with well-established

ethical standards prohibiting a judge from using the prestige of judicial office to further private interests and requiring a judge to avoid even the appearance of impropriety. Judge Daniels, who is not an attorney, did not request review by the Court of Appeals.

Matter of Karl Ridsdale

On July 20, 2011, the Commission determined that Karl Ridsdale, a Justice of the Antwerp Town Court, Jefferson County, should be censured for presiding over a criminal case in which his co-judge was the complaining witness and his co-judge's son was the defendant. After accepting his co-judge's son's waiver of the right to counsel, Judge Ridsdale accepted the defendant's guilty plea to criminal mischief and sentenced him to 30 days in jail. The Commission said that there was no indication that the defendant – whose mental state prompted Judge Ridsdale to order a mental exam – appreciated the importance of consulting with counsel regarding the consequences of pleading guilty to a crime and being sentenced to jail. Judge Ridsdale's misconduct was compounded, the Commission said, by his failure to record the proceedings, as mandated by a 2008 statewide Order of the Chief Administrative Judge. Judge Ridsdale, who is not an attorney, did not request review by the Court of Appeals.

Matter of Kevin V. Hunt

On November 9, 2011, the Commission determined that Kevin V. Hunt, a Justice of the Shawangunk Town Court, Ulster County, should be censured for intervening in his friend's traffic case that was returnable before his co-judge. After receiving two traffic tickets, Judge Hunt's friend entered a plea of not guilty by mail. Prior to the trial date, Judge Hunt went to the Shawangunk Police Station and spoke with the officer who had issued the tickets. He told the officer that his friend and her family were "good people," and asked the officer to "do whatever you can do." The officer, who knew Judge Hunt and had appeared before him in court, subsequently recommended that an adjournment in contemplation of dismissal ("ACD") be granted. The officer would not have recommended the ACD except for the judge's request. As a result, the tickets were ultimately dismissed. Judge Hunt, who is not an attorney, did not request review by the Court of Appeals.

Matter of P. Michael Shanley

On November 14, 2011, the Commission determined that P. Michael Shanley, a part-time Judge of the Oswego City Court, Oswego County, should be censured for acting as an attorney in four cases in his own court. The Commission determined that after being appointed as a part-time judge, Judge Shanley, who practices law in Oswego and Mexico, New York, was advised to dispose of any outstanding matters he had pending in Oswego City Court. Instead, he continued to provide legal services to one client with a pending Oswego City Court case, and became involved in three additional matters in that court in violation of statutory and ethical mandates prohibiting him from practicing in his own court. In doing so, the Commission said, Judge Shanley 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. Judge Shanley did not request review by the Court of Appeals.

DETERMINATIONS OF ADMONITION

The Commission completed four proceedings in 2011 that resulted in public admonition. The cases are summarized as follows and the full texts can be found in Appendix F.

Matter of Robert A. Kelly, Jr.
On March 31, 2011, the Commission determined that Robert A. Kelly, Jr., a Justice of the Westhampton Beach Village Court, Suffolk County, should be admonished for various acts of misconduct relating to his legal practice. As a part-time judge who also practices law in Westhampton Beach, Judge Kelly failed to avoid conflicts and the appearance of conflicts, in that he represented private clients in matters that came before the Westhampton Beach Building and Zoning Department, an agency in his court's jurisdiction. The Commission said Judge Kelly also permitted his name to appear on legal papers filed by his law firm against Westhampton Beach, thereby placing the prestige of judicial office and the private interests of the judge and his law firm in direct conflict with the interests of the municipality where he sits. Finally, Judge Kelly failed to prevent his law firm from making $925 in political contributions notwithstanding that a judge is prohibited from directly or indirectly contributing to a political organization. The Commission concluded that Judge Kelly's conduct showed inattention to his ethical responsibilities and, in particular, to the special ethical obligations of judges who are permitted to practice law. Judge Kelly did not request review by the Court of Appeals.

Matter of David A. Shults
On July 7, 2011, the Commission determined that David A. Shults, a part-time Judge of the Hornell City Court, Steuben County, should be admonished for presiding over cases involving the Hornell City Attorney, who was a client of the judge's law firm. Between 2006 and 2009, the judge's firm brought 16 actions on behalf of the Hornell City Attorney. Over the same period, Judge Shults presided over and/or took other action in nine cases in which the City Attorney represented a party. In one of these matters, Judge Shults denied an attorney's request that he disqualify himself. The Commission stated that in view of Judge Shults' attorney-client relationship with the City Attorney, the judge's handling of these matters was unavoidably tinged with an appearance of impropriety. Judge Shults did not request review by the Court of Appeals.

Matter of John W. Riordan
On November 9, 2011, the Commission determined that John W. Riordan a Justice of the Gouverneur Town Court, St. Lawrence County, should be admonished for regularly holding court in his chambers, rather than in the courtroom, for approximately seven years. The Commission found that Judge Riordan's chambers contained no space for members of the public to observe the proceedings, which violated the statutory requirement that court proceedings be public. At the very least, the Commission said, the public nature of court proceedings was severely compromised, and public confidence in the fair and proper administration of justice was impaired. Judge Riordan, who is not an attorney, did not request review by the Court of Appeals.

Matter of Shari R. Michels
On November 17, 2011, the Commission determined that Shari R. Michels, a Judge of the New York City Civil Court, New York County, should be admonished for distributing misleading literature during her 2006 judicial campaign. The Commission concluded that a palm card distributed by the judge was deceptive in that it juxtaposed Judge Michels' photograph with that of another candidate and included 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 Judge Michels did not have the *Times'* endorsement. The fact that Judge Michels continued to distribute the card in

spite of the other candidate's objection exacerbated her misconduct, the Commission said. Judge Michels did not request review by the Court of Appeals.

OTHER PUBLIC DISPOSITIONS

The Commission completed two other proceedings in 2011 that resulted in public dispositions. The cases are summarized below and the full text can be found in Appendix F.

Matter of David J. Evans

On March 8, 2011, pursuant to a stipulation, the Commission discontinued a proceeding involving David J. Evans, a Justice of the Norwich Town Court, Chenango County, who resigned from office after he was charged by the Commission with granting special consideration to a defendant after another Chenango County judge intervened in the case. Judge Evans was also charged with giving misleading and evasive testimony under oath before the Commission and presiding over criminal cases without disclosing that the Assistant District Attorney assigned to prosecute such cases had previously represented the judge in a proceeding before the Commission. Judge Evans resigned after a hearing was held and the referee had filed a report with the Commission. Judge Evans, who is not an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of James E. Chase

On December 8, 2011, pursuant to a stipulation, the Commission discontinued a proceeding involving James E. Chase, a Justice of the Turin Town Court, Lewis County, who resigned from office after being charged *inter alia* with failing to: (1) regularly deposit court funds within 72 hours of receipt, as required by law; (2) notify the Commissioner of Motor Vehicles, as required by law, to order the suspension of the drivers' licenses of 1,008 defendants who had failed to appear in response to traffic charges and 320 defendants who had failed to pay over $54,000 in fines and surcharges; and (3) properly administer his court by mishandling court funds, resulting in an apparent shortage of available funds. Judge Chase, who is not an attorney, affirmed that he 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 2011 without rendering public disposition. One complaint was 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 upon the judge's resignation from office. One complaint was closed because the judge's term had expired, and one complaint was dismissed.

MATTERS CLOSED UPON RESIGNATION

Fifteen judges resigned in 2011 while complaints against them were pending at the Commission. Ten resigned while under investigation. Five resigned while under formal charges by the Commission, two of whom did so pursuant to public stipulation. 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 2011, the Commission referred 33 matters to other agencies. Twenty-three matters were referred to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record-keeping or other administrative issues. Five matters were referred to an attorney grievance committee. One matter was referred to the Attorney General's office; three matters were referred to the Chief Administrative Judge; and one matter was referred to a Deputy Administrative Judge.

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 2011, the Commission issued 28 Letters of Dismissal and Caution and one Letter of Caution. 18 town or village justices were cautioned, including eight who are lawyers. Eleven judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct as indicated below.

Improper *Ex Parte* Communications. Two judges were cautioned for engaging in isolated and relatively minor instances of improper out-of-court communications with a party or taking judicial action without affording one or more parties the opportunity to be heard.

Political Activity. The Rules Governing Judicial Conduct prohibit judges from attending political gatherings, endorsing other candidates or otherwise participating in political activities except for a certain specifically-defined "window period" when they themselves are candidates for elective judicial office. Judges are specifically prohibited, *inter alia*, from making a contribution directly or indirectly to a political organization or candidate. Five judges were cautioned for isolated and relatively minor violations of the applicable rules. For example, one judge permitted his law firm to make modest political contributions and another used his court stationery to announce his candidacy for judicial office.

Conflicts of Interest. All judges are required by the Rules to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned. One judge failed to disclose on the record that the complaining witness was the judge's client in a routine matter more than two years earlier, and another presided over a matter involving a distant relative.

Inappropriate Demeanor. Six judges were cautioned for being discourteous or making inappropriate comments to litigants, attorneys, witnesses, or the press. One judge, for instance, made public comments about a case that was pending appeal, and another made inappropriate comments, in open court, about an attorney's appearance.

Finances. Three judges were cautioned for failing to file a financial disclosure statement with the Ethics Commission for the Unified Court System in a timely manner. Section 211(4) of the Judiciary Law and Section 40.2 of the Rules of the Chief Judge require judges to file an annual financial disclosure statement by May 15th of each succeeding year.

Delay. One judge was cautioned for taking eleven months to issue a decision in a small claims case, notwithstanding the statutory requirement that a decision be issued within 30 days, and another was cautioned for a delay of several months in rendering a decision in a criminal case. Section 100.3(B)(7) of the Rules Governing Judicial Conduct requires a judge to dispose of all judicial matters promptly, efficiently and fairly.

Violation of Rights. Seven judges were cautioned for relatively isolated incidents of violating or not protecting the rights of parties appearing before them. One judge, for example, accepted a guilty plea and imposed a sentence without all parties being present. Two judges failed to administer an oath to the parties prior to their testimony, as required by law.

Assertion of Influence. Four judges were cautioned for lending the prestige of judicial office to advance private interests. One judge, for example, was cautioned for improperly using an official parking permit. Another judge invoked his judicial office to promote a charitable organization.

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 DETERMINATION 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 2011, one judge requested review by the Court of Appeals of a Commission determination.

Matter of Lafayette D. Young, Jr.
On October 7, 2011, the Commission determined that Lafayette D. Young, Jr., a Justice of the Macomb Town Court, St. Lawrence County, should be removed from office for presiding over eight matters involving his girlfriend's relatives without disclosing the relationship and for engaging in out-of-court communications about the matters. Judge Young filed a request for review with the Court of Appeals, and the matter is pending.

CHALLENGES TO THE COMMISSION'S PROCEDURES

Matter of Holzman v. Commission on Judicial Conduct

In July 2011, Bronx Surrogate Lee Holzman commenced a CPLR Article 78 proceeding seeking an order dismissing the Commission's Formal Written Complaint without prejudice to renew or, in the alternative, staying the Commission's proceeding against him. Judge Holzman claimed that it was unfair to require him to proceed to a hearing without the testimony of Michael Lippman, the former counsel to the Bronx Public Administrator. At the time of the hearing, Mr. Lippman was under indictment for his conduct while counsel to the Public Administrator, and his attorney indicated that Lippman would invoke his 5th Amendment privilege against self-incrimination if subpoenaed to testify in the Commission proceeding.

Judge Holzman had brought a motion for similar relief before the Commission in February 2011. Commission Counsel opposed the motion, arguing: (1) that Judge Holzman's motion was premature and should be addressed to the Referee after Counsel puts in its case in chief and (2) that Lippman's testimony was not relevant, since the allegations in the Formal Written Complaint were tailored to address Judge Holzman's conduct, not Mr. Lippman's, and that Judge Holzman had failed to show how Mr. Lippman's alleged criminal conduct could excuse the judge's failure to act based on the documentary evidence before him in his court. The Commission denied Judge Holzman's motion on March 21, 2011, and the hearing was subsequently scheduled to commence on September 12, 2011.

On July 19, 2011, Judge Holzman filed his Article 78 petition in Supreme Court, New York County, and sought a temporary restraining order to prevent the hearing from going forward. The case was assigned to Justice Barbara Jaffe. On July 28, 2011, the Commission, represented by the Attorney General's Office, opposed a restraining order. After hearing argument on July 29, 2011, Justice Jaffe declined to sign a temporary restraining order and directed the Commission to file a Verified Answer to the Article 78 Petition.

The Commission filed its Verified Answer on August 12, 2011, and, on September 6, 2011, Justice Jaffe dismissed the Article 78 petition.

The disciplinary hearing commenced on September 12, 2011, and Judge Holzman waived confidentiality of the proceeding. That morning, Judge Holzman also filed a motion to renew and reargue before Justice Jaffe and sought a stay of the hearing, which was already underway. Justice Jaffe granted a temporary stay until September 20, 2011, when Mr. Lippman's criminal case was next on the calendar in Bronx Supreme Court. On September 16, 2011, the Commission submitted papers opposing Judge Holzman's motion to renew and reargue. On September 21, 2011, the motion was argued, at which time the Commission informed Justice Jaffe that Lippman's criminal case had been adjourned to November 1st and was not yet trial-ready. That same day, Justice Jaffe issued an order denying Judge Holzman's motion for a further stay.

On October 5, 2011, Judge Holzman filed a notice of appeal from Justice Jaffe's order to the Appellate Division, First Department. He also sought a temporary restraining order to stay the hearing, which was scheduled to resume on October 11, 2011, and a stay pending appeal. Justice

Sheila Abdus-Salaam granted a temporary restraining order and set an expedited briefing schedule for Judge Holzman's motion for a stay pending appeal.

On November 3, 2011, while the motion for a stay pending appeal was under consideration, Judge Holzman perfected his appeal. On December 6, 2011, the Appellate Division denied Judge Holzman's request for a stay pending appeal. Thereafter, the parties filed their briefs, and oral argument on the appeal was heard by the Appellate Division in its February 2012 term. On March 1, 2012, the Appellate Division unanimously affirmed Judge Jaffe's order and denied Judge Holzman's petition.

The Commission's public hearing resumed on December 14, 2011 and, after a recess for the holidays, continued through and concluded on January 17, 2012. The Commission should render a decision later in the year, after the parties have submitted briefs, the Referee has submitted a report and the parties have the opportunity to present final arguments to the full Commission.

Challenges to the Confidentiality of Commission Records

In two defamation lawsuits brought by state court judges, the Commission was subject to non-party subpoenas seeking confidential Commission records.

The defendants in *Rivera v NYP Holdings, Inc. et al.*, in Supreme Court, New York County, subpoenaed the Commission for all its records concerning an alleged investigation of a complaint against the plaintiff. The Commission moved to quash the subpoena, and the defendants cross-moved to compel disclosure. The parties subsequently agreed to withdraw their respective motions without prejudice on the premise that the court could direct the plaintiff to authorize release of Commission records. By decision dated April 12, 2011, Supreme Court, (Tingling, J.) declined to do so, and granted the Commission's motion to quash, holding that the records sought are privileged and not discoverable under Judiciary Law Sections 44 and 45. The court found that

> CJC has established confidentiality as a cornerstone of its workings and proceedings. The CJC's procedures have consistently been in line with the State's interests in the quality of its judiciary. Under same, the CJC's insistence on confidentiality is well founded and widely upheld in this State. The confidentiality is not only for the Judges themselves, but for the witnesses and complainants involved in the proceedings before the CJC. Interference with that confidentiality curtails the free-flow of information to the CJC which is the lifeblood of its ability to perform its statutory duties.
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> 31 Misc3d 1223A, 930 NYS2d 176 (Sup Ct NY Co, 2011)

In *Martin v Daily News L.P., et al.*, in Supreme Court, New York County, the plaintiff sought to depose the Commission's Administrator and Counsel, Robert H. Tembeckjian. The Commission moved to quash the subpoena, invoking the confidentiality mandate of Judiciary Law Section 45. After the Administrator apprised the plaintiff, by letter, of his limited contacts with the defendants in the case, the plaintiff withdrew his subpoena.

OBSERVATIONS AND RECOMMENDATIONS

PUBLIC DISCIPLINARY PROCEEDINGS

The Commission raises this important topic, as it did last year.

All Commission investigations and formal hearings are confidential by law. Commission activity is only made public at the end of the disciplinary process – when a determination of 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 supported in newspaper editorials around the state. 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.

It has been a fundamental premise of the American system of justice, since the founding of the republic, that the rights of citizens are protected, and governmental tyranny thwarted, by conducting the business of the courts in public; and that secret or "star chamber" proceedings are great potential threats to liberty and individual rights. Moreover, judges are public officials, and the Commission is a public agency. Not only does the public have a right to know when formal charges have been preferred by a prosecuting authority against a public official, but the prosecuting entity is more likely to exercise its power wisely if it is subject to public scrutiny. It may well be that a judge as to whom charges are eventually dismissed may feel his or her reputation has been damaged by the trial having been public. Yet the historical presumption in favor of openness is so well established that criminal trials, where not only reputations but liberty are at stake, have been public since the adoption of the Constitution.

There are practical as well as philosophical considerations in making formal judicial disciplinary proceedings public. The process of evaluating a complaint, conducting a comprehensive investigation, conducting formal disciplinary proceedings and making a final determination subject to review by the Court of Appeals takes considerable time. The process is lengthy in significant part because the Commission painstakingly endeavors to render a determination that is fair and comports with due process. If the charges and hearing portion of a Commission matter were open, the public would have a better understanding of the entire disciplinary process. The very fact that charges had been served and a hearing scheduled would no longer be secret.

As it is, maintaining confidentiality is often beyond the Commission's control. For example, in any formal disciplinary proceeding, subpoenas are issued and witnesses are interviewed and prepared to testify, by both the Commission staff and the respondent-judge. It is not unusual for word to spread around the courthouse, particularly as the hearing date approaches. Respondent-judges themselves often consult with judicial colleagues, staff and others, revealing the details of

[1] The Commission has conducted over 750 formal disciplinary proceedings since 1978. Eleven judges have waived confidentiality in the course of those proceedings. Two others waived confidentiality as to investigations.

the charges against them and seeking advice. As more "insiders" learn of the proceedings, the chances for "leaks" to the press increase, often resulting in published misinformation and suspicious accusations as to the source of the "leaks." In such situations, both confidentiality and confidence in the integrity of the disciplinary system suffer.

It should be noted that even if Commission disciplinary proceedings were made public, the vast majority of Commission business would remain confidential. In 2011, for example, out of 1,818 new complaints received, 464 preliminary inquiries conducted and 172 investigations commenced, only 19 Formal Written Complaints were authorized. Those 19, as to which confidential investigations established reasonable cause to commence formal disciplinary proceedings, would have been the only new matters made public last year. In one case, *Matter of Holzman* involving the Surrogate of Bronx County, the respondent-judge waived confidentiality. The proceedings, which are still pending, were therefore conducted in public, without incident or any adverse effect on the judge's rights.

On several occasions in recent years, the Legislature has considered bills to open the Commission's proceedings to the public at the point when formal disciplinary charges are filed against a judge. Such legislation has had support in either the Assembly or the Senate at various times, although never in both houses during the same legislative session.

In 2009 and again in 2011, public-proceedings bills have been introduced. The Commission has been communicating with the Legislature, the Governor and the Chief Judge and urges that such a measure be enacted.

FAILING TO ADMINISTER OATHS TO WITNESSES AT TRIAL

Section 214.10(j) of the Uniform Civil Rules for the Justice Courts requires that all witnesses who testify in a justice court must be sworn. Sections 100.2(A) and 100.3(B)(1) of the Rules Governing Judicial Conduct require a judge to respect, comply with, be faithful to and maintain professional competence in the law. In the past several years, the Commission has confidentially cautioned several town and village court justices who have failed to administer oaths to the parties, to non-party witnesses, and sometimes to both. Two were cautioned in 2011. The types of matters in which such omissions occurred include eviction proceedings and small claims cases.

Apart from being the law, administering an oath imparts to a witness the seriousness of the proceeding and underscores the obligation to testify truthfully. The Commission reminds all town and village court justices to adhere to this important responsibility.

JUDICIAL INDEPENDENCE VERSUS THE FEAR OF CRITICISM

Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct require a judge to act in a manner that preserves and promotes public confidence in the integrity, independence and impartiality of the judiciary. Section 100.3(B)(1) of the Rules requires that a judge not be swayed by partisan interests, public clamor or fear of criticism.

In a recent criminal case where the defendant was charged with a misdemeanor, the District Attorney said during a conference that if the defendant pleaded guilty, any lawful sentence imposed by the judge would be acceptable to the People. In response, the judge twice stated that he would sentence the defendant to a term of imprisonment because the District Attorney was providing "no cover" for a more lenient disposition. The judge was plainly suggesting that he would sentence the defendant to jail not because he thought it was the appropriate sentence under the circumstances of this case but because the DA, by not taking a position on sentence, made it unpalatable for the judge to impose a lesser penalty.

The judge clearly abandoned his obligation to act independently and without fear of criticism. On motion of the defense, the judge disqualified himself from the case, and sentence was imposed by another judge. The Commission decided to caution rather than publicly discipline the original judge, in part because his disqualification mitigated the harm flowing from his comments.

It should go without saying that a District Attorney is not obliged to provide a judge with "cover," and a judge must do what s/he deems right regardless of the recommendations of the prosecution or defense. The Commission comments on this matter here, to impress upon all that public confidence in the judiciary is seriously undermined when it even appears that a judge is acting out of fear of criticism or some other basis unrelated to the merits of the matter at hand.

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 the 2010 annual report and are compelled to do so again, in part because such practices continue to come to light.

In the last four years, for example, the Commission has encountered 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 two years ago in one of the five counties of New York City, a senior Commission investigator, sitting alone as a courtroom spectator to observe the judge while investigating a complaint concerning the judge's demeanor, 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 credentials and purpose in attending court. (Insofar as all Commission investigators are instructed by the Administrator to answer a judge truthfully if confronted, she identified herself as being from the Commission.) 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 in 2009 advised the pertinent administrative judges in New York City

to remind all judges and courthouse personnel that most court proceedings, including Family Court matters, are required by law to be public. In December 2011, a month after an article in the New York Times highlighted the denial of access to 35 out of 40 Family Court courtrooms visited by a reporter, newly appointed Chief Administrative Judge A. Gail Prudenti issued extensive guidelines for Family Court judges to ensure that individuals are only excluded for good cause and as a last resort. These guidelines are in conjunction with Rule 205.4 of the Uniform Rules for the Family Court, which governs access to Family Court proceedings. 22 NYCRR 205.4. The Commission expects that adherence to these laudable guidelines will improve access to the courts.

The Commission admonished a town court justice in November 2011 for regularly holding court in the non-public setting of his chambers, where there was no space for the public to attend and observe. *See Matter of Riordan*, appended.[2]

Numerous other incidents have come to the Commission's attention, either through complaints, newspaper reports or petitions filed by newspapers or interested parties, in which such proceedings as arraignments or arguments on motions were conducted in police facilities, chambers or otherwise 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 (Judiciary Law Section 4). Court decisions at least as early as 1971 have further addressed the issue, specifically holding that a judge may not hold court in a police barracks or schoolhouse.[3]

Unfortunately, these standards are still not uniformly observed throughout the state, despite reminders from the Office of Court Administration and the Commission. Absent a controlling exception, all criminal and civil proceedings, including matrimonial and Family Court matters, should be conducted in public settings which do not detract from the impartiality, independence and dignity of the court.

Likewise, public records of the court must also be reasonably available to the public. 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

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[2] *See also, 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.

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

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.

DRIVING UNDER THE INFLUENCE OF ALCOHOL

Over the years, the Commission has publicly disciplined a number of judges for driving under the influence of alcohol. Typically, such matters come to the Commission's attention when local newspapers report that a judge has been charged with an alcohol-related offense, such as Driving While Intoxicated (DWI) or Driving While Ability Impaired by alcohol (DWAI).

In New York as in most states, DWI is defined as driving with a blood alcohol content (BAC) of .08% or greater. The DWAI range is between .05% and .08%. Failing to submit to an alcohol-measuring test such as a breathalyzer will result automatically in suspension of the driver's license. (See Section 1192 of the Vehicle and Traffic Law.)

DWI is a crime, chargeable as a misdemeanor. "Aggravated DWI" carries enhanced penalties for driving with a BAC of .18% or higher. There are various circumstances in which DWI may be charged as a felony, such as where there is a passenger under the age of 15 in the car, or the motorist was guilty of a misdemeanor DWI within the past 10 years, or where there was some additional crime, such as vehicular manslaughter if someone was killed in an accident involving the intoxicated driver.[4]

DWI is a significant social problem. According to the FBI, in 2007 there were over 28,000 arrests for DWI in New York, and over 1.4 million nationwide. According to the National Highway Traffic Safety Administration, in 2008 there were 320 fatal traffic accidents in New

[4] A judge convicted of a felony automatically vacates judicial office. Const Art 6, §22(e), (f).

York, resulting in 341 deaths, in which at least one driver had a BAC of .08% or higher. Nationwide, there were over 10,600 such accidents and nearly 12,000 deaths.

A judge is required by the Rules Governing Judicial Conduct to respect and comply with the law, and to act on and off the bench in a manner that promotes public confidence in the integrity of the judiciary. It is especially disturbing when a judge who is obliged to administer the law breaks it by committing a misdemeanor such as DWI. In addition to whatever penalties may be imposed by the courts, even if the original alcohol-related charge is pleaded down to a non-criminal violation, the judge will also be subject to professional discipline.

The Court of Appeals and the Commission are sensitive to the nuances of alcohol-related offenses and the evolution of professional and public opinion regarding alcoholism as a disease. Nevertheless, while a DWI-convicted judge may be an alcoholic and a candidate for substance abuse evaluation and treatment, s/he cannot expect to escape the disciplinary consequences for committing a significant violation of law, even if a DWI event compels the judge to enter rehabilitation.

The posture of disciplinary enforcement entities toward alcohol-related offenses has evolved over the years. Thirty years ago, a judge who committed such an offense, where there were no aggravating factors, may have received no more than a private caution or reprimand, even if the alcohol-fueled incident was a matter of public record. Now, for a first-time alcohol-related driving offense, where there are no aggravating factors, the standard response of most judicial conduct commissions throughout the country is to admonish the judge publicly. Aggravating circumstances are likely to result in a heightened discipline.

In recent years, the Commission has censured a number of judges who were guilty of driving while impaired or intoxicated, with the majority at times indicating that the more stringent sanction of suspension would be appropriate were the Commission authorized to impose it, and with some dissenters voting in favor of removal. *See, Matter of Burke, Matter of Martineck* and *Matter of Maney*.[5]

In the appropriate case, the Commission will not hesitate to impose the sanction of removal.[6] Among the factors to be considered: whether the episode is singular or part of a pattern, whether the level of intoxication is significantly higher than the legal threshold, whether there is personal injury and/or property damage, and whether there is an attempt to avoid responsibility by invoking the judicial office.

