ANNUAL REPORT

March 1984

New York State
Commission on Judicial Conduct

1984 ANNUAL REPORT

OF THE

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

COMMISSION MEMBERS

MRS. GENE ROBB, Chairwoman

HONORABLE FRITZ W. ALEXANDER, II

JOHN J. BOWER, ESQ.

DAVID BROMBERG, ESQ.

E. GARRETT CLEARY, ESQ.

DOLORES DEL BELLO

VICTOR A. KOVNER, ESQ.

HONORABLE WILLIAM J. OSTROWSKI

HONORABLE ISAAC RUBIN

HONORABLE FELICE K. SHEA

JOHN J. SHEEHY, ESQ.
(Term Commenced April 1, 1983)

CARROLL L. WAINWRIGHT, JR., ESQ.
(Term Expired March 31, 1983)

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DEPUTY ADMINISTRATOR

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CLERK
ALBERT B. LAWRENCE

GERALD STERN
ADMINISTRATOR
ROBERT H. TEMBECKJIAN
DEPUTY ADMINISTRATOR

To the Governor, the Chief Judge of the Court of Appeals 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. The report covers the period from January 1, 1983, through December 31, 1983.

Respectfully submitted,

Mrs. Gene Robb, Chairwoman,
On Behalf of the Commission

March 1, 1984
New York, New York

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INTRODUCTION

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.

By offering a forum for citizens with conduct-related complaints, 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. The Commission does not act as an appellate court, does not make judgments as to the merits of judicial decisions or rulings, and does not investigate complaints that judges are either too lenient or too severe in criminal cases.

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.[1]

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[1] For the purpose of clarity, the Commission which operated from September 1, 1976, through March 31, 1978, will henceforth be referred to as the "former" Commission. A description of the temporary and former commissions, their composition and workload, is appended.

STATE COMMISSION ON JUDICIAL CONDUCT

Authority

The State Commission on Judicial Conduct 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 VI, 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.

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 provision of the State Constitution (Article VI, 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, 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 convenes once a month. 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 complaint is assigned to a staff attorney, who is responsible for conducting the inquiry and supervising the 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 at least one Commission member 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 appoints 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 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 investigative or adjudicative proceedings.

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 confidentiality provisions in Article 2-A of the Judiciary Law, all proceedings and records are private.) 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.

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 each by 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 chairwoman of the Commission is Mrs. Gene Robb of Newtonville. The other members are: Honorable Fritz W. Alexander, II, of New York City, Justice of the Appellate Division, First Department; John J. Bower, Esq., of Upper Brookville; David Bromberg, Esq., of New Rochelle; E. Garrett Cleary, Esq., of Rochester; Dolores DelBello of South Salem; Victor A. Kovner, Esq., of New York City; Honorable William J. Ostrowski of Buffalo, Justice of the Supreme Court, Eighth Judicial District; Honorable Isaac Rubin of Rye, Justice of the Appellate Division, Second Department; Honorable Felice K. Shea of New York City, Justice of the Supreme Court, First Judicial District; and John J. Sheehy, Esq., of New York City. Carroll L. Wainwright, Jr., Esq., of New York City, served as a member through March 31, 1983, when he was succeeded by Mr. Sheehy. The Commission takes this opportunity to recognize the dedicated and distinguished

service of Mr. Wainwright, who was a member of the Commission since its inception as a temporary commission in 1974.

The administrator of the Commission is Gerald Stern, Esq. The deputy administrator is Robert H. Tembeckjian, Esq. The chief attorney in Albany is Stephen F. Downs, Esq. The chief attorney in Rochester is Cody B. Bartlett, Esq. The clerk of the Commission is Albert B. Lawrence, Esq.[2]

The Commission has 41 full-time staff employees, including ten attorneys. A limited number of law students are employed throughout the year on a part-time basis.

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

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[2] Biographies are appended.

COMPLAINTS AND INVESTIGATIONS IN 1983

In 1983, 810 new complaints were received. Of these, 614 were dismissed upon initial review, and 196 investigations were authorized and commenced.[3] As in previous years, the majority of complaints were submitted by civil litigants and by complaining witnesses and defendants in criminal cases. Other complaints were received from attorneys, judges, law enforcement officers, civic organizations and concerned citizens not involved in any particular court action. Among the new complaints were 66 initiated by the Commission on its own motion.

The Commission carried over 142 investigations and proceedings on formal charges from 1982.

Some of the new complaints dismissed upon initial review were frivolous or outside the Commission's jurisdiction (such as complaints against attorneys or judges not within the state unified court system). Many were from litigants who complained about a particular ruling or decision made by a judge in the course of a proceeding. Absent any underlying misconduct, such as demonstrated prejudice, intemperance or conflict of interest, the Commission does not investigate such matters, which belong in the appellate courts. Judges must be free to act, in

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[3]The statistical period in this report is January 1, 1983, through December 31, 1983. Statistical analysis of the matters considered by the temporary, former and present Commissions is appended in chart form.

good faith, without fear of being investigated for their rulings or decisions.

Of the combined total of 338 investigations and proceedings on formal charges conducted by the Commission in 1983 (142 carried over from 1982 and 196 authorized in 1983), the Commission made the following dispositions:

-- 62 matters were dismissed outright after investigations were completed.

-- 46 matters involving 35 different judges were dismissed with letters of dismissal and caution. (45 of these matters were dismissed with caution upon conclusion of an investigation and 1 was issued upon conclusion of a formal proceeding.)

-- 12 matters involving 7 different judges were closed upon resignation of the judge from office. (11 of these matters were closed at the investigation stage and 1 during the formal proceeding stage.)

-- 5 matters involving 5 different judges were closed upon vacancy of office due to the judge's retirement or failure to win re-election. (All of these matters were closed at the investigation stage.)

-- 22 matters involving 20 different judges resulted in formal discipline (admonition, censure or removal from office).

One hundred ninety-one matters were pending at the end of the year.

ACTION TAKEN IN 1983

Formal Proceedings

No disciplinary sanction may be imposed by the Commission 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. These proceedings fall within the confidentiality provisions of the Judiciary Law and are not public unless confidentiality is waived, in writing, by the judge.

In 1983, the Commission authorized Formal Written Complaints against 34 judges.

The confidentiality provisions of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibit public disclosure by the Commission with respect to charges served, hearings commenced or other matters, absent a waiver by the judge, until a case has been concluded and a final determination has been filed with the Chief Judge of the Court of Appeals and forwarded to the respondent-judge. Following are summaries of those matters which were completed during 1983 and made public pursuant to the applicable provisions of the Judiciary Law.

Determinations of Removal

The Commission completed nine disciplinary proceedings in 1983 in which it determined that the judge involved should be removed from office.

Matter of Elmer L. Lobdell

Elmer L. Lobdell, a justice of the Fulton Town Court, Schoharie County, was served with a Formal Written Complaint dated April 1, 1982, alleging inter alia that he continued to preside over cases despite not having been duly certified to perform the duties of judicial office. Judge Lobdell filed an answer dated April 22, 1982.

A hearing was held before a referee, Margrethe R. Powers, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Lobdell did not appear for oral argument.

The Commission filed with the Chief Judge its determination dated January 18, 1983, that Judge Lobdell be removed from office. A copy of the determination is appended.

Judge Lobdell requested review of the Commission's determination by the Court of Appeals. On June 30, 1983, the Court of Appeals accepted the Commission's determination and ordered Judge Lobdell's removal from office. 59 NY2d 338 (1983).

Matter of Paul L. McGee

Paul L. McGee, a justice of the Peru Town Court, Clinton County, was served with a Formal Written Complaint dated January 7, 1982, alleging *inter alia* that over a two-year period he engaged in a course of conduct prejudicial to the administration of justice, in that he denied defendants certain fundamental rights. Judge McGee filed an answer dated January 18, 1982.

A hearing was held before a referee, the Honorable James A. O'Connor. Both sides filed motion papers with respect to the referee's report to the Commission. Judge McGee appeared by counsel for oral argument.

The Commission filed with the Chief Judge its determination dated January 21, 1983, that Judge McGee be removed from office. A copy of the determination is appended.

Judge McGee requested review of the Commission's determination by the Court of Appeals. On June 14, 1983, the Court of Appeals accepted the Commission's determination and ordered Judge McGee's removal from office. 59 NY2d 870 (1983).

Matter of Philip G. Godin

Philip G. Godin, a justice of the Manheim Town Court, Herkimer County, was served with a Formal Written Complaint dated December 3, 1982, alleging various acts of misconduct with respect to court funds entrusted to his care. Judge Godin did not file an answer.

Judge Godin, his counsel and the Commission's administrator entered into an agreed statement of facts on December 30, 1982. The Commission approved the agreed statement. Papers were filed with respect to the conclusions of law to be drawn from the stipulated facts and with respect to appropriate sanction. Judge Godin did not appear for oral argument.

The Commission filed with the Chief Judge its determination dated January 26, 1983, that Judge Godin be removed from office. A copy of the determination is appended.

Judge Godin did not request review of the Commission's determination, and the Court of Appeals ordered his removal from office on March 3, 1983.

Matter of Alan I. Friess

Alan I. Friess, a judge of the New York City Criminal Court, was served with a Formal Written Complaint dated February 25, 1982, alleging misconduct with respect to two cases over which he presided. Judge Friess filed an answer dated March 15, 1982.

A hearing was held before a referee, the Honorable Simon J. Liebowitz. Both sides filed motion papers with respect to the referee's report. Judge Friess appeared with counsel for oral argument.

The Commission filed with the Chief Judge its determination dated March 30, 1983, that Judge Friess be removed from office. A copy of the determination is appended.

Judge Friess did not request review of the Commission's determination, and the Court of Appeals ordered his removal from office on June 28, 1983.

Matter of Vincent T. Cerbone

Vincent T. Cerbone, a justice of the Mount Kisco Town Court, Westchester County, was served with a Formal Written Complaint dated July 23, 1982, alleging that he addressed patrons of a bar in a degrading, racist, threatening, profane and abusive manner. Judge Cerbone filed an answer dated August 13, 1982.

A hearing was held before a referee, Edward Brodsky, Esq. Both sides submitted motion papers with respect to the referee's report to the Commission. Judge Cerbone appeared with counsel for oral argument.

The Commission filed with the Chief Judge its determination dated August 5, 1983, that Judge Cerbone be removed from office. A copy of the determination is appended.

Judge Cerbone requested review of the Commission's determination by the Court of Appeals. On January 17, 1984, the Court of Appeals accepted the Commission's determination and ordered Judge Cerbone's removal from office. 61 NY2d 93 (1984).

Matter of Warren L. Boulanger

Warren L. Boulanger, a justice of the Cold Spring Village Court, Putnam County, was served with a Formal Written Complaint dated November 10, 1982, alleging *inter alia* that he transferred to himself certain assets of a client of his private

law practice. Judge Boulanger filed an answer dated January 14, 1983.

A hearing was held before a referee, William V. Maggipinto, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Boulanger appeared with counsel for oral argument.

The Commission filed with the Chief Judge its determination dated August 10, 1983, that Judge Boulanger be removed from office. A copy of the determination is appended.

Judge Boulanger requested review of the Commission's determination by the Court of Appeals. On January 17, 1984, the Court of Appeals accepted the Commission's determination and ordered Judge Boulanger's removal from office. 61 NY2d 89 (1984).

Matter of Robert W. Kelso

Robert W. Kelso, a justice of the Montgomery Town Court, Orange County, was served with a Formal Written Complaint dated October 4, 1982, alleging certain improprieties in connection with his private law practice. Judge Kelso filed an answer dated October 21, 1982.

A hearing was held before a referee, Richard D. Parsons, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Kelso appeared with counsel for oral argument.

The Commission filed with the Chief Judge its determination dated September 21, 1983, that Judge Kelso be removed from office. A copy of the determination is appended.

Judge Kelso requested review of the Commission's determination by the Court of Appeals. On January 17, 1984, the Court of Appeals accepted the Commission's finding that respondent's misconduct had been established but, in a four-to-three decision, modified the sanction from removal to censure. 61 NY2d 82 (1984).

Matter of Paul E. Hutzky

Paul E. Hutzky, a justice of the Saratoga Town Court, Saratoga County, was served with a Formal Written Complaint dated May 2, 1983, alleging that he had failed to meet various record keeping and financial reporting, deposit and remittance requirements. Judge Hutzky did not file an answer.

Judge Hutzky, his counsel and the Commission's administrator entered into an agreed statement of facts on September 16, 1983. The Commission approved the agreed statement. Papers were filed with respect to the conclusions of law to be drawn from the stipulated facts and with respect to appropriate sanction. Judge Hutzky did not appear for oral argument.

The Commission filed with the Chief Judge its determination dated November 4, 1983, that Judge Hutzky be removed from office. A copy of the determination is appended.

Judge Hutzky did not request review of the Commission's determination, and the Court of Appeals ordered his removal from office on December 28, 1983.

Matter of Luvern W. Moore

Luvern W. Moore, a justice of the Kinderhook Town Court, Columbia County, was served with a Formal Written Complaint dated August 3, 1983, alleging that he had made false entries in his court records. Judge Moore did not answer the Formal Written Complaint.

The Commission granted the administrator's motion for summary determination and found misconduct established. Judge Moore did not submit a memorandum as to appropriate sanction, nor did he appear for oral argument.

The Commission filed with the Chief Judge its determination dated November 10, 1983, that Judge Moore be removed from office. A copy of the determination is appended.

Judge Moore did not request review of the Commission's determination, and the Court of Appeals ordered his removal from office on December 23, 1983.

Determinations of Censure

The Commission completed three disciplinary proceedings in 1983 in which it determined that the judges involved should be censured.

Matter of Donald E. Whalen

Donald E. Whalen, a justice of the Ticonderoga Town Court, Essex County, was served with a Formal Written Complaint dated March 15, 1982, alleging that he presided in 37 matters in which his employer was a party. Judge Whalen filed an answer dated April 5, 1982.

A hearing was held before a referee, Michael Whiteman, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Whalen appeared by counsel for oral argument.

The Commission filed with the Chief Judge its determination dated January 20, 1983, that Judge Whalen be censured. A copy of the determination is appended.

Judge Whalen did not request review of the Commission's determination, which thus became final.

Matter of W. Howard Sullivan

W. Howard Sullivan, a judge of the Norwich City Court, Chenango County, was served with a Formal Written Complaint dated May 10, 1982, alleging inter alia that he failed to disqualify himself in certain cases involving his law firm. Judge Sullivan filed an answer dated June 21, 1982.

A hearing was held before a referee, Bernard H. Goldstein, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Sullivan did not appear for oral argument.

The Commission filed with the Chief Judge its determination dated April 22, 1983, that Judge Sullivan be censured. A copy of the determination is appended.

Judge Sullivan did not request review of the Commission's determination, which thus became final.

Matter of Barbara M. Sims

Barbara M. Sims, a judge of the Buffalo City Court, Erie County, was served with a Formal Written Complaint dated February 2, 1981, alleging *inter alia* that she signed orders in ten cases in which the defendants were clients or former clients of her or her husband. Judge Sims filed an answer dated March 13, 1981.

A hearing was held before a referee, Sheila L. Birnbaum, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Sims appeared by counsel for oral argument.

The Commission filed with the Chief Judge its determination dated May 16, 1983, that Judge Sims be censured. A copy of the determination is appended.

Judge Sims requested review of the Commission's determination by the Court of Appeals, where the matter is pending.

Determinations of Admonition

The Commission completed eight disciplinary proceedings in 1983 in which it determined that the judge involved should be admonished.

Matter of Victor A. Jurhs

Victor A. Jurhs, a justice of the Kendall Town Court, Orleans County, was served with a Formal Written Complaint dated January 14, 1982, alleging *inter alia* that he failed to make timely deposits and remittances of court funds and that he failed to keep accurate records of his court accounts. Judge Jurhs filed an answer dated February 11, 1982.

A hearing was held before a referee, John J. Darcy, Esq. Judge Jurhs did not file motion papers with respect to the referee's report to the Commission but appeared for oral argument.

The Commission filed with the Chief Judge its determination dated January 11, 1983, that Judge Jurhs be admonished. A copy of the determination is appended.

Judge Jurhs did not request review of the Commission's determination, which thus became final.

Matter of Frank R. Bayger

Frank R. Bayger, a justice of the Supreme Court, Eighth Judicial District (Erie County), was served with a Formal Written Complaint dated November 25, 1981, alleging that he disparaged a litigant in a matter before him and that he engaged in numerous

business activities prohibited by the Rules Governing Judicial Conduct. Judge Bayger filed an answer dated January 28, 1982.

A hearing was held before a referee, the Honorable Francis Bergan. Both sides filed motion papers with respect to the referee's report. Judge Bayger appeared with counsel for oral argument.

The Commission filed with the Chief Judge its determination dated January 18, 1983, that Judge Bayger be admonished. A copy of the determination is appended.

Judge Bayger did not request review of the Commission's determination, which thus became final.

Matter of Anthony T. Jordan, Jr.

Anthony T. Jordan, Jr., a justice of the Supreme Court, Second Judicial District (Kings County), was served with a Formal Written Complaint dated February 2, 1982, alleging that he addressed an attorney in an improper manner in a 1981 proceeding. Judge Jordan filed an answer dated February 10, 1982.

A hearing was held before a referee, Gerald Harris, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Jordan appeared with counsel for oral argument.

The Commission filed with the Chief Judge its determination dated January 26, 1983, that Judge Jordan be admonished. A copy of the determination is appended.

Judge Jordan did not request review of the Commission's determination, which thus became final.

Matter of Joseph S. Curcio

Joseph S. Curcio, a justice of the Malta Town Court, Saratoga County, was served with a Formal Written Complaint dated November 5, 1981, alleging, *inter alia*, that he threatened a defendant with jail if the defendant did not make restitution with bail money that was not his and had been posted by others on his behalf. Judge Curcio filed an answer dated January 20, 1982.

A hearing was held before a referee, Edward Brodsky, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Curcio did not appear for oral argument.

The Commission filed with the Chief Judge its determination dated March 1, 1983, that Judge Curcio be admonished. A copy of the determination is appended.

Judge Curcio did not request review of the Commission's determination, which thus became final.

Matter of Raymond E. Burr

Raymond E. Burr, a justice of the Middlefield Town Court, Otsego County, was served with a Formal Written Complaint dated May 6, 1982, alleging that over a 19-month period he repeatedly refused a newspaper reporter access to public court

records and proceedings. Judge Burr filed an answer dated May 28, 1982.

A hearing was held before a referee, William H. Morris, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Burr did not appear for oral argument.

The Commission filed with the Chief Judge its determination dated April 22, 1983, that Judge Burr be admonished. A copy of the determination is appended.

Judge Burr did not request review of the Commission's determination, which thus became final.

Matter of Louis Kaplan

Louis Kaplan, a judge of the New York City Civil Court, was served with a Formal Written Complaint dated July 19, 1982, alleging that he assisted his wife in obtaining charitable contributions from lawyers who appeared before him and that he obtained an adjournment in another court for a friend. Judge Kaplan did not file an answer.

Judge Kaplan, his counsel and the Commission's administrator entered into an agreed statement of facts on January 3, 1983. The Commission approved the agreed statement. Papers were filed with respect to the conclusions of law to be drawn from the stipulated facts and with respect to appropriate sanction. Judge Kaplan appeared by counsel for oral argument.

The Commission filed with the Chief Judge its determination dated May 17, 1983, that Judge Kaplan be admonished. A copy of the determination is appended.

Judge Kaplan did not request review of the Commission's determination, which thus became final.

Matter of W. Eugene Sharpe

W. Eugene Sharpe, a justice of the Supreme Court, Eleventh Judicial District (Queens County), was served with a Formal Written Complaint dated March 31, 1982, alleging that he improperly cited for contempt an attorney appearing before him and ordered the attorney held in detention. Judge Sharpe filed an answer dated May 28, 1982.

A hearing was held before a referee, Seymour M. Kléin, Esq. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Sharpe appeared by counsel for oral argument.

The Commission filed with the Chief Judge its determination dated June 6, 1983, that Judge Sharpe be admonished. A copy of the determination is appended.

Judge Sharpe did not request review of the Commission's determination, which thus became final.

Matter of Robert M. Jacon

Robert M. Jacon, a justice of the East Greenbush Town Court, Rensselaer County, was served with a Formal Written Complaint dated December 7, 1982, alleging that he presided over

a case involving a client of his private law practice. Judge Jacon filed an answer dated January 7, 1983.

A hearing was held before a referee, the Honorable James A. O'Connor. Both sides filed motion papers with respect to the referee's report to the Commission. Judge Jacon appeared with counsel for oral argument.

The Commission filed with the Chief Judge its determination dated November 28, 1983, that Judge Jacon be admonished. A copy of the determination is appended.

