

NEW YORK STATE

**COMMISSION ON JUDICIAL
CONDUCT**



**ANNUAL REPORT
2016**

**NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT**



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March 1, 2016

To Governor Andrew M. Cuomo,
Chief Judge Janet DiFiore, 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, 2015.

Respectfully submitted,

A handwritten signature in blue ink, reading "Robert H. Tembeckjian".

Robert H. Tembeckjian, Administrator
On Behalf of the Commission

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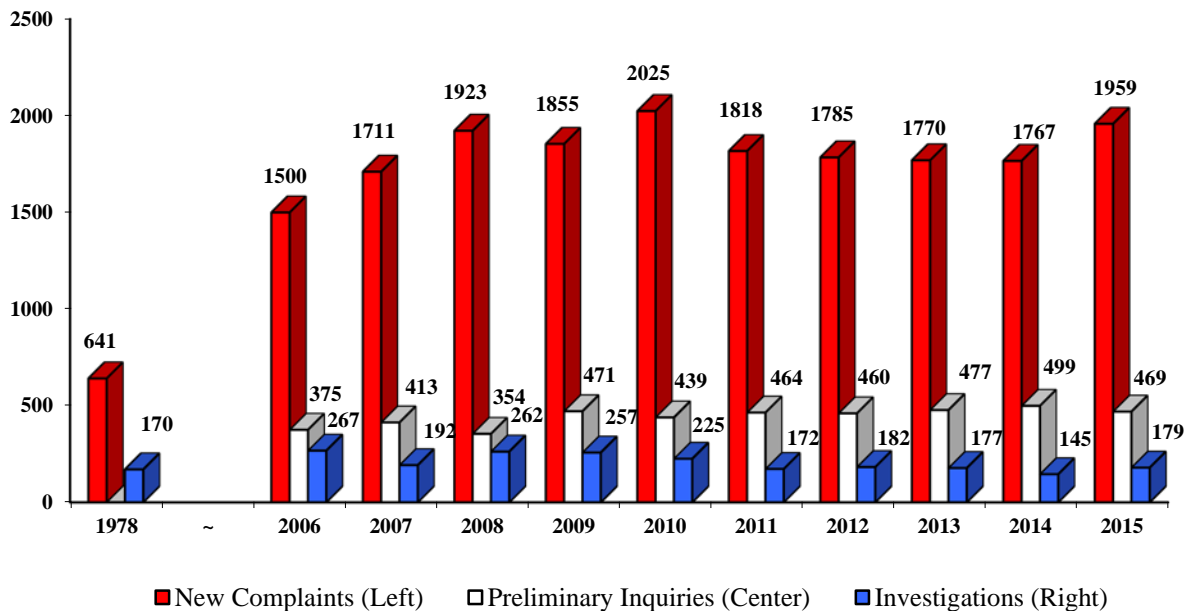
INTRODUCTION TO THE 2016 ANNUAL REPORT

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 3,350 judicial positions in the system filled by approximately 3,150 individuals, in that some town or village justices serve in more than one town or village court.

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 2006, the Commission has averaged 1,811 new complaints per year, 442 preliminary inquiries and 206 investigations. Last year, 1,959 new complaints were received, the second highest total ever. Every complaint was reviewed by investigative and legal staff, and a 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 469 preliminary reviews and inquiries and 179 investigations.

This report covers Commission activity in the year 2015.



COMPLAINTS, INQUIRIES & INVESTIGATIONS IN THE LAST TEN YEARS

ACTION TAKEN IN 2015

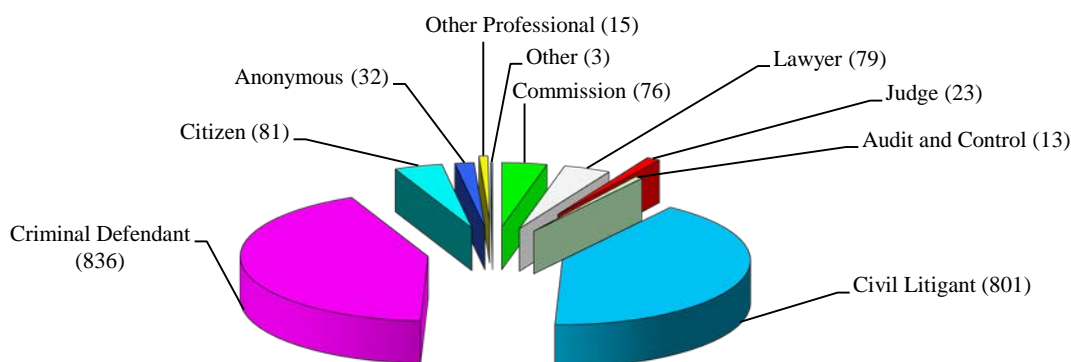
Following are summaries of the Commission's actions in 2015, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

COMPLAINTS RECEIVED

The Commission received 1,959 new complaints in 2015. 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 intervene in a pending case, or reverse or remand trial court decisions.

A breakdown of the sources of complaints received by the Commission in 2015 appears in the following chart.



COMPLAINT SOURCES IN 2015

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 2015, staff conducted 469 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

In 179 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 2015, in addition to the 179 new investigations, there were 138 investigations pending from the previous year. The Commission disposed of the combined total of 317 investigations as follows:

- 80 complaints were dismissed outright.
- 23 complaints involving 22 different judges were dismissed with letters of dismissal and caution.
- 20 complaints involving 16 different judges were closed upon the judge's resignation, five becoming public by stipulation and 11 that were not public.
- Nine complaints involving seven different judges were closed upon vacancy of office due to reasons other than resignation, such as the expiration of the judge's term.
- 10 complaints involving six different judges resulted in formal charges being authorized.
- 175 investigations were pending as of December 31, 2015.

FORMAL WRITTEN COMPLAINTS

As of January 1, 2015, there were pending Formal Written Complaints in 33 matters involving 16 judges. In 2015, Formal Written Complaints were authorized in 10 additional matters involving six judges (as to two of whom a Formal Written Complaint was already pending). Of the combined total of 43 matters involving 20 different judges, the Commission acted as follows:

- 12 matters involving nine different judges resulted in formal discipline (admonition or censure).
- One matter involving one judge resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- Two matters involving two different judges were closed upon the judges' resignation from office and became public by stipulation.
- 28 matters involving eight different judges were pending as of December 31, 2015.

SUMMARY OF ALL 2015 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 – 1,886,* ALL PART-TIME

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	131	145	276
Complaints Investigated	41	63	104
Judges Cautioned After Investigation	4	13	17
Formal Written Complaints Authorized	1	3	4
Judges Cautioned After Formal Complaint	1	0	1
Judges Publicly Disciplined	2	5	7
Judges Vacating Office by Public Stipulation	0	5	5
Formal Complaints Dismissed or Closed	0	0	0

NOTE: Approximately 707 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 – 384, ALL LAWYERS

	<i>Part-Time</i>	<i>Full-Time</i>	<i>Total</i>
Complaints Received	30	307	337
Complaints Investigated	3	14	17
Judges Cautioned After Investigation	0	1	1
Formal Written Complaints Authorized	0	0	0
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	0	1	1
Judges Vacating Office by Public Stipulation	0	1	1
Formal Complaints Dismissed or Closed	0	0	0

NOTE: Approximately 51 City Court Judges serve part-time.

TABLE 3: COUNTY COURT JUDGES – 124, FULL-TIME, ALL LAWYERS*

Complaints Received	239
Complaints Investigated	12
Judges Cautioned After Investigation	3
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

* Includes seven who also serve as Surrogates, five who also serve as Family Court Judges, and 37 who also serve as both Surrogates and Family Court Judges.

TABLE 4: FAMILY COURT JUDGES – 148, FULL-TIME, ALL LAWYERS

Complaints Received	213
Complaints Investigated	12
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

TABLE 5: SURROGATES – 69, FULL-TIME, ALL LAWYERS

Complaints Received	44
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 6: DISTRICT COURT JUDGES – 50, FULL-TIME, ALL LAWYERS

Complaints Received	22
Complaints Investigated	0
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: COURT OF CLAIMS JUDGES – 75, FULL-TIME, ALL LAWYERS

Complaints Received	80
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 8: SUPREME COURT JUSTICES – 327, FULL-TIME, ALL LAWYERS*

Complaints Received	342
Complaints Investigated	30
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	1
Formal Complaints Dismissed or Closed	0

* Includes 12 who serve as Justices of the Appellate Term.

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

Complaints Received	76
Complaints Investigated	0
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 10: NON-JUDGES AND OTHERS NOT WITHIN THE COMMISSION’S
JURISDICTION***

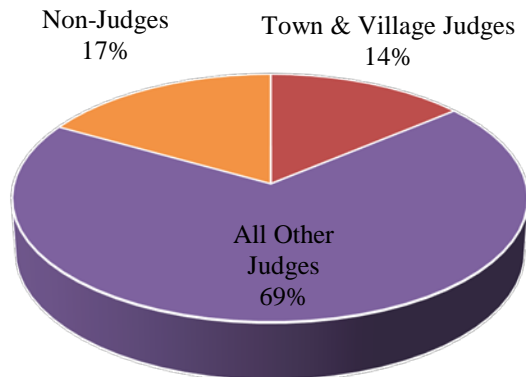
Complaints Received	330
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* The Commission reviews such complaints to determine whether to refer them to other agencies.

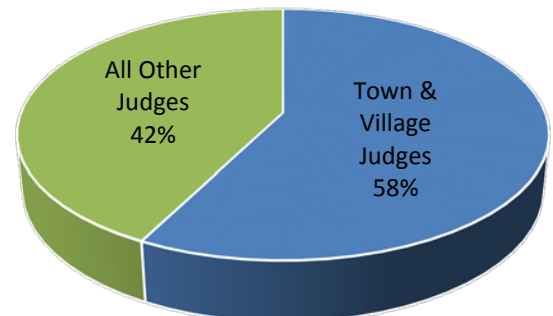
NOTE ON JURISDICTION

The Commission’s jurisdiction is limited to judges and justices of the State Unified Court System. The Commission does not have jurisdiction over non-judges, retired judges, judicial hearing officers, 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.

SUMMARY OF TABLES 1-10



COMPLAINTS RECEIVED BY JUDGE TYPE



**INVESTIGATIONS AUTHORIZED
TOWN & VILLAGE JUDGES v ALL OTHER JUDGES**

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.

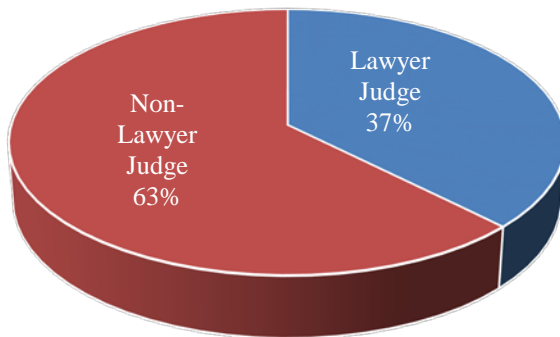
The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibits public disclosure by the Commission of the charges, hearings or related matters, absent a waiver by the judge, until the case has been concluded and a determination of admonition, censure, removal or retirement has been rendered.

Following are summaries of those matters that were completed and made public during 2015. The actual texts are appended to this Report in Appendix F.

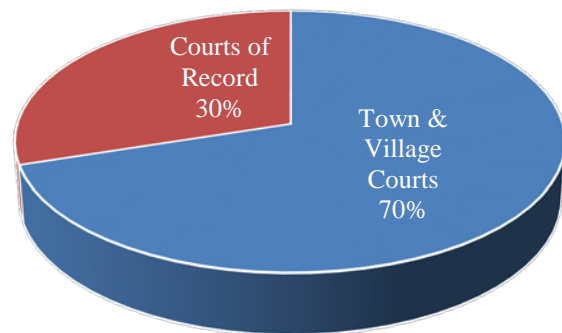
OVERVIEW OF 2015 DETERMINATIONS

The Commission rendered nine formal disciplinary determinations in 2015: four censures and five admonitions. In addition, seven matters were disposed of by stipulation made public by agreement of the parties (five such stipulations were negotiated during the investigative stage, and two after a Formal Written Complaint had been served). Ten of the 16 judges were non-lawyer judges and six were lawyers. Twelve of the 16 judges were town or village justices and four were judges of higher courts.

To put these numbers and percentages in some context, it should be noted that, of the roughly 3,150 judges in the state unified court system, approximately 60% are part-time town or village justices. About 63% of the town and village justices, *i.e.* 37% of all judges in the court system, are not lawyers. (Town and village justices serve part-time and need not be lawyers. Judges of all other courts must be lawyers.)



2015 DETERMINATIONS



1978-2015 DETERMINATIONS

DETERMINATIONS OF CENSURE

The Commission completed four formal proceedings in 2015 that resulted in public censure. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Gerald J. Popeo

On February 12, 2015, the Commission determined that Gerald J. Popeo, a Judge of the Utica City Court, Oneida County, should be censured for misconduct, including: (1) summarily holding two defendants in contempt of court and depriving them of their liberty without due process and (2) making injudicious comments to and about attorneys, including referring to a prosecutor as “a cigar store Indian” for not speaking during plea discussions. The Commission stated: “It is a judge’s duty to act in a patient, neutral, judicious manner and to properly apply the law regardless of provocation.” The Commission also noted that while Judge Popeo “holds defendants and lawyers to exacting standards of courtroom behavior and is quick to lecture them for perceived displays of disrespect, [the judge’s] own behavior fell short of the required standards.” Judge Popeo did not request review by the Court of Appeals.

Matter of Daniel P. Sullivan

On July 14, 2015, the Commission determined that Daniel P. Sullivan, a Justice of the Whitestown Town Court, Oneida County, should be censured for lending the prestige of his judicial office to advance his son’s private interests with respect to pending criminal charges. In 2013 after learning that the police intended to charge his son for an incident involving mistreating kittens, Judge Sullivan called the Whitestown police chief’s cell phone and told the chief that he hoped the police would not “pile on” or “overcharge” his son. The judge again improperly advocated for his son two days later when the arresting officer came to tell him that his son would need to come to the police station. In its determination the Commission stated: “While it is understandable that [Judge Sullivan] was concerned for his son and hoped for leniency in the officers’ assessment of potential charges, his ‘paternal instincts’ do not justify a departure from the standards expected of the judiciary.” Judge Sullivan, who is not an attorney, did not request review by the Court of Appeals.

Matter of Edwin R. Williams

On November 2, 2015, the Commission determined that Edwin R. Williams, a Justice of the Manchester Town Court, Ontario County, should be censured for failing to respect and comply with law by improperly issuing warrants of eviction in two cases. Between 2012 and 2013, Judge Williams presided over two summary eviction proceedings in which he issued warrants of eviction and money judgements without according the tenants an opportunity to be heard or adequately reviewing the supporting documents. In its determination the Commission stated: “The issuance of an eviction warrant is a significant exercise of discretion. The fact that a tenant is facing the potential loss of his/her home places a special burden on a judge to make sure that the statutory requirements are met.” Judge Williams, who is not an attorney, did not request review by the Court of Appeals.

Matter of Carl J. Landicino

On December 28, 2015, the Commission determined that Carl J. Landicino, a Justice of the Supreme Court, Second Judicial District, Kings County, should be censured for driving after consuming alcohol in excess of the legal limit, which resulted in his pleading guilty to Driving While Intoxicated, a misdemeanor. The judge also repeatedly invoked his judicial office during his arrest in an effort to avoid being charged. In 2012, Judge Landicino was pulled over by a New York State trooper for speeding and driving erratically. After coming to a stop following a two-mile pursuit, the judge failed three sobriety field tests but refused to submit to a breath test. During and after his arrest he repeatedly identified himself as a judge, including asking the trooper whether this is “how you treat a Supreme Court Judge.” In its determination the Commission stated that Judge Landicino’s inebriated driving “endangered public safety and brought the judiciary as a whole into disrepute,” and that his repeated assertions of his judicial office were “egregious,” “exacerbating” and left “no doubt that he was seeking favorable treatment simply because of his judicial position.” In censuring the judge, the Commission noted that he has “made extensive efforts to become rehabilitated as well as to assist others similarly afflicted” and has demonstrated a “compelling” commitment to sobriety. Judge Landicino did not request review by the Court of Appeals.

DETERMINATIONS OF ADMONITION

The Commission completed five proceedings in 2015 that resulted in public admonition. The cases are summarized as follows and the full texts can be found in Appendix F.

Matter of Thomas C. Kressly

On March 25, 2015, the Commission determined Thomas C. Kressly, a Justice of the Urbana Town Court, Steuben County, should be admonished for mishandling bail funds he received at an arraignment and failing to maintain a record of the proceeding. In 2011, Judge Kressly presided over an after-hours arraignment in a case returnable in neighboring Wayne Town Court. The judge accepted a cash bail payment which he failed to deposit into his court account. Without making copies of the court records or the bail receipt issued, the judge placed the money and court records inside an envelope, on which he wrote “BAIL \$500.00 CASH.” Later that day he took the envelope to the Town of Wayne municipal building and gave it to an unidentified man who advised that he would forward it to the Wayne Town Court. In its determination the Commission stated that the handling of official funds is “one of a judge’s most important responsibilities” and that the judge’s mishandling of the \$500 cash bail “circumvented the required procedures and was inconsistent with his ethical duty to diligently discharge his administrative responsibilities and to avoid even the appearance of impropriety.” Judge Kressly, who is not an attorney, did not request review by the Court of Appeals.

Matter of Joseph A. Sakowski

On August 20, 2015, the Commission determined that Joseph A. Sakowski, a Justice of the Elma Town Court, Erie County, should be admonished for engaging in prohibited political activity when he made prohibited political contributions either directly or indirectly through his law firm, including many contributions to candidates and political organization on a national level. In its

determination the Commission stated: “By making numerous contributions, both directly and through his law firm, to political organizations and candidates over the past decade, [Judge Sakowski] repeatedly engaged in conduct that is specifically barred by the ethical rules.” Judge Sakowski, who is an attorney, did not request review by the Court of Appeals.

Matter of Andrew P. Fleming

On August 20, 2015, the Commission determined that Andrew P. Fleming, a Justice of the Hamburg Village Court, Erie County, should be admonished for engaging in prohibited political activity by making, directly and/or indirectly through his law firm and his spouse, prohibited political contributions. In its determination the Commission noted that the Rules Governing Judicial Conduct, Advisory Opinions and its own decisions over the years have long made it clear that a judges may not directly or indirectly make political contributions, with certain narrow exceptions applicable to a limited time when they are running for office. Judge Fleming, who is an attorney, did not request review by the Court of Appeals.

Matter of David M. Trickler

On December 17, 2015, the Commission determined that David M. Trickler, a Justice of the Birdsall, Burns and Grove Town Courts, Allegany County, should be admonished for engaging in prohibited out-of-court conversations. In 2013, Judge Trickler, presiding in Birdsall Town Court, arraigned two defendants charged with Environmental Conservation Law (ECL) violations. With no prosecutor or defense attorney present, the judge improperly engaged the defendants in conversation about the substance of the case, allowing them to make potentially incriminating statements. In its determination the Commission found that the judge’s prohibited *ex parte* communications could “influence, or appear to influence, the judge who will be the trier of fact at a bench trial, and thus compromise the judge’s impartiality.” Judge Trickler, who is not an attorney, did not request review by the Court of Appeals.

Matter of Gene R. Heintz

On December 17, 2015, the Commission determined that Gene R. Heintz, a Justice of the Sardinia Town Court, Erie County, should be admonished for deciding a Dangerous Dog case without according the owner and her lawyer the opportunity to be heard, and for other legal and procedural irregularities. In 2014, after a pit bull terrier allegedly attempted to attack a detective from the County Sheriff’s Office, Judge Heintz ruled that the dog was dangerous before the dog’s owner or her witnesses had testified. He then failed to order the animal to be spayed or microchipped, as required by law when a dog has been deemed dangerous. In finding that Judge Heintz made “numerous procedural and substantive errors” in the case, the Commission stated that the judge’s actions, “resulted in a decision made on an abbreviated record that deprived the dog owner of the right to be heard pursuant to law.” Judge Heintz, who is not an attorney, did not request review by the Court of Appeals.

OTHER PUBLIC DISPOSITIONS

The Commission completed seven other proceedings in 2015 that resulted in public dispositions. The cases are summarized below and the full text can be found in Appendix F. Five of the matters were concluded during the investigative stage, and two after formal proceedings had been commenced.

Matter of Randy Alexander

On March 17, 2015, pursuant to a stipulation, the Commission discontinued a proceeding involving Randy Alexander, a Justice of the Mansfield Town Court, Cattaraugus County, who resigned from office after being charged with (1) failing to cooperate with the Commission during its investigation; (2) engaging in prohibited *ex parte* conversations with defendants and dismissing and/or reducing charges against them, without notice to or consent of the prosecution; (3) imposing fines in the absence of guilty pleas or any finding of guilt; and (4) using undignified and discourteous language on the bench. Judge Alexander, who is not an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of David J. Narducci

On October 6, 2015, pursuant to a stipulation, the Commission closed its investigation of complaints against David J. Narducci, a Justice of the Chautauqua Town Court, Chautauqua County, who resigned from office after being apprised by the Commission that it had commenced an investigation based upon complaints alleging that (1) after a non-jury trial in which the defendant was charged with boating-related and penal law offenses, the judge initiated and engaged in several *ex parte* email communications with the prosecutor, for the purpose of reconsidering his decision; and (2) prior to arraigning three defendants, the judge viewed video-recorded evidence provided by law enforcement personnel which purportedly showed the three defendants engaging in the alleged criminal conduct; the judge failed to mechanically record the arraignment of any of the defendants and personally made copies of the video-recorded evidence, which he distributed to the prosecutor and one or more defense attorneys. Judge Narducci, who is not an attorney, agreed that he would neither seek nor accept judicial office in the future.

Matter of Robert C. Cerrato

On October 7, 2015, pursuant to a stipulation, the Commission discontinued a proceeding involving Robert C. Cerrato, a Judge of the Yonkers City Court, Westchester County, who agreed to relinquish his judicial office effective January 1, 2016, after being charged with (1) invoking his judicial title on several occasions when he called third parties on behalf of his daughter regarding incidents arising from the matrimonial dispute between his daughter and her then-husband; and (2) charging a flat fee of \$200 to officiate at weddings that took place outside the City of Yonkers, notwithstanding that General Municipal Law §805-b limits the fee for the solemnization of marriage to \$100. Judge Cerrato, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Yvonne Lewis

On October 7, 2015, pursuant to a stipulation, the Commission closed its investigation of complaints against Yvonne Lewis, a Justice of the Supreme Court, Second Judicial District, Kings County, who agreed to relinquish her judicial office effective December 31, 2015, after being apprised by the Commission that it was investigating complaints based on allegations that she (1) improperly approved payments to her confidential law clerk for services rendered by her as a guardian in matters pending before other judges of the court and (2) failed to adequately oversee and review the law clerk's matters after she went to work for the judge, and approved a guardianship payment to her after hiring her as her full-time law clerk. Judge Lewis affirmed that she would neither seek nor accept judicial office at any time in the future.

Matter of Linda A. Becker

On December 10, 2015, pursuant to a stipulation, the Commission closed its investigation of a complaint against Linda A. Becker, a Justice of the Newfield Town Court, Tompkins County, who resigned from office after being apprised by the Commission that it had commenced an investigation based upon a complaint alleging that she telephoned a Tompkins County Assistant District Attorney (ADA), misrepresented herself as her daughter, who was the complaining witness in a criminal case, on a voicemail message left on the ADA's phone line, and requested that criminal charges in the case be upgraded from harassment to assault. Judge Becker, who is not an attorney, agreed that she would neither seek nor accept judicial office in the future.

Matter of David P. Daniels

On December 10, 2015, pursuant to a stipulation, the Commission closed its investigation of a complaint against David P. Daniels, a Justice of the Guilford Town Court, Chenango County, who resigned from office after being apprised by the Commission that it had commenced an investigation based upon a complaint alleging that Judge Daniels exhibited impatience and intemperance towards participants in traffic cases and eviction proceedings, made comments suggesting he prejudged the cases, failed to make proper audio records of court proceedings as required, engaged in unauthorized *ex parte* communications, and in one case involving his former attorney, presided without disclosing the relationship to the parties. Judge Daniels, who is not an attorney, agreed that he would neither seek nor accept judicial office in the future.

Matter of Victoria B. Zach

On December 10, 2015, pursuant to a stipulation, the Commission closed its investigation of a complaint against Victoria P. Zach, a Justice of the Colden Town Court, Erie County, who resigned from office after being apprised by the Commission that it had commenced an investigation based upon a complaint alleging that Judge Zach lent the prestige of her judicial office to advance the private interests of a defendant charged in another court with Driving While Intoxicated, and that her actions created the impression that she was the defendant's attorney, notwithstanding that Judge Zach is not a lawyer. Judge Zach agreed that she would neither seek nor accept judicial office in the future.

MATTERS CLOSED UPON RESIGNATION

In 2015, 18 judges resigned while complaints against them were pending before the Commission, and the matters pertaining to those judges were closed. Two of those judges resigned while under formal charges by the Commission, both pursuant to public stipulation. Sixteen judges resigned while under investigation, five of those pursuant to public stipulation. 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 other 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 2015, the Commission referred 34 matters to other agencies. Thirty-two matters were referred to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record-keeping or other administrative issues. One matter was referred to an attorney grievance committee and one matter was referred to a district attorney.

LETTERS OF DISMISSAL AND CAUTION

A Letter of Dismissal and Caution contains confidential suggestions and recommendations to a judge upon conclusion of an investigation, in lieu of commencing formal disciplinary proceedings. A Letter of Caution is a similar communication to a judge upon conclusion of a formal disciplinary proceeding with a finding that the judge's misconduct, albeit minor, 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 2015, the Commission issued 22 Letters of Dismissal and Caution and one Letter of Caution. Eighteen town or village justices were cautioned, including five who are lawyers. Five judges of higher courts – all lawyers, as required by law – were cautioned. The caution letters addressed various types of conduct as indicated below.

Assertion of Influence. Three judges were cautioned for lending the prestige of judicial office to advance private interests. One judge improperly notarized a document, notwithstanding that he was not a notary. Another judge lent her name to promote a fund-raising event, and a third judge sent a letter on his judicial stationery inviting a litigant who was appearing before him on a recreational trip.

Political Activity. The Rules Governing Judicial Conduct prohibit judges from attending political gatherings, endorsing other candidates, making political contributions or otherwise participating in political activities except during a specifically-defined "window period" when they are candidates for elective judicial office. Two judges were cautioned for using misleading advertisements in their judicial campaigns that conveyed the appearance that they were incumbents, and one judge was cautioned for making prohibited political contributions outside of his "window period."

Conflicts of Interest. All judges are required by the Rules to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned. Two judges were cautioned for various isolated or promptly redressed conflicts of interest. One judge failed to recuse himself from an arraignment in which he had signed a supporting deposition in connection with the felony charges before him. Another judge failed to disclose his relationship with a probation officer who was involved in a case over which he was presiding.

Inappropriate Demeanor. The Rules require every judge to be patient, dignified and courteous to litigants, attorneys and others with whom the judge deals in an official capacity. One judge was cautioned for making an inappropriate comment to defendants appearing before him.

Audit and Control. Two judges were cautioned for failing to file monthly reports and remittances with the State Comptroller in a timely manner. Two other judges were cautioned for failing to properly supervise the court clerk, which resulted in misappropriated funds.

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, arraigned a defendant in absence of counsel. Another improperly suspended defendants' driver's licenses without providing them an opportunity to be heard. A third judge failed to permit a defendant to withdraw a guilty plea after imposing fines higher than those that were included in the plea agreement.

Improper *Ex Parte* Communications. One judge was cautioned for engaging in prohibited *ex parte* communications in one case with both the defendant and with the prosecutor.

Miscellaneous. The Rules prohibit a judge from making "any public comment about a pending or impending proceeding in any court within the United States or its territories." One judge was cautioned for publicly commenting on a pending case during a ceremonial event. Another judge was cautioned for making statements linking the amount of fines he could impose to the town's denial of his request for a salary increase.

Follow Up on Caution Letters. Should the conduct addressed by a cautionary letter continue or be repeated, the Commission may authorize an investigation of 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).

CHALLENGES TO THE COMMISSION'S PROCEDURES

Denaro v Commission on Judicial Conduct

Attorney Anthony Denaro brought an Article 78 proceeding seeking: (1) an order compelling the Commission to investigate and discipline a Supreme Court judge for alleged bias; (2) an order in the nature of mandamus to review overturning the Commission's determination not to commence disciplinary proceedings; and (3) an order compelling the Commission to turn over its investigatory file pursuant to the freedom of information law ("FOIL"). On April 27, 2015, the Attorney General's office filed a motion to dismiss the petition, arguing that the petitioner's claims were non-justiciable, that the petitioner lacked standing, that mandamus did not lie and that Judiciary Law § 45 made FOIL inapplicable. The petitioner filed papers in opposition to the motion on May 14, 2015. The matter was assigned to Justice Paul Wooten, who heard oral argument on September 9th.

On September 24, 2015, Justice Wooten granted the Attorney General's motion to dismiss. Adopting the reasoning of earlier decisions, the court found that the Commission's "function is, in many respects, similar to that of a public prosecutor who is required to exercise independent judgment." *See e.g. Matter of Walker v New York State Commn. on Jud. Conduct*, 42 Misc3d 1204[A] (Sup Ct, NY County 2013); *Matter of Mantell v New York State Commn. on Jud. Conduct*, 181 Misc2d 1027, 1029 (Sup Ct, New York County 1999), *affd* 277 AD2d 96, 96 (1st Dept 2000), *lv denied* 96 NY2d 706 (2001). As a result, the Commission's "decision to dismiss the complaint without investigation is not subject to [the] court's review" and mandamus is unavailable to compel exercise of the Commission's discretion.

The court also denied petitioner's FOIL request, holding that Judiciary Law § 45 prohibited disclosure of the Commission's investigatory files.

OBSERVATIONS AND RECOMMENDATIONS

The Commission traditionally devotes a section of its Annual Report to a discussion of topics of special note that have come to its attention in the course of considering complaints. It does so for public education purposes, to advise the judiciary as to potential misconduct that may be avoided, and pursuant to its statutory authority to make administrative and legislative recommendations.

IMPROPER DELEGATION OF ADJUDICATIVE RESPONSIBILITIES

It is fundamental to the independence, impartiality and integrity of the judiciary for a judge to exercise the powers of office without undue or unauthorized reliance upon non-judges. In a number of cases over the years, judges have been disciplined for actually or effectively ceding certain uniquely judicial functions and duties to others. Recently, the Advisory Committee on Judicial Ethics addressed the issue, which was also illustrated in two disciplinary matters recently concluded by the Commission.

In Opinion 15-127, the Advisory Committee thoroughly and unequivocally responded to a supervising judge who asked whether judges in municipalities without a traffic violations bureau may, by standing court order, delegate to their court clerks the tasks of accepting written guilty pleas and imposing and collecting fines and surcharges, based on specific written guidelines created and approved by the judge in the form of a “fixed schedule” of fines. The clerks in such situations would apply the fine schedule without review by the judge.

As it has in previous opinions, the Advisory Committee distinguished between “ministerial” functions, which may be delegated, and “judicial” functions, which may not be delegated. The Committee reiterated prior advice that “judicial decision-making” is not delegable, and that “the imposition of a fine, even if only for an arguably ‘routine’ traffic infraction, is a nondelegable judicial duty.” Opinion 15-127, which cites pertinent Judicial Conduct cases and commentary from the Commission’s annual reports, goes on to emphasize that imposing a fine is a discretionary judicial function that must be made on a case-by-case basis, which would be thwarted by a system in which a court clerk would apply a predetermined fine to each traffic offense where a guilty plea was entered. Whether by court order or memorandum, the Opinion concludes, a judge may not delegate the authority to impose fines.

The process of accepting pleas and imposing fines in speeding, seat-belt and other “routine” traffic matters may seem monotonous or inconsequential, but it is nevertheless an adjudicative role that is to be fulfilled only by the judge of the court with jurisdiction. That there may be mitigating or aggravating circumstances in a particular case, such as prior convictions against the motorist, would only underscore the importance in assuring that a judge was reviewing the record and making the decision. In such a situation, the judge may find it appropriate to impose a fine lower or higher than a formulaic guideline from which a clerk or other designee could not veer.

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

In 2014, the Commission accepted the stipulated resignation of a town justice in Westchester County after he was charged with misconduct for not sufficiently overseeing and approving dispositions in a significant number of Vehicle and Traffic Law (VTL) cases. *Matter of Porco*, 2015 Annual Report 183.