In a more perfect world, people would not drive after drinking to excess. The Commission hopes that calling special attention to this topic will increase judicial and public sensitivity and decrease the number of incidents that require the imposition of discipline.

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[5] Determinations are available on the Commission's website: www.cjc.ny.gov.

[6] In *Matter of Quinn*, 54 NY2d 386 (1981), a case which involved multiple alcohol-related motor vehicle offenses, the Court censured the judge and accepted his retirement, holding that there is cause for terminating the services of an unfit judge whose alcoholism results in serious misconduct unrelated to the judicial function. The Commission had determined that the judge should be removed from office. Before the Court of Appeals heard the case, the judge retired from the bench.

THE COMMISSION'S BUDGET

In 2007, for the first time in more than a generation, the Commission's budget was significantly increased by the Legislature, commensurate with its constitutional mandate and ever increasing caseload. In the last five years, the Commission has received and processed a record number of new complaints (9,332) and authorized a record number of preliminary inquiries (2,141) and a near-record number of investigations (1,108). The combined total of 3,249 preliminary inquiries and investigations from 2007-11 is also a near-record number for a five-year period. At the same time, the number of cases pending at year end has been reduced by 21% (from 275 to 216).

In light of the significant financial stress constraining all of state government for several years, the Commission has proposed a "flat" budget of just under $5.4 million for the fifth year in a row. This will again result in economies, since escalating contractual obligations such as rent would actually increase annual costs. Nevertheless, with prudent management, such funding would permit the Commission to meet its constitutional mandate to render discipline where appropriate, and dismiss unsubstantiated complaints, as fairly and promptly as possible. The Commission appreciates the continuing advice and support of the Governor and leaders of the Legislature in the budget process.

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

SELECTED BUDGET FIGURES: 1978 TO PRESENT

Fiscal Year	Annual Budget[1]	New Complaints[1]	New Investig'ns	Pending Year End	Public Disciplines	Attorneys on Staff[2]	Investig'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
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	27	17	10	51
2008	5.3m	1923	262	208	21	19	10	49
2009	5.3m	1855	257	243	24	18	10	48
2010	5.4m	2025	225	226	15	18	10	48
2011	5.4m	1818	172	216	14	17	9	49
2012	5.4m[3]	~	~	~	~	18	9	49

[1] Complaint figures are calendar year (Jan 1 – Dec 31); Budget figures are fiscal year (Apr 1 – Mar 31). Budget figures are rounded off.
[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*
HON. TERRY JANE RUDERMAN, *VICE CHAIR*
HON. ROLANDO T. ACOSTA
JOSEPH W. BELLUCK, ESQ.
JOEL COHEN, ESQ.
RICHARD D. EMERY, ESQ.
PAUL B. HARDING, ESQ.
NINA M. MOORE
HON. KAREN K. PETERS
RICHARD A. STOLOFF, ESQ.

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
Terry Jane Ruderman	(Former) Chief Judge Judith S. Kaye	1999	3/31/2012
Rolando T. Acosta	Chief Judge Jonathan Lippman	2010	3/31/2014
Joseph W. Belluck	(Former) Governor David A. Paterson	2008	3/31/2012
Joel Cohen	Assembly Speaker Sheldon Silver	2010	3/31/2014
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
Nina M. Moore	(Former) Governor David A. Paterson	2009	3/31/2013
Karen K. Peters	(Former) Governor David A. Paterson	2000	3/31/2014
Richard A. Stoloff	Senate President Pro Tem Dean Skelos	2011	3/31/2015
Vacant	Governor		3/31/2015

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 is a former lecturer for the Office of Court Administration's continuing Judicial Education Programs for Town and Village Justices.

Honorable Terry Jane Ruderman, *Vice Chair of the Commission*, graduated *cum laude* from Pace University School of Law, and 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 State 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.

Honorable Rolando T. Acosta is a graduate of Columbia College and the Columbia University School of Law. He served as a Judge of the New York City Civil Court from 1997 to 2002, as an Acting Justice of the Supreme Court from 2001 to 2002, and as an elected Justice of the Supreme Court from 2003 to present. He presently serves as an Associate Justice of the Appellate Division, First Department, having been appointed in January 2008. Prior to his judicial career, Judge Acosta served in various capacities with the Legal Aid Society, including Director of Government Practice and Attorney in Charge of the civil branch of the Brooklyn office. He also served as Deputy Commissioner and First Deputy Commissioner of the New York City Commission on Human Rights.

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 is a recipient of the New York State Bar Association's Legal Ethics Award.

Joel Cohen, Esq., is a graduate of Brooklyn College and New York University Law School, where he earned a J.D. and an LL.M. He is a partner in Stroock & Stroock & Lavan LLP in Manhattan, which he joined in 1985. Mr. Cohen previously served as a prosecutor for ten years, first with the New York State Special Prosecutor's Office and then as Assistant Attorney-in-Charge with the US Justice Department's Organized Crime & Racketeering Section in the Eastern District of New York. He is a member of the Federal Bar Council and is an Adjunct Professor of Law teaching Professional Responsibility at Fordham Law School, having previously done so at Brooklyn Law School. He widely lectures on Professional Responsibility. Mr. Cohen is the author of three books dealing with religion -- *Moses: A Memoir* (Paulist Press 2003), *Moses and Jesus: A Conversation* (Dorrance Publishing 2006) and *David and Bathsheba: Through Nathan's Eyes* (Paulist Press 2007). He also authored *Truth Be Veiled: A Justin Steele Murder Case* (Coffeetown Press, 2010), a novel on legal ethics and truth. Mr. Cohen has authored over 200 articles in legal periodicals – including a bimonthly column on "Ethics and Criminal Practice" for the New York Law Journal, and columns for Law.com and Huffington Post.

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 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.

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 headed the Research Council and the Faculty Development Council. She was appointed to the endowed Arnold R. Sio Chair in Diversity and Community for 2009-2011, as part of which she spearheaded campus-wide initiatives promoting faculty and student research on diversity. Moore previously held teaching positions at DePaul University, the University of Minnesota and Loyal University of Chicago. A member of the American Political Science Association, Moore was selected to chair the Constitutional Law and Jurisprudence Division of the national organization for 2011-2012. Professor Moore is the author of *Racial Tracking and Criminal Justice in America: Policy Makers, the Public, and Law Enforcement* (Cambridge University Press, forthcoming), *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 has served on the editorial board of the *Ralph Bunche Journal of Public Affairs*, and is also a member of the New York State Advisory Council on Underage Alcohol Consumption and Youth Substance Abuse.

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, Governor Eliot L. Spitzer in 2007, and Governor Andrew Cuomo in 2011. 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. She was appointed by Chief Judge Jonathan Lippman in 2009 to the New York State Justice Task Force to examine the causes of wrongful convictions and make appropriate recommendations to safeguard against such convictions. 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.

Richard A. Stoloff, Esq., graduated from The City College of the City University of New York, and Brooklyn Law School. He is a partner in the law firm of Stoloff & Silver, LLP, in Monticello, New York, and he serves as Town Attorney for the Town of Mamakating. Mr. Stoloff is a past President of the Sullivan County Bar Association and has chaired its Grievance Committee since 1994. He is a member of the New York State Bar Association and has served on its House of Delegates. He is also a member of the American Bar Association and the New York State Trial Lawyers Association.

RECENT MEMBERS

Stephen R. Coffey, Esq., *Former 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.

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.

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 previously served as a Trustee of the Westwood Mutual Funds and the United Nations International School, and on the Board of Directors of the Civic Education Project. Mr. Tembeckjian has served on various ethics and professional responsibility committees of the New York State and New York City Bar Associations, and he has published numerous articles in legal periodicals on judicial ethics and discipline. He was a member of the editorial board of the Justice System Journal, a publication of the National Center for State Courts, from 2007-10.

Cathleen S. Cenci, *Deputy Administrator in Charge of the Commission's Albany office*, is a graduate of Potsdam College *(summa cum laude)* and the Albany Law School. In 1979, she completed the course superior at the Institute of Touraine in Tours, France. Ms. Cenci joined the Commission staff in 1985. She has been a judge of the Albany Law School moot court competitions and a member of Albany County Big Brothers/Big Sisters.

John J. Postel, *Deputy Administrator in Charge of the Commission's Rochester office*, is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission staff in 1980. Mr. Postel is a past president of the Governing Council of St. Thomas More R.C. Parish. He is a former officer of the Pittsford-Mendon Ponds Association and a former President of the Stonybrook Association. He served as the advisor to the Sutherland High School Mock Trial Team for eight years. He is the Vice President and a past Treasurer of the Pittsford Golden Lions Football Club, Inc. He is an assistant director and coach for Pittsford Community Lacrosse. He is an active member of the Pittsford Mustangs Soccer Club, Inc.

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.

Mark Levine, *Deputy Administrator in Charge of the Commission's New York office*, is a graduate of the State University of New York at Buffalo and Brooklyn Law School. He previously served as Principal Law Clerk to Acting Supreme Court Justice Jill Konviser and Supreme Court Justice Phylis Skloot Bamberger, as an Assistant Attorney General in New York, as an Assistant District Attorney in Queens, and as law clerk to United States District Court

Judge Jacob Mishler. Mr. Levine also practiced law with the law firms of Patterson, Belknap, Webb & Tyler, and Weil, Gotshal & Manges.

Mary C. Farrington, *Administrative Counsel*, is a graduate of Barnard College and Rutgers Law School. She previously served as an Assistant District Attorney in Manhattan, most recently as Supervising Appellate Counsel. She has also served as Law Clerk to United States District Court Judge Miriam Goldman Cedarbaum, and as an associate in private practice with the law firm of Fried, Frank, Harris, Shriver & Jacobson in Manhattan.

Pamela Tishman, *Principal Attorney*, is a graduate of Northwestern University and New York University School of Law. She previously served as Senior Investigative Attorney in the Office of the Inspector General at the Metropolitan Transportation Authority. Ms. Tishman also served as an Assistant District Attorney in New York County, in both the Appeals and Trial Bureaus, where she prosecuted felonies and misdemeanors.

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 and Albany Law School. After practicing law with Adams & Hoeth in Albany, she served in public sector posts including

Executive Director of the New York State Ethics Commission, Special Advisor to the Governor for Management and Productivity, Deputy Director of State Operations, and Executive Director of the New York State Office of Business Permits and Regulatory Assistance. She has lectured and written on public sector ethics and taught legal ethics at The Sage Colleges. She is a former member of the Advisory Committee of Albany Law School's Government Law Center and has extensive not-for-profit management experience.

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.

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.

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.

S. Peter Pedrotty, *Staff Attorney*, is a graduate of St. Michael's College (*cum laude*) and the Albany Law School of Union University (*magna cum laude*). Prior to joining the Commission staff, he served as an Appellate Court Attorney at the Appellate Division, Third Department, and was engaged in the private practice of law in Saratoga County and with the law firm of Clifford Chance US LLP in Manhattan.

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Alan W. Friedberg, *Special Counsel*, is a graduate of Brooklyn College, the Brooklyn Law School and the New York University Law School, where he earned an LL.M. in Criminal Justice. He previously served as Chief Counsel to the Departmental Disciplinary Committee of the Appellate Division, First Department, as Deputy Administrator in Charge of the Commission's New York City Office, as a Senior Attorney at the Commission, as a staff attorney in the Law Office of the New York City Board of Education, as an adjunct professor of business law at Brooklyn College, and as a junior high school teacher in the New York City public school system.

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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 Moszkowicz, *Public Information Officer*, is a graduate of Brandeis University, the S.I. Newhouse School of Publications Communications at Syracuse University and the Syracuse University College of Law. Prior to joining the Commission staff in 2008, she was a reporter for the New York Law Journal and the Journal News (Westchester).

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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 legal 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 2011

Referee	City	County
Hon. Frank J. Barbaro	Watervliet	Albany
Robert A. Barrer, Esq.	Syracuse	Onondaga
G. Michael Bellinger, Esq.	New York	New York
Peter Bienstock, Esq.	New York	New York
A. Vincent Buzard, Esq.	Pittsford	Monroe
Jay C. Carlisle, Esq.	White Plains	Westchester
Linda J. Clark, Esq.	Albany	Albany
William T. Easton, Esq.	Rochester	Monroe
Vincent D. Farrell, Esq.	Mineola	Nassau
Paul Feigenbaum, Esq.	Albany	Albany
Edward B. Flink, Esq.	Latham	Albany
David Garber, Esq.	Syracuse	Onondaga
Victor J. Hershdorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
Hon. Janet A. Johnson	White Plains	Westchester
H. Wayne Judge, Esq.	Glens Falls	Warren
Nancy Kramer, Esq.	New York	New York
Gregory S. Mills, Esq.	Clifton Park	Saratoga
Hugh H. Mo, Esq.	New York	New York
Gary Muldoon, Esq.	Rochester	Monroe
Malvina Nathanson, Esq.	New York	New York
Steven E. North, Esq.	New York	New York
Edward J. Nowak, Esq.	Penfield	Monroe
Hon. Leon B. Polsky	New York	New York
Hon. Felice K. Shea	New York	New York
Hon. Richard D. Simons	Rome	Oneida
Robert H. Straus, Esq.	New York	Kings
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

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. Rolando T. Acosta (2010-present)
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 (1995-2011)
Joel Cohen (2010-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 (2008-2011)
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 (2006-10)
*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)
Richard A. Stoloff (2011-present)
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, 45,155 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 37,169 were dismissed upon initial review or after a preliminary review and inquiry, and 7,986 investigations were authorized. Of the 7,986 investigations authorized, the following dispositions have been made through December 31, 2011:

- 1,044 complaints involving 799 judges resulted in disciplinary action. (See details below and on the following page.)
- 1,593 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1,471, 87 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 661 complaints involving 469 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 506 complaints were closed upon vacancy of office by the judge other than by resignation.
- 3,966 complaints were dismissed without action after investigation.
- 216 complaints are pending.

Of the 1,044 disciplinary matters against 799 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.

- 161 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);
- 326 judges were censured publicly;
- 247 judges were admonished publicly;
- 59 judges were admonished confidentially by the temporary or former Commission; and
- 1 matter was dismissed by the Court of Appeals upon the judge's request for review.

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.
- One request for review is pending.

APPENDIX E: RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR § 100 *et seq.*

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 50.5 of the Rules of the Chief Judge (22 NYCRR 50.5).

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

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

(5) Nothing in this rule shall further limit the practice of law by the partners or associates of a part-time judge in any court to which such part-time judge is temporarily assigned to serve pursuant to section 106(2) of the Uniform Justice Court Act or Section 107 of the Uniform City Court Act in front of another judge serving in that court before whom the partners or associates are permitted to appear absent such temporary assignment.

(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

Added 100.6(B)(5) March 24, 2010

APPENDIX F: DETERMINATIONS RENDERED BY THE COMMISSION

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

GARY P. ALLEN,

a Justice of the Newfield Town Court,
Tompkins County.

DETERMINATION

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission

Williamson, Clune & Stevens (by John Alden Stevens) for the Respondent

The respondent, Gary P. Allen, a Justice of the Newfield Town Court, Tompkins County, was served with a Formal Written Complaint dated April 14, 2010,

containing two charges. The Formal Written Complaint alleged that respondent intervened in an impending proceeding involving his son, engaged in an improper *ex parte* communication, and took judicial action in the matter involving his son's complaint. Respondent filed a verified answer dated May 6, 2010.

On October 21, 2010, 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 4, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Newfield Town Court, Tompkins County, since 1994. His current term expires on December 31, 2013. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On November 30, 2008, respondent's son, Gary C. Allen, told respondent that he had an encounter with a hunter, Larry G. Fenton, Jr., on his private property. Respondent and his son discussed initiating a trespassing charge against Mr. Fenton with the New York State Police or the Department of Environmental Conservation ("DEC").

3. Osman J. Eisenberg is the DEC officer assigned to the area that covers respondent's court and, as of December 2008, had appeared before respondent in about two dozen cases. Respondent has known Officer Eisenberg and his family since Officer Eisenberg was a child.

4. In late November or early December 2008, Mr. Allen called Officer Eisenberg on the officer's personal cell phone to talk about pursuing a trespassing charge against Mr. Fenton. Mr. Allen met with Officer Eisenberg and signed a complaint against Mr. Fenton on December 3, 2008. Sometime after signing the complaint, Mr. Allen told respondent that Officer Eisenberg was taking too long to resolve the case.

5. In early December 2008, respondent called Officer Eisenberg on Eisenberg's cell phone and requested that Officer Eisenberg make Mr. Fenton's appearance ticket returnable before him in the Newfield Town Court. Respondent told Officer Eisenberg that he did not want Mr. Fenton's ticket to go to his co-judge and that he wanted to transfer the ticket to County Court for re-assignment.

6. On January 24, 2009, Officer Eisenberg issued an appearance ticket to Mr. Fenton for Trespassing on Posted Lands for the Purpose of Hunting, a violation of Section 11-2113 of the Environmental Conservation Law. The appearance ticket directed Mr. Fenton to appear in the Newfield Town Court on February 9, 2009.

As to Charge II of the Formal Written Complaint:

7. On February 9, 2009, Larry G. Fenton, Jr., appeared before respondent in response to an appearance ticket for Trespassing Upon Posted Lands for the

Purpose of Hunting, a violation of Section 11-2113 of the Environmental Conservation Law. He was not represented by counsel.

8. At this and all times relevant to the facts herein, respondent was aware that his son, Gary C. Allen, was the complainant in Mr. Fenton's case and that the charge alleged that Mr. Fenton had trespassed on Mr. Allen's property.

9. Prior to Mr. Fenton's appearance, respondent had contacted Osman J. Eisenberg, the DEC officer handling his son's complaint, and requested that he make Mr. Fenton's appearance ticket returnable before him.

10. Respondent presided over Mr. Fenton's arraignment and accepted his guilty plea to the trespassing charge. Respondent disclosed that his son was the complainant and advised Mr. Fenton that he could not impose sentence.

11. There is no stenographic, audio or other mechanical recording of the *Fenton* arraignment, notwithstanding the requirement as of June 16, 2008, that all proceedings in town and village courts be mechanically recorded, pursuant to Section 30.1 of the Rules of the Chief Judge and Administrative Order 245-08 of the Chief Administrative Judge.

12. Sometime after Mr. Fenton's appearance, respondent sent a letter to his co-justice, Debbi J. Payne, with Mr. Fenton's appearance ticket on which respondent made the notes "Attorney-No" and "Guilty."

13. In his letter to Judge Payne, respondent stated that Mr. Fenton's arrest stemmed from a complaint made by his son and that he initially planned to recuse

himself but then felt that "neither side" of the court could hear the matter because he was a "possible witness." He also stated that he decided to "arraign [Mr. Fenton] with the understanding that I would only do the arraignment, gain trial jurisdiction and if he pled not guilty draw up an order for County Court to reassign to another town court."

14. Respondent's letter to Judge Payne further stated that he had advised Mr. Fenton of his "dilemma" and that Mr. Fenton wanted to plead guilty. Respondent asserted that he told Mr. Fenton he "would take his plea but would not be able to sentence him." He then advised Judge Payne that she could "adopt a new case and send him a fine notice."

15. On February 12, 2009, Judge Payne sent a letter to the Tompkins County District Attorney advising that she was disqualifying herself from Mr. Fenton's case and requesting the transfer of the case to another court.

Mitigating Factors

16. During the arraignment, respondent advised Mr. Fenton of his right to counsel and disclosed his relationship with the complainant in the case, before accepting Mr. Fenton's guilty plea.

17. Respondent has been cooperative with the Commission throughout its inquiry.

18. Respondent has served as a Newfield Town Court justice for 16 years and has never been disciplined for judicial misconduct. He regrets his failure to abide by the Rules in this instance and pledges to conduct himself in accordance with

the Rules, to which he avers he has been attentive throughout his judicial tenure.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(6), 100.3(E)(1) and 100.3(E)(1)(e) 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.

Upon learning of his son's interest in initiating a Trespass complaint arising out of an incident to which respondent was a possible witness, respondent was obliged to refrain from any involvement in the matter and, in particular, to avoid any conduct that used or appeared to use his judicial prestige to advance his son's private interests (Rules, §100.2[C]). Instead, he violated well-established ethical standards by intervening in his son's case, engaging in an *ex parte* communication with the Environmental Conservation Officer handling the complaint, arranging for the case to come before himself, and taking judicial action in the matter.

After respondent's son told him that the officer "was taking too long" to act on the complaint, respondent contacted the officer and asked him to make the ticket returnable before respondent. By doing so, he conveyed an implicit message that he was personally interested in the matter and that the officer should act on his son's complaint.

Such conduct lent the prestige of his judicial status to advance his son's personal interests, which is strictly prohibited (Rules, §100.2[C]); s*ee, e.g., Matter of Edwards*, 67 NY2d 153 (1986) (judge initiated several *ex parte* contacts with a judge who was presiding over his son's traffic case). As the Court of Appeals has stated:

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

Matter of Lonschein, 50 NY2d 569, 571-72 (1980). Respondent, who is not an attorney, could not act as his son's legal advocate, a role which should properly be delegated to an attorney. A judge's "'paternal instincts' do not justify a departure from the standards expected of the judiciary" (*Matter of Edwards*, *supra*, 67 NY2d at 155). *See also, Matter of Pennington*, 2004 Annual Report 139 (judge contacted the district attorney to discuss a pending case involving his son and to object to his son's treatment by the police); *Matter of Magill,* 2005 Annual Report 177 (after transferring a case in which his wife was the complaining witness, judge personally delivered the file to the transferee court and left his judicial business card, on which he had written a request for an order of protection).

By asking specifically that the ticket be returnable *before him*, respondent

not only underscored his expectation that a ticket would be issued, but compounded the impropriety by insuring that he would be personally involved in the case in his judicial capacity. While the dissent minimizes respondent's involvement in his son's case even before the arraignment, it seems clear that there was no reason for respondent to ask that the case be brought before him except to convey his personal interest in the matter and to ensure that respondent himself would have control of the case when the defendant appeared in court. Respondent had no authority to disqualify his co-judge from handling the case (*Matter of Hooper*, 2004 Annual Report 113).

Respondent further compounded his misconduct by failing to disqualify himself promptly when the case came before him; instead, he arraigned the defendant and accepted his guilty plea. Taking such judicial action in a case in which his son is the complaining witness was patently improper since the judge's impartiality could reasonably be questioned (*see* Rules, §100.3[E][1]; *see*, *Matter of Tyler*, 75 NY2d 525 [1990] and *Matter of Sims*, 61 NY2d 349 [1984]). Respondent's on-the-bench disclosure of the relationship underscores why the case should not have been before him in the first place; for the defendant, hearing from the judge that the complaining witness is the judge's son could only be an intimidating message, and respondent should have been aware that making such a statement might have encouraged the defendant to plead guilty. Moreover, his disclosure to the defendant was incomplete since he did not disclose that he was a possible witness in the case.

Even with full disclosure and even if the defendant wanted to go forward, it

was improper for respondent to take judicial action in the case under the remittal provision (Rules, §100.3[F]) since (i) the conflict could not be waived by the unrepresented defendant and (ii) the disclosure and waiver of the conflict were not on the record. The fact that no recording was made of the arraignment, contrary to a recent statewide Order of the Administrative Judge requiring such recording, compounds the appearance of impropriety.

Finally, in belatedly transferring the case to his co-judge, respondent sent a letter describing his own involvement in the matter and noting that his son was the complaining witness. This was *ex parte* information, and given the context – and respondent's suggestion that his co-judge could "adopt a new case" and fine the defendant – his letter conveyed the appearance that he was attempting to influence the sentence. From start to finish, respondent's conduct seemed calculated to ensure that his son's complaint would result in the defendant being charged by the DEC and that respondent would have control over the outcome of the case.

As an experienced judge, respondent should have recognized that his conduct was improper. We note that he has been cooperative and contrite and pledges to conduct himself in accordance with the Rules in the future.

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

Judge Klonick, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck, Mr. Coffey and Ms. Hubbard dissent and vote to reject the Agreed Statement on the basis that the proposed disposition is too harsh. Mr. Belluck files an opinion in which Mr. Coffey and Ms. Hubbard join.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: January 4, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

GARY P. ALLEN,

a Justice of the Newfield Town Court,
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- -

DISSENTING OPINION BY MR. BELLUCK, IN WHICH MR. COFFEY AND MS. HUBBARD JOIN

I respectfully vote to reject the Agreed Statement in this case because I believe that on the facts presented, the stipulated sanction of censure is too harsh. Because of the limited sanctions available to the Commission, it is important that the Commission reserve censure for the most severe behavior short of removal. Otherwise, the sanction of censure will be diluted to the point that the public assigns no weight to this punishment.

In this case, the facts simply do not warrant a censure. It was improper for respondent to contact a DEC officer in connection with his son's complaint and to conduct an arraignment of the defendant. To avoid any appearance of impropriety, he should have avoided any involvement in his son's case, as required by the ethical standards (Rules, §100.3[E][1][e]), and his failure to do so requires a disciplinary sanction.

Significantly, however, before accepting the plea, respondent advised the

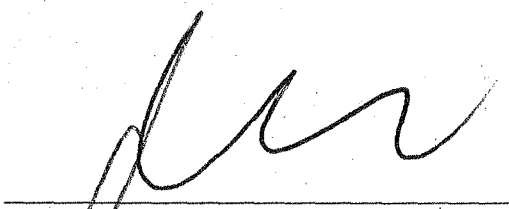
defendant of the right to counsel, disclosed that the complaining witness was his son and told the defendant that he could not impose a sentence. There is no indication that the defendant objected to respondent's handling the arraignment under these circumstances. Nor is there any indication of bias or coercion in respondent's handling of the matter. Moreover, I do not see any improper message in respondent's note transmitting the case for sentencing to his co-judge, which explained why he was disqualifying himself. And while the lack of a recording for the arraignment may compound the appearance of impropriety, I am reluctant to base a misconduct finding on what might have been an oversight or even a mechanical error. (The Agreed Statement offers no explanation for the absence of a recording.) In sum, during and following the arraignment the Judge seemed to take due care to make sure that the defendant's rights were protected and that he remained uninvolved with the process.

On these facts, I cannot conclude that respondent's misconduct rises to a level which requires censure, the same sanction the Commission has recently imposed on a judge who repeatedly handled cases involving his nephews, his employers' sons and his co-workers (*Matter of Menard*) and on a judge who was convicted of a misdemeanor Driving While Intoxicated, based on a .18% blood alcohol content, after driving erratically (*Matter of Martineck*). Having censured those judges, the Commission should not accept an Agreed Statement imposing the same sanction for a single incident of improper but far less serious misbehavior. By doing so, the Commission diminishes the significance of this sanction when it is imposed in an appropriate case.