Judge Jacon did not request review of the Commission's determination, which thus became final.

Dismissed Formal Written Complaints

The Commission disposed of seven Formal Written Complaints in 1983 without rendering public discipline.

In one of these seven matters, the Commission determined that the judge's misconduct was not established, dismissed the Formal Written Complaint and issued the judge a confidential letter of dismissal and caution.

In three other cases, the Commission found that the judges involved had committed misconduct but that, upon the judge's resignation from office, further action was not warranted.

In another case, the Commission dismissed the Formal Written Complaint, *sua sponte*, after finding that it was without

jurisdiction since the judge had been removed from office by the Court of Appeals in a related matter.

In the remaining two cases, after hearings before referees, the Commission found that misconduct was not established and the Formal Written Complaints were dismissed.

Letters of Dismissal and Caution

Pursuant to Commission rule, 22 NYCRR 7000.1(1), a "letter of dismissal and caution" constitutes the Commission's written confidential suggestions and recommendations to a judge.

Where the Commission determines that allegations of misconduct or the misconduct itself does not warrant public discipline, the Commission, by issuing a letter of dismissal and caution, can privately call a judge's attention to de minimis violations of ethical standards which should be avoided in the future. Such a communication is valuable since it is the only method by which the Commission may caution a judge as to his or her conduct without making the matter public.

Should the conduct addressed by the letter of dismissal and caution continue unabated or be repeated, the Commission may authorize an investigation which may lead to a Formal Written Complaint and further disciplinary proceedings.

In 1983, 34 letters of dismissal and caution were issued by the Commission. In sum total, the Commission has issued 211 letters of dismissal and caution since its inception on April 1, 1978. Of these, 19 were issued after formal charges

had been sustained and determinations made that the judges had engaged in misconduct.

Matters Closed Upon Resignation

Seven judges resigned in 1983 while under investigation or under formal charges by the Commission.

Since 1975, 114 judges have resigned while under investigation or charges by the temporary, former or present Commission.

The jurisdiction of the temporary and former Commission was limited to incumbent judges. An inquiry was therefore terminated if the judge resigned, and the matter could not be made public. The present Commission may retain jurisdiction over a judge for 120 days following a resignation. The Commission may proceed within this 120-day period, but no sanction other than removal may be determined by the Commission within such period. (When rendered final by the Court of Appeals, the "removal" automatically bars the judge from holding judicial office in the future.) Thus, no action may be taken if the Commission decides within that 120-day period following a resignation that removal is not warranted.

SUMMARY OF COMPLAINTS CONSIDERED BY THE TEMPORARY, FORMER AND PRESENT COMMISSIONS

Since January 1975, when the temporary Commission commenced operations, 6145 complaints of judicial misconduct have been considered by the temporary, former and present Commissions.

Of the 6145 complaints received since 1975, the following dispositions have been made through December 31, 1983:

- 4123 dismissed upon initial review;
- 2022 investigations authorized;
- 854 dismissed without action after investigation;
- 348 dismissed with caution or suggestions and recommendations to the judge;
- 139 closed upon resignation of the judge;
- 119 closed upon vacancy of office by the judge other than by resignation; and
- 371 resulted in disciplinary action.

Of the 371 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission[4]:

- 46 judges were removed from office;
- 3 judges were suspended without pay for six months;
- 2 judges were suspended without pay for four months;

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[4]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 which resulted in action and the number of judges disciplined.

-- 134 judges have been censured publicly;

-- 59 judges have been admonished publicly; and

-- 59 judges have been admonished confidentially by the temporary or former Commission, which had such authority.

In addition, 114 judges resigned during investigation, upon the commencement of disciplinary proceedings or in the course of those proceedings.

REVIEW OF COMMISSION DETERMINATIONS BY THE COURT OF APPEALS

Determinations rendered by the Commission are filed with the Chief Judge of the Court of Appeals and served by the Chief Judge on the respondent-judge, pursuant to statute. The Judiciary Law allows the respondent-judge 30 days to request review of the Commission's determination by the Court of Appeals. If review is waived or not requested within 30 days, the Commission's determination becomes final.

In 1983, the Court had before it eight requests for review, two of which had been filed in late 1982 and six of which were filed in 1983. Of these eight matters, the Court decided four in 1983, three in January 1984, and one is pending.

Matter of Raymond E. Aldrich, Jr.

On September 17, 1982, the Commission determined that Raymond E. Aldrich, Jr., a judge of the County Court, Dutchess County, be removed from office for presiding over two sessions of court while under the influence of alcohol.

Judge Aldrich requested review of the Commission's determination by the Court of Appeals.

In its opinion dated March 24, 1983, the Court unanimously held that Judge Aldrich had engaged in misconduct. In a five-to-two decision, the Court accepted the Commission's determination and removed Judge Aldrich from office. Two judges dissented as to the sanction only; one judge voted to modify the

sanction to censure, and one voted that the judge be retired. 58 NY2d 279 (1983).

Matter of J. Richard Sardino

On September 20, 1982, the Commission determined that J. Richard Sardino, a judge of the Syracuse City Court, Onondaga County, be removed from office for engaging in a course of conduct in which he disparaged and demeaned defendants who appeared before him and deprived them of their constitutional rights.

Judge Sardino requested review of the Commission's determination by the Court of Appeals.

On November 16, 1982, the Court suspended Judge Sardino from performing his judicial duties pending its decision on his request for review.

In its opinion dated March 24, 1983, the Court unanimously accepted the Commission's determination and removed Judge Sardino from office. 58 NY2d 286 (1983).

Matter of Elmer L. Lobdell

On January 18, 1983, the Commission determined that Elmer L. Lobdell, a justice of the Fulton Town Court, Schoharie County, be removed from office for failing to complete the certification requirements for non-attorney justices in a timely manner and for continuing to preside over cases notwithstanding that he had not been certified to perform the duties of judicial office.

Judge Lobdell requested review of the Commission's determination by the Court of Appeals.

In its decision dated June 30, 1983, the Court unanimously accepted the Commission's determination and removed Judge Lobdell from office. 59 NY2d 338 (1983).

Matter of Paul L. McGee

On January 21, 1983, the Commission determined that Paul L. McGee, a justice of the Peru Town Court, Clinton County, be removed from office for engaging in a course of conduct prejudicial to the administration of justice, in that he denied defendants certain fundamental rights.

Judge McGee requested review of the Commission's determination by the Court of Appeals.

In its opinion dated June 14, 1983, the Court unanimously accepted the Commission's determination and removed Judge McGee from office. 59 NY2d 870 (1983).

Matter of Vincent T. Cerbone

On August 5, 1983, the Commission determined that Vincent T. Cerbone, a justice of the Mount Kisco Town Court, Westchester County, be removed from office for addressing patrons of a bar in a degrading, racist, threatening, profane and abusive manner.

Judge Cerbone requested review of the Commission's determination by the Court of Appeals.

In its opinion dated January 17, 1984, the Court unanimously accepted the Commission's determination that Judge Cerbone be removed from office. 61 NY2d 93 (1984).

Matter of Warren L. Boulanger

On August 10, 1983, the Commission determined that Warren L. Boulanger, a justice of the Cold Spring Village Court Putnam County, be removed from office for engaging in a series of deliberate deceptions including, inter alia, transferring to himself certain assets of a client of his private law practice and falsely reporting the client's death in order to avoid paying interest penalties.

Judge Boulanger requested review of the Commission's determination by the Court of Appeals.

In its opinion dated January 14, 1984, the Court unanimously accepted the Commission's determination and removed Judge Boulanger from office. 61 NY2d 89 (1984).

Matter of Robert W. Kelso

On September 21, 1983, the Commission determined that Robert W. Kelso, a justice of the Montgomery Town Court, Orange County, be removed from office for deliberately deceiving a client in his private law practice and offering to pay the client $10,000 to dissuade him from filing a grievance.

Judge Kelso requested review of the Commission's determination by the Court of Appeals.

In its opinion dated January 17, 1984, the Court did not accept the Commission's determination of removal. While unanimously holding that Judge Kelso had engaged in misconduct, the Court in a four-to-three decision modified the sanction to censure. 61 NY2d 82 (1984).

CHALLENGES TO COMMISSION PROCEDURES

The Commission's staff litigated a number of cases in state and federal courts in 1983, involving several important constitutional and statutory issues relative to the Commission's jurisdiction and procedures.

Commission v. Doe

The Commission made a motion in Supreme Court, Albany County, to compel compliance with a subpoena duces tecum served on a Family Court judge. The subpoena sought the production of various records and documents related to the judge's personal and business financial activities. The judge cross-moved to quash the subpoena on the grounds that the materials requested by the subpoena pertained to matters which impermissibly exceeded the scope of the initiatory complaints.

In a decision dated February 2, 1983, Supreme Court Justice Edward S. Conway granted the Commission's motion and denied the judge's cross-motion. The Court held that the information sought was "reasonably related to the general area of the complaint which relates to a proper subject of inquiry," and thus that the subpoena was proper.

On appeal, the Appellate Division, Third Department, granted the judge's motion to change the caption of proceeding by substituting "Honorable John Doe" for the judge's name. Thereafter, in a decision dated July 14, 1983, the Appellate Division reversed the order of the Supreme Court and quashed those

portions of the subpoena not already complied with. Terming the Commission's request for the judge's financial records "a veritable 'fishing expedition,'" the Appellate Division concluded that the subpoena exceeded the scope of the complaints. The Court declined to seal the record of the proceeding.

The matter was then reviewed on appeal by the Court of Appeals. In a decision dated January 17, 1984, the Court upheld the Commission's subpoena power "within bounds circumscribed by a reasonable relation to the subject-matter under investigation" (emphasis in original) and directed the judge to comply with the subpoena as modified. Recognizing the "broad investigatory and enforcement powers" afforded to the Commission, the Court stated:

> [T]he Commission need not proffer facts in its complaint which would support formal charges. Nor must it tailor its request for information to relate precisely to specific allegations contained in the complaints. All that need be shown is that the information sought is reasonably related to the subject matter under investigation. To hold otherwise would sharply curtail the Commission's investigatory capabilities and render it ineffective as the instrument through which the State seeks to insure the integrity of its judiciary. [Citations omitted.]

Within these guidelines, the Court modified the subpoena by eliminating certain portions which requested information deemed by the Court to be unrelated to the subject matters under investigation. 61 NY2d 56 (1984).

Stern v. Morgenthau

Gerald Stern, the administrator of the Commission, was served with a subpoena duces tecum issued by the District Attorney of New York County, requiring him to appear before a grand jury with Commission records and files pertaining to a Commission investigation of certain judges. (The Commission had previously determined not to refer the requested materials to the district attorney's office pursuant to Judiciary Law Section 44[10].) Mr. Stern moved in Supreme Court, New York County to quash the subpoena on the grounds that the requested materials are confidential under Judiciary Law Section 45. Mr. Stern's appearance before the grand jury was stayed pending determination of the motion to quash.

In a decision dated August 1, 1983, Acting Supreme Court Justice Joan B. Carey denied the motion to quash. Judge Carey concluded that Judiciary Law Section 45 did not bar disclosure of the subpoenaed materials to the grand jury. Notwithstanding Mr. Stern's contentions that the public policy underlying Section 45 was to prevent unwarranted disclosure of Commission information in order to protect the rights and interests of judges, complainants, witnesses and the general public, Judge Carey found that the statute does not reflect a "clear constitutional or legislative expression" to limit the power of a grand jury subpoena and that the secrecy accorded to grand jury investigations was sufficient to protect the confidentiality of the Commission's records. While noting that

the powers of a grand jury are not unlimited, Judge Carey concluded that "the investigation by the grand jury into judicial misconduct should and must be afforded the greatest possible breadth" in order to maintain the integrity of the judicial system.

On August 5, 1983, Judge Carey granted Mr. Stern's motion to renew and, with the District Attorney's consent, excluded lawyers' work product from the materials Mr. Stern was required to produce.

On appeal, the Appellate Division, First Department, unanimously affirmed in an order, issued without an opinion, dated December 1, 1983.

Mr. Stern obtained leave to appeal in the Court of Appeals, and the appeal is pending.

Wilk v. Commission

New York City Civil Court Judge Elliott Wilk commenced an Article 78 proceeding seeking to bar the Commission from proceeding under a Formal Written Complaint against him and to declare that the Commission had no jurisdiction to proceed in a disciplinary proceeding against him. Judge Wilk's motion for a stay was denied. The Commission cross-moved to dismiss the petition.

On February 16, 1983, Acting Supreme Court Justice Ethel B. Danzig denied the Commission's cross-motion to dismiss and directed the Commission to file an answer to the petition.

Citing Matter of Friess v. State Commission on Judicial Conduct, 91 A.D.2d 554 (1st Dept. 1982), Judge Danzig stated that the "Court may review the proceedings and jurisdiction of the New York State Commission on Judicial Conduct."

The Commission appealed. On November 15, 1983, the Appellate Division, First Department, reversed Judge Danzig's holding. In a unanimous decision, the Court held that pursuant to the New York Constitution, the Commission has the authority to "receive, initiate, investigate and hear complaints with respect to the conduct...[and] performance of official duties of any judge or justice of the unified court system" (Article VI, section 22). Citing Matter of Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597 (1980), the Court concluded that under the circumstances "an Article 78 petition seeking relief in the nature of prohibition [does not lie]."

Judge Wilk filed a notice of appeal in the Court of Appeals, and the appeal is pending.

Sims v. Commission (State Court Case)

The petitioner, Buffalo City Court Judge Barbara M. Sims, brought two CPLR Article 78 proceedings in State Supreme Court to stay or quash a pending disciplinary proceeding. In one proceeding, the judge alleged, inter alia, that the Commission investigation was improper and violated her civil and constitutional rights; in the other proceeding, it was alleged that the referee could not properly determine the question of

whether the judge's attorney should be disqualified. The petitions were dismissed and all stays vacated.

On appeal, the Appellate Division, Fourth Department, unanimously affirmed.

Sims v. Commission (Federal Court Case)

Judge Sims, the Buffalo Chapter of the National Bar Association, and the Northern Region Black and Puerto Rican Political Caucus brought an action in the United States District Court (W.D.N.Y.) against the Commission, a newspaper, a television station, various editors and others, claiming civil rights violations in connection with the news reporting and investigation of the judge. Asserting violations of their constitutional rights, the plaintiffs sought damages and declaratory and injunctive relief. The plaintiffs' motion for a preliminary injunction was denied. Depositions have been taken. The Commission and other defendants have moved for summary judgment. A decision in this case has been pending since oral argument before Judge John T. Elfvin on January 31, 1983.

Matter of Aldrich

The Commission had determined in 1982 that Dutchess County Family Court Judge Raymond E. Aldrich, Jr., should be removed from office. Judge Aldrich requested review of that determination by the Court of Appeals. The judge asserted, *inter alia*, that the Commission had the authority to impose a conditional sanction and that the sanction of censure, conditioned

upon the judge's continued participation in an Alcoholics Anonymous program, should be considered.

The Court accepted the Commission's determination that Judge Aldrich be removed from office. The Court noted that there is neither a constitutional nor a statutory basis for a contingent or probationary penalty. 58 NY2d 279 (1983).

Matter of Sardino

The Commission had determined in 1982 that Syracuse City Court Judge J. Richard Sardino should be removed from office. Judge Sardino requested review of that determination by the Court of Appeals. The judge asserted, inter alia, that the matters at issue--his bail determinations, alleged failure to advise defendants of their rights, failure to afford defendants their rights and abuse of his authority at arraignments--were not reviewable by the Commission. He also alleged that he was denied due process of law in numerous respects, including that certain rules and regulations of the Commission were impermissibly vague and permitted an inappropriate combination of investigative and adjudicative functions; that the standard of proof applied by the Commission (preponderance of the evidence) was inadequate; and that he was denied a speedy prosecution of his case.

Accepting the Commission's determination, the Court found that the judge's actions constituted misconduct which warranted the sanction of removal. 58 NY2d 286 (1983).

Matter of Cerbone

The Commission determined that Mount Kisco Town Justice Vincent T. Cerbone should be removed from office. Judge Cerbone requested review of that determination by the Court of Appeals. The judge asserted, inter alia, that in view of his prior acquittal in a criminal action on charges arising from the same incidents at issue in the disciplinary proceeding, the Commission proceeding constituted double jeopardy. He also argued that the standard of proof applied by the Commission (i.e., preponderance of the evidence) is improper and that proof by at least a "clear and convincing evidence" standard should be required.

On review, the Court of Appeals accepted the Commission's determination of removal. The Court stated that it was unnecessary to determine whether the higher standard of proof was required since it concluded, as did the referee, that the charges were supported by clear and convincing evidence.

SPECIFIC PROBLEM AREAS IDENTIFIED BY THE COMMISSION

In the course of its inquiries into individual complaints, the Commission has identified certain types of misconduct which appear to occur periodically and sometimes frequently. Several such areas are discussed below.

Judge-Sponsored Trips

The Rules Governing Judicial Conduct permit a judge to participate in certain quasi-judicial and extra-judicial activities for which reasonable compensation or expense reimbursement may be received. Typically such activities include teaching a law school class or lecturing at a public forum on the legal system or publishing an article on a particular facet of the law. Subject to certain strictures (such as avoiding payment from parties that might appear before or otherwise influence the judge in the performance of official duties), judges have routinely participated in such extra-judicial or quasi-judicial activities.

In 1983 the Commission considered two complaints involving judges who not only accepted invitations to participate in seminars held in foreign countries but who appeared to be actively promoting the trips themselves. One judge resigned while an investigation was in progress, and the other was cautioned for the degree to which he participated in planning and organizing the trip.

A judge is prohibited, *inter alia*, from active participation in a profit-making business and from business dealings

that exploit the judicial position (Section 100.5[c][1] and [2] of the Rules). In the two cases investigated in 1983, the judges had written letters on judicial stationery to their colleagues, strongly encouraging their participation in the foreign trips. One of the two sent such letters to lawyers as well as judges. The other sent a separate letter, not on judicial stationery, to lawyers. In one of these cases, the judge and his wife received free trips to the foreign country, totaling more than $9,000 in value and appearing to exceed the Rules requirement of reasonable compensation or expense reimbursement. In the other case, the judge not only sent letters of solicitation but also drafted press releases, helped arrange and approved hotel accommodations and otherwise worked closely with the travel agency organizing the trip.

The clear intent of the Rules is to permit and even encourage judges to share their expertise by lecturing on the law while preserving the dignity due to judicial office. However, it is inappropriate for a judge to act as a travel and booking agent and to accept remuneration by way of a free trip. Such conduct undermines respect for the judiciary. If the judge's free trip is contingent upon a certain number of people signing up as participants, the judge's role seems even less quasijudicial and more business-oriented. As such, the judge's role as conference lecturer can be overshadowed by his or her role as sales agent for a profit-making trip, and a conflict with the Rules arises.

Beyond the prohibitions on business activities, the judge's conduct in actively promoting such trips can create a problem in that lawyers who practice before the judge may feel pressured by the judge to participate. Even if the judge is careful and restrained in the actual solicitation, the appearance of impropriety is easily conveyed in such a circumstance.

Political Activity

The Rules Governing Judicial Conduct and the Code of Judicial Conduct proscribe a variety of political activities by judges. In 1983 the Commission considered various complaints that judges had engaged in improper political conduct. One area of activity considered by the Commission in 1983 merits particular attention.

A judge may not participate in or contribute to any political campaign except his or her own campaign for elective judicial office (Section 100.7 of the Rules).

In 1983, the Commission considered a number of situations in which campaign committees made virtually identical lump sum payments requested by a political party, ostensibly to reimburse the party for expenses it had incurred in promoting the election of judges. Neither the judges nor their campaign committees were able to show any itemized receipts or other indication that the money had in fact been spent on their campaigns.

The appearance of such a practice is that the payment from the judge's campaign fund to the party is not entirely a reimbursement for the judge's expenses but is at least in part a contribution to the party, for use as the party sees fit, presumably to be used in the campaigns of other candidates for office.

Improper Financial Management and Record Keeping

In 1983, the Commission rendered three determinations that town court justices be removed from office and that one be admonished for improprieties arising from their failure, in whole or in part, to observe various financial reporting, depositing and remitting requirements. (See Matters of Philip G. Godin, Paul E. Hutzky, Luvern W. Moore and Victor A. Jurhs.) The Commission also issued four letters of dismissal and caution in this regard.

Improper and neglected accountings of court monies continue to be a problem, particularly in those town and village courts in which the judge handles official funds (e.g., fines, fees and bail) and has insufficient clerical or administrative assistance in keeping records up to date. While irregularities in financial management and record keeping most often result from honest mistakes, they sometimes indicate serious misconduct.