In *Matter of Piraino*, 2015 Annual Report 166, a town justice was censured for *inter alia* setting fines in hundreds of cases that were either above the maximum allowable by law or below the minimum required by law. While the judge attributed many of the dispositions to his court clerk, who testified that the judge had authorized her to set fines in certain VTL cases according to a predetermined amount (which the judge denied), the Commission held that the judge was responsible for the conduct of the court clerk.

In 11 admonitions reported in its 1993 Annual Report, the Commission identified an improper practice in which town and village court justices in Cayuga County permitted the local sheriff's office to review and approve bail bonds and sign the judges' names to certificates of release from incarceration, without review by the judges.

In *Matter of Rider*, 1988 Annual Report 212, a town justice was censured for permitting the local prosecutor to prepare the judge's decision, without notice to the defense.

In *Matter of Hopeck*, 1981 Annual Report 133, a town justice was censured for *inter alia* allowing his wife to preside over a series of traffic cases on an evening when the judge himself was unavailable.

From time to time, the Commission has also become aware of situations in which judges have delegated authority to court attorneys or law clerks to act in a manner that creates the appearance that they are judges. While it is not uncommon or inappropriate for a judge to ask a court attorney to conduct conferences with the lawyers or parties in a case and make recommendations, at times such assignments constitute improper delegations of judicial authority. Some court attorneys take the bench to conduct conferences, or have made express references to "my ruling," "my cases" or "my decision," or otherwise convey the impression that they are the judges. Some have acted in a manner that encourages lawyers and parties to call them "Your Honor" or "Judge."

While a court attorney should know better than to foster such an appearance, it is the judge who is ultimately responsible. A judge is obliged not only to safeguard the independence and integrity of the judiciary but also to "require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge...." Section 100.3(C)(2) of the Rules Governing Judicial Conduct.

COURT OF APPEALS REVIEW OF COMMISSION DETERMINATIONS

In its 2010 Annual Report, the Commission recommended that the Legislature expand the jurisdiction of the Court of Appeals, to authorize the Court to review Commission determinations on its own motion, when it deems appropriate. Some six years and 100 determinations later, the only way for the Court to review a Commission determination remains at the request of the disciplined judge. Court of Appeals review of judicial disciplinary determinations is so important to the integrity of the judicial ethics enforcement system that the Commission revisits the subject here.

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

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

Of the 801 public disciplinary decisions rendered by the Commission since 1978, the Court has entertained 95 reviews, all at the initiation of the disciplined judge, according to law. The Court has accepted 79 Commission determinations and modified 16 others. While on 12 occasions it reduced and on two occasions it increased the discipline imposed by the Commission, only once did the Court reject a Commission determination outright – in *Matter of Greenfield*, 76 NY2d 293 (1990), involving unreasonable delay in rendering decisions. However, that decision was effectively reversed by the Court's ruling in *Matter of Gilpatric*, 13 NY3d 586 (2009), which held that the *Greenfield* doctrine was “not workable” and affirmed the Commission's jurisdiction in delay cases. (*Gilpatric* was remitted and resulted in a public admonition which the disciplined judge did not contest. 2011 Annual Report 97. ¹)

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

Under present law, if the disciplined judge chooses to accept a determination, the Court of Appeals cannot review it, even if it disagrees with the Commission's decision. While one might speculate as to whether the Court, on its own motion, would be inclined to review many or any Commission determinations, of which there are fewer than 20 per year, authorizing it to do so would affirm the principle that the state's highest court is the ultimate authority on matters of judicial discipline. The Commission recommends that the Legislature amend the Judiciary Law to permit such *sua sponte* review by the Court of Appeals.

UNAUTHORIZED *EX PARTE* COMMUNICATIONS

Section 100.3(B)(6) of the Rules Governing Judicial Conduct prohibits a judge from initiating or considering *ex parte* communications in a pending or impending matter, with limited exceptions.

¹ Also available on the Commission's website at [http://cjc.ny.gov/Determinations/G/gilpatric\(3\).htm](http://cjc.ny.gov/Determinations/G/gilpatric(3).htm).

For example, certain scheduling and administrative matters are authorized insofar as they “do not affect a substantial right of any party.” A judge, “with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.” A judge may consult with a disinterested expert if the judge gives notice to the parties, provides them with the expert’s opinion and gives them reasonable opportunity to be heard. A judge may also consult with other judges and court employees such as law clerks. Town and village justices and city court judges may confer *ex parte* with the Judicial Resource Center, which was established by the Office of Court Administration to provide them assistance.

Over the years, the Commission has publicly disciplined at least 60 judges for violating the standard on *ex parte* communications, primarily for having substantive discussions off the record with one of the parties or participants in a case before them, without notice to or the consent of the other side. These do not include cases in which an *ex parte* communication was incidental to underlying misconduct.

In some instances, the *ex parte* communications may result from the judge’s failure to appreciate the responsibilities of a judge in our legal system. It is not the judge’s role at arraignment, for example, to engage the defendant one-on-one about what led to an arrest, or to ask for an explanation as to what the defendant was doing at the scene of the alleged crime, or to permit the defendant to offer “my side of the story.” Often such exchanges produce admissions or otherwise incriminating statements without benefit of legal counsel and with little appreciation of the adverse consequences.

In *Matter of Trickler* in 2015, reported in this Annual Report, a town justice conducted *ex parte* conversations on the merits of their cases with two defendants at arraignment, with no prosecutor or defense counsel present.

In *Matter of George*, 2014 Annual Report 127, *accepted*, 22 NY3d 323 (2013), a town justice *inter alia* had an *ex parte* discussion with a prospective claimant, discouraging him from filing a claim.

In *Matter of Buchanan*, 2013 Annual Report 103, and *Matter of Singer*, 2010 Annual Report 228, two Family Court judges *inter alia* made improper *ex parte* visits to parties who were in the hospital.

In *Matter of LaBombard*, 2008 Annual Report 294, *accepted*, 11 NY3d 294 (2008), a town justice *inter alia* changed a bail decision based on an *ex parte* request.

In *Matter of Connor*, 2004 Annual Report 78, a Supreme Court Justice relied on *ex parte* reports of law guardians and issued a decision before the expiration of time for submissions from the parties.

In *Matter of Sardino*, 1983 Annual Report 173, *accepted*, 58 NY2d 286 (1983), an assistant district attorney testified that he and a full-time city court judge regularly held morning meetings to review and make judgments as to the merits of cases on the day’s calendar.

In *Matter of McGee*, 1984 Annual Report 124, *accepted*, 59 NY2d 870 (1983), a town justice acknowledged holding *ex parte* conversations concerning pending cases with the arresting officers.

Town and village justices, who often serve without full-time court staff that can shield them, have to take special precautions against engaging in such *ex parte* pre-court meetings.

Ex parte practices, in which judges privately discuss the merits of cases with the prosecutor or other law enforcement personnel, are clearly improper and undermine a fundamental judicial obligation to hear both sides in a dispute in order to render judgment impartially. At the very least, such a distortion of the judicial process gives rise to an appearance of impropriety. At worst, such communications offer one side a means of learning the judge's view of the case and tailoring their strategy accordingly, or influencing the judge with information that the other side does not know is being presented to the judge and therefore cannot rebut.

Case-specific discussions are not in the nature of permissible administrative meetings at which the judge and ADAs might generally discuss caseload management or scheduling issues. Nor are they analogous to settlement discussions in civil cases where the judge, on specific consent of the parties, meets with each side separately to try to facilitate agreement. Even where a judge's follow-up to an unauthorized conversation with one side is favorable to the other side – for example, where the prosecutor discusses a prospective plea offer to a reduced charge that the judge approves and the defendant would later accept – the private substantive conversation between the judge and only one party would still have been improper. The absent party, for example, may have rebutted the otherwise unchallenged information being offered to the judge by the other side, in the hope of an even more favorable final outcome.

The Commission takes this opportunity to remind all judges of the prohibition against and disciplinary consequence for engaging in unauthorized *ex parte* communications.

THE COMMISSION'S BUDGET

In 2007, for the first time in more than a generation, the Legislature significantly increased the Commission's budget, commensurate with its constitutional mandate and caseload. In every year since 2007, the number of complaints has gone up. Last year's 1959 new complaints were the second highest in history. Investigations were up 24% over the prior year, and public decisions – admonitions, censures, removals and stipulated resignations – went from 12 to 16 (up 33%).

However, the Commission's resources have not kept pace, resulting among other things in a slower disposition rate and a higher number of matters pending at year end – most recently a 19% increase, from 171 in 2014 to 203 in 2015.

Consistently over the past decade, the Executive Budget has recommended no increase in the Commission's budget. Such “flat” funding is actually a decrease, because in order to meet rising expenses (such as rent increases) on the same dollar amount each year, the Commission has had to make significant cuts. For example, from an authorization of 55 full-time employees in 2007, the Commission is now down to 50 but only has funding to fill 45. That is an 18% reduction in workforce for the Commission, compared to a statewide reduction in force of under 10%. In order to keep current and prevent even further cuts and delays in deciding matters, the Commission has requested a modest increase of \$186,000 for the fiscal year beginning April 1, 2016.

SELECTED BUDGET FIGURES: 1978 TO PRESENT

Fiscal Year	Annual Budget ¹	New Complaints ²	Prelim Inquiries	New Investig'ns	Pending Year End	Public Dispositions	Attorneys on Staff ³	Investig'rs ft/pt	Total Staff
1978	1.6m	641	N.A.	170	324	24	21	18	63
1988	2.2m	1109	N.A.	200	141	14	9	12/2	41
1996	1.7m	1490	492	192	172	15	8	2/2	20
2000	1.9m	1288	451	215	177	13	9	6/1	27
2006	2.8m	1500	375	267	275	14	10	7	28½
2007	4.8m	1711	413	192	238	27	17	10	51
2008	5.3m	1923	354	262	208	21	19	10	49
2009	5.3m	1855	471	257	243	24	18	10	48
2010	5.4m	2025	439	225	226	15	18	10	48
2011	5.4m	1818	464	172	216	14	17	9	49
2012	5.4m	1785	460	182	206	20	19	9	49
2013	5.4m	1770	477	177	201	17	19	9	50
2014	5.5m	1767	499	145	171	12	18	7	47
2015	5.6m	1959	469	179	203	16	19	7	46
2016	5.8m ⁴	~	~	~	~	~	19	7	45

¹ Budget figures are rounded off; budget figures are fiscal year (Apr 1 – Mar 31)

² Complaint figures are calendar year (Jan 1 – Dec 31)

³ Number includes Clerk of the Commission, who does not investigate or litigate cases

⁴ 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.
JODIE CORNGOLD
RICHARD D. EMERY, ESQ.
PAUL B. HARDING, ESQ.
RICHARD A. STOLOFF, ESQ.
HON. DAVID A. WEINSTEIN

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	(Former) Chief Judge Jonathan Lippman	2005	3/31/2017
Terry Jane Ruderman	(Former) Chief Judge Jonathan Lippman	1999	3/31/2016
Rolando T. Acosta	(Former) Chief Judge Jonathan Lippman	2010	3/31/2018
Joseph W. Belluck	Governor Andrew M. Cuomo	2008	3/31/2016
Joel Cohen	(Former) Assembly Speaker Sheldon Silver	2010	3/31/2018
Jodie Corngold	Governor Andrew M. Cuomo	2013	3/31/2019
Richard D. Emery	(Former) Senate Minority Leader John L. Sampson	2004	3/31/2016
Paul B. Harding	Assembly Minority Leader Brian M. Kolb	2006	3/31/2017
Richard A. Stoloff	(Former) Senate President Pro Tem Dean Skelos	2011	3/31/2019
David A. Weinstein	Governor Andrew M. Cuomo	2012	3/31/2018
Vacant	Governor		3/31/2017

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, 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 2015, Judge Ruderman was appointed to the state Supreme Court. She previously served as a Judge of the Court of Claims from 1995 to 2015. At the time of her appointment to the Court of Claims 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 New York State-Federal Judicial Council and 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 Of Counsel at 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.

Jodie Corngold graduated from Swarthmore College. She oversees communications for Kolot Chayeinu, a synagogue in Brooklyn, and previously served as Director of Communications for the Berkeley Carroll School, a college preparatory school in Brooklyn. She sits on the Board of the Brooklyn Heights Montessori School, is a marathon runner, and is engaged in a variety of activities associated with her alma mater.

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 founding partner of Emery Celli Brinckerhoff & Abady LLP. His practice focuses on commercial litigation, civil rights, election law and litigation challenging governmental actions. Mr. Emery enjoys a national reputation as a litigator, trying and handling cases at all levels, from the U.S. Supreme Court to federal and state appellate and trial courts in New York, Washington, D.C., California, Washington state, and others. While a partner at Lankenau Kovner & Bickford, he successfully challenged the structure of the New York City Board of Estimate under the one-person, one-vote doctrine, resulting in the U.S. Supreme Court's unanimous invalidation of the Board on constitutional grounds. Before then, he was a staff attorney at the New York Civil Liberties Union and director of the Institutional Legal Services Project in Washington state, which represented persons held in

juvenile, prison, and mental health facilities. He was also a law clerk for the Honorable Gus J. Solomon of the U.S. District Court for the district of Washington. He has taught as an adjunct at the New York University and University of Washington schools of law. Mr. Emery was a member of Governor Cuomo's Commission on Integrity in Government and sat on Governor Eliot Spitzer's Transition Committee for Government Reform Issues. He was appointed to the New York State Commissions on Judicial Conduct and Public Integrity and was appointed chair of the New York City Civilian Complaint Review Board. He is a founding member of the City Club, which addresses New York City preservation issues. He also is a founder and president of the West End Preservation Society, which has achieved the landmarked West End-Riverside Historic District. His honors include Landmark West's 2013 Unsung Heroes Award for his preservation work; the 2008 Children's Rights Champion Award for his civil rights work and support of children's rights; 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 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.

Richard A. Stoloff, Esq., graduated from the CUNY College of the City of New York, and Brooklyn Law School. He is a partner in the law firm of Stoloff & Silver, LLP, in Monticello, New York. He also served for 19 years 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.

Honorable David A. Weinstein is a graduate of Wesleyan University and Harvard Law School, where he was Notes Editor for the Harvard Human Rights Journal. He is a Judge of the Court of Claims, having been appointed by Governor Andrew M. Cuomo in 2011 for a term ending in 2018. Judge Weinstein served previously as Assistant Counsel and First Assistant Counsel to Governors Cuomo, David A. Paterson and Eliot L. Spitzer, as a New York State Assistant Attorney General, as an Associate in the law firm of Debevoise & Plimpton, as Law Clerk to United States District Court Judge Charles S. Haight (SDNY) and as *Pro Se* Law Clerk to the United States Court of Appeals for the Second Circuit. He also served as an Adjunct Professor of Legal Writing at New York Law School and has written numerous articles for legal and other publications.

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 of Union University. 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 Phyllis 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, until April 2011, when she joined the Commission staff. 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 in Manhattan, 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.

David M. Duguay, *Senior Attorney*, is a graduate of the State University of New York at Buffalo (*summa cum laude*) and the SUNY 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, *Senior 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.

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 has served on the Monroe County Bar Association (MCBA) Board of Trustees and is a member of the MCBA's Professional Performance Committee. She has served on 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.

Erica K. Sparkler, *Staff Attorney*, is a graduate of Middlebury College (*cum laude*) and Fordham University School of Law (*magna cum laude*). Prior to joining the Commission staff, she was an associate in private practice with the law firms of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer and Gibson, Dunn & Crutcher. She also served as law clerk to United States District Court Judge Peter K. Leisure. Ms. Sparkler is an adjunct professor at Fordham University School of Law.

Daniel W. Davis, *Staff Attorney*, is a graduate of New York University (*cum laude*), earned a Masters in Public Administration at NYU and graduated from the Benjamin N. Cardozo School of Law, where he was Articles Editor on the law review and a teaching assistant. Prior to joining the Commission staff, he was Senior Consultant with a business advisory firm.

Eteena J. Tadjigoueu, *Staff Attorney*, is a graduate of Boston University and Washington University in St. Louis School of Law, where she served as associate editor of the *Journal of*

Law & Policy, and earned a Dean's Service Award for providing seventy-five hours of community service during law school. Prior to joining the Commission, she worked as a communications professional in the non-profit global health sector. She is a member of the Albany County Bar Association.



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.



Karen Kozac Reiter, *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.



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 writer and editor.

APPENDIX C: REFEREES WHO SERVED IN 2015

Referee	City	County
Eleanor B. Alter, Esq.	New York	New York
Mark S. Arisohn, Esq.	New York	New York
William I. Aronwald, Esq.	White Plains	Westchester
Robert A. Barrer, Esq.	Syracuse	Onondaga
G. Michael Bellinger, Esq.	New York	New York
Howard Benjamin, Esq.	New York	New York
Peter Bienstock, Esq.	New York	New York
Jay C. Carlisle, Esq.	White Plains	Westchester
Linda J. Clark, Esq.	Albany	Albany
Bruno Colapietro, Esq.	Binghamton	Broome
Hon. John P. Collins	New York	Bronx
William T. Easton, Esq.	Rochester	Monroe
Edward B. Flink, Esq.	Albany	Albany
Maryann Saccomando Freedman, Esq.	Buffalo	Erie
Thomas F. Gleason, Esq.	Albany	Albany
H. Wayne Judge, Esq.	Glens Falls	Warren
Nancy Kramer, Esq.	New York	New York
Sherman F. Levey, Esq.	Rochester	Monroe
Jane W. Parver, Esq.	New York	New York
Margaret Reston, Esq.	Rochester	Monroe
Hugh H. Mo, Esq.	New York	New York
Gary Muldoon, Esq.	Rochester	Monroe
Edward J. Nowak, Esq.	Penfield	Monroe
Hon. Stewart A. Rosenwasser	Montgomery	Orange
Laurie Shanks, Esq.	Albany	Albany
Hon. Felice K. Shea	New York	New York
Robert H. Straus, Esq.	New York	Kings

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)
Jodie Corngold (2013-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 (2009-13)
Hon. Juanita Bing Newton (1994-99)
Hon. William J. Ostrowski (1982-89)
Hon. Karen K. Peters (2000-12)
*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)
Hon. David A. Weinstein (2012-present)

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, 52,436 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 43,767 were dismissed upon initial review or after a preliminary review and inquiry, and 8,669 investigations were authorized. Of the 8,669 investigations authorized, the following dispositions have been made through December 31, 2015:

- 1,107 complaints involving 840 judges resulted in disciplinary action (this does not include the 58 public stipulations in which judges agreed to vacate judicial office). (See details below and on the following page.)
- 1,691 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1,562, 90 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 748 complaints involving 530 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 558 complaints were closed upon vacancy of office by the judge other than by resignation.
- 4,362 complaints were dismissed without action after investigation.
- 203 complaints are pending.

Of the 1,107 disciplinary matters against 840 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 95 decisions by the Court of Appeals, 16 of which modified a Commission determination.

- 166 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);
- 350 judges were censured publicly;
- 268 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 95 determinations filed by the present Commission. Of these 95 matters:

- The Court accepted the Commission's sanctions in 79 cases (70 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.

APPENDIX E: RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR § 100 *et seq.*

Rules of the Chief Administrator of the Courts Governing Judicial Conduct

Preamble

Section 100.0 Terminology.

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

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

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

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

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

Section 100.6 Application of the rules of judicial conduct.

Preamble

The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The rules are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The rules are designed to provide guidance to judges and candidates for elective judicial office and to provide a structure for regulating conduct through disciplinary agencies. They are not designed or intended as a basis for civil liability or criminal prosecution.

The text of the rules is intended to govern conduct of judges and candidates for elective judicial office and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there

is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The rules are not intended as an exhaustive guide for conduct. Judges and judicial candidates also should be governed in their judicial and personal conduct by general ethical standards. The rules are intended, however, to state basic standards which should govern their conduct and to provide guidance to assist them in establishing and maintaining high standards of judicial and personal conduct.

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.

(12) It is not a violation of this Rule for a judge to make reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard.

(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

Added 100.3(B)(12) Mar. 26, 2015

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:
DECISIONS RENDERED BY THE
COMMISSION IN 2015**

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

RANDY ALEXANDER,

a Justice of the Mansfield Town Court,
Cattaraugus 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Honorable Randy Alexander, *pro se*

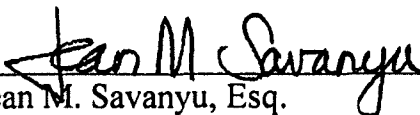
The matter having come before the Commission on March 12, 2015; and
the Commission having before it the Stipulation dated February 24, 2015, with appended
exhibits; and respondent having been served with a Formal Written Complaint dated

January 20, 2015, containing four charges, and having resigned from judicial office effective December 31, 2014, 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 become public upon being signed by the signatories and that the Commission's Decision and Order thereto will become public; 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.

Dated: March 17, 2015



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

RANDY ALEXANDER,

STIPULATION

a Justice of the Mansfield Town Court,
Cattaraugus County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Randy Alexander (“Respondent”), as follows:

1. Respondent began serving as Mansfield Town Justice, Cattaraugus County, in 1989. He was last elected as Mansfield Town Justice in November 2013, to a term commencing on January 1, 2014, and expiring on December 31, 2017. He is not an attorney.
2. Respondent was served with a Formal Written Complaint dated January 20, 2015, containing four charges, a copy of which is appended as Exhibit 1.
3. Respondent enters into this Stipulation in lieu of filing an Answer to the Formal Written Complaint.
4. Respondent forwarded a notice dated November 14, 2014, to John J. Postel, Deputy Administrator of the Commission’s Rochester office, indicating his intent to resign from judicial office, effective December 15, 2014. A copy of the notice is appended as Exhibit 2. The Office of Court Administration, by letter dated January 5,

2015, notified Robert Tembeckjian, the Administrator and Counsel to the Commission, that Respondent's resignation from judicial office became effective December 31, 2014. A copy of the letter is appended as Exhibit 3.

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

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


7. Respondent understands that, should he abrogate the terms of this Stipulation and hold any judicial position at any time, the present proceedings before the Commission will be revived and the matter will proceed to a hearing before a referee.

8. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

9. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will become public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated:

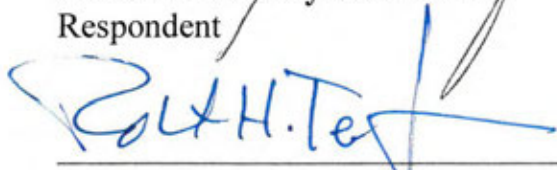
2/5/14



Honorable Randy Alexander
Respondent

Dated:

Feb. 24, 2015



Robert H. TembeckjianAdministrator and Counsel to the Commission
(David M. Duguay, Of Counsel)

THE FOLLOWING EXHIBITS ARE AVAILABLE AT WWW.CJC.NY.GOV

EXHIBIT 1: FORMAL WRITTEN COMPLAINT

EXHIBIT 2: RESPONDENT'S LETTER OF RESIGNATION

EXHIBIT 3: OFFICE OF COURT ADMINISTRATION RESIGNATION NOTICE

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Investigation of
Complaints Pursuant to Section 44,
Subdivisions 1 and 2, in Relation to

LINDA A. BECKER,

a Justice of the Newfield Town Court,
Tompkins 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Honorable Linda A. Becker, *pro se*

The matter having come before the Commission on December 10, 2015;
and the Commission having before it the Stipulation dated November 30, 2015; and


Judge Becker having tendered her resignation by letter dated November 30, 2015, effective December 31, 2015, and having affirmed that having vacated her judicial office, she will neither seek nor accept judicial office at any time in the future, and having waived confidentiality as provided by Judiciary Law §45 to the extent that the Stipulation will become public upon being signed by the parties and that the Commission's Decision and Order with respect thereto will become public; now, therefore, it is

DETERMINED, on the Commission's own motion, that the Stipulation is accepted and that the pending matter is concluded according to the terms of the Stipulation, subject to being revived according to the terms of the Stipulation; and it is

SO ORDERED.

Judge Acosta was not present.

Dated: December 10, 2015



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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2,
of the Judiciary Law in Relation to

LINDA A. BECKER,

STIPULATION

a Justice of the Newfield Town Court,
Tompkins County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Linda A. Becker.

1. Judge Linda A. Becker has served as a justice of the Newfield Town Court, Tompkins County, since January 1, 2015. Her current term expires on December 31, 2018. She is not an attorney.

2. Judge Becker was apprised by the Commission in August 2015 that it was investigating a complaint that she telephoned a Tompkins County Assistant District Attorney, misrepresented herself as her daughter in a voicemail message left on the Assistant District Attorney's phone line, and requested that criminal charges in *People v Jeffrey J. Goldrick*, in which her daughter was the complaining witness, be upgraded from harassment in the second degree to assault in the third degree.

3. Judge Becker has submitted her resignation as Newfield Town Justice by letter dated November 30, 2015, addressed to the Chief Administrator of the Courts and

the Newfield Town Clerk. Judge Becker's resignation will become effective December 31, 2015. A copy of the resignation letter is annexed as Exhibit A.

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

5. Judge Becker affirms that, having vacated her judicial office, she will neither seek nor accept judicial office at any time in the future.

6. Judge Becker understands that, should she abrogate the terms of this Stipulation and hold any judicial position at any time in the future, the Commission's investigation of the complaint would be revived, she would be served with a Formal Written Complaint on authorization of the Commission, and the matter would proceed to a hearing before a referee.

7. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

8. Judge Becker waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will become public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: 11/19/15


Honorable Linda A. Becker

Dated: NOV. 30, 2015


Robert H. Tembeckjian
Administrator and Counsel to the Commission
(John J. Postel and Kathleen Martin, Of
Counsel)

THE FOLLOWING EXHIBIT IS AVAILABLE AT WWW.CJC.NY.GOV
EXHIBIT A: JUDGE'S LETTER OF RESIGNATION

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 C. CERRATO,

a Judge of the Yonkers City Court,
Westchester 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Daniel W. Davis, Of Counsel) for the Commission
Scalise Hamilton & Sheridan LLP (by Deborah A. Scalise) for the Respondent

The matter having come before the Commission on October 1, 2015; and
the Commission having before it the Stipulation dated September 17, 2015; and
respondent having averred that on October 1, 2015, he will submit the appropriate papers


to the Office of Court Administration and the New York State and Local Retirement System stating that he will relinquish his judicial position on January 1, 2016, and having affirmed that upon vacating his judicial office, 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 become public upon being signed by the signatories and that the Commission's Decision and Order thereto will become public; now, therefore, it is

DETERMINED, on the Commission's own motion, that the Stipulation is accepted and that the pending matter is concluded according to the terms of the Stipulation, subject to being revived according to the terms of the Stipulation; and it is

SO ORDERED.

Mr. Cohen was not present.

Dated: October 7, 2015



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 C. CERRATO,

STIPULATION

A Judge of the Yonkers City Court,
Westchester County.


IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Robert C. Cerrato (“Respondent”), who is represented in these proceedings by Deborah A. Scalise of Scalise Hamilton & Sheridan LLP, as follows:

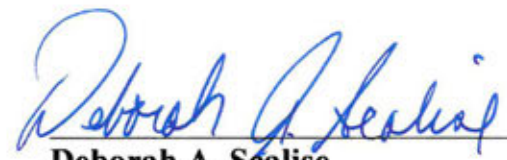
1. Respondent has been a Judge of the Yonkers City Court, Westchester County, since 2001. Respondent’s current term expires on December 31, 2020. Pursuant to Judiciary Law section 23, Respondent would be required to retire his judicial position on December 31, 2017, having attained the age of seventy.
2. Respondent was served with a Formal Written Complaint dated February 20, 2015, containing two charges alleging that:
 - A. From in or about the fall of 2011 to in or about May 2012, Respondent invoked his judicial title on several occasions when he called third parties on behalf of his daughter regarding incidents arising from the matrimonial dispute between his daughter and her then-husband; and
 - B. Approximately two to three times per year from in or about 2009 until in or about November 2013, Respondent charged a flat fee of \$200 to officiate at weddings that took place outside of the City of Yonkers, notwithstanding

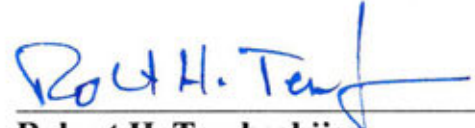
General Municipal Law § 805-b, which limits the fees for the solemnization of a marriage to \$100.

3. Respondent enters into this Stipulation in lieu of filing an Answer to the Formal Written Complaint.
4. Respondent avers that on October 1, 2015, he will submit the appropriate papers to the Office of Court Administration and the New York State and Local Retirement System, stating that he will relinquish his judicial position on January 1, 2016.
5. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from the date of a judge's resignation to complete proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.
6. Respondent affirms that, upon vacating his judicial office, he will neither seek nor accept judicial office at any time in the future.
7. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings, pending verification that Respondent filed the appropriate papers on October 1, 2015.
8. Respondent understands that, should he abrogate the terms of this Stipulation by, for example, failing to submit the appropriate papers on October 1, 2015, or holding any judicial position at any time after January 1, 2016, the present proceedings before the Commission will be revived and the matter will proceed to a hearing before a referee.

9. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will become public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: September 16, 2015 
Honorable **Robert C. Cerrato**
Respondent

Dated: 9/16/15 
Deborah A. Scalise
Scalise Hamilton & Sheridan LLP
Attorney for Respondent

Dated: 9/17/2015 
Robert H. Tembeckjian
Administrator and Counsel to the Commission
(**Daniel W. Davis**, Of Counsel)

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Investigation of
Complaints Pursuant to Section 44,
Subdivisions 1 and 2, in Relation to

DAVID P. DANIELS,

a Justice of the Guilford Town Court,
Chenango 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Honorable David P. Daniels, *pro se*

The matter having come before the Commission on December 10, 2015;
and the Commission having before it the Stipulation dated November 24, 2015; and


Judge Daniels having tendered his resignation by letter dated October 21, 2015, and having affirmed that upon vacating his judicial office, he will neither seek nor accept judicial office at any time in the future, and having waived confidentiality as provided by Judiciary Law §45 to the extent that the Stipulation will become public upon being signed by the parties and that the Commission's Decision and Order with respect thereto will become public; now, therefore, it is

DETERMINED, on the Commission's own motion, that the Stipulation is accepted and that the pending matter is concluded according to the terms of the Stipulation, subject to being revived according to the terms of the Stipulation; and it is

SO ORDERED.

Judge Acosta was not present.

Dated: December 10, 2015



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 Investigation of Complaints
Pursuant to Section 44, subdivision 1 and 2,
of the Judiciary Law in Relation to

DAVID P. DANIELS,

STIPULATION

A Justice of the Guilford Town Court,
Chenango County.

THE FOLLOWING IS HEREBY STIPULATED AND AGREED by and between
Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the
Honorable David P. Daniels:

1. David P. Daniels has been a Justice of the Guilford Town Court, Chenango County, since 1995. His current term expires on December 31, 2017. He is not an attorney.
2. Judge Daniels was apprised by the Commission in August 2015 that it was investigating a complaint filed by its Administrator pursuant to Section 44(2) of the Judiciary Law, alleging that in various traffic cases and eviction proceedings, Judge Daniels exhibited impatience and intemperance toward participants, made comments suggesting that he had prejudged the cases, failed to make proper audio recordings of court proceedings as required, engaged in unauthorized *ex parte* communications and, in one case involving his former attorney, presided without disclosing the relationship to the parties.

3. Judge Daniels tendered his resignation as Guilford Town Justice by letter dated October 21, 2015. A copy of his resignation letter is annexed as Exhibit 1.

4. Judge Daniels affirms that, upon vacating his judicial office, he will neither seek nor accept judicial office at any time in the future.

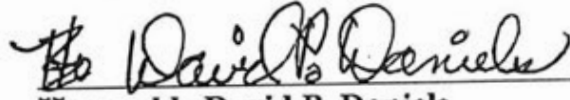
5. Judge Daniels understands that, should he seek to withdraw from this Stipulation at any time, or rescind his letter of resignation, or remain in office beyond October 31, 2015, or otherwise abrogate the terms of this Stipulation, the Commission's investigation of the complaint will be revived.

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

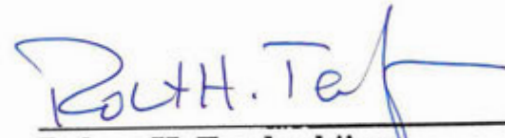
7. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

8. Judge Daniels waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will be made public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: 11-19-15


Honorable David P. Daniels

Dated: 11-24-15


Robert H. Tembeckjian
Administrator and Counsel to the Commission
(Thea Hoeth, Of Counsel)

THE FOLLOWING EXHIBIT IS AVAILABLE AT WWW.CJC.NY.GOV
EXHIBIT 1: JUDGE'S LETTER OF RESIGNATION

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 P. FLEMING,

a Justice of the Hamburg Village Court,
Erie 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Daniel M. Killelea for the Respondent

The respondent, Andrew P. Fleming, a Justice of the Hamburg Village
Court, Erie County, was served with a Formal Written Complaint dated September 25,

2014, containing one charge. The Formal Written Complaint alleged that respondent engaged in prohibited political activity by making improper contributions to political organizations and candidates through his law firm and his spouse. Respondent filed a verified Answer dated October 18, 2014.