Accordingly, since I believe admonition at most is appropriate here, I vote

to reject the Agreed Statement of Facts.

Dated: January 4, 2011



Joseph W. Belluck, Esq., Member
New York State
Commission on Judicial Conduct

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STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- -

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

JAMES E. CHASE,

a Justice of the Turin Town Court,
Lewis County.

DECISION
AND
ORDER

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

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

Michael F. Young for the Respondent

The matter having come before the Commission on December 8, 2011; and the Commission having before it the Notice and Formal Written Complaint dated August 30, 2011, in the above-entitled matter; respondent's Verified Answer dated October 11,

2011; and the Stipulation dated December 1, 2011, with appended exhibits; and respondent having resigned from judicial office by letter dated November 30, 2011, effective December 8, 2011, 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 proceeding is hereby discontinued and the matter closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: December 8, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

----------X

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

JAMES E. CHASE, **STIPULATION**

A Justice of the Turin Town Court,
Lewis County.

----------X

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, the Honorable James E. Chase ("respondent"), and Michael F. Young, Esq., respondent's counsel, as follows.

1. Respondent has served as a Justice of the Turin Town Court since August 1, 1998. He is not an attorney. His current term of office expires on December 31, 2011. At all times relevant herein, the Turin Town Court had a single justice.

2. Respondent was served by the Commission with a Formal Written Complaint dated August 30, 2011, which alleged that respondent failed to:

A. regularly deposit all court funds within 72 hours of receipt, as required by law, with the result that, on March 2, 2009, the court account's cumulative deficiency reached $6,080.00;

B. notify the Commissioner of Motor Vehicles, as required by law, to order the suspension of the drivers' licenses of 1,008 traffic defendants who failed to appear in response to their traffic charges;

C. notify the Commissioner of Motor Vehicles, as required by law, to order the suspension of the drivers' licenses of 320 traffic defendants who failed to pay fines and surcharges totaling $54,465.00, imposed following their convictions;

D. schedule or take other action pursuant to law to dispose of 276 traffic cases in which defendants had pleaded not guilty to their charges;

E. notify the Commissioner of Motor Vehicles, as required by law, of the convictions of 14 traffic defendants, and;

F. properly administer his court by mishandling court funds with the result that as of December 31, 2010, the court had only $3,162.36 in unencumbered funds available to cover the pending disposition of $30,180.00, in bail.

The Formal Written Complaint is appended hereto as Exhibit 1, and respondent's Answer is appended hereto as Exhibit 2.

3. Respondent tendered his resignation from judicial office on November 30, 2011, effective December 8, 2011, and has submitted copies to the Town of Turin and the Office of Court Administration. Copies of the respondent's resignation letters are appended hereto as Exhibit 3 and Exhibit 4.

4. Respondent affirms that he will neither seek nor accept judicial office in the future.

5. Respondent has notified the Department of Audit and Control about the Commission's investigation and has requested an audit of the court.

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

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

Dated: November 30, 2011

Honorable James E. Chase
Respondent

Dated: November 30, 2011

Michael F. Young, Esq.
Attorney for Respondent

Dated: Dec. 1, 2011

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

EXHIBIT 1: FORMAL WRITTEN COMPLAINT:
Available at www.cjc.ny.gov

EXHIBIT 2: ANSWER:
Available at www.cjc.ny.gov

EXHIBIT 3: RESPONDENT'S RESIGNATION LETTER TO TOWN OF TURIN: Available at www.cjc.ny.gov

EXHIBIT 4: RESPONDENT'S RESIGNATION LETTER TO NYS COMPTROLLER: Available at www.cjc.ny.gov

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STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- -

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

DETERMINATION

DAVID P. DANIELS,

a Justice of the Guilford Town Court,
Chenango County.

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Charles Farcher, Of Counsel) for the Commission

Scott Clippinger for the Respondent

The respondent, David P. Daniels, a Justice of the Guilford Town Court, Chenango County, was served with a Formal Written Complaint dated February 11, 2010,

containing one charge. The Formal Written Complaint alleged that respondent improperly intervened on behalf of a defendant in a traffic case. Respondent filed a Verified Answer dated March 8, 2010.

By Order dated April 29, 2010, the Commission designated Honorable Frank J. Barbaro as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 21, 2010, in Albany. The referee filed a report dated September 13, 2010.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Counsel to the Commission recommended the sanction of removal, and respondent's attorney recommended dismissal of the charge. On December 8, 2010, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has served as a Justice of the Guilford Town Court, Chenango County, since 1995. He is not an attorney. At all relevant times herein, he was employed as Transportation Director for the Norwich City School District.

2. On October 7, 2008, Larry Bates was involved in a motor vehicle accident while operating a school bus for the Norwich City School District. The bus operated by Mr. Bates struck a passenger vehicle while making a right turn. Mr. Bates telephoned the bus garage and informed respondent's secretary of the accident. Respondent, who was Mr. Bates' supervisor, went to the scene of the accident.

3. When respondent arrived, a New York State Trooper was in the

process of issuing a ticket to Mr. Bates for Failure To Yield Right of Way. The ticket was returnable in the Norwich Town Court on November 13, 2008.

4. Either the trooper or Mr. Bates gave the ticket to respondent. Respondent drove Mr. Bates to the hospital for drug/alcohol testing.

5. Respondent took possession of the ticket issued to Mr. Bates and said that he would take it to the Norwich Town Court.

6. Several weeks after the accident, respondent went to the Norwich Town Court. Respondent told court clerk Faye Pierce that he was looking for the Norwich Town Justice, David J. Evans. It was not a court night, and Judge Evans was not there.

7. Respondent had been to the Norwich Town Court several times to train Ms. Pierce on the court's computer program.

8. After telling Ms. Pierce about the video recording system installed on school buses, respondent showed her and court officer Kent Smith, on his laptop computer, a video of the accident in which Mr. Bates was involved. Respondent narrated the video and said that it showed that Mr. Bates was not at fault for the accident.

9. Respondent asked Ms. Pierce and Officer Smith to tell Judge Evans that respondent had "stopped by." He left Mr. Bates' copy of the ticket, on which no plea was entered, in a box on Judge Evans' desk. Ms. Pierce was unaware that respondent had left the ticket that evening.

10. Mr. Bates never appeared in the Norwich Town Court on the ticket

or entered a plea.

11. On November 20, 2008, Judge Evans dismissed the charge against Mr. Bates, with no plea or appearance by the defendant.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(6) and 100.4(A)(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.

By personally delivering his co-worker's traffic ticket to the Norwich Town Court, showing a video of the accident to court staff and asking the staff to tell the judge of his visit to the court, respondent created the appearance that he was attempting to obtain favorable treatment for the defendant and lent the clout of his judicial status to advance his co-worker's interests. These actions, which are undisputed in this record, were inconsistent with well-established ethical standards prohibiting a judge from using the prestige of judicial office to further private interests and requiring a judge to avoid even the appearance of impropriety (Rules, §§100.2, 100.2[C]).

After being called to the scene of the accident in his capacity as transportation director and speaking with his co-worker, who was charged in the incident,

respondent was obliged to refrain from any conduct that might convey an appearance of seeking special consideration for the defendant. As the Court of Appeals has stated:

> Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved. There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. Thus, any communication from a judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office. [Citations omitted.]

Matter of Lonschein, 50 NY2d 569, 571-72 (1980).

Under the circumstances presented here, respondent's actions could reasonably be construed as demonstrating his personal interest in an outcome in the case favorable to the defendant. That interest was reinforced by respondent's showing the court staff a video of the accident on his laptop computer, which he had brought with him to the court. While respondent, who had visited the court on prior occasions to provide computer training to the court clerk, denies that he was attempting to "fix" the ticket and testified that showing the video was merely a demonstration of new technology, his actions, at the very least, convey an appearance of impropriety (Rules, §100.2). We also accept the referee's finding that, in narrating the video, respondent said that it showed that Mr. Bates was not at fault for the accident. This comment, which respondent denies having made, strongly suggests that respondent was attempting to act as the defendant's advocate and further supports the conclusion that the purpose of his visit was to attempt to influence the court.

As a non-attorney, respondent could not act as the defendant's legal advocate (Jud Law §478). Any such advocacy on the defendant's behalf should properly have come from the defendant himself or his attorney.

It is no excuse that respondent, as he claims, was simply trying to do a favor for his co-worker by taking the ticket to the court, since doing so under these circumstances is impermissible when the prestige of judicial office is invoked, even implicitly. *See*, *e.g.*, *Matter of Magill*, 2005 Annual Report 177 (judge delivered the file of his wife's case to the transferee court, left his judicial business card on which he had noted a request for an order of protection, and told the clerk that his wife wanted an order of protection); *Matter of Edwards*, 67 NY2d 153 (1986) (judge whose son was issued a traffic ticket initiated several *ex parte* contacts with the judge handling the case). As an experienced judge, respondent should have recognized that his conduct, in its totality, could be perceived as an attempt to obtain special consideration for the defendant based on respondent's judicial status. Such conduct is improper even in the absence of an explicit request for favorable treatment, as the Court of Appeals has stated (*Id.* at 155).

Compounding the appearance of impropriety, we note that the ticket was dismissed a week after respondent's visit to the Norwich court, without a plea or appearance by the defendant. Even in the absence of any direct communication between respondent and Judge Evans prior to the dismissal, an appearance of favoritism was unavoidably created as a result of respondent's intervention in the matter.

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

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

Mr. Coffey, Mr. Belluck and Mr. Cohen dissent only as to the sanction and vote that respondent be admonished.

Mr. Harding did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: March 25, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- -

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

DAVID J. EVANS,

DECISION
AND
ORDER

a Justice of the Norwich Town Court,
Chenango County.

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Charles F. Farcher, Of Counsel) for the Commission

David E. Sonn for the Respondent

The matter having come before the Commission on January 26, 2011; and the Commission having before it the Formal Written Complaint dated February 11, 2010,

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the Answer dated April 7, 2010, and the Stipulation dated January 19, 2011, with appended exhibits; and the Commission, by order dated April 29, 2010, having designated Honorable Frank J. Barbaro as referee to hear and report proposed findings of fact and conclusions of law, a hearing having been held in Albany on July 19, 2010, and the referee having filed a report dated December 13, 2010; and respondent having resigned from judicial office by letter dated January 19, 2011, effective April 1, 2011, and having affirmed that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if accepted by the Commission; now, therefore, it is

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

SO ORDERED.

Ms. Moore was not present.

Dated: March 8, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

----------X

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

DAVID J. EVANS,

STIPULATION

a Justice of the Norwich Town Court,
Chenango County.

----------X

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter "Commission"), the Honorable David J. Evans, the respondent in this proceeding, and his attorney, David E. Sonn.

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

2. Respondent has been a Justice of the Norwich Town Court, Chenango County, since 1994. His current term expires on December 31, 2011. Respondent is not an attorney.

3. Respondent was served with a Formal Written Complaint dated February 11, 2010, a copy of which is annexed as Exhibit A, containing four charges.

4. Respondent filed an Answer, dated April 7, 2010, a copy of which is annexed as Exhibit B.

5. On April 29, 2010, the Commission designated Honorable Frank J. Barbaro as Referee to hear and report proposed findings of fact and conclusions of law.

A hearing was held in Albany on July 19, 2010. A transcript of the hearing, and the exhibits admitted into evidence are attached as Exhibit C. In a report dated December 13, 2010, the Referee submitted his proposed findings of fact and conclusions of law, a copy of which is annexed as Exhibit D.

6. The matter is currently scheduled for oral argument before the Commission on March 17, 2011.

7. Respondent tendered his resignation as Norwich Town Justice, dated January 19, 2011, effective April 1, 2011. A copy of respondent's letter of resignation is annexed as Exhibit E.

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

9. Respondent understands that, should he remain on the bench beyond April 1, 2011, or return to the bench at any time, or otherwise abrogate the terms of the Stipulation, the proceedings upon the Formal Written Complaint will be revived and proceed.

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

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

Dated: 1/19/2011

Honorable David J. Evans
Respondent

Dated: 1/19/2011

David E. Sonn, Esq.
Attorney for Respondent

Dated: 1/19/2011

Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(Charles F. Farcher, Of Counsel)

EXHIBIT A:	FORMAL WRITTEN COMPLAINT: Available at www.cjc.ny.gov
EXHIBIT B:	ANSWER: Available at www.cjc.ny.gov
EXHIBIT C:	TRANSCRIPT OF HEARING AND EXHIBITS: Available at www.cjc.ny.gov
EXHIBIT D:	REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW: Available at www.cjc.ny.gov
EXHIBIT E:	RESPONDENT'S RESIGNATION LETTER TO NORWICH TOWN BOARD: Available at www.cjc.ny.gov

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

EDIE M. HALSTEAD,

a Justice of the Davenport Town Court,
Delaware County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission

Honorable Edie M. Halstead, *pro se*

The respondent, Edie M. Halstead, a Justice of the Davenport Town Court, Delaware County, was served with a Formal Written Complaint dated August 10, 2010,

containing four charges. The Formal Written Complaint alleged that respondent failed to deposit and remit court funds in a timely manner, filed reports with the State Comptroller that falsely and/or inaccurately stated the amounts collected, and engaged in impropriety with respect to various traffic violations with which she was charged. Respondent filed an answer on October 1, 2010.

By motion dated November 17, 2010, the administrator of the Commission moved for summary determination, pursuant to Section 7000.6(c) of the Commission's Operating Procedures and Rules (22 NYCRR §7000.6[c]). No response to the motion was received from respondent. By Decision and Order dated December 8, 2010, the Commission granted the administrator's motion and determined that the charges were sustained and that respondent's misconduct was established.

The Commission scheduled oral argument on the issue of sanctions for January 26, 2011. Oral argument was not requested and thereby was waived. Counsel to the Commission filed a memorandum recommending that respondent be removed from office. No papers on the issue of sanctions were received from respondent.

On January 26, 2011, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent was a Justice of the Davenport Town Court, Delaware County, from January 1, 2009, until her resignation on October 1, 2010. She is not an attorney.

2. From in or around 2006 through December 31, 2008, respondent

served as the court clerk to Davenport Town Justice Britt Kelch. At all relevant times herein, the Davenport Town Court had a single town justice.

As to Charge I of the Formal Written Complaint:

3. From on or about January 1, 2009 to on or about December 31, 2009, as set forth on Schedule A annexed to the Formal Written Complaint and as described below, respondent failed to deposit over $11,000 in court funds into her court bank account within 72 hours of receipt, as required by Section 214.9 of the Uniform Civil Rules for the Justice Courts. During that period, respondent received court funds on over 100 occasions that she failed to deposit in a timely manner.

4. Respondent made 34 deposits in her court account between January 1, 2009 and December 31, 2009, in which the amount of money deposited did not match the sum of the funds received by the court since the previous deposit. On 20 occasions the amount respondent deposited was less than the amount received by her court since the previous deposit, and on 14 occasions the amount deposited was more than the amount received since the previous deposit.

5. Respondent's failure to deposit court funds in a timely manner as required by law resulted in a cumulative deficiency in her court bank account of $3,511.45 as of December 31, 2009. From May 27, 2009, to December 31, 2009, the cumulative deficiency in respondent's court account was consistently more than $3,500, and on September 30, 2009, the deficiency reached $5,098.95.

As to Charge II of the Formal Written Complaint:

6. From in or about February 2009 through in or about November 2009, in the 19 cases set forth on Schedule B annexed to the Formal Written Complaint and as described below, respondent failed to report court funds totaling $2,203.95 to the State Comptroller within ten days of the month succeeding collection, as required by Section 1803 of the Vehicle and Traffic Law and Section 27.1 of the Town Law, and failed to remit those funds to the State Comptroller or to the Chief Fiscal Officer of the Town of Davenport, as required by Sections 2020 and 2021 of Uniform Justice Court Act, Section 1803 of the Vehicle and Traffic Law, Section 27.1 of the Town Law and Section 99-a of the State Finance Law.

7. With respect to seven of the cases on Schedule B, respondent falsely and/or inaccurately certified in her reports to the State Comptroller that she had dismissed the case or collected no fine, when in fact she had collected funds totaling $1,110 in those cases.

As to Charge III of the Formal Written Complaint:

8. In November and December 2008, as the clerk of the Davenport Town Court, respondent deposited court funds into the court account of then-Davenport Town Justice Britt Kelch and prepared Judge Kelch's monthly reports to the State Comptroller and remittances to the Davenport Chief Fiscal Officer.

9. On January 1, 2009, respondent replaced Judge Kelch as the Davenport Town Justice. Respondent maintained Judge Kelch's court account and funds

through April 2009.

10. In or about February and March 2009, respondent prepared and submitted reports to the State Comptroller with respect to funds received by the Davenport Town Court or deposited into the court account in November and December 2008. As set forth on Schedule C annexed to the Formal Written Complaint, those reports falsely and/or inaccurately failed to report court funds totaling $5,700 that were received by the court or deposited into the court account in 29 cases. With respect to two of these cases, the reports indicated that Judge Kelch had dismissed the case or collected no fine, when in fact the court had collected $470 in those cases.

11. In November 2008 respondent deposited $1,248 from her personal funds into Judge Kelch's court account in order to cover deficiencies in the account.

12. Upon becoming a judge on January 1, 2009, respondent took no action to report the deficiencies in the court account, audit the books, examine the court's administrative procedures or otherwise determine the circumstances which had led her to cover the deficiency with her personal funds.

As to Charge IV of the Formal Written Complaint:

13. Respondent failed to respect and comply with the law and failed to uphold high standards of conduct by: (i) asserting the prestige of the Davenport Town Court with regard to Vehicle and Traffic Law violations charged against her in the Princetown Town Court, (ii) failing to appear in court on scheduled return dates and/or failing to pay fines and surcharges imposed with regard to Vehicle and Traffic Law

violations charged against her in the Princetown and Richmondville Town Courts, (iii) failing to maintain vehicle liability insurance coverage and (iv) operating a motor vehicle notwithstanding that her license had been suspended by the Department of Motor Vehicles.

Town of Princetown 2008 Speeding Violation

14. On or about April 3, 2008, respondent was charged in the Town of Princetown, Schenectady County, with Speeding in violation of Section 1180(d) of the Vehicle and Traffic Law.

15. On or about April 28, 2008, respondent mailed her not guilty plea to the Princetown Town Court in an envelope bearing the return address "Hon. Britt Turner Kelch, Davenport Town Court."

16. On or about September 4, 2008, the Princetown Town Court mailed respondent a notice of trial and set a pre-trial conference for November 12, 2008. Respondent never appeared or communicated with the court for an adjournment.

17. On or about May 12, 2009, the Department of Motor Vehicles notified respondent that her driver's license would be suspended for her failure to answer the summons. Respondent did not subsequently appear or otherwise communicate with the Princetown Town Court, and her license was suspended on June 19, 2009.

18. On or about March 14, 2010, after receiving a letter from the Commission requesting her appearance to give testimony concerning, *inter alia*, the suspensions of her driver's license, respondent mailed a letter to the Princetown Town

Court in which she changed her plea to guilty. Respondent sent the letter in an envelope bearing the pre-printed return address of the "Davenport Town Court," which was crossed out but still legible.

19. On or about March 17, 2010, the Princetown Town Court issued respondent a notice of fine, surcharge and fee totaling $220.

20. On or about March 22, 2010, respondent paid a fee to lift the suspension of her license for the violation in the Town of Princetown. As of the date of the Formal Written Complaint, respondent had not paid the fine or surcharge to the court.

Town of Richmondville 2009 Seat Belt Violation

21. On or about January 6, 2009, respondent was charged in the Richmondville Town Court, Schoharie County, with a Seat Belt violation under Section 1229-c(3) of the Vehicle and Traffic Law. Respondent pled guilty to the charge by mail.

22. On or about February 2, 2009, the Richmondville Town Court notified respondent that her guilty plea had been accepted and that a fine and surcharge totaling $110 were imposed, payable to the court by March 4, 2009. Respondent failed to pay the fine and surcharge as required.

23. On or about June 17, 2009, the Department of Motor Vehicles notified respondent that her license would be suspended for failure to pay the fine owed to the Richmondville Town Court. Respondent did not pay the fine, and her license was suspended on July 22, 2009.

24. On or about March 23, 2010, respondent paid a fee to the

Richmondville Town Court to lift the suspension of her driver's license. The court granted respondent until April 7, 2010 to pay the fine and surcharge. As of the date of the Formal Written Complaint, respondent had not paid the fine or surcharge for the underlying offense.

2009 Suspension Order for Lapsed Vehicle Liability Insurance Coverage

25. On or about December 4, 2009, the Department of Motor Vehicles sent respondent a suspension order informing her that her driver's license would be suspended indefinitely effective December 17, 2009, for her failure to maintain continuous vehicle liability insurance coverage.

Town of Sidney Aggravated Unlicensed Operation Violation

26. On or about March 31, 2010, respondent was charged in the Sidney Town Court, Delaware County, with Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree, a misdemeanor, in violation of Vehicle and Traffic Law Section 511(1)(a), for driving while knowing or having reason to know that her driver's license was suspended. Respondent pled guilty to the charge by mail.

27. On or about June 28, 2010, the Sidney Town Court notified respondent that her guilty plea had been accepted and that a fine and surcharge totaling $540 were imposed, payable to the court by July 22, 2010.

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

The record establishes that throughout her first year as a judge, respondent repeatedly failed to comply with clear statutory requirements governing the depositing, reporting and remitting of court funds and filed reports that falsely and/or inaccurately understated the amounts collected by the court. The failure to comply with these statutory mandates constitutes a serious dereliction of a judge's duties since the handling of public monies is one of a judge's most important responsibilities. *See*, *Matter of Rater*, 69 NY2d 208 (1987); *Matter of Petrie*, 54 NY2d 807 (1981); *Matter of Cooley*, 53 NY2d 64 (1981). "The mishandling of public money by a judge is 'serious misconduct' even when not done for personal profit" (*Bartlett v. Flynn*, 50 AD2d 401, 404 [4th Dept 1976]).

All funds received by a town justice must be deposited within 72 hours of receipt and must be reported and remitted to the State Comptroller or the town's Chief Fiscal Officer by the tenth day of the month following collection (Uniform Civil Rules for the Justice Courts §214.9 [22 NYCRR §214.9]; UJCA §2021[1]; Town Law §27; Vehicle and Traffic Law §1803). Having made deposits and prepared the required monthly reports when she had served as the court clerk under her predecessor, respondent was presumably familiar with these important administrative responsibilities, but, as a judge, she was apparently unwilling or unable to comply with the statutorily mandated

procedures. She failed to make timely deposits and frequently made deposits that did not match the total amounts received by the court since the previous deposit, resulting in a cumulative deficiency in the court bank account of more than $3,500 by the end of her first year as a judge. Her reports to the State Comptroller were inaccurate and incomplete, failing to report the receipt of more than $2,200 and stating, as to seven cases, that she had dismissed the cases or collected no fines when in fact she had collected funds totaling $1,110 in those cases. The reports she prepared for the final two months of her predecessor's term were similarly deficient. In the final months of her tenure as court clerk, respondent deposited $1,248 from her personal funds into the court account in order to cover deficiencies in the account.

With respect to such financial and administrative transgressions, the Court of Appeals has stated:

> The severity of the sanction imposed for this variety of misconduct depends upon the presence or absence of mitigating and aggravating circumstances. Certainly, in the absence of any mitigating factors, the failure to make timely deposits in the court account and timely reports and remittances to the State might very well lead to removal (*Matter of Petrie*, 54 NY2d 807; *Matter of Cooley*, 53 NY2d 64). On the other hand, if a Judge can demonstrate that mitigating circumstances accounted for such failings, such a severe sanction may be unwarranted *(id.; Matter of Rogers*, 51 NY2d 224).

Matter of Rater, *supra*, 69 NY2d at 209. We find no mitigation here. This record of pervasive derelictions cannot be excused by respondent's claim that the court's records were inaccurate and unreliable because of persistent computer problems and

administrative deficiencies that she inherited from her predecessor. The fact that respondent was aware of those problems should have prompted her to take whatever steps were necessary to obtain assistance in order to ensure that the records were accurate and that all court monies were properly accounted for. "The judicial duties of a judge take precedence over all the judge's other activities" (Rules, §100.3).

Compounding this misconduct is a pattern of impropriety by respondent with respect to a series of traffic violations. She failed to appear in court in response to a summons; failed to pay fines and surcharges imposed for two traffic violations, resulting in her license suspension; failed to maintain vehicle liability insurance coverage; and was convicted of Aggravated Unlicensed Operation, a misdemeanor, for driving with a suspended license. These transgressions represent a pattern of failing to respect and comply with the law that is unacceptable for a judicial officer. Such conduct diminishes public confidence in the judiciary as a whole and irreparably damages her authority as a judge.

In its totality, respondent's conduct shows a pervasive disregard for the ethical and administrative responsibilities of her judicial office, which establishes that she is unfit to serve as a judge. "[T]he purpose of judicial disciplinary proceedings is 'not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents'" (*Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [lll] [Ct on the Jud 1975]). In view of respondent's resignation,

the sanction of removal is necessary to ensure that she is ineligible for judicial office in the future (NY Const Art 6 §22[h]).

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

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

Judge Klonick, Mr. Coffey, Mr. Cohen, Mr. Emery, Ms. Hubbard, Judge Peters and Judge Ruderman concur.

Judge Acosta, Mr. Belluck and Mr. Harding dissent as to the sanction and vote that the matter be closed in view of respondent's resignation.

Ms. Moore was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: January 27, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

KEVIN V. HUNT,

a Justice of the Shawangunk Town Court,
Ulster County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk, Of Counsel) for the Commission

Honorable Kevin V. Hunt, *pro se*

The respondent, Kevin V. Hunt, a Justice of the Shawangunk Town Court, Ulster County, was served with a Formal Written Complaint dated July 18, 2011, containing one charge. The Formal Written Complaint alleged that respondent intervened

in his friend's traffic case that was returnable before respondent's co-judge.

On October 11, 2011, the Administrator 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 3, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Shawangunk Town Court, Ulster County, since January 2005. His current term expires on December 31, 2013. He is not an attorney.

2. On May 25, 2006, Shawangunk Police Officer Roy Snyder issued Wendy M. Myers two traffic tickets, for violations of Vehicle and Traffic Law Sections 1180(c) (speeding in a school zone) and 1225-c(2)(a) (using a cell phone while operating). The tickets were returnable in the Shawangunk Town Court on June 13, 2006, before respondent's co-judge, Timothy S. McAdam.

3. After receiving the tickets, Ms. Myers entered a plea of not guilty by mail. By letter dated June 6, 2006, Judge McAdam acknowledged receipt of the defendant's not guilty plea and scheduled a trial date for July 11, 2006.