In many cases, cash deficiencies result from the judge's failure to make prompt deposits of court monies in official court bank accounts, and from failure to make timely

remittances of those funds to the State Comptroller as required by law. In some instances, substantial amounts of court funds are kept for long periods under the judge's personal control, resulting in the inevitable suspicion that the money is being used by the judge. Even where venality is not an issue, negligence sometimes is. The Commission has recently reported cases in which town or village justices kept court funds at home, in a shoebox or a freezer.

Clearly, town and village court justices need greater clerical assistance. Where a town board has available resources, it should make a greater commitment to court administration. In addition, as we have previously recommended, the State Comptroller's Office of Audit and Control should consider sending teams of financial managers around the state to help the local justices set up and maintain appropriate bookkeeping and record keeping systems. The cost of operating such a modest program would be more than offset by the prompt reporting and remitting of funds to the State Comptroller and by the consequent decline in the number and cost of disciplinary proceedings against judges whose financial records raise misconduct issues.

Training Programs for Judges and Justices

Of the 3500 judges and justices in New York State, 2400 serve part-time in town or village courts, and approximately 2000 of them do not have law degrees. The State Constitution requires

that these non-lawyer town and village justices be certified to sit as judges, upon completion of a program of training.

In previous annual reports, the Commission has noted with concern that the training programs have not been as successful as hoped, especially in areas pertaining to appropriate standards of ethical conduct.

We note with particular satisfaction, therefore, that in recent years the Office of Court Administration has made great strides toward improving the program of education and certification required of part-time non-lawyer justices, as well as expanding the program it offers to part-time lawyer-justice and to the judges and justices of the state's full-time courts, who by law must be lawyers. Of special note are the expanded offerings on the Rules Governing Judicial Conduct and financial management, which address problems in the part-time courts that the Commission has identified over the years as especially troublesome.

CONCLUSION

Public confidence in the integrity and impartiality of the judiciary is essential to the rule of law. The members of the State Commission on Judicial Conduct believe the Commission contributes to that ideal and to the fair and proper administration of justice.

Respectfully submitted,

Mrs. Gene Robb, Chairwoman
Fritz W. Alexander, II
John J. Bower
David Bromberg
E. Garrett Cleary
Dolores DelBello
Victor A. Kovner
William J. Ostrowski
Isaac Rubin
Felice K. Shea
John J. Sheehy
(Term commenced April 1, 1983)
Carroll L. Wainwright, Jr.
(Term expired March 31, 1983)

APPENDIX A

BIOGRAPHIES OF COMMISSION MEMBERS

HONORABLE FRITZ W. ALEXANDER, II, is a graduate of Dartmouth College and New York University School of Law. He is presently an Associate Justice of the Appellate Division, First Department, to which he was appointed by Governor Carey in October 1982. He had been appointed a Justice of the Supreme Court for the First Judicial District by Governor Carey in September 1976 and was elected to that office in November 1976. He was a Judge of the Civil Court of the City of New York from 1970 to 1976. He previously was senior partner in the law firm of Dyett, Alexander & Dinkins and was Executive Vice President and General Counsel of United Mutual Life Insurance Company. Judge Alexander is a former Adjunct Professor of Cornell Law School, and he currently is a Trustee of the Law Center Foundation of New York University Law School and a Director of the New York Society for the Prevention of Cruelty to Children. He is a member and past President of the Harlem Lawyers Association, a member of the Association of the Bar of the City of New York and the National Bar Association, and he serves as a member of the Executive Committee of the Judicial Council of the National Bar Association. Judge Alexander is a member and founder of 100 Black Men, Inc., and founder and past president of the Dartmouth Black Alumni Association.

JOHN J. BOWER, ESQ., is a graduate of New York University and New York Law School. He is a partner in Bower & Gardner in New York City. He is a Fellow of the American College of Trial Lawyers, a Member of the Federation of Insurance Counsel and a Member of the American Law Institute.

DAVID BROMBERG, ESQ., is a graduate of Townsend Harris High School, City College of New York and Yale Law School. He is a member of the firm of Bromberg, Gloger, Lifschultz & Marks. Mr. Bromberg served as counsel to the New York State Committee on Mental Hygiene from 1965 through 1966. He was elected a delegate to the New York State Constitutional Convention of 1967, where he was secretary of the Committee on the Bill of Rights and Suffrage and a member of the Committee on State Finances, Taxation and Expenditures. He serves, by appointment, on the Westchester County Planning Board. He is a member of the Association of the Bar of the City of New York and has served on its Committee on Municipal Affairs. He is a member of the New York State Bar Association and is presently serving on its Committee on the New York State Constitution. He serves on the National Panel of Arbitrators of the American Arbitration Association.

E. GARRETT CLEARY, ESQ., attended St. Bonaventure University and is a graduate of Albany Law School. He was an Assistant District Attorney in Monroe County from 1961 through 1964. In August of 1964, he resigned as Second Assistant District Attorney to enter private practice. He is now a partner in the law firm of Harris, Beach, Wilcox, Rubin and Levey in Rochester. In January 1969 he was appointed a Special Assistant Attorney General in charge of Grand Jury Investigation ordered by the late Governor Nelson A. Rockefeller to investigate financial irregularities in the Town of Arietta, Hamilton County, New York. In 1970 he was designated as the Special Assistant Attorney General in charge of an investigation ordered by Governor Rockefeller into a student-police confrontation that occurred on the campus of Hobart College, Ontario County, New York, and in 1974 he was appointed a Special Prosecutor in Schoharie County for the purpose of prosecuting the County Sheriff. Mr. Cleary is a member of the Monroe County and New York State Bar Associations, and he has served as a member of the governing body of the Monroe County Bar Association, Oak Hill Country Club, St. John Fisher College, Better Business Bureau of Rochester, Automobile Club of Rochester, Hunt Hollow Ski Club and the Monroe County Advisory Committee for the Title Guarantee Company. In 1981 he became the Chairman of the Board of Trustees of St. John Fisher College. He and his wife Patricia are the parents of seven children.

DOLORES DEL BELLO received a baccalaureate degree from the College of New Rochelle and a masters degree from Seton Hall University. She is presently Regional Public Relations Director for Bloomingdale's. Mrs. DelBello is a member of the League of Women Voters; the Board of Overseers for the Naylor Dana Institute for Disease Prevention; American Health Foundation; the Board of Trustees of St. Cabrini Nursing Home, Inc.; Hadassah; the Westchester Women in Communications; Alpha Delta Kappa, the international honorary society for women educators; the Board of Directors for the Hudson River Museum; Board of Directors Universitas Internationalis Coluccio Salutati; Advisory Committee, Westchester County Chapter, New York State Association for Retarded Children; and the Board of Directors, Lehman College Performing Arts Center. She is a founding member of the Westchester Repertory Theatre.

VICTOR A. KOVNER, ESQ., is a graduate of Yale College and the Columbia Law School. He is a partner in the firm of Lankenau Kovner & Bickford. Mr. Kovner has been a member of the Mayor's Committee on the Judiciary since 1969. He was a member of Governor Carey's Court Reform Task Force and now serves on the board of directors of the Committee for Modern Courts. Mr. Kovner is Chairman of the Committee on Communications Law of the Association of the Bar of the City of New York, and serves as a member of its Council on Judicial Administration. He is also a member of the advisory board of the Media Law Reporter. He formerly served as President of Planned Parenthood of New York City. Mr. Kovner serves in the House of Delegates of the New York State Bar Association.

HONORABLE WILLIAM J. OSTROWSKI is a graduate of Canisius College and received law degrees from Georgetown and George Washington Universities. He attended the National Judicial College in 1967. Justice Ostrowski is a Justice of the Supreme Court in the Eighth Judicial District and was elected to that office in 1976. During the preceding 16 years he was a judge of the City Court of Buffalo, and from 1956 to 1960 he was a Deputy Corporation Counsel of the City of Buffalo. He served with the 100th Infantry Division in France and Germany during World War II. He has been married to Mary V. Waldron since 1949 and they have six children and four grandchildren. Justice Ostrowski is a member of the American Law Institute, American Bar Association and its National Conference of State Trial Judges; American Judicature Society; National Advocates Society; New York State Bar Association and its Judicial Section; Erie County Bar Association; and the Lawyers Club of Buffalo.

MRS. GENE ROBB is a graduate of the University of Nebraska. She is a former President of the Women's Council of the Albany Institute of History and Art and served on its Board. She also served on the Chancellor's Panel of University Purposes under Chancellor Boyer, later serving on the Executive Committee of that Panel. She served on the Temporary Hudson River Valley Commission and later the permanent Hudson River Valley Commission. She is a member of the Board of the Salvation Army Executive Committee for the New York State Plan. She is on the Board of the Saratoga Performing Arts Center, the Board of the Albany Medical College and the Board of Trustees of Union College. Mrs. Robb is a former member of the Advisory Committee of the Center for Judicial Conduct Organizations of the American Judicature Society. Mrs. Robb received an honorary degree of Doctor of Law from Siena College, Loudonville, in 1982. She serves on the Visiting Committee for Fellowships and Internships of the Nelson A. Rockefeller Institute of Government. She is the mother of four children and grandmother of ten. Mrs. Robb has been a member of the Commission since its inception.

HONORABLE ISAAC RUBIN is a graduate of New York University, the New York University Law School (J.D.) and St. John's Law School (J.S.D.). He is presently a Justice of the Appellate Division, Second Department, to which he was appointed by Governor Carey in January 1982. Prior to this appointment, Justice Rubin sat in the Supreme Court, Ninth Judicial District, where he served as Deputy Administrative Judge of the County Courts and superior criminal courts. Judge Rubin previously served as a County Court Judge in Westchester County, and as a Judge of the City Court of Rye, New York. He is a director and former president of the Westchester County Bar Association. He has also served as a member of the Committee on Character and Fitness of the Second Judicial Department, and as a member of the Nominating Committee and the House of Delegates of the New York State Bar Association.

HONORABLE FELICE K. SHEA is a graduate of Swarthmore College and Columbia Law School. She is a Justice of the Supreme Court, First Judicial District (New York County), and served previously as a Judge of the Civil Court of the City of New York. Justice Shea is a Director of the Association of Women Judges of the State of New York, a Director of the New York Women's Bar Association, a Fellow of the American Bar Foundation, a Fellow of the American Academy of Matrimonial Lawyers, and an advisor to the American Bar Association's Special Committee on Dispute Resolution. She is also a member of the Association of the Bar of the City of New York and serves on its Committee on Legal Education and Admission to the Bar.

JOHN J. SHEEHY, ESQ., is a graduate of the College of the Holy Cross, where he was a Tilden Scholar, and Boston College Law School. He is a senior partner in the New York office of Rogers & Wells. He is a senior member of the firm's litigation department and chairman of its personnel committee. Mr. Sheehy was an Assistant District Attorney in New York County from 1963 to 1965, when he was appointed Assistant Counsel to the Governor by the late Nelson A. Rockefeller. Mr. Sheehy joined Rogers & Wells in February 1969. He is a member of the bars of the United States Supreme Court, the United States Court of Appeals for the Second and Eighth Circuits, the United States District Court for the Southern, Eastern and Northern Districts of New York, the United States Court of International Trade and the United States Court of Military Appeals. He is a member of the American and New York State Bar Associations, Vice Chairman of the Parish Council of Epiphany Church in Manhattan and a member of the Metropolitan Club. He is also a Commander in the U.S. Naval Reserve, Judge Advocate General Corps. John and Morna Ford Sheehy live in Manhattan and East Hampton, with their three children.

CARROLL L. WAINWRIGHT, JR., ESQ., is a graduate of Yale College and the Harvard Law School and is a member of the firm of Milbank, Tweed, Hadley & McCloy. He served as Assistant Counsel to Governor Rockefeller, 1959-1960, and presently is a Trustee of The American Museum of Natural History, The Boys' Club of New York, and The Cooper Union for the Advancement of Science and Art. He is a Trustee of the Church Pension Fund of the Episcopal Church. He is a former Treasurer and a former Vice President of the Association of the Bar of the City of New York and is a member of the American Bar Association, the New York State Bar Association and the American College of Probate Counsel. Mr. Wainwright was a member of the Commission from its inception until March 31, 1983.

ADMINISTRATOR OF THE COMMISSION

GERALD STERN, ESQ., is a graduate of Brooklyn College, the Syracuse University College of Law and the New York University School of

Law, where he received an LL.M. in Criminal Justice. Mr. Stern has been Administrator of the Commission since its inception. He previously served as Director of Administration of the Courts, First Judicial Department, Assistant Corporation Counsel for New York City, Staff Attorney on the President's Commission on Law Enforcement and the Administration of Justice, Legal Director of a legal service unit in Syracuse, and Assistant District Attorney in New York County. He has taught constitutional law at Queens College (C.U.N.Y.) and Lehman College (C.U.N.Y.) as an adjunct professor of political science and presently teaches Professional Responsibility at Pace University School of Law as an adjunct Professor of Law in the evening division.

DEPUTY ADMINISTRATOR

ROBERT H. TEMBECKJIAN, ESQ., is a graduate of Syracuse University and Fordham Law School. He previously served as special assistant to the Deputy Director of the Ohio Department of Economic and Community Development, staff director of the Governor's Cabinet Committee on Public Safety in Ohio and publications director for the Council on Municipal Performance in New York. Mr. Tembeckjian joined the Commission's staff in 1976 and was appointed its clerk when the position was created in 1979. He became Deputy Administrator on April 1, 1983.

CLERK OF THE COMMISSION

ALBERT B. LAWRENCE, ESQ., is a graduate of the State University of New York and Antioch School of Law. He joined the Commission staff in 1980 and has been Clerk of the Commission since April 1, 1983. He is a former newspaper reporter who has written on criminal justice and legal topics. Mr. Lawrence is on the adjunct faculty of Empire State College, where he teaches business law. He is chairman of the advisory council for New Start, a program which counsels young men and women who have recently been released from jail. He is a member of the Board of Directors of Big Brothers/Big Sisters of Rensselaer County and a founding member of the Capital District Civil Liberties Organization.

CHIEF ATTORNEY, ALBANY

STEPHEN F. DOWNS, ESQ., is a graduate of Amherst College and Cornell Law School. He served in India as a member of the Peace Corps from 1964 to 1966. He was in private practice in New York City from 1969 to 1975, and he joined the Commission's staff in 1975 as a staff attorney. He has been Chief Attorney in charge of the Commission's Albany office since 1978.

CHIEF ATTORNEY, ROCHESTER

CODY B. BARTLETT, ESQ., is a graduate of Auburn Community College, Michigan State University, and the Harvard Law School. He was Director of Administration of the Courts, Fourth Judicial Department, from 1972 through 1980. Mr. Bartlett was previously in the private practice of law in Michigan and New York. He was an adjunct professor at the Syracuse University College of Law, and adjunct professor at the College of Criminal Justice at the Rochester Institute of Technology, and undergraduate assistant in the political science department at Michigan State University, a member of the Advisory Committee to the Regional Criminal Justice Education and Training Center at Monroe Community College, and Special Administrator of the 1973 Dangerous Drug Control Program in the Fourth Judicial Department.

COMMISSION STAFF

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Gerald Stern

DEPUTY ADMINISTRATOR
Robert H. Tembeckjian

CLERK OF THE COMMISSION
Albert B. Lawrence

CHIEF ATTORNEYS
Cody B. Bartlett
Stephen F. Downs

SENIOR ATTORNEYS
Alan W. Friedberg
Robert Straus*

STAFF ATTORNEYS
Karen Kozac
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Deborah M. Holden*
Brunilda Lopez
Lisa O'Garrow*
Jennifer A. Rand
Kathleen M. Riefer*
Gertrude Valli
Linda J. Wentworth
Marsha Westfall
Christine Zizzo*

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* Denotes individuals who left the Commission staff prior to March 1984.

APPENDIX B

COMMISSION BACKGROUND

Temporary State Commission on Judicial Conduct

The Temporary State Commission on Judicial Conduct 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 Court on the Judiciary or the Appellate Division. All proceedings in the Court on the Judiciary and most proceedings 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 Commission's tenure lasted through March 31, 1978, when it was replaced by the present Commission.

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*A full account of the temporary Commission's activity is available in the Final Report of the Temporary State Commission on Judicial Conduct, dated August 31, 1976.

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 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 which 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 by 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.

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*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 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 in 1978, 1979 and 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.

State Commission on Judicial Conduct

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 which 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.

State of New York
Commission on Judicial Conduct

APPENDIX C

Determinations
Rendered in 1983

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

FRANK R. BAYGER,

a Justice of the Supreme Court, Eighth Judicial District (Erie County).

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Albrect, Maguire, Heffern & Gregg (Charles H. Dougherty, Of Counsel) for Respondent

The respondent, Frank R. Bayger, a justice of the Supreme Court, Eighth Judicial District (Erie County), was served with a Formal Written Complaint dated November 25, 1981, alleging that he disparaged a litigant in a matter before him and that he engaged in numerous business activities prohibited by the Rules Governing Judicial Conduct. Respondent filed an answer dated January 28, 1982.

By order dated March 2, 1982, the Commission designated the Honorable Francis Bergan as referee to hear and report proposed findings of

fact and conclusions of law. The hearing was held on May 13 and 14, 1982, and the referee filed his report with the Commission on September 28, 1982.

By motion dated November 3, 1982, the administrator of the Commission moved to confirm in part and disaffirm in part the report of the referee, and for a determination that respondent be censured. By cross-motion dated November 18, 1982, respondent opposed the administrator's motion and moved to confirm the referee's report and for dismissal of the Formal Written Complaint. The Commission heard oral argument on the motions on November 30, 1982, at which respondent appeared with counsel, thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. On January 20, 1981, the case of Wecksler v. Kubiak and Whelan came before respondent in Special Term of Supreme Court, Erie County. Robert E. Whelan, as City Comptroller of Buffalo, was a nominal party to the proceeding, which involved a disability claim.

2. Prior to January 20, 1981, respondent had two experiences involving Mr. Whelan. First, in 1975, respondent presided over an election law matter in which he ruled in Mr. Whelan's favor. Sometime thereafter, in a public encounter at a restaurant, respondent and Mr. Whelan had an angry verbal confrontation in which, among other things, Mr. Whelan made a denigrating ethnic remark about Polish people.

3. On January 20, 1981, respondent decided to recuse himself from presiding over the Wecksler v. Kubiak and Whelan case. Respondent instructed his court deputy, Joseph D. Pirrone, to go into a public hallway outside the courtroom and request members of the press to come into the courtroom. Mr. Pirrone informed two newspaper reporters of respondent's request. The reporters went to the courtroom, where attorneys, court personnel and spectators were also present.

4. Respondent announced in open court that he was disqualifying himself in the Wecksler v. Kubiak and Whelan case because Robert E. Whelan was a litigant. Respondent disparaged Mr. Whelan as a "so-called public servant" and an "anti-Polish American." Respondent announced that he would urge the administrative judge to assign the case to a judge who is not of Polish extraction.

5. At the time of his actions on January 20, 1981, respondent knew Mr. Whelan was a declared candidate for Erie County Surrogate. Respondent knew or should have known that his disparaging comments about Mr. Whelan would be widely reported in the Buffalo area. In no other case in which he disqualified himself had respondent called members of the press into his courtroom for the announcement.

6. Respondent's actions and comments were based upon his intense dislike of Mr. Whelan.

As to Charge II of the Formal Written Complaint:

7. On October 7, 1971, respondent entered into a general partnership with Dimitri Tzetzo, Donald Hayes, John Conroy, Mary Chur, Oliver Reed and Robert Brooks, to form Capital Leasing Company. Respondent was aware that the agreement which he signed on that date in entering the partnership was for a general and not a limited partnership.

8. Capital Leasing Company was a business organized for profit which leased equipment, including dental equipment, office equipment, office furniture and automobiles. As a general partner, respondent had rights concerning the operation of the business, including: the right to prevent the company or its partners from borrowing or lending money on behalf of the partnership; selling, assigning or pledging any partnership interest; or executing any lease, mortgage or security agreement.

9. Respondent was an active participant in the company. As a general partner, he had a role equal to that of the other general partners in the management and conduct of the business. Throughout the life of the Capital Leasing Company, respondent exercised the rights and obligations of a general partner and participated in management, as noted in the examples below:

(a) by participating in the decision to buy the share of retiring partner Mary Chur and continue the company's operation in February 1975, by discussing with the other general partners the amount to offer and by signing the formalized agreement to do so;

(b) by participating in the decision to buy the share of retiring partner Oliver Reed and continue the company's operation in July 1975, by discussing with the other general partners the amount to offer and by formalizing and signing the agreement to do so;

(c) by participating in the decision to buy the share of deceased partner Robert Brooks and continue the company's operation in December 1977, by discussing with the other general partners the amount to offer and by formalizing and signing the agreement to do so;

(d) by attending dinner meetings with the other general partners once or twice a year to discuss company matters;

(e) by being consulted periodically about certain partnership transactions; and

(f) by signing documents related to the conduct of the business.