On May 8, 2015, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, 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 18, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Hamburg Village Court, Erie County, since 2006. His current term expires on April 2, 2018. Respondent was admitted to the practice of law in New York in 1986.
2. Respondent is a partner in Chiacchia & Fleming, LLP, a law firm with offices in Hamburg, New York. Respondent has been a law partner with Daniel J. Chiacchia since 1990 and formed Chiacchia & Fleming, LLP, in August 1998.
3. As set forth below, from May 2006 through December 2013 respondent directly and/or indirectly engaged in prohibited political activity when (A) through his law firm Chiacchia & Fleming, LLP, he made 71 prohibited ticket purchases to politically sponsored dinners or other functions totaling \$11,960.55, (B) through his

law firm, Chiacchia & Fleming, LLP, he made 27 prohibited contributions to political organizations and candidates for elective office, totaling \$12,533.48, and (C) through his spouse, Mary Pat Fleming, he made two prohibited ticket purchases to politically sponsored dinners or other functions totaling \$400.

4. From January 2007 through April 2013, as set forth in Schedule A to the Agreed Statement, respondent was responsible for 71 prohibited ticket purchases made through Chiacchia & Fleming, LLP, to politically sponsored dinners or other functions, totaling \$11,960.55. None of these contributions were made during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules Governing Judicial Conduct ("Rules").

5. From January 2007 through March 2013, as set forth in Schedule B to the Agreed Statement, respondent was responsible for 17 prohibited contributions made through Chiacchia & Fleming, LLP, to political organizations and candidates for elective office, totaling \$6,450. None of these contributions were made during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules.

6. From May 2006 through December 2013, as set forth in Schedule C to the Agreed Statement, respondent was responsible for ten prohibited contributions made through Chiacchia & Fleming, LLP, to political organizations and candidates for elective office, totaling \$6,083.48. Although each of these contributions was made

during respondent's "window period," none were made to purchase tickets to politically sponsored dinners or other functions, as permitted by Section 100.5(A)(2)(v) of the Rules, or for any other purpose authorized in the Rules.

7. From February 2011 through April 2011, as set forth in Schedule D to the Agreed Statement, respondent was responsible for two contributions in the form of prohibited ticket purchases made by his wife, Mary Pat Fleming, using a bank account held jointly by her and respondent, to politically sponsored dinners or other functions, totaling \$400. None of these contributions were made during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules.

Additional Factors

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

9. Notwithstanding that many of the prohibited contributions and ticket purchases made through respondent's law firm were on checks signed by his law partner, respondent recognizes that it is his obligation as a part-time judge to ensure that his law firm acts in a manner consistent with the Rules, which prohibit such contributions and purchases as are at issue here.

10. Respondent regrets his failure to abide by the Rules with respect to political activity and pledges to conduct himself in accordance with the Rules for the remainder of his service as a judge.

11. Respondent's public admonition in 2013 – for acting as an attorney for a crime victim and the victim's family notwithstanding that he had presided over prior proceedings in the underlying criminal case – was unrelated to the instant matter.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(1)(h) and 100.5(A)(1)(i) 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.

Respondent has acknowledged that since becoming a judge in 2006, he was responsible for numerous prohibited contributions to political organizations and candidates, constituting political activity that is specifically barred by the ethical standards.

A judge or judicial candidate cannot “directly or indirectly” engage in partisan political activity except for certain limited activity during a prescribed “window period” in connection with the judge's campaign for judicial office (Rules, §§100.5, 100.0[Q]). These limitations have been carefully drawn to address “the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary” (*Matter of Raab*, 100 NY2d 305, 316 [2003]). As the Court of Appeals has held, the ethical restrictions are not only constitutionally

sound, but fair and necessary to “preserv[e] the impartiality and independence of our state judiciary and maintain[] public confidence in New York State’s court system” (*Id.* at 312).

Among these restrictions, a judge or judicial candidate is specifically prohibited from “making a contribution to a political organization or candidate” or purchasing tickets to attend politically sponsored events (Rules, §§100.5[A][1][h], [i]), except that a candidate, during the prescribed “window period,” may with some restrictions purchase two tickets to attend politically sponsored functions (Rules, §100.5[A][2][v]). *See Matter of Raab, supra*; *Matter of Mullin*, 2001 NYSCJC Annual Report 117; *Matter of Laurino*, 1989 NYSCJC Annual Report 105; *see also, e.g., Adv Ops 99-18, 96-29, 94-66, 92-128, 92-97, 91-68*. Contributions and ticket purchases by a part-time judge’s law firm are subject to the same ethical restrictions, since judges “cannot do indirectly that which is forbidden explicitly” (*Adv Op 96-29*). As the Advisory Committee on Judicial Ethics (“Advisory Committee”) has stated:

When a law firm, whose members include a part-time judge, donates money to a political campaign, it is correctly presumed that a percentage of the donation comes from the judge. If the judge is an associate or a partner of the firm, such donations give the clear appearance that the judge has endorsed the donee’s candidacy. Such contributions, therefore, may not be made in the firm’s name. (*Adv Op 88-56*)

See Matter of Burke, 2015 NYSCJC Annual Report 78; *Matter of Kelly*, 2012 NYSCJC Annual Report 113; *Matter of DeVaul*, 1986 NYSCJC Annual Report 83.

From 2006 to 2013, respondent’s law firm, Chiacchia & Fleming, LLP,

made 98 improper political contributions totaling \$24,494. Of these, 71 contributions were for tickets to political events that were not within respondent's window periods for permissible political activity and thus were prohibited by Rule 100.5(A)(1)(i). The remaining 27 payments were contributions to political organizations and candidates; while 17 of these were made during respondent's window periods, such contributions are always impermissible under the ethical rules.

While many of these contributions and ticket purchases were through checks signed by respondent's law partner, the payments were improper regardless of who signed the checks (*see* Adv Op 96-29). Since the checks came from respondent's law firm, where he was a name partner, there was at least an appearance that he was responsible for or endorsed those donations, or that at least a portion of the funds was attributable to him. Respondent has acknowledged that it is his obligation as a part-time judge to ensure that his law firm acts in a manner consistent with the ethical limitations on political activity that are incumbent upon him.

Respondent has also acknowledged that he was also responsible for two prohibited political contributions totaling \$400 made by his spouse, using their joint bank account, to purchase tickets to political events. Since these contributions were not made within respondent's window periods, they were inconsistent with Rule 100.5(A)(1)(i). The Advisory Committee has stated that such contributions by a spouse from a joint account are inadvisable since, regardless of who writes the check, the payments can be viewed as coming from jointly held funds, and thus indirectly from the judge (*see* Adv

Ops 98-111, 96-29).

We note that respondent has acknowledged that all the contributions at issue were inconsistent with the ethical standards and that he has pledged to conduct himself in accordance with the Rules for the remainder of his service as a judge. In accepting the stipulated sanction of admonition, we remind every judge and judicial candidate of the obligation to know and abide by the ethical rules as interpreted and applied by the Commission and the Advisory Committee.

We are constrained to reply to our colleague Mr. Emery's opinion that the rule barring political contributions by a judge or judicial candidate impermissibly treads on First Amendment rights. In our view, nothing in the recent Supreme Court decision, *Williams-Yulee v. Florida Bar*, 575 US ___, 135 S Ct 1656, 191 L Ed2d 570 (2015), which upheld a Florida rule prohibiting judicial candidates from personally soliciting campaign contributions, permits a judge to make contributions to political candidates or organizations, as respondent did here, or otherwise undermines New York's rules limiting political activity by judges and judicial candidates. Indeed, in affirming that political speech by judicial candidates can be regulated by narrowly tailored restrictions that serve a compelling state interest, the Supreme Court in *Williams-Yulee* applied an analysis similar to that in *Matter of Raab*, *supra*, where this state's highest court in 2003 considered a vigorous constitutional challenge to New York's restrictions on political activity. In upholding the New York rules, the *Raab* court, applying a strict scrutiny analysis, noted the state's compelling interest in ensuring that its

judicial system “is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption” and concluded that the challenged restrictions were narrowly tailored to further those interests (*Raab, supra*, 100 NY2d at 315).

The *Raab* court specifically addressed the rule at issue in the matter before us, the ban on political contributions by judges and judicial candidates (§100.5[A][1][h]), concluding that such a limitation serves a valid state objective and is constitutionally permissible. While our dissenting colleague treats the *Raab* decision as though the Court of Appeals intended to limit application of the contributions ban to facts that are identical to the conduct in *Raab*, we find nothing in the Court’s rationale in *Raab* to support such a conclusion. Though the particular facts in *Raab* were different, there is no suggestion in the *Raab* decision that political contributions of the kind here would be permitted under the applicable rule.

In the wake of *Republican Party of Minn. v. White*, 536 US 765 (2002), some commentators, including our dissenting colleague, believed that the Supreme Court had greatly expanded a judge’s right to engage in traditional forms of political activity, including personally soliciting campaign funds (*see Weaver v. Bonner*, 309 F3d 1312 [11th Cir 2002]; *Matter of Chan*, 2010 NYSCJC Annual Report 124 [Emery Dissent]). Now the Supreme Court, applying the same standards, has upheld a rule barring judicial candidates from engaging in such solicitations, while underscoring that “judges are not politicians” and that judicial elections may be regulated differently from political

elections (*Williams-Yulee, supra*, 191 L Ed2d at 580, 585). While the particular conduct in the case before us is different than in *Raab* and *Williams-Yulee*, it is clearly prohibited by a rule in New York that has not been diminished or weakened by prior precedent.

The Commission is not a court, and it is our role to interpret and apply the ethical rules, not to make broad constitutional pronouncements. To the extent that any aspect of the rules is constitutionally challenged, we believe that the courts are in the best position to make such a determination.

As the Commission has previously stated, “the rules governing political activity for judges and judicial candidates seek to achieve a reasonable balance between the goals of prohibiting judges from being involved in politics and permitting judges to campaign effectively,” while respecting their First Amendment rights (*Matter of Campbell*, 2005 NYSCJC Annual Report 133).

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Stoloff and Judge Weinstein concur.

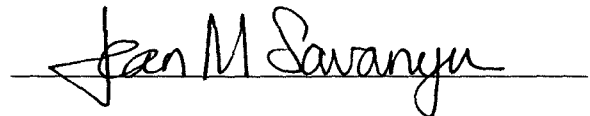
Mr. Emery dissents in an opinion and votes to reject the Agreed Statement of Facts.

Mr. Belluck and Mr. Harding did not participate.

CERTIFICATION

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

Dated: August 20, 2015

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line.

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

ANDREW P. FLEMING,

a Justice of the Hamburg Village Court,
Erie County.

**DISSENTING OPINION
BY MR. EMERY**

INTRODUCTION

A fundamental right of the American political system is the right to support political candidates who reflect one's view, hopes and dreams for a better future. We support these candidates with our votes, our voices and our money. The Supreme Court has jealously policed any government intrusions into the rights of citizens to participate in the political process. This right of political expression is the basic guarantee of the First Amendment on which our elective system – the system based on the consent of the governed – operates.

We start from this basic proposition when we evaluate any necessity to compromise or abridge the right to full political participation. The Supreme Court has repeatedly affirmed that a compelling governmental interest is the only basis on which to legitimately diminish the right to full political participation and, then, the method of diminution must be the least restrictive one available that achieves the government's

compelling need.

This is the simplified analysis of the Court in the recent case of *Williams-Yulee v. Florida Bar*, 575 US ___, 135 S Ct 1656, 191 L Ed2d 570 (2015), in which Chief Justice Roberts, in a 5-4 decision, concluded that a compelling governmental interest in a judiciary that does not appear corrupted supports a rule that prohibits judicial candidates from directly soliciting campaign donations from voters who will be appearing before the judge.

Regrettably, this cabined, well-reasoned Supreme Court decision appears to be interpreted by this Commission as a license to accelerate this Commission's proclivity to discipline judges for all manner of campaign activity that has no relationship to this narrowly defined compelling interest. The case before us, for example, is the exact opposite situation – a judge is deemed to have engaged in impermissible political activity because the judge's law firm and the judge's spouse made political contributions which the judge himself was prohibited from making – conduct that is vastly different, and quite benign, as compared to the corrupting perception of judges soliciting money. Ironically, the Commission agrees to discipline Judge Fleming for such conduct even though it cannot – because the New York rules allow it – discipline a New York judge whose campaign committee (with the knowledge of the judicial candidate) solicits contributions from people and parties who appear before the judge – almost the same conduct prohibited in *Williams-Yulee*.

I write separately, below, because I strongly believe that this is a road that the Commission should not travel. Campaign rule enforcement for judicial elections

should be handled by some other body as a discrete subset of enforcement of judicial conduct. If we are going to continue on this path, then we had better hew to the Constitution and the basic tenets of respect for the rights of judges to express themselves both at a personal level and in the judicial campaign context – a context that is complex bordering on byzantine – that neither candidates nor this Commission has the expertise to fathom given the feudal vagaries of City versus Long Island versus Upstate judicial selection gamesmanship. Put simply, we are in way over our heads and we are regularly drowning fundamental constitutional rights in our flailing attempts to make sense of the political realities of New York State regional political judicial selection mechanisms. Posturing itself as regulator of judicial elections in New York is a task this Commission has attempted and failed. We should quit this business or, at a minimum, exercise the restraint that the federal Constitution requires when governmental regulators tamper with precious First Amendment rights.¹

RESPONDENT'S CASE

The Agreed Statement of Facts accepted by the majority publicly disciplines Judge Fleming for “directly and/or indirectly” engaging in prohibited political activity by making political contributions “through his law firm” and “through his

¹ I recognize that each of my colleagues, in his or her own way, is a devotee of constitutional principles. But rather than wrestle with the commands of First Amendment analysis, the majority opts to pay lip service to *Raab* and the Supreme Court precedent without fulfilling our obligation to our oath to uphold constitutional doctrine by rigorous analysis of their reach and import. Any decision – the majority’s decision – that punishes a judge for core electoral speech and activity, without any analysis of the judge’s specific conduct in the context of a compelling governmental interest that is actually undermined by that speech activity, abdicates our basic obligation. Passive acquiescence, in the sheep’s clothing of the pretension that we are not a court, degrades our role as much as it fails fundamental First Amendment tests.

spouse,” notwithstanding that the Agreed Statement contains no facts indicating whether the judge was personally involved in, or was even aware of, any of the contributions at issue. Omitting those critical facts, the stipulation simply states that Judge Fleming “was responsible for” the contributions made by his law firm and his spouse, which are deemed to violate the rule barring judges from “making a contribution to a political organization or candidate” (Rule 100.5[A][1][h]). Because I believe, for reasons set forth below, that the rule itself is of doubtful constitutionality and that, in any case, the unclear, ambiguous facts before us are insufficient to support a finding that Judge Fleming violated the provision, I must dissent from accepting the Agreed Statement.

HISTORY AND BACKGROUND

In New York, every judge of the state unified court system is required to “refrain from inappropriate political activity,” as described in Section 100.5 of the Rules Governing Judicial Conduct. Essentially, judges are prohibited from “directly or indirectly” engaging in any partisan political activity, except – to a strictly limited extent – in connection with the judge’s own campaign for judicial office during a prescribed “window period” before and after a nominating convention, primary or general election. These rules and their interpretations are inordinately complex and only a cadre of sophisticated election practitioners even pretend to be able to apply them. They are also far more relevant in some parts of the State – outside of New York City – where there are many more contested elections than in the City where, for the most part, political leaders select judges.

Among other restrictions, a judge or judicial candidate may not endorse

other candidates or participate in their campaigns, make speeches on behalf of a political organization or candidate, attend political gatherings, or solicit funds for or make a contribution to a political organization or candidate (Rules, §§100.5[A][1][c], [d], [e], [f], [g], [h]). This particular combination of restrictions, the New York Court of Appeals has told us, is designed to ensure “that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption,” while simultaneously “respect[ing] the First Amendment rights of judicial candidates and voters” (*Matter of Raab*, 100 NY2d 305, 315 [2003]). Applying a strict scrutiny analysis and finding a compelling interest, the Court in *Raab* rejected a First Amendment challenge to the political activity restrictions at issue – including the ban on contributions.² *Raab* was decided after a Supreme Court decision invalidated a Minnesota rule prohibiting judicial candidates from “announcing” their views on disputed legal and political issues (*Republican Party of Minn. v. White*, 536 US 765 [2002]).

Buttressed by *Raab*, the Commission has ranged far and wide, punishing judges for political activity in contexts far beyond the limited, factually different scenarios of *Raab*, without engaging in any basic First Amendment analysis of whether a compelling governmental interest justified precluding the specific conduct at issue.³ And

² Prior to serving on this Commission, I represented the respondent-judge in *Raab* before the Commission and the Court of Appeals.

³ *E.g.*, *Matter of Burke*, 2015 NYSCJC Annual Report 78, and *Matter of Kelly*, 2012 NYSCJC Annual Report 113 (contributions by judge’s law firm); *Matter of Michels*, 2012 NYSCJC Annual Report 130 (misleading campaign literature); *Matter of McGrath*, 2011 NYSCJC Annual Report 120 (campaign literature conveyed bias); *Matter of Chan*, 2010 NYSCJC Annual Report 124 (personal solicitation of campaign contributions and campaign literature that was misleading and conveyed bias); *Matter of Herrmann*, 2010 NYSCJC Annual Report 172 (nominated a

the Advisory Committee on Judicial Ethics has issued opinions concluding that particular scenarios are inconsistent with the political activity rules and therefore prohibited, without providing even lip service to the First Amendment interests at issue.⁴

Essentially, for New York State, *Raab* opened a constitutionally bereft sluice gate of judicial campaign regulation by this Commission and the Advisory Committee that, in abandoning a First Amendment analytical framework, has descended to ad hoc, pure rational basis policy-making as opposed to the rigorous First Amendment compliance unquestionably required both by *Raab* itself, and by *Williams-Yulee* and *White*.

Though this Commission, and those who advocate for controlling unseemly

candidate at a caucus); *Matter of Yacknin*, 2009 NYSCJC Annual Report 176 (solicited political support in court from an attorney appearing before her); *Matter of King*, 2008 NYSCJC Annual Report 145 (served as a party chair, circulated petitions for and endorsed other candidates); *Matter of Kulkin*, 2007 NYSCJC Annual Report 115 (misrepresented facts about his opponent); *Matter of Spargo*, 2007 NYSCJC Annual Report 107 (spoke at a party fund-raiser and engaged in “unseemly” political activity including buying drinks for patrons at a bar when he was a candidate); *Matter of Farrell*, 2005 NYSCJC 159 (made phone calls supporting another candidate and made a prohibited payment to a political organization); *Matter of Campbell*, 2005 NYSCJC Annual Report 133 (endorsed other candidates); *Matter of Schneier*, 2004 NYSCJC Annual Report 153 (improper use of campaign funds).

⁴ To cite just a few examples: the Committee has opined that a judge who is not a candidate may not attend a fund-raiser for a local school board candidate (Adv Op 99-18) or purchase tickets to attend a social event sponsoring school board candidates (Adv Op 88-129); may not attend a party celebrating a neighbor’s election as a town board member even if the event is not sponsored by a political organization (Adv Op 00-113) or attend a picnic sponsored by a political party (Adv Op 90-11); may not award prizes in a high school essay contest at a political club (Adv Op 89-26) or speak at a political club about the function of the Family Court (Adv Op 88-136); may not introduce judicial candidates at a bar association-sponsored event (Adv Op 96-49); may not accompany a spouse who is a candidate for public office to political functions (Adv Op 92-129), march in a parade with his/her spouse-candidate, or appear at a political event held by the spouse in the marital home (Adv Op 06-147); further, a judge must advise his/her spouse not to place signs endorsing political candidates on the property where the judge and spouse reside, even if the spouse is the sole owner of the property (Adv Ops 99-118, 07-169), and may not attend a candlelight vigil on behalf of crime victims (Adv Op 04-91). The notion that any of these rulings could survive a First Amendment challenge is patently absurd.

election tactics, may like a Marquis of Queensbury approach to judicial contests, telling judges who are campaigning that they cannot hit below the belt is plainly unconstitutional. New York has chosen to select most of its judges using elections. Along with this choice comes the constitutional guarantees of free speech that allow for gloves off behavior even in judicial elections. And of course, in reality, New York judicial elections, even when purportedly regulated by this Commission and the Advisory Committee, are actually little better than cage fights. The hallucination that this Commission and the Advisory Committee are somehow civilizing these contests is magical thinking.⁵

THE SUPREME COURT'S RECENT RULING

Thirteen years after *White*, the Supreme Court in *Williams-Yulee v Florida Bar* upheld the application of a Florida rule that precluded otherwise protected speech (personal solicitation of campaign contributions) by judicial candidates. Accepting that strict scrutiny requires a compelling interest as a basis to regulate judicial speech in campaigns, the Court concluded that the rule was narrowly tailored to promote the State's

⁵ Instances of salacious and misleading campaign advertising by judicial candidates have persisted since the infamous 1968 commercial by Supreme Court candidate Sol Wachtler (later New York's Chief Judge), showing the candidate strolling through a jail and slamming a cell door while pledging to "get the thieves and muggers and murderers into these cells." See, e.g., *Matter of Polito*, 1999 NYSCJC Annual Report 129 (candidate ran graphic television ads portraying a masked man with a gun attacking a woman outside her car, while a voice declared the candidate would "crack down on crime" as a cell door slammed shut; another ad vowed that he would not "send convicted child molesters home for the weekend" and would "stick his foot in the revolving door of justice," with dramatic footage of a foot jammed in a door); *Matter of Hafner*, 2001 NYSCJC Annual Report 113 (candidate's campaign literature attacked the record of his opponent, the incumbent judge, in dismissing cases and said, "Soft judges make hard criminals!"); *Matter of Kulkin*, 2007 NYSCJC Annual Report 115 (candidate distorted and misrepresented facts about his opponent, falsely implying that she had refused to handle parking tickets and thereby deprived the City of \$400,000 in revenue).

compelling interest in a fair and impartial judiciary free from corruption and the appearance of corruption. Writing for the majority, Chief Justice Roberts applied a stringent First Amendment analysis to the rule at issue, carefully weighing the competing interests and issues at stake. While opining that judicial candidates may be treated differently from campaigners for political office since “the role of judges differs from the role of politicians,” he underscored the narrow scope of the Court’s ruling on the particular facts presented, stating: “We have emphasized that ‘it is the rare case’ in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. . . . This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny” (*supra*, 191 L Ed2d at 585, 584).

CONSTITUTIONAL ANALYSIS

Rather than read *Williams-Yulee* as an endorsement of any and all restrictions on political activity by judges and judicial candidates that appear to be “desirable” as a matter of preferred policy, we should respect the Court’s clear message: that judicial campaign speech and conduct are core First Amendment activity, that a compelling interest must be identified if a narrow rule is to be upheld, that personal solicitation of campaign contributions by judicial candidates is such an interest that cuts to the core of judicial integrity, that strict scrutiny requires analysis of the campaign activity at issue to determine whether the compelling governmental interest (appearance of corruption) legitimately requires restriction of that particular activity, and that the rule restricting judicial speech is the least restrictive available to support the compelling governmental interest at stake.

Plainly, *Williams-Yulee* did not address any campaign activity beyond judicial candidates directly soliciting funds. Notably, neither *Williams-Yulee* nor *Raab* addressed the New York common practice of judicial candidates and sitting judges soliciting money through committees, knowing who contributed, and soliciting funds through these same committees from lawyers and entities which will and do appear before the candidate for judicial office, though even this practice is mentioned and not criticized as raising constitutional questions in the *Williams-Yulee* decision (191 L Ed2 at 588). Of course, the ultimate hypocrisy in our campaign regulatory scheme is the failure to restrict these donations in a meaningful way.⁶ Until we do, we will have no moral or legal high ground to restrict far more mundane and benign political judicial behavior, as we do now. Of course, in a whisper we all acknowledge that donations from lawyers and entities to judges before whom they appear are the sanctified lifeblood of judicial campaigns even though such donations are plainly as corrupting as the solicitations in

⁶ An administrative rule adopted by the court system in 2011 to prevent judges from presiding over cases involving their largest contributors only mildly mitigates the problem. Rule 151.1 (22 NYCRR §151.1), which provides that “no case shall be assigned” to a judge when the lawyers or parties, within the prior two years, have donated \$2,500 or more, or collectively contributed \$3,500 or more, to the judge’s campaign, while no doubt well-intended, has significant loopholes and does far too little to address the problems inherent in our system of electing judges under the existing rules. Since the terms of full-time judges in this state range from six to 14 years, the two-year cut-off period is plainly inadequate. While contributions by an attorney’s law firm are included within the threshold limits, personal contributions by the attorney’s law partners, colleagues, friends and relatives are not included; nor are contributions by a party’s family members, friends, etc., or contributions by unnamed non-party entities that have may have a direct interest in litigation, such as banks, assignees, entities liable as guarantors or who buy an interest in litigation. If \$2,500 is a meaningful threshold for full-time judges, whose campaigns, at least in New York City, routinely cost \$100,000 or more, it should certainly be lower at the town and village level, where most of this state’s judges preside. To prevent judge-shopping, the rule includes a waiver provision that may be of little practical value. Nor, of course, does the rule bar judges from doling out lucrative assignments to the lawyers and law firms that routinely contribute to judicial campaigns.

Williams-Yulee. But, wink, wink, as long as we do not have public financing of campaigns, no one can handle the fundamental truth that New York cannot have judicial elections without such plainly corrupting contributions.

Beyond this glaring hypocrisy, which violates the First Amendment itself as a result of basic over- and underbreadth defects (*see Matter of Herrmann, supra*, Emery Dissent; *Matter of Yacknin, supra*, Emery Dissent; *Matter of King, supra*, Emery Concurrence; *Matter of Spargo, supra*, Emery Concurrence/Dissent; *Matter of Farrell, supra*, Emery Concurrence; *Matter of Campbell, supra*, Emery Concurrence), neither *Williams-Yulee* nor *Raab* addressed the myriad issues that lead to preclusion of judicial speech that the Advisory Committee and this Commission routinely and blithely prohibit. And those controlling cases certainly never addressed the issues now before the Commission in the cases here (*Fleming* and *Matter of Sakowski*, also issued today): contributions by a judge to national candidates and political organizations, political contributions by a judge's spouse, and contributions by the law firm of a part-time judge to local candidates and political organizations. Nothing in *Williams-Yulee* or *Raab* compels, let alone suggests, that the rule banning such conduct could withstand strict scrutiny. Nonetheless, in finding misconduct here, the Commission has chosen to ignore the Supreme Court's and *Raab*'s clear analytical framework for determining whether the particular political activity fits within the compelling interest these courts have set forth.

Contributions by Judge's Law Firm

With respect to the 98 contributions by Judge Fleming's law firm over seven years – 71 of which were for the purchase of tickets to attend political events that

were not within Judge Fleming’s “window period” – the majority accepts the stipulation that by virtue of these contributions, for which he “was responsible,” the judge “directly and/or indirectly” engaged in prohibited political activity by violating the ban on contributions, Rule 100.5(A)(1)(h). Critically, the majority provides no analysis as to why such conduct violates a compelling governmental interest and how the Court of Appeals’ stated rationale in *Raab* for upholding the ban – preventing a candidate from “buying” a judgeship, or the appearance of doing so⁷ – can justify applying the rule in such circumstances.

The Court in *Raab* had stated:

The contribution limitation is intended to ensure that political parties cannot extract contributions from persons seeking nomination for judicial office in exchange for a party endorsement. It achieves this necessary objective by preventing candidates from making contributions in an effort to buy – and parties attempting to sell – judicial nominations. It also diminishes the likelihood that a contribution, innocently made and received, will be perceived by the public as having had such an effect. Needless to say, the State’s interest in ensuring that judgeships are not – and do not appear to be – “for sale” is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function. (*Id.* at 315-16)

Ignoring that rationale, the majority here, in finding misconduct, cites several Advisory Opinions that are completely devoid of any First Amendment analysis and that ground their conclusions in speculation and conjuring, suggesting that personal

⁷ In *Raab*, the Court found that the candidate violated the rule by agreeing, prior to being nominated, to make a \$10,000 contribution to the Nassau County Democratic Committee, conveying the appearance that the payment was an effort to “buy” a judgeship (*supra*, 100 NY2d at 315-16).

involvement in such contributions is irrelevant since a judge is strictly liable under the Rules for the firm's expenditures, even if he was unaware of them, since they are prohibited "indirect" political contributions. This reasoning by the Advisory Committee, which our Commission adopts, tramples First Amendment principles and serves only to stifle protected speech and conduct rather than to support any realistic or legitimate ethical or governmental concern. It is government regulation of judicial speech run amok.

However doubtful the constitutionality of an absolute ban on political contributions by a judge, it is even more unlikely that such a ban could be upheld as applied to contributions by a judge's law firm, especially on the scant, ambiguous facts presented here. While it is stipulated that "many" of the checks for the firm's contributions were signed by the judge's law partner, the Agreed Statement contains no information indicating whether Judge Fleming himself signed *any* of the checks, whether he was otherwise involved in these expenditures or was even aware of them, or whether he attended any of the political events for which tickets were purchased (though since he was not charged with attending such events, we can assume he did not). Did he intentionally make the contributions "through his law firm," indirectly, in order to evade the contributions ban, or did he have no role in them whatsoever? The Agreed Statement does not tell us. Did he believe that the law firm was a separate entity from its individual members and therefore permitted to make such contributions? We do not know. On the facts before us, with no analysis of whether banning such activity treads on the free expression rights of the judge or others at his law firm – when it plainly does – we simply

cannot properly exercise our powers to sanction a judge.

According to the schedules included in the Agreed Statement, nearly half of the contributions at issue were made at least five years ago, as far back as 2006. Records of political contributions are now readily accessible and searchable online. Our purpose is, hopefully, more elevated than to scour the Internet to ferret out any and all political contributions by a judge or a judge's law firm over the past decade or more and impose discipline in such cases on the dubious premise that any contribution attached to a judge's name, or to any entity with a connection to a judge, warrants punishment.

Contributions by Judge's Spouse

Even more problematic, in my view, is a finding of misconduct based on two contributions by Judge Fleming's spouse, made from a joint checking account, for the purchase of tickets to political events. The facts presented, on their face, are not only unclear and conclusory, but highly patronizing. Whether Judge Fleming's wife made the purchases entirely on her own, or crossed out his name on the checks, or whether the judge was even aware of the expenditures, we do not know, and we are told it does not matter. (Since there is no charge that he engaged in misconduct by attending these events, we can assume he did not attend.) We are told that the judge "was responsible for" these contributions, but whether that means that his wife acted at his direction, or is simply a legal conclusion based on a strict liability standard, we are not told. We are also told that he "made" the contributions "through his spouse," but whether that reflects an attempt to evade the contributions ban or is another legal conclusion, we have no idea. In sum, we simply do not know whether the finding of misconduct is based on a strict

liability standard applied to Judge Fleming's responsibility for his spouse's conduct, although since the underlying facts presented are so sparse, we must assume that it is. To me, that is not only completely unacceptable and unfair to the judge, but an impingement on his spouse's First Amendment right to engage in political activity.

In finding misconduct, the majority cites opinions of the Advisory Committee opining that a spouse's contributions from a joint account "can be viewed as coming from jointly held funds, and thus indirectly from the judge." In fact, in numerous opinions the Committee has adopted a nuanced approach in trying to strike a balance between the principle that a judge cannot "directly or indirectly" engage in political activity and the recognition that a spouse has the right to engage in political activity independently from the judge. As the Committee has stated, the ethical rules "do not restrict the bona fide, independent political activity of a judge's spouse or any other member of the judge's family" (Adv Op 06-147), and plainly, neither the Committee nor this Commission has jurisdiction over the activities of a judge's spouse. The opinions also seem to recognize, as this Commission does not, that a judge's authority to prevent a spouse from engaging in any activity is not unfettered (*e.g.*, a judge should "strongly urge" a spouse not to post political signs on property where the judge resides, but "[o]nce the judge has done so, he/she is not required to take further action" [*see* Adv Ops 07-169, 99-118]). With respect to political contributions, the Committee has opined that since a judge "cannot do indirectly that which is forbidden explicitly," a judge "*may not allow*" the judge's law firm to make such contributions, but it is "*inadvisable*" for a judge's spouse to make political contributions from a joint bank account (Adv Ops 96-29, 88-56)

– pointedly avoiding stating that a judge “may not allow” such conduct by a spouse and applying a more lenient standard to such activity. Two years later, the Committee advised that a spouse with no independent income “should not” make a contribution from a joint checking account “even if the judge’s name is deleted from the check,” since that would not rectify the concern that it was, or could appear to be, an indirect contribution by the judge, but in the same opinion advised that such a spouse may contribute from a separate account in the spouse’s name, even if funded entirely by the judge (Adv Op 98-111). Critically, nothing in these opinions, or in the applicable rules, suggests that a judge is accountable for a spouse’s activities and is subject to discipline if the judge’s spouse engages in conduct that is “inadvisable.” And even to begin to apply the opinions to this case, we would have to know, at the very least, whether Judge Fleming was aware of the contributions or had told his spouse that such contributions are “inadvisable” – which the Agreed Statement does not tell us.