4. Respondent became aware of the *Myers* tickets shortly after their issuance. At the time the tickets were issued, respondent had known Ms. Myers and her husband, Keith Myers, in a social capacity for approximately 15 years. Respondent

never spoke to Wendy Myers about the tickets, but he looked up the tickets in the court's files and determined they were returnable before Judge McAdam.

5. Prior to the trial date, respondent went to the Shawangunk Police station and spoke to Officer Snyder about Myers' tickets. Officer Snyder was acquainted with respondent and had appeared before him in court. Respondent told Officer Snyder that Ms. Myers was a friend and that she and her family were "good people." He asked Officer Snyder to do "whatever you can do."

6. Officer Snyder and defendant Myers both appeared in court on the July 11, 2006, trial date before Judge McAdam. Officer Snyder recommended that the tickets be disposed of by adjournment in contemplation of dismissal ("ACD"). Judge McAdam granted an ACD, and the matter was adjourned for six months. On January 11, 2007, the tickets were dismissed. Respondent never spoke to Judge McAdam about the defendant or the tickets.

7. Officer Snyder would not have proposed an ACD as a disposition for the charges against Wendy Myers absent respondent's request.

8. Respondent acknowledges that he should not have intervened in the disposition of Wendy Myers' tickets.

9. Respondent acknowledges that his actions in speaking to Officer Snyder and advocating for his friend lent the prestige of judicial office to advance the private interest of his friend and constituted a request for favoritism.

Mitigating Factors

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

11. Respondent is remorseful and assures the Commission that lapses such as occurred here will not recur.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B) and 100.2(C) of the Rules Governing Judicial Conduct ("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 was improper for respondent to seek special consideration for a defendant in a traffic case by contacting the officer who issued the tickets, identifying the defendant as a friend whose family are "good people," and asking the officer to do "whatever you can do." By engaging in such conduct, respondent violated the Rules enumerated above and engaged in ticket-fixing, which is a form of favoritism that has long been condemned. In *Matter of Byrne*, 47 NY2d (b), (c) (1979), the Court on the Judiciary declared that "a judicial officer who accords or requests special treatment or favoritism to a defendant in his court or another judge's court, is guilty of *malum in se* misconduct constituting cause

for discipline." Ticket-fixing was equated with favoritism, which the Court stated "is wrong, and has always been wrong" (*Id.* at [b]).

Making such a request of a police officer who appears in the judge's court is particularly egregious. In these circumstances, there is inherent pressure on the officer to accede to the judge's request. Moreover, seeking such favors from the police corrupts future cases – if the officer accedes to the request, which benefits the judge's friend, the judge's impartiality is tainted in subsequent cases in which the judge might be required to determine the officer's credibility. Certainly a defendant "might reasonably…question" the judge's impartiality if the defendant knew that the officer had done such a favor for the judge (Rules, §100.3[E][1]). There is no indication whether respondent disclosed the conflict or disqualified himself in such cases after this incident.

In the 1970s and 1980s, the Commission uncovered a widespread pattern of ticket-fixing throughout the state and disciplined over 140 judges for the practice. As the Commission stated in a 1977 report about the assertion of influence in traffic cases, ticket-fixing results in "two systems of justice, one for the average citizen and another for people with influence." The report stated: "While most people charged with traffic offenses accept the consequences, including the full penalties of the law … some are treated more favorably simply because they are able to make the right 'connections'" ("Ticket-Fixing: The Assertion of Influence in Traffic Cases," Interim Report, June 20, 1977, p. 16). Such conduct subverts the entire system of justice, which is based on the impartiality and independence of the judiciary, and undermines respect for the judiciary as

a whole. With the benefit of a significant body of case law, every judge in the state should be well aware that such conduct is prohibited.

Here, respondent's message to the officer who issued the tickets was clearly a request for special consideration. As the Court of Appeals has held, such requests are improper even in the absence of a specific request for favorable treatment. *See, Matter of Edwards v. Comm. on Judicial Conduct,* 67 NY2d 153, 155 (1986). As a result of respondent's intervention, the officer recommended that the defendant be granted an adjournment in contemplation of dismissal, a lenient disposition he would not have proposed absent respondent's request.

The Court of Appeals has stated that even a single incident of ticket-fixing "is misconduct of such gravity as to warrant removal" (*Matter of Reedy v. Comm. on Judicial Conduct*, 64 NY2d 299, 302 [1985]), although mitigating factors may warrant a reduced sanction (*see, e.g.*, *Matter of Edwards*, *supra* [judge's "judgment was somewhat clouded by his son's involvement"]; *Matter of Lew*, 2009 Annual Report 130 [in dismissing a charge based on *ex parte* emails from the defendant's husband who was serving in Iraq, judge "was motivated in significant part by the desire…to make what he viewed as a patriotic gesture"]).

In considering the appropriate disposition in this case, we note in mitigation that respondent is contrite and has been forthright and cooperative in this proceeding. We also note that this incident, which occurred more than five years ago, appears to be an isolated occurrence and that, at the time, respondent had served as a judge for 18 months.

While we conclude that censure is appropriate here, this decision, based upon a joint recommendation, should not be interpreted to suggest that we will never impose the sanction of removal for such transgressions. We continue to regard ticket-fixing as extremely serious misconduct and underscore that such conduct will be condemned with strong measures.

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

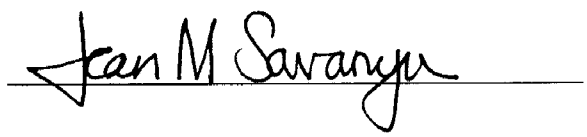
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: November 9, 2011



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

ROBERT A. KELLY, JR.,

a Justice of the Westhampton Beach Village
Court, Suffolk County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Edward Lindner, Of Counsel) for the Commission

Stillman, Friedman & Shechtman, P.C. (by Paul Shechtman) for the Respondent

The respondent, Robert A. Kelly, Jr., a Justice of the Westhampton Beach Village Court, Suffolk County, was served with a Formal Written Complaint dated July

19, 2010, containing four charges. The Formal Written Complaint alleged that: (i) respondent represented clients before the Westhampton Beach Building and Zoning Department, which enforces the local building code, over which respondent's court has jurisdiction; (ii) respondent's name appeared on papers filed by his law firm in connection with lawsuits against the Village of Westhampton Beach; (iii) respondent failed to disqualify himself in two cases involving a party who was a client or former client of his law firm; and (iv) respondent made or permitted political contributions through his law firm. Respondent filed a verified answer dated September 8, 2010.

On March 10, 2011, 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 March 17, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Westhampton Beach Village Court, Suffolk County since 1996. He was admitted to the practice of law in New York in 1990 and has been in private practice at the law firm of Kelly & Hulme, P.C., in Westhampton Beach, New York, since that time.

As to Charge I of the Formal Written Complaint:

2. Pursuant to sections 70-48 and 197-56 of the Village of Westhampton Beach Municipal Code, the Westhampton Beach Village Court has jurisdiction over local building and zoning ordinance violation cases.

3. The Westhampton Beach Building and Zoning Department ("Building Department") enforces and administers the Westhampton Beach Village Building Code. The Westhampton Beach Building and Zoning Administrator reviews all applications for building permits and certificates of occupancy and has the authority to grant or deny such applications.

4. The Westhampton Zoning Board of Appeals hears appeals of the Building and Zoning Administrator's denial of an application for a building permit or certificate of occupancy. The Board may reverse, affirm or modify the Building and Zoning Administrator's determination.

5. Between August 1999 and February 2007, in four cases set forth below, respondent represented private clients in matters before the Building Department, seeking non-ministerial determinations as to building permits and certificates of occupancy.

The 2007 Anderson Representation

6. On February 27, 2007, respondent filed an application to the Building Department on behalf of George and Elvira Anderson for an updated certificate of occupancy for a residential property in Westhampton Beach. The Building Department

denied the application on March 1, 2007, and notified the Andersons that a lawn area installed on the property violated provisions of the Village Laws dealing with Coastal Erosion Management.

7. On March 2, 2007, respondent met with Bridget Napoli, the Village Ordinance Enforcement Officer, and Paul Houlihan, the Village Building and Zoning Administrator, concerning the alleged violations. At the meeting, respondent asserted that the lawn area did not encroach upon the dune and, therefore, was not subject to dune restrictions.

8. On April 3, 2007, Ms. Napoli issued an Order to Remedy the alleged violations to the Andersons.

9. On April 9, 2007, Mr. Houlihan sent respondent a letter advising that the New York State Department of Environmental Conservation agreed with his interpretation of the dune area. Mr. Houlihan recommended that the Andersons revise their application or request a variance from the Zoning Board of Appeals.

10. On April 17, 2007, respondent wrote to Mr. Houlihan and requested that he modify two "factual errors" in his April 9th letter "so that there will be a clear record for the Zoning Board of Appeals and the courts for appeals that may take place with respect to these matters." Mr. Houlihan denied respondent's request in a letter dated April 20, 2007.

11. On April 18, 2007, respondent sent Ms. Napoli a letter requesting a stay of enforcement of the Order to Remedy so that the Andersons could submit an

application for a variance to the Zoning Board of Appeals.

12. On May 9, 2007, respondent's partner, James Hulme, Esq., submitted an application in the name of the Andersons to the Zoning Board of Appeals, seeking a coastal erosion variance and interpretation of a zoning ordinance. Respondent did not participate in preparation of the zoning board application and did not appear before the Zoning Board on the matter.

The 2001-2002 Anderson Representation

13. Respondent represented the Andersons in December 2001 and January 2002 in connection with their application for a building permit to construct an access walkway and a set of front entry stairs on the same property as above.

14. On December 11, 2001, respondent met with Paul Houlihan concerning the application. Mr. Houlihan told respondent that the proposed walkway was not permitted. On December 12, 2001, respondent sent Mr. Houlihan a three-page letter arguing that the new walkway had been previously approved.

15. Mr. Houlihan denied the Anderson application on January 8, 2002. On January 18, 2002, respondent sent Mr. Houlihan a letter re-submitting the building permit application without the walkway.

The 2001 Weiss/Chandler Representation

16. In 1999 respondent represented Louis and Alice Weiss in the sale of a residential property in Westhampton Beach to Jordan Chandler.

17. Thereafter, on January 3, 2001, respondent sent a letter to then-

Building Inspector Fred Showers on behalf of Mr. Chandler, in which he enclosed copies of a building permit and certificates of occupancy, provided his recollection of the events surrounding the issuance of the certificates, and requested that Mr. Showers revise the most recent certificate of occupancy to include a tennis court.

The 1999 Gizang Representation

18. In August 1999 respondent represented Michael Gizang in connection with his application to the Building Department for a building permit to construct a walkway at a residential property in Westhampton Beach.

19. Respondent sent two letters dated August 2, 1999, and September 22, 1999, to Mr. Gizang's neighbors requesting their consent to construct the walkway.

20. On December 9, 1999, respondent personally executed an affidavit, which he submitted to the Building Department, in which he stated: (1) that he had contacted Mr. Gizang's neighbors and that they refused to consent to the construction of a walkway, and (2) that he had filed a title certification with the Village establishing that Gizang had the right of way to construct a walkway.

21. The Administrator withdraws the specifications set forth in paragraphs 9, 11 and 12 of the Formal Written Complaint regarding respondent's representation of Dana Seymour, Tim Presutti, Fourth Generation, LLC, Peter Colucci and Georgia Malone. Upon review of respondent's Answer and upon further reflection, the Administrator agrees that the decisions of the Building Department in those cases were largely ministerial and that respondent's representation of those parties in the

Building Department does not rise to the level of misconduct.

22. Respondent acknowledges that Opinion 89-44 of the Advisory Committee on Judicial Ethics ("Advisory Committee") provides that a part-time judge who presides over zoning and planning matters should not represent private clients before the zoning or planning boards in the community served by his or her court. Respondent now recognizes that his conduct created the appearance of impropriety by seeking discretionary determinations to approve building permits and certificates of occupancy from the Building Department on behalf of private clients. Respondent has agreed that he will not apply for any Building Permits in the Village of Westhampton Beach in the future.

23. Advisory Opinion 89-44 does not expressly address whether a part-time judge may apply for building permits or certificates of occupancy on behalf of clients. After Commission staff contacted respondent during the investigation of the conduct described in the Formal Written Complaint, respondent requested an opinion from the Advisory Committee on Judicial Ethics as to whether a part-time judge may assist clients seeking "building permits *** need[ed] to obtain a certificate of occupancy" where the client is "entitled to the permits 'as of right' without the exercise of any discretion."

24. On October 28, 2010, in response to respondent's request, the Advisory Committee issued Opinion 10-149, which restates the need for part-time judges practicing law in the municipalities where they sit to avoid conduct which lends the

prestige of their judicial office to advance the private interests of others, to act at all times in a manner that promotes public confidence in the judiciary and to avoid the appearance of impropriety in their representation of private clients. The opinion advises that it is permissible for a judge to apply for an updated certificate of occupancy or building permit where the approval is "ministerial," provided that "the judge must withdraw from representing the client in the matter" "if a particular application is contested."

As to Charge II of the Formal Written Complaint:

25. Between April 1998 and December 2008, respondent's name appeared on submissions made to the Suffolk County Supreme Court by his law firm, Kelly & Hulme, in six lawsuits filed against Westhampton Beach Village, including but not limited to the submissions set forth below.

A. In *Hoffman v. Village of Westhampton Beach*, respondent's law firm filed a petition for a small claims assessment review, dated April 29, 1997. Respondent's name was listed on the petition in a space provided for designating a representative to act on behalf of the petitioner in the proceeding.

B. In *Rila Realty Corp. v. Bean et al.*, respondent's law firm filed an Article 78 petition seeking to annul a determination of the Village Zoning Board of Appeals. Respondent's name appeared on his law firm's letterhead on three letters submitted to the court: (i) a cover letter, dated July 24, 2001, accompanying the petition, (ii) a letter dated May 13, 2001, requesting an adjournment of the petition return date, and (iii) a cover letter dated December 14, 2001, accompanying a Memorandum of Law in

support of the petition.

C. In *Little v. Bean*, respondent's law firm filed an Article 78 petition seeking to annul a determination of the Village Zoning Board of Appeals. Respondent's name appeared on his law firm's letterhead on a cover letter, dated June l, 2004, accompanying a Memorandum of Law in support of the petition.

D. In *Malone v. Village of Westhampton Beach*, respondent's law firm succeeded as the attorney of record in an Article 78 proceeding seeking to annul a determination of the Village Zoning Board of Appeals. Respondent's name appeared on his law firm's letterhead on three letters submitted to the court: (i) a cover letter dated November 27, 2007, accompanying an Affirmation and Memorandum of Law in support of the Article 78 petition; (ii) a letter dated August 23, 2006, requesting an adjournment of the return date of the petition, and (iii) a letter dated September 26, 2006, requesting a second adjournment.

E. In *East End Concrete & Stone Products, Inc. v. Josephine Carnevale, et al.*, respondent's law firm filed a cross-claim against the Village of Westhampton Beach as a third-party defendant. Respondent's name appeared on his law firm's letterhead on two letters submitted to the court: (i) a cover letter dated February 20, 2007, accompanying a Verified Answer with Counterclaim and Cross-Claim, and (ii) a letter dated March 13, 2007, concerning an adjournment request made by one of the defendants.

F. In *Denihan v. Village of Westhampton Beach Zoning Board of*

Appeals, respondent's law firm filed an Article 78 petition seeking to annul a determination of the Village Zoning Board of Appeals. Respondent's name appeared on his law firm's letterhead on a cover letter dated February 27, 2008, accompanying the petition.

26. In the six cases listed above, and in one additional case, *Szafran v. Village of Westhampton Beach*, respondent shared in the fees earned by his law firm from the lawsuits.

27. Respondent was aware that his law firm did not have separate letterhead without respondent's name for use in litigation against the Village and in matters before the Zoning Board of Appeals. He was not aware of Advisory Opinion 99-184, which provides that a part-time judge should not allow his/her name to appear on submissions made to a court, in connection with a lawsuit brought by the judge's law firm against the municipality in which the judge's court is located.

28. Respondent did not appear in court in these matters and did not sign any of the letters submitted to the court in these cases. Respondent acknowledges that although his law partner handled the actual representation in these cases, which is permitted, he should not have allowed his name to appear on documents submitted to the courts.

29. Respondent was also aware that he received a share of the fees earned from lawsuits against the Village of Westhampton Beach. Respondent and his law partner divided profits equally and did not maintain a separate accounting for fees

generated by these lawsuits. Respondent was not aware of Advisory Opinions 94-32 and 93-68 which state that a part-time judge who practices law may not share in the profits earned from lawsuits against the town in which the judge sits.

30. As a result of the Commission's investigation, respondent's law firm created stationery without respondent's name for use in litigation against the Village and in matters before the Zoning Board of Appeals.

31. As a result of the Commission's investigation, respondent's law firm instituted a new fee sharing policy to ensure that respondent does not share in fees generated by his firm in litigation against the Village.

As to Charge III of the Formal Written Complaint:

32. The Administrator withdraws the specifications set forth in paragraphs 24 through 35 of the Formal Written Complaint regarding respondent's failure to disqualify himself in two cases involving a party who was a current client of his law firm.

33. Respondent affirmatively states that the summonses in these two cases were issued by a court clerk using respondent's signature stamp and that respondent did not personally sign the summonses or direct his clerk to issue them.

34. Respondent acknowledges that he must disqualify himself in any case in which a client of his law firm appears as a party and affirmatively states that it is now his regular practice to have the administrator in his law firm check the calendar for client conflicts before taking the bench, that he continues to check the calendar himself

and that he will disqualify himself in all cases involving a client of his firm.

35. Upon review of respondent's Answer and upon further reflection, the Administrator agrees that respondent's involvement in the two cases set forth in Charge III of the Formal Written Complaint was negligible and that any violation of the Rules was *de minimis.*

As to Charge IV of the Formal Written Complaint:

36. Between May 2006 and June 2009, respondent's law firm, Kelly & Hulme, made $925 in contributions to political candidates and organizations using firm checks issued from the firm business account, as follows:

A. $200 to the campaign of Chris Nuzzi, a candidate for Town Council in the Town of Southampton, Suffolk County, on May 10, 2006.

B. $300 to the campaign of Skip Heaney, a candidate for Town Supervisor in the Town of Southampton, Suffolk County, on May 22, 2006.

C. $200 to the campaign of Sundy Schermeyer, a candidate for Town Clerk in the Town of Southampton, Suffolk County, on June 24, 2006.

D. $100 to the Southampton Town Republican Committee in Suffolk County, on August 11, 2008.

E. $125 to the campaign of Chris Nuzzi, a candidate for Town Council in the Town of Southampton, Suffolk County, on May 26, 2009.

37. Before the Commission's investigation, respondent was not aware that his law firm's checking account was used to make political contributions.

Respondent acknowledges that this practice is prohibited by Section 100.5(A)(1)(h) of the Rules Governing Judicial Conduct ("Rules"). Respondent acknowledges that Advisory Opinion 96-29 provides that a judge may not permit political contributions to be made from his law firm's account. Respondent concedes that he was obliged to comply with the Rule and that he failed to do so.

Additional Finding:

38. There is no evidence that the judge committed misconduct with respect to the disposition of any case in his court.

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), 100.4(A)(1), 100.4(A)(3) and 100.5(A)(1)(h) of the Rules and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I, II and IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge III is not sustained and therefore is dismissed.

A part-time judge may practice law subject to certain 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 Aison*, 2010 Annual Report 62; *Matter of Miller*, 2003 Annual Report 140 (Comm on Judicial Conduct). Every

lawyer-judge must scrupulously observe the applicable ethical standards in order to avoid conduct that may create an appearance of impropriety and impugn the integrity of judicial office. As set forth in this record, respondent's conduct showed inattention to his ethical responsibilities and, in particular, to the special ethical obligations of judges who are permitted to practice law.

The ethical standards provide that a judge must conduct his or her extra-judicial activities so that they are not incompatible with judicial office and do not cast reasonable doubt on the judge's capacity to act impartially or interfere with the proper performance of judicial duties (Rules, §100.4(A), subd [1], [3]). The Advisory Committee on Judicial Ethics has held that a part-time judge who presides over zoning and planning matters should not represent private clients before the zoning or planning boards in the municipality served by his or her court (Adv Op 89-44/89-60). As the Advisory Committee explains, such representation may create an appearance of impropriety (Rules, §100.2[A]) since a judge who presides over zoning violation matters may appear to be an integral part of the town's zoning enforcement scheme. By advocating for his private clients with the Village Building Department seeking non-ministerial determinations as to building permits and certificates of occupancy, respondent created a similar appearance of impropriety.

For example, in the 2007 Anderson representation, after the Building Department denied respondent's client an updated certificate of occupancy because of alleged violations, respondent met with enforcement officials and sent a letter to the

Building and Zoning Administrator contesting "factual errors" in the Administrator's letter and requesting that the errors be modified "so that there will be a clear record for the Zoning Board of Appeals and the *courts* for appeals that may take place with respect to these matters" (emphasis added). After respondent had advocated for his client in the matter, respondent's law partner then did so before the Zoning Board of Appeals.

The Building Department not only issues building permits, but enforces the Village Building Code. At the very least, respondent's requests of the Building and Zoning Administrator create the appearance that the judge is in a special position to secure favors for his clients since the Administrator knows that respondent's court has jurisdiction over building and zoning ordinance violation cases. It is incumbent upon respondent to avoid such employment, which creates a clear conflict with his judicial duties.

It was also improper for respondent's name to appear on papers filed by his law firm in Suffolk County Supreme Court in connection with lawsuits against the Village where respondent's court is located, and for respondent to share in the fees earned by his firm from these lawsuits. Such conduct is incompatible with judicial office in that it places the prestige of judicial office and the private interests of the judge and the judge's law firm in direct conflict with the interests of the municipality where the judge sits. While another attorney from a judge's law firm is permitted to represent a client in such litigation, it is improper for the judge to participate in any way in the lawsuit or to share in the profits earned from such litigation, as the Advisory Committee has stated

(Adv. Op. 99-184, 94-32, 93-68). We note that as a result of the Commission's investigation, respondent's law firm has created stationery without his name for use in litigation against the Village and has instituted a new fee-sharing policy to ensure that respondent does not share in fees generated by his firm in litigation against the Village.

Finally, it was improper for respondent's law firm to make five political contributions over a three-year period. Such conduct is contrary to Section 100.5(A)(i)(h) of the Rules, which prohibits contributions by a judge to political organizations or candidates. *See*, *Matter of DeVaul*, 1986 Annual Report 83; Adv Op 96-29. Although respondent was not aware that his law firm's checking account was used to make such contributions, this does not excuse the impropriety. The onus was on respondent to ensure that his law firm was in compliance with the ethical rules.

In considering the appropriate sanction, we note that respondent has acknowledged that his actions were inconsistent with the relevant ethical standards. We note further that, as indicated above, respondent has taken significant steps to ensure that these transgressions are not repeated.

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

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

Mr. Cohen and Mr. Emery did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: March 31, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

SHARI R. MICHELS,

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

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Edward Lindner and Brenda Correa, Of Counsel)
for the Commission

Godosky & Gentile, PC (by David Godosky) for the Respondent

The respondent, Shari R. Michels, a Judge of the New York City Civil Court, New York County, was served with a Formal Written Complaint dated January 26,

2009, containing two charges. The Formal Written Complaint alleged that during her 2006 campaign for judicial office, (i) respondent's campaign literature misrepresented that she had been endorsed by the *New York Times* and used another candidate's name without her permission (Charge I) and (ii) respondent's campaign received contributions that exceeded the maximum allowed by law (Charge II).

Between June 2009 and December 2009, the Administrator, respondent's attorney and respondent entered into two Agreed Statements of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and waiving further submissions and oral argument. The Commission rejected each of the Agreed Statements.

By Order dated March 25, 2010, the Commission designated Honorable Janet A. Johnson as referee to hear and report proposed findings of fact and conclusions of law. On September 14 and 15, 2010, a hearing was held in New York City. The referee filed a report dated May 29, 2011.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of censure, and respondent's counsel recommended dismissal of the Formal Written Complaint. On August 4, 2011, 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 since January 2007.

2. Respondent ran for election to the Civil Court in the general election held on November 7, 2006, in Manhattan's Seventh Municipal Court District. There were three candidates for two vacancies: Rita Mella, the Democratic Party candidate; Kelly O'Neill Levy, running on the "Northern Manhattan" ballot line; and respondent, running on the "Equal Justice" ballot line.

3. Respondent established a campaign committee named the Northern Manhattan Committee for Shari Michels (the "Michels Committee"). The campaign manager was Michael Oliva, and the campaign treasurer was Stanley Michels, respondent's father. Mr. Michels, who died in 2008, was an attorney who had previously been involved in numerous political campaigns and had run his own campaigns for New York City Council but had never previously worked on a judicial campaign.

4. Respondent had no prior experience as a candidate for public office.

As to Charge I of the Formal Written Complaint:

5. On October 22, 2006, the *New York Times* endorsed Ruth Mella and Kelly O'Neill Levy for Civil Court in the Seventh Municipal Court District. Respondent was not endorsed by the *New York Times*.

6. Thereafter, Mr. Oliva created a palm card for respondent's campaign that included photos of both respondent and Mella.[1] The words "Endorsed by the *New*

[1] A few months earlier Mr. Oliva had created somewhat similar literature for the primary campaign of Margaret Chan, a candidate for Civil Court in a different district. *See Matter of Margaret Chan*, 2010 Annual Report 124.

York Times" appeared on both sides of the palm card and were placed in such a manner that it could be interpreted to mean that both respondent and Mella had been endorsed by the *Times*.

7. The palm card was authorized by three political clubs which are referenced on the card, Frederick E. Samuel Democratic Club, Audubon Democratic Club and West Harlem Independent Democrats, in order to support the two candidates endorsed by the clubs, respondent and Mella. Respondent's campaign paid for the production of the palm card.

8. Ms. Mella had not given permission for her name or likeness to be used by respondent or the Michels Committee.

9. Respondent reviewed the palm card prior to its distribution.

10. At the hearing, respondent testified that the purpose of the palm card was to make clear to potential voters that they could vote for two candidates in the race. As the only candidate on the Democratic Party line, Mella was expected to, and did, finish first by a wide margin; thus, it was important to underscore that both she and Mella had the support of the political clubs.

11. The palm card was widely disseminated prior to the election, and respondent herself handed out the card.

12. On or about November 5, 2006, two days before the election, Ms. Mella told respondent that she objected to the palm card and that she had not given permission for the literature. Ms. Mella gave respondent a copy of a letter dated

November 5, 2006, that Mella had written to the three Democratic clubs stating her objections and further stating that the clubs and respondent should cease distributing the literature. In the letter, Ms. Mella stated, in pertinent part, that the use of the *New York Times* endorsement gave the impression that both respondent and she were endorsed by the *Times*.