10. Respondent sold his interest in Capital Leasing Company in January 1982.

As to Charge III of the Formal Written Complaint:

11. On August 1, 1975, respondent entered into a general partnership with Dimitri Tzetzo, Donald Hayes and John Conroy, to form Willink Development Company. Respondent was aware that the agreement which he signed on that date in entering the partnership was for a general and not a limited partnership.

12. Willink Development Company was a business organized for profit which leased property. As a general partner, respondent had rights concerning the operation of the business, including: the right to prevent the company or its partners from borrowing or lending money on behalf of the partnership; selling, assigning or pledging any partnership interest; or executing any lease, mortgage or security agreement.

13. Respondent was an active participant in the company. As a general partner, he had a role equal to that of the other general partners in the management and conduct of the business. Throughout his tenure as a general partner in Willink Development Company, respondent exercised the rights and obligations of a general partner and participated in management.

14. Respondent sold his interest in Willink Development Company in January 1982 and presently holds a mortgage as a result of the sale.

As to Charge IV of the Formal Written Complaint:

15. On August 1, 1979, respondent filed a certificate that he was conducting business under the name of Arlington Properties, a business organized for profit.

16. On August 23, 1979, respondent formed 19 Arlington Place Corporation, a business organized for profit, of which he is president. Respondent formed the corporation in order to secure a $225,000 commercial loan from Western New York Savings Bank. His earlier application to the same bank for a personal loan in that amount had been denied.

17. On August 28, 1979, 19 Arlington Place Corporation entered into a $225,000 mortgage agreement with Western New York Savings Bank for purchase of a tract of land in Buffalo from Burke Rental Corporation. On that same date, 19 Arlington Place Corporation entered into a $25,000 mortgage agreement with Burke Rental Corporation. On that same date, 19 Arlington Place Corporation transferred the tract of land to Arlington Properties.

18. Respondent is an active and managing participant in Arlington Properties. While his employee, Wendy Rothfuss, performs certain duties delegated to her by respondent with respect to Arlington Properties, such as collecting rents, respondent makes all management decisions and without exception signs all company checks. He alone reviews the company books and finances. He alone approves major repairs and determines which company will be contracted to make the repairs.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a), 100.2(b), 100.3(a)(3) and 100.5(c)(2) of the Rules Governing Judicial Conduct (formerly Sections 33.1, 33.2[a], 33.2[b], 33.3[a][3] and 33.5[c][2]) and Canons 1, 2A and 2B of the Code of Judicial Conduct. Charges I through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established. The affirmative defenses asserted by respondent are not sustained.

Respondent's conduct in the course of announcing his disqualification in the case involving Buffalo City Comptroller Robert E. Whelan was improper. Rather than recuse himself in a decorous manner, respondent disparaged Mr. Whelan in open court, having deliberately invited the press into the courtroom for the specific purpose of hearing his remarks. Respondent knew Mr. Whelan was a declared candidate for judicial office at the time, and he knew or should have known that his disparaging remarks would be widely publicized. Respondent allowed his personal animosity toward Mr. Whelan to affect his judicial conduct and judgment.

Respondent's participation in four businesses organized for profit was also improper. The Rules Governing Judicial Conduct (Section 100.5[c][2]) specifically prohibit the very type of business activity in which respondent engaged. Respondent's business activities cannot be excused by the assertion that they did not interfere with the performance of his duties as a judge. The prohibitions in the Rules are straightforward and unequivocal and make no exception for business activities which do not interfere with the judicial function.

By reason of the foregoing, the Commission determines that respondent should be admonished.

Mrs. Robb, Judge Alexander, Mr. Bower, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Shea and Mr. Wainwright concur.

Judge Ostrowski did not participate.

Judge Rubin was not present.

Dated: January 18, 1983

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

WARREN L. BOULANGER,

a Justice of the Cold Spring Village Court, Putnam County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Robert Straus, Of Counsel) for the Commission

Shulman, Boulanger & Carlo, P.C. (By Louis G. Carlo) for Respondent

The respondent, Warren L. Boulanger, an attorney, is a justice of the Cold Spring Village Court, Putnam County. Respondent was served with a Formal Written Complaint dated November 10, 1982, alleging, *inter alia*, that he transferred to himself certain assets of a client of his private law practice. Respondent filed an answer dated January 14, 1983.

By order dated December 17, 1982, the Commission designated William V. Maggipinto, Esq., as referee to hear and report proposed

findings of fact and conclusions of law. The hearing was held on January 19, 1983, and the referee filed his report with the Commission on May 2, 1983.

By motion dated May 16, 1983, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on June 3, 1983. The Commission heard oral argument on the motion on June 16, 1983, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. In January 1975, respondent prepared a document giving him a general power of attorney for Fred H. M. Dunseith and naming him Mr. Dunseith's attorney-in-fact. The power of attorney was signed by Mr. Dunseith on January 7, 1975, in the presence of respondent with no witnesses. Respondent notarized Mr. Dunseith's signature.

2. At the time, Mr. Dunseith was 95 years old, legally blind, partially deaf and lived in a nursing home. The execution of the power of attorney took place in Mr. Dunseith's room at the nursing home.

3. In April 1975, respondent used his power of attorney to sell Mr. Dunseith's home to a third party. Respondent deposited the proceeds of the sale, approximately $48,300, in a bank account maintained and controlled by respondent. He used the proceeds of the sale to pay his personal bills and expenses.

4. In or about November 1975, respondent used his power of attorney to sell certain stock of Mr. Dunseith for $8,524.25. The proceeds of the sale were initially deposited in a brokerage account in the name of respondent as attorney for Mr. Dunseith. They were later withdrawn by respondent and deposited in respondent's savings account. Respondent used the money for his personal needs.

5. In January 1976, Mr. Dunseith gave respondent a special power of attorney for a Dime Savings Bank account. Respondent made two withdrawals from this account in January 1976, one of $7,500 and the other of $24,888.88. Respondent deposited the $7,500 in his personal checking account and used the money for his personal bills and living expenses. He deposited the $24,888.88 in his personal savings account.

6. In October 1976, using his power of attorney, respondent withdrew a total of $6,000 from Mr. Dunseith's checking and savings accounts. Respondent kept the money for himself as a retainer for his legal work on behalf of Mr. Dunseith.

7. In January 1977, using his power of attorney, respondent sold for $72,000 other stock owned by Mr. Dunseith. Approximately one-half of the proceeds of the sale was used by respondent to purchase new stock in Mr. Dunseith's name. The balance was deposited in the stockbroker's cash reserve management account in the name of Mr. Dunseith. Respondent later drew two checks against that account, one for $10,000 and one for $2,500, and the broker sent respondent a check for the balance of $23,650. Respondent deposited the $2,500 in his personal checking account and used it to pay personal bills and expenses. He deposited the $10,000 and the $23,650 in his personal savings account.

8. In the spring of 1977, respondent closed a bank account of Mr. Dunseith in a Scranton, Pennsylvania, bank. Respondent used the $3,928 from the account for his personal needs.

9. On May 28, 1976, respondent wrote two letters to the Newburgh Savings Bank, falsely stating that Mr. Dunseith had died and requesting that several accounts in respondent's name "in trust" for Mr. Dunseith be changed to respondent's name alone. Respondent wrote these letters to avoid the imposition of penalties in requesting changes in the titles of the account. He wrote them shortly after a matrimonial action brought by his former wife had been settled.

10. On March 5, 1976, respondent filed a false and fraudulent financial affidavit in the matrimonial action for the purpose of concealing his property and financial assets from his former wife.

11. In August 1981, at a time when he knew that he was under criminal investigation, respondent filed late gift tax returns for 1975, 1976 and 1977, on behalf of Mr. Dunseith, causing his estate to pay $15,000 in penalties and taxes.

As to Charge II of the Formal Written Complaint:

12. On November 18, 1982, respondent was sentenced to federal prison by the United States District Court for the Southern District of New York, having been found guilty by a jury of three counts of violating Section 7201 of Title 26 of the United States Code, a felony, by unlawfully, knowingly and willfully attempting to evade income taxes by means of filing false and fraudulent income tax returns.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2(a) of the Rules Governing Judicial Conduct and Canons 1 and 2A of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

As attorney-in-fact for Mr. Dunseith, respondent acted as a fiduciary for his client. McMahon v. Pfister, 39 AD2d 691 (1st Dept. 1972). He was, thus, required to handle his client's money in the best interests of the client. Nonetheless, respondent transferred to himself $135,000 of Mr. Dunseith's money. As the referee found, respondent's position that this money was given by Mr. Dunseith as gifts is "uncorroborated, incredible and inherently unreliable, since it is self-serving...." Even assuming that Mr. Dunseith had repeatedly told respondent to take vast sums of money, such transfers were of dubious benefit to Mr. Dunseith, and, given his age and infirmities, respondent should have questioned whether they were in the client's best interests.

This gross abuse of the trust placed in him by his client and by the state that licenses him to practice law is exacerbated by a series of deliberate deceptions on the part of respondent. He admits that he falsely reported the death of Mr. Dunseith to a bank in order to avoid paying interest penalties and that he filed a false and fraudulent financial affidavit in a divorce proceeding in order to conceal assets from his former wife. There is also evidence that he filed false income tax returns for the purpose of avoiding payment of taxes. Furthermore, his testimony before the Commission and at his federal court trial, the transcript of which is part of the record of this proceeding, "lack[s] the ring of truth." Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 81 (1980).

The judiciary cannot accommodate one who so consistently abandons his ethical obligations. "[A] Judge cannot simply cordon off his public role from his private life and assume safely that the former will have no impact on the latter." Matter of Steinberg, supra. By his unprincipled conduct as an attorney, respondent has brought the judiciary into disrepute and has demonstrated that he is unfit for judicial office.

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

Mrs. Robb, Judge Alexander, Mr. Bower, Mr. Bromberg, Mrs. DelBello, Mr. Kovner, Judge Ostrowski and Judge Shea concur.

Mr. Cleary and Judge Rubin were not present.

Mr. Sheehy was not a member of the Commission at the time the vote in this proceeding was taken.

Dated: August 10, 1983

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

RAYMOND E. BURR,

a Justice of the Middlefield Town Court, Otsego County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.*

APPEARANCES:

Gerald Stern (Albert B. Lawrence, Of Counsel) for the Commission

Greene and Green (By Lynn E. Green, Jr.) for Respondent

The respondent, Raymond E. Burr, a justice of the Middlefield Town Court, Otsego County, was served with a Formal Written Complaint dated

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*Mr. Wainwright's term as a member of the Commission expired on March 31, 1983. The vote in this case was held on February 16, 1983.

May 6, 1982, alleging that over a 19-month period he repeatedly refused a newspaper reporter access to public court records and proceedings. Respondent filed an answer dated May 28, 1982.

By order dated June 17, 1982, the Commission designated William H. Morris, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on July 29, 1982, and the referee filed his report with the Commission on October 4, 1982.

By motion dated January 6, 1983, the administrator of the Commission moved to confirm in part and to disaffirm in part the referee's report, and for a determination that respondent be admonished. Respondent opposed the motion on January 21, 1983. Respondent waived oral argument.

The Commission considered the record of the proceeding on February 16, 1983, and made the following findings of fact:

1. Respondent serves as a part-time town justice. He customarily holds court on Monday evenings at 7:00 P.M. at the Middlefield firehouse.

2. Respondent keeps his court dockets in a foot locker at his home and brings them with him to court on Monday evenings. He customarily makes his dockets available for inspection on Monday evenings at the firehouse. Respondent does not release information over the telephone concerning court cases.

3. Claude Rose is a newspaper reporter for the Oneonta Star. Richard Johnson is editor and publisher of the Freeman's Journal in Cooperstown.

4. In October 1980, Mr. Rose requested information from respondent on several occasions, by telephone and in person, concerning People v. Mervin Nichols, over which respondent had presided. Respondent refused to provide Mr. Rose with information in the Nichols case, notwithstanding that the records of the case were not sealed or otherwise confidential. Mr. Rose thereafter invoked the Freedom of Information Law, gave respondent a copy of Section 2019-a of the Uniform Justice Court Act pertaining to court records, and asked to see respondent's records. Respondent denied the request. Several times thereafter in the autumn of 1980, Mr. Rose requested to see respondent's court records, and each time respondent denied the request.

5. On March 16, 1981, Mr. Rose attended a public court proceeding in respondent's court in the case of People v. Robert Race. Respondent attempted to remove Mr. Rose from the court, but he was prevailed upon by the prosecutor to allow Mr. Rose to remain. At the end of the proceeding, Mr. Rose asked to see the court dockets and was informed by respondent that

the dockets were not there that evening. Respondent did not state when the records could be examined.

6. On March 16, 1981, and April 7, 1981, Mr. Rose and his newspaper's attorney, respectively, wrote to respondent and asked that Mr. Rose be allowed to see the court dockets. Respondent did not answer the letters.

7. On April 5, 1982, Mr. Rose and another journalist, Mr. Johnson, attended a regularly scheduled public session of respondent's court and requested to see the court dockets for 1981 and 1982, either then or by appointment within the next two days. Respondent denied the request and asked Mr. Rose and Mr. Johnson to leave the court.

8. On May 4, 1981, Mr. Rose attended a regularly scheduled public session of respondent's court. Respondent ordered Mr. Rose to leave and threatened to call the sheriff if Mr. Rose refused. Respondent thereupon telephoned the sheriff's department, and a deputy was sent to court. Mr. Rose left the court on his own accord after a discussion with the deputy.

9. In late summer of 1981, Mr. Rose telephoned respondent to inquire about a kidnapping case heard in respondent's court. Respondent made no comment and hung up the phone.

10. Respondent was aware of Section 2019-a of the Uniform Justice Court Act and was aware that his court records are public records which Mr. Rose and Mr. Johnson were entitled to see. Respondent was aware that the proceedings in his court are open to the public and that Mr. Rose and Mr. Johnson were entitled to be present.

11. Respondent refused to permit Mr. Rose to see his court records because he disliked Mr. Rose personally and because he wanted to keep his records and proceedings private. Respondent's refusal to allow Mr. Rose to see the court records was not motivated by any good faith considerations.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a) and 100.3(b)(1) of the Rules Governing Judicial Conduct, Canons 1, 2A and 3B(1) of the Code of Judicial Conduct, Section 2019-a of the Uniform Justice Court Act and Section 4 of the Judiciary Law. The Charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Records and proceedings of the court are public, with certain exceptions which do not apply in this instance, such as cases in which "youthful offender" status is granted to the defendant or when sealed by the court upon a disposition favorable to the defendant. Court records

which are not confidential must be made available for public inspection. (See, Section 4 of the Judiciary Law and Section 2019-a of the Uniform Justice Court Act. See also, Werfel v. Fitzgerald, 23 AD2d 306 [2d Dept. 1965].) Court records are not the private property of the individual judge. They cannot be withheld from the public, except pursuant to law.

Respondent excluded a newspaper reporter from public court proceedings and refused for 19 months to allow access by that reporter to public documents. He did so because of personal animosity toward the reporter, and because of an inappropriate and legally unsupportable view that such proceedings and records should be private. Respondent thereby failed to observe the applicable standards of conduct, with which he was familiar.

The Commission notes that the incidents involved in this proceeding appear to be isolated and not indicative of a pattern of denying access to court proceedings and records.

By reason of the foregoing, the Commission determines that respondent should be admonished.

Mrs. Robb, Judge Alexander, Mr. Bower, Mr. Bromberg, Mrs. DelBello, Judge Ostrowski, Judge Shea and Mr. Wainwright concur.

Mr. Cleary, Mr. Kovner and Judge Rubin were not present.

Dated: April 22, 1983

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

VINCENT T. CERBONE,

a Justice of the Mount Kisco Town Court, Westchester County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Morosco & Cunard (By B. Anthony Morosco) for Respondent

The respondent, Vincent T. Cerbone, a justice of the Mount Kisco Town Court, Westchester County, was served with a Formal Written Complaint dated July 23, 1982, alleging that he addressed patrons of a bar in a degrading, racist, threatening, profane and abusive manner. Respondent filed an answer dated August 13, 1982.

By order dated October 18, 1982, the Commission designated Edward Brodsky, Esq., as referee to hear and report proposed findings of fact and

conclusions of law. The hearing was held on November 15, 16, 18 and 22, 1982, and the referee filed his report with the Commission on March 31, 1983.

By motion dated April 8, 1983, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on May 6, 1983. The Commission heard oral argument on the motion on June 17, 1983, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent, an attorney, is a justice of the Mount Kisco Town Court. He has been a judge in that community since 1962.

2. On October 25, 1981, respondent went to Finn's Tavern in Mount Kisco to meet the bar owners, who were clients of respondent.

3. Upon entering the bar, respondent announced to several patrons that he had seen men engaging in a drug transaction outside the bar.

4. Respondent then went to a telephone and called the police. He did not tell the police on the telephone or when they arrived at the bar that he had witnessed a drug transaction.

5. Four men, Clifton Mosley, James Ferguson, Earl Bynum and Gary Barker, entered the bar after respondent. Mr. Bynum left moments later.

6. Respondent addressed Mr. Ferguson as a "drug pusher" and told him, "If you are going to sell that stuff, do it outside of my presence," notwithstanding that he had seen no drug sale take place and had no reason to believe that Mr. Ferguson was engaged in the sale of narcotics.

7. An argument ensued between respondent and Mr. Ferguson, Mr. Mosley and Mr. Barker, who are black. Respondent, in a loud voice, addressed them in a degrading, racist, and profane manner that was heard by others in the bar. Respondent referred to the men as "niggers" and "black bastards." He asked them what they were doing in "a white man's bar."

8. Respondent identified himself as a judge and used his judicial position to threaten the black men by stating that he would incarcerate them for a specific number of years and would "railroad" and "hang" them if they ever appeared in his court.

9. Respondent also became involved in a heated argument with a white patron of the bar, Dennis Moroney, during which respondent referred to Mr. Moroney by such terms as "son of a bitch," "bastard" and "dumb fuck."

10. Respondent discussed leaving the bar to fight Mr. Moroney and at one point raised his forearm and made contact with Mr. Moroney's face or neck.

11. Respondent was in the bar for about an hour, and during this time he had two drinks. He was not intoxicated.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2(a) of the Rules Governing Judicial Conduct and Canons 1 and 2A of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Judges are held to a higher standard of conduct on and off the bench than are members of the public at large. Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465 (1980). Respondent was no ordinary bar patron. At Finn's Tavern, he "remained cloaked figuratively, with his black robe of office...." Matter of Kuehnel, supra, at 469. Yet, respondent's actions were grossly inappropriate even for one not charged with upholding the integrity of and public confidence in the judiciary.

Respondent walked into a bar and announced to the patrons that there were men outside "doing drugs" and that he would call the police. He allowed himself to be drawn into a heated argument, during which he loudly used degrading, racist and profane language. By the account of ten witnesses, he struck one of the patrons and, by his own admission, discussed fighting the patron outside the bar.

That respondent identified himself as a judge and threatened to use his judicial office against his antagonists exacerbates his misconduct.

These confrontations took place over a sustained period of time. The misconduct is not based on a single remark uttered in the heat of passion or in response to a personal attack. Even respondent's claim of a trap contrived by all of the many other patrons of the bar (a claim not sustained by the evidence), would not justify his remaining at the scene for nearly an hour engaging in such conduct.

The law of New York is now clear that racist conduct by a member of the judiciary will not be tolerated. Matter of Kuehnel, supra; Matter of Aldrich v. State Commission on Judicial Conduct, 58 NY2d 279 (1983). No citizen should be required to appear before a judge who publicly uses terms such as "niggers" and "black bastards," and who questions the right of black patrons to visit "a white man's bar."

Even where a judge's use of profane and racist language has been influenced by alcohol, he has been held to have irretrievably lost public confidence so as to be unfit to hold judicial office. Matter of Aldrich, supra. Here, respondent's actions were not influenced by alcohol.

Such conduct would be outrageous from a private citizen. Coming from one who brandishes his judicial office, it becomes especially intolerable. Despite his 20 years of service on the bench, respondent's conduct at Finn's Tavern effectively terminated public confidence in his ability to fairly and impartially adjudicate matters without bias.

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

Mrs. Robb, Mr. Bower, Mr. Bromberg, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Rubin and Judge Shea concur.

Judge Alexander and Mr. Cleary were not present.

Mr. Sheehy was not a member of the Commission at the time the vote in this proceeding was taken.

Dated: August 5, 1983

State of New York
Commission on Judicial Conduct

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

JOSEPH S. CURCIO,

a Justice of the Malta Town Court, Saratoga County.