These rules and opinions read and sound like tax or disclosure regulations, not core First Amendment campaign activity. They may be desirable on a rational basis regulatory scheme, but that is not the world we live in when government regulates free expression especially in the electoral process. It is as if the Commission and the Advisory Committee are operating in a universe far away from any governed by the Constitution and are just doing what they think is best without any regard to protections for expressive activity. Who are these spouses who have no voice because their wives became judges? Who is this Commission or this Advisory Committee to tell them to shut up?

In sum, even this Commission, which has stated that “the onus is on the

judge” to ensure that a judge’s law firm does not make prohibited contributions, should recognize that the “strict liability” standard is inapplicable with respect to a spouse’s activity. Most importantly, as with contributions by the judge’s law firm, the finding of misconduct here is entirely devoid of any analysis, let alone seeming awareness of the First Amendment rights of the judge and, in this case, his spouse.

CONCLUSION

As I have previously stated, “too often the Commission has become a peripatetic watchdog of judicial campaign activity” (*Matter of Chan, supra*, Emery Dissent). See *Matter of Michels, supra*; *Matter of Kelly, supra*; *Matter of McGrath, supra*; *Matter of Chan, supra*; *Matter of Herrmann, supra*; *Matter of Yacknin, supra*; *Matter of King, supra*; *Matter of Spargo, supra*; *Matter of Farrell, supra*; *Matter of Campbell, supra*; *Matter of Schneier, supra*; *Matter of Crnkovich*, 2003 NYSCJC Annual Report 99; *Matter of Raab, supra*; *Matter of Watson*, 100 NY2d 290 (2003). In my view, our role should be hands off except in the clearest cases. Ideally, the Chief Judge would direct the Office of Court Administration or another entity to police these rules to the extent they are constitutional. At least then, some group could legitimately claim expertise in their application.

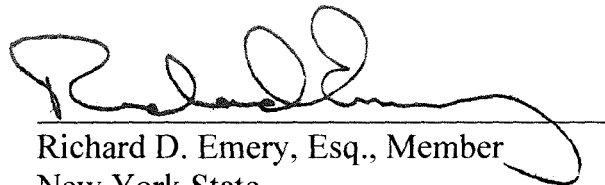
In any event, this is not a case that warrants the Commission’s intervention. This is a case involving constitutionally protected conduct. We should not accept such a result even if the judge, for pragmatic reasons, agrees.

In the past in cases in which I have differed from the majority’s view on judicial campaign issues, I have often concurred – feeling bound *by Raab* – rather than

dissented. This case leads me to dissent because I am voting to reject an Agreed Statement for the reason that I believe that public discipline of this judge is unwarranted in any event. In addition, I do not believe that Rule 100.5(A)(1)(h), notwithstanding its flat prohibition on political contributions by a judge, was intended to sweep within it contributions such as those in this case. Our duty is to interpret the Rules in a way that is consistent with constitutional strictures. No precedent of the Court of Appeals or any other influential court commands that the contributions at issue here be considered as equivalent to those in *Raab*. Thus, I do not here feel compelled to concur.

For these reasons, I vote to reject the Agreed Statement and, respectfully, dissent.

Dated: August 20, 2015

A handwritten signature in black ink, appearing to read "Richard D. Emery", written over a horizontal line.

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

GENE R. HEINTZ,

a Justice of the Sardinia Town Court,
Erie 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Daniel M. Killelea for the Respondent

The respondent, Gene R. Heintz, a Justice of the Sardinia Town Court, Erie
County, was served with a Formal Written Complaint dated August 19, 2015, containing

one charge alleging that he mishandled a Dangerous Dog case. Respondent filed a verified Answer dated October 2, 2015.

On November 30, 2015, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 10, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Sardinia Town Court, Erie County, since January 1, 2014. Respondent's term expires on December 31, 2017. He is not an attorney.

2. In August 2014, while presiding over *Town of Sardinia v Megan Shimburski*, a Dangerous Dog matter pursuant to Section 123 of the Agriculture and Markets Law, respondent failed to be faithful to the law and created the appearance that he was biased in favor of the town, in that he: (A) *sua sponte* sent hearing notices to witnesses whom he speculated would be needed to testify for the town; (B) summarily ended the hearing at the conclusion of the prosecutor's case; (C) did not allow Ms. Shimburski or her witnesses to testify; and (D) issued a decision ruling for the town without including statutorily-mandated conditions consistent with the ruling.

3. On July 31, 2014, Detectives Gregory McCarthy and John Graham

of the Erie County Sheriff's Office affirmed a Dangerous Dog complaint, alleging that on July 25, 2014, a pit bull terrier owned by Megan Shimburski attempted to attack Detective McCarthy as he, Detective Graham and Detective Matthew Noecker approached the home of Ms. Shimburski's parents, looking for Ms. Shimburski's boyfriend.

4. On August 5, 2014, the detectives filed the complaint in the Sardinia Town Court.

5. On August 5, 2014, respondent issued an order under the provisions of Section 123 of the Agriculture and Markets Law directing Sardinia Dog Control Officer Duane DeGolier to seize Ms. Shimburski's two-year-old pit bull terrier, known as "Lady." Respondent also issued a notice to Ms. Shimburski advising her that a hearing concerning her pit bull terrier would be held on August 12, 2014, at 5:00 PM.

6. On August 6, 2014, respondent *sua sponte* sent witness appearance notices addressed to the complainants, Detectives McCarthy, Noecker and Graham, at the Erie County Sheriff's Office, advising them of the hearing date in *Shimburski*.

7. On August 12, 2014, respondent commenced the hearing in *Sardinia v Shimburski*. After testimony by the town's first witness, Detective McCarthy, respondent granted a request by Matthew A. Albert, Ms. Shimburski's attorney, to call two defense witnesses out of order due to scheduling conflicts. After the first witness testified, Sardinia Town Prosecutor Jill S. Anderson objected to the second witness because the second witness had been in the courtroom during the first witness's testimony. Mr. Albert responded that there had been no request to sequester witnesses.

Respondent then prohibited testimony by the second witness.

8. Detectives Graham and Noecker then testified for the town, and Ms. Anderson rested her case. Respondent asked Mr. Albert if he was ready to proceed. Mr. Albert said Ms. Shimburski was going to testify, but needed a brief recess. He also stated that he would make a motion to dismiss.

9. After a short recess, Mr. Albert informed respondent that Erie County Sheriff's deputies had directed Animal Control Officer Joseph Neamon, an intended defense witness, to leave the court before he was called to testify and that such police conduct raised a "serious constitutional issue." Respondent replied, "The problem is, is we have no list of who was to appear on the defense, so I can't say if this person was allowed or not," and "we weren't told that this person was coming ... we needed this knowledge prior and it didn't occur." The following exchange then occurred:

MR. ALBERT: Is that a problem that a witness of mine was kicked out of the courtroom?

THE COURT: No, it's not at all. Obviously, there was an issue.

MR. ALBERT: To me, it's a problem, Your Honor.

THE COURT: Well, you'll have to discover that yourself. Obviously there was an issue elsewhere, outside of this court, that has nothing to do with this case, obviously.

10. Mr. Albert then made an oral motion to dismiss, which Ms. Anderson opposed. Respondent took another short recess.

11. When the proceeding resumed, respondent announced his ruling that Ms. Shimburski's dog was dangerous. Mr. Albert objected, stating that he had not had a

chance to present the rest of his case on behalf of the defense. Respondent replied, “We’re done.” The following exchanges then occurred:

MR. ALBERT: No, you cannot cut me off in the middle of my case, Judge. (Inaudible) --

THE COURT: You were done. You were done, sir. The process was completely finished, sir.

MR. ALBERT: Judge, I said --

THE COURT: Have a seat, sir.

MR. ALBERT: -- that was my motion to dismiss.

THE COURT: And continue listening. It was dismiss -- I am not honoring a dismissal, I am giving [] you my judgment. Let me continue. And that is the end.

MR. ALBERT: I have two witnesses.

THE COURT: There is no other witnesses [sic], sir.

MR. ALBERT: Judge, how am I not allowed to put on my case?

THE COURT: Have a seat, sir. We’re continued. We’re done. Sit down, please.

MR. ALBERT: I made a motion to dismiss. Do you know the procedure?

THE COURT: And I am -- I am not honoring it.

MR. ALBERT: You denied the motion to dismiss --

THE COURT: I heard you out.

MR. ALBERT: -- then I’m supposed to put on my witnesses.

THE COURT: I heard you out and I am not honoring it. That’s my decision.

MR. ALBERT: So I’m allowed to put on my witnesses.

THE COURT: Negative. It’s through.

MR. ALBERT: I said, before I call my witnesses, I’m making a motion to dismiss.

THE COURT: It's not.

MR. ALBERT: You heard that.

THE COURT: It's done.

MR. ALBERT: It's on the record.

THE COURT: Your motion is not accepted.

MR. ALBERT: You know there's a motion to dismiss. I know --

THE COURT: Your motion's not accepted.

MR. ALBERT: -- it's not accepted, so now I'm bringing on my witnesses.

THE COURT: Negative. It's done.

MR. ALBERT: What are you talking about?

THE COURT: The process is over.

12. In his written decision, dated August 12, 2014, respondent did not “order neutering or spaying of the dog” and “microchipping of the dog,” as required by Section 123(2) of the Agriculture and Markets Law following a “dangerous” dog determination by a judge after a hearing.

Additional Factors

13. *Sardinia v Shimburski* was the first hearing or trial over which respondent presided in his judicial career.

14. Respondent provided notice of the *Sardinia v Shimburski* hearing to all interested parties of whom he was aware, including Ms. Shimburski and Town of Sardinia Dog Control Officer Duane DeGolier, who was called about the trial date by the court clerk.

15. Respondent regrets his failure to be and appear to be fair and

impartial and to abide by the Rules in this instance. He avers that he has since familiarized himself with the procedural rules governing hearings and trials and discussed his handling of this case with his Supervising Judge. Respondent has also, since the date of the trial, attended additional judicial training seminars. He pledges to conform himself in accordance with the Rules for the remainder of his term as a judge.

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(4) and 100.3(B)(6) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

In handling a Dangerous Dog case during his first year as a judge, respondent made numerous procedural and substantive errors. Most seriously, he summarily ended the hearing before the attorney for the dog’s owner had completed his case, which resulted in a decision made on an abbreviated record that deprived the dog’s owner of the right to be heard pursuant to law. After the prosecutor had rested her case, respondent announced his decision that the dog was dangerous and that the case was over. Even if he was confused because a defense witness had testified out of order or because a

motion to dismiss was made before the defense had concluded, the attorney's repeated objections that he was "in the middle of my case" and wanted to call two additional witnesses should have prompted respondent to recognize that his decision was premature. Instead, he refused to be dissuaded, reiterating, "You were done ... We're done." It also appears that respondent impermissibly excluded another defense witness from testifying because the witness had been in the courtroom during earlier testimony, although the prosecutor had not requested sequestration and no witness list was provided.

It is a fundamental principle of law that every person with a legal interest in a proceeding – civil or criminal – must be accorded the right to be heard under the law (Rules, §100.3[B][6]). By foreclosing the dog's owner from calling her witnesses, respondent failed to afford an essential element of due process. *See, e.g., Matter of Buchanan*, 2013 NYSCJC Annual Report 103.

Other errors by respondent in the same case include failing to include statutorily-mandated conditions (microchipping and neutering or spaying) in his decision that the dog was dangerous, and *sua sponte* sending witness appearance notices to the complaining witnesses. Even if those individuals would likely be called to testify by the prosecutor, it is not the judge's role to determine who the potential witnesses are and then require their appearance.

"Legal error and judicial misconduct are not mutually exclusive" (*Matter of Reeves*, 63 NY2d 105, 109-10 [1983]). Errors that are clearly contrary to well-established law have been found to constitute misconduct, especially where the conduct involves

deprivation of fundamental rights. *See Matter of Jung*, 11 NY3d 365 (2008) (Family Court judge violated the due process rights of litigants by depriving them of the right to be heard and/or the right to counsel). While some of respondent's errors might be explained by the fact that this was his first hearing in his first year as a judge, the right to be heard is fundamental, and even a new judge must be able to understand and adhere to basic trial procedures. Every litigant has a right to expect that his or her case will be heard by a judge who is familiar with and follows the relevant law.

It is stipulated that since this case, respondent has had additional training and has familiarized himself with procedural rules governing hearings and trials, and that he pledges to adhere to the mandated rules in the future.

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

Judge Klonick, Judge Ruderman, Mr. Belluck, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

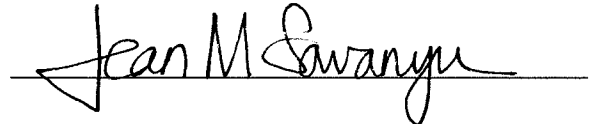
Judge Acosta was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State

Commission on Judicial Conduct.

Dated: December 17, 2015

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line.

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

THOMAS C. KRESSLY,

a Justice of the Urbana Town 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Honorable Thomas C. Kressly, *pro se*

The respondent, Thomas C. Kressly, a Justice of the Urbana Town Court,
Steuben County, was served with a Formal Written Complaint dated January 6, 2015,

containing one charge. The Formal Written Complaint alleged that respondent mishandled \$500 cash bail he received at an arraignment and failed to maintain records of the proceeding as required. Respondent filed an answer dated January 25, 2015.

On February 17, 2015, 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 March 12, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Urbana Town Court, Steuben County, since 1996. Respondent's current term expires on December 31, 2015. He is not an attorney.

2. As set forth below, on or about August 8, 2011, in connection with his arraignment of the defendant in *People v John Doe*, respondent:

A. accepted \$500 cash bail which he failed to deposit into his court account within 72 hours, as required by Section 214.9(a) of the Uniform Civil Rules for the Justice Courts;

B. failed to mechanically record the proceeding, 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; and

C. failed to maintain copies of any and all papers, files, orders, minutes

or notes made by the court, and documents relating to the proceeding, as required by Section 214.11(a)(1) of the Uniform Civil Rules for the Justice Courts.

3. Early in the morning on August 8, 2011, respondent presided over an after-hours arraignment in *People v John Doe* for the Town of Wayne Court. Mr. Doe was charged with Unlawful Imprisonment in the Second Degree, a violation of Section 135.05 of the Penal Law.

4. Respondent did not record the proceeding in *People v John Doe*, 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.

5. Respondent set bail at \$500 cash or \$1,000 bond.

6. During the proceeding, James Doe, the defendant's father, gave respondent \$500 cash for the defendant's bail. Respondent issued receipt #5162 to James Doe, but did not maintain an exact duplicate record of that receipt.

7. After the arraignment, respondent took the \$500 cash bail and placed it in a business-size envelope, which he then placed in a manila envelope.

8. Respondent also placed the *Doe* court records in the manila envelope, and made notations about the case on the outside of the manila envelope, including "BAIL \$500.00 CASH." Respondent took the manila envelope, containing the cash bail and court records, home with him.

9. On August 8, 2011, respondent drove to the Town of Wayne municipal building and gave the manila envelope and its contents, including the business-

size envelope containing the \$500 cash bail, to an unidentified man who indicated that he would forward it to the Wayne Town Court.

10. Respondent failed to deposit the \$500 cash bail posted by the defendant into his justice court account within 72 hours of receipt, as required by Section 214.9(a) of the Uniform Civil Rules for the Justice Courts.

11. Respondent failed to maintain any notes, records, files, or a copy of the receipt related to the arraignment in *People v John Doe*, as required by Section 214.11(a)(1) of the Uniform Civil Rules for the Justice Courts.

12. There is no record of the *Doe* matter and no exact record of the \$500 cash bail in the records of the Urbana Town Court. The *Doe* matter was disposed of in the Wayne Town Court, which resulted in the defendant being granted an Adjournment in Contemplation of Dismissal on October 27, 2011, and approximately \$500 from the court's consolidated bail account was paid to the defendant's father. As of April 27, 2012, the adjourned date, the charge was deemed dismissed.

13. The report of an audit of the Wayne Town Court by the New York State Comptroller for the period covering January 1, 2010, through August 31, 2012, indicated that the \$500 cash bail had not been deposited or properly accounted for in the court's financial records. In response to the Comptroller's report, a Justice of the Wayne Town Court who has since left office reported depositing the \$500 bail and reconciling that court's bail account on or about April 30, 2013.

Additional Factors

14. Respondent has been cooperative and contrite throughout the Commission inquiry.

15. Respondent acknowledges that on December 17, 2004, he was admonished by the Commission for failing to follow required procedures in a code violation case and depriving the town attorney or code enforcement officer of the opportunity to present evidence.

16. Respondent regrets his failure to abide by the applicable Rules in this instance and pledges henceforth to abide by them faithfully.

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

The handling of official funds is one a judge’s most important responsibilities, and “a town justice is personally responsible for moneys received by the justice court” (1983 Ops St Comp 83-174)]. This responsibility requires strict adherence to the mandated procedures in order to avoid even the appearance that court funds have been mishandled or misappropriated. Among other requirements, all funds received by a

town or village justice are required to be deposited “as soon as practicable” and no later than 72 hours after receipt (Uniform Civil Rules for the Justice Courts §214.9[a] [22 NYCRR §214.9(a)]). Respondent’s mishandling of the \$500 cash bail in *People v Doe* circumvented the required procedures and was inconsistent with his ethical duty to diligently discharge his administrative responsibilities and to avoid even the appearance of impropriety (Rules, §§100.3[B][1], 100.2).

After conducting a late-night arraignment in *Doe*, a case that was returnable in a neighboring town court, respondent did not deposit the \$500 cash bail into his court account, as required by the relevant rules. Instead, he personally delivered the money later that day, along with the court records of the matter, to the Town of Wayne municipal building, leaving the envelope marked “BAIL \$500.00 CASH” with an unidentified individual. Though it is unclear in the record before us whether the funds were received or deposited by the Wayne Town Court, respondent’s own conduct was clearly inconsistent with his duty to safeguard court monies entrusted to his care. His departure from the mandated procedures placed the funds at risk and gave rise to questions and uncertainty as to how the money was handled – all of which could have been avoided if he had deposited the bail into his court account as required. And at the very least, it was ill-advised to leave a cash-filled envelope with an unidentified person at the Wayne municipal building. Respondent’s failure to keep any records of the case, or to record the arraignment, was also a violation of the procedural requirements and compounds the appearance of impropriety.

Depositing official monies promptly is essential to ensure public confidence in the integrity of the judiciary. *See Matter of Murphy*, 82 NY2d 491 (1993) (judge failed to deposit \$1,173 in court monies, claiming that he lost the funds and might have left them in a car that was sold). In *Murphy*, the Court of Appeals observed that whether the judge's failure to make the deposit resulted from "carelessness or calculation,... the mishandling of public money by a judge is 'serious misconduct'" (*Id.* at 494). Such conduct is improper even, as here, when not done for personal profit and when all the funds are eventually accounted for. *Matter of Carver*, 2010 NYSCJC Annual Report 119 (judge failed to make timely deposits and reports to the State Comptroller for six months) (admonition); *Matter of Chapman*, 2005 NYSCJC Annual Report 137 (judge delayed in depositing numerous bail checks over a three-year period, resulting in significant delays in returning the funds) (censure).

While we note that respondent was previously admonished in 2004 for unrelated misconduct (*Matter of Kressly*, 2005 NYSCJC Annual Report 173), his acknowledged failure to follow the mandated procedures in *Doe* appears to be an isolated instance of such behavior. We accept his assurance that he will abide by the applicable rules in the future.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

CERTIFICATION

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

Dated: March 25, 2015

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line.

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

CARL J. LANDICINO,

a Justice of the Supreme Court,
2nd Judicial District, Kings 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Erica K. Sparkler, Of Counsel) for the Commission

Godosky & Gentile, P.C. (by David M. Godosky) for the Respondent

The respondent, Carl J. Landicino, a Justice of the Supreme Court, 2nd Judicial District, Kings County, was served with a Formal Written Complaint dated March 5, 2014, containing two charges. The Formal Written Complaint alleged that in

October 2012 respondent drove his motor vehicle while under the influence of alcohol, resulting in his conviction for Driving While Intoxicated, and that he repeatedly asserted his judicial office to advance his private interests in connection with his arrest.

Respondent filed a verified Answer dated November 26, 2014.

The Commission rejected an Agreed Statement of Facts on July 17, 2014, and denied a request to reconsider the Agreed Statement on November 4, 2014.

By Order dated November 7, 2014, the Commission designated Honorable Felice K. Shea as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 9 and 10, 2015, in New York City. A stipulation of facts was received in evidence; respondent testified on his own behalf and called nine witnesses. The referee filed a report dated July 15, 2015.

The parties submitted briefs with respect to the referee's report. Both sides recommended the sanction of censure. On October 1, 2015, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Supreme Court, 2nd Judicial District, Kings County, since January 1, 2012. His term expires on December 31, 2025.

As to Charge I of the Formal Written Complaint:

2. On October 17, 2012, respondent drove his car on Interstate 87 from Saratoga Springs to Colonie, New York, after voluntarily consuming a sufficient number of alcoholic beverages to cause him to become legally intoxicated within the meaning of

Vehicle and Traffic Law (“VTL”) Section 1192(3).

3. Respondent had left Saratoga Springs around 3:00 PM on that date, after attending a judicial conference. He testified at the hearing that he “drank pretty heavily” the preceding night, and while he did not recall drinking that day, it was “not unlikely” he did so. The night before his arrest, respondent also took Xanax, which he had been prescribed, in an undetermined amount; however, the effect, if any, of this medication on his actions is uncertain and unquantifiable.

4. At about 4:00 PM, State Police Sergeant Mary McGreevy, who was in an unmarked car, observed respondent, through her rear view and side view mirrors, driving aggressively, making unsafe lane changes and following her vehicle too closely.

5. Respondent passed Sergeant McGreevy and accelerated to 80 miles per hour, in excess of the posted speed limit of 55 miles per hour. Sergeant McGreevy pursued respondent for two miles with her emergency lights and siren activated. She changed the tone of her siren two times in order to get respondent’s attention, after which he abruptly came to a stop at the side of the road.

6. Sergeant McGreevy pulled over behind respondent’s car and radioed her location and respondent’s license plate number to a State Police operator. The license plate was a standard-issue New York State license plate that did not identify the vehicle as belonging to a judge.¹

¹ Two months later, on or about December 21, 2012, respondent replaced the license plate on his vehicle with one that identified him as a Justice of the Supreme Court. Two years later, two months prior to the hearing in this proceeding, respondent replaced the judicial license plate with a standard-issue plate.

7. When Sergeant McGreevy approached the car and spoke to respondent, she detected an odor of alcohol on his breath and observed that he had glassy eyes and slurred speech. Respondent stumbled when exiting his car and had an unsteady gait, and his gross motor movements were mechanical and slow.

8. Sergeant McGreevy asked respondent if he had any drugs on his person, and respondent said that he had prescription drugs in his luggage.

9. Respondent was cooperative and polite in his interactions with Sergeant McGreevy.

10. New York State Park Police Officer Shaun Rooney arrived at the scene shortly after 4:00 PM. He detected an odor of alcohol on respondent's breath and observed that respondent was unsteady on his feet.

11. At about 4:25 PM, State Police Trooper Eric Terraferma arrived at the scene. He detected an odor of alcohol on respondent's breath and observed that respondent had difficulty keeping his balance.

12. Trooper Terraferma conducted three field sobriety tests – the horizontal gaze nystagmus, one-leg stand and finger-to-nose tests – all of which respondent failed.

13. Trooper Terraferma asked respondent to take a portable breath test, but respondent refused to do so. Respondent was then placed under arrest.

14. While seated in Trooper Terraferma's police car, respondent again was asked if he would submit to a chemical breath test. Respondent stated that he would not do so.

15. Respondent was taken to the State Police Station in Latham, New York. At the police station, respondent was asked two more times to submit to a breath test, and he refused to do so. At the hearing in this proceeding, respondent testified that his refusal to submit to a breath test was “unconscionable.”

16. By simplified traffic information respondent was charged with Driving While Intoxicated (VTL §1192[3]); Driving While Ability Impaired (VTL §1192[1]); Following Too Closely (VTL §1129[a]); Moving from a Lane Unsafely (VTL §1128[a]); Speeding (VTL §1180[b]); and Refusal to Take a Breath Test (VTL §1194[1][b]). On January 2, 2013, respondent was indicted by a Grand Jury in Albany County and charged with Driving While Intoxicated (VTL §1192[3]); Reckless Driving (VTL §1212); Refusal to Take a Breath Test (VTL §1194[1][b]); Following Too Closely (VTL §1129[a]); Speeding (VTL §1180[d][1]); and Moving from a Lane Unsafely (VTL §1128[a]).

17. On January 29, 2013, respondent appeared before Judge Stephen W. Herrick in Albany County Court and pled guilty to Driving While Intoxicated in violation of VTL Section 1192(3), a misdemeanor, in full satisfaction of all charges. Respondent was sentenced to a one-year conditional discharge, a \$500 fine and a \$395 surcharge. Respondent was also required to successfully complete substance abuse treatment and to attend the Victim Impact Panel and the Drinking Driver Program. Respondent’s driver’s license was revoked for one year, and he was required to have an ignition interlock device installed on his car for one year.

As to Charge II of the Formal Written Complaint:

18. On October 17, 2012, at about 4:00 PM, when Sergeant McGreevy stopped respondent's car, she asked for his driver's license and vehicle registration. In response, respondent handed her his driver's license and his Unified Court System judicial identification card, which identified him as a judge.

19. Thereafter, respondent at least twice volunteered that he was coming from a judicial conference although Sergeant McGreevy had not asked him where he was coming from or where he had been.

20. Respondent told Sergeant McGreevy that he wanted to show her his luggage in the trunk of his car in order to prove that he was coming from a judicial conference, and, despite Sergeant McGreevy's request that respondent not open the trunk, he did so.

21. After respondent was placed under arrest and handcuffed, he said to Sergeant McGreevy, in words or substance, "Is this how you treat a Supreme Court Judge?"

22. During the drive to the State Police Station in Latham, respondent referred to the fact that he was a judge.

23. At the station house, respondent said, in words or substance, "Is this the way you treat a Supreme Court Justice?" and "Couldn't this just be resolved with a Speeding ticket?" and/or "Couldn't this just be made a Speeding ticket?"

Additional Factors

24. Respondent acknowledges that he is an alcoholic and has been

suffering from alcoholism for approximately the last four years. He states that his arrest was a trigger for him to obtain the help that he needed to treat his condition.

25. Respondent attended an inpatient alcohol rehabilitation program for 19 days in November 2012. Beginning in January 2013, he attended an intensive outpatient alcohol rehabilitation program four times per week for approximately two months, followed by a relapse prevention alcohol rehabilitation program two times per week for approximately four months. Since August 2013, he has attended a weekly outpatient alcohol rehabilitation group. Respondent avers that he has regularly attended Alcoholics Anonymous meetings at least once a week since November 2012, and the Administrator has no evidence to the contrary. From December 2012 through May 2014, respondent attended individual therapy sessions with a psychologist twice a week. Since June 2014, respondent has attended individual therapy sessions with a psychologist once a week. In addition, after attending the Victim Impact Panel as required by his sentence, respondent has returned to speak to other drunk driving offenders about his life experience as a judge before and after conviction to demonstrate that the law treats all offenders equally.

26. Respondent avers that he has not had an alcoholic drink since May 2013, and the Administrator has no evidence to the contrary.

27. Respondent acknowledges that it was wrong under these circumstances to identify himself as a judge to the police. He regrets that he did not behave in a manner consistent with the integrity and dignity required of all judges, on or off the bench.

28. Respondent avers that he has never been impaired at any time while attending to his official judicial duties and that the consumption of alcohol has never impacted on his ability to preside over any case. The Administrator has no evidence to the contrary. There is no claim in the pending Complaint that respondent engaged in on-the-bench misconduct or committed any other dereliction with respect to the discharge of his adjudicative responsibilities.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C) and 100.4(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 and II of the Formal Written Complaint are sustained, and respondent’s misconduct is established.

As the Court of Appeals recently stated, Driving While Intoxicated (“DWI”) is “‘a very serious crime’ ... that has long posed a ‘menace’ to highway safety ... and has caused many tragic consequences” (*People v. Washington*, 23 NY3d 228, 231 [2014] [internal citations omitted]). In language that seems applicable to the facts presented here, “[g]rievous harm to innocent victims could have been caused by defendant’s driving with a blood alcohol level of .15% while speeding and weaving in and out of lanes, had [he] not been caught and stopped” (*County of Nassau v. Canavan*, 1 NY3d 134, 140 [2003]).

Respondent violated his ethical obligation to respect and comply with the

law by operating a motor vehicle at a high speed while legally intoxicated, resulting in his conviction for DWI, a misdemeanor. His unlawful, reckless conduct – which occurred just after he had attended a judicial conference, and which included leading police on a high-speed two-mile pursuit prior to his arrest – endangered public safety and brought the judiciary as a whole into disrepute. *See Matter of Martineck*, 2011 NYSCJC Annual Report 116, and cases cited therein. Moreover, during his arrest respondent engaged in additional egregious misconduct by repeatedly asserting his judicial status, in contravention of well-established ethical standards (Rules, §100.2[C]), leaving no doubt that he was seeking favorable treatment simply because of his judicial position. *See, e.g., Matter of Maney*, 2011 NYSCJC Annual Report 106. In its totality, respondent’s behavior warrants a severe sanction.

In determining an appropriate disposition for alcohol-related driving offenses, the Commission in prior cases has considered mitigating and/or aggravating circumstances, including the level of intoxication, whether the judge’s conduct caused an accident or injury, whether the conduct was an isolated instance or part of a pattern, the conduct of the judge during arrest (including whether the judge was cooperative or asserted his or her judicial position), and the judge’s acceptance of responsibility and willingness to seek appropriate treatment. *See Matter of Newman*, 2014 NYSCJC Annual Report 164 (judge was convicted of Driving While Ability Impaired [“DWAI”] after rear-ending a car stopped at a traffic light; was uncooperative and engaged in “unruly, self-destructive and at times suicidal behavior” during his arrest [censure]); *Matter of Apple*, 2013 NYSCJC Annual Report 95 (DWI conviction, based on a blood alcohol

content [“BAC”] of .21% [censure]; *Matter of Maney, supra* (DWAI conviction; judge made an illegal U-turn to avoid a checkpoint, repeatedly identified himself as a judge and asked for “professional courtesy” [censure]); *Matter of Martineck, supra* (DWI conviction, based on a BAC of .18%, after driving erratically and hitting a mile marker [censure]); *Matter of Burke*, 2010 NYSCJC Annual Report 110 (DWAI conviction after causing a minor accident [censure, in part for additional misconduct]); *Matter of Mills*, 2006 NYSCJC Annual Report 218 (though acquitted of DWI, judge admitted operating a motor vehicle after consuming alcoholic beverages, “vehemently” protested her arrest and made offensive statements to the arresting officers [censure]); *Matter of Pajak*, 2005 NYSCJC Annual Report 195 (DWI conviction after a property damage accident [admonition]); *Matter of Stelling*, 2003 NYSCJC Annual Report 165 (DWI conviction following a prior conviction for DWAI before he was a judge [censure]); *Matter of Burns*, 1999 NYSCJC Annual Report 83 (DWAI conviction [admonition]); *Matter of Henderson*, 1995 NYSCJC Annual Report 118 (DWAI conviction; judge referred to his judicial office during the arrest and asked, “Isn’t there anything we can do?” [admonition]); *Matter of Siebert*, 1994 NYSCJC Annual Report 103 (DWAI conviction after causing a three-car accident [admonition]); *Matter of Innes*, 1985 NYSCJC Annual Report 152 (DWAI conviction; judge’s car struck a patrol car while backing up [admonition]); *Matter of Quinn*, 54 NY2d 386, 395 (1981) (DWI conviction after a prior conviction for DWAI and other alcohol-related incidents; judge was uncooperative and abusive to arresting officers and repeatedly referred to his judicial position [removal reduced to censure by the Court of Appeals in view of the judge’s retirement and ill

health, noting “his manifest unfitness for judicial office”]); *Matter of Barr*, 1981 NYSCJC Annual Report 139 (two alcohol-related convictions; judge asserted his judicial office and was abusive and uncooperative during his arrests, but had made “a sincere effort to rehabilitate himself” [censure]).