13. Respondent reviewed Ms. Mella's letter and discussed Mella's concerns with her father and her campaign manager. They advised her not to be concerned about the issues raised in the letter particularly because the three political clubs had authorized the literature for their endorsed candidates and that Ms. Mella's permission was not required.

14. Relying on this advice, respondent continued to distribute the literature up to and on Election Day.

15. Respondent acknowledges that she is responsible for the material produced by her campaign and that it is the candidate's obligation pursuant to the Rules to insure that his or her campaign committee adheres to relevant laws and rules. In hindsight, respondent acknowledges that she should have withdrawn the literature promptly and ceased distributing it after Ms. Mella objected to it. She regrets that she did not do so and testified that the literature did not uphold her own standards for "the integrity that I would like to carry...as a judicial candidate, as a judge." She commits that in any future judicial campaign, she would carefully review the campaign literature, would not use the likeness of another candidate without the candidate's specific

authorization or consent, and, if any issues arose requiring guidance, would consult the Advisory Committee on Judicial Ethics.

16. The State Board of Elections certified the results of the foregoing election as follows: Mella received 37,859 votes; respondent received 9,808 votes; and Levy received 7,814 votes. As the two highest vote recipients, Mella and respondent were elected.

As to Charge II of the Formal Written Complaint:

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

Additional Finding:

18. The affirmative defense of laches is rejected.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(4)(a) and 100.5(A)(4)(d)(iii) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established. Charge II is not sustained and therefore is dismissed.

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 "knowingly ... misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent" (Rules, §100.5[A][4][d][iii]). This requirement not only helps ensure that judicial campaigns comport with fundamental standards of honesty and fairness, but enables voters to choose judges based upon information that is fairly and accurately presented.

Respondent's campaign literature, which was widely disseminated and which respondent herself had reviewed prior to its distribution, was inconsistent with the ethical standards. Viewed in its totality, the literature was misleading in that it juxtaposed respondent's photograph with that of another candidate, Rita Mella – who had not given permission for her likeness to be used by respondent's campaign – 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. In *Matter of Chan*, 2010 Annual Report 124 (Comm on Judicial Conduct), we found that a similar palm card was inconsistent with the ethical rules. Such deceptive practices have no place in campaigns for judicial office.

We reach this conclusion based on our own careful examination of the palm card in its entirety. We are mindful that the referee, after evaluating the evidence

presented at the hearing, concluded that the palm card was not misleading (Referee's report, pp. 10-11, 16-17). By law, the Commission has the authority to accept or reject a referee's proposed findings as well as to determine the appropriate sanction (22 NYCRR §§7000.6[f][1][iii], 7000.6[l]; Jud. Law §44[7]). While due deference should be accorded to a referee's findings and analysis, neither the Commission nor the Court of Appeals is bound to accept a referee's findings (*Matter of Marshall*, 8 NY3d 741, 743 [2007]).

In this case, it is particularly troubling that the other candidate depicted in the literature (Mella) did not consent to the use of her likeness and that even after Mella objected to it, pointed out to respondent that it was misleading and asked respondent to cease distributing it, respondent continued to distribute the literature until the election. This behavior exacerbates respondent's misconduct, further conveying the appearance that her campaign traded on Mella's status by knowingly and intentionally making misleading use of the *Times*' endorsement.

We note that in a race in which three candidates were vying for two seats, respondent finished a distant second to Mella and defeated the third candidate by a small margin. 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 that violate the ethical rules. *See Matter of Watson*, 100 NY2d 290 (2003); *Matter of Hafner*, 2001 Annual Report 113 (Comm on Judicial Conduct).

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

consistent with these standards. A judicial candidate's reliance on the advice of campaign officials does not excuse misconduct during a campaign (*Matter of Shanley*, 2002 Annual Report 157, *accepted*, 98 NY2d 310 [2002]) – especially where, as in the circumstances presented here, the impropriety is clear and was brought to respondent's attention. Respondent's behavior in using such literature in her campaign, and continuing to distribute it over Mella's objection, represents a departure from the high standards of conduct required of judicial candidates.

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

Judge Klonick, Judge Ruderman, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur except that, as to Charge II, Judge Klonick, Judge Ruderman and Ms. Moore dissent and vote to sustain the charge.

Judge Acosta, Mr. Belluck and Mr. Emery, in an opinion, dissent as to Charge I and vote to dismiss the charge, concur as to Charge II, and, accordingly, vote to dismiss the Formal Written Complaint.

Mr. Cohen did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: November 17, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

SHARI R. MICHELS,

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

OPINION BY JUDGE ACOSTA, MR. BELLUCK AND MR. EMERY, DISSENTING IN PART

This Commission has long recognized the complexities of judicial elections among three-quarters of the over 1,143 full-time New York State judges, as well as the majority of almost 2,200 town and village justices. It thus referred this matter to an independent referee with extensive knowledge and expertise of the judicial election process.[1] After an extensive hearing, including fact and expert witnesses, and examination of documentary evidence, the referee issued a report evincing thorough and sophisticated findings and recommended dismissal of both charges. The majority, without much analysis, rejects the referee's report as to Charge I and perplexingly reaches a conclusion that ignores the realities of the New York judicial selection process, as well as the evidence presented at the hearing. We therefore dissent and vote to dismiss Charge I.

Since the United States Supreme Court decision in *Republican Party of*

[1]The referee, Janet A. Johnson, is a former Pace Law School Dean and former appellate judge.

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Minnesota v. White, 536 US 765 (2002), states have had to modify their notions of what restrictions on judicial campaign activity are consistent with the First Amendment to the U.S. Constitution. New York in particular has had to balance its clearly compelling interest in maintaining the dignity of judicial elections and the integrity, impartiality, and independence of the bench against judicial candidates' constitutionally protected activity. In that light, the Chief Administrator's Rules protect the state's interest while recognizing that the current system of selecting judges by popular election, while distasteful and undignified to some, is the system we chose.[2]

The conduct for which the majority sanctions respondent today is core First Amendment protected conduct which is part and parcel of a complex and nuanced relationship between political clubs and the candidates they endorsed as well as the relationship between the candidates themselves. The referee's report strikes a proper balance between the conduct rules and respondent's conduct, and we should adopt it.

Of course, we all would prefer judicial campaigns to be elevated, substantive and non-political. However, we cannot characterize as prohibited political activity any conduct which is part and parcel of the very democratic process by which we elect most of our judges. The Supreme Court in *White* said it this way: "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must

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[2]"The change to judicial selection by popular election was born of discontent over the appointive system. Tension between New York's landed aristocracy and tenant farmers in the early 1800s fostered a violent anti-rent movement. By the middle of the century, the 'Jacksonian Democracy' movement was sweeping the nation, and the two movements together provided the catalyst for the Constitutional Convention of 1846. The resulting constitution provided that the judicial appointment system would be replaced with an elective system." Report to the Chief Judge of the State of New York, Commission to Promote Public Confidence in Judicial Elections, p. 4 (June 29, 2004).

accord the participants in that process... the First Amendment rights that attach to their role" (*White* at 788).

One of us, brother Emery, has been crying in the wilderness for some time about what he considers hypocritical and unconstitutional application of conduct rules to restrict political activity and the unseemly scheme it creates. *See*, *Matter of Young*, 2012 Annual Report ___ (Concurrence); *Matter of Herrmann,* 2010 Annual Report 172 (Dissent); *Matter of Yacknin*, 2009 Annual Report 176 (Dissent); *Matter of King*, 2008 Annual Report 145 (Concurrence); *Matter of Spargo*, 2007 Annual Report 127 (Concurring in Part and Dissenting in Part); *Matter of Farrell*, 2005 Annual Report 159 (Concurrence); *Matter of Campbell*, 2005 Annual Report 133 (Concurrence).

The *Michels* matter is a case in point. As found by the Commission's appointed referee:

> Judicial candidates are encouraged, even required, to obtain the political "support" of the clubs and organizations that decide who will be elected as judges in the State of New York. Part of this "bargain" is that the candidates will contribute funds to publish materials supported by these clubs – and to do so accurately. Interpreting this participation as a "prohibited political activity" that is inconsistent with the dignity of the office is not only "folly" but inappropriate. The [Commission] charge, if it is to be considered at all, essentially asserts that the regular and necessary contact with the political organizations by judicial candidates is not "consistent" with the dignity of the judicial office. While it might be easy to say that the system that requires judicial candidates to seek the "backing" of political leaders and clubs is less than dignified, Respondent (and her opponents) did not engage in misconduct in producing campaign literature that accurately reflected the full endorsements of these groups. (Report, p. 16)

In this context, the Commission majority faults respondent for distributing a "palm card" that reflects that three clubs endorsed her as well as the Democratic Party nominee, Rita Mella. These palm cards were reflections of the symbiotic relationship of the clubs and the candidates: both fed off the advertisement of their political relationships. The clubs garner support and sustenance from the candidate's campaigns, and the candidates can rely on the clubs for votes and legitimacy. As our referee found:

> The testimony at the Hearing demonstrated that the palm card accurately portrayed the likeness of the two candidates endorsed by the three political clubs and that the card was produced under the authority of these clubs (290). Judge Mella conceded that she and the third judicial candidate, Kelly O'Neill Levy, had also distributed a palm card authorized by another political club where both candidates are pictured (144-147).[3] The Commission does not dispute that the endorsing political clubs authorized the palm card. (Report, p. 15)
>
> Respondent's campaign committee funded a palm card that was authorized by three clubs and accurately noted the endorsement of these clubs for two of the three candidates for the office. (Report, p. 16)

Without accounting for the realistic role of the political clubs' approval of the palm card and its distribution in the hurly-burly of a New York City judicial campaign, the Commission majority votes to admonish respondent for "literature [that] was misleading in that it juxtaposed respondent's photograph with that of another candidate, Rita Mella--who had not given permission for her likeness to be used by respondent's campaign--and positioned the language 'Endorsed by the *New York Times*'

[3] "(Now) Judge Mella and (now) Judge O'Neill Levy produced a functionally similar political palm card that was 'put out' by the 'Dems in the Heights' political club (144-46). Mella testified that she remembered paying for the card –'my campaign paid for whatever my part of the cost was' (146)." (Report, p. 15)

in such a way that it *could be* construed as referring to both candidates, when in fact respondent did not have the *Times'* endorsement" (Determination, p. 7) (Emphasis added). The majority sanction, therefore, appears to be based on two components: a palm card that "could" appear to display an erroneous *New York Times* endorsement, *and* inclusion of Mella's "likeness" without her permission. As to the first basis, referee Johnson found, and we agree:

> It is possible that an ordinary, reasonable voter could look at the front side layout design of the palm card and conclude that it created the impression that Respondent had been endorsed by the *New York Times* when she had not been so endorsed. (Emphasis in original.) Judge Mella testified that "the fact that it said, 'endorsed by the *New York Times'* and it—you know, it could—I guess if you look at this piece, it could—it could be that someone could think that, perhaps, both of us were endorsed by the *New York Times* and I knew that that was not accurate" (81).
>
> The palm card, however, must be viewed in its entirety. The second side of the palm card, no less important in the information it contained than the first, clearly limited the scope of the *New York Times* endorsement to candidate Mella. Respondent's testimony at the hearing that she "could see now" that "an average reasonable person" could look just at the front of the palm card "and interpret this to mean that the card indicates that we are both endorsed by the *Times,*" (300) does not change this conclusion. *The evidence, therefore, does not establish that Respondent and/or her campaign committee produced and distributed campaign literature that represented and/or appeared to represent that Respondent was endorsed by The New York Times when in fact she had not been so endorsed.* (Emphasis added.) (Report, pp. 10-11)

The referee further concluded that "*the evidence failed to establish any knowing or other misrepresentation of fact by Respondent* about herself as to the

endorsement by the *New York Times* when the palm card is viewed in its entirety" (Report, p. 14) (Emphasis added). Nonetheless, the Commission majority rejects these findings, substituting its opinion for that of the referee who heard the testimony and reviewed the evidence in the context of a full hearing. Instead, the majority evaluates the palm card in isolation and concludes that misconduct occurred on the basis that the palm card's message "*could be*" confused (Emphasis added). The majority's conclusion that respondent "knowingly misrepresent[ed]" a fact about herself contrary to section 100.5(A)(4)(d)(iii) of the Rules not only ignores the referee's persuasive analysis and findings, but is totally inconsistent with the uncontradicted testimony.[4]

With respect to the second asserted ground for discipline, the referee determined that respondent conceded that on November 5, 2006, Mella personally gave her an envelope containing a letter objecting to the use of Mella's likeness (295-96, 337; Ex. 2):

> [Respondent] testified that she reviewed the letter and "very briefly" discussed Mella's concerns with her father and Oliva (296-297). They told her "everything was fine, not to be concerned about the issues raised in the letter" (297), *particularly because the three political clubs listed on the palm card had authorized the piece and that Mella was not required to give her permission* (289-290).
>
> Respondent testified "my understanding from Mr. Olivo [sic] and my father, Stan Michels, was that my campaign had been authorized to produce this palm card on their [the three political clubs'] behalf, showing that each of these three clubs was endorsing each of us for--for the two out of the three

[4] The majority also cites Section 100.5(A)(4)(a) of the Rules, which requires a candidate to "maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary...." It is difficult to see how this rule would give notice that the conduct here was prohibited.

> running for the two seats in the Democratic election--I'm sorry--in the general election on November 7th" (290). (Report, p. 12) (Emphasis added).

And,

> Respondent's campaign committee funded a palm card that was authorized by three clubs and accurately noted the endorsement of these clubs for two of the three candidates for the office. When Mella handed the letter (Ex. 2) to Respondent and indicated that now "she's going to have to hire a lawyer" (296), Respondent stated that she told Ms. Mella that "I was really sorry that she felt that- -that that was required and that I--felt for her because I was pretty much under the impression that her campaign didn't have a lot or resources… . So, I felt sorry because I thought, you know, the palm card is helping get her face out there and it was good for her, so I felt sorry that she looked at it that way"… . (296). She also believed that Mella's concern about "authorization" was misplaced because the piece had been produced under the color and authority of the clubs (297).
>
> Respondent's campaign committee assured her that the literature was appropriate and, "in the frenzy of the campaign" (298), the decision was made to continue to distribute what was, essentially, the only literature the campaign had in hand for the final days before the general election. (Report, p. 16)

Why and how the majority chooses to reject the referee's plainly accurate and reasoned finding that Michels acted upon expert advice, in good faith, is troubling. It ignores conditions on the ground of judicial campaign battles and blames a candidate for her considered judgment in good faith. We agree that inexperience or reliance on the advice of campaign advisers does not excuse ethical violations that are clear on their face and that every judicial candidate has a duty to "ensure that his or her campaign literature and practices are consistent with [the relevant] standards" (Determination, p. 8-9). However, under the circumstances presented here, we cannot endorse a finding of

misconduct and the imposition of public discipline for a piece of literature that even our own referee viewed as unobjectionable.

As a Commission, our duty is to respect both the First Amendment and the quandary this system imposes upon judicial candidates. It ain't pretty and we should not pretend that it is. Therefore, we should give every judicial candidate the benefit of the doubt when there is any margin to do so. That's the least the First Amendment demands and the least we can do to be fair to the judges who face this unenviable process which is necessary to ply their idealistic, supremely difficult trade.

In this case, the referee has ably documented the reasons why Judge Michels should not be disciplined for participating in the process we all require her to endure. Though she and we may wish that the palm card had been handled differently in retrospect, her hindsight and our aspirations are not a basis to find that she has violated the rules. She has not, and therefore we respectfully dissent.

Dated: November 17, 2011

Honorable Rolando T. Acosta, Member
New York State
Commission on Judicial Conduct

Joseph W. Belluck, Esq., Member
New York State
Commission on Judicial Conduct

Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

KARL RIDSDALE,

a Justice of the Antwerp Town Court,
Jefferson County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Kathleen Martin, Of Counsel) for the Commission

Honorable Karl Ridsdale, *pro se*

The respondent, Karl Ridsdale, a Justice of the Antwerp Town Court, Jefferson County, was served with a Formal Written Complaint dated October 8, 2010, containing two charges. The Formal Written Complaint alleged that respondent presided

over a case in which his co-judge's son was the defendant and that he failed to record the proceedings. Respondent filed an answer dated October 21, 2010.

On June 3, 2011, the Administrator 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. Between December 2010 and May 2011, the Commission rejected three earlier Agreed Statements of Facts.

On June 16, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Antwerp Town Court, Jefferson County, since 2006. His current term expires on December 31, 2013. Respondent is not an attorney.

2. Donald Hull is respondent's co-judge and has been a part-time Justice of the Antwerp Town Court since 1979.

As to Charge I of the Formal Written Complaint:

3. On March 12, 2009, respondent's co-judge, Donald Hull, called the New York State Police after an incident at his home involving his 20-year-old son, Tyrone Hull. Tyrone, who had a history of behavioral problems and anger, had intentionally not taken his prescribed medication, [redacted] Tyrone had an explosive outburst toward his mother in which he claimed she put too much salt in

a dish she was preparing for the family's dinner. Tyrone yelled and threatened his siblings, warning that he was going to get a gun. Tyrone punched a hole in a wall and rampaged through the house searching for a gun owned by the family. Judge Hull warned Tyrone that he would call the police and Tyrone replied that he might hurt someone. A New York State Trooper and an Antwerp Village Police Officer responded to the call.

4. Tyrone Hull was arrested that evening and charged with Criminal Mischief in the Fourth Degree, a Class A misdemeanor and a violation of Penal Law Section 145.00. Tyrone was transported to the Antwerp Town Court for arraignment at about 8:30 PM.

5. Sometime between 8:30 PM and 9:30 PM on March 12, 2009, respondent presided over the arraignment in *People v. Tyrone Hull*. A New York State Trooper was present.

6. At the arraignment, respondent read the charge to Tyrone Hull and asked him if he understood the charge, which Tyrone said he did. Respondent then advised Tyrone of his right to counsel at every stage of the proceeding and said that if he could not afford counsel, one would be appointed. When respondent asked Tyrone if he wanted an attorney, Tyrone declined.

7. Respondent asked Tyrone Hull how he wished to plead to the charge, and Tyrone said that he wished to plead guilty. Respondent advised Tyrone that if he pleaded guilty, he would be sentenced to 30 days in jail. Pursuant to Penal Law Sections 70.15 and 145.00, the maximum sentence of incarceration allowed was one year.

Respondent then sentenced Tyrone, who had no prior criminal record, to 30 days in jail. Respondent also ordered that Tyrone receive a mental health exam.

8. At the time he presided over the arraignment, respondent was aware that Tyrone Hull was the son of his co-judge and that his co-judge was the complaining witness. Respondent did not disclose his relationship with Judge Hull to Tyrone Hull or offer to disqualify himself from the case because he did not know that it was improper to preside over a matter involving his co-judge and his co-judge's son.

9. Prior to Tyrone's arraignment and plea, respondent did not speak to Judge Hull about any aspect of Tyrone's case.

10. After the arraignment, respondent telephoned Judge Hull and said that he had arraigned Tyrone and that Tyrone pleaded guilty to Criminal Mischief and was sentenced to 30 days in jail. Respondent indicated that he would issue an Order of Protection against Tyrone and asked Judge Hull to provide the names and ages of the twelve children residing at the home. Judge Hull and respondent did not discuss anything else about Tyrone.

11. Respondent did not obtain a pre-sentence report prior to sentencing Tyrone Hull because under Section 390.20(2) of the Criminal Procedure Law, a pre-sentence report is not required where a person is convicted of a misdemeanor, except in limited circumstances not applicable here.

12. Respondent was not required to obtain the consent of the District Attorney's Office before sentencing Tyrone Hull upon his guilty plea at arraignment

under Section 170.10 of the Criminal Procedure Law. As a general practice, and in this case, the Assistant District Attorney assigned to respondent's court did not ask for the opportunity to make a sentencing recommendation before respondent imposed sentence at arraignment.

13. Respondent had not previously accepted a guilty plea at arraignment from a defendant who chose to proceed without counsel. Respondent accepted Tyrone Hull's guilty plea because Tyrone indicated he wanted to plead guilty, Tyrone understood everything respondent said, and respondent was authorized by law to accept the plea.

14. Mr. Hull served 19 days of his 30-day sentence in the Jefferson County Jail and then was released.

Mitigating Factors

15. Respondent has been contrite and cooperative with the Commission throughout its inquiry.

16. Respondent has no previous disciplinary record. Respondent regrets his failure to know and abide by the applicable Rules in this instance and pledges to conduct himself in accordance with the Rules in the future.

Additional Factors

17. Respondent failed to mechanically record the arraignment and plea proceedings in *People v. Tyrone Hull,* as required by Section 30.1 of the Rules of the Chief Judge and Administrative Order 245/08 of the Chief Administrative Judge of the

Courts dated May 21, 2008.[1]

18. Respondent's practice is to record proceedings, including after-hours arraignments. His court clerk typically turns on the digital recording equipment. When Tyrone Hull appeared before him for arraignment, respondent forgot to turn on his computer and to activate the recording equipment.

As to Charge II of the Formal Written Complaint:

19. The charge was withdrawn (*see* fn. 1).

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), 100.3(E)(1) and 100.3(E)(1)(a)(i) 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. Charge II was withdrawn.

Since his impartiality "might reasonably be questioned" (Rules, §100.3[E][1]), respondent was required to disqualify himself in a criminal case in which

[1] The Formal Written Complaint charged respondent's failure to mechanically record the proceedings in *People v. Tyrone Hull* as a separate and independent charge of misconduct. Upon reflection, the Administrator agreed that these allegations should be characterized as an aggravating factor for the Commission's consideration with respect to Charge I and, therefore, Charge II of the Formal Written Complaint was withdrawn.

the complaining witness was his co-judge and the defendant was his co-judge's son (*see*, Adv Op 98-18; *see also*, *Matter of Menard*, 2011 Annual Report 126 [judge failed to disqualify himself in four small claims cases in which his co-justice was the claimant]). Instead of doing so, respondent conducted the arraignment, accepted the defendant's guilty plea to Criminal Mischief in the Fourth Degree and sentenced him to 30 days in jail. Respondent did not disclose the conflict or offer to disqualify himself, although even with disclosure, remittal was unavailable since the defendant was unrepresented (*see*, Rules, §100.3[F]).

In view of the conflict, respondent's handling of the case was unavoidably tinged with an appearance of impropriety. Even though the defendant had a right to plead guilty to the charge at the arraignment, under these circumstances it was particularly disturbing for respondent to accept a guilty plea to a misdemeanor from the unrepresented defendant – whose mental state prompted respondent to order a mental exam – and to sentence him to jail. Notwithstanding that respondent advised the defendant of the right to counsel and assigned counsel and the defendant chose to proceed without an attorney, it is unclear whether respondent conducted any inquiry, as required by law, to determine whether the defendant's waiver of counsel was "unequivocal, voluntary and intelligent" or that he attempted to impress on the defendant the "dangers and disadvantages" of giving up the fundamental right to counsel (*People v. Smith*, 92 NY2d 516, 520 [1998]). There is no indication that the defendant appreciated the importance of consulting with counsel regarding the significant consequences of pleading guilty to a crime and being

sentenced to incarceration.

The impropriety was compounded by respondent's failure to record the proceeding, as mandated by a statewide Order of the Chief Administrative Judge. This important administrative requirement, which was promulgated in 2008, protects everyone, including the judge. The absence of a recording of the arraignment makes it more difficult to determine precisely what transpired at the proceeding.

In considering an appropriate sanction, we note that respondent has acknowledged his misconduct and has been cooperative throughout the proceedings, that it appears that his errors in this case were isolated, and that he has pledged to conduct himself in accordance with the ethical Rules in the future.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur. Judge Acosta concurs in an opinion.

Mr. Emery dissents in an opinion and votes to reject the Agreed Statement on the basis that the facts as presented are insufficient for the Commission to make a determination.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: July 20, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- -

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

KARL RIDSDALE,

a Justice of the Antwerp Town Court,
Jefferson County.

- -

CONCURRING
OPINION BY JUDGE
ACOSTA

I agree with the majority's conclusion that the stipulated facts amply demonstrate respondent's misconduct and establish that the appropriate sanction is censure. I write separately because I take issue with the dissent's view that the record contains significant deficiencies and is inadequate for the Commission to make an appropriate determination. Even if I were to agree with the dissent that the record presents some unanswered questions about Judge Ridsdale's handling of the case of his co-judge's son, I believe that under the circumstances of this matter, the majority has nevertheless fulfilled its statutory obligations when (1) it deferentially considered an Agreed Statement of Facts without knowledge of the tactical reasons that may have prompted both sides to offer such a stipulation after the Commission had rejected three earlier stipulations, and (2) it accepted an Agreed Statement which, on its face, is credible and sufficient for us to determine whether the respondent engaged in misconduct and what the sanction should be.

Contrary to my dissenting brother, I believe it is unnecessary to require both sides to go through a costly formal hearing where the stipulated facts, in my view, provide a sufficient basis for us to impose a just result. The Agreed Statement accepted by the majority describes a set of circumstances which supports the imposition of discipline for cause, inasmuch as Judge Ridsdale (1) failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that such integrity would be preserved; (2) failed to avoid impropriety and the appearance of impropriety, in that he did not respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary; (3) allowed a professional relationship with his co-judge to influence his judicial conduct; (4) failed to perform the duties of judicial office impartially and diligently, in that he failed to disqualify himself in a proceeding in which his impartiality might reasonably be questioned; and (5) failed to disqualify himself in a proceeding in which he had a personal bias or prejudice concerning a party.

I fully agree with my dissenting brother that it is the duty of this Commission to review stipulations critically and carefully. The critical question, in my view, is not whether every possible factual question has been answered, but whether the facts as presented are sufficient for the Commission to make a determination as to misconduct and, if so, the appropriate sanction. In this case, recognizing our ultimate responsibility to impose appropriate discipline based upon a fully developed record, we rejected three earlier Agreed Statements due to various deficiencies. The Commission

should, and will, continue to review every stipulation with due care.

Nevertheless, I believe that in exercising its statutory responsibilities, the Commission must be cognizant that tactical decisions by both sides are implicit in every Agreed Statement. While the Commission has the ultimate statutory responsibility to impose discipline, it has no prosecutorial role after authorizing formal charges and, by law, delegates that function to its staff. Thus, the Commission is privy neither to the evidence nor to the tactical considerations of the prosecuting staff when staff determines whether to attempt to negotiate a stipulation or to proceed to a hearing. These tactical choices may be predicated upon such concerns as the availability of witnesses, the credibility of witnesses if called to testify, the nature of the information uncovered during the investigation, and, ultimately, whether the staff believes it can meet its burden before a referee and the Commission. In addition, in negotiating an Agreed Statement, each side compromises on language to avoid the uncertainty that comes with a full hearing. To be sure, we cannot and should not accept an Agreed Statement in which the facts as presented are ambiguous, unclear, inconsistent, or patently incredible on their face. Yet, mindful of such considerations and recognizing that, even after a hearing, unanswered questions often remain, the Commission should give due deference to a negotiated stipulation that permits us to impose appropriate discipline.