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Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Albert B. Lawrence, Of Counsel) for the Commission

David L. Riebel for Respondent

The respondent, Joseph S. Curcio, a justice of the Malta Town Court, Saratoga County, was served with a Formal Written Complaint dated November 5, 1981, alleging misconduct with respect to two cases involving the same defendant in January 1980 and March 1981. Respondent filed an answer dated January 20, 1982.

By order dated June 4, 1982, the Commission designated Edward Brodsky, Esq., as referee to hear and report proposed findings of fact and

conclusions of law. The hearing was held on July 13, 1982, and the referee filed his report with the Commission on October 22, 1982.

By motion dated December 3, 1982, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion on January 10, 1983. Oral argument was waived.

The Commission considered the record of the proceeding on January 18, 1983, and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. On December 31, 1979, Barry L. King was arraigned before respondent on a criminal complaint charging that he issued two bad checks in payment of rent on his residence at Northway Eleven Apartments.

2. Mr. King appeared before respondent on January 17, 21 and 26, 1980. On January 17 he was represented by counsel. On January 21 and 26 he appeared without counsel. At the January 26 appearance, no prosecutor was present.

3. Respondent fixed bail on January 17, 1980, at $1,500. That amount was determined by calculating restitution for the two allegedly bad checks, plus a fine. Bail was posted by Mr. King's mother-in-law, Catherine McCallum, and by John O'Connor.

4. At the January 26, 1980, appearance, Mr. King appeared before respondent without counsel. No prosecutor was present. Respondent told Mr. King and Mrs. McCallum, who was reached by telephone, that if Mr. King did not arrange to use the bail money to make restitution for the two allegedly bad checks, he would order Mr. King incarcerated for 90 days. Respondent entered a judgment of conviction against Mr. King for disorderly conduct, although the defendant was not charged with or tried on such a charge. Indeed, Mr. King had not pled guilty to any charge in connection with this matter.

5. Mrs. McCallum arranged to have the bail money in Northway Eleven released, and it was used to make restitution and pay a $250 fine set by respondent.

6. The judgment of conviction entered by respondent in the Northway Eleven matter, and respondent's entry in his court docket book, incorrectly state that the defendant was convicted after a trial, when in fact there was no trial.

As to Charge II of the Formal Written Complaint:

7. In March 1981, a civil complaint was filed against Mr. King by Robert Van Patten, the owner of Northway Eleven Apartments, for eviction and for back rent for October 1980 through February 1981.

8. On March 19, 1981, Mr. King appeared before respondent in the Van Patten matter and denied that he owed back rent. Mr. King presented proof of payment for at least part of the back rent. The plaintiff, Mr. Van Patten, presented no evidence to the effect that rent was owing. No trial was held.

9. Respondent entered a default judgment against Mr. King on March 19, 1981, in the full amount demanded in the plaintiff's petition, notwithstanding that Mr. King appeared, was not in default and denied the allegations in the complaint. Respondent failed to deduct from the awarded judgment the amount which he acknowledged Mr. King showed he had paid.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a), 100.3(a)(1) and 100.3(a)(4) of the Rules Governing Judicial Conduct (formerly Sections 33.1, 33.2[a], 33.3[a][1] and 33.3[a][4]) and Canons 1, 2A, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained and respondent's misconduct is established.

A judge is obliged by the Rules Governing Judicial Conduct to be faithful to and competent in the law, to insure that all those with a legal interest have a full right to be heard, and to act in a manner that promotes public confidence in the integrity of the judiciary. By disposing of the Northway Eleven Apartments case without a trial, in the absence of a prosecutor and defense counsel, with a judgment that found the defendant guilty of a crime he had not been accused of committing, respondent did not meet the relevant provisions of the Rules cited above. Moreover, respondent abused the bail process by improperly threatening the defendant with incarceration if he failed to make restitution with bail money that was not his and which others had posted on his behalf.

By disposing of the Van Patten case without a trial, and by entering a default judgment against the defendant who was not in default and in fact was present before the judge, respondent again denied the defendant his fundamental right to be heard.

By reason of the foregoing, the Commission determines that respondent should be admonished.

Mrs. Robb, Judge Alexander, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski and Mr. Wainwright concur.

Mr. Bower, Judge Rubin and Judge Shea were not present.

Dated: March 1, 1983

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

ALAN I. FRIESS,

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

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Eric A. Seiff, Alan I. Friess, Bette Blank and Bryan Barrett for Respondent

The respondent, Alan I. Friess, a judge of the Criminal Court of the City of New York, was served with a Formal Written Complaint dated February 25, 1982, alleging misconduct with respect to two cases over which he presided. Respondent filed an answer dated March 15, 1982.

By order dated March 18, 1982, the Commission designated the Honorable Simon J. Liebowitz as referee to hear and report proposed findings of fact and conclusions of law. The hearing was public, pursuant to respondent's written waiver of the confidentiality provision of Section 44, subdivision 4, of the Judiciary Law. It was held on January 20 and 27 and

February 2, 9 and 10, 1983,* and the referee filed his report with the Commission on March 11, 1983.

By motion dated March 11, 1983, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion by cross-motion dated March 21, 1983. By determination and order dated March 24, 1983, the Commission disposed of the procedural issues raised in respondent's cross-motion.

The Commission heard oral argument on the merits of this matter on March 25, 1983, thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. During the week of June 18, 1979, respondent was assigned to sit in Part SP1 of the Criminal Court of the City of New York, at 346 Broadway. The physical conditions of the court were generally unsatisfactory, and the courtroom was frequently crowded.

2. Quarrels between neighbors frequently became the subject of bitter disputes in SP1. With the exception of those cases involving fines and petty offenses, many complaints in SP1 are dismissed without witnesses being sworn, adjourned in contemplation of dismissal or referred to a trial part.

3. The condition of the courtroom and its surroundings has no bearing on or relevance to the acts of conduct of respondent.

4. On June 22, 1979, in SP1, respondent presided over the case of People v. Louis Santiello, in which the complaining witness, John Haisley, charged the defendant with harassment. In addition to Santiello, there were 10 other cases on respondent's calendar involving quarrels between individuals.

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*Respondent commenced a CPLR Article 78 proceeding in Supreme Court in April 1982, challenging the Commission on various jurisdictional and procedural grounds. He was granted a stay of the hearing, pending determination of his petition. The matter reached the Appellate Division, which denied respondent's petition on December 16, 1982. Respondent sought leave to appeal to the Court of Appeals and on January 13, 1983, his request that the hearing continue to be stayed was denied, except that the Appellate Division temporarily stayed the referee from filing his report with the Commission. On January 20, 1983, the hearing was commenced. On January 25, 1983, respondent's motion for leave to appeal was denied by the Appellate Division, and the stay on the referee was vacated.

5. Before rendering his decision in the Santiello case, respondent told both Mr. Haisley and the defendant that he was going to ask the courtroom spectators to decide the case by a show of hands as to whether Mr. Haisley or Mr. Santiello was telling the truth. Respondent asked both Haisley and Santiello if they would abide by the spectators' vote, which he referred to as "the decision of the jury." Mr. Santiello agreed. Mr. Haisley refused.

6. Respondent then asked the courtroom spectators to vote by raising their hands in favor of either Mr. Haisley or Mr. Santiello. After the vote, respondent stated: "It seems to be a divided jury. This case is A.C.D.'d" [adjourned in contemplation of dismissal]. Respondent then rendered a disposition of A.C.D.

7. By his actions, respondent intended to convey to the litigants that he was basing his decision on the audience vote. He conveyed to the audience the impression that he intended to abide by their vote.

As to Charge II of the Formal Written Complaint:

8. On January 26, 1982, respondent was sitting in Part AP7 of the Criminal Court of the City of New York, and presided over a plea and bench conference in People v. Jeffrey Jones, in which the defendant was charged with jostling, a Class A misdemeanor. The assistant district attorney was John Jordan, and the defendant's counsel was Michael Moscato.

9. During the bench conference, respondent stated that he would sentence the defendant to 3-years probation if he pled guilty. The district attorney's office took no position on sentencing. Mr. Moscato conferred with the defendant and advised respondent that the defendant would prefer a short jail sentence to probation.

10. Respondent stated that he would sentence the defendant to a term of 30 days in jail if he pled guilty. Mr. Moscato conferred with the defendant and advised respondent that the defendant would prefer a sentence of 20 days.

11. Respondent asked Mr. Moscato if the defendant was a "gambling man." Respondent then asked the defendant directly if he was a "gambling man."

12. Respondent then told the defendant he was prepared to have a coin tossed to determine if the defendant should be sentenced to 20 days or 30 days in jail. The defendant agreed to the procedure and asked respondent if the coin was rigged. Respondent told the defendant that the coin was not rigged.

13. Respondent requested that Mr. Moscato toss the coin. Respondent stated that if the coin landed "heads" the sentence would be 30

days, and if it landed "tails" the sentence would be 20 days. Mr. Moscato tossed the coin, which came out "tails."

14. As a result of the coin toss, respondent sentenced the defendant to 20 days in jail.

15. Other people in the court besides the individuals involved in the bench conference were able to observe the coin toss and hear respondent's statements during the conference.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a) and 100.3(a) (1-4) of the Rules Governing Judicial Conduct and Canons 1, 2A and 3A (1-4) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained and respondent's misconduct is established.

Public confidence in the judiciary is fundamental to the fair and proper administration of justice. A judge's conduct must be and appear to be beyond reproach if respect for the courts is to be maintained.

In allowing a coin toss to determine the length of a defendant's jail term, and in representing to courtroom spectators that their show of hands would determine the outcome of a disputed matter, respondent undermined public respect for the judiciary and irretrievably lost the public's confidence.

As noted by the referee:

> Judicial judgment is a non-delegable duty. For a judge to abdicate this judicial judgment to the flipping of a coin gives the appearance of reckless dispensation of justice [Ref. Rep. 17].
>
> * * *
>
> It is not the function of a judge to play games with the litigants or the spectators. His avowed intention of not being bound by the vote and then calling for a vote was deceptive. The respondent's callous reaction to the humiliation he caused Mr. Haisley should not be discounted. Furthermore, thousands of these neighborly quarrels, bitter as they have been, have been resolved satisfactorily without resorting to the method used by respondent. It is true that at the time respondent...was a new and inexperienced judge. He still insists with vehemence and fervor that the polling of the audience was an act of judicial propriety and dignity. His immutable belief [to

> date] that he acted properly negates any possible mitigating finding that his conduct was the result of his inexperience. He insists to this very day that his act was one of a genius and that he acted with judicial propriety. He compares his conduct of being innovative as a new judge to Mozart creating his first symphony at the age of 4 [Ref. Rep. 10-11].

It is intolerable for a judge to act as respondent did. The suggestion that his conduct was "creative" or "innovative" and therefore appropriate is absurd. A court of law is not a game of chance. The public has every right to expect that a jurist will carefully weigh the matters at issue and, in good faith, render reasoned rulings and decisions. Abdicating such solemn responsibilities, particularly in so whimsical a manner as respondent exhibited, is inexcusable and indefensible.

The argument that respondent acted reasonably, given the emotional character of the court in which he sat, is likewise without merit. The disdainful characterization of the court, by respondent and others, as a "sham," a "zoo" and a "nut part," is troublesome. Respondent's unflattering view of the litigants does not excuse his having made a mockery of the legal proceedings. Indeed, that the court was a volatile place made it all the more imperative for respondent to act in a dignified manner. He was obliged to set an appropriate example.

The Commission notes the testimony of several members of the judiciary in support of respondent's conduct. While their opinion evidence was well-intentioned, and they are well within their rights in expressing their views, we deem their testimony totally unpersuasive.

Respondent resigned from office on December 31, 1982, during the course of these proceedings. Section 47 of the Judiciary Law authorizes the Commission to determine that a judge be removed from office, notwithstanding such resignation. Removal automatically bars a judge from ever again holding judicial office in this state.

Among the factors to be weighed in making such a serious determination are the nature of the misconduct, respondent's appreciation of the gravamen of the misconduct, and whether the prospect of his attaining a maturity of judgment, such as would warrant his possible service as a jurist in the future, is worth the risk to the public and the administration of justice in permitting him to return to the bench.

Of course, no one can make such a judgment with absolute certainty. However, in considering these issues and the entire record of this proceeding, we note respondent's complete failure to appreciate the fact that his conduct was totally inappropriate and plainly wrong. We also note his continued and unyielding insistence not only that his conduct was appropriate but that it was an act of genius. Finally, we take particular

note that in June 1981, only seven months before the coin-tossing incident, respondent was censured by this Commission for having taken to his home the criminal defendant in a case over which he was presiding. Matter of Friess, June 25, 1981 (Com. on Jud. Conduct).

By his conduct in these cases, respondent has exhibited extraordinarily poor judgment, utter contempt for the process of law and the grossest misunderstanding of the role and responsibility of a judge in our legal system. He has severely prejudiced the administration of justice and demonstrated his unfitness to hold judicial office.

By reason of the foregoing, the Commission determines that respondent should be removed from office pursuant to Section 47 of the Judiciary Law.

All concur, except for Judge Shea, who dissents in a separate opinion as to sanction only.

Dated: March 30, 1983

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

ALAN I. FRIESS,

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

DISSENTING OPINION BY JUDGE SHEA

I concur in the finding of misconduct as to Charges I and II. I agree that respondent exhibited extremely poor judgment on these two occasions and demonstrated a serious misconception of the proper role of a judge.

Nevertheless, the record as a whole, and particularly the testimony of esteemed members of the bench, shows that respondent was an able and dedicated judge. His resignation makes it unnecessary to apply the ultimate sanction that the majority finds appropriate. In my view, removing respondent solely to insure that he can never again serve on the judiciary is unwarranted.

Accordingly, I dissent and vote for dismissal, the only other disposition available pursuant to Section 47.

Dated: March 30, 1983

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

PHILIP G. GODIN,

a Justice of the Manheim Town Court, Herkimer County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Stephen F. Downs, Of Counsel) for the Commission

G. Gerald Fiesinger, Jr., for Respondent

The respondent, Philip G. Godin, is a justice of the Manheim Town Court, Herkimer County. He serves as a judge part-time and is also a practicing attorney. He was served with a Formal Written Complaint dated December 3, 1982, alleging various acts of misconduct with respect to court funds entrusted to his care. Respondent did not file an answer.

On December 30, 1982, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving

the hearing provided for by Section 44, subdivision 4, of the Judiciary Law, stipulating that the agreed statement be executed in lieu of respondent's answer and further stipulating that the Commission make its determination on the pleadings and the agreed upon facts. Among the exhibits appended to the agreed statement was respondent's testimony before a member of the Commission on October 26, 1982, in the course of the investigation of the matters herein.

The Commission approved the agreed statement as submitted. The administrator and respondent waived oral argument on the issues of misconduct and sanction.

The Commission considered the record of this proceeding on January 19, 1983, and made the following findings of fact.

1. Between August 1980 and June 1981, respondent received $5,022.56 in fines and other court funds which he was required to deposit promptly in his official court account and remit to the State Comptroller. In that period, respondent actually deposited $3,071.80, resulting in a deficiency of $1,950.76, as set forth in Schedule A appended to the agreed statement of facts. Respondent was aware throughout this period that he was depositing less money than he actually received, and he did so deliberately in order to conceal earlier deficiencies.

2. On June 30, 1981, respondent was asked by examiners from the State Department of Audit and Control to certify the amount of undeposited court funds in his possession. Respondent certified that there were no undeposited court funds, on the form annexed as Exhibit 1 to the agreed statement of facts. In fact, respondent knew at the time that there were over $1,800 in court funds which had not been deposited.

3. On July 3, 1981, when his court account was deficient by more than $1,900, respondent's records were being audited by the Department of Audit and Control. On that date, respondent made deposits of $1,838.61 and $182.25 into his court account. Respondent then made false entries in his cashbook to indicate that the deposits had been made in May 1981 and January 1981, respectively, as set forth in Exhibits 2 and 3 appended to the agreed statement of facts.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 107, 2019 and 2019-a of the Uniform Justice Court Act, Sections 30.7(a) and 30.9 of the Uniform Justice Court Rules, Section 105.1 of the Recordkeeping Requirements for Town and Village Courts, Sections 100.1, 100.2(a), 100.3(a)(1), 100.3(a)(5) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(1), 3A(5) and 3B(1) of the Code of Judicial Conduct. The Charge in the Formal Written Complaint is sustained and respondent's misconduct is established.

Respondent deliberately failed to deposit court funds into his official court account over an 11-month period, resulting in a deficiency of more than $1,900. He then made false entries in his records in order to conceal the deficiency from state auditors, and he falsely certified the status of his court funds and accounts in a statement submitted to the auditors. In so doing, respondent engaged in egregious misconduct for which there can be no excuse. In attempting with falsehoods to cover up his original misconduct, respondent acted in a disgraceful manner which has prejudiced the administration of justice and destroyed his credibility as a judge.

By reason of the foregoing, the Commission determines that respondent should be removed from office.

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

All concur, except for Mr. Bower and Judge Rubin, who were not present.

Dated: January 26, 1983

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

PAUL E. HUTZKY,

a Justice of the Saratoga Town Court, Saratoga County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Stephen F. Downs and Henry S. Stewart, Of Counsel) for the Commission

David L. Riebel for Respondent

The respondent, Paul E. Hutzky, a justice of the Saratoga Town Court, Saratoga County, was served with a Formal Written Complaint dated May 2, 1983, alleging that he had failed to meet various records keeping and financial reporting, deposit and remittance requirements. Respondent did not file an answer.

On September 16, 1983, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for by Section 44, subdivision 4, of the Judiciary Law, stipulating that the agreed statement be executed in lieu of

respondent's answer and further stipulating that the Commission make its determination upon the pleadings and the agreed upon facts.

The Commission approved the agreed statement and, on October 13, 1983, considered the record of the proceeding and made the following findings of fact.

Preliminary Findings:

1. Respondent is a justice of the Saratoga Town Court and has been since January 1978.

2. Respondent was a justice of the Schuylerville Village Court from October 1980 to September 1982.

3. Respondent holds a master's degree in education and has received credit toward a doctorate.

4. Respondent has successfully completed three training sessions for non-lawyer judges given by the Office of Court Administration.

As to Charge I of the Formal Written Complaint:

5. Between January 1978 and January 25, 1983, respondent failed to deposit court moneys into his official account within 72 hours of receipt in that he:

(a) Made no deposits in his town court account from March 15, 1980, to June 3, 1980, notwithstanding that he received a total of $1,863 in court funds in his town court during that period;

(b) made no deposits in his town court account from February 28, 1981, to May 28, 1981, notwithstanding that he received a total of $830 in court funds in his town court during that period;

(c) made no deposits in his village court account form April 4, 1981, to May 28, 1981, notwithstanding that he received a total of $2,540 in court funds in his village court during that period;

(d) made no deposits in his village court account from August 1, 1981, to September 28, 1981, notwithstanding that he received a total of $1,823.25 in court funds in his village court during that period;

(e) deposited money in his court accounts at an average frequency of once a month between January 1980 and May 1981;

(f) did not deposit a $10 check received on May 15, 1981, on behalf of the defendant in People v. David Jordan;

(g) did not deposit until December 3, 1982, a total of $50 in cash received on September 4, 1980, from the defendants in People v. Theresa Mayer, People v. Gerald G. Mayer and People v. Dale P. Mayer;

(h) did not deposit a $20 money order received on July 28, 1981, from the defendant in People v. Frederick Trinkaus;

(i) did not deposit $5 in cash received in October 1981 from the defendant in People v. Linda Kosloske;

(j) did not deposit a $250 check received on June 3, 1982, from the defendant in People v. Kenneth Tilford; and,

(k) did not deposit a $25 money order received on October 31, 1981, from the defendant in People v. Edward White.

6. Respondent kept undeposited court funds in his home freezer, in his shoes and at other locations in his house for substantial periods of time.

7. Respondent made deposits only when he remembered to do so. The bank in which his official accounts were held was only a half mile from his home.

8. Respondent was aware that he was required by law to deposit court funds in his official accounts within 72 hours of receipt.

As to Charge II of the Formal Written Complaint:

9. On June 2, 1981, during an audit of his town court, respondent falsely certified in writing to the Department of Audit and Control that he had no undeposited court funds and no cash on hand in his town court.

10. In fact, on June 2, 1981, respondent had more than $300 in court funds at his home. Respondent deposited these court funds after the auditor called his attention to a deficiency in his court account.

11. Respondent did not then know and still does not know the exact amount of funds hidden in his house, to what cases the funds relate, or how long they have lain undeposited in his house.