In this matter, the record establishes that respondent operated his vehicle while intoxicated, at a high speed (at least 80 miles per hour) and in an unsafe manner, and continued to do so for two more miles while pursued by police, with emergency lights and siren activated, before stopping abruptly. While he was not charged with attempting to flee, his conduct imperiled the lives of others, including other motorists, their passengers and law enforcement personnel. Although he refused to take a breath test², the field sobriety tests and the observations of several police officers leave no doubt that respondent’s ability to drive safely was seriously impaired by alcohol. Indeed, he has acknowledged that “due at least in part” to the degree of his intoxication at the time, he “does not specifically recall the details of all of his statements and actions” during and after his arrest.

Exacerbating this serious misconduct, throughout this entire incident respondent invoked his judicial position, creating the appearance that he was using the

² New York’s “implied consent” law requires a driver to submit to such testing upon the request of an officer who reasonably suspects impairment by drugs or alcohol, and refusing to do so triggers serious consequences, including a one-year suspension of the driver’s license and a fine (VTL §1194.2[a][1]). The Court of Appeals has stated that such testing is “an important investigative tool” in an attempt to combat the scourge of alcohol-related driving offenses (*People v. Washington, supra*, 23 NY3d at 231). At the hearing, respondent testified that refusing to take the breath test was “unconscionable,” and indeed – despite the stipulation that he was “cooperative” during the arrest – he acknowledged that he “wouldn’t characterize my behavior as polite or cooperative” (Tr 51, 64).

prestige of judicial office in an attempt to minimize the consequences of his unlawful behavior. Respondent does not dispute the recollections of various law enforcement personnel that on repeated occasions – at the scene of his arrest, in the police car, and at the police station – he referred to his judicial status. While respondent attributes this behavior to his diminished capacity and judgment due to his intoxication, that factor in no way excuses or diminishes his responsibility for his actions.

Initially, respondent interjected his judicial status into the incident by producing his judicial identification card when asked for his driver's license and vehicle registration, conveying the appearance that he was asserting his judicial office in order to obtain special treatment by the police. Standing alone, such behavior can warrant public discipline. *See Matter of Werner*, 2003 NYSCJC Annual Report 198 (although acquitted of DWI, judge was admonished for giving the police officer his judicial ID when stopped and asked for his driver's license). Thereafter, respondent continued to invoke his judicial position. He volunteered "at least twice" that he was coming from a judicial conference and offered to show his luggage in his trunk to prove it; then, refusing to heed the officer's specific instruction that he not open his trunk, he proceeded to do so. It was unnecessary and completely irrelevant for respondent to mention his attendance at a judicial conference, except as a means of calling attention to his judicial status and conveying the message that, as a judge, he was entitled to special consideration. Finally, respondent underscored that message by stating several times, in words or substance, "Is this how you treat a Supreme Court Justice?", while asking if the matter could be resolved with a Speeding ticket – an unmistakable, specific request for special treatment

based on his judicial status. The implicit message in respondent's actions and statements – that because he is a high-ranking judge, he should be exempt from the ordinary standards of law enforcement that apply to others – is repugnant and inconsistent with ethical standards prohibiting a judge from using the prestige of judicial office to advance private interests (Rules, §100.2[C]). As the Commission has stated: “Public confidence in the fair and proper administration of justice requires that judges, who are sworn to uphold the law, neither request nor receive special treatment when the laws are applied to them personally” (*Matter of Werner, supra*, 2003 NYSCJC Annual Report at 199).

In determining the appropriate sanction, we must consider whether this single incident, which occurred during respondent's first year as a judge, has irreparably damaged his effectiveness as a judge and whether the public interest is served by permitting him to remain on the bench in the face of such serious misconduct.³ While we view respondent's misconduct as extremely serious, we have concluded that it does not establish that he is “unfit to remain in office” (*Matter of Reeves*, 63 NY2d 105, 111 [1984]).

In making this determination, we are mindful of respondent's frank acknowledgment that he suffers from the insidious disease of alcoholism and his assertion that this episode “was a trigger for him to obtain the help that he needed to treat

³ We note that although there is no evidence that respondent's consumption of alcohol affected his performance of judicial duties, that fact “is not determinative” since a judge “also has a higher obligation to insure that his conduct off the Bench does not undermine the integrity of the judiciary or public confidence in his character and judicial temperament” (*Matter of Quinn, supra*, 54 NY2d at 392).

his condition” (Stipulation, par 29). In this regard, the record before us of his ongoing rehabilitative efforts and his commitment to sobriety is compelling. Since his arrest more than three years ago, as the referee has noted, respondent has “made extensive efforts to become rehabilitated as well as to assist others similarly afflicted” (Report, p 10); he has undergone inpatient and outpatient treatment and counseling, continues to regularly attend individual therapy sessions and Alcoholics Anonymous meetings, and has continued to appear at the Victim Impact Panel to speak to other drunk driving offenders about his own experiences as a judge who is an alcoholic.

Despite some admitted relapses after the incident, respondent avers that he has not had an alcoholic drink since May 2013. Were it not for the abundant evidence that respondent has taken significant steps to rehabilitate himself, and seems to be succeeding, we would vote to remove him for his egregious conduct.

To be sure, the Commission has encouraged judges who need assistance with alcohol-related problems to take advantage of the services that exist “*before* the effects of alcoholism exhibit themselves in behavior that must be addressed in a disciplinary setting” (2014 NYSCJC Annual Report 23 [emphasis added]). While we give due weight to respondent’s rehabilitative efforts, we emphasize that the result in this case should not suggest that professing a commitment to sobriety *after* an alcohol-fueled incident of misconduct will guarantee that a judge can avoid removal for egregious misconduct (*see Matter of Aldrich*, 58 NY2d 279, 283 [1983] [judge was removed for presiding over two court sessions while under the influence of alcohol, engaging in conduct that included “displays of vulgarity and racism and ... threats of violence both on

and off the Bench”).

In determining the sanction here, we are also mindful of the referee’s findings that respondent has been “cooperative” and “contrite” and that his “candid” and “forthright” testimony at the hearing reflects that he “has insight into the nature of his disease” and “has taken responsibility for his actions” (Report, pp 10-11). We thus conclude, based on the totality of the record before us, that respondent should be censured.

As we have stated recently in several cases involving alcohol-related driving offenses with significant aggravating factors (*Matter of Newman*, *Matter of Martineck* and *Matter of Maney*, *supra*), were the sanction of suspension from judicial office without pay available to us, we would have imposed it in those cases, and would impose it here, to reflect the seriousness of such behavior. Absent that alternative, we have concluded that censuring respondent not only underscores the seriousness of such misconduct, but also serves as a reminder to respondent and to the public that judges at all times are held to the highest standards of conduct, even off the bench (Rules, §100.2[A]).

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

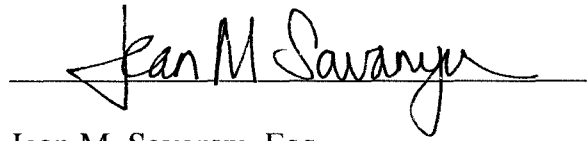
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur. Mr. Belluck files a concurring opinion, which Mr. Emery and Judge Weinstein join.

Mr. Cohen was not present.

CERTIFICATION

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

Dated: December 28, 2015

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a large, stylized initial "J" that loops back under the line.

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

CARL J. LANDICINO,

a Justice of the Supreme Court,
2nd Judicial District, Kings County.

CONCURRING OPINION
BY MR. BELLUCK,
WHICH MR. EMERY
AND JUDGE
WEINSTEIN JOIN

As I have noted in previous disciplinary cases involving alcohol-related driving offenses, I believe that the Commission's past decisions for such behavior have been unduly lenient given the serious consequences of drunk driving. *See Matter of Maney*, 2011 NYSCJC Annual Report 106; *Matter of Burke*, 2010 NYSCJC Annual Report 110. I have stated before, and still believe, that in most circumstances drunk driving should lead to removal, particularly where there are aggravating factors. Nevertheless, for the reasons set forth below, I respectfully concur that in this case censure is the appropriate result. I write separately to address the circumstances that have persuaded me to vote for censure in this case and to underscore that in future cases involving similar conduct, I may argue strenuously for removal – especially in the absence of a persuasive record demonstrating a judge's acceptance of his or her alcoholism and commitment to rehabilitation.

The conduct presented here – respondent drove drunk, endangered innocent

victims, asserted his judicial office and engaged in conduct after the incident from which it could be inferred that he was trying to game the system – is unquestionably repugnant and would ordinarily require the sanction of removal. Holding judicial office is not a right, but a privilege that can be forfeited when a judge engages in behavior that is so plainly inconsistent with the high standards of conduct that our society requires both on and off the bench.

Judges hold powerful positions in which they are entrusted to sit in judgment of the conduct of others, including adjudicating and sentencing drunk drivers. In addition, for good reason, they are also highly respected members of their communities. I have the utmost respect for members of the judiciary and have previously written about the increasing workloads and demands being placed on judges. Few positions carry with them a higher level of respect from the legal community and the public. However, no judge is above the law. A judge whose personal behavior flouts the law and puts others at risk of death and serious injury should not be allowed to continue to have the protection and privileges of judicial office.

Despite these considerations, there is compelling mitigation that weighs against the sanction of removal in this case.¹ I give little weight to the majority's

¹The Court of Appeals has underscored that the severity of the sanction imposed for many types of misconduct “depends upon the presence or absence of mitigating and aggravating circumstances” (*Matter of Rater*, 69 NY2d 208, 209 [1987] [“in the absence of any mitigating factors, [such conduct] might very well lead to removal.... On the other hand, if a judge can demonstrate that mitigating circumstances accounted for such failings, such a severe sanction may be unwarranted”]). See also, e.g., *Matter of Edwards*, 67 NY2d 153, 155 (1986) (“as a general rule, intervention in a proceeding in another court should result in removal,” but this “should not ... preclud[e] consideration of mitigating factors”); *Matter of Dixon*, 47 NY2d 523, 525 (1979) (“In so deciding [the appropriate sanction] we consider various mitigating factors”).

findings that respondent has been “cooperative” and “contrite” (Determination, p 15), since cooperation with a Commission inquiry should be expected of every judge, and contrition may be strategic and insincere. What is most compelling – and uncontroverted – is that respondent suffers from the disease of alcoholism and that, in the three years since the incident, he has demonstrated a strong commitment to fighting his disease and helping others similarly afflicted. In that regard, respondent’s subsequent behavior, documented at length in the record before us, demonstrates an apparently sincere, determined effort to ensure that his conduct will not be repeated. These efforts, I believe, deserve strong consideration because he has convinced me that his acknowledgment of his alcoholism and commitment to treatment are sincere.

Both Congress and the Legislature of this State have recognized that alcoholism is an illness that must be treated as a serious public health problem (42 USC §4541[a]; NY Mental Hygiene Law §1.03[13] [“‘Alcoholism’ means a chronic illness in which the ingestion of alcohol usually results in the further compulsive ingestion of alcohol beyond the control of the sick person to a degree which impairs normal functioning”). It is a disease from which no group in our society, including judges, is exempt.

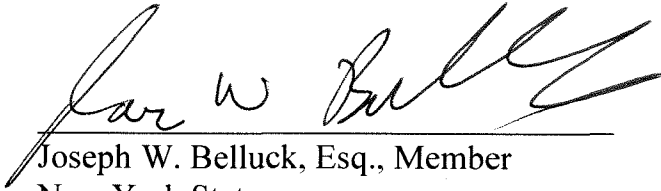
To be sure, respondent’s alcoholism in no way diminishes his responsibility for his terrible behavior, but I believe that his subsequent actions compellingly show that he recognizes the harm that could have come from this episode and thus, that he can continue to serve as a productive member of the bench, the bar and society. As both sides here have acknowledged, while his rehabilitative efforts appear to be succeeding,

whether they are ultimately successful can only be measured over his lifetime. However, the fact that three years have passed since the incident and all indications are that he has maintained his treatment and sobriety since May 2013, allows some measure of optimism that he will not endanger himself or others in the future. Even though there are no guarantees that the conduct will not recur, I have been convinced that he should remain on the bench.

My sincere hope is that all judges recognize the high stakes roulette that is involved when they drive drunk and will heed the Commission's increasing penalties as a stern warning to avoid gambling with their lives and the lives of others. However, I do not want to create an environment where judges are afraid to seek assistance that may help them to avoid discipline. Judges who suffer from alcoholism or other addictions should feel increasingly free to come forward and get help (*see* "Seeking Treatment for an Alcohol Problem," 2014 NYSCJC Annual Report 23). Judges should know that if they suffer from these illnesses getting help before engaging in dangerous conduct on or off the bench will be viewed with empathy by court administrators and be a mitigating factor for this Commission.

Accordingly, on the facts presented here, I concur that the sanction of censure is appropriate.

Dated: December 28, 2015



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

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Investigation of
Complaints Pursuant to Section 44,
subdivisions 1 and 2, in Relation to

YVONNE LEWIS,

a Justice of the Supreme Court, 2nd Judicial
District, Kings 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Brenda Correa, Of Counsel) for the Commission
Scalise Hamilton & Sheridan LLP (by Deborah A. Scalise) for Judge Lewis

The matter having come before the Commission on October 1, 2015; and
the Commission having before it the Stipulation dated September 30, 2015; and Judge

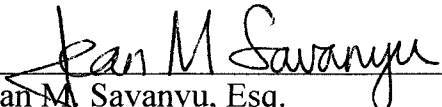
Lewis having averred that she will submit the appropriate papers on October 5, 2015, to the Office of Court Administration and the New York State and Local Retirement System stating that she will retire from her judicial position on December 31, 2015, and having affirmed that upon retiring her judicial office she will neither seek nor accept judicial office at any time in the future, and having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will become public on October 5, 2015, and that the Commission's Decision and Order with respect thereto will become public on or after October 5, 2015; now, therefore, it is

DETERMINED, on the Commission's own motion, that the Stipulation is accepted and that the pending matter is concluded according to the terms of the Stipulation, subject to being revived according to the terms of the Stipulation; and it is

SO ORDERED.

Mr. Cohen was not present.

Dated: October 7, 2015



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 Investigation of Complaints
Pursuant to Section 44, subdivision 1 and 2,
of the Judiciary Law in Relation to

YVONNE LEWIS,

STIPULATION

A Justice of the Supreme Court, 2nd Judicial District
(Kings County).

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Yvonne Lewis and her attorney, Deborah Scalise, of Scalise Hamilton & Sheridan LLP.

1. Yvonne Lewis has been a judge since 1987, when she was elected as a Judge of the Civil Court of the City of New York in Kings County.
2. Judge Lewis also served as a Judge of the Criminal Court of the City of New York in Kings County and Queens County from 1987 to 1988 and in 1991.
3. In 1991, Judge Lewis was elected as a Justice of the Supreme Court in Kings County. She was re-elected in 2005.
4. In November 2014, having reached the retirement age of 70, Judge Lewis was certificated to serve two years, through December 2016. She would be eligible for two additional two-year certifications, which would permit her to serve through 2020, the year she turns 76, beyond which certifications are not permitted under the Constitution.
5. On May 2, 2013, the Commission, on its own motion, authorized an investigation based upon newspaper articles alleging that Judge Lewis improperly

approved payments to her confidential law clerk, Kimberly Detherage, for services rendered by her as a guardian in matters pending before other judges of the court. A copy of the Administrator's Complaint dated May 2, 2013, is appended as Exhibit 1.

6. In September 2014, the Commission apprised Judge Lewis that it was investigating the complaint.

7. On December 11, 2014, the Commission, on its own motion, authorized a second investigation based on a report of the Inspector General for the Unified Court System, alleging *inter alia* that Judge Lewis failed to adequately oversee and review Ms. Detherage's work as a guardian, and improperly continued to preside over three of Ms. Detherage's matters and approved a guardianship payment to her after hiring her as her full-time law clerk. A copy of the Administrator's Complaint dated December 19, 2014, is appended as Exhibit 2.

8. The Commission interviewed witnesses, reviewed documents and heard from Judge Lewis with respect to both Administrator's Complaints. Judge Lewis denied certain aspects of the complaints and offered explanations as to certain aspects of the complaints. The Commission has neither evaluated nor rendered substantive determinations as to the foregoing.

9. Judge Lewis avers that on October 5, 2015, she will submit the appropriate papers to the Office of Court Administration and the New York State and Local Retirement System, stating that she will retire from her judicial position on December 31, 2015.

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

11. Judge Lewis affirms that, upon retiring her judicial office, she has no plans to, nor will she seek or accept judicial office at any time in the future.

12. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings, pending verification that Judge Lewis filed the appropriate papers on October 5, 2015.

13. Judge Lewis understands that, should she abrogate the terms of this Stipulation by, for example, failing to submit the appropriate papers on October 5, 2015, or holding any judicial position at any time after December 31, 2015, the Commission's investigation of the complaints against her would be revived, she would be served with a Formal Written Complaint on authorization of the Commission, and the matter would proceed to a hearing before a referee, in which case the statements made herein shall not be used by the Commission, the Respondent or the Administrator and Counsel to the Commission.

14. Judge Lewis waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will become public on October 5, 2015, and (2) the Commission's Decision and Order regarding this Stipulation will become public on or after October 5, 2015.

Dated: *September 25, 2015*

Yvonne Lewis

Honorable Yvonne Lewis

Dated: *9/28/15*

Deborah A. Scalise

Deborah Scalise
Scalise Hamilton & Sheridan LLP
Attorney for Judge Lewis.

Dated: *9/30/2015*

Robert H. Tembeckjian

Robert H. Tembeckjian
Administrator and Counsel to the Commission
(**Brenda Correa, Of Counsel**)

THE FOLLOWING EXHIBITS ARE AVAILABLE AT WWW.CJC.NY.GOV
EXHIBIT 1: ADMINISTRATOR'S COMPLAINT DATED MAY 2, 2013
EXHIBIT 2: ADMINISTRATOR'S COMPLAINT DATED DECEMBER 19, 2014

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Investigation of
Complaints Pursuant to Section 44,
Subdivisions 1 and 2, in Relation to

DAVID J. NARDUCCI,

a Justice of the Chautauqua Town Court,
Chautauqua 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Daniel M. Killelea for Judge Narducci

The matter having come before the Commission on October 1, 2015; and
the Commission having before it the Stipulation dated September 16, 2015; and Judge

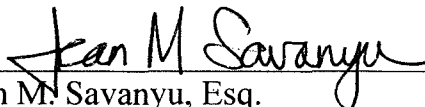
Narducci having tendered his resignation by letter dated August 12, 2015, effective September 1, 2015, and having affirmed that he will neither seek nor accept judicial office at any time in the future, and having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will become public upon being signed by the parties and that the Commission's Decision and Order with respect thereto will become public; now, therefore, it is

DETERMINED, on the Commission's own motion, that the Stipulation is accepted and that the pending matter is concluded according to the terms of the Stipulation, subject to being revived according to the terms of the Stipulation; and it is

SO ORDERED.

Mr. Cohen was not present.

Dated: October 6, 2015



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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2,
of the Judiciary Law in Relation to

DAVID J. NARDUCCI,

STIPULATION

a Justice of the Chautauqua Town Court,
Chautauqua County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct, and the Honorable David J. Narducci, who is represented by Daniel M. Killelea, Esq., as follows:

1. Judge Narducci served as Chautauqua Town Justice from January 1, 1990, to September 1, 2015. He is not an attorney.
2. The Commission commenced investigations of Judge Narducci based upon complaints that alleged the following:
 - A. After a non-jury trial in which the defendant was charged with boating-related and penal law offenses, Judge Narducci initiated and engaged in several *ex parte* e-mail communications with the prosecutor concerning three of the offenses, for the purpose of reconsidering his decision. He did not change his decision.
 - B. Prior to the arraignment of three defendants, each charged with two penal law offenses, Judge Narducci viewed video-recorded evidence provided by law enforcement personnel which purportedly showed the three defendants engaging in the alleged criminal conduct. Judge Narducci failed to mechanically record the arraignment of any of the

three defendants and personally made copies of the video-recorded evidence, which he then distributed to the Assistant District Attorney and one or more defense attorneys.

3. Judge Narducci submitted his resignation as Chautauqua Town Justice by letter dated August 12, 2015, addressed to the Chief Administrator of the Courts and the Chautauqua Town Clerk. Judge Narducci's resignation became effective September 1, 2015. A copy of the resignation letter is appended as Exhibit 1.

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

5. Judge Narducci affirms that, having vacated his judicial office, he will neither seek nor accept judicial office at any time in the future.

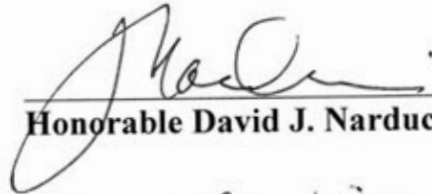
6. Judge Narducci understands that, should he abrogate the terms of this Stipulation and hold any judicial position at any time, the Commission's investigation of the complaints against him will be revived, and the matter will proceed.

7. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

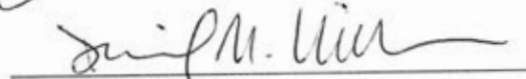
8. Judge Narducci waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will be made public upon being

signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

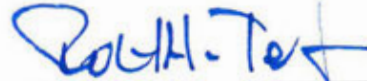
Dated: 8/27/15


Honorable David J. Narducci

Dated: 8-27-2015


Daniel M. Killelea
Attorney for Judge Narducci

Dated: 9/16/2015


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

THE FOLLOWING EXHIBIT IS AVAILABLE AT WWW.CJC.NY.GOV

EXHIBIT 1: JUDGE'S RESIGNATION LETTER

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

GERALD J. POPEO,

a Judge of the Utica City Court,
Oneida 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Robert F. Julian for the Respondent

The respondent, Gerald J. Popeo, a Judge of the Utica City Court, Oneida County, was served with a Formal Written Complaint dated May 30, 2013, and an Amended Formal Written Complaint dated July 29, 2013, containing three charges. The

Amended Formal Written Complaint alleged that respondent was discourteous to two defendants and committed them to jail for summary contempt without following the procedures required by law (Charges I and II) and that he made injudicious statements to and about attorneys (Charge III). Respondent filed a verified Answer dated August 23, 2013.

Respondent filed a motion on June 19, 2013, and an amended motion dated June 25, 2013, to dismiss certain specifications of the Formal Written Complaint for lack of specificity. Commission counsel opposed the motion to dismiss by affidavit and memorandum dated August 14, 2013, noting that an Amended Formal Written Complaint had been served. By affirmation and memorandum in reply dated August 23, 2013, respondent argued that paragraphs 30 through 34 of the Amended Formal Written Complaint should be dismissed. By Decision and Order dated September 20, 2013, the Commission denied respondent's motion, as modified, in all respects.

By Order dated October 24, 2013, the Commission designated Bruno Colapietro, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 24, 25 and 26, April 29 and 30, and May 29, 2014, in Albany. The referee filed a report dated September 30, 2014.

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

On December 11, 2014, 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 Utica City Court, Oneida County, since 2001. His present term expires in 2020.

As to Charge I of the Amended Formal Written Complaint:

2. On February 17, 2010, respondent presided over the case of *People v. Robert M. Gentile*. The defendant was appearing for sentencing on a charge of Assault in the Third Degree. Assistant Public Defender James Kehoe represented the defendant.

3. As he approached the podium to speak prior to the imposition of sentence, the defendant addressed the victim of the Assault and two others in the courtroom, stating, "If I go to jail you guys won't hear the end of this." During his statement, the defendant repeatedly turned to the audience, made faces and again addressed the victim. Respondent warned Mr. Gentile not to "put a show on" and that threatening or intimidating the victim could result in criminal contempt. As the defendant complained about his lawyer and that his rights had been violated, respondent engaged in extended colloquy with him, stating that the jury "didn't buy it" and that he was "not retrying the case."

4. As respondent sentenced the defendant to a term of one year in jail on the Assault charge, Mr. Gentile stated, "I already knew what you were going to do." Respondent warned the defendant, "[I]nterrupt me one more time, it's 30 days contempt of court. Do it again, it's 30 more. So if you would like to interrupt me again, go ahead."

5. Thereafter, in a series of incidents as set forth below, respondent committed the defendant to jail for five separate counts of criminal contempt, with five

separate 30-day sentences to be served consecutively in addition to his sentence for Assault.

(A) After respondent warned the defendant not to interrupt and said, “May I continue?”, the defendant responded, “You didn’t let me continue.” Respondent then held him in contempt and sentenced him to 30 days in jail. Mr. Kehoe told his client, “I caution you,” and the defendant stated that he did not want the attorney there, that his lawyer did nothing for him, and that he wanted to represent himself.

(B) Respondent accused Mr. Gentile of “disrupting my courtroom,” turning away, saying something and “ma[king] a face to me.” The defendant said, “Made a face to you?”, resulting in the second contempt and 30-day sentence.

(C) When the defendant said, “You can do what you want to do,” respondent stated, “There’s 90.” The defendant said, “They already took my life away, your Honor,” and respondent said, “Okay, do you want more or do you want to keep your mouth shut?”

(D) Near the end of the proceeding, Mr. Gentile did something that prompted a deputy to warn, “Don’t do that again.” Respondent stated that the defendant was “standing at the podium smirking, turning away, looking at the audience,” and the defendant said, “Smirking?” Respondent stated, “There’s another 30.”

(E) The defendant said, “This is a mockery in this court.” Respondent stated, “There’s another 30. We’re up to five now.”

6. During the proceeding, the defendant raised his voice, yelled at his attorney, repeatedly turned and addressed the audience, made faces, laughed and was

otherwise disruptive and disrespectful.

7. Prior to holding Mr. Gentile in summary contempt in five successive instances, respondent did not issue appropriate warnings before each contempt citation or give the defendant an opportunity to make a statement on his own behalf or apologize for his contumacious behavior.

8. On August 12, 2010, on motion of Mr. Gentile's lawyer, respondent dismissed two of the five counts of contempt.

9. At the hearing before the referee, respondent testified that the number of contempt citations in *Gentile* "just doesn't seem fair" and that he "should have just let [Mr. Gentile] talk no matter how."

As to Charge II of the Amended Formal Written Complaint:

10. On January 5, 2011, the defendant in the case of *People v. Jeffrey D. Blount* appeared before respondent for disposition of a charge of Harassment. The defendant, who was represented by Assistant Public Defender Cory Zennamo, was being sentenced to time served with an order of protection.

11. As respondent was imposing the sentence, Mr. Zennamo spoke quietly to his client. Respondent reprimanded the attorney, stating, "When you were a kid did anyone tell you it was rude to be talking when somebody else is talking?" Mr. Zennamo said, "Yes," and respondent continued, "Well, it's rude, okay. If you need to talk to your client, hold your hand up, and I will be quiet; I'll wait. I don't want to interfere with an attorney's obligation and right to provide legal advice, but once I'm

doing my end of things, shut up and let me do my thing, okay?” Mr. Zennamo apologized and said he was “just explaining the surcharge” to his client.

12. After that exchange, respondent told the defendant, “You’re standing there with a grin that I would love to get off the bench and slap off your face.” Mr. Blount said he was “just laughing.” Respondent said, “What are you laughing about? You’re in a courtroom, handcuffed, in an orange jumpsuit being issued an order of protection, and you’re laughing. That’s a funny thing, that’s hilarious. How about 30 days in jail for contempt, that’s hilarious, too, isn’t it? What’s wrong with you? We done smirking?” Respondent then warned the defendant of the consequences of violating the order of protection.

13. After the proceeding had concluded, as the defendant was leaving the courtroom, respondent ordered him brought back, stating, “As he turned away he gave me a nice, big smirk, nice big smirk as if to say, blank you, Judge. That’s 30 days contempt of court. Have a good day, Mr. [Blount].”

14. When Mr. Zennamo attempted to intercede, respondent stated, “File an appeal, Mr. Zennamo.” Shortly thereafter, Mr. Zennamo approached respondent and asked if his client might come back and apologize, and respondent denied the request.

15. Respondent summarily held the defendant in contempt of court without warning him that his conduct could result in a citation for contempt and without giving him an opportunity to make a statement on his own behalf or apologize. The commitment order for the contempt states that the defendant “displayed a disrespectful attitude towards the Court, smirking at the Court while being issued an order of

protection and continuing to do so after being advised to cease such conduct.”

16. On the following Monday, January 10, 2011, after respondent’s administrative judge had questioned him about his actions in *Blount* and after his chambers had received media inquiries about the matter, respondent vacated the contempt on his own motion. In doing so, respondent said:

“It’s my responsibility as judge to hold people accountable for their conduct. I recognize that in doing so, I am also accountable and expected to properly apply the law. With regard to contempt matters, there is a multi-step procedure essentially involving several warnings and an opportunity to be heard before there is a finding of contempt.”

Respondent stated that after learning that the defendant’s attorney was contesting the contempt citation, respondent reviewed the transcript to refresh his recollection “since it was one of 73 cases I handled that day.” He stated that he had “concluded that in my effort to address what I felt was inappropriate conduct and being upset with the conduct, I reacted with some intemperate words and did not fully and completely follow the procedure in place in order to hold a person in contempt.”

17. Mr. Blount was not subject to any additional incarceration as a result of respondent’s contempt citation since he was in custody on other charges.

As to Charge III of the Amended Formal Written Complaint:

18. Paragraphs 30 to 34 are not sustained and therefore are dismissed.

People v. Bart Harvey, Jr.

19. On November 7, 2008, respondent presided over the case of *People v. Bart Harvey, Jr.*, in which the defendant was charged with Unlawful Possession of

Marijuana and Aggravated Unlicensed Operation of a Motor Vehicle. ADA Christopher Hameline appeared for the Office of District Attorney Scott D. McNamara, and Assistant Public Defender James Kehoe represented the defendant. Mr. Kehoe objected to a plea offer that included forfeiture of \$400 that had been seized from the defendant. Pursuant to local law, monies that are illegal proceeds from a criminal enterprise can be seized and forfeited. When Mr. Kehoe said that the defendant wanted the funds returned, respondent stated, “Then you deal with them over that. I don’t have anything to do with the forfeiture sir. If Mr. McNamara wants to buy a new couch for his office or something else, I’m not in the middle of that.”

20. After Mr. Kehoe said that the ADA was “getting direction from higher,” respondent stated, “I think my couch thought might be true afterwards, if somebody is pressuring you to do this to get the forfeiture. Somebody wants a new laptop or whatever. I’m not saying it’s inappropriate, maybe it is appropriate for the forfeiture. I sometimes wonder.” Respondent continued, “Where the money goes, it goes for another picture in the paper and a headline.”

21. Subsequently, District Attorney McNamara complained to Administrative Judge James D. Tormey that respondent’s comments impugned his integrity, and Judge Tormey asked respondent to apologize. Respondent testified that he and Mr. McNamara did “mend fences.”

22. At the hearing, respondent acknowledged that his comments about forfeiture were “snide” and “sharp.” He testified that forfeiture places judges “in an uncomfortable position” because they have no authority over the seizure of funds.

People v. Rossie L. Harris

23. On or about December 6, 2008, in the case of *People v. Rossie L. Harris*, the defendant appeared before respondent for sentencing on a charge of Disorderly Conduct. Assistant District Attorney Todd C. Carville was the prosecutor, and Assistant Public Defender Mark C. Curley represented the defendant. Mr. Carville recommended a conditional discharge with a forensic evaluation so that the defendant could be evaluated for anger management.

24. Respondent imposed a conditional discharge, noting that the defendant was 74 years old. After imposing the sentence, respondent said to the defendant's attorney, "You know what? Mr. Curley, there is no justice because the end result of this is Mr. Carville gets another notch on his belt. It actually helps his standing in the office."

People v. David Carter

25. On June 28, 2011, in the case of *People v. David Carter*, in which the defendant was charged with Stalking, Assistant District Attorney Patrick Scully offered a plea, and Assistant Public Defender Cory Zennamo asked that the charge be dismissed because the accusatory instrument was insufficient. After a new accusatory instrument was filed, Mr. Scully made the same plea offer. Following an off-the-record discussion, respondent stated, "That would be the appropriate thing to do, but Mr. Scully is playing the cigar store Indian at the moment, so I don't know what he wants to do."