I disagree with the dissent that we weigh the Commission's duties differently. I simply choose to accept the Agreed Statement based on the record before me rather than speculate about what a formal hearing on "suspicious circumstances,"

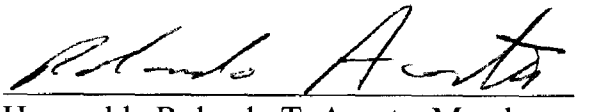
some of which have not been charged, might yield. It is patently obvious that in attempting to resolve this case by stipulation, both sides are making tactical decisions in good faith based on the nature and strength of their case. The Commission, concededly without the evidence available to both sides, should be reluctant to insist that a hearing be held when both sides, for reasons to which we are not privy, have chosen to waive a hearing and to recommend a disposition based on stipulated, credible facts. And our final and ultimate constitutional responsibilities should not be an excuse to do so.

I also disagree with the dissent's characterization of the differences between a judicial prosecutorial model and models followed in administrative disciplinary agencies. Since 1978, by constitutional amendment, New York has had a unitary judicial commission handling investigative, prosecutorial and adjudicatory functions, a system that now exists in 42 states. The combination of functions within the Commission is marked by important procedural safeguards. While the staff investigates complaints authorized by the Commission and regularly reports to the Commission on investigations, once the Commission has authorized formal charges, the staff independently prosecutes those matters before a referee and ultimately the Commission. In this adjudicative stage, the Commission has no private communications with staff about pending matters. Instead, by rule (22 NYCRR §7000.13) and in practice, the Commission is assisted only by its confidential clerk who has no investigative or prosecutorial role. Consequently, our role in reviewing a stipulated recommendation as to discipline is fueled neither by any special knowledge of the underlying circumstances

nor by any institutional bias favoring either side. The final and ultimate constitutional responsibility to impose discipline is not incompatible with a unitary model, which at the core safeguards due process by separating prosecutorial and adjudicatory functions.

For these reasons, I believe that the "suspicious circumstances" presented in respondent's handling of the case at issue, as described by the dissent, are an insufficient basis for the Commission to reject an Agreed Statement which imposes the strongest possible sanction short of removal against Judge Ridsdale, a non-attorney with a heretofore unblemished disciplinary record.

Dated: July 20, 2011



Honorable Rolando T. Acosta, Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

KARL RIDSDALE,

a Justice of the Antwerp Town Court,
Jefferson County.

DISSENTING OPINION
BY MR. EMERY

Three times previously, the Commission rejected proposed Agreed Statements in this case because of essentially the same defects in the one accepted today. It remains unexplained how an experienced judge could accept a Criminal Mischief guilty plea at an evening off-hours arraignment, with no prosecutor or defense attorney present, without any recording of the proceeding, from a defendant whom the judge knew was his co-judge's son and then sentence the young man to 30 days in jail without any pre-sentence report. Most significantly, at the sentencing the judge ordered a mental health examination for this defendant who apparently had failed to take prescribed anti-psychotic medication, raising a clear doubt that the guilty plea, without counsel and under all the circumstances, was knowing and voluntary. Significantly, this judge had never before sentenced a defendant to jail at arraignment.

Under these extraordinarily suspicious circumstances it is simply impossible to exclude, without a more fully developed record, the likelihood that the

respondent-judge was short-circuiting proper procedure in order to serve the private family interests of his co-judge to incarcerate his unstable son. If this was respondent's motivation, removal should seriously be considered as the mandated sanction for using his judicial office to serve the personal, private interests of his co-judge. No matter how well-intended that undertaking may have been, trampling the due process rights of a defendant for such purposes is very serious misconduct and the record provided to us by this now well-laundered Agreed Statement is inadequate to reach a determination that censure is the appropriate response to this admitted misuse of judicial power. This case cries out for a full hearing rather than a pragmatic resolution.

Instead, the Commission accepts the judge's claim that he sentenced the young man because the defendant had "indicated" that he wanted to plead guilty. And the Commission accepts the staff-recommended woodshed spanking because the judge supposedly did not know it was misconduct to jail his co-judge's son in a matter in which his co-judge was the complaining witness. Yet, the Commission ignores the plain evidence of what appears to be the much more serious misconduct of intentionally denying a defendant due process to serve the personal interests of his co-judge.

I find that the facts compel further development of the record. Off his anti-psychotic meds, a mentally unstable son of a judge appears at night before his father's co-judge – the respondent – on charges filed by the judge/father against his son for threatening the judge and his family. Respondent does not turn on the recording device. No lawyer is present – neither a defense attorney nor a prosecutor. We are supposed to believe that the defendant "understood" everything the judge said and "chose" to proceed

without a lawyer and "indicated" he wanted to plead guilty, though only the self-interested judge confirms these vague assertions. Did the young man "indicate" that he wanted to spend 30 days in jail? Did he "understand" the significant consequences of a guilty plea? Did he want the mental exam the judge ordered? What did the judge do to determine, as the law requires, that the defendant's waiver of the right to a lawyer was "unequivocal, voluntary and intelligent" or that he appreciated the "dangers and disadvantages" of giving up the fundamental right to counsel (*People v. Smith*, 92 NY2d 516, 520 [1998])? How could the judge accept a waiver from someone he viewed as sufficiently unstable to warrant a mental exam? Why is this the *only* defendant that the judge has ever sentenced to jail at an arraignment? Did the judge really "forget" to turn on the recording device? Did the judge really think that he was authorized to sit in judgment of his co-judge's family? The Commission's determination resolves all these problematic questions by accepting conclusory, stipulated facts that, on their face, are counter-intuitive. A hearing would likely establish through overwhelming circumstantial and, perhaps, even some direct evidence that the judge was serving his co-judge's personal family interests rather than his duties as a judge to the public.

Once again, I find myself reciting in dissent the bedrock of this Commission's existence: our purpose and function in imposing discipline, according to the Court of Appeals, is "to safeguard the Bench from unfit incumbents" (*Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [111] [Ct on the Judiciary 1975]) (*see*, *Matter of Feeder*, 2010 Annual Report 143; *Matter of Williams*, 2008 Annual Report 207; *Matter of Blackburne*, 2006 Annual Report 103;

Matter of Cook, 2006 Annual Report 119; *Matter of LaClair*, 2006 Annual Report 199 [Emery Dissents]). Judges who, even with the best of motivations, ignore ethical and due process imperatives and knowingly trample litigants' rights must be separated from their awesome power and responsibilities. They should rejoin the citizenry whom we are constitutionally invested to protect. Judge Ridsdale may or may not be such a judge. But this Agreed Statement begs more questions than it answers.

If I had the answers or, at least, was convinced that Ridsdale had been asked under oath to respond to the flaming questions in this case, I might agree that a censure is appropriate. Then again, I might not. But it would be a dereliction of my duty to otherwise pragmatically dispose of this case.

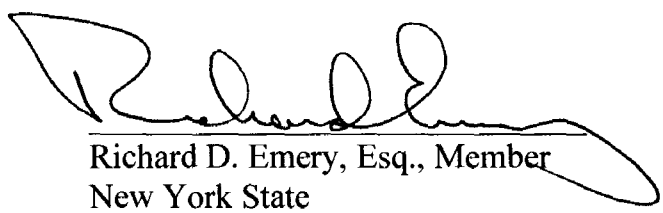
Judge Acosta's concurrence weighs the Commission's duties differently than I do. He is too willing, in my opinion, to defer to the "tactical" considerations that he infers, without any evidentiary basis, *must* exist for staff to agree to what on this record is an unsupported result. Unlike courts and prosecutors whose functions and responsibilities are defined by concepts of separation of powers, we are an administrative disciplinary agency that has final and ultimate constitutional responsibility for protecting the public from wayward jurists. I too am willing to defer to staff when there is a basis to do so. I see none here; in fact, if anything staff is accepting patently false exculpatory statements from the judge that the Commission is adopting. In my view, the judge's excuses would not satisfy a fifth grade teacher who would at least expect that the student have a dog and that the homework presented was partially chewed.

Accordingly, I must again vote to reject an Agreed Statement on the basis

that the record before us lacks information that is the fulcrum for making an appropriate determination. (*See*, *Matter of Valcich*, 2008 Annual Report 221 [Emery Dissent]; *Matter of Honorof*, 2008 Annual Report 133 [Emery Dissent]; *Matter of Carter*, 2007 Annual Report 79 [Emery Concurrence]; *Matter of Clark*, 2007 Annual Report 93 [Emery Dissent].) We should not render a determination where a more fully developed record might reveal that the respondent is unfit to remain on the bench.

Thus, the Agreed Statement should again be rejected and the Formal Written Complaint should proceed to a hearing.

Dated: July 20, 2011



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

JOHN W. RIORDAN,

a Justice of the Gouverneur Town Court,
St. Lawrence County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (S. Peter Pedrotty, Of Counsel) for the Commission

Frederick E. Paddock for the Respondent

The respondent, John W. Riordan, a Justice of the Gouverneur Town Court, St. Lawrence County, was served with a Formal Written Complaint dated July 5, 2011, containing one charge. The Formal Written Complaint alleged that respondent regularly

held court in his chambers for approximately seven years. Respondent filed a verified answer dated July 27, 2011.

On September 19, 2011, the Administrator, 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 November 3, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Gouverneur Town Court, St. Lawrence County, since January 1996. Respondent's current term expires December 31, 2013. He is not an attorney.

2. From fall 2003 until July 2010, as a matter of practice, respondent regularly held court proceedings in chambers as opposed to the courtroom.

3. Respondent held court proceedings in chambers for his personal convenience.

4. The courtroom, the court clerk's office and respondent's chambers (which is an office) are located on the second floor of a building complex in the Village of Gouverneur.

5. The courtroom is well-equipped and spacious. It can accommodate numerous members of the public who wish to observe court proceedings.

6. In contrast, respondent's office, which he uses as chambers, is much smaller. It is furnished with, *inter alia*, filing cabinets, respondent's desk and only a few chairs. When respondent, the parties and their attorneys were in chambers for court proceedings, no space remained for members of the public to observe the proceedings.

7. A doorway connects chambers to the rear of the courtroom. Although respondent usually left this door open when he conducted proceedings in chambers, it was unlikely that anyone sitting in the courtroom could have heard the events and discussions occurring in chambers.

8. On several occasions between fall 2003 and July 2010, Gouverneur Deputy Court Clerk Irma Ashley, Gouverneur Court Clerk Lauri Andrews and St. Lawrence County Conflict Defender Amy Dona each expressed to respondent their view that he should hold court in the courtroom.

9. In or about July 2009, respondent and the court clerks attended a training session sponsored by the Office of Court Administration. One of the instructors discussed the need to hold court proceedings in the courtroom. Shortly thereafter, respondent acknowledged to the court clerks that he should hold court in the courtroom, but nevertheless continued to hold court in his chambers until in or about July 2010.

10. In July 2010, after a Commission investigator visited respondent's court to observe where proceedings were being conducted, examine records and interview witnesses, respondent began to hold court proceedings in the courtroom.

11. Respondent acknowledges that Section 4 of the Judiciary Law

requires that "the sittings of every court within the state shall be public, and every citizen may freely attend the same."

12. Respondent agrees that he will regularly conduct future proceedings in the courtroom, in accordance with the Judiciary Law.

Mitigating Factors

13. Since July 2010, respondent has conducted and continues to conduct court proceedings in the courtroom.

Prior Cautions

14. Respondent was cautioned in 2002 and 2005 for conduct unrelated to the subject matter herein.

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.

With limited exceptions not applicable here, Section 4 of the Judiciary Law requires that the "sittings of every court within this state shall be public, and every citizen may freely attend the same." Section 214.2(a) of the Uniform Civil Rules for the Justice Courts provides:

> It is the policy that the public is best served by justice courts which function in facilities provided by the municipality .... When facilities are provided by the municipality, the sessions of the court shall be held therein.

Notwithstanding the clear language of these mandates, which require that court proceedings be held at a location that is readily accessible by members of the public, respondent, for reasons of personal convenience, regularly held court proceedings in his chambers, rather than in the adjoining courtroom, for a period of approximately seven years. The judge's chambers contained no space for members of the public to observe the proceedings, and although the connecting door between the judge's chambers and the courtroom was "usually" kept open, it has been stipulated that anyone sitting in the courtroom was likely unable to hear the events and discussions occurring in chambers. The totality of these circumstances establishes that by conducting court proceedings in his chambers, respondent effectively excluded members of the public and thereby violated the statutory mandate (Jud. Law §4) and his ethical obligation to be faithful to the law (Rules, §100.3[B][1]). At the very least, the public nature of court proceedings was severely compromised, which impairs public confidence in the fair and proper administration of justice.

Compounding his misconduct, respondent inexplicably continued to hold court in his chambers even after: (i) his court clerks and an attorney advised him on several occasions that court proceedings should take place in the courtroom; (ii) he attended an OCA training session in 2009 where the issue was addressed; and (iii) he acknowledged to his court clerks that court proceedings should take place in the

courtroom. Not until a Commission investigator visited respondent's court in July 2010 did he discontinue his improper practice and begin to conduct court proceedings in the courtroom.

The Commission notes that respondent has agreed that in the future he will hold court proceedings in the courtroom, as required by law. The Commission also notes that respondent was cautioned in 2002 and 2005 for conduct unrelated to the misconduct described herein.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: November 9, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

P. MICHAEL SHANLEY,

a Judge of the Oswego City Court,
Oswego County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission

Honorable P. Michael Shanley, *pro se*

The respondent, P. Michael Shanley, a Judge of the Oswego City Court, Oswego County, was served with a Formal Written Complaint dated May 17, 2011, containing one charge. The Formal Written Complaint alleged that respondent, a part-

time judge who is permitted to practice law, acted as an attorney in four cases that originated in or were heard in the Oswego City Court. Respondent filed an Answer dated June 8, 2011.

On September 15, 2011, the Administrator 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 3, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Oswego City Court, Oswego County, since December 20, 2007. His term expires on December 19, 2013. Respondent was admitted to the practice of law in New York in 1970.

2. Respondent practices law under the firm name "Shanley Law Offices," which maintains offices in Oswego and Mexico, New York. Between December 20, 2007, and July 2008, the only other attorney at Shanley Law Offices was respondent's daughter, Kristin A. Shanley, Esq.

3. Respondent was appointed by Randolph F. Bateman, the mayor of the City of Oswego, as a part-time judge of the Oswego City Court, effective December 20, 2007.

4. Shortly after respondent's appointment, Oswego City Court Judge James M. Metcalf was assigned to mentor respondent. On or about January 16, 2008,

Judge Metcalf met with respondent and advised him to dispose of any outstanding matters he had pending in Oswego City Court.

5. As set forth below, respondent represented clients in four matters pending or originating in Oswego City Court notwithstanding that, during his representation of those clients, he was a judge of that court.

6. Respondent acknowledges that, after his judicial appointment, his representation of clients in cases pending or originating in Oswego City Court violated Section 100.6(B)(2) of the Rules Governing Judicial Conduct ("Rules") and Judiciary Law Section 16.

People v. Kelly King (nee White)

7. On or about August 2, 2007, Kelly King was involved in a traffic accident in the City of Oswego. Ms. King was charged by the Oswego City Police with Failure To Yield, in violation of Section 1141 of the Vehicle and Traffic Law ("VTL"). The traffic ticket was returnable in the Oswego City Court on August 30, 2007.

8. In or about August 2007, Ms. King retained respondent to represent her with respect to the traffic ticket. Ms. King also retained respondent to represent her in a personal injury action arising from the August 2nd traffic accident.

9. After respondent was retained, he took possession of the traffic ticket and told Ms. King in words or substance that he would "take care of it."

10. In March 2008, respondent met with Ms. King at the Shanley Law Offices to discuss the traffic ticket. Respondent presented Ms. King with a plea reduction

letter dated March 13, 2008, obtained from the Oswego County District Attorney's Office, which offered a reduction of the original charge to a violation of Section 1201(a) of the VTL, No Parking.

11. After Ms. King agreed to accept the District Attorney's plea offer, respondent secured her signature on the waiver portion of the plea reduction letter. The waiver bore a handwritten date of "3-14-08," which was written by respondent. Respondent's office then forwarded Ms. King's plea reduction letter to the Oswego City Court.

12. On or about May 28, 2008, Oswego City Court Judge James M. Metcalf accepted Ms. King's plea and sentenced her to pay a $75 fine and $35 surcharge. Ms. King paid the monies to the Oswego City Court prior to the July 2, 2008, due date.

People v. C.J. MacCaull

13. On or about February 22, 2008, C.J. MacCaull was issued two tickets by the Oswego City Police for Operating a Vehicle Without Insurance, in violation of Section 319(1) of the VTL, and Operating a Vehicle While Registration Suspended/Revoked, in violation of Section 512 of the VTL. The tickets were returnable in the Oswego City Court on March 13, 2008.

14. In or about February 2008, Mr. MacCaull retained Shanley Law Offices to represent him on the two February 22nd tickets.

15. In or about April 2008, respondent met with Mr. MacCaull at the Shanley Law Offices, at which time he presented Mr. MacCaull with a plea reduction

letter dated April 14, 2008, obtained from the Oswego County District Attorney's Office.

16. Mr. MacCaull accepted the District Attorney's plea offer to violations of Section 1201(a) of the VTL (No Parking) and Section 401(1)(a) of the VTL (Unregistered Motor Vehicle). Respondent secured Mr. MacCaull's signature on the waiver portion of the plea reduction letter. The waiver bore a handwritten date of "4/30/08," which was written by respondent.

17. Respondent gave the plea reduction letter to Mr. MacCaull and advised him to take it to his scheduled court appearance on May 1, 2008.

18. On May 1, 2008, Mr. MacCaull appeared at the Oswego City Court. Mr. MacCaull waited into the afternoon for respondent to appear on his behalf. Respondent never appeared.

19. When Mr. MacCaull's case was called on the May 1, 2008, calendar, he told Oswego City Court Judge James M. Metcalf that he had retained respondent as his attorney and he presented the proposed plea agreement. The judge informed Mr. MacCaull that since respondent was a judge in the Oswego City Court he could not accept the proposed disposition.

20. Judge Metcalf entered a plea of not guilty on Mr. MacCaull's behalf and allowed Mr. MacCaull to confer with an Assistant District Attorney. After the Assistant District Attorney present in court that day consented to the proposed disposition, Judge Metcalf accepted Mr. MacCaull's plea to the reduced traffic charges as set forth in the plea reduction letter dated April 14, 2008.

Oswego Community Housing Co., Inc. v. Donna J. Tunis

21. In or about June 2008, Donna J. Tunis was served with a summons and complaint in *Oswego Community Housing Co., Inc. v. Donna J. Tunis* ("*Oswego Housing v. Tunis*"), a civil action which had been filed in Oswego City Court by Ms. Tunis's subsidized housing provider seeking a judgment for $1,599 for rent owed.

22. In or about June 2008, Ms. Tunis contacted respondent, who had provided legal services to Ms. Tunis in the past. Respondent told Ms. Tunis that he would assist her with the action.

23. In or about June 2008, respondent and his office drafted an Answer on behalf of Ms. Tunis. The Answer was presented to Ms. Tunis by Nicole K. Reed, a paralegal employed by Shanley Law Offices, who verified Ms. Tunis's signature on June 17, 2008. The Answer did not list respondent or his office as the attorney for Ms. Tunis.

24. In or about June 2008 and July 2008, respondent communicated with James P. McGrath, Esq., counsel for the Oswego Community Housing Co., Inc., regarding a resolution of *Oswego Housing v. Tunis*.

25. In or about July 2008, in accordance with an agreement reached through his communication with Mr. McGrath, respondent advised Ms. Tunis to make prorated payments of rent in arrears to the Oswego Community Housing Co., Inc. along with her current rent payments. Ms. Tunis did so.

People v. Jeanine Buske

b. On May 14, 2008, Jeanine Buske was arraigned in Oswego City

Court by Judge James M. Metcalf on two sets of charges: (a) Docket No. 08-0644, which consisted of two counts of Rape in the Third Degree (a felony), in violation of Section 130.25(2) of the Penal Law, and three counts of Endangering the Welfare of a Child (a misdemeanor), in violation of Section 260.10(1) of the Penal Law; and (b) Docket No. 08-0645, which consisted of Criminal Impersonation in the Second Degree (a misdemeanor), in violation of Section 190.25 of the Penal Law, Endangering the Welfare of a Child (a misdemeanor), in violation of Section 260.10(1) of the Penal Law, and Forgery in the Third Degree (a misdemeanor), in violation of Section 170.05 of the Penal Law.

26. Judge Metcalf assigned Edward Izyk, Esq., to represent Ms. Buske on all charges.

27. Between May 14, 2008, and June 4, 2008, respondent spoke with Ms. Buske, whom he was representing on matters pending in Oswego Family Court. Respondent agreed to represent Ms. Buske on the criminal charges and advised her to request that Mr. Izyk waive the felony charges to Oswego County Court. Ms. Buske wrote to Mr. Izyk on or about May 27, 2008, directing him to waive her charges to County Court. On or about May 28, 2008, Mr. Izyk wrote a letter to Judge Metcalf requesting that the charges be waived to the Oswego County Court.

28. On or about June 4, 2008, Mr. Izyk wrote a letter to Judge Metcalf in which he forwarded Ms. Buske's May 27, 2008, letter, and advised: (1) that Ms. Buske had retained respondent as counsel and (2) that respondent had advised Ms. Buske to

waive the felony charges to Oswego County Court because he could not represent her in Oswego City Court.

29. On or about June 5, 2008, in response to Mr. Izyk's letter, the Oswego City Court accepted Ms. Buske's waiver of her right to a preliminary hearing on Docket No. 08-0644 and forwarded all required and pertinent legal documents to the Oswego County Court.

30. At about the same time, respondent was advised by an official with the Office of Court Administration that the Judiciary Law prohibited him from representing Ms. Buske, even after the felony charges were waived to Oswego County Court.

31. On or about June 11, 2008, respondent wrote a letter to Judge Metcalf advising that, because the misdemeanor charges against Ms. Buske remained in Oswego City Court, he was withdrawing from his representation of Ms. Buske in connection with all the charges.

Mitigating Factors

32. Respondent did not receive or retain any remuneration from Ms. King, Mr. MacCaull, Ms. Tunis or Ms. Buske for any representation on the matters identified herein.

33. Respondent has been cooperative with the Commission throughout its inquiry.

34. Respondent regrets his failure to abide by the Rules in this

instance and pledges to accord himself with the Rules.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.4(A)(3) and 100.6(B)(2) of the 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.

A part-time lawyer-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. Among other restrictions, a judge may not represent clients in the judge's own court or in any matter that originated in the judge's court, even if the case is transferred to another court (Rules, §100.6[B][2]; Jud Law §16). In the seven months following his appointment to the Oswego City Court in December 2007, respondent violated these well-established standards in four matters. In doing so, he 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 Section 100.4(A)(3) of the Rules.

For several months after taking judicial office, and after respondent's co-judge had advised him to dispose of any outstanding matters pending in that court,

respondent not only continued to provide legal services to his client in one such case, but became involved in three additional matters pending in the Oswego City Court. In *People v. King*, instead of advising his client that he could no longer represent her on a traffic charge, respondent gave her a letter from the District Attorney's office offering a plea reduction, obtained her signature agreeing to the plea and sent the letter to respondent's own court. In three subsequent cases, respondent or his law firm (consisting at that time of the judge and his daughter) was retained by and/or agreed to provide legal services to individuals whose cases were pending in respondent's court. In *People v. MacCaull*, respondent met with the defendant, gave him a letter from the District Attorney's office offering a plea reduction and advised him to take the letter to court. In *Oswego Community Housing Co. v. Tunis*, he agreed to assist a former client who had been served with a complaint for rent arrears, and he and his firm drafted an answer to the complaint and negotiated a resolution. The fact that respondent did not identify himself or his firm as her attorney on the answer suggests that he was attempting to conceal that he was providing legal assistance to the defendant, which he knew was impermissible.

In *People v. Buske*, after agreeing to represent the defendant who had been arraigned by respondent's co-judge on a felony and several misdemeanors, respondent advised the defendant to ask her court-appointed attorney to waive the felony charges to County Court. Providing such advice was improper since at that time the defendant's case was still pending in respondent's court, where he was prohibited from practicing. Moreover, even after the case was transferred, respondent was precluded from

representing the defendant since the case had originated in his court (Jud Law §16). *See Matter of Aison*, 2010 Annual Report 62; *Matter of Miller*, 2003 Annual Report 140; *Matter of Feeney*, 1988 Annual Report 159; *Matter of Bruhn*, 1988 Annual Report 133 (Comm on Judicial Conduct); *see also* Adv Op 88-50, 99-34. After respondent was advised by an OCA official that it was improper to continue to represent the defendant under such circumstances, respondent withdrew from his representation of the defendant.

Notwithstanding that he did not physically appear in the Oswego City Court in these cases or receive any payment for his actions in the four matters described herein, respondent's involvement in these matters was inconsistent with the statutory and ethical mandates prohibiting him from practicing in his own court. Those restrictions provide no exception for anonymous legal assistance or even uncompensated activity. Every lawyer-judge has a responsibility to learn about and scrupulously adhere to the applicable restrictions on the practice of law in order to avoid conduct that may create an appearance of impropriety and impugn the integrity of judicial office.

In mitigation, we note that respondent has been contrite and cooperative with the Commission and pledges to accord himself with the Rules in the future.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: November 14, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

DAVID A. SHULTS,

a Judge of the Hornell City Court,
Steuben County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission

Honorable David A. Shults, *pro se*

The respondent, David A. Shults, a Judge of the Hornell City Court, Steuben County, was served with a Formal Written Complaint dated February 16, 2011, containing one charge. The Formal Written Complaint alleged that respondent presided

over nine cases in which a client of his law firm represented a party. Respondent filed an undated answer on or about March 9, 2011.

On June 7, 2011, the Administrator 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 16, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Hornell City Court, Steuben County, since 1997. His current term expires on October 26, 2015. Respondent was admitted to the practice of law in New York in 1969.

2. Respondent is a partner in the law firm of Shults and Shults, which maintains an office in Hornell, New York.

3. Joseph G. Pelych, Esq., is the City Attorney of Hornell, New York and maintains a solo private law practice.

4. From about May 2006 to about February 2009, Mr. Pelych was a client of respondent's law firm. Respondent's firm brought 16 actions on behalf of Mr. Pelych to recover unpaid legal fees, and obtained judgments for Mr. Pelych totaling $10,226.57 in 13 of those actions, as set forth in Schedule A to the Agreed Statement of Facts.