As to Charge III of the Formal Written Complaint:

12. From the time that he took judicial office in January 1978, respondent failed to perform his administrative and judicial duties in that he:

(a) Failed to respond to 42 defendants who pled guilty by mail to traffic tickets in respondent's court;

(b) failed to return 48 driver's licenses to defendants who sent in their licenses in connection with pleas of guilty to traffic charges;

(c) failed to dispose of 282 cases;

(d) failed to make entries in his docket book for 456 cases pending in his court;

(e) failed to maintain any records for 63 cases pending in his court;

(f) failed to report and remit to the Department of Audit and Control in a timely manner a total of $6,533.05 in fines received over a period of nearly four years from defendants in 183 cases;

(g) failed to report to law enforcement agencies the disposition of 99 cases brought by those agencies in respondent's court;

(h) failed to submit certificates of conviction to the Department of Motor Vehicles for 44 cases which were disposed of by respondent;

(i) failed to report cases and remit moneys received to the Department of Audit and Control in a timely manner, in that reports were submitted an average of three weeks late for the town and an average of more than one month late for the village, with one village report submitted 172 days late; and,

(j) failed to maintain case files and indices of cases for all cases in his town and village courts.

As to Charge IV of the Formal Written Complaint:

13. Respondent failed to explain to the Commission staff the status of hundreds of cases or to give information concerning those cases, notwithstanding that the information was requested seven times over a period of five months.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a), 100.3(a)(5) and 100.3(b)(1) of the Rules Governing Judicial Conduct; Canons 1, 2A, 3A(5) and 3B(1) of the Code of Judicial Conduct; Sections 107, 2019, 2019-a, 2020 and 2021(1) of the Uniform Justice Court Act; Sections 30.7(a) and 30.9 of the Uniform Justice Court Rules; Sections 105.1 and 105.3 of the Recordkeeping Requirements for Town and Village Courts; Section 91.12 of the Regulations of the Commissioner of the Department of Motor Vehicles (15 NYCRR 91.12); Section 1803 of the Vehicle and Traffic Law; Section 27

of the Town Law; and Section 4-410(1) of the Village Law. Charges I through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent has neglected nearly every aspect of his judicial and administrative duties. As a result, the records of his courts are a shambles. No one, including respondent, can reconstruct what cases have come before him and how they were handled.

Respondent is well-educated and has no excuse for his gross negligence except "bad habits" and "sloppy bookkeeping." He has mishandled hundreds of cases and thousands of dollars in public moneys. Such disregard of a judge's statutory responsibilities warrants removal from office. Bartlett v. Flynn, 50 AD2d 401 (4th Dept. 1976); Matter of Petrie, 54 NY2d 807 (1981); Matter of Cooley, 53 NY2d 64 (1981).

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

All concur.

Dated: November 4, 1983

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 M. JACON,

a Justice of the East Greenbush Town Court, Rensselaer County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (John J. Postel and Henry S. Stewart, Of Counsel) for the Commission

Jack J. Pivar for Respondent

The respondent, Robert M. Jacon, a justice of the East Greenbush Town Court, Rensselaer County, was served with a Formal Written Complaint dated December 7, 1982, alleging that he presided over a case involving a client of his private law practice. Respondent filed an answer dated January 7, 1983.

By order dated February 10, 1983, the Commission designated the Honorable James A. O'Connor as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on April 14, 1983, and the referee filed his report with the Commission on August 23, 1983.

By motion dated September 15, 1983, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings of fact and conclusions of law and for a determination that respondent be censured. Respondent moved on October 3, 1983, to confirm the referee's report and to dismiss the Formal Written Complaint. The administrator submitted a reply to respondent's motion on October 6, 1983. The Commission heard oral argument on the motions on October 13, 1983, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a part-time justice of the East Greenbush Town Court and has been since January 1978.

2. Respondent is also an attorney who has a private law practice in East Greenbush.

3. Patrick Trexler was a client of respondent from 1974 to 1982.

4. On May 20, 1980, Mr. Trexler was arrested on a charge of disorderly conduct in the Town of East Greenbush as the result of a domestic disturbance in which he was alleged to have been drinking.

5. The case was scheduled for respondent's court on June 5, 1980.

6. Sometime before June 5, 1980, respondent learned of the case and told Mr. Trexler not to appear in court. Respondent told Mr. Trexler that he would see what disposition of the case the arresting officer, Sergeant Robert N. Kroll, would like.

7. The case was called in respondent's court on June 5, 1980. Sergeant Kroll was present in the courtroom. Mr. Trexler was not.

8. Respondent engaged in an *ex parte* discussion with Sergeant Kroll in which the police officer described the case as "junk" and indicated that, as the officer designated by the district attorney to prosecute the case, he would agree to an adjournment in contemplation of dismissal as an appropriate disposition.

9. Respondent adjourned the case in contemplation of dismissal and assured Sergeant Kroll that he would speak with Mr. Trexler about his drinking habits.

10. Respondent did not inform Sergeant Kroll that Mr. Trexler was a longstanding client of his private law practice.

11. At no time did respondent disqualify himself and transfer the case to another judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(a)(4) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(1), 3A(4) and 3C(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established. Respondent's motion to dismiss is denied.

Respondent acted as both judge and attorney in handling the Trexler matter. He presided over the case and disposed of it in his judicial capacity, and at the same time he counseled the defendant and negotiated a disposition as defense counsel. Although respondent is permitted to practice law, he is required to distinguish scrupulously his judicial function from his role as advocate. A judge may not sit as a neutral and impartial arbiter and, in the same case, represent one of the parties. To do so, creates an appearance of favoritism.

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

Mrs. Robb, Judge Alexander, Mr. Bromberg, Mrs. DelBello, Mr. Kovner, Judge Rubin and Mr. Sheehy concur.

Mr. Bower, Mr. Cleary, Judge Ostrowski and Judge Shea dissent as to sanction only and vote that the appropriate disposition would be a letter of dismissal and caution.

Dated: November 28, 1983

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 M. JACON,

a Justice of the East Greenbush Town Court, Rensselaer County.

DISSENTING OPINION BY JUDGE OSTROWSKI IN WHICH MR. BOWER, MR. CLEARY AND JUDGE SHEA JOIN

The genesis of this proceeding was a noisy argument between former spouses in the home of the ex-wife to which the father of their child had gone to babysit. A neighbor called the police. An officer asked the father to step outside and then arrested him for disorderly conduct. No one in the home wanted the police or called the police. No accusatory instrument or supporting deposition was ever executed by anyone in the home. There is nothing to indicate that anyone other than a single neighbor and the arresting officer heard the argument.

On this record, there does not appear to be even the semblance of a prima facie case of disorderly conduct. People v. Munafo, 50 NY2d 326, and particularly People v. Canner and People v. Chesnick, cited therein. Hence, the proceeding should have been terminated by dismissal of the accusatory instrument pursuant to Section 170.35(a) of the Criminal Procedure Law, by the granting of a trial order of dismissal pursuant to Section 290.10, Criminal Procedure Law, or by acquittal. Rather than the total vindication the defendant seems to have been entitled to, there was an adjournment in contemplation of dismissal pursuant to Section 170.55 of the Criminal Procedure Law. Hence, what this case involves is an accusation of an offense of less than misdemeanor grade which was baseless and which should never have been made.

The only reason the case is before the Commission is that the defendant was a client of the judge who is also a practicing lawyer. But the judge was well aware of his obligation to disqualify himself and, in open court, announced his intention to transfer the case to another judge at which point the arresting officer described the charge as "junk" and suggested an adjournment in contemplation of dismissal, which the court granted.

The respondent acknowledges that he should not have participated in the case. There is nothing in the record to suggest that this is anything other than an isolated occurrence. The underlying charge was

petty and groundless. The Commission's referee concluded that there was no misconduct. All of the circumstances point to a letter of dismissal and caution as the appropriate disposition pursuant to 22 NYCRR 7000.7(c), rather than public admonition.

Dated: November 28, 1983

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

ANTHONY T. JORDAN, JR.,

a Justice of the Supreme Court, Second Judicial District (Kings County).

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Nathan R. Sobel for Respondent

The respondent, Anthony T. Jordan, Jr., a justice of the Supreme Court, Second Judicial District (Kings County), was served with a Formal Written Complaint dated February 2, 1982, alleging that he addressed an attorney in an improper manner in a 1981 proceeding. Respondent filed an answer dated February 10, 1982.

By order dated March 3, 1982, the Commission designated Gerald Harris, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on May 17, 1982, and the referee filed his report with the Commission on July 14, 1982.

By motion dated August 18, 1982, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be admonished. By papers and motion dated October 5, 1982, respondent opposed the administrator's motion and moved to disaffirm the referee's report and for dismissal of the Formal Written Complaint. The administrator filed a reply to respondent's opposing papers on November 17, 1982.

The Commission heard oral argument in this matter on December 20, 1982, at which respondent appeared with counsel, and thereafter made the following findings of fact.

1. Martha Copleman is an attorney who was admitted to the New Jersey bar in 1974, the Texas bar in 1977 and the New York bar in 1979. She has been an attorney with East Brooklyn Legal Services since 1979 and, prior to December 7, 1981, had appeared before respondent on more than one occasion.

2. On December 7, 1981, Ms. Copleman appeared before respondent in Special Term, Part I, of Supreme Court in Kings County, representing the petitioner in Matter of Troy v. Krauskopf. Assistant New York City Corporation Counsel John Jokl was her opposing counsel. Between 30 and 50 people, mostly attorneys, were present in the courtroom at that time.

3. When the Troy case was called, respondent heard argument on a requested adjournment. (Mr. Jokl requested a two-week adjournment and Ms. Copleman argued for a shorter one.) In the ensuing dialogue, respondent asked Ms. Copleman several questions, including the length of time she had been practicing law. At one point during his questioning, respondent addressed Ms. Copleman as "little girl." Ms. Copleman objected to being called "little girl" and requested that respondent address her as "counselor." Respondent apologized.

4. As the argument on the requested adjournment was concluded, respondent told Ms. Copleman: "I will tell you what, little girl, you lose." Respondent's voice was raised and he conveyed the impression of insulting and demeaning Ms. Copleman. Ms. Copleman was upset by the incident, felt humiliated and was close to tears as she left the courtroom. Respondent did not apologize because he did not believe he had said anything wrong.

5. Respondent has foresworn future use in his court of the expression "little girl."

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Section 100.3(a)(3) of the Rules Governing Judicial Conduct and Canon 3A(3) of the Code of Judicial Conduct. The Charge in the Formal Written Complaint is sustained, except as to those

portions of paragraph 7 of the Formal Written Complaint which alleges violations of Sections 100.1, 100.2(a), 100.3(a)(1) and 100.3(a)(2) of the Rules and Canons 1, 2A, 3A(1) and 3A(2) of the Code, which are dismissed. Respondent's misconduct is established.

A judge is obliged to treat those who appear in his or her court with courtesy and respect, and to maintain the decorum and dignity of the court.

As the referee observed, when respondent first addressed a lawyer in his court as "little girl," it may well have been an inadvertent expression of unconscious prejudice or the result of an ingrained pattern of speech. That phrase is objectionable no matter what its origin. We note here that we do not share the dissenter's view that the term "little girl" is comparable to "young lady." Notwithstanding our respect for the dissenter's extensive experience in court, the former term was never an accepted or acceptable manner of addressing an attorney, even in the "bruising give-and-take" of the courtroom.

When respondent, with his voice raised, repeated the phrase "little girl" after the attorney had objected, it was clearly an epithet calculated to demean the lawyer. It was intentional and not, as the dissent suggests, inadvertent. As such it constituted misconduct. Yet even if respondent's second use of the phrase was unintentional, his contention that "little girl" is analogous to "sweetheart" or "darling," and his suggestion that these are terms of endearment, are neither persuasive nor mitigating. Expressions such as these are insulting, belittling and inappropriate in an exchange between judge and lawyer. They diminish the dignity of the court.

By reason of the foregoing, the Commission determines that respondent should be admonished.

Mrs. Robb, Mr. Bromberg, Mrs. DelBello, Mr. Kovner, Judge Ostrowski and Judge Shea concur.

Mr. Cleary and Mr. Wainwright dissent as to sanction only and vote that respondent be issued a confidential letter of dismissal and caution.

Mr. Bower dissents and votes that respondent's misconduct was not established and that the Formal Written Complaint be dismissed.

Judge Alexander and Judge Rubin were not present.

Dated: January 26, 1983

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

ANTHONY T. JORDAN, JR.,

a Justice of the Supreme Court, Second Judicial District (Kings County).

DISSENTING OPINION BY MR. BOWER

I dissent from the finding of misconduct.

Patterns of speech as well as inflexions of voice are parts of one's personality. They are no more amenable to rapid change than one visit to a psychiatrist is likely to change the patient's insight. As social patterns change rapidly, there is a gap between what was acceptable a decade ago and what is unacceptable today. In the fifties or sixties, judicial sternness was seen as an asset. Courtroom decorum was desirable and in order to have it, bench and bar perceived a direct relationship between the stern mien of the court and the respect by all who appeared before it. Judges of today who grew up professionally in the atmosphere of those days didn't think anything of being referred to as "young fellow," "young lady" and the like. They may not have liked it but did not feel that it was insulting. In fact, smart lawyers turned such remarks to their advantage.

Without drawing invidious parallels between courtroom behavior then and now (including the behavior, intelligence, mode of dress of the court personnel, jurors and lawyers), it is easy to see how one raised professionally in those antediluvian days may have erred inadvertently and in the heat of a debate, the innocuous remark "little girl" slipped out in addressing a lawyer. When this inadvertent error was committed, the respondent apologized and properly so, when the attorney indicated her preference not to be called "little girl." I cannot think of conduct more proper than the apology. Even the referee found no misconduct in this first instance. As the argument wore on, however, once again respondent lapsed from modern ways and once again, in the heat of argument, alluded to the attorney as "little girl."

It is unthinkable to me that this trivial matter evoked the oversensitive response from the attorney in that she made the complaint in the first place. Law is an adversarial process and its practitioners are

not swathed in cotton. A certain amount of give-and-take and bruising is expected. There would have been nothing wrong, in my opinion, in the attorney engaging in a bit of give-and-take in the courtroom on this point. I am sure that respondent would have apologized again and the matter would have been simply forgotten. Instead, the awesome machinery of this Commission geared up to prosecute with ability and zeal the respondent, a capable judge with a previously unblemished record, in order to hold him up to public opprobrium. I find this more shocking than the trivial incident which gave rise to the complaint.

Neither the Constitution (Article VI, Section 22) nor the statute (Judiciary Law, Chapter 5) defines "judicial misconduct." The Constitution provides that justices of the Supreme Court may be removed or otherwise punished by the Commission "for cause." This may include, among other things, "misconduct in office." This solemn language relates to an act significant to the administration of justice or other proper performance of the judicial function and to me, it is obvious that every trivial deviation from a formally spelled out rule, either procedural or behavioral, does not reach the level of significance to sustain a sanction against a judge, either for "cause" or "judicial misconduct." The act complained of must be significant enough to reflect adversely either on the office or the public perception of its performance. Unimportant or trivial violations of any rule by a judge cannot be "judicial misconduct." One instance of lateness on the bench in violation of a provision as to the hours of court, for example, would be "misconduct" if we apply the majority's reasoning. This is somewhat silly. To prosecute a judge for anything trivial was aptly described by Horace some 2,000 years ago: "The mountains will be in labor, and a ridiculous mouse will be brought forth."

Throughout history, more excesses have been committed against decency in the name of moral or political good, than in the name of evil. To impose public punishment on the respondent so that "male chauvinists" are put on notice, demeans the purpose for which this Commission was created.

I am not persuaded that we must make a public example of respondent so that no judge in the state will insult sensitive female lawyers by calling even one, in an inadvertent manner, "little girl." Certainly, insofar as respondent is concerned, a mere letter of caution, without a formal complaint, would have achieved that result. To impose public sanction under these circumstances, in my opinion, is far worse than the trivial incident upon which it is based.

Dated: January 26, 1983

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

VICTOR A. JURHS,

a Justice of the Kendall Town Court, Orleans County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Cody B. Bartlett, Of Counsel) for the Commission

Victor A. Jurhs, Respondent Pro Se

The respondent, Victor A. Jurhs, a justice of the Kendall Town Court, Orleans County, was served with a Formal Written Complaint dated January 14, 1982, alleging inter alia that he failed to make timely deposits and remittances of court funds and that he failed to keep accurate records of his court accounts. Respondent filed an answer dated February 11, 1982.

By order dated March 16, 1982, the Commission designated John J. Darcy, Esq., as referee to hear and report proposed findings of fact and

conclusions of law. The hearing was held on April 5 and 7, 1982, and the referee filed his report with the Commission on June 10, 1982.

By motion dated September 27, 1982, the administrator of the Commission moved to confirm the referee's report and to return the matter to the referee for further proceedings and additional findings relative to respondent's most current accounting and record keeping practices. Respondent did not file papers in opposition to the administrator's motion but appeared for oral argument before the Commission on October 29, 1982. Thereafter the Commission made the following findings of fact.

1. Respondent has been a justice of the Kendall Town Court since his first election to that office in 1963. He is not a lawyer. The Town of Kendall does not provide respondent with any clerical, secretarial or administrative assistance.

2. Respondent maintained his official court bank account at the Marine Midland Bank in Holley, New York, where he also maintained his personal bank account. The bank is approximately eight miles from both respondent's home and the town hall in which he holds court.

3. From January 1, 1976, to September 30, 1981, respondent failed to deposit all monies received in his official capacity within 72 hours of receipt, as required.

4. In 48 of the 81 months from January 1975 through September 1981, respondent failed to make deposits of court funds, although he received funds in his official capacity in those months, as set forth in Schedule A appended to the Formal Written Complaint and accepted into evidence by the referee, as amended, as Exhibit 60. Respondent made a practice of accumulating such official funds for varying periods and then making lump sum deposits. Respondent used a portion of the undeposited funds as petty cash from which he made change for defendants in his court.

5. From January 1, 1975, to September 30, 1981, respondent failed to report and remit as required to the State Comptroller, within the first ten days of the month following receipt, all fines, bail forfeitures and civil fees received by him, as set forth in Schedule B appended to the Formal Written Complaint. The average delay in reporting during this period was 56 days. Eleven reports were over 100 days late, including three which were over 200 days late and two which were over 300 days late. Respondent received numerous communications from the Department of Audit and Control with respect to the law on timely report filing, and in September 1976 his salary was stopped because of his failure to file timely reports.

6. From January 1, 1975, to September 30, 1981, respondent did not maintain a cashbook at all times, as required. Respondent did not issue receipts for official monies received from the Orleans County Sheriff's

Department but did issue receipts for official monies received from all other sources.

7. At no time did respondent misappropriate funds or act in a dishonest manner.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 2020 and 2021(1) of the Uniform Justice Court Act, Section 27 of the Town Law, Section 1803 of the Vehicle and Traffic Law, Section 30.9 of the Uniform Justice Court Rules, Sections 100.1, 100.2(a), 100.3(a)(5) and 100.3(b)(1) of the Rules Governing Judicial Conduct (formerly Sections 33.1, 33.2[a], 33.3[a][5] and 33.3[b][1] and Canons 1, 2A, 3A(5) and 3B(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint (Charge I, paragraphs a through g) is sustained and respondent's misconduct is established. The administrator's motion requesting additional proceedings before the referee is denied.

Respondent is habitually tardy in making the reports, remittances and administrative records required of him by law and rules. Those who assume judicial office are obliged to find the time and make the sacrifices necessary to discharge their administrative duties promptly and accurately. While occasional lapses may be unavoidable, respondent's oversights and omissions over a six-year period were both frequent and protracted and thus require public discipline.

We note that respondent's honesty and integrity are not in issue and that there is no suggestion that official funds were misappropriated or used for other than court-related purposes.

By reason of the foregoing, the Commission determines that respondent should be admonished.

Mrs. Robb, Judge Alexander, Mr. Bromberg, Mrs. DelBello, Mr. Kovner, Judge Ostrowski and Judge Rubin concur.

Mr. Cleary and Mr. Wainwright dissent as to sanction only and vote that the matter be closed with a confidential letter of dismissal and caution to the judge.

Mr. Bower and Judge Shea were not present.

Dated: January 11, 1983

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

LOUIS KAPLAN,

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

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.*

APPEARANCES:

Gerald Stern for the Commission

John H. Doyle, III, for Respondent

The respondent, Louis Kaplan, a judge of the New York City Civil Court, was served with a Formal Written Complaint dated July 19, 1982, alleging that he assisted his wife in obtaining charitable contributions

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*Mr. Wainwright's term as a member of the Commission expired on March 31, 1983. This determination was rendered pursuant to a vote on March 24, 1983.

from lawyers who appeared before him and that he obtained an adjournment in another court for a friend. Respondent did not file an answer.

On January 3, 1983, the administrator of the Commission, respondent and respondent's counsel, entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for by Section 44, subdivision 4, of the Judiciary Law, stipulating that the agreed statement be executed in lieu of respondent's answer and further stipulating that the Commission make its determination upon the pleadings and the agreed upon facts.