People v. Jean Palmer

26. A week later, on July 5, 2011, respondent presided over the case of

People v. Jean Palmer. Mr. Scully was the prosecutor. During discussion of a plea, respondent stated, “Mr. Scully is the perfect cigar store Indian at the moment, but he did discuss this with the court and is in agreement.”

27. Respondent testified at the hearing that his comment in both *Carter* and *Palmer* was “an innocent use of words that were not intended to be offensive.” He testified that he wanted the prosecutor to note his position on the record and stated, “[I]n hindsight, I wish I had used different language such as ‘Mr. Scully, can we hear your input, please,’ or words to that effect.”

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

On two occasions respondent abused his judicial power by summarily holding defendants in contempt of court and depriving them of their liberty without due process. One defendant, who was disrespectful during a sentencing proceeding, was sentenced to a total of 150 days in jail on five separate counts of summary contempt, which respondent imposed in quick succession without issuing appropriate warnings or providing the defendant with an opportunity to make a statement in defense or

extenuation of his conduct. Another defendant was held in contempt and sentenced to 30 days in jail for “smirking” as he was leaving the courtroom after the proceeding had ended. In both matters, respondent failed to observe the mandated procedural safeguards before exercising his contempt power and sending the defendants to jail.

Pursuant to a judge’s duty to “require order and decorum” in court proceedings (Rules, §100.3[B][2]), a judge may impose contempt for “[d]isorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority” (Jud Law §750[A][1]). “Where the offense is committed in the immediate view and presence of the court,... it may be punished summarily” (Jud Law §755). The exercise of the contempt power requires compliance with procedural safeguards, including giving the accused an appropriate warning and opportunity to desist from the contumacious conduct (*Katz v Murtagh*, 28 NY2d 234, 238 [1971]; *Loeber v. Teresi*, 256 AD2d 747 [3d Dept 1998]; *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]). Implicit in the law is that strict adherence to these procedures is necessary to ensure that summary contempt be imposed only in “exceptional and necessitous circumstances” (*see* 22 NYCRR §604.2[a][1]). A judge’s failure to adhere to the mandated procedures is inconsistent with his or her ethical duty to “be faithful to the law” and may constitute misconduct that warrants public discipline. Rules, §100.3(B)(1); *Matter of Feeder*, 2013 NYSCJC Annual Report 124; *Matter of Mills*, 2005 NYSCJC Annual Report 185; *Matter of Teresi*, 2002 NYSCJC Annual Report 163; *Matter of Recant*, 2002 NYSCJC Annual Report 139.

In the case of *People v. Gentile*, respondent disregarded these procedural and ethical requirements in issuing five successive contempt citations against the defendant and imposing five consecutive 30-day jail sentences. Although it is clear from the record that the defendant was disruptive – he repeatedly turned and addressed the audience, threatened the victim, made faces, yelled at his lawyer, interrupted respondent and made disrespectful comments – it is a judge’s duty to act in a patient, neutral, judicious manner and to properly apply the law regardless of the provocation (Rules, §100.3[B][3]). While respondent warned the defendant early in the proceeding that “putting on a show,” threatening the victim and interrupting could result in contempt, he has acknowledged that he did not give appropriate warnings before each of the acts that triggered a contempt citation or thereafter provide the defendant with an opportunity to purge the contempt by making a statement or apologizing for his behavior; nor did respondent make a clear record of each of the defendant’s contumacious acts. Even if it seemed unlikely that repeated warnings would have deterred further misbehavior or that the defendant would have apologized if afforded the opportunity to do so, he was entitled to the full protections afforded by law. At the hearing before the referee, respondent acknowledged that the number of contempt citations “just doesn’t seem fair” and that he “should have just let [Mr. Gentile] talk.”

In the case of *People v. Blount*, respondent not only failed to follow the mandatory contempt procedures, but abused his authority by holding the defendant in summary contempt and imposing a 30-day jail sentence for “smirking” after the proceeding had ended. The record establishes that from the outset of the proceeding,

respondent took personal offense at the defendant's demeanor and overreacted to a perceived show of disrespect. After the defendant apparently smiled or laughed as respondent was explaining the order of protection, respondent stated, "You're standing there with a grin that I would love to get off the bench and slap off your face." He then added, "How about 30 days in jail for contempt, that's hilarious too, isn't it? What's wrong with you? We done smirking?" Later, as the defendant was leaving the courtroom, respondent called him back and summarily committed him to jail for 30 days, stating that the defendant "gave me a nice, big smirk ... as if to say, blank you, Judge." Respondent provided no opportunity for the defendant to make a statement prior to the contempt adjudication and curtly rejected his attorney's attempt to intervene. Respondent's conduct was clearly a "substantial overreaction to conduct that in no way warranted such extreme punitive measures" (*Matter of Mills, supra*, 2005 NYSCJC Annual Report at 191). Not until five days later, after hearing from his administrative judge, did respondent vacate the contempt citation on his own motion, recognizing that his conduct in *Blount* was "intemperate" and inconsistent with the mandated procedures.

As respondent stated when he vacated Mr. Blount's contempt, a judge who has responsibility to hold people accountable for their conduct is "also accountable and expected to properly apply the law." If an individual's behavior is disorderly or disrespectful, strict adherence to the contempt procedures required by law may avoid the necessity of imposing a contempt citation to maintain order and decorum. Here, respondent's disregard of due process in both matters was inconsistent with the fair and proper administration of justice.

While the record before us depicts a judge who holds defendants and lawyers to exacting standards of courtroom behavior and is quick to lecture them for perceived displays of disrespect (*e.g.*, scolding Mr. Blount’s lawyer and telling him to “shut up” when he quietly spoke to his client), respondent’s own behavior fell short of the required standards. On several occasions he made injudicious, disparaging comments to and about attorneys. Respondent twice referred to a prosecutor as “a cigar store Indian” for not speaking during plea discussions. Such language was snide and demeaning, although we do not consider the term racially offensive in this context (*see Matter of Duckman*, 92 NY2d 141, 151 [1998] [judge described prosecutors as “mannequins” and “puppets” as part of a pattern of “open-court sarcasm and ridicule”). In another case, involving a 74-year old defendant who pled guilty to Disorderly Conduct, respondent stated derisively that the conviction gave the prosecutor “another notch on his belt.” In a case where the prosecutor proposed a plea involving forfeiture of funds seized from the defendant, respondent speculated that the district attorney “wants to buy a new couch for his office” or “wants a new laptop or whatever.” Respondent’s flippant remarks were not only discourteous but impugned the lawyers’ integrity and undermine their role in the eyes of defendants and the public, which is inconsistent with established ethical standards requiring judges to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary and to treat lawyers with courtesy, dignity and patience (Rules, §§100.2[A], 100.3[B][3]).

In finding that respondent engaged in misconduct with respect to the above matters, it seems appropriate to comment with respect to the dismissal of paragraphs 30

through 34 of the Amended Formal Written Complaint, which allege that respondent used a racial epithet in an off-the-record courtroom conversation with a lawyer approximately six years ago.¹ We consider this accusation of the utmost gravity. It would certainly be grounds for removal if credited, particularly in light of the other misconduct findings regarding respondent. We are deeply reluctant, however, to remove a jurist on the basis of the ambiguous evidence presented in connection with this allegation. While two attorneys say they heard the remark, at least three others (including an attorney) who were alleged to have been in the courtroom at the time swear they did not, and respondent has categorically denied using that term. Moreover, two supervisors who say they were contemporaneously informed of the alleged statement acknowledge that they did nothing in response at that time, and none of the witnesses memorialized the event or brought it to the attention of respondent's administrative judge (although one of the attorneys had previously made a complaint against respondent about matters that seem less egregious). Not until at least two years later was the allegation included in a complaint filed with the Commission.

Finally, as respondent's counsel has pointed out, the manner in which respondent was confronted by this allegation made any rebuttal on his part extremely difficult. Respondent was not made aware of the accusation – consisting of a single off-the-record statement – until more than a year after the Commission had received the

¹ It was alleged that after a court session had ended, respondent asked the lawyer, who is African-American, if the lawyer knew what black people from New York City call black people from upstate New York and when the lawyer responded in the negative, respondent replied, "Country niggers."

complaint and more than three years after the statement was allegedly made. Even then, respondent was given shifting time frames and few specifics as to when it took place; ultimately he was provided with a possible range of six months.

Under these circumstances, we simply cannot come to a firm conclusion as to what occurred in respondent's courtroom on the day in question. And while we generally give deference to the referee's findings, in this case the referee accepted the allegation as true without any explanation as to why, without making any credibility findings, and without setting forth any reasoning as to how he reached this conclusion. Indeed, the referee drew many conclusions favorable to respondent, including a finding that his testimony was "forthright" and that there was no other evidence of racial bias, without reconciling them with the findings on this incident. Absent any understanding of how the referee arrived at his factual determination, we cannot give it any deference.

Thus we are left with no clear view as to the accuracy of this allegation. In so stating, we do not intimate that we believe any particular account to be truthful, or any other to be false. Indeed, those are not the only possibilities. Even on a matter of this importance, witnesses can mishear or have mistaken or faded recollections, and after so many years uncertain memories can harden, while others can change. But the bottom line is that we cannot make a finding in regard to this allegation with any degree of confidence. Given the seriousness of this charge, the conflicting testimony, the absence of a clear explanation for the actions taken or not taken afterwards by those involved, respondent's adamant and consistent denials, and the difficulties presented in defending

against the allegation under these circumstances, we find that the record does not contain sufficient proof to sustain the allegation.

As to the misconduct established in the record before us, we conclude that it constitutes a significant breach of the ethical standards. We are unpersuaded, however, that the record establishes that respondent is “unfit to remain in office” (*Matter of Reeves*, 63 NY2d 105, 111 [1984]) and, in view of several factors, determine that he should be censured. In particular, we note that respondent took ameliorative steps to reduce the harsh consequences of his contempt citations. In *Blount*, he vacated the contempt on his own motion five days later, and the defendant, who was in custody on unrelated matters, was not subject to any additional incarceration. In *Gentile*, when the defendant’s lawyer moved to modify the sentence (conceding that the defendant had engaged in “bad behavior”), respondent vacated two of the five counts of contempt. We also note that respondent has acknowledged that his actions were inconsistent with the procedures required by law and, as the referee found, has been “contrite recognizing that he had made errors in language and temperament” (Report, p 16). We accept respondent’s assurance that he has learned from this experience and that his conduct in the future will be in strict accordance with the mandated procedural and ethical standards. Accordingly, we conclude that censure is appropriate.

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

Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Ms. Corngold,

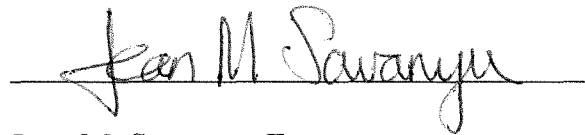
Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

Judge Klonick dissents as to the dismissal of paragraphs 30 to 34 of the Amended Formal Written Complaint and dissents as to the sanction, voting that respondent should be removed from office.

CERTIFICATION

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

Dated: February 12, 2015

A handwritten signature in cursive script, reading "Jean M. Savanyu", is written over a horizontal line.

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

JOSEPH A. SAKOWSKI,

a Justice of the Elma Town Court,
Erie 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Daniel M. Killelea for the Respondent

The respondent, Joseph A. Sakowski, a Justice of the Elma Town Court,
Erie County, was served with a Formal Written Complaint dated July 15, 2014,

containing one charge. The Formal Written Complaint alleged that respondent engaged in prohibited political activity by making improper contributions to political organizations and candidates, both directly and through his law firm. Respondent filed a verified Answer dated August 1, 2014.

On September 24, 2014, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument. Thereafter, the Commission invited counsel to make additional submissions addressing the relevance, if any, of *Williams-Yulee v. Florida Bar*, 575 US ___, 135 S Ct 1656, 191 L Ed2d 570 (2015), a matter before the United States Supreme Court that was decided on April 29, 2015.

On June 18, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Elma Town Court, Erie County, since January 1, 1980. His current term expires on December 31, 2015. Respondent was admitted to the practice of law in New York in 1976.

2. As set forth below, from June 2003 through January 2014 respondent engaged in prohibited political activity directly, and indirectly through his law firm Sakowski & Markello, LLP, when he made approximately 78 prohibited contributions to political organizations or candidates for elective office, totaling approximately \$21,162,

and made approximately 27 prohibited ticket purchases to politically sponsored dinners or other functions, totaling approximately \$2,322.

3. Respondent is a partner in Sakowski & Markello, LLP, a law firm with offices in Elma, New York. Respondent has been a law partner with Jeffrey P. Markello since at least 1998 and formed Sakowski & Markello, LLP, in January 2005.

4. From August 2004 through January 2014, as set forth in Schedule A to the Agreed Statement, respondent was directly responsible for 49 prohibited contributions to political organizations or candidates for elective office, totaling \$10,533. None of these contributions were made during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules Governing Judicial Conduct ("Rules").

5. From June 2003 through May 2012, as set forth in Schedule B to the Agreed Statement, respondent was directly responsible for 20 prohibited contributions to political organizations or candidates for elective office, totaling \$10,100. Although each of these contributions was made during respondent's "window period," none were made to purchase tickets to politically sponsored dinners or other functions, as permitted by Section 100.5(A)(2)(v) of the Rules, or for any other purpose authorized in the Rules.

6. From 2006 through April 2009, as set forth in Schedule C to the Agreed Statement, respondent was indirectly responsible for four prohibited contributions made through his law firm Sakowski & Markello, LLP, to political organizations or candidates for elective office, totaling \$229. None of these contributions were made

during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules.

7. From July 2007 through April 2008, as set forth in Schedule D to the Agreed Statement, respondent was indirectly responsible for five prohibited contributions made through his law firm Sakowski & Markello, LLP, to political organizations or candidates for elective office, totaling \$300. Although each of these contributions was made during respondent's "window period," none were made to purchase tickets to politically sponsored dinners or other functions, as permitted by Section 100.5(A)(2)(v) of the Rules, or for any other purpose authorized in the Rules.

8. From March 2005 through April 2010, as set forth in Schedule E to the Agreed Statement, respondent was indirectly responsible for 27 prohibited ticket purchases made through his law firm Sakowski & Markello, LLP, to politically sponsored dinners or other functions totaling approximately \$2,322. None of these contributions were made during respondent's "window period" of permissible political activity on behalf of his own candidacy for elected judicial office, as defined in Section 100.0(Q) of the Rules, and therefore none of these contributions were permitted by Section 100.5(A)(2)(v) of the Rules, or authorized for any other purpose in the Rules.

Additional Factors

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

10. In his 34 years on the bench, respondent has not been previously

disciplined for judicial misconduct. He regrets his failure to abide by the Rules with respect to political activity and pledges to conduct himself in accordance with the Rules for the remainder of his service as a judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(1)(h) and 100.5(A)(1)(i)¹ 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 or judicial candidate cannot “directly or indirectly” engage in partisan political activity except for certain limited activity during a prescribed “window period” in connection with the judge's campaign for judicial office (Rules, §§100.5, 100.0[Q]). These limitations have been carefully drawn to address “the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary” (*Matter of Raab*, 100 NY2d 305, 316 [2003]). As the Court of Appeals has held, the ethical restrictions are not only constitutionally

¹ It was stipulated that the Formal Written Complaint inadvertently omitted citing a violation of Section 100.5(A)(1)(i) of the Rules, and that respondent agrees that the purchase of 27 tickets to political events as set forth in Schedule E was a violation of that section, waives the filing of any amended Formal Written Complaint or other notice with regard to citing 100.5(A)(1)(i), and consents to amending the Formal Written Complaint to conform to the proof as set forth in the Agreed Statement and therefore to include a violation of 100.5(A)(1)(i). The purchase of these tickets was included on Schedule C of the Formal Written Complaint and sufficient notice had been provided to respondent that these purchases were part of the charges against him.

sound, but fair and necessary to “preserv[e] the impartiality and independence of our state judiciary and maintain[] public confidence in New York State’s court system” (*Id.* at 312).

Among these restrictions, a judge or judicial candidate is specifically prohibited from “making a contribution to a political organization or candidate” or purchasing tickets to attend politically sponsored events (Rules, §§100.5[A][1][h], [i]), except that a candidate, during his or her “window period,” may with some restrictions purchase two tickets to attend politically sponsored functions (Rules, §100.5[A][2][v]). *See Matter of Raab, supra; Matter of Mullin*, 2001 NYSCJC Annual Report 117; *Matter of Laurino*, 1989 NYSCJC Annual Report 105. By making numerous contributions, both directly and through his law firm, to political organizations and candidates over the past decade, respondent repeatedly engaged in conduct that is specifically barred by the ethical rules.

Respondent has acknowledged making 69 prohibited political contributions directly, totaling \$20,633; 49 of these were made outside of his “window period” as a candidate for judicial office. While most of respondent’s direct contributions went to presidential campaigns, candidates in other states, and political organizations and causes on a national level, that does not excuse the impropriety. Any such contributions to a political organization or candidate are inconsistent with the ethical rule (§100.5[A][1][h]), which makes no distinction between local and national politics.

Although there is nothing in the record before us that discloses whether

respondent knew that such contributions were improper, we have to assume that as a judge since 1980, he was familiar with the ethical rule prohibiting contributions to candidates or political organizations. The rule is clear; the Commission and the Advisory Committee on Judicial Ethics (“Advisory Committee”) have warned judges for decades to strictly adhere to the limitations on partisan political activity; and the Commission has addressed the subject in its annual reports. If respondent had any question whether he could properly make such contributions notwithstanding the clear language of Rule 100.5(A)(1)(h), he could have researched the determinations of the Commission and the opinions of the Advisory Committee, or requested a confidential advisory opinion. The Advisory Committee has frequently reminded judges that it is improper for a judge to contribute “to any political campaign except his or her own” (Adv Op 91-68), and specifically has advised that the prohibition against political contributions extends even to the campaigns of a presidential candidate or an out-of-state congressional or gubernatorial candidate (Adv Ops 11-146, 94-66; *see also* Adv Ops 14-95, 96-29, 92-128, 89-55). Nor may a judge make a contribution to entities such as MoveOn.org, which is a political organization within the meaning of the Rules (*see* §100.0[M]), notwithstanding that the organization may have a nonprofit educational advocacy arm (Adv Op 14-117).

Respondent has also acknowledged that his law firm, Sakowski & Markello, LLP, made 36 prohibited political contributions totaling \$2,851. Since a judge “cannot do indirectly that which is forbidden explicitly” and since political contributions are prohibited by Rule 100.5(A)(1)(h), contributions by a judge’s law firm are also

improper (*see* Adv Op 96-29). As the Advisory Committee has stated:

When a law firm, whose members include a part-time judge, donates money to a political campaign, it is correctly presumed that a percentage of the donation comes from the judge. If the judge is an associate or a partner of the firm, such donations give the clear appearance that the judge has endorsed the donee's candidacy. Such contributions, therefore, may not be made in the firm's name. (Adv Op 88-56)

See also Matter of Burke, 2015 NYSCJC Annual Report 78; *Matter of Kelly*, 2012 NYSCJC Annual Report 113; *Matter of DeVaul*, 1986 NYSCJC Annual Report 83.

Of the contributions by respondent's law firm, 27 payments were for the purchase of tickets to political events that were not within respondent's window periods and thus were prohibited by Rule 100.5(A)(1)(i); the other nine payments were prohibited contributions made both during and outside respondent's window periods. All of the law firm's contributions involved local campaigns and candidates.

The contributions by respondent's law firm were improper regardless of whether respondent was aware of them or who signed the checks (*see* Adv Op 96-29). Since the checks came from respondent's law firm, where he was a name partner, there was at least an appearance that he was responsible for or endorsed those donations, or that at least a portion of the funds was attributable to him. It was respondent's obligation to ensure that his law firm was in compliance with the ethical limitations on political activity that were incumbent upon him.

As a judge for more than three decades, respondent should have been more sensitive to his obligation to strictly adhere to the ethical ban on political contributions.

In admonishing respondent, we remind every judge and judicial candidate of the obligation to know and abide by the ethical rules as interpreted and applied by the Commission and the Advisory Committee.

We are constrained to reply to our colleague Mr. Emery's opinion that the rule barring political contributions by a judge or judicial candidate impermissibly treads on First Amendment rights. In our view, nothing in the recent Supreme Court decision, *Williams-Yulee v. Florida Bar*, 575 US ___, 135 S Ct 1656, 191 L Ed2d 570 (2015), which upheld a Florida rule prohibiting judicial candidates from personally soliciting campaign contributions, permits a judge to make contributions to political candidates or organizations, as respondent did here, or otherwise undermines New York's rules limiting political activity by judges and judicial candidates. Indeed, in affirming that political speech by judicial candidates can be regulated by narrowly tailored restrictions that serve a compelling state interest, the Supreme Court in *Williams-Yulee* applied an analysis similar to that in *Matter of Raab, supra*, where this state's highest court in 2003 considered a vigorous constitutional challenge to New York's restrictions on political activity. In upholding the New York rules, the *Raab* court, applying a strict scrutiny analysis, noted the state's compelling interest in ensuring that its judicial system "is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption" and concluded that the challenged restrictions were narrowly tailored to further those interests (*Raab, supra*, 100 NY2d at 315).

The *Raab* court specifically addressed the rule at issue in the matter before us, the ban on political contributions by judges and judicial candidates (§100.5[A][1][h]), concluding that such a limitation serves a valid state objective and is constitutionally permissible. While our dissenting colleague treats the *Raab* decision as though the Court of Appeals intended to limit application of the contributions ban to facts that are identical to the conduct in *Raab*, we find nothing in the Court’s rationale in *Raab* to support such a conclusion. Though the particular facts in *Raab* were different, there is no suggestion in the *Raab* decision that political contributions of the kind here would be permitted under the applicable rule.

In the wake of *Republican Party of Minn. v. White*, 536 US 765 (2002), some commentators, including our dissenting colleague, believed that the Supreme Court had greatly expanded a judge’s right to engage in traditional forms of political activity, including personally soliciting campaign funds (*see Weaver v. Bonner*, 309 F3d 1312 [11th Cir 2002]; *Matter of Chan*, 2010 NYSCJC Annual Report 124 [Emery Dissent]). Now the Supreme Court, applying the same standards, has upheld a rule barring judicial candidates from engaging in such solicitations, while underscoring that “judges are not politicians” and that judicial elections may be regulated differently from political elections (*Williams-Yulee, supra*, 191 L Ed2d at 580, 585). While the particular conduct in the case before us is different than in *Raab* and *Williams-Yulee*, it is clearly prohibited by a rule in New York that has not been diminished or weakened by prior precedent.

The Commission is not a court, and it is our role to interpret and apply the ethical rules, not to make broad constitutional pronouncements. To the extent that any aspect of the rules is constitutionally challenged, we believe that the courts are in the best position to make such a determination.

As the Commission has previously stated, “the rules governing political activity for judges and judicial candidates seek to achieve a reasonable balance between the goals of prohibiting judges from being involved in politics and permitting judges to campaign effectively,” while respecting their First Amendment rights (*Matter of Campbell*, 2005 NYSCJC Annual Report 133).

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Harding, Mr. Stoloff and Judge Weinstein concur, except as follows.

Mr. Stoloff, in an opinion, dissents only as to the conclusion that respondent’s conduct in contributing to political candidates on a national level warrants public discipline.

Mr. Emery and Mr. Belluck dissent and vote to reject the Agreed Statement of Facts. Mr. Emery files an opinion, which Mr. Belluck joins.

CERTIFICATION

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

Dated: August 20, 2015

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a large initial "J" and "S".

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

JOSEPH A. SAKOWSKI,

a Justice of the Elma Town Court,
Erie County.

OPINION BY MR. STOLOFF
CONCURRING IN PART AND
DISSENTING IN PART

I largely agree with the analysis set forth in the Dissent of Mr. Emery, joined by Mr. Belluck. This separate opinion is drafted to highlight the essential conflict between a judicial candidate's or a sitting judge's fundamental First Amendment right of free speech and the rule which I am constrained to enforce.

The issue which requires further discussion and analysis is whether a judge, during either the window period or the four to 14-year term while sitting as a judge on the bench¹, has forfeited the ability to contribute to candidates seeking elected office in federal elections by making contributions directly to the candidate's campaign committee. The New York rule, on its face, bans all contributions to political campaigns, whether federal or state (22 NYCRR 100.5[A][1][h]).² The Court of Appeals, in *Matter*

¹ A town justice's term of office is generally four years.

² By contrast, Canon 5 of the California Code of Judicial Ethics permits judges and candidates for judicial office to make contributions to a political party, political organization, or non-judicial candidate, with limits of \$500 in any calendar year per political party, political organization or non-judicial candidate, and \$1,000 in any calendar year for all political parties, political

of Raab, 100 NY2d 305 (2003), applied the strict scrutiny standard to an in-state contribution in accepting a determination of the Commission and the censure of Judge Raab. It did not have to consider the application of the rule in the context of federal elections and whether a contribution to a presidential, senatorial or congressional candidate election committee might result in an appearance that such contribution was made in a candidate's effort to buy, and the political party's attempt to sell, judicial nominations or party support. While I have no doubt the state has a compelling interest to ensure that state judgeships are not bought and sold, and do not appear to be for sale, one must examine the federal process of appointing individuals for judicial positions to determine in this instance whether there is there a compelling state interest.

As of July 28, 2015, it was reported that there are 63 judicial vacancies in the federal branch, with only 17 pending nominations, leaving 73% of the vacancies not even at the starting gate (www.uscourts.gov/judges-judgeships/judicial-vacancies). The Article III vacancies were as follows: for the United States Courts of Appeals, 9 vacancies, with 1 nomination pending; for the United States District Courts (including territorial courts), 50 vacancies, with 15 nominations pending and 2 nominations pending for future vacancies; for the United States Court of International Trade, 4 vacancies, with 1 nomination pending. All of these judges are appointed with the advice and consent of the U.S. Senate.

organizations, or non-judicial candidates. Arizona permits contributions of up to 50% of the maximum allowed by law (see Arizona Code of Judicial Conduct, Rule 4.1(A)(4) and A.R.S. §16-905).

Thus, even the nomination process is so delayed that the possibility of a state court judge benefitting from a modest contribution to a candidate for national office is so remote that one cannot reasonably conclude that it would play a part in both the nomination process and the Senate's responsibility of advice and consent.

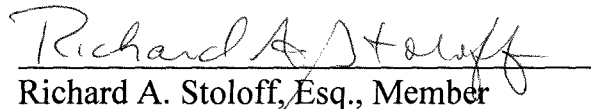
Undeniably, politics plays its part in this process. However, to conclude that one seeking or holding judicial office in New York may be strong-armed by a political leader or organization to make a contribution to a campaign committee of one vying for the Presidency, Senate or Congress, or that an aspiring or sitting judge such as Town Justice Sakowski might *sua sponte* make such a contribution to curry favor with local political leaders, perhaps in the hope of obtaining either local support or support for a federal judgeship, is sheer speculation and conjecture that is attenuated from both the reality of local politics and the actual process of appointment of federal judges. In my opinion there is no compelling "state interest" that should prevent an individual seeking an elected New York State judicial position, or a sitting New York State judge, from making modest campaign contributions to those seeking federal office, and none has been identified. If the individual to whom a campaign contribution was made were to appear before the judge on subsequent occasions, recusal would be appropriate.³ While the bright line rule serves a purpose of avoiding the appearance of impropriety in some circumstances, it is my opinion that the conduct of Judge Sakowski in making contributions over a period of eleven years to the campaigns of those seeking federal

³ I leave the time frame for such recusal to others.

office, even if a technical violation of Rule 100.5(A)(1)(h), in and of itself should not warrant a public sanction.

Based upon the foregoing, I concur with the Determination of the Commission, except as to the conclusion that respondent's contribution to the campaign committees of political candidates on a national level warrants public discipline.

Dated: August 20, 2015


Richard A. Stoloff, 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

JOSEPH A. SAKOWSKI,

a Justice of the Elma Town Court,
Erie County.

DISSENTING OPINION
BY MR. EMERY, WHICH
MR. BELLUCK JOINS

INTRODUCTION

A fundamental right of the American political system is the right to support political candidates who reflect one’s view, hopes and dreams for a better future. We support these candidates with our votes, our voices and our money. The Supreme Court has jealously policed any government intrusions into the rights of citizens to participate in the political process. This right of political expression is the basic guarantee of the First Amendment on which our elective system – the system based on the consent of the governed – operates.

We start from this basic proposition when we evaluate any necessity to compromise or abridge the right to full political participation. The Supreme Court has repeatedly affirmed that a compelling governmental interest is the only basis on which to legitimately diminish the right to full political participation and, then, the method of diminution must be the least restrictive one available that achieves the government’s

compelling need.

This is the simplified analysis of the Court in the recent case of *Williams-Yulee v. Florida Bar*, 575 US ___, 135 S Ct 1656, 191 L Ed2d 570 (2015), in which Chief Justice Roberts, in a 5-4 decision, concluded that a compelling governmental interest in a judiciary that does not appear corrupted supports a rule that prohibits judicial candidates from directly soliciting campaign donations from voters who will be appearing before the judge.

Regrettably, this cabined, well-reasoned Supreme Court decision appears to be interpreted by this Commission as a license to accelerate this Commission's proclivity to discipline judges for all manner of campaign activity that has no relationship to this narrowly defined compelling interest. The case before us, for example, is the exact opposite situation – a judge making campaign contributions to national candidates who reflect his views – and, therefore, quite benign, as compared to the corrupting perception of judges soliciting money. Ironically, the Commission agrees to discipline Judge Sakowski for national contributions even though it cannot – because the New York rules allow it – discipline a New York judge whose campaign committee (with the knowledge of the judicial candidate) solicits contributions from people and parties who appear before the judge – almost the same conduct prohibited in *Williams-Yulee*.

I write separately, below, because I strongly believe that this is a road that the Commission should not travel. Campaign rule enforcement for judicial elections should be handled by some other body as a discrete subset of enforcement of judicial

conduct. If we are going to continue on this path, then we had better hew to the Constitution and the basic tenets of respect for the rights of judges to express themselves both at a personal level and in the judicial campaign context – a context that is complex bordering on byzantine – that neither candidates nor this Commission has the expertise to fathom given the feudal vagaries of City versus Long Island versus Upstate judicial selection gamesmanship. Put simply, we are in way over our heads and we are regularly drowning fundamental constitutional rights in our flailing attempts to make sense of the political realities of New York State regional political judicial selection mechanisms. Posturing itself as regulator of judicial elections in New York is a task this Commission has attempted and failed. We should quit this business or, at a minimum, exercise the restraint that the federal Constitution requires when governmental regulators tamper with precious First Amendment rights.¹

RESPONDENT'S CASE

The Agreed Statement of Facts accepted by the majority publicly disciplines Judge Sakowski for making numerous political contributions, both personally and through his law firm, over a period of eleven years. Most of the judge's 69 direct contributions – in amounts ranging from \$10 to \$2,300 – were made to candidates and

¹ I recognize that each of my colleagues, in his or her own way, is a devotee of constitutional principles. But rather than wrestle with the commands of First Amendment analysis, the majority opts to pay lip service to *Raab* and the Supreme Court precedent without fulfilling our obligation to our oath to uphold constitutional doctrine by rigorous analysis of their reach and import. Any decision – the majority's decision – that punishes a judge for core electoral speech and activity, without any analysis of the judge's specific conduct in the context of a compelling governmental interest that is actually undermined by that speech activity, abdicates our basic obligation. Passive acquiescence, in the sheep's clothing of the pretension that we are not a court, degrades our role as much as it fails fundamental First Amendment tests.

causes on a national level, including presidential campaigns and U.S. Senate races in other states, and he made such contributions both when he was, and was not, running for judicial office. Because such contributions violate the rule barring judges from “making a contribution to a political organization or candidate” (Rule 100.5[A][1][h]), I am compelled to concur that Judge Sakowski’s conduct violates the plain meaning of the ethical provisions charged. But for reasons set forth below, I must dissent from accepting the Agreed Statement.

HISTORY AND BACKGROUND

In New York, every judge of the state unified court system is required to “refrain from inappropriate political activity,” as described in Section 100.5 of the Rules Governing Judicial Conduct. Essentially, judges are prohibited from “directly or indirectly” engaging in any partisan political activity, except – to a strictly limited extent – in connection with the judge’s own campaign for judicial office during a prescribed “window period” before and after a nominating convention, primary or general election. These rules and their interpretations are inordinately complex and only a cadre of sophisticated election practitioners even pretend to be able to apply them. They are also far more relevant in some parts of the State – outside of New York City – where there are many more contested elections than in the City where, for the most part, political leaders select judges.