5. Respondent acknowledges that Section 100.3(E) of the Rules

Governing Judicial Conduct ("Rules") obligates him to disqualify himself in a proceeding in which his impartiality might reasonably be questioned. Respondent further acknowledges that Opinions 01-71 and 89-13 of the Advisory Committee on Judicial Ethics direct that a judge must recuse when an attorney appears as counsel within two years of being a client of the judge's law firm. Where an attorney appearing before a judge was a client of the judge's law firm more than two years prior to the appearance, the judge may preside after full disclosure on the record, and in the absence of a meritorious objection.

6. As set forth below, respondent presided over and/or took other judicial action in nine cases in which Mr. Pelych represented a party, notwithstanding that Mr. Pelych was at the time a client of respondent's law firm.

The 2008 Proceedings

7. On May 15, 2008, respondent presided over eight cases in which the defendants were represented by Mr. Pelych. Respondent knew that Mr. Pelych represented the defendants in these cases and that Mr. Pelych was a client of respondent's law firm. Respondent took judicial action by accepting guilty pleas to reduced charges in four cases, granting an Adjournment in Contemplation of Dismissal in one case, and adjourning three cases, as set forth in Schedule B to the Agreed Statement of Facts.

8. Respondent did not disclose his relationship to Mr. Pelych or offer to disqualify himself in any of the eight cases set forth in Schedule B.

The 2009 Proceeding

9. On or about January 29, 2009, respondent was assigned to preside over *Patricia Scouten v. Terry & Patricia Mann,* a summary eviction proceeding in which Mr. Pelych represented the landlord/petitioner. A trial in the matter was scheduled for February 6, 2009.

10. By letter dated January 30, 2009, the tenants' attorney, William W. Pulos, Esq., requested that respondent recuse himself from the case. Mr. Pulos argued, among other things, that "Mr. Pelych has brought cases to [respondent] and/or his law firm and/or the collection agency owned by [respondent] for either the personal representation of Mr. Pelych and/or other of Mr. Pelych's clients resulting in referrals of clients and payment of fees between them."

11. On or about February 2, 2009, respondent issued a Decision and Order denying Mr. Pulos' recusal request.

12. On February 3, 2009, Mr. Pulos filed a CPLR Article 78 petition seeking a Writ of Prohibition prohibiting Mr. Pelych from representing private clients in the Hornell City Court because of his position as City Attorney and prohibiting respondent from presiding over *Scouten v. Mann.*

13. On February 3, 2009, Acting Steuben County Supreme Court Justice Peter C. Bradstreet signed a Temporary Restraining Order staying the jury trial, but not other proceedings, in *Scouten v. Mann.*

14. On February 4, 2009, respondent presided over a pre-trial conference

attended by Mr. Pulos and Mr. Pelych.

15. On February 5, 2009, Judge Bradstreet issued an oral order from the bench, disqualifying Mr. Pelych from serving as counsel in *Scouten v. Mann.*

16. On February 6, 2009, Brian C. Schu, Esq., became the substituted attorney of record for the landlord/petitioner in *Scouten v. Mann.*

17. On February 6, 2009, prior to the commencement of trial in *Scouten v. Mann*, respondent approved a settlement proposed by the parties. The settlement was reduced to an Order which respondent executed on February 11, 2009. On March 9, 2009, Judge Bradstreet dismissed the Article 78, finding, *inter alia*, that the settlement of the case rendered the petitioners' remaining claims moot.

Mitigating Factors

18. On May 15, 2008, respondent was substituting for his colleague, Hornell City Court Judge Joseph E. Damrath. All defendants on the court calendar had been previously arraigned by Judge Damrath, who was the assigned judge on each matter scheduled. All of the judicial determinations made by respondent on that occasion were in accordance with dispositional recommendations made by the Steuben County District Attorney's Office, as formulated or negotiated while the matters were pending before Judge Damrath and as would have been presented to Judge Damrath had he been available to preside that day. There is no indication that respondent's judicial actions were affected by his relationship with Mr. Pelych.

19. Respondent has been cooperative with the Commission throughout

its inquiry.

20. Respondent has served as a Hornell City Court Judge for 14 years and has never been disciplined for judicial misconduct. He regrets his failure to abide by the Rules in this instance and pledges to accord himself with the Rules.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(E)(1) and 100.4(D)(1)(c) of the 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.

A judge's disqualification is required in any matter in which the judge's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]). Since respondent's law firm had represented attorney Joseph Pelych in numerous matters between May 2006 and February 2009, his disqualification was required in the cases at issue, in which Mr. Pelych represented the parties.

In order to maintain public confidence in the integrity and impartiality of the judiciary, judges who practice law must scrupulously observe the relevant ethical standards 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). Of particular relevance here, well-

established law requires disqualification in matters involving clients of the judge's law firm.

In a 1976 disciplinary proceeding, the Appellate Division, Second Department, stated that handling matters involving *former* clients "cannot [be] countenance[d]" and might in some cases result in removal:

> While we realize that in small communities, part-time judges or justices, many of whom are principally engaged in the practice of the law, know many, if not most, of the people in their community, and may, in exigent circumstances, be required to preside over arraignments and bail applications, we cannot countenance the apparently prevailing practice in which such judicial officers sit in judgment in cases in which they formerly had an attorney-client relationship with the litigant. Hereafter any such conduct by a judicial officer, whether full or part-time, may well be met with removal of the offender from office.

Matter of Filipowicz, 54 AD2d 348, 350 (2d Dept 1976). Since 1988, the Advisory Committee on Judicial Ethics has issued numerous opinions reminding judges who practice law of the impropriety of handling matters involving their clients and providing specific guidelines for judges in such situations. Under these standards, a judge's disqualification in matters involving a client of the judge's law firm is required during the representation and for two years thereafter, subject to remittal; after that time, a judge may preside in such matters after full disclosure on the record and in the absence of a meritorious objection (*see*, *e.g.*, Adv Op 01-71, 97-85, 94-71, 92-14, 92-01, 89-13). The Committee has also stated that "the same standards and guidelines [for disqualification] should apply" in matters in which the *attorney* in a case is a client or former client as in

matters in which a party is a client (Op 01-71; *see also*, Op 89-13). The Commission has disciplined judges for failing to disqualify in cases involving such conflicts (*see*, *e.g.*, *Matter of Aison*, 2010 Annual Report 62; *Matter of Bruhn*, 1988 Annual Report 133; *Matter of Feeney*, 1988 Annual Report 159; *Matter of Darrigo*, 2 Commission Determinations 353 [1981]).

As stipulated here, respondent violated these standards by presiding over and/or taking other judicial action in eight criminal cases and one civil case in which Mr. Pelych represented a party, notwithstanding that at the time Mr. Pelych was a client of respondent's firm. Respondent did not disclose the conflict or offer to disqualify himself. In *Scouten v. Mann*, respondent denied a request for his recusal when an attorney objected to respondent's participation in the case, forcing the attorney to commence litigation that resulted in Mr. Pelych's disqualification. It is inexplicable why the attorney's request for respondent's recusal failed to bring to his attention that he should not be presiding, or even to create a doubt in his mind sufficient to check the Advisory Opinions or other relevant law. In view of respondent's attorney-client relationship with Mr. Pelych, respondent's handling of these matters was unavoidably tinged with an appearance of impropriety.

Even if respondent believed he could be impartial in these cases, at the very least 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 attorney-client relationship with the attorney appearing before him, respondent did not act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules, §100.2[A]).

In mitigation, we note that the eight criminal cases occurred on the same date, when respondent was substituting for a colleague who was the assigned judge in those cases, and that there is no indication that respondent's judicial actions were influenced by his relationship with Mr. Pelych. We also note that respondent was cooperative with the Commission and has pledged to adhere to the Rules.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Harding, Ms. Moore and Mr. Stoloff concur.

Mr. Emery and Judge Peters dissent in an opinion and vote to reject the Agreed Statement on the basis that the proposed disposition is too lenient.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: July 7, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DAVID A. SHULTS,

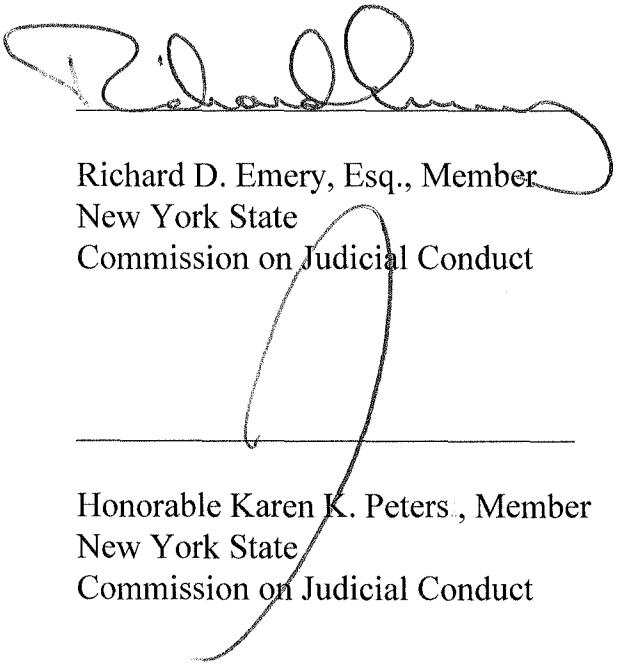
a Judge of the Hornell City Court,
Steuben County.

DISSENTING OPINION
BY MR. EMERY AND
JUDGE PETERS

Put simply, respondent, a part-time judge for over a decade, had a private practice which included debt collection. The Town Attorney had cases in front of the judge. At the same time the Town Attorney hired the judge to collect debts for his own law practice. The Rules could not be clearer that a judge cannot sit on a current client's case. In fact, as the Determination points out, this violation can be grounds for removal. In this case the judge not only violated the Rules but refused to acknowledge the violation when a litigant's attorney appearing before him pointed it out and asked him to do what was required – get off the case. Respondent's intransigence forced the litigant to go to a higher judge to order respondent to step aside. We do not believe that this conduct, in the face of a glaring and knowing violation, should be rewarded with a mere admonition. More severe discipline is mandated no matter how conveniently remorseful the judge is when the Commission institutes proceedings. Thus, he should be censured.

Accordingly, we vote to reject the Agreed Statement of Facts.

Dated: July 7, 2011



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

Honorable Karen K. Peters, Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- -

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

ANDREW G. TARANTINO, JR.,

a Judge of the Family Court, Suffolk County.

DETERMINATION

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Roger J. Schwarz, Of Counsel) for the Commission

Ruth J. Bednarz for the Respondent

The respondent, Andrew G. Tarantino, Jr., a Judge of the Family Court, Suffolk County, was served with a Formal Written Complaint dated October 13, 2010, containing one charge. The Formal Written Complaint alleged that respondent had an *ex*

parte out-of-court meeting with a participant in a Family Court Juvenile Treatment program.

On March 3, 2011, 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 17, 2011, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Family Court in Suffolk County since January 1, 2007; his term expires on December 31, 2016. He was assigned to the Suffolk County Family Treatment Court ("Treatment Court") until June 2009, when he was transferred to the Civil Term of the County Court, Suffolk County. Respondent was admitted to the practice of law in the State of New York in 1991.

2. J ___ ("J.") was a participant in the Treatment Court program. Respondent presided over J.'s participation in the Treatment Court from June 2008 to June 2009.

3. On May 24, 2007, Suffolk County Family Court Judge Ettore Simeone issued an Order of Protection against J., who was 18 years old, directing *inter alia* that he refrain from consuming, possessing or being under the influence of any illegal drugs or alcohol. The Order of Protection remained in effect until May 24, 2008.

4. On July 25, 2007, the Suffolk County Probation Department ("Probation Department") filed a violation petition against J. alleging that he violated the Order of Protection by using cocaine, marijuana, oxycontin and alcohol.

5. J. appeared before the court on the violation petition on September 26, 2007. At that time, Judge Simeone placed him on probation, on condition that he enter and successfully complete an in-patient substance abuse rehabilitation program as directed by the Treatment Court and the Probation Department. The probation remained in effect for one year, until September 26, 2008.

6. On or about June 24, 2008, the Probation Department filed another violation petition against J. alleging that he violated the terms of the Order of Protection by failing to return to the in-patient drug rehabilitation program. A warrant was issued for his arrest on June 25, 2008.

7. Upon his return on the warrant, J. appeared before respondent on June 30, 2008. He was represented by attorney J. Gary Waldvogel. Respondent released J. on his own recognizance and adjourned the matter to July 1, 2008.

8. On July 1, 2008, J., his father and Mr. Waldvogel appeared before respondent. An Assistant County Attorney and a member of the Treatment Court team were also present. Respondent extended J.'s probation to September 1, 2009, required him to perform 160 hours of community service, and directed him to re-enter and successfully complete an in-patient substance abuse rehabilitation program as directed by the Treatment Court and the Probation Department.

9. On March 26, 2009, J. was charged in a petition with violating the Order of Protection by overdosing on drugs. He appeared before respondent on March 31, 2009. J.'s attorney, Stephen Hellman, J.'s father and an Assistant County Attorney were also present. J. entered a denial to the violation petition and agreed to continue substance abuse counseling. Respondent met privately with Mr. Hellman in a private corridor near respondent's chambers. It was in this meeting that, respondent believed, Mr. Hellman gave his consent to a meeting with J., if J. approached respondent. However, at no time did respondent and Mr. Hellman discuss the possibility that respondent would take J. out of the courthouse. Respondent adjourned the matter to April 9, 2009.

10. Respondent acknowledges that he never asked the Assistant County Attorney, the Treatment Court team or J.'s family for permission to speak with J.

11. On April 9, 2009, J., Mr. Hellman, an Assistant County Attorney and a Treatment Court team member appeared before respondent, at which time J. agreed to enter an out-patient substance abuse rehabilitation program. Respondent then adjourned the matter to April 16, 2009.

12. J., Mr. Hellman and a Treatment Court team member appeared before respondent on April 16, 2009. Treatment Court staff informed respondent that J. had bereavement issues he did not want to discuss. Respondent indicated to J. that he should obtain grief counseling. Respondent adjourned the matter to April 23, 2009.

13. On or about April 20, 2009, respondent learned from Treatment Court

staff that J. had overdosed a second time.

14. On or about April 21, 2009, Probation filed a violation petition against J., alleging that he violated the terms of the Order of Protection by *inter alia* testing positive for marijuana.

15. On April 23, 2009, J., Mr. Hellman, an Assistant County Attorney, a Treatment Court team member and J.'s aunt appeared before respondent, at which time Mr. Hellman entered a denial of the violation petition on J.'s behalf.

16. J. and a Treatment Court team member appeared before respondent on April 29, 2009. J. confirmed that he had entered an out-patient substance abuse rehabilitation program, and respondent adjourned the violation until August 6, 2009.

17. J. appeared before respondent on May 6, 2009 and May 14, 2009. A Treatment Court team member was present at each appearance. At the May 14, 2009, appearance, J. stated he was "miserable," "a little depressed" and "not happy."

18. On May 27, 2009, J. came to the courthouse for a meeting with a Treatment Court Case Manager. He did not have a case on respondent's calendar that day.

19. During the meeting, J. asked to speak to respondent. The Case Manager accompanied him to respondent's courtroom and asked respondent if he would be willing to speak with J.

20. Respondent met briefly with J. in his court before the lunch recess. The Case Manager was not present for the meeting. Respondent asked if J. would like to

sit in the courtroom and talk, go to the courthouse cafeteria and talk, or go for a car ride.

21. During the court's lunch recess, respondent took J., alone, for a ride in his personal automobile. Respondent drove J. to Robert Moses State Park, on the western end of Fire Island, approximately 16 miles from the courthouse. The ride to the park lasted approximately 20 minutes.

22. At the park, respondent and J. parked on the roadway adjacent to a public wildlife observation deck and walked to the observation deck, where they remained for approximately ten minutes.

23. En route to, at and after they left the observation deck, respondent spoke with J. about the reasons for his continuing substance abuse, including his mother's death and his need for grief counseling.

24. While respondent and J. were at the observation deck, two police officers in a patrol car stopped alongside respondent's vehicle and asked if they needed assistance. Respondent said they did not, that he was a Family Court judge and that J. was one of his respondents. The police officers departed without further inquiry. Respondent then drove J. back to the courthouse.

25. Respondent states under penalty of perjury that he and J. never had any relationship other than as a judge and litigant, and that no untoward behavior occurred between them at Robert Moses State Park or anywhere else, at any time. Commission Counsel interviewed J. and has no evidence to the contrary.

26. Throughout the Commission's investigation, respondent has been

candid and fully cooperative. Respondent admits that he made a serious error in judgment resulting from what he believed were exigent circumstances created by J.'s two drug overdoses within a month's time. Respondent acknowledges that he has no training as a social worker or as a medical or mental health professional.

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.

It was improper for respondent to make an *ex parte*, out-of-court excursion with a Treatment Court participant, in which he took the defendant for a ride in his personal car over a lunch recess and spoke privately with him about personal issues, including the defendant's drug use and his mother's death. Although a Treatment Court case manager had asked respondent if he would be willing to speak with the defendant and respondent believed that the defendant's attorney had consented to a meeting, it is clear that neither the Treatment Court team, the defendant's attorney nor anyone else was aware of, or consented to, respondent's extended out-of-court excursion with the defendant. Such behavior, no matter how well-intentioned, was inappropriate and showed extremely poor judgment, as respondent has conceded.

Nor do the unique dynamics and relative informality of Treatment Court proceedings excuse such conduct, which overstepped the appropriate boundaries between a judge and a defendant in pending proceedings. Even in Treatment Court, a judge is not a social worker or therapist (*Matter of Abramson,* 2011 Annual Report ___), but must maintain the role of a neutral and detached arbiter who at all times remains "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]). Respondent's behavior showed a serious misunderstanding of the role of a judge.

Having served as a Family Court judge for more than two years at the time, respondent should have realized that this extra-judicial meeting with the defendant -- a vulnerable young man who had recently been charged with violating an order of protection for overdosing on drugs -- not only would compromise respondent's impartiality at a time when he wielded considerable power over this defendant, but would create a potential for suspicion and misunderstanding. 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 Singer*, 2010 Annual Report 228 (Family Court judge made an improper *ex parte* hospital visit to a 14-year old boy, who was being held for a mental evaluation); *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).

Respondent has acknowledged that his actions were inconsistent with the high ethical standards required of judges and warrant public rebuke.

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Harding, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Emery dissents and votes to reject the Agreed Statement of Facts on the basis that the disposition is too harsh.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: March 28, 2011

Jean M. Savanyu

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

LAFAYETTE D. YOUNG, JR.,

a Justice of the Macomb Town Court,
St. Lawrence County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission

Case & Leader LLP (by Henry J. Leader) for the Respondent

The respondent, Lafayette D. Young, Jr., a Justice of the Macomb Town Court, St. Lawrence County, was served with a Formal Written Complaint dated February 25, 2010, containing seven charges. The Formal Written Complaint alleged that

respondent: (i) with respect to numerous cases involving his girlfriend's relatives, failed to disqualify himself, failed to disclose the relationship and engaged in *ex parte* communications (Charges I through VI), and (ii) engaged in improper political activity by serving as chair of local party caucus (Charge VII). Respondent filed a verified amended answer dated May 12, 2010.

By Order dated April 21, 2010, 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 November 16 and 17, 2010, in Canton.[1] The referee filed a report dated April 21, 2011.

Commission counsel filed a brief recommending the sanction of removal. No papers with respect to the issue of sanction were filed by respondent. Oral argument was waived. On June 16, 2011, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a Justice of the Macomb Town Court, St. Lawrence County, and has served in that capacity since January 2004, except for a brief period in 2010 in which he had resigned (*see* fn. 1). He was re-elected to that position in

[1] The hearing, originally scheduled to commence on July 13, 2010, was cancelled after the parties executed a Stipulation by which respondent resigned as Town Justice effective July 31, 2010, and represented that he would neither seek nor accept judicial office in the future. On July 26, 2010, respondent rescinded his resignation and thereafter was appointed to the position of Macomb Town Justice. Upon learning of these events, Commission counsel asked that the Stipulation, which the Commission had not yet considered, be withdrawn and that a hearing date be set. The Stipulation was tabled; the Commission granted the request of respondent's former attorney to withdraw; and a new hearing date was set (Tr. 11-12).

November 2010. Respondent is not an attorney.

2. From 2005 through approximately October 2010, Robyne Petrie-Platt was respondent's girlfriend, and they resided together. Many members of Ms. Petrie-Platt's family live in the Town of Macomb, and respondent grew up with members of her family, socialized with her relatives and attended some family gatherings. Respondent officiated at the wedding of a Petrie family member and also officiated when Ms. Petrie-Platt's parents renewed their marriage vows. Respondent's sister was formerly married to Ms. Petrie-Platt's brother.

As to Charge I of the Formal Written Complaint:

3. On or about July 8, 2007, Andrew Bowden was charged with Unlawfully Dealing with a Child in the Second Degree. The underlying complaint alleged that Mr. Bowden had provided alcohol to Kimberly Worden, who was under the age of 21. Mr. Bowden was issued an appearance ticket directing him to appear in the Macomb Town Court for arraignment on August 9, 2007.

4. Kimberly Worden, the complaining witness in the *Bowden* case, is the daughter of Robyne Petrie-Platt. In or about June 2007, Ms. Worden frequently visited the home that respondent shared with Ms. Petrie-Platt.

5. On or about July 13, 2007, after an *ex parte* request by Ms. Petrie-Platt, respondent issued an Order of Protection requiring Mr. Bowden to stay away from Ms. Worden.

6. Respondent failed to disclose in a timely fashion his relationship

with the complaining witness's mother and failed to promptly disqualify himself in the matter. Gary R. Alford, Mr. Bowden's attorney, learned from his client that Ms. Worden is Robyne Petrie-Platt's daughter and of respondent's relationship with Ms. Worden.

7. By letter dated July 13, 2007, Mr. Alford requested respondent's recusal due to respondent's relationship with Ms. Petrie-Platt and Ms. Worden.

8. In a telephone conversation with Mr. Alford, respondent initially refused to disqualify himself. Mr. Alford then told respondent that if respondent did not recuse himself, Mr. Alford would make a motion for recusal and would file a complaint with the Commission. Shortly thereafter, on or about August 7, 2007, respondent signed a certificate of disqualification in *People v. Bowden.*

As to Charge II of the Formal Written Complaint:

9. On or about June 21, 2005, Merton Petrie was arraigned in the Rossie Town Court on charges of Criminal Mischief in the Third Degree and Making a False Written Statement. The matter was transferred to the Macomb Town Court.

10. Merton Petrie is the nephew of Robyne Petrie-Platt and the son of respondent's former brother-in-law, William Petrie, who had been married to respondent's sister.

11. On or about October 20, 2005, upon the district attorney's recommendation, respondent accepted Mr. Petrie's guilty plea to Criminal Mischief in the Fourth Degree in full satisfaction of both charges and imposed a one-year conditional discharge, requiring Mr. Petrie to perform 60 hours of community service and to pay

restitution and a surcharge.

12. Respondent neither disqualified himself nor disclosed that Mr. Petrie is Ms. Petrie-Platt's nephew and the son of his former brother-in-law.

13. In 2006, after Mr. Petrie violated the terms of his conditional discharge by failing to complete the community service, respondent executed a Declaration of Delinquency to bring Mr. Petrie to court for resentencing.

14. On or about May 18, 2006, Heather Dona, Assistant St. Lawrence County Conflict Defender, appeared before respondent as Mr. Petrie's attorney for resentencing.

15. In the summer of 2006, respondent attended a Petrie family picnic. At the time, Mr. Petrie was due to be resentenced by respondent. During the weekend of the picnic, respondent discussed Mr. Petrie's violation of his conditional discharge with various members of the Petrie family, who urged respondent to send Mr. Petrie to jail and told respondent that he had been "not harsh enough" on Mr. Petrie when he initially sentenced him.

16. Sometime during that weekend, respondent told Mr. Petrie that respondent intended to resentence him to jail for violating the terms of his conditional discharge.

17. In or around July or August 2006, Sandra Petrie and Sherry Parker (respectively, Robyne Petrie-Platt's mother and sister) contacted respondent, *ex parte*, and asked him to send Mr. Petrie to jail.

18. During her representation of Merton Petrie, Heather Dona learned that Robyne Petrie-Platt is Merton Petrie's aunt, that Ms. Petrie-Platt lived with respondent and that respondent had engaged in *ex parte* conversations with Mr. Petrie and members of the Petrie family about Mr. Petrie's violation of his conditional discharge. Accordingly, on August 31, 2006, Ms. Dona wrote to respondent requesting that he recuse himself in the case. Respondent did not recuse himself.

19. On or about September 21, 2006, respondent resentenced Mr. Petrie to 45 days in jail and three years' probation for violating the terms of his conditional discharge. The St. Lawrence County Department of Probation had recommended three years' probation and no jail time.

20. Respondent failed to disclose that Merton Petrie is the nephew of Robyne Petrie-Platt and the son of his former brother-in-law and failed to disclose his relationship with Ms. Petrie-Platt and his *ex parte* conversations with Mr. Petrie and members of Mr. Petrie's family.

21. On or about April 12, 2007, respondent accepted Merton Petrie's guilty plea to charges of Unlawful Operation of an ATV on Highway and Uninsured Operation of an ATV, and sentenced Mr.Petrie to fines and surcharges totaling $210.

22. Respondent neither disqualified himself nor disclosed his relationship with Mr. Petrie's aunt or that Mr. Petrie is the son of respondent's former brother-in-law.

23. On or about July 17, 2008, respondent arraigned Merton Petrie on

charges of Harassment in the Second Degree and Attempted Grand Larceny in the Fourth Degree, and issued an Order of Protection against Mr. Petrie in favor of the alleged victim. Respondent released Mr. Petrie on his own recognizance.

24. Respondent neither disqualified himself nor disclosed his relationship with Mr. Petrie's aunt or that Mr. Petrie is the son of respondent's former brother-in-law.

25. The *Petrie* case was transferred from the Macomb Town Court to St. Lawrence County's Integrated Domestic Violence Court.

As to Charge III of the Formal Written Complaint:

26. In July 2007 Ruth Parker was charged in Macomb Town Court with Petit Larceny for allegedly using the telephone of Sandra Petrie to make long distance phone calls without Ms. Petrie's permission and consent. On or about July 12, 2007, respondent arraigned Ms. Parker on the charge.

27. Sandra Petrie, the complainant in *People v. Ruth Parker*, is the mother of Robyne Petrie-Platt. Ms. Petrie is the aunt by marriage of Ruth Parker; *i.e.*, Ms. Parker was married to Ms. Petrie's nephew.

28. On or about March 6, 2008, respondent issued a temporary order of protection in favor of Sandra Petrie against Ruth Parker. Respondent issued the order *ex parte* at the request of the district attorney, who was not aware of the family relationships among Ruth Parker, Robyne Petrie-Platt and Sandra Petrie and was not aware of respondent's relationship with Robyne Petrie-Platt.