The Commission approved the agreed statement on January 18, 1983, and, on March 24, 1983, heard oral argument on the issues herein. Respondent's counsel appeared for oral argument. Thereafter the Commission considered the record of the proceeding and made the following findings of fact:

As to Charge I of the Formal Written Complaint:

1. In the summer and fall of 1980, respondent assisted his wife in connection with advertisements she had solicited for the Park Avenue Synagogue Dedication Journal, in that respondent on several occasions in chambers gave journal contract forms to attorneys and received such forms from attorneys for delivery to his wife.

2. These attorneys had been previously solicited for advertisements to the journal by respondent's wife.

3. The journal was to be published as part of a fund-raising effort to defray the costs of the synagogue's newly-constructed religious school.

4. Respondent's wife received journal contracts from 46 persons. Twenty-seven of the contracts were received from attorneys or law firms.

5. Four of these attorneys or law firms appeared once before respondent in the fall of 1980. Fifteen of them appeared more than once before respondent in the fall of 1980. Eight did not appear before respondent at all.

6. Some solicitations to attorneys were made at the request of respondent's wife by Jack Feder, a person who regularly appears in respondent's court.

As to Charge II of the Formal Written Complaint:

7. On January 5, 1981, a friend of respondent who was the manager of a clothing store called respondent and told him that the

clothing store was the defendant in a case pending in the Small Claims Part of the Civil Court in New York County. The case was on the court calendar for January 6, 1981.

8. Respondent asked the clerk in the Small Claims Part about obtaining an adjournment in the case. As a result of the conversation, the case was adjourned from January 6, 1981, to January 13, 1981.

9. The adjournment was not approved by a judge presiding in the Small Claims Part. The adjourned date was recorded on the Small Claims calendar prior to the court session of January 6, 1981.

10. At respondent's suggestion, the defendant advised the plaintiff of the adjournment by telegram. The plaintiff received the telegram on January 6, 1981, prior to the time the case was scheduled to be heard.

11. Respondent also suggested to the store manager that he request that a judge rather than an arbitrator try the case. On January 13, 1981, the case was tried before an arbitrator. A verdict and judgment in the plaintiff's favor was entered, and the defendant's counterclaim was dismissed. The defendant paid the judgment in full.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.5(b)(2) of the Rules Governing Judicial Conduct and Canons 1, 2 and 5B(2) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A judge may not "solicit funds for any educational, religious, charitable, fraternal or civic organization or use or permit the use of the prestige of the office for that purpose...." Section 100.5(b)(2) of the Rules Governing Judicial Conduct. Although the funds were solicited by his wife, respondent, by distributing and collecting the advertising contracts, used the prestige of his office to assist her fund-raising activities. That he did so in his chambers to lawyers exacerbates his violation of the rule. Lawyers with matters pending before respondent or who regularly appeared in his court could not help feeling pressured to cooperate in his wife's efforts in order to maintain good relations with respondent.

By intervening in a case in another court to obtain an adjournment for a friend, respondent lent "the prestige of his...office to advance the private interests of others...." See Section 100.2(c) of the Rules Governing Judicial Conduct. Respondent took advantage of his position to get from a court clerk what his friend or any other person could only have obtained from a judge for good cause shown: an adjournment of a case scheduled for the following day. Such interventions by a judge cloaked in the authority of his office have in the past met with public sanction, even when done for understandable reasons. See Lonschein v. State Commission on

Judicial Conduct, 50 NY2d 569 (1980); Shilling v. State Commission on Judicial Conduct, 51 NY2d 397 (1980); Matter of Figueroa, NYLJ, Nov. 28, 1979, p. 11, col. 1 (Com. on Jud. Conduct, Nov. 1, 1979). We note that respondent used his office only to seek an adjournment, not to influence the outcome of his friend's case.

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

Judge Alexander, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Shea and Mr. Wainwright concur.

Mr. Bower did not participate.

Mrs. Robb and Judge Rubin were not present.

Dated: May 17, 1983

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 W. KELSO,

a Justice of the Montgomery Town Court, Orange County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Robert Straus, Of Counsel) for the Commission

G. R. Bartlett, Jr., for Respondent

The respondent, Robert W. Kelso, is an attorney and has been a justice of the Montgomery Town Court, Orange County, since 1973. He was served with a Formal Written Complaint dated October 4, 1982, alleging certain improprieties in connection with his private law practice. Respondent filed an answer dated October 21, 1982.

By order dated January 4, 1983, the Commission designated Richard D. Parsons, Esq., as referee to hear and report proposed findings of fact

and conclusions of law. The hearing was held on March 9, 1983, and the referee filed his report with the Commission on May 27, 1983.

By motion dated June 20, 1983, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion by cross-motion on July 11, 1983. The Commission heard oral argument on the motion on July 21, 1983, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. In 1972, respondent was retained by Charles Duryea to pursue legal claims arising from an injury received in an accident at his place of employment.

2. In 1975, Mr. Duryea received approximately $2,000 in satisfaction of a Workers' Compensation claim arising from his injury.

3. Although respondent knew that Section 11 of the Workers' Compensation Law precluded a civil action for damages for personal injuries arising from the accident, he told Mr. Duryea that he would bring such a claim. He did not advise Mr. Duryea that such an action was precluded.

4. From 1975 to 1979, respondent made numerous misrepresentations to Mr. Duryea. He told Mr. Duryea that he had commenced a civil action for damages, that the action had been placed on the court calendar and that it had been adjourned several times. In fact, respondent had commenced no action and all of his statements were false.

5. Respondent made these misrepresentations to deceive Mr. Duryea into believing that his action had been commenced and was proceeding.

6. On January 4, 1980, respondent instituted a civil action on Mr. Duryea's behalf, although he knew that that recovery on the claim was then barred by both Section 11 of the Workers' Compensation Law and the statute of limitations. He did not advise Mr. Duryea that recovery was barred. Respondent withdrew the complaint after Mr. Duryea retained another attorney and filed a grievance against respondent.

As to Charge II of the Formal Written Complaint:

7. On February 20, 1980, respondent offered to pay Mr. Duryea $10,000 for the purpose of inducing him not to file a grievance for professional misconduct against respondent. Respondent confirmed the offer in writing on February 21, 1980.

8. Because Mr. Duryea thereafter filed the grievance, respondent never paid the money as promised.

As to Charge III of the Formal Written Complaint:

9. On the basis of Mr. Duryea's grievance, formal charges were instituted against respondent, and on June 1, 1982, he was suspended from the practice of law for one year by the Appellate Division, Second Department.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a) and 100.3(a)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A and 3A(1) of the Code of Judicial Conduct. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established. Respondent's cross-motion is denied.

Over a period of years, in dozens of conversations, respondent deliberately deceived a client who had placed his trust in respondent to give truthful legal advice and conscientious legal assistance. In violating that trust, respondent prejudiced the administration of justice. Such misconduct by one who also sits as a judge "engender[s] disrespect for the entire judiciary." In re Ryman, 394 Mich 637, 232 NW2d 178, 184 (1975).

Respondent compounded his misconduct by offering his client $10,000 to dissuade him from filing a grievance--a right available to the client as a matter of law. Respondent's offer was malum in se. By this act, respondent further destroyed public confidence in his ability to adhere to the high standards of conduct expected of every judge.

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

Mrs. Robb, Mrs. DelBello, Mr. Kovner, Judge Rubin, Judge Shea and Mr. Sheehy concur.

Mr. Cleary and Judge Ostrowski dissent as to sanction only and vote that respondent be censured.

Judge Alexander, Mr. Bower and Mr. Bromberg were not present.

Dated: September 21, 1983

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 W. KELSO,

a Justice of the Montgomery Town Court, Orange County.

DISSENTING OPINION BY MR. CLEARY IN WHICH JUDGE OSTROWSKI JOINS

On this record, I do not feel that the sanction of removal is appropriate. Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances. Matter of Steinberg, 51 NY2d 74, 83. The Court of Appeals recently indicated that removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment. Matter of Cunningham, 57 NY2d 270, 275, citing Matter of Shilling, 51 NY2d 397, 403, and Matter of Steinberg, supra, at 81. Under the circumstances of this case, I feel that censure is the appropriate sanction.

Dated: September 21, 1983.

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

ELMER L. LOBDELL,

a Justice of the Fulton Town Court, Schoharie County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Albert B. Lawrence, Of Counsel) for the Commission

Roger H. Mallery for Respondent

The respondent, Elmer L. Lobdell, a justice of the Fulton Town Court, Schoharie County, was served with a Formal Written Complaint dated April 1, 1982, alleging inter alia that he continued to preside over cases despite not having been duly certified to perform the duties of judicial office. Respondent filed an answer dated April 22, 1982.

By order dated May 3, 1982, the Commission designated Margrethe R. Powers, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on May 19 and 20, 1982, and the referee filed her report with the Commission on October 19, 1982.

By motion dated November 1, 1982, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion in papers dated November 17, 1982. Oral argument was waived. The Commission considered the record of the proceeding on November 29, 1982, and made the following findings of fact.

1. Respondent was first elected to judicial office in November 1979 and commenced his term on January 1, 1980. Respondent serves part-time as a town justice. He is not an attorney.

2. The first available basic training course for non-lawyer town justices after respondent's election was offered in November 1979 by the Office of Court Administration. Respondent failed to complete the course and therefore was not certified to discharge the responsibilities of his judicial office on January 1, 1980.

3. Respondent was granted temporary certification by the Office of Court Administration on April 28, 1980. Prior thereto, respondent had presided over seven cases, despite not having been certified to do so.

4. In July 1980, respondent attended and successfully completed a basic training course. The basic certificate he received from the Office of Court Administration stated that an advanced training course must be successfully completed within the first year of a town justice's new term.

5. Respondent was informed by the Office of Court Administration, by letter dated November 13, 1980, that he must successfully complete an advanced training course within one year of a new term to retain his certification.

6. Respondent's basic certificate expired on December 30, 1980. He was not issued a temporary certificate thereafter.

7. Respondent was informed by his administrative judge, by letter dated March 13, 1981, that he was not certified, that he must attend an advanced training course and that he could be removed from office for failure to be certified.

8. In March 1981, respondent appeared for an advanced training course but failed to pass the final examination. By letter dated April 2, 1981, respondent was notified by the Office of Court Administration that he had failed the examination and could not assume the functions of his judicial office.

9. Respondent did not attend any of the next five regularly scheduled advanced training courses offered in May, July, September and October 1981 and February 1982.

10. By letter dated October 9, 1981, respondent was notified by the Commission that a complaint had been filed regarding his non-certification.

11. In March 1982, respondent appeared for an advanced training course but again failed to pass the final examination. By letter dated March 23, 1982, respondent was notified by the Office of Court Administration that he had failed the examination and could not assume the functions of his judicial office.

12. Respondent presided over and disposed of 84 cases in 1981, despite not being certified to assume judicial duties. Seventeen of the 84 cases were disposed of after respondent had been notified by the Commission of the complaint against him.

13. There was no town justice in Fulton other than respondent throughout 1981. A second town justice took office in Fulton in January 1982.

14. On February 18, 1982, the town board of Fulton requested that respondent resign from office. Respondent declined.

15. On April 21, 1982, respondent transferred the 14 cases pending on his court calendar to his co-justice.

16. Since the date of the hearing before the referee, respondent attended and successfully completed an advanced training course.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Article VI, Section 20(c) of the Constitution of the State of New York, Section 105 of the Uniform Justice Court Act, Section 31 of the Town Law, Section 17.2 of the Rules of the Chief Judge (formerly Section 30.6 of the Uniform Justice Court Rules), Sections 100.1, 100.2(a), 100.3(a)(1) and 100.3(b)(1) of the Rules Governing Judicial Conduct and Canons 1, 2A, 3A(1) and 3B(1) of the Code of Judicial Conduct. The Charge in the Formal Written Complaint is sustained and respondent's misconduct is established.

For more than 21 of the first 30 months of his term, respondent was not qualified to discharge the duties of judicial office because of his failure to meet the certification requirements of the Constitution and state law. Nevertheless, in that period, respondent presided over and disposed of 91 cases.

Respondent was fully aware of the applicable requirements and procedures, but for periods during 1980 and 1982, and throughout 1981, he did not endeavor to attend the requisite judicial training programs run by the Office of Court Administration.

That there was no other town justice in Fulton to hear cases in 1981 does not excuse respondent for his conduct. Respondent was obliged to make known to the parties in his court that he was not certified, and he should have disqualified himself from the proceedings, thereby enabling the parties to move in county court for a change of venue under Section 170.15(3) of the Criminal Procedure Law.

Failure to complete judicial certification requirements affects the ability of a judge to preside and is cause for removal from office, "in and of itself." Bartlett v. Bedient, 47 AD2d 389, 390 (4th Dept. 1975). By failing to attend and complete the training and certification program required by law for all non-lawyer town and village justices, despite repeated notice from the Office of Court Administration and his administrative judge, respondent demonstrated a serious disregard of the constitutional and statutory obligations of judicial office. See, Matter of Joedicke, unreported (Com. on Jud. Conduct, July 1, 1981). His conduct in presiding over 91 cases while not certified was prejudicial to the administration of justice and is not mitigated by his eventual completion of the certification requirements.

By reason of the foregoing, the Commission determines that respondent should be removed from office.

Mrs. Robb, Judge Alexander, Mr. Bower, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Shea and Mr. Wainwright concur.

Judge Rubin was not present.

Dated: January 18, 1983

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

PAUL McGEE,

a Justice of the Peru Town Court, Clinton County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Albert B. Lawrence, Of Counsel), for the Commission

O'Connell and Wolfe (By Louis E. Wolfe and Lois McS. Webb) for Respondent

The respondent, Paul McGee, a justice of the Peru Town Court, Clinton County, was served with a Formal Written Complaint dated January 7, 1982, alleging inter alia that over a two-year period he engaged in a course of conduct prejudicial to the administration of justice, in that he denied defendants certain fundamental rights. Respondent filed an answer dated January 18, 1982.

By order dated January 29, 1982, the Commission designated the Honorable James A. O'Connor as referee to hear and report proposed findings

of fact and conclusions of law. The hearing was held on March 19, 29, 30 and 31 and April 21, 1982, and the referee filed his report with the Commission on September 10, 1982.

By motion dated October 15, 1982, the administrator of the Commission moved to confirm in part and disaffirm in part the report of the referee, and for a determination that respondent be removed from office. Respondent opposed the motion in papers dated November 1, 1982. The Commission heard oral argument on the motion on November 29, 1982, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. From February 1979 through January 1981, respondent engaged in a course of conduct prejudicial to the administration of justice by failing to advise defendants in criminal cases of their rights, including: the right to counsel; the right to communicate with someone by letter or telephone, free of charge, for the purpose of obtaining counsel; the right of indigent defendants to have counsel appointed for them; the right to an adjournment to obtain counsel; the right to pretrial hearings in felony cases; and the right to trial by jury in misdemeanor and felony cases. Respondent failed both to accord to defendants the opportunity to exercise their rights and to take the affirmative actions necessary to effectuate those rights, contrary to the requirements of law.

2. Respondent failed to give defendants copies of accusatory instruments.

3. Respondent abused the bail process by using it to coerce guilty pleas.

4. Respondent made improper inquiries of defendants in open court concerning pending charges, and he improperly elicited potentially incriminating statements from them.

5. Respondent engaged in _ex parte_ discussions concerning cases pending before him.

6. Respondent conveyed the impression that he was prejudiced against defendants in his court and that he believed them to be guilty.

7. In some cases, respondent coerced or attempted to coerce defendants into pleading guilty. In other cases, respondent entered pleas of guilty to criminal charges without asking defendants how they pled and without their telling him they chose to plead guilty.

8. Respondent reported to government agencies that defendants had been convicted of various crimes, notwithstanding that the defendants had never received a trial or pled guilty to any crime.

As to Charge II of the Formal Written Complaint:

9. On October 25, 1979, respondent signed a warrant for the arrest of Helen Kellas, charging her with theft of services, a class A misdemeanor.

10. The information, upon which the warrant was issued, had been prepared by a member of the New York State Police and alleged that the defendant had paid by personal check for repairs to a saw, and that she subsequently stopped payment on the check.

11. When the defendant was brought before him, respondent failed to advise her of her right to counsel. When the defendant asked him if she should get a lawyer, respondent replied: "if you want, but it will be costly."

12. Respondent failed to give the defendant a copy of the accusatory instrument.

13. Respondent informed the defendant that the complaining witness had indeed performed the repair services and was entitled to be paid for his labor.

14. Respondent informed the defendant that if she did not plead guilty she could be incarcerated "immediately."

15. Respondent informed the defendant after she pled guilty that she would have "a record" but that it did not "mean anything."

16. After the defendant had entered a plea of guilty and made restitution, the respondent entered a conviction to the charge on his records and reported it to the Division of Criminal Justice Services.

As to Charge III of the Formal Written Complaint:

17. On September 26, 1979, Donald J. Shappy was brought before respondent on a charge of harassment, a violation.

18. Respondent failed to give the defendant a copy of the information and failed to advise him that he had a right to counsel.

19. Respondent failed to enter a plea of "not guilty" on behalf of the defendant after the latter repeatedly stated that he was not guilty of the charge.

20. Respondent signed a commitment order sentencing the defendant to 30 days in jail unless a fine of $250.00 was paid.

21. Respondent entered in his records a conviction on the charge, even though the defendant did not plead guilty and was not afforded a trial.

As to Charge IV of the Formal Written Complaint:

22. On August 22, 1979, Beverly M. Gannon was brought before respondent on a charge of petit larceny, a misdemeanor. The defendant was alleged to have left a supermarket without paying for a carton of cigarettes.

23. Respondent failed to ask the defendant to enter a plea to the charge. After an ex parte conference with the arresting officer, respondent informed the defendant she must pay a $25 fine.

24. Respondent entered a conviction on the petit larceny charge in his criminal docket and reported the conviction to the authorities, notwithstanding that no trial had been held and the defendant had not pled guilty.

As to Charge V of the Formal Written Complaint:

25. The charge was withdrawn at the hearing and therefore is not sustained.

As to Charge VI of the Formal Written Complaint:

26. On December 6, 1980, Patricia Burl was brought before respondent on a charge of third degree assault, a class A misdemeanor, resulting from an altercation she had had with Laurie Bouyea.

27. The defendant entered a plea of not guilty and told respondent she had acted in self-defense. Respondent ignored her explanation and said: "I saw Laurie Bouyea's eye and you're twice the size she is."

28. Respondent asked the defendant whether she had bail money. On learning that she did not, respondent informed her she would have to be incarcerated in lieu of bail for six days.

29. When the defendant demanded a trial by jury, respondent replied that whether or not she had a jury trial was entirely up to him.

30. Respondent told the defendant that when she returned to court, she was not to bring a lawyer.

31. After the arraignment, the defendant telephoned respondent and asked for clarification on whether she was entitled to be represented

by counsel. Respondent again told her not to bring an attorney to court. Respondent also again told her that it was up to him whether she had a jury trial.

As to Charge VII of the Formal Written Complaint:

32. On February 15, 1978, Anthony Jacques was charged with petit larceny, a class A misdemeanor, for allegedly failing to pay for a pair of boots. He was arraigned before respondent on the same date.

33. At the arraignment, respondent failed to give the defendant a copy of the accusatory instrument, failed to advise the defendant of his rights and failed to ask the defendant to enter a plea to the charge. After an ex parte conference with the arresting officer, respondent told the defendant he had a choice between paying a $50 fine or spending 25 days in jail. Respondent signed a commitment order sentencing the defendant to jail unless the fine was paid.

34. Respondent entered a conviction to the charge in his records and reported the conviction to the appropriate authorities, notwithstanding that no trial had been held and the defendant had not pled guilty.

As to Charge VIII of the Formal Written Complaint:

35. On February 16, 1980, in People v. Richard Test, in which the defendant was charged with class A misdemeanors of driving while intoxicated and unauthorized use of a motor vehicle, respondent conducted a proceeding, found the defendant guilty of the latter charge and sentenced him to jail for five days, notwithstanding that the defendant was visibly intoxicated. Respondent's docket as to the driving while intoxicated charge indicates the following: "2/19/80 Y.O. Released on time served."

As to Charge IX of the Formal Written Complaint:

36. On June 19, 1980, Michael Alexander, age 18, was charged with criminal mischief, 4th degree, a class A misdemeanor, and with two charges of harassment.

37. Respondent failed to advise the defendant of his right to counsel, and he failed to give the defendant a copy of the accusatory instruments.

38. Prior to asking the defendant for his plea to the charges, respondent asked the defendant if he had jumped on the hood of the car involved in the alleged incident underlying the charges, and if he had struck the occupants of the car. Respondent then refused to listen to the

defendant's explanation as to what had occurred and admonished him to be quiet.