Among other restrictions, a judge or judicial candidate may not endorse other candidates or participate in their campaigns, make speeches on behalf of a political

organization or candidate, attend political gatherings, or solicit funds for or make a contribution to a political organization or candidate (Rules, §§100.5[A][1][c], [d], [e], [f], [g], [h]). This particular combination of restrictions, the New York Court of Appeals has told us, is designed to ensure “that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption,” while simultaneously “respect[ing] the First Amendment rights of judicial candidates and voters” (*Matter of Raab*, 100 NY2d 305, 315 [2003]). Applying a strict scrutiny analysis and finding a compelling state interest, the Court in *Raab* rejected a First Amendment challenge to the political activity restrictions at issue – including the ban on contributions.² *Raab* was decided after a Supreme Court decision invalidated a Minnesota rule prohibiting judicial candidates from “announcing” their views on disputed legal and political issues (*Republican Party of Minn. v. White*, 536 US 765 [2002]).

Buttressed by *Raab*, the Commission has ranged far and wide, punishing judges for political activity in contexts far beyond the limited, factually different scenarios of *Raab*, without engaging in any basic First Amendment analysis of whether a compelling governmental interest justified precluding the specific conduct at issue.³ And

² Prior to serving on this Commission, I represented the respondent-judge in *Raab* before the Commission and the Court of Appeals.

³ *E.g.*, *Matter of Burke*, 2015 NYSCJC Annual Report 78, and *Matter of Kelly*, 2012 NYSCJC Annual Report 113 (contributions by judge’s law firm); *Matter of Michels*, 2012 NYSCJC Annual Report 130 (misleading campaign literature); *Matter of McGrath*, 2011 NYSCJC Annual Report 120 (campaign literature conveyed bias); *Matter of Chan*, 2010 NYSCJC Annual Report 124 (personal solicitation of campaign contributions and campaign literature that was misleading and conveyed bias); *Matter of Herrmann*, 2010 NYSCJC Annual Report 172 (nominated a candidate at a caucus); *Matter of Yacknin*, 2009 NYSCJC Annual Report 176 (solicited political

the Advisory Committee on Judicial Ethics has issued opinions concluding that particular scenarios are inconsistent with the political activity rules and therefore prohibited, without providing even lip service to the First Amendment interests at issue.⁴

Essentially, for New York State, *Raab* opened a constitutionally bereft sluice gate of judicial campaign regulation by this Commission and the Advisory Committee that, in abandoning a First Amendment analytical framework, has descended to ad hoc, pure rational basis policy-making as opposed to the rigorous First Amendment compliance unquestionably required both by *Raab* itself, and by *Williams-Yulee* and *White*.

Though this Commission, and those who advocate for controlling unseemly

support in court from an attorney appearing before her); *Matter of King*, 2008 NYSCJC Annual Report 145 (served as a party chair, circulated petitions for and endorsed other candidates); *Matter of Kulkin*, 2007 NYSCJC Annual Report 115 (misrepresented facts about his opponent); *Matter of Spargo*, 2007 NYSCJC Annual Report 107 (spoke at a party fund-raiser and engaged in “unseemly” political activity including buying drinks for patrons at a bar when he was a candidate); *Matter of Farrell*, 2005 NYSCJC 159 (made phone calls supporting another candidate and made a prohibited payment to a political organization); *Matter of Campbell*, 2005 NYSCJC Annual Report 133 (endorsed other candidates); *Matter of Schneier*, 2004 NYSCJC Annual Report 153 (improper use of campaign funds).

⁴ To cite just a few examples: the Committee has opined that a judge who is not a candidate may not attend a fund-raiser for a local school board candidate (Adv Op 99-18) or purchase tickets to attend a social event sponsoring school board candidates (Adv Op 88-129); may not attend a party celebrating a neighbor’s election as a town board member even if the event is not sponsored by a political organization (Adv Op 00-113) or attend a picnic sponsored by a political party (Adv Op 90-11); may not award prizes in a high school essay contest at a political club (Adv Op 89-26) or speak at a political club about the function of the Family Court (Adv Op 88-136); may not introduce judicial candidates at a bar association-sponsored event (Adv Op 96-49); may not accompany a spouse who is a candidate for public office to political functions (Adv Op 92-129), march in a parade with his/her spouse-candidate, or appear at a political event held by the spouse in the marital home (Adv Op 06-147); further, a judge must advise his/her spouse not to place signs endorsing political candidates on the property where the judge and spouse reside, even if the spouse is the sole owner of the property (Adv Ops 99-118, 07-169), and may not attend a candlelight vigil on behalf of crime victims (Adv Op 04-91). The notion that any of these rulings could survive a First Amendment challenge is patently absurd.

election tactics, may like a Marquis of Queensbury approach to judicial contests, telling judges who are campaigning that they cannot hit below the belt is plainly unconstitutional. New York has chosen to select most of its judges using elections. Along with this choice comes the constitutional guarantees of free speech that allow for gloves off behavior even in judicial elections. And of course, in reality, New York judicial elections, even when purportedly regulated by this Commission and the Advisory Committee, are actually little better than cage fights. The hallucination that this Commission and the Advisory Committee are somehow civilizing these contests is magical thinking.⁵

THE SUPREME COURT'S RECENT RULING

Thirteen years after *White*, the Supreme Court in *Williams-Yulee v. Florida Bar* upheld the application of a Florida rule that precluded otherwise protected speech (personal solicitation of campaign contributions) by judicial candidates. Accepting that strict scrutiny requires a compelling interest as a basis to regulate judicial speech in campaigns, the Court concluded that the rule was narrowly tailored to promote the state's

⁵ Instances of salacious and misleading campaign advertising by judicial candidates have persisted since the infamous 1968 commercial by Supreme Court candidate Sol Wachtler (later New York's Chief Judge), showing the candidate strolling through a jail and slamming a cell door with a pledge to "get the thieves and muggers and murderers into these cells." *See, e.g., Matter of Polito*, 1999 NYSCJC Annual Report 129 (candidate ran graphic television ads portraying a masked man with a gun attacking a woman outside her car, while a voice declared the candidate would "crack down on crime" as a cell door slammed shut; another ad vowed that he would not "send convicted child molesters home for the weekend" and would "stick his foot in the revolving door of justice," with dramatic footage of a foot jammed in a door); *Matter of Hafner*, 2001 NYSCJC Annual Report 113 (candidate's campaign literature attacked the record of his opponent, the incumbent judge, in dismissing cases and said, "Soft judges make hard criminals!"); *Matter of Kulkin*, 2007 NYSCJC Annual Report 115 (candidate distorted and misrepresented facts about his opponent, falsely implying that she had refused to handle parking tickets and thereby deprived the City of \$400,000 in revenue).

compelling interest in a fair and impartial judiciary free from corruption and the appearance of corruption. Writing for the majority, Chief Justice Roberts applied a stringent First Amendment analysis to the rule at issue, carefully weighing the competing interests and issues at stake. While opining that judicial candidates may be treated differently from campaigners for political office since “the role of judges differs from the role of politicians,” he underscored the narrow scope of the Court’s ruling on the particular facts presented, stating: “We have emphasized that ‘it is the rare case’ in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. . . . This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny” (*supra*, 191 L Ed2d at 585, 584).

CONSTITUTIONAL ANALYSIS

Rather than read *Williams-Yulee* as an endorsement of any and all restrictions on political activity by judges and judicial candidates that appear to be “desirable” as a matter of preferred policy, we should respect the Court’s clear message: that judicial campaign speech and conduct are core First Amendment activity, that a compelling interest must be identified if a narrow rule is to be upheld, that personal solicitation of campaign contributions by judicial candidates is such an interest that cuts to the core of judicial integrity, that strict scrutiny requires analysis of the campaign activity at issue to determine whether the compelling governmental interest (appearance of corruption) legitimately requires restriction of that particular activity, and that the rule restricting judicial speech is the least restrictive available to support the compelling

governmental interest at stake.

Plainly, *Williams-Yulee* did not address any campaign activity beyond judicial candidates directly soliciting funds. Notably, neither *Williams-Yulee* nor *Raab* addressed the New York common practice of judicial candidates and sitting judges soliciting money through committees, knowing who contributed, and soliciting funds through these same committees from lawyers and entities which will and do appear before the candidate for judicial office, though even this practice is mentioned and not criticized as raising constitutional questions in the *Williams-Yulee* decision (191 L Ed2 at 588). Of course, the ultimate hypocrisy in our campaign regulatory scheme is the failure to restrict these donations in a meaningful way.⁶ Until we do, we will have no moral or legal high ground to restrict far more mundane and benign political judicial behavior, as we do now. Of course, in a whisper we all acknowledge that donations from lawyers and entities to judges before whom they appear are the sanctified lifeblood of judicial

⁶ An administrative rule adopted by the court system in 2011 to prevent judges from presiding over cases involving their largest contributors only mildly mitigates the problem. Rule 151.1 (22 NYCRR §151.1), which provides that “no case shall be assigned” to a judge when the lawyers or parties, within the prior two years, have donated \$2,500 or more, or collectively contributed \$3,500 or more, to the judge’s campaign, while no doubt well-intended, has significant loopholes and does far too little to address the problems inherent in our system of electing judges under the existing rules. Since the terms of full-time judges in this state range from six to 14 years, the two-year cut-off period is plainly inadequate. While contributions by an attorney’s law firm are included within the threshold limits, personal contributions by the attorney’s law partners, colleagues, friends and relatives are not included; nor are contributions by a party’s family members, friends, etc., or contributions by unnamed non-party entities that have may have a direct interest in litigation, such as banks, assignees, entities liable as guarantors or who buy an interest in litigation. If \$2,500 is a meaningful threshold for full-time judges, whose campaigns, at least in New York City, routinely cost \$100,000, it should certainly be lower at the town and village level, where most of this state’s judges preside. To prevent judge-shopping, the rule includes a waiver provision that may be of little practical value. Nor, of course, does the rule bar judges from doling out lucrative assignments to the lawyers and law firms that routinely contribute to judicial campaigns.

campaigns even though such donations are plainly as corrupting as the solicitations in *Williams-Yulee*. But, wink, wink, as long as we do not have public financing of campaigns, no one can handle the fundamental truth that New York cannot have judicial elections without such plainly corrupting contributions.

Beyond this glaring hypocrisy, which violates the First Amendment itself as a result of basic over- and underbreadth defects (*see Matter of Herrmann, supra*, Emery Dissent; *Matter of Yacknin, supra*, Emery Dissent; *Matter of King, supra*, Emery Concurrence; *Matter of Spargo, supra*, Emery Concurrence/Dissent; *Matter of Farrell, supra*, Emery Concurrence; *Matter of Campbell, supra*, Emery Concurrence), neither *Williams-Yulee* nor *Raab* addressed the myriad issues that lead to preclusion of judicial speech that the Advisory Committee and this Commission routinely and blithely prohibit. And those controlling cases certainly never addressed the issues now before the Commission in the cases here (*Sakowski* and *Matter of Fleming*, also issued today): contributions by a judge to national candidates and political organizations, political contributions by a judge's spouse, and contributions by the law firm of a part-time judge to local candidates and political organizations. Nothing in *Williams-Yulee* or *Raab* compels, let alone suggests, that the rule banning such conduct could withstand strict scrutiny. Nonetheless, in finding misconduct here, the Commission has chosen to ignore the Supreme Court's and *Raab*'s clear analytical framework for determining whether the particular political activity fits within the compelling interest these courts have set forth.

Direct Contributions

With respect to Judge Sakowski’s direct contributions to political candidates and organizations, the majority merely states that such conduct is impermissible because it is inconsistent with the absolute ban on contributions, Rule 100.5(A)(1)(h), which the Court of Appeals upheld in *Matter of Raab*. This is far too glib to withstand either *Raab* or *Williams-Yulee* scrutiny. While noting that “most of” the judge’s 69 direct contributions were made to candidates and political organizations on a national level⁷, the majority provides no further analysis as to why such conduct violates a compelling governmental interest and is, therefore, sanctionable. Plainly, it does not. Nor does the majority address whether the Court’s stated rationale in *Raab* for upholding the contributions ban – preventing a candidate from “buying” a judgeship, or the appearance of doing so⁸ – can justify applying the rule to contributions on a national level. It is hard to conceive any scenario where anyone could ever perceive (though apparently the Commission does) that Judge Sakowski was buying a judgeship, or appeared to be, by contributing to MoveOn.org.

The Court in *Raab* stated:

The contribution limitation is intended to ensure that political parties cannot extract contributions from persons seeking

⁷ *E.g.*, the schedules appended to the Agreed Statement show six contributions to MoveOn.org, ten contributions to Organizing for Action, ten contributions to Obama for America and Obama Victory Fund, and two contributions (each for \$20.16) to Ready for Hillary.

⁸ In *Raab*, the Court found that the candidate violated the rule by agreeing, prior to being nominated, to make a \$10,000 contribution to the Nassau County Democratic Committee, conveying the appearance that the payment was an effort to “buy” a judgeship (*supra*, 100 NY2d at 315-16).

nomination for judicial office in exchange for a party endorsement. It achieves this necessary objective by preventing candidates from making contributions in an effort to buy – and parties attempting to sell – judicial nominations. It also diminishes the likelihood that a contribution, innocently made and received, will be perceived by the public as having had such an effect. Needless to say, the State’s interest in ensuring that judgeships are not – and do not appear to be – “for sale” is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function. (*Id.* at 315-16)

If the limitations on political activity by judges are intended to promote public confidence in the judiciary by distancing judges from local politics and avoiding the appearance of “buying” a judgeship, a rule that would prohibit a town justice from contributing to a presidential campaign is clearly too broad if applied in such circumstances. However doubtful the constitutionality of an absolute ban on political contributions by a judge – even when the judge is not a candidate for office – it is even more unlikely that such a ban could be upheld as applied in such circumstances. In my view, the rule, as applied here, serves only to stifle protected speech and conduct rather than to support any realistic or legitimate ethical or governmental concern. It is government regulation of judicial speech run amok.

Contributions by Judge’s Law Firm

The Commission finds that 36 political contributions by Judge Sakowski’s two-partner law firm constitute prohibited political activity, which is automatically attributable to the judge. Significantly, the Agreed Statement of Facts does not indicate whether Judge Sakowski signed the checks for these contributions (27 of which were for

ticket purchases to political events outside of the judge’s “window period”), whether he was even aware of the contributions, or whether he or someone else attended any of the events. This is strict liability for a First Amendment violation, an unprecedented application of regulatory power.

Citing several opinions of the Advisory Committee that are completely devoid of any First Amendment analysis and that ground their conclusions in speculation and conjuring, the majority suggests that knowledge of or personal responsibility for the contributions is irrelevant since the judge is strictly liable under the Rules for the firm’s expenditures, which are prohibited “indirect” political contributions. This reasoning by our Commission tramples First Amendment principles. On the scant facts presented to us, with no analysis of whether banning such activity treads on the free expression rights of the judge or others at his law firm – when it plainly does – we simply cannot properly exercise our powers to sanction a judge.

According to the information provided in the Agreed Statement, all the contributions at issue by the judge’s firm were made at least five years ago, and some more than ten years ago. Records of political contributions are now readily accessible and searchable online. Our purpose is, hopefully, more elevated than to scour the Internet to ferret out any and all political contributions by a judge or a judge’s law firm over the past decade or more and impose discipline in such cases on the dubious premise that any contribution attached to a judge’s name, or to any entity with a connection to a judge, warrants punishment.

CONCLUSION

As I have previously stated, “too often the Commission has become a peripatetic watchdog of judicial campaign activity” (*Matter of Chan, supra*, Emery Dissent). See *Matter of Michels, supra*; *Matter of Kelly, supra*; *Matter of McGrath, supra*; *Matter of Chan, supra*; *Matter of Herrmann, supra*; *Matter of Yacknin, supra*; *Matter of King, supra*; *Matter of Spargo, supra*; *Matter of Farrell, supra*; *Matter of Campbell, supra*; *Matter of Schneier, supra*; *Matter of Crnkovich*, 2003 NYSCJC Annual Report 99; *Matter of Raab, supra*; *Matter of Watson*, 100 NY2d 290 (2003). In my view, our role should be hands off except in the clearest cases. Ideally, the Chief Judge would direct the Office of Court Administration or another entity to police these rules to the extent they are constitutional. At least then, some group could legitimately claim expertise in their application.

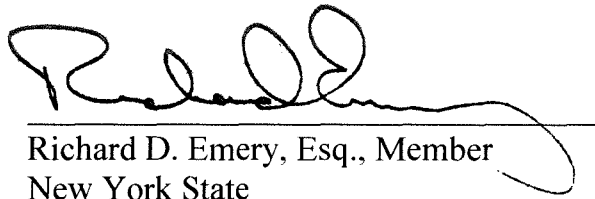
In any event, this is not a case that warrants the Commission’s intervention. This is a case involving constitutionally protected conduct. We should not accept such a result even if the judge, for pragmatic reasons, agrees.

In the past in cases in which I have differed from the majority’s view on judicial campaign issues, I have often concurred – feeling bound *by Raab* – rather than dissented. This case leads me to dissent because I am voting to reject an Agreed Statement for the reason that I believe that public discipline of this judge is unwarranted in any event. In addition, I do not believe that Rule 100.5(A)(1)(h), notwithstanding its flat prohibition on political contributions by a judge, was intended to sweep within it

contributions such as those in this case. Our duty is to interpret the Rules in a way that is consistent with constitutional strictures. No precedent of the Court of Appeals or any other influential court commands that the contributions at issue here be considered as equivalent to those in *Raab*. Thus, I do not here feel compelled to concur.

For these reasons, I vote to reject the Agreed Statement and, respectfully, dissent.

Dated: August 20, 2015



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

DANIEL P. SULLIVAN,

a Justice of the Whitestown Town Court,
Oneida 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

The respondent, Daniel P. Sullivan, a Justice of the Whitestown Town Court, Oneida County, was served with a Formal Written Complaint dated March 24, 2015, containing one charge. The Formal Written Complaint alleged that in two

conversations with law enforcement officials respondent lent the prestige of judicial office to advance the private interests of his son.

On April 16, 2015, 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 censured and waiving further submissions and oral argument. On June 18, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Whitestown Town Court, Oneida County, since January 1, 2012, having been elected to that position on November 8, 2011. Respondent's term expires on December 31, 2015. He is not an attorney.

2. On July 20, 2013, and July 22, 2013, respondent created the appearance of impropriety and lent the prestige of his judicial office to advance his son's private interests by requesting leniency for his son from two law enforcement officers in two separate conversations concerning impending charges of Overdriving, Torturing and Injuring Animals, a misdemeanor, and Violating Prohibited Park Hours, a violation under the local law.

3. On Friday, July 19, 2013, shortly after 9:00 PM, Whitestown Police Officer Frank S. McCully contacted respondent regarding respondent's 19-year-old son, Joseph Sullivan, and asked respondent to come to the Gibson Road Town Park.

4. When respondent arrived at the park a few minutes later, his son was

handcuffed and sitting in the back seat of a police car in the parking area adjacent to park restrooms. Officer McCully led respondent to the women's restroom where he had earlier found Joseph Sullivan with two small kittens. One of the kittens had been hog-tied with tape, and there was a lighter nearby. Officer McCully informed respondent that his son would be charged at a later time and would be allowed to go home with respondent that night. Respondent was given custody of the kittens to return them to the location where his son had obtained them. No charges were issued against respondent's son that night.

5. Early the next morning, Saturday, July 20, 2013, respondent telephoned Whitestown Chief of Police Donald Wolanin on the chief's cell phone to discuss the incident in the park the night before. Respondent told the chief that he hoped that the police would not "go piling on" charges or "overcharge" his son, or words to that effect.

6. On the evening of July 22, 2013, at the conclusion of respondent's court session, Officer McCully entered the Whitestown Town Court and asked to speak with respondent. The two went outside the building, where Officer McCully said that he needed respondent's son to come to the police station where the officer would issue an appearance ticket for animal cruelty and being in the park after hours. Respondent stated, "Do you really have to arrest him?" or words to that effect. Respondent told Officer McCully that if his son was arrested it would ruin his chances of getting a job with the Oneida County sheriff.

7. Respondent also said to Officer McCully that his son's drug

rehabilitation had cost respondent and his wife nearly all their life savings. Respondent argued that because the kittens were not actually injured, a charge of cruelty to animals did not apply.

8. Later on July 22, 2013, Officer McCully charged respondent's son with violating Section 353 of the Agriculture and Markets Law (Overdriving, Torturing and Injuring Animals), a misdemeanor, and Section 145-1 of Town of Whitestown Local Law (Violating Prohibited Park Hours), a violation. The charges against respondent's son were subsequently transferred to the Oriskany Village Court, where the son pled guilty to a violation of Section 359 of the Agriculture and Markets Law (Carrying Animal in a Cruel Manner). He was sentenced to a one-year Conditional Discharge that required him to refrain from possessing or being in the presence of any feline, stay out of the Whitestown Park grounds, complete 50 hours of community service, and pay a mandatory surcharge of \$205.

Additional Factors

9. Respondent has been cooperative throughout the Commission's inquiry.

10. Although understandably concerned that his son was about to be charged by the police, respondent recognizes that it was improper to call the Chief of Police, and to communicate with the arresting officer, in order to suggest leniency for his son. He acknowledges that his "'paternal instincts' do not justify a departure from the standards expected of the judiciary" (*Matter of Edwards*, 67 NY2d 153, 155 [1986]). He

also recognizes that “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” (*Matter of Lonschein*, 50 NY2d 569, 572-73 [1980]). Respondent regrets his failure to abide by the applicable Rules and pledges henceforth to abide by them faithfully.

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

By acting as his son’s advocate in two conversations with law enforcement officials while seeking leniency with respect to impending charges, respondent lent the prestige of his judicial office to advance his son’s private interests. Such conduct is prohibited by well-established ethical standards (Rules, §100.2[C]), even in the absence of a specific request for special consideration or an overt assertion of judicial status and authority (*see Matter of Edwards*, 67 NY2d 153 [1986]; *Matter of Lonschein*, 50 NY2d 569 [1980]). 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, supra, 50 NY2d at 571-72. Regardless of a judge's intent, such conduct may convey an appearance of using the prestige of judicial office to advance private interests. Section 100.2 of the Rules requires a judge to avoid even the appearance of impropriety.

Initially, after learning that the police intended to charge his son regarding an incident involving mistreating kittens, respondent contacted the chief of police the next morning to discuss the matter. The fact that respondent was able to reach the police chief, via the chief's cell phone, to discuss his son's case underscored both his special access, as a judge, to law enforcement officials and the likelihood that the police chief would give particular attention to respondent's intercession on his son's behalf. At a time when the police were still considering the potential charges to be filed, respondent told the chief that he hoped the police would not "pile on" or "overcharge" respondent's son, or words to that effect. This was impermissible advocacy in the form of an implicit request for favorable treatment.

Respondent again acted as his son's advocate two days later when he spoke to the arresting officer. Though respondent did not initiate that conversation – the officer had come to court to tell respondent that his son needed to go to the police station and

would be issued an appearance ticket – respondent’s comments were inappropriate.

Urging leniency, he asked, “Do you really have to arrest him?”, noted that an arrest would “ruin” his son’s chances of employment, and argued that a charge of animal cruelty was inapplicable. These statements could have had only one purpose: to influence the police to give favorable consideration to respondent’s son. As a judge for 18 months, respondent should have recognized that such communications were improper and that any legal arguments on his son’s behalf should instead have come from his son’s lawyer.

While it is understandable that respondent was concerned for his son and hoped for leniency in the officers’ assessment of potential charges, his “paternal instincts’ do not justify a departure from the standards expected of the judiciary” (*see Matter of Edwards, supra*, 67 NY2d at 155). A judge does not relinquish his or her parental rights and responsibilities, but the instinct to help a family member in trouble must be constrained by a judge’s ethical responsibilities, including the duty to act “at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and to avoid using the prestige of office to advance private interests (Rules, §§100.2[A], [C]). Strict adherence to these important principles is essential to ensure public confidence in our system of justice, which is based on equal treatment for all and decisions that are based on the merits, not the result of special influence or having the right “connections.” Under the circumstances here, acting as his son’s advocate or otherwise seeking leniency on his son’s behalf was inconsistent with those requirements, since such communications could be perceived as backed by his judicial power and

prestige.

Seeking special consideration from local law enforcement officials is especially problematic. There is inherent pressure on the police – who presumably appear in the judge’s court and knew that the suspect’s father was the local judge – to agree to the request. And seeking such favors from police impacts future cases – if the police accede to a request that benefits a judge’s child, the judge’s impartiality in subsequent cases in which the police appear is compromised. A defendant could have little confidence in a judge’s impartiality if the defendant knows that the police had done the judge a significant favor. Respondent should have been more sensitive to the implications of seeking, or appearing to seek, such a favor.

Violations of Rule 100.2(C) have been found in a broad spectrum of cases, including where judges have contacted other judges, law enforcement officials or other persons in a position of authority in order to advance private interests. *E.g.*, *Matter of Smith*, 2014 NYSCJC Annual Report 208 (judge sent an unsolicited letter on judicial stationery on behalf of an inmate seeking parole, whose mother was a friend of the judge’s relative); *Matter of Pennington*, 2004 NYSCJC Annual Report 139 (judge met with DA to object to the police investigation of his son); *Matter of Nesbitt*, 2003 NYSCJC Annual Report 152 (judge sent a letter on judicial stationery to his son’s school challenging an administrative determination regarding his son and the legal sufficiency of the school’s procedures); *Matter of Stevens*, 1999 NYSCJC Annual Report 153 (judge angrily confronted police who were investigating a complaint involving his son and urged

the police to arrest his son's neighbor).

In accepting the stipulated sanction of censure, we are mindful that while respondent's communications were highly improper, his judgment "was somewhat clouded by his son's involvement" in difficult circumstances (*see Matter of Edwards, supra*, 67 NY2d at 155). We also note that in his efforts to help his son, respondent's misconduct was limited to a plea for leniency. In the circumstances here, we conclude that censure, the most severe sanction available short of removal, is appropriate. We underscore that every judge must be mindful of the importance of adhering to the ethical standards so that public confidence in the integrity and impartiality of the judiciary may be preserved.

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

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

Mr. Emery dissents in an opinion and votes to reject the Agreed Statement on the basis that the sanction of censure 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 14, 2015

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a large, stylized initial "J".

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

DANIEL P. SULLIVAN,

a Justice of the Whitestown Town Court,
Oneida County.

DISSENTING OPINION
BY MR. EMERY

Public confidence in our system of justice requires that the outcome of every case, no matter who the parties are, “must be fair, unbiased, untainted, and driven by the law and the facts,” not by “the personal desires and interests of individual judges” (*see Matter of Cook*, 2006 NYSCJC Annual Report 119, Emery Dissent; *Matter of LaClair*, 2006 NYSCJC Annual Report 199, Emery Dissent). As I have previously stated, when a judge attempts to use the system for personal gain by wielding special influence to advance private interests in pending cases, “I consider this category of judicial misconduct to be the most serious of any that comes before the Commission” (*Id.*; *Matter of Lew*, 2009 NYSCJC Annual Report 130, Emery Dissent; *see also Matter of Maney*, 2011 NYSCJC Annual Report 106). Such behavior “strikes at the heart of our justice system,” invidiously perverting the fair and proper administration of justice and eroding public confidence in the judiciary as a whole (*Id.*).

It is uncontroverted that on two separate occasions Judge Sullivan

interceded with law enforcement officials to advocate on behalf of his son and urge leniency with respect to impending charges. First reaching out to the police chief by calling the chief's cell phone, then speaking directly with the arresting officer, he vigorously and repeatedly acted as his son's advocate, making legal arguments as well as personal pleas that were irrelevant to the merits of the charges (noting, for example, that he had borne the expenses of his son's drug treatment and that the charges would adversely affect his son's employment prospects). Plain and simple, in arguing for leniency, Judge Sullivan was asking the police for a very personal and very significant favor. In any circumstances, such behavior is highly improper; seeking such a favor from local law enforcement officials, who presumably appear in his court on a regular basis, is especially troubling and corrupts the appearance of impartiality in subsequent cases.

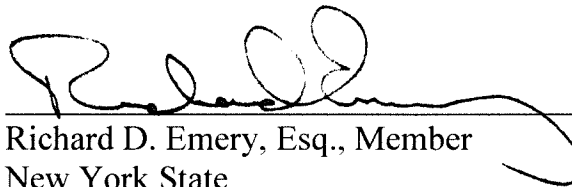
Unlike the majority, I find no mitigation in the fact that Judge Sullivan was motivated by "paternal instincts." "Instincts" are what the rule of law seeks to control and regulate, and such motivations animating a judge should never be characterized as "mitigation." A civilized legal system, a system that respects the rule of law as enforced by judges cannot allow judges to indulge their "paternal instincts."

Before contacting the police chief, Judge Sullivan had ample opportunity to reflect on the propriety of making that phone call and intervening on his son's behalf. Over more than three decades, the Commission and the Court of Appeals have disciplined judges for communicating with law enforcement officials or others in a

position of authority to seek special treatment for themselves, their friends and relatives.¹ With this substantial body of case law, no judge can credibly claim that he or she was unaware that such conduct is improper, and a judge who is unable to observe these basic ethical boundaries should not remain in office. Nor do I find mitigation in the fact that, when caught, the judge was contrite, since no amount of contrition can override inexcusable conduct. *See Matter of Bauer*, 3 NY3d 158, 165 (2004).

Because this misconduct, in my view, is so inconsistent with the highest standards of honor and integrity required of every judge, it requires the most severe sanction available – removal from office. Accordingly, I must dissent and vote to reject the Agreed Statement of Facts.

Dated: July 14, 2015



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

¹ *E.g.*, *Matter of Lonschein*, 50 NY2d 569 (1980) (judge asked a deputy counsel at the Taxi and Limousine Commission to expedite a friend's license application); *Matter of Pennington*, 2004 NYSCJC Annual Report 139 (judge asserted his judicial office in a vulgar tirade towards a park official when stopped and charged with infractions); *Matter of Williams*, 2003 NYSCJC Annual Report 200 (judge misused his judicial prestige in asking another judge to vacate an order of protection issued against his friend); *Matter of Stevens*, 1999 NYSCJC Annual Report 153 (judge interfered in police investigation of a dispute involving his son and demanded that his son's antagonist be arrested); *Matter of D'Amanda*, 1990 NYSCJC Annual Report 91 (judge used the authority of his office to avoid receiving three traffic tickets); *Matter of LoRusso*, 1988 NYSCJC Annual Report 195 (judge intervened with police on behalf of the son of a former court employee); *Matter of Montaneli*, 1983 NYSCJC Annual Report 145 (judge sought special consideration from the prosecutor and the presiding judge on behalf of a friend who was charged with a crime).

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 M. TRICKLER,

a Justice of the Birdsall Town Court,
the Burns Town Court and the Grove
Town Court, Allegany 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Brian C. Schu for the Respondent

The respondent, David M. Trickler, a Justice of the Birdsall Town Court,
the Burns Town Court and the Grove Town Court, Allegany County, was served with a

Formal Written Complaint dated October 27, 2015, containing one charge. The Formal Written Complaint alleged that respondent engaged in impermissible *ex parte* communications with two defendants.

On November 30, 2015, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 10, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Birdsall Town Court since January 1, 2002, a Justice of the Grove Town Court since November 1, 1994, and a Justice of the Burns Town Court since November 1, 1980. His current terms in the Birdsall Town Court and the Burns Town Court expire on December 31, 2017, and his current term in the Grove Town Court expires on December 31, 2015. He is not an attorney.

2. As set forth below, from January 2013 to November 2013, in the course of presiding over *People v Kenneth A. Jablonski* and *People v Donald R. Shelton* in the Birdsall Town Court, respondent engaged in *ex parte* conversations with the defendants and handled the cases in a manner that was contrary to the Rules Governing Judicial Conduct.

3. On December 18, 2012, Kenneth A. Jablonski and Donald R. Shelton were charged by Environmental Conservation Officer Ken R. Basile with trespass to hunt on posted property in violation of Section 11-2113(1) of the Environmental Conservation Law (“ECL”). Mr. Jablonski was additionally charged with hunting deer during muzzle-loader season without a muzzle-loading license, in violation of ECL 11-0703(6)(a)(2)¹.

4. On January 3, 2013, respondent presided in Birdsall Town Court and arraigned Mr. Jablonski and Mr. Shelton on the ECL charges. No prosecutor or Environmental Conservation Officer was present.

5. After respondent read to Mr. Jablonski and Mr. Shelton the supporting deposition of Cherie Button-Dobmeier, who accused the men of trespassing, Mr. Shelton said, “Here’s my version of the story,” and proceeded to recount to respondent certain facts related to the trespass charges. Mr. Shelton *inter alia* stated that he and Mr. Jablonski had gone with another hunter to help track a deer that the other hunter had wounded earlier in the day on state land, that he and Mr. Jablonski had gone into a roadside ditch tracking the wounded deer, and that Ms. Button-Dobmeier lied when she said that he and Mr. Jablonski were carrying guns. Respondent questioned Mr. Shelton about the name of the road where the alleged trespass occurred.