29. On or about March 13, 2008, respondent issued a modified temporary order of protection in favor of Sandra Petrie and against Ms. Parker.

30. While the *Ruth Parker* case was pending before him, respondent discussed the case *ex parte* with Ms. Petrie-Platt and with Sherry Parker.

31. Respondent failed to disqualify himself in *People v. Ruth Parker* and failed to disclose that Sandra Petrie is the mother of Robyne Petrie-Platt; nor did respondent disclose the family relationships among Ruth Parker, Robyne Petrie-Platt and Sandra Petrie or his *ex parte* conversations with Ms. Petrie-Platt and Sherry Parker.

As to Charge IV of the Formal Written Complaint:

32. On or about January 26, 2008, James R. Petrie, Jr., was charged with Criminal Mischief in the Third Degree (a Class E felony), Criminal Mischief in the Fourth Degree, and Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree. The defendant was issued an appearance ticket returnable in the Macomb Town Court on February 12, 2008.

33. James R. Petrie, Jr., is the nephew of Robyne Petrie-Platt.

34. On or about March 13, 2008, upon oral motion by Mr. Petrie's attorney, respondent dismissed the charge of Criminal Mischief in the Third Degree for facial insufficiency without notice to or the consent of the prosecution and without affording to the prosecution an opportunity to amend the accusatory instrument.

35. Respondent neither disqualified himself nor disclosed his relationship to Mr. Petrie's aunt, Robyne Petrie-Platt.

As to Charge V of the Formal Written Complaint:

36. On or about May 4, 2007, Scott M. Parker was charged with Failure to Wear a Helmet on an ATV, a violation of Section 2406(2) of the Vehicle and Traffic Law.

37. Scott M. Parker is the son of Sherry Parker and the nephew of Robyne Petrie-Platt.

38. On or about June 14, 2007, Mr. Parker appeared before respondent. Neither the arresting officer nor a representative of the district attorney's office was present. Two individuals, who were unsworn, told respondent that Mr. Parker was not operating the ATV at the time he was cited for the aforementioned violation.

39. Respondent then dismissed the charge against Mr. Petrie without notice to or the consent of the prosecution, in violation of Sections 170.40, 170.45 and 210.45 of the Criminal Procedure Law.

40. Respondent neither disqualified himself nor disclosed his relationship with Mr. Petrie's aunt, Robyne Petrie-Platt.

As to Charge VI of the Formal Written Complaint:

41. On or about March 6, 2006, Justin R. Petrie was charged with Unsafe Backing in violation of Section 1211(a) of the Vehicle and Traffic Law.

42. Justin Petrie is the nephew of Robyne Petrie-Platt.

43. Mr. Petrie entered into a negotiated plea recommendation with the

district attorney's office in which he agreed to plead guilty to a violation of Section 1101 of the Vehicle and Traffic Law.

44. On June 8, 2006, Mr. Petrie appeared before respondent. Despite the negotiated plea recommendation, respondent dismissed the charge.

45. Respondent neither disqualified himself nor disclosed his relationship with Mr. Petrie's aunt, Robyne Petrie-Platt.

As to Charge VII of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(1), 100.3(B)(6) 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 VI of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge VII is not sustained and therefore is dismissed.[2]

[2] On the specific facts elicited at the hearing, we find no misconduct as to Charge VII. However, the Commission does not endorse that a judge accept the position of chairing a political caucus as it can too easily involve the judge in prohibited political activity.

It is a fundamental precept of judicial ethics that a judge may not preside over a case in which the judge's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]). Moreover, judges must assiduously avoid even the appearance of impropriety (Rules, §100.2). In view of respondent's close relationship with Robyne Petrie-Platt, his girlfriend with whom he resided, his impartiality would reasonably be questioned – by members of the public and by the parties themselves – in cases in which her relatives were the defendants and/or the complaining witnesses. Nevertheless, over a five-year period, respondent not only presided over eight such matters without disclosing the conflict, but also engaged in *ex parte* communications with his girlfriend and her relatives concerning four of these matters and, in some instances, imposed dispositions that, at the very least, conveyed an appearance of favoritism. Such conduct, in its totality, demonstrates a blatant disregard for the ethical obligations incumbent upon every judge.

Like the referee, we reject respondent's affirmative defense that he was not prohibited from presiding over cases involving Ms. Petrie-Platt's relatives because they are not his own family members. In addition to the prohibition against presiding over matters involving persons within the sixth degree of relationship to the judge or the judge's spouse (*see* Rules, §100.3[E][1][d]), a provision that is inapplicable here, the ethical rules set forth a broad range of additional circumstances requiring disqualification, including any matters in which the judge's impartiality "might reasonably be questioned" (§100.3[E][1]). While it would be impossible for an ethical code to enumerate in specific detail all the situations that would require a judge's recusal, that general language

certainly encompasses the circumstances presented here. *See Matter of LaBombard,* 11 NY3d 294, 297-98 (2008), involving a judge who presided over cases in which his step-grandchildren were the defendants, in which the Court of Appeals emphasized that the misconduct finding was based on a violation of Rule 100.3(E)(1) and "does not depend on whether the children of the spouse of a judge's child are relatives within the sixth degree of consanguinity or affinity"; *see also, e.g., Matter of Robert*, 89 NY2d 745 (1997) (judge presided over multiple cases involving his friends); *Matter of O'Donnell*, 2010 Annual Report 201 (judge arraigned a defendant without disclosing that his daughter was the defendant's friend); *Matter of Valcich*, 2008 Annual Report 221 (judge arraigned a defendant with whom he had a social and business relationship, issued an order of protection and granted an adjournment in contemplation of dismissal).

Under the circumstances shown in this record, respondent should have recognized that his disqualification was required in these cases. Notwithstanding respondent's investigative testimony that his contacts with Ms. Petrie-Platt's relatives were minimal, the record establishes not only that respondent had significant social interactions with his girlfriend's family members at family gatherings and on other occasions, but that on several such occasions, he discussed the pending charges against her relatives with his girlfriend and/or her family members. As to Charge II, for example, while Merton Petrie (Ms. Petrie-Platt's nephew) was facing resentencing for violating the terms of his conditional discharge, which respondent had imposed earlier, respondent attended a picnic with Petrie family members, several of whom urged the judge to send

Mr. Petrie to jail and told respondent that he had not been "harsh enough" on Mr. Petrie when he initially sentenced him. That same weekend, respondent told Mr. Petrie himself that respondent intended to impose a jail sentence. These *ex parte* communications with his girlfriend's relatives, standing alone, were highly improper (Rules, §100.3[B][6]; *see, e.g., Matter of Racicot*, 1982 Annual Report 99). Even if these out-of-court communications were brief and unsolicited, respondent was obligated to give both sides notice of them and an opportunity to respond. *See Matter of Marshall*, 2008 Annual Report 161; *removal accepted*, 8 NY3d 741 (2007). Further compounding the appearance of impropriety, respondent later resentenced the defendant to 45 days in jail notwithstanding that the Probation Department had recommended no jail time. Because of his relationship with the defendant's aunt and his *ex parte* communications with the defendant's relatives, respondent's handling of the case was unavoidably tinged with an appearance of partiality and prejudgment.

As we have previously stated: "We recognize that, in small communities, local justices may frequently be presented with matters in which they have some personal relationship with the parties. Although disqualification may occasion some inconvenience and delay, every judge must be mindful of the importance of adhering to the ethical standards so that public confidence in the impartiality of the judiciary may be preserved" (*Matter of Thwaits*, 2003 Annual Report 171, 174).

At the very least, even if he believed he could be impartial in these cases, respondent should have disclosed the relationships and his *ex parte* communications,

which would have afforded both sides an appropriate opportunity to be heard on the issue of his participation in the matters (Rules, §100.3[F]). *See, e.g., Matter of Valcich, supra*; *Matter of Merrill*, 2008 Annual Report 181; *Matter of Merkel*, 1989 Annual Report 111. 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. Instead, in seven of the eight cases here, respondent made no disclosure of his close relationship to a relative of the defendant or complaining witness; in one case (*Parker*), respondent left a telephone message for the defendant's attorney that might be construed as an attempt at disclosure, but gave no notice to the prosecution. Incredibly, even after the conflict was brought to his attention in two cases by attorneys who requested his recusal after learning of the relationship from their clients, respondent failed to recognize that his disqualification was required, insisted that he could be impartial, and, thereafter, made no disclosure in subsequent cases when his girlfriend's relatives appeared before him. In *Bowden*, respondent disqualified himself only after the attorney stated that if he did not do so, the attorney would make a formal motion and report the conduct to the Commission. By taking judicial action in these cases without disclosing his relationship to the defendant or complaining witness, respondent did not act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Rules, §100.1).

While handling the cases of his girlfriend's relatives would be improper regardless of the dispositions imposed, in several cases the results here were plainly

favorable ones, which compounds the appearance of impropriety. In *Bowden*, a case in which his girlfriend's daughter was the complaining witness, respondent issued an order of protection at his girlfriend's request on behalf of her daughter. In the *Merton Petrie* case, respondent sentenced the defendant to jail after his girlfriend's relatives had urged him, *ex parte*, to do so. The dispositions afforded to other Petrie family members were not only very lenient, but in some cases contrary to statutorily mandated procedures, further conveying the appearance of favoritism. *See*, *Matter of Marshall*, *supra*; *Matter of Schurr*, 2010 Annual Report 221 (without notice to or consent of the prosecutor, judge allowed five defendants in traffic cases to plead to reduced charges); *Matter of More*, 1996 Annual Report 99 (judge dismissed three cases without notice to the prosecutor and disposed of three other cases based upon *ex parte* communications). In *James Petrie, Jr.* (Charge IV), respondent dismissed a felony charge against his girlfriend's nephew with no notice to the prosecutor, and in *Scott Parker* (Charge V), he dismissed a charge against his girlfriend's nephew without notice to or the consent of the prosecution, in violation of statutory requirements. In *Justin Petrie* (Charge VI), he inexplicably dismissed a charge against his girlfriend's nephew that could have resulted in two points on the defendant's driver's license, notwithstanding that the defendant had accepted a plea offer by which he would have pled to a lesser charge. In light of respondent's relationship to the defendants' relative, the appearance of favoritism is unavoidable.

We thus conclude after a full review of the record that Charges I through VI

are established.[3] By presiding over numerous cases involving his girlfriend's relatives, respondent showed insensitivity to his ethical obligations, even after the conflict was brought to his attention. The fact that the misconduct continued even after respondent was on notice of the potential impropriety is a significant exacerbating factor (*see Matter of Robert, supra*). Compounding this misconduct, respondent took judicial action in four cases after entertaining *ex parte* communications from his girlfriend and/or her relatives, ignored statutorily mandated procedures and rendered dispositions in several instances that conveyed the appearance of favoritism. Such misconduct undermines public confidence in the integrity and impartiality of the judiciary.

As the Court of Appeals has stated, removal is "a drastic sanction which should only be employed in the most egregious circumstances" (*Matter of Cohen,* 74 NY2d 272, 278 [1989]) and "'where necessary 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 1979]). In its totality, respondent's misconduct demonstrates conclusively that he lacks fitness for judicial office.

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[3] As the referee noted, respondent admitted "nearly all" of the factual allegations contained in the Formal Written Complaint (Rep. 2). While respondent's failure to testify at the hearing or to offer any evidence in relation to the charges permits us to draw negative inferences to support the finding of misconduct (*Matter of Reedy*, 64 NY2d 299, 302 [1985]), we find it unnecessary to do so in view of the overwhelming evidence presented at the hearing establishing respondent's misconduct.

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

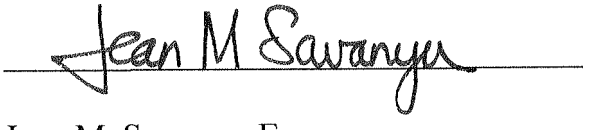
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Emery concurs in an opinion in which Mr. Belluck joins.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: October 7, 2011



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

LAFAYETTE D. YOUNG, JR.,

a Justice of the Macomb Town Court,
St. Lawrence County.

CONCURRING OPINION
BY MR. EMERY, IN WHICH
MR. BELLUCK JOINS

I agree with the result in this case. But the footnote on page 10 of the Determination directing itself to the dismissal of Count VII, in my view, does a disservice to the judiciary by *advising* judges not to participate in the First Amendment protected activity of chairing an open caucus because "it can too easily involve a judge in prohibited political activity."

Judge Young's role as a chair of an open party caucus was core First Amendment activity. He was indisputably engaged in associational functions enabling a political party to select candidates. What is missing from, and crucial to, any analysis of the propriety of such conduct is an evaluation of the specific activities in the context of First Amendment protections. Such an analysis is critical in order to determine whether the conduct is constitutionally protected or permissibly prohibited under rules intended to curb political influence in the state's judiciary. *Republican Party of Minnesota v. White*, 536 US 765 (2002).

Even if that analysis were unclear (and it is not), the fear that particular political activities of a judge might be prohibited should not give rise to official advice to avoid the activity on the basis that "it can too easily involve a judge in prohibited political activity." If anything, the reverse should be true: a judge should get the benefit of the doubt if his/her conduct is arguably protected by the First Amendment, especially in our elective system which requires judges to be political.

Assuming, as I do, for purpose of this analysis that the Rules are facially constitutional (*see Matter of Raab*, 100 NY2d 305 [2003]), any proscription of a judge's conduct must still pass muster by a demonstration that the specific application of the Rule to what appears to be constitutionally protected activity nonetheless supports a sanction. Here, it is clear that a Rule that would apply to punish the judge for merely acting in the ministerial function of chair of an open caucus, and no more, violates the judge's First Amendment rights because the application of the Rule to this situation is not supported by a state interest sufficient to overcome the judge's constitutional right to participate in the caucus.

The problem is that this Commission and the Advisory Committee, which frequently opines on the application of these rules, regularly and erroneously evaluate cases such as this one under what appears to be a standard far less rigorous than that which is constitutionally required. (In over 300 Advisory Opinions issued concerning

political activity by judges, I find no First Amendment analysis whatsoever.[1])

This judge was clearly not a "political leader." His caucus activities were purely ministerial. Therefore, the question is whether there is a sufficiently compelling state interest to support application of the rules prohibiting judges from engaging in political activity to infringe on what otherwise would be the judge's clear right to associate and participate in the caucus. This question can only be answered in the context of an analysis of the entire scheme of what judges are permitted and prohibited from doing under the Rules. "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process…the First

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[1] *See e.g.* Adv Ops 88-32 (judge may not speak at a political club about the legal system), 88-136 (Family Court judge may not speak at a political club about the function of Family Court), 89-26 (judge may not participate in the activities of a political club, even if the activities are non-political [re: participation in an essay contest sponsored by the club]), 89-55 (judge may not contribute to a political action committee established by the judge's employer), 90-77 (judge's spouse may not hold a political fundraiser at their joint residence even if the judge does not appear or participate), 91-67 (recently elected judge may not attend a dinner sponsored by a political party at any time after the six-month period following election--even one day after the end of the period), 92-129 (judge whose spouse is a candidate for political office cannot accompany the spouse to political functions or contribute to the spouse's campaign), 94-66 (judge may not contribute to the campaign of a candidate for political office in another state), 99-18 (judge may not attend or purchase a ticket to a fundraiser on behalf of a candidate seeking election to a local school board), 99-118 (judge who is not currently a candidate for judicial office should advise his/her spouse not to place signs endorsing political candidates on the property where the judge and his/her spouse reside, even if the spouse is the sole owner of the property), 00-113 (judge may not attend a post-election victory party celebrating a neighbor's election as a town board member, even if the event is not sponsored by a political organization), 04-91 (judge may not attend a candlelight vigil for crime victims in the judge's county), 05-117 (judicial candidate cannot express support for the desirability of joining the incumbent on the bench, since that would constitute an endorsement of the incumbent), 06-183 (judge may not attend or be present for any fund-raising activity hosted by the judge's child, who is a candidate for office, in their joint residence), 09-176 (two judicial candidates may display lawn signs with both candidates' names, but may not send voters a letter bearing both candidates' signatures and conveying both candidates' qualifications that is printed on letterhead with both candidates' names).

Amendment rights that attach to their roles" (*White*, *supra*, 536 US at 788). "Applying strict scrutiny, *White* made unmistakably plain that in order to be constitutional, rules regulating judicial campaign activity can be neither overinclusive nor underinclusive – that is, they can neither burden more speech than is necessary, nor leave unregulated those activities that directly undermine the State's supposedly compelling interest in restricting speech" (*Matter of Spargo*, 2007 Annual Report 127 [Emery Opinion Concurring in Part and Dissenting in Part]). Both we and the Advisory Committee regularly skip this crucial imperative by simply evaluating constitutionally protected conduct under what appears to be a mere rational basis test.

The First Amendment defect in applying a prohibition of political conduct to this judge is clear. This is a plainly fatal overinclusive application of the Rules that were charged here. *See Matter of Campbell*, 2005 Annual Report 133, and *Matter of Farrell*, 2005 Annual Report 159 (Emery Concurrences). It is not disputed that the Rules allow a judge to attend and vote publicly at a political caucus (Rules, §100.5[A][1][ii]; Adv Op 09-180). Also, it is not disputed that under the Rules a judge can (and virtually must) be a publicly identified member of a political party and actively involved in obtaining the support of political parties to secure a nomination and win an election. S/he can and, as a practical matter, must campaign on a slate, directly associating with other judicial and non-judicial candidates. The notion that a judge who directly participates in political activity in the variety of ways necessary to run for office does *not* violate the Rules, while a judge who simply calls a political meeting to order and rules on motions does, is patently hypocritical, untenable and, at the very least, a constitutional violation as

an overinclusive application of the Rules.

Thus, application of the Rules to prohibit this judge's relatively innocuous conduct would conflict with legitimate prohibitions on judicial political activities. And our advice in the footnote to avoid such activities because they "can too easily involve a judge in prohibited political activity" is just bad advice that stands First Amendment protection on its head. If anything, requiring a judge to defend against such charges and be subject to the chill of the accusations and the advice proffered in the footnote is a profound disservice except in a system which is designed to suppress constitutionally protected political activity. The footnote is a symptom of a system which does just that.

More generally, insofar as they purport to regulate the First Amendment political activity of judges, the conduct Rules are a hornet's nest of inconsistencies and are rife with questionable assumptions about what measures are appropriate and effective to control political activity within an elected judiciary which is authorized by the same Rules to associate with parties and raise money from the lawyers who appear before them. *See Matter of Yacknin*, 2009 Annual Report 176 (Emery Dissent); *Matter of King*, 2008 Annual Report 145 (Emery Concurrence); *Matter of Spargo*, *supra* (Emery Opinion Concurring in Part and Dissenting in Part); *Matter of Farrell*, *supra* (Emery Concurrence); *Matter of Campbell*, *supra* (Emery Concurrence). As such, constitutionally commanded strict scrutiny of any proposed sanction under a Rule, as applied, is the minimum we must assure to protect judicial candidates who inevitably are ensnared in a baroque tangle of contradictory and confusing rules, prohibitions and exceptions. As I have previously stated, "The entire system of regulating judicial

campaigns is riddled with hypocrisy" (*Matter of Yacknin*, *supra* [Emery Dissent]):

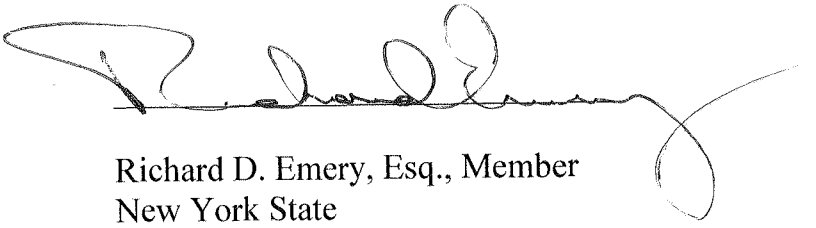
> I understand and sympathize with the [Court of Appeals'] pragmatic impulse to muddle through this mire, attempting to maintain the integrity and stature of the judiciary by separating it from unseemly political party activity and, at the same time, allowing judges to participate in the politics that are an inescapable part of our state constitutionally mandated elective selection system. But the result of this conundrum is that the Court of Appeals has upheld an entirely unworkable and untenable system of judicial candidate regulation in which the conduct rules are unrealistic, unclear and contradictory.

Id. We must guard against wooden application of the Rules, including those interpreted by the Advisory Committee, which regularly fails, as does this Commission, to analyze application of the Rules in the First Amendment context. It serves neither the judges nor the public if we fall into the trap of treating judicial campaigns and political activity under the same standards as other judicial misconduct.

This case, and others where we evaluate alleged misconduct in the judicial campaign process, beg the larger question of whether this is our appropriate role and whether it is the best use of our resources. I believe this Commission and the Advisory Committee are unsuited to this task because judicial misconduct does not ordinarily arise in the First Amendment context and the Commission and Advisory Committee appear to be committed to ignoring the overarching constitutional concerns. I think that regulating judicial campaigns should be the function of some other administrative body more experienced and sensitive to the fundamental rights at stake. My two terms on this Commission certainly document the need for this reform. Until that day comes, if ever, in my view the Commission's role should be "hands off" except in the clearest cases.

This is a case of a misconduct charge that cannot be supported on the facts or the law and, accordingly, is properly dismissed.

Dated: October 7, 2011



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

APPENDIX G: STATISTICAL ANALYSIS OF COMPLAINTS

COMPLAINTS PENDING AS OF DECEMBER 31, 2010								
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		13	28	3	2	0	1	47
DELAYS		6	8	1	3	0	0	18
CONFLICT OF INTEREST		10	3	4	1	0	6	24
BIAS		1	5	0	1	2	0	9
CORRUPTION		8	1	0	0	0	0	9
INTOXICATION		0	1	0	2	0	0	3
DISABILITY/QUALIFICATIONS		0	0	0	0	0	0	0
POLITICAL ACTIVITY		7	6	3	1	2	3	22
FINANCES/RECORDS/TRAINING		8	10	1	3	2	1	25
TICKET-FIXING		2	0	0	1	0	2	5
ASSERTION OF INFLUENCE		4	6	3	2	0	1	16
VIOLATION OF RIGHTS		14	17	5	0	1	1	38
MISCELLANEOUS		3	4	0	1	1	1	10
TOTALS		76	89	20	17	8	16	226

*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 2011

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	1031							1031
NON-JUDGES	304							304
DEMEANOR	115	25	3	2	0	0	0	145
DELAYS	42	9	1	2	0	0	0	54
CONFLICT OF INTEREST	28	8	3	0	0	0	0	39
BIAS	18	8	1	0	0	0	0	27
CORRUPTION	22	9	0	0	0	0	0	31
INTOXICATION	2	4	0	0	0	1	0	7
DISABILITY/QUALIFICATIONS	1	0	0	0	0	0	0	1
POLITICAL ACTIVITY	14	11	2	0	0	0	0	27
FINANCES/RECORDS/TRAINING	4	27	3	1	0	1	0	36
TICKET-FIXING	0	2	0	0	0	0	0	2
ASSERTION OF INFLUENCE	17	13	3	1	0	0	0	34
VIOLATION OF RIGHTS	26	22	1	1	0	0	0	50
MISCELLANEOUS	22	2	2	2	2	0	0	30
TOTALS	1646	140	19	9	2	2	0	1818

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ALL COMPLAINTS CONSIDERED IN 2011: 1818 NEW & 226 PENDING FROM 2010								
SUBJECT OF COMPLAINT	**DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY**	**STATUS OF INVESTIGATED COMPLAINTS**						**TOTALS**
		PENDING	***DISMISSED***	***CAUTION***	***RESIGNED***	***CLOSED****	***ACTION****	
INCORRECT RULING	1031							1031
NON-JUDGES	304							304
DEMEANOR	115	38	31	5	2	0	1	192
DELAYS	42	15	9	3	3	0	0	72
CONFLICT OF INTEREST	28	18	6	4	1	0	6	63
BIAS	18	9	6	0	1	2	0	36
CORRUPTION	22	17	1	0	0	0	0	40
INTOXICATION	2	4	1	0	2	1	0	10
DISABILITY/QUALIFICATIONS	1	0	0	0	0	0	0	1
POLITICAL ACTIVITY	14	18	8	3	1	2	3	49
FINANCES/RECORDS/TRAINING	4	35	13	2	3	3	1	61
TICKET-FIXING	0	4	0	0	1	0	2	7
ASSERTION OF INFLUENCE	17	17	9	4	2	0	1	50
VIOLATION OF RIGHTS	26	36	18	6	0	1	1	88
MISCELLANEOUS	22	5	6	2	3	1	1	40
TOTALS	1646	216	108	29	19	10	16	2044

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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	18,811							18,811
NON-JUDGES	6034							6034
DEMEANOR	3491	38	1242	329	122	119	252	5593
DELAYS	1442	15	177	94	35	19	26	1808
CONFLICT OF INTEREST	697	18	482	161	57	26	137	1578
BIAS	1887	9	279	57	29	20	33	2314
CORRUPTION	504	17	123	14	`39	23	37	757
INTOXICATION	58	4	38	7	13	4	28	152
DISABILITY/QUALIFICATIONS	58	0	33	2	18	14	6	131
POLITICAL ACTIVITY	349	18	283	188	23	28	50	939
FINANCES/RECORDS/TRAINING	290	35	302	197	133	89	101	1147
TICKET-FIXING	27	4	88	160	44	62	167	552
ASSERTION OF INFLUENCE	228	17	166	82	26	9	61	589
VIOLATION OF RIGHTS	2485	36	499	219	90	51	88	3468
MISCELLANEOUS	808	5	254	83	32	42	58	1282
TOTALS	37,169	216	3966	1593	661	506	1044	45,155

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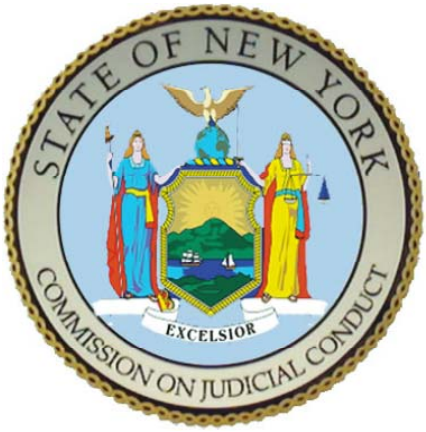

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

61 BROADWAY, SUITE 1200
NEW YORK, NEW YORK 10006
(646) 386-4800
(646) 458-0037 (FAX)

CORNING TOWER, SUITE 2301
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223
(518) 453-4600
(518) 486-1850 (FAX)

400 ANDREWS STREET, SUITE 700
ROCHESTER, NEW YORK 14604
(585) 784-4141
(585) 232-7834 (FAX)

WWW.CJC.NY.GOV