39. The defendant pled guilty, and respondent sentenced him to $50 or ten days in jail.

As to Charge X of the Formal Written Complaint:

40. On September 16, 1979, in People v. Helen Macey, in which the defendant was charged with harassment, a violation, for allegedly using abusive language to a trooper, respondent failed to give the defendant a copy of the accusatory instrument, failed to advise her of her rights and failed to ask her to enter a plea to the charge. After an ex parte conference with the arresting officer, respondent told Ms. Macey that she was guilty and the fine would be $50. He accepted a personal check from her in payment of the fine and entered a conviction of the charge in his records, notwithstanding that no trial had been held and the defendant had not pled guilty.

41. Thereafter, respondent was advised that a stop-payment notice had been placed on Ms. Macey's check. On September 26, 1979, respondent issued warrants for Ms. Macey's arrest on charges of obstructing governmental administration and criminal contempt.

42. At the arraignment of Ms. Macey on the new charges, respondent failed to give the defendant a copy of the accusatory instrument, failed to advise her of one of the charges against her (obstructing governmental administration), failed to advise her of her rights and failed to ask her to enter a plea to the charges. When Ms. Macey stated that she had not stopped payment on the check, respondent said that she had stopped payment and was guilty. Respondent then imposed a sentence of a $50 fine or five days in jail, signed a commitment order and reported a conviction to the Division of Criminal Justice Services on the bad check charge, notwithstanding that no trial had been held and the defendant had not pled guilty.

As to Charge XI of the Formal Written Complaint:

43. The charge is not sustained.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a), 100.3(a)(1) and 100.3(a)(4) of the Rules Governing Judicial Conduct (formerly Sections 33.1, 33.2[a], 33.3[a][1] and 33.3[a][4]) and Canons 1, 2A, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charges I through IV and Charges VI through X of the Formal Written Complaint are sustained and respondent's misconduct is established. Charges V and XI of the Formal Written Complaint are not sustained and therefore are dismissed.

Respondent has engaged in a course of conduct which both violates the relevant ethical standards and shocks the conscience. He has abused the power of his office in a manner that has brought disrepute to the judiciary and has irredeemably damaged public confidence in the integrity of his court.

The record reveals that respondent routinely denied defendants of their constitutional and statutory rights by failing to advise them of the right to counsel, the right to pretrial hearings and the right to trial by jury. He failed to give defendants the accusatory instruments upon which the prosecutions against them were based. He coerced guilty pleas. He entered guilty pleas against defendants who had neither pled guilty nor stood trial. Often he did so after conducting improper *ex parte* conferences with the arresting officers.

Respondent has distorted the legal process in his court beyond recognition. He has routinely and deliberately conducted himself as one predisposed toward the prosecution.

Although ignorance of the law would be no excuse, we note that respondent's knowledge and awareness of the applicable law are not at issue. The record reveals that in some cases that came before him, respondent indeed advised defendants of their rights, as required.

No judge is above the law he is sworn to administer. The legal system cannot accommodate a jurist who disregards due process. Respondent's conduct has revealed an egregious misapplication of judicial power and a fatal misunderstanding of the role of a judicial officer. He is not fit to serve as judge.

By reason of the foregoing, the Commission determines that respondent should be removed from office.

All concur, except for Judge Rubin, who was not present.

Dated: January 21, 1983

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

LUVERN W. MOORE,

a Justice of the Kinderhook Town Court, Columbia County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
John J. Sheehy, Esq.

APPEARANCES:

Gerald Stern (Henry S. Stewart, Of Counsel) for the Commission

The respondent, Luvern W. Moore, a justice of the Kinderhook Town Court, Columbia County, was served with a Formal Written Complaint dated August 3, 1983, alleging that he had made false entries in his court records. Respondent did not answer the Formal Written Complaint.

By motion dated September 16, 1983, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct was established. Respondent did not oppose the motion or file any papers in response thereto.

By determination and order dated October 17, 1983, the Commission granted the administrator's motion, found respondent's misconduct established and set a schedule for argument as to appropriate sanction. The

administrator submitted a memorandum in lieu of oral argument. Respondent neither submitted a memorandum nor requested oral argument.

On November 4, 1983, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. On August 10, 1982, respondent fined the defendant in People v. Miroslaw Kozlowski $40 on a charge of Speeding.

2. Respondent received $40 in cash from the defendant and issued a receipt, number 3145, to the defendant for $40.

3. On the same date, at about 7:00 P.M., respondent wrote a second receipt, number 3020, falsely stating that he had received $30 from the defendant. Respondent also marked on a copy of the Uniform Traffic Ticket that he had received only $30.

4. Respondent made the false entry intentionally and knowingly in an attempt to conceal his larceny of $10.

5. On May 20, 1983, respondent was charged with violating Section 175.10 of the Penal Law, Falsifying Business Records, First Degree, a Class E felony.

6. On the same date, respondent pled guilty to the reduced charge of Falsifying Business Records, Second Degree, a Class A misdemeanor (Section 175.05 of the Penal Law).

7. On June 20, 1983, respondent was sentenced to three years probation on the condition that he make restitution of $1,070 and resign his judicial office.

As to Charge II of the Formal Written Complaint:

8. Between April 28, 1981, and November 30, 1982, in 34 cases, respondent wrote bogus receipts which falsely stated that he had received lesser amounts of money in fines from defendants than he had actually received.

9. Respondent kept the false receipts as part of his official court records and reported and remitted to the Department of Audit and Control only the lesser amounts listed on the false receipts.

10. Respondent withheld from the Department of Audit and Control amounts ranging from $5 to $100 from each of the defendants in the 34 cases. The total amount withheld was $1,015.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a) and 100.3(a)(1) of the Rules Governing Judicial Conduct; Canons 1, 2A and 3A(1) of the Code of Judicial Conduct; Sections 107, 2019, 2019-a, 2020 and 2021(1) of the Uniform Justice Court Act; Section 1803 of the Vehicle and Traffic Law; and Section 27(1) of the Town Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent was plainly engaged in a scheme to misappropriate funds received in his official capacity and to conceal his misconduct by falsifying court records. Deception is antithetical to the role of a judge who is sworn to uphold the law and seek the truth. Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 78 (1980).

By falsely certifying the receipt of public monies and maintaining personal control over them for extended periods of time, respondent violated the legal, administrative and ethical duties of a judge. Such misconduct warrants removal. Matter of James O. Kane, unreported (Com. on Jud. Conduct, March 5, 1979); Matter of Hollebrandt, unreported (Com. on Jud. Conduct, Nov. 12, 1980); Matter of Godin, unreported (Com. on Jud. Conduct, Jan. 26, 1983).

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

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

Mrs. Robb, Mr. Bower, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Shea and Mr. Sheehy concur.

Judge Alexander and Judge Rubin were not present.

Dated: November 10, 1983

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

W. EUGENE SHARPE,

a Justice of the Supreme Court, Eleventh Judicial District, Queens County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea

APPEARANCES:

Gerald Stern (Robert Straus, Of Counsel) for the Commission

Flamhaft, Levy, Kamins, Hirsch & Booth (By William H. Booth) for Respondent

The respondent, W. Eugene Sharpe, a justice of the Supreme Court, Eleventh Judicial District, was served with a Formal Written Complaint dated March 31, 1982, alleging that he improperly cited for contempt an attorney appearing before him and ordered the attorney held in detention. Respondent filed an answer dated May 28, 1982.

By order dated June 29, 1982, the Commission designated Seymour M. Klein, Esq., as referee to hear and report proposed findings of fact and

conclusions of law. The hearing was held on October 18, 1982, and the referee filed his report with the Commission on February 8, 1983.

By motion dated March 23, 1983, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion on April 13, 1983. The Commission heard oral argument on the motion on April 20, 1983, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Supreme Court, Eleventh Judicial District, assigned to the Criminal Division, and has been since January 1979.

2. Seymour Roth is an assistant district attorney in the Queens County District Attorney's Office and has been a practicing attorney for 25 years.

3. On Friday, September 4, 1981, respondent presided at a hearing in People v. Frank Green, in which the defendant was charged with Attempted Murder. Mr. Roth represented the prosecution.

4. Vincent Pepe, a New York City police officer, was on the witness stand when the hearing was adjourned until Tuesday, September 8, 1981. Officer Pepe, who was testifying for the prosecution, was directed to return at 9:30 A.M. on September 8 to continue his testimony.

5. After the hearing was adjourned on September 4, Mr. Roth arranged to have Officer Pepe assigned to the District Attorney's Office on September 8 and directed the officer to meet him at 9:30 A.M. that day.

6. On Tuesday, September 8, 1981, at about 9:30 A.M., when Officer Pepe failed to meet him at his office, Mr. Roth attempted unsuccessfully to reach the officer by telephone.

7. At about 9:35 A.M., Mr. Roth telephoned respondent's law secretary, Marvin Scharf, to inform him that Officer Pepe had not yet arrived, that Mr. Roth was trying to reach him and that they would come to the courtroom as soon as the officer arrived.

8. Shortly before 10:00 A.M., Mr. Scharf called Mr. Roth and told him that respondent wanted him in the courtroom immediately.

9. Mr. Roth again attempted to reach Officer Pepe and then went to respondent's courtroom.

10. Respondent came on the bench, and the following colloquy took place:

* * *

THE COURT: Where is the police officer, sir?

MR. ROTH: Your Honor, Officer Pepe came up to our office when we adjourned last Friday, and we told him to be back here in court.

THE COURT: I told him to be back, also, at 9:30 this morning.

MR. ROTH: That's correct. I told him to be in my office by 9:30. He said he would. I called the Anti-Crime Unit in Far Rockaway three times. I was unable to get to anybody.

People at the Precinct put me in touch with the Anti-Crime Unit, it's a separate unit in Far Rockaway, and nobody answered the phone. I just called two minutes ago again, and the line was busy.

I did speak to a Detective Richardson this morning. He told me he did not get the message which we had left. That's myself and also Pepe called Friday and told the Detective Richardson to be down here at nine o'clock this morning at my office. He told me he did not get those messages, but he would come down to my office; and he said he'd be down in my office--

THE COURT: Why would he do us a favor? I don't need him to do this Court any favors. He was directed to be here this morning at 9:30.

MR. ROTH: I am referring to another witness, Richardson; Detective Richardson.

THE COURT: That's not who we need. Pepe was in the process of being cross-examined as I recall it, when we adjourned this matter on Friday.

MR. ROTH: Your Honor, I have no idea why he is not here, and I am continually trying to reach the Anti-Crime Unit and have not been able to reach anybody yet.

THE COURT: What do you wish to do? We are not going to allow you, nor any police officer, to determine when this Court transacts its business, and it is the Court's business, and not the Prosecutor's business. Is that clear to you, sir?

MR. ROTH: No, I am sorry. I didn't understand.

THE COURT: I will help, explain you--

MR. ROTH: May I tell you what my quandry is?

THE COURT: What quandry? What is your quandry?

MR. ROTH: I understand, and I wanted to proceed this morning at 9:30.

THE COURT: Then it's your responsibility to have your witnesses here.

MR. ROTH: I am sorry, I can't be responsible--

THE COURT: Why is it you can't be responsible?

MR. ROTH: --for anything but my duty.

THE COURT: What is your duty? Your duty is to have your--

MR. ROTH: I understand my duties.

THE COURT: Your duty is to have witnesses here. Isn't that your duty, sir? What is your duty?

MR. ROTH: I can only try my best.

THE COURT: Trying your best is not enough. Not for this Court.

MR. ROTH: I can't do anything past that.

THE COURT: You couldn't do anything past that.

MR. ROTH:	I can't do anything but try my best.
THE COURT:	Sir, if you don't get the officer in here in two minutes, I am going to cite you for contempt to this Court. Two minutes. Two minutes, sir. Did you hear that?
MR. ROTH:	I am sorry. I won't be able to.
THE COURT:	You are cited for contempt. Put him in, sir.

* * *

11. When respondent told Mr. Roth that he would cite him for contempt if he did not produce Officer Pepe in court in two minutes, respondent knew that Mr. Roth would be unable to produce the witness within that time.

12. Before he cited Mr. Roth for contempt, respondent did not warn Mr. Roth "that his conduct [was] deemed contumacious and give him an opportunity to desist..." as required by Section 701.4 of the Appellate Division Rules.

13. Before he cited Mr. Roth for contempt, respondent did not give Mr. Roth "a reasonable opportunity to make a statement in his defense or in extenuation of his conduct," as required by Section 701.2(c) of the Appellate Division Rules.

14. After he cited Mr. Roth for contempt, respondent did not set forth in an order and a mandate of commitment the particular circumstances of the offense, as required by Sections 752 and 755 of the Judiciary Law.

15. Mr. Roth had engaged in no improper, discourteous or contumacious conduct prior to or at his appearance before respondent on September 8, 1981. Mr. Roth had never before been cited for contempt or warned that he might be held because of contumacious conduct.

16. After Mr. Roth was cited for contempt, respondent ordered Mr. Roth escorted from the courtroom by uniform officers and held in the detention area for prisoners, where he remained for from 15 to 45 minutes. The defendant, Frank Green, was also taken into the detention area. While passing Mr. Roth, Mr. Green laughed at the prosecutor. While Mr. Roth was being questioned by officers in the detention area, he was told to keep his voice down so that Mr. Green could not overhear the prosecutor giving his address.

17. Officer Pepe eventually arrived in court and explained that he had been tied up in traffic.

18. Mr. Roth was ordered back into the courtroom by respondent. Respondent vacated the contempt order and ordered Mr. Roth's record expunged. He did not apologize to Mr. Roth.

19. Respondent previously had experiences in which he felt that other assistant district attorneys had misled him concerning the availability of witnesses. Respondent misdirected his annoyance, anger and frustration with these other prosecutors and with Officer Pepe at Mr. Roth.

20. In citing Mr. Roth summarily for contempt and ordering him to be placed in the detention area under guard, respondent abused his contempt power and improperly subjected Mr. Roth to public humiliation and embarrassment.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(a), 100.3(a)(1) and 100.3(a)(3) of the Rules Governing Judicial Conduct; Canons 1, 2A, 3A(1) and 3A(3) of the Code of Judicial Conduct; Sections 752 and 755 of the Judiciary Law, and Sections 701.2(c) and 701.4 of the Appellate Division Rules. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

By summarily citing Mr. Roth for contempt and ordering him detained, respondent engaged in a gross abuse of power. There could be no rational basis for citing for contempt a lawyer who, by respondent's own admission, had engaged in no improper, discourteous or contumacious conduct. Even if Mr. Roth had acted disrespectfully, respondent's hasty citation, made without giving the attorney a right to explain or purge himself of any contempt, was improper.

Respondent misdirected at Mr. Roth his anger with Officer Pepe and Mr. Roth's colleagues in the District Attorney's Office. In doing so, he departed from the high standards of conduct expected of every judge. In depriving Mr. Roth of his liberty, even temporarily, respondent deviated from the confines of the law he was sworn to uphold.

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

Mrs. Robb, Judge Alexander, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Judge Ostrowski and Judge Shea concur.

Mr. Bower dissents as to sanction only and votes that respondent be censured.

Mr. Kovner and Judge Rubin were not present.

Dated: June 6, 1983

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

BARBARA M. SIMS,

a Judge of the Buffalo City Court, Erie County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.*

APPEARANCES:

Gerald Stern (Cody B. Bartlett, Of Counsel) for the Commission

William Sims and George Hairston for Respondent

The respondent, Barbara M. Sims, a judge of the Buffalo City Court, was served with a Formal Written Complaint dated February 2, 1981, alleging, inter alia, that she signed orders in ten cases in which the defendants were clients or former clients of her or her husband. Respondent filed an answer dated March 13, 1981.

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*Mr. Wainwright's term as a member of the Commission expired on March 31, 1983. This determination was rendered pursuant to a vote on March 24, 1983.

By order dated April 30, 1981, the Commission designated Shelia L. Birnbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on March 1, 1982, and the referee filed her report with the Commission on October 5, 1982.

By motion dated November 24, 1982, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report and for a determination that respondent be censured. Respondent opposed the motion in papers dated December 31, 1982, and cross-moved for, inter alia, dismissal of the charges. The Commission heard oral argument on the motion on March 24, 1983, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

Preliminary findings:

1. One judge of the Buffalo City Court is assigned to preside over weekend arraignments at the courthouse. The judge is not obligated to consider at home or in the evening a request for bail or release.

2. Respondent's husband, William Sims, often assisted her in the preparation of orders for the release of defendants on bail or on their own recognizance. Generally, Mr. Sims would do whatever respondent asked in the preparation of a release order. When a request was received, respondent would either call the jail to ask for information about the defendant or ask her husband to do so. Respondent would either prepare the release herself or ask her husband to prepare it for her signature. Even when respondent herself obtained the information and prepared the release order, Mr. Sims would "know what was going on."

3. Mr. Sims is an attorney who practices in Buffalo. He holds no position in the Buffalo City Court. He and respondent practiced law in the same office until she took the bench on December 27, 1977.

As to Charge I of the Formal Written Complaint:

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

As to Charge II of the Formal Written Complaint:

5. On the evening of January 25, 1979, respondent received at her home a telephone call from a former client, Patricia Jones, requesting the release of her husband, Walter, from jail. Respondent had also represented Mr. Jones when she was in private practice.

6. Mr. Jones was charged with Assault, Third Degree, and Menacing, both misdemeanors.

7. Respondent signed an order releasing Mr. Jones from custody without the requirement of cash bail or bond.

8. Respondent's husband talked to Mr. Jones at the Sims' home shortly after he was released from jail pursuant to respondent's order.

9. On January 26, 1979, respondent's husband appeared before another judge in the Buffalo City Court representing Mr. Jones in the same case in which he had been released from jail by respondent.

10. Mr. Sims charged a fee of $1,350 for his representation of Mr. Jones in this case, although he collected only $50 from him.

As to Charge III of the Formal Written Complaint:

11. On May 2, 1978, respondent received a telephone call at her political campaign headquarters from the daughter of James Grant, requesting Mr. Grant's release from jail. Mr. Grant was a former client of respondent's husband.

12. Mr. Grant was charged with Criminal Possession Of A Weapon, Third Degree, a felony.

13. Respondent's husband left campaign headquarters, went to his home to obtain a release form and returned to campaign headquarters where respondent signed an order releasing Mr. Grant from custody without the requirement of cash bail or bond.

14. Respondent's husband prepared the body of the release order for her signature. Mr. Sims testified that he could not remember whether the body of the release order was completed before or after respondent signed it. He also testified, "[I]t does not matter whether it was on before or after, as long as it was prepared for a signature at her direction...."

15. Before preparing the release, Mr. Sims called the Buffalo City Police to find out whether there were papers holding the defendant, what the charge was and what the circumstances were. He did not contact any particular person at police headquarters but talked to someone in "central booking."

16. On May 3, 1978, Mr. Sims appeared before another judge in the Buffalo City Court with Mr. Grant.

17. Mr. Sims charged a fee for his legal service in this matter.

18. Respondent knew or should have known that signing the release order outside of court when she was not obligated to do so would lead the defendant to seek Mr. Sims' representation in court the following day.

As to Charge IV of the Formal Written Complaint:

19. On May 12, 1978, respondent signed at her home an order releasing Maurice Gaines from custody without the requirement of cash bail or bond.

20. Mr. Gaines was charged with Criminal Possession Of Stolen Property, a misdemeanor, and with Disorderly Conduct and Harassment, both violations.

21. Respondent's husband prepared the body of the release order for her signature. Mr. Sims testified that he could not remember whether the body of the release order was completed before or after respondent signed it.

22. On May 13, 1978, Mr. Sims appeared before another judge in the Buffalo City Court with Mr. Gaines.

23. Respondent knew or should have know that signing the release order outside of court when she was not obligated to do so would lead the defendant to seek Mr. Sims' representation in court the following day.

As to Charge V of the Formal Written Complaint:

24. On the evening of November 29, 1978, respondent's husband received a telephone call from the sister of Lawrence Grant, requesting Mr. Grant's release from jail.

25. Mr. Grant was charged with Assault, First Degree, a felony.

26. Mr. Sims had previously represented Mr. Grant and members of his family.

27. Mr. Sims called respondent after receiving the call from Mr. Grant's sister. Mr. Sims or Ms. Grant conveyed to respondent the request to release Mr. Grant.

28. Respondent called the Buffalo City Police central booking with respect to the <u>Grant</u> case and then signed an order releasing Mr. Grant from custody without the requirement of cash bail or bond.

29. Respondent's husband represented Mr. Grant at the time respondent signed the release order. His representation had begun the same day the release order was signed.

30. On November 30, 1978, Mr. Sims appeared before another judge in the Buffalo City Court with Mr. Grant.

31. Respondent knew or