6. Respondent said that he would “bring” witnesses into court and “we’ll have a trial.” Mr. Shelton responded that he would “love it” because he was

¹ The accusatory instrument inaccurately cited the violation section as ECL 11-0703(6)(a)(3).

“toting no gun,” was not “trespassing” and had the right to “walk up to the posted sign to see who’s posted the land.” Respondent replied, “I would think so.”

7. At Mr. Shelton’s suggestion, respondent viewed a map of the alleged trespass area with the defendants. Mr. Shelton pointed out to respondent that the map indicated that more than a two-mile stretch on both sides of the road in the area where they allegedly trespassed was state land. Respondent asked Mr. Shelton, “Where’s, where’s this property [the witness] is saying?” Mr. Shelton responded by pointing out the area. Mr. Jablonski asked respondent if the area they were identifying was state land. Respondent replied, “Yeah, if that, that’s where you were.” Mr. Jablonski replied, “Standing right here, yeah, that’s where we were.”

8. Mr. Shelton again indicated that the map showed more than a two-mile stretch of state land on both sides of the road, and respondent stated, “You were probably right here.” Respondent asked, “Where did [the environmental conservation officer] give you the tickets? Right there?” Mr. Shelton showed respondent the location on the map where he and Mr. Jablonski had been stopped by Ms. Button-Dobmeier.

9. Respondent told Mr. Shelton and Mr. Jablonski that he would let them know by mail about a trial date and that it would “probably be a few weeks.”

10. Respondent failed to set a court date in the cases for about ten months. By letter dated July 10, 2013, Emmanuel Hillery, one of the allegedly aggrieved landowners, wrote to the court inquiring about the status of the cases. On September 21, 2013, respondent spoke to Mr. Hillery, who again inquired about the status of the cases.

On October 21, 2013, respondent sent letters to Mr. Jablonski and Mr. Shelton advising them to appear at the Birdsall Town Court on November 13, 2013, regarding the ECL charges.

11. On November 13, 2013, both Mr. Jablonski and Mr. Shelton appeared for trial without counsel. Their cases were being prosecuted by Allegany County Assistant District Attorney J. Thomas Fuoco.

12. Notwithstanding an error in the court address on subpoenas issued to Ms. Button-Dobmeier, she appeared at the Birdsall Town Court on November 13, 2013, prior to the commencement of the trial, accompanied by Mr. Hillery and Margaret Spittler, another allegedly aggrieved landowner in the ECL matters. Shortly after their arrival, they engaged in conversation with Mr. Fuoco in a room adjacent to the courtroom and expressed to him their dissatisfaction with various aspects of the impending trial, including Mr. Fuoco's decision not to call Environmental Conservation Officer Basile, Mr. Hillery or Ms. Spittler as witnesses. Ms. Spittler addressed Mr. Fuoco in a loud voice.

13. Respondent, upon hearing the conversation in the room adjacent to the courtroom, left the bench and went into the adjacent room, where he observed Mr. Fuoco, Ms. Button-Dobmeier, Mr. Hillery and Ms. Spittler engaged in discussion about the prosecution of the cases. Respondent heard Ms. Spittler questioning Mr. Fuoco about not calling Mr. Basile as a trial witness. Mr. Fuoco stated, in words or substance, "Nobody's going to tell me how to do my job," and said he would ask respondent to

dismiss the charges against both defendants.

14. Respondent, followed by Mr. Fuoco, returned to the courtroom and took the bench. Mr. Fuoco stated that Ms. Button-Dobmeier, the only witness he had intended to call, had appeared at the courthouse late due to an error on the subpoenas drafted by his office. Subsequently, the following exchange occurred:

MR. FUOCO: ... So, she arrived anyway, and she arrived also with the landowners, and all three of them proceeded to give me a hard time and tried to tell me how to do my job. I didn't appreciate it. So, I'm doing my job by asking the court to dismiss the charge against Donald Shelton. With regard to Kenneth Jablonski--

JUDGE TRICKLER: --Go ahead--

MR. FUOCO: --same facts apply. I'm asking the court to dismiss that charge as well.

JUDGE TRICKLER: Right, then all charges dismissed.

MR. JABLONSKI: Thank you, Your Honor --.

Additional Factors

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

16. Respondent, in his 35 years of judicial service (including eight years serving concurrently in two town courts and 13 years serving concurrently in three town courts), was previously twice admonished for conduct in the Burns Town Court where he has served since 1980. In 2009 respondent was admonished for failing to timely remit fines and fees to the State Comptroller, report traffic convictions, issue receipts, and use

available means to punish defendants who had failed to appear to pay traffic fines. In 2010 respondent was admonished for failing to immediately disqualify himself in a harassment case despite knowing the parties and having personal knowledge of the underlying events.

17. Respondent recognizes his obligation to avoid improper *ex parte* communications. Respondent regrets his scheduling delay in this matter and avers that henceforth he will promptly and efficiently dispose of judicial matters.

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)(6) and 100.3(B)(7) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

While arraigning two defendants charged with ECL violations, respondent listened to a defendant’s “version of the story,” reviewed a map of the alleged trespass site, identified locations on the map and discussed with the defendants whether they were public or private locations, asked the defendants about the events and listened to their explanations. As a judge for more than three decades, respondent should have recognized that allowing unrepresented defendants to give their “version” of events at an arraignment – for any reason – is strictly prohibited by the ethical rules. With no prosecutor present,

these were impermissible *ex parte* communications in violation of Rule 100.3(B)(6). Such communications can influence, or appear to influence, the judge who will be the trier of fact at a bench trial, and thus compromise the judge's impartiality. Moreover, questioning defendants at arraignment about the underlying events, as respondent did here, places the defendant in jeopardy of making incriminating admissions or other statements that might prejudice the defendant's position at trial. *See, e.g., Matter of Moore*, 2002 NYSCJC Annual Report 125; *Matter of Pemrick*, 2000 NYSCJC Annual Report 141.

Thereafter, respondent delayed the case by failing to set a court date for about ten months. The record indicates that he did so only after one of the landowners where the alleged trespass occurred had inquired twice about the status of the case. A judge is required to dispose of all judicial matters "promptly, efficiently and fairly" (Rules, §100.3[B][7]; *see Matter of Scolton*, 2008 NYSCJC Annual Report 209).²

In accepting the stipulated sanction of admonition, we note that respondent has been cooperative throughout the proceedings, recognizes his obligation to avoid improper *ex parte* communications, and avers that he will promptly and efficiently dispose of judicial matters in the future. We also note that respondent was previously disciplined in 2009 and 2010 for unrelated misconduct (*see* 2011 NYSCJC Annual Report 147; 2010 NYSCJC Annual Report 235).

² On the facts presented, we cannot conclude that respondent's subsequent decision to dismiss the charges based on the prosecutor's request constitutes misconduct even though it appears the prosecutor's application was not on the merits.

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

Judge Klonick, Judge Ruderman, Mr. Belluck, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Harding, Mr. Stoloff and Judge Weinstein concur.

Judge Acosta was not present.

CERTIFICATION

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

Dated: December 17, 2015

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a solid horizontal line.

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

EDWIN R. WILLIAMS,

a Justice of the Manchester Town Court,
Ontario 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Zimmerman & Tyo (by John E. Tyo) for the Respondent

The respondent, Edwin R. Williams, a Justice of the Manchester Town
Court, Ontario County, was served with a Formal Written Complaint dated March 13,

2015, containing one charge. The Formal Written Complaint alleged that respondent: (i) issued a warrant of eviction and money judgment in two summary eviction proceedings without according the tenants an opportunity to be heard or reviewing the supporting documents and (ii) failed to mechanically record two eviction proceedings.

On July 15, 2015, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.¹ The Commission previously rejected two earlier Agreed Statements.

On August 6, 2015, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Manchester Town Court, Ontario County, since 1971. Respondent's current term expires on December 31, 2017. He is not an attorney.

2. From October 24, 2012, to May 22, 2013, in various eviction proceedings, respondent engaged in conduct that was and/or appeared lacking in impartiality, fundamental fairness and adherence to court rules, in that he (A) failed to accord a tenant an opportunity to be heard when the tenant attempted to raise defenses,

¹ The Agreed Statement of Facts stipulated that the Formal Written Complaint was deemed amended to include an allegation that respondent violated Section 100.3(B)(6) of the Rules Governing Judicial Conduct.

(B) failed to review the landlords' petitions and supporting documents adequately enough to determine if they complied with the Real Property Law ("RPL") and the Real Property Actions and Proceedings Law ("RPAPL"), and (C) failed to ensure that two of the court proceedings were recorded 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.

Meadows of Manchester, LLC v Joseph Mallory and Lindsey Toper

3. On November 21, 2012, respondent presided over *Meadows of Manchester, LLC v Joseph Mallory and Lindsey Toper*, a summary eviction proceeding.

4. Respondent did not have any social, professional or other relationship with the landlord, its agents and/or its employees.

5. On November 21, 2012, respondent issued a warrant of eviction against Joseph Mallory and Lindsey Toper, without holding a hearing and taking testimony under oath, despite the fact that the tenants' attorney informed respondent that the petition had not been served on either tenant.

6. As indicated in the transcript of the proceeding on November 21, 2012, respondent engaged in the following colloquy:

MR. MALLORY: -- that's what the lawyer was saying. We never received the eviction.

ATTORNEY: Yeah, that was still our position. We received a notice of petition. According to the affidavit of -- They--

JUDGE WILLIAMS: -- Did I --

ATTORNEY: -- never received the petition itself.

JUDGE WILLIAMS: Court feels that they owe the money, therefore, I'm going to render that judgment of \$3,500 and, 30, \$3,530 to Meadows of Manchester.

7. The court file contained no affidavit of service as to Mr. Mallory, and the affidavit of service as to Ms. Toper did not state that the petition had been served, as required by RPAPL Sections 731 and 735.

8. It was respondent's practice to review the supporting documents in a summary proceeding when he took the bench. In this matter, respondent did not note the absence of an affidavit of service as to Mr. Mallory or that the affidavit of service as to Ms. Toper did not indicate service of the petition.

9. During the proceeding, the tenants acknowledged owing the rent demanded by the landlord and having defaulted on an existing payment agreement to pay the back rent.

10. Respondent, based upon his review of the court file and the tenants' acknowledgment of the unpaid rent, concluded that the landlord should be put in possession of the property. In rendering the judgment at that time, respondent was influenced by his belief based upon his long experience that a delay in the proceeding would only result later in increased judgment against the tenants for additional unpaid rent and late and legal fees.

11. Respondent acknowledges that he had not given Mr. Mallory and Ms. Toper an opportunity to be heard regarding a defense.

Old Dutch Properties, Inc. v Nicole Baldwin

12. On May 22, 2013, respondent presided over *Old Dutch Properties, Inc. v Nicole Baldwin*, a summary eviction proceeding.

13. Respondent did not have any social, professional or other relationship with the landlord, its agents and/or its employees.

14. Respondent reviewed the 41-page court file, which indicated that Ms. Baldwin had been personally served with the notice of petition and the petition and that the 30-day notice for a mobile home tenant had been left with a suitable person, Ms. Baldwin's mother, and mailed to Ms. Baldwin.

15. Respondent commenced the proceeding by asking Ms. Baldwin if she owed \$1,950 in rent.

16. As indicated in the transcript of the proceeding on May 22, 2013, respondent then engaged in the following colloquy:

MS. BALDWIN: I do --

JUDGE WILLIAMS: -- I render that judgment --

MS. BALDWIN: -- have objections --

JUDGE WILLIAMS: -- to Old Dutch Properties, and I will sign a judgment and the warrant.

MS. BALDWIN: (Unintelligible).

JUDGE WILLIAMS: Have a good night.

MS. BALDWIN: Can I get it dismissed? I have this signed by counsel of legal assistance.

COURT CLERK: Well, they have to know that when the case is opened so that --

17. As respondent heard it, Ms. Baldwin acknowledged that she owed the rent. Respondent avers that he did not understand that she had an objection, which, he later learned, she had stated as she walked away from the bench.

18. Ms. Baldwin went over to the court clerk to whom she indicated that she had consulted counsel.

19. Respondent did not hear Ms. Baldwin's reference to having consulted counsel, and the court clerk never advised him that she had done so or that she had not been properly served with the 30-day notice to a mobile home tenant required by RPL Section 233.

20. On May 22, 2013, respondent issued a warrant of eviction and rendered a judgment in the amount of \$2,205 against Ms. Baldwin.

21. Respondent acknowledges that he did not give Ms. Baldwin the opportunity to be heard regarding a defense.

Meadows of Manchester, LLC v Elizabeth Flagg and Antoinette Bacon

22. On October 24, 2012, respondent presided over *Meadows of Manchester, LLC v Elizabeth Flagg and Antoinette Bacon*, a summary eviction proceeding, and inadvertently failed to mechanically record the proceeding.

Victor Mobile Home Parks, Inc. v Rebeca Ramos

23. On January 23, 2013, respondent presided over *Victor Mobile Home Parks, Inc. v Rebeca Ramos*, a summary eviction proceeding, and inadvertently failed to mechanically record the proceeding.

24. It has been the practice of the court clerk to set up the court recorder before each court session and the practice of respondent to record all proceedings. Respondent inadvertently failed to record the proceedings in *Meadows of Manchester, LLC v Elizabeth Flagg and Antoinette Bacon* and *Victor Mobile Home Parks, Inc. v Rebeca Ramos*, and he failed to sufficiently supervise the clerk to ensure that he indeed

recorded all proceedings.

Additional Factors

25. Respondent began his judicial career as the Manchester Village Court Justice before becoming the Manchester Town Court Justice and has served continually since April 1, 1971. Respondent has no previous disciplinary history over his lengthy career on the bench.

26. Respondent has been cooperative and contrite throughout the Commission inquiry.

27. Commission Counsel examined respondent's case records for all of 2012 and 2013. There appeared to be 22 summary eviction proceedings. Except as noted above, respondent appears to have been faithful to the law, to have accorded the parties the opportunity to be heard, and to have mechanically recorded the proceedings.

28. Respondent regrets his failure to abide by the applicable Rules in the cases noted herein and pledges henceforth to abide by them faithfully. Respondent recognizes that according litigants their fundamental rights is especially significant when the failure to do so may result in a litigant's eviction. As a consequence of the Commission investigation, respondent has engaged in significantly more probing reviews of the paperwork filed by landlords in summary proceedings.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(4), 100.3(B)(6), 100.3(C)(1) and 100.3(C)(2) of the Rules Governing Judicial Conduct

(“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. 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.

Every judge is required to “be faithful to the law and maintain professional competence in it” and to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law” (Rules, §§100.3[B][1], 100.3[B][6]). Respondent has acknowledged that his handling of several eviction proceedings was inconsistent with these ethical standards.

The issuance of an eviction warrant is a significant exercise of discretion. The fact that a tenant is facing the potential loss of his/her home places a special burden on a judge to make sure that the statutory requirements are met. In issuing a warrant, a judge is obliged to know the statutory requirements, review the documents presented and make certain that they are valid. It is stipulated that prior to issuing a warrant of eviction and money judgment in two summary eviction proceedings, respondent did not observe the required safeguards or afford the tenants an opportunity to be heard regarding a defense. In *Mallory and Toper*, he failed to hold a hearing, ignored the tenants’ attorney’s argument that they had not been served with a petition, and did not adequately review the court file, which supported the tenants’ defenses that they had not been properly served. Notwithstanding the tenants’ acknowledgment that they owed the

amount at issue and had defaulted on an existing payment agreement, they were entitled to, and did not receive, the full protections afforded by law. In *Baldwin*, respondent interrupted the tenant when she objected to the eviction and failed to provide an opportunity to present her defense that she had not been properly served with a 30-day notice as required by law (the file indicated that the notice had been left with her mother and mailed to her). It was respondent's understanding that the tenant acknowledged owing the rent, and he did not understand that she had an objection, which she stated as she walked away from the bench. Respondent's errors and mishandling of both matters resulted in proceedings that were lacking in fundamental fairness.

While an isolated or inadvertent error of law, standing alone, might not rise to the level of misconduct (*see Matter of Tyler*, 75 NY2d 525, 528 [1990]), errors that are fundamental and clearly contrary to well-established law have been found to constitute misconduct, especially where the conduct involves deprivation of fundamental rights. *See Matter of Jung*, 11 NY3d 365 (2008) (Family Court judge was removed for violating the due process rights of five litigants by depriving them of the right to be heard and/or the right to counsel); *see also Matter of Temperato*, 2014 NYSCJC Annual Report 217 (judge issued a warrant of eviction based on a notice of petition that failed to comply with RPAPL Section 731, a month after being cautioned for failing to comply with the same statute) (admonition); *Matter of Holmes*, 1998 NYSCJC Annual Report 139 (judge issued a warrant of eviction, with no notice or opportunity to be heard, based upon landlord's *ex parte* request) (admonition); *Matter of Wood*, 1991 NYSCJC Annual Report 82 (judge

failed to advise numerous defendants of the right to counsel and convicted two defendants without a trial or plea) (censure).

In addition, it is the responsibility of every town and village justice to ensure that court proceedings are recorded as required by Section 30.1 of the Rules of the Chief Judge (22 NYCRR §30.1) and Administrative Order 245/08 of the Chief Administrative Judge of the Courts. It has been stipulated that respondent inadvertently failed to record two proceedings due to insufficient supervision of the court clerk.

In accepting the stipulated sanction of censure, we note that respondent has no social or other relationship with the landlords in the cases at issue and that his actions appear to be isolated occurrences of impropriety over more than four decades of service as a judge. We also note that he has been cooperative and contrite throughout the Commission's inquiry and has pledged to adhere to the applicable rules in the future.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Ms. Corngold, Mr. Emery and Mr. Harding concur.

Mr. Belluck, Mr. Stoloff and Judge Weinstein dissent and vote to reject the Agreed Statement on the basis that the sanction of censure is too harsh. Judge Weinstein files an opinion, which Mr. Belluck and Mr. Stoloff join.

Mr. Cohen was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State

Commission on Judicial Conduct.

Dated: November 2, 2015

A handwritten signature in cursive script, reading "Jean M. Savanyu", is written over a horizontal line.

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

EDWIN R. WILLIAMS,

a Justice of the Manchester Town Court,
Ontario County.

DISSENTING OPINION
BY JUDGE WEINSTEIN,
WHICH MR. BELLUCK
AND MR. STOLOFF JOIN

According to the Statement of Facts agreed to by the parties, the entirety of Judge Williams' misconduct in this case, over the course of two years in which he heard 22 summary eviction proceedings, was as follows: First, he inadvertently failed twice to mechanically record the proceedings. Second, on two occasions he did not give tenants an opportunity to be heard on their procedural defenses or ensure that they had been properly served with the papers required by law. The transcripts of these cases appear to reflect some confusion on the judge's part as to the tenants' position, rather than a conscious denial of the tenants' efforts to defend themselves. Moreover, the stipulation makes clear that none of the judge's conduct was motivated by a venal or improper purpose, or involved any favoritism or the appearance thereof for one of the parties.

This is the only blemish on Judge Williams' otherwise pristine disciplinary record, after 44 years of service on the bench.

Given these circumstances, I cannot fathom why this conduct is thought to warrant a sanction of censure, the highest penalty we may impose short of removal. I do not deny that the judge conducted the proceedings at issue improperly. But against the backdrop of a long judicial career without incident, and his cooperation with the Commission and willingness to accept sanction, this seems an exceedingly draconian result for an error of this sort.

I understand that the judge has agreed on this outcome with the Commission staff, and a fair amount of deference must be given to that agreement. Nevertheless, I am concerned that the misconduct at issue here is completely out of line with numerous other rulings, as it censures conduct less egregious than that which we have found to warrant only an admonishment (*see e.g. Matter of Holmes*, 1998 NYSCJC Annual Report 139 [judge admonished for issuing an eviction warrant based on the landlord's *ex parte* request, without any notice of petition or petition and with no opportunity for the tenant to be heard]; *Matter of Hise*, 2003 NYSCJC Annual Report 125 [judge admonished for convicting and sentencing an unrepresented defendant charged with a zoning violation to ten days in jail, without a trial or guilty plea]; *Matter of Shannon*, 2002 NYSCJC Annual Report 161 [judge admonished for routinely failing to advise defendants of the right to assigned counsel and closing his courtroom without legal justification]; *Matter of Christie*, 2002 NYSCJC Annual Report 83 [judge admonished for convicting a defendant without a trial or guilty plea, regularly imposing fines that exceeded the maximum permitted by law, and failing to take corrective action when one excessive fine was brought to his attention]). Accepting a result so far outside

the norm has the potential to unbalance the structure of penalties the Commission imposes, muddies our guidance as to the relative severity of different forms of misconduct, and undermines the significance of a public censure when it is appropriately imposed.

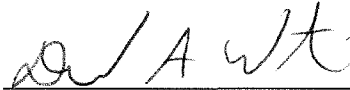
We should also bear in mind the choice the judge has to make when he or she is presented with the Commission staff's position that a censure would be the alternative both to a hearing and the risk of an even more severe sanction. Of particular concern is that a judge may accept a penalty when faced with the prospect of removal if he or she does not agree, even if the Commission when finally presented with the case might never consider that extreme penalty. The precise discussion between staff and the judge's attorney is of course not in the record, but we can take notice of the pressures on a judge, even in the hands of an able lawyer, to accept a stipulated sanction, and should exercise independent judgment to determine whether the outcome imposed is a fair one. I cannot reach that conclusion here.¹

¹ These concerns are not new. The observations of the dissent in *Matter of Ridgeway*, 2010 NYSCJC 205, are directly on point here:

“I recognize that [the judge], represented by counsel, has agreed to the sanction of censure. In my view, the judge's assent to this result, negotiated with Commission counsel, does not make it fair, appropriate or acceptable. With the weight of Commission proceedings bearing down on him for several years, it is not surprising that a judge is willing to conclude the proceedings in any way that permits him to keep his judgeship and move forward. But I cannot vote to accept such a draconian result based on the facts presented here. ... [T]he continued use of censure for wrongdoing that is relatively minor, as in this case – simply because the parties have agreed to the sanction – undermines the significance of this sanction when it is appropriately imposed and undermines public confidence in the Commission's ability to properly distinguish between serious wrongdoing and less serious misbehavior.”

In light of the foregoing, I respectfully dissent. I would reject the proposed sanction, and would condition acceptance of the Agreed Statement of Facts on the parties' consent to a sanction of admonition.

Dated: November 2, 2015



Honorable David A. Weinstein, Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Investigation of
Complaints Pursuant to Section 44,
Subdivisions 1 and 2, in Relation to

VICTORIA B. ZACH,

a Justice of the Colden Town Court,
Erie 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel)
for the Commission

Lipsitz Green Scime Cambria LLP (by Paul J. Cambria, Jr.) for Judge Zach

The matter having come before the Commission on December 10, 2015;
and the Commission having before it the Stipulation dated December 8, 2015; and Judge


Zach having tendered her resignation by letter dated December 7, 2015, effective December 31, 2015, and having affirmed that upon vacating her judicial office, she will neither seek nor accept judicial office at any time in the future, and having waived confidentiality as provided by Judiciary Law §45 to the extent that the Stipulation will become public upon being signed by the parties and that the Commission's Decision and Order with respect thereto will become public; now, therefore, it is

DETERMINED, on the Commission's own motion, that the Stipulation is accepted and that the pending matter is concluded according to the terms of the Stipulation, subject to being revived according to the terms of the Stipulation; and it is

SO ORDERED.

Judge Acosta was not present.

Dated: December 10, 2015



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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2,
of the Judiciary Law in Relation to

VICTORIA B. ZACH,

STIPULATION

a Justice of the Colden Town Court,
Erie County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Victoria B. Zach and her attorney, Paul J. Cambria, Jr. of Lipsitz Green Scime Cambria LLP.

1. Victoria B. Zach has served as a justice of the Colden Town Court, Erie County, since January 1, 2009. Her current term expires on December 31, 2016. Judge Zach is not an attorney.
2. Judge Zach was apprised by the Commission in May 2015 that it was investigating a complaint that she lent the prestige of her judicial office to advance the private interests of a defendant charged in another court with Driving While Intoxicated, and that her actions also created the impression that she was the defendant's attorney, notwithstanding that she is not a lawyer.
3. Judge Zach has tendered her resignation as Colden Town Justice by letter dated December 7, 2015, addressed to the Colden Town Clerk and copied to the Office of the Administrative Judge, Eighth Judicial District. Judge Zach's resignation will become effective December 31, 2015. A copy of the resignation letter is annexed as Exhibit A.

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

5. Judge Zach affirms that, upon vacating her judicial office, she will neither seek nor accept judicial office at any time in the future.

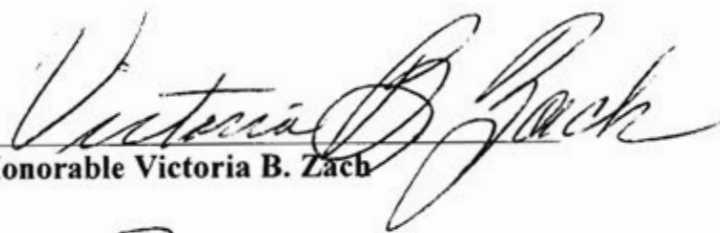
6. Judge Zach understands that, should she abrogate the terms of this Stipulation and hold any judicial position at any time in the future, the Commission's investigation of the complaint would be revived, she would be served with a Formal Written Complaint on authorization of the Commission, and the matter would proceed to a hearing before a referee.

7. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

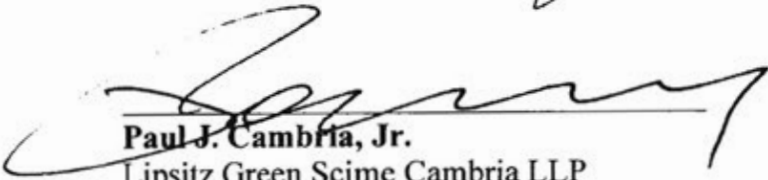
8. Judge Zach waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will become public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated:

12-9-2015


Honorable Victoria B. Zach

Dated:


Paul J. Cambria, Jr.

Lipsitz Green Scime Cambria LLP

Attorney for Judge Zach

Dated:

DEC. 8, 2015


Robert H. Tembeckjian

Administrator and Counsel to the Commission

(John J. Postel and David M. Duguay, Of Counsel)

THE FOLOWING EXHIBIT IS AVAILABLE AT WWW.CJC.NY.GOV

EXHIBIT A: JUDGE'S LETTER OF RESIGNATION

APPENDIX G: STATISTICAL ANALYSIS OF COMPLAINTS

COMPLAINTS PENDING AS OF DECEMBER 31, 2014								
SUBJECT OF COMPLAINT		STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		<i>PENDING</i>	<i>DISMISSED</i>	<i>CAUTION</i>	<i>RESIGNED</i>	<i>CLOSED*</i>	<i>ACTION*</i>	
<i>INCORRECT RULING</i>								
<i>NON-JUDGES</i>								
<i>DEMEANOR</i>		18	4	5	2	0	3	32
<i>DELAYS</i>		2	4	0	1	0	1	8
<i>CONFLICT OF INTEREST</i>		2	2	3	0	0	0	7
<i>BIAS</i>		4	3	1	0	0	0	8
<i>CORRUPTION</i>		1	7	0	1	0	0	9
<i>INTOXICATION</i>		2	0	0	0	0	1	3
<i>DISABILITY/QUALIFICATIONS</i>		0	0	0	1	0	0	1
<i>POLITICAL ACTIVITY</i>		2	2	2	0	3	1	10
<i>FINANCES/RECORDS/TRAINING</i>		7	5	4	4	0	1	21
<i>TICKET-FIXING</i>		0	0	0	0	0	0	0
<i>ASSERTION OF INFLUENCE</i>		2	6	1	3	1	1	14
<i>VIOLATION OF RIGHTS</i>		15	20	6	5	2	4	52
<i>MISCELLANEOUS</i>		0	4	0	1	1	0	6
TOTALS		55	57	22	18	7	12	171

*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.

NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 2015								
SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		<i>PENDING</i>	<i>DISMISSED</i>	<i>CAUTION</i>	<i>RESIGNED</i>	<i>CLOSED*</i>	<i>ACTION*</i>	
<i>INCORRECT RULING</i>	1,150							1,150
<i>NON-JUDGES</i>	330							330
<i>DEMEANOR</i>	92	35	4	0	1	0	0	132
<i>DELAYS</i>	37	9	0	0	0	0	0	46
<i>CONFLICT OF INTEREST</i>	24	12	4	0	0	0	0	40
<i>BIAS</i>	21	16	0	0	1	0	0	38
<i>CORRUPTION</i>	41	2	0	0	0	0	0	43
<i>INTOXICATION</i>	2	0	0	0	1	0	0	3
<i>DISABILITY/QUALIFICATIONS</i>	0	2	0	0	0	0	0	2
<i>POLITICAL ACTIVITY</i>	28	17	1	1	0	0	0	47
<i>FINANCES/RECORDS/TRAINING</i>	6	22	9	0	1	0	0	38
<i>TICKET-FIXING</i>	0	4	2	0	0	0	0	6
<i>ASSERTION OF INFLUENCE</i>	2	5	0	1	0	1	0	9
<i>VIOLATION OF RIGHTS</i>	33	19	2	0	0	1	0	55
<i>MISCELLANEOUS</i>	14	5	1	0	0	0	0	20
TOTALS	1,780	148	23	2	4	2	0	1,959

*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.

ALL COMPLAINTS CONSIDERED IN 2015: 1959 NEW & 171 PENDING FROM 2014								
SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		<i>PENDING</i>	<i>DISMISSED</i>	<i>CAUTION</i>	<i>RESIGNED</i>	<i>CLOSED*</i>	<i>ACTION*</i>	
<i>INCORRECT RULING</i>	1,150							1,150
<i>NON-JUDGES</i>	330							330
<i>DEMEANOR</i>	92	53	8	5	3	0	3	164
<i>DELAYS</i>	37	11	4	0	1	0	1	54
<i>CONFLICT OF INTEREST</i>	24	14	6	3	0	0	0	47
<i>BIAS</i>	21	20	3	1	1	0	0	46
<i>CORRUPTION</i>	41	3	7	0	1	0	0	52
<i>INTOXICATION</i>	2	2	0	0	1	0	1	6
<i>DISABILITY/QUALIFICATIONS</i>	0	2	0	0	1	0	0	3
<i>POLITICAL ACTIVITY</i>	28	19	3	3	0	3	1	57
<i>FINANCES/RECORDS/TRAINING</i>	6	29	14	4	5	0	1	59
<i>TICKET-FIXING</i>	0	4	2	0	0	0	0	6
<i>ASSERTION OF INFLUENCE</i>	2	7	6	2	3	2	1	23
<i>VIOLATION OF RIGHTS</i>	33	34	22	6	5	3	4	107
<i>MISCELLANEOUS</i>	14	5	5	0	1	1	0	26
TOTALS	1,780	203	80	24	22	9	12	2,130

*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.

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
		<i>PENDING</i>	<i>DISMISSED</i>	<i>CAUTION</i>	<i>RESIGNED</i>	<i>CLOSED*</i>	<i>ACTION*</i>	
<i>INCORRECT RULING</i>	23,077							23,077
<i>NON-JUDGES</i>	7,306							7,306
<i>DEMEANOR</i>	3,861	53	1,326	343	133	123	260	6,099
<i>DELAYS</i>	1,595	11	194	101	37	23	32	1,993
<i>CONFLICT OF INTEREST</i>	804	14	515	171	59	31	145	1,739
<i>BIAS</i>	1,976	20	295	59	32	21	34	2,437
<i>CORRUPTION</i>	603	3	145	14	44	23	42	874
<i>INTOXICATION</i>	63	2	41	8	18	4	31	167
<i>DISABILITY/QUALIFICATIONS</i>	64	2	34	2	20	14	6	142
<i>POLITICAL ACTIVITY</i>	415	19	305	198	25	38	53	1,053
<i>FINANCES/RECORDS/TRAINING</i>	317	29	355	217	152	100	105	1,275
<i>TICKET-FIXING</i>	28	4	93	160	46	62	169	562
<i>ASSERTION OF INFLUENCE</i>	248	7	197	98	39	15	67	671
<i>VIOLATION OF RIGHTS</i>	2,547	34	589	231	108	60	103	3,672
<i>MISCELLANEOUS</i>	863	5	273	89	35	44	60	1,369
TOTALS	43,767	203	4,362	1,691	748	558	1,107	52,436

* 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.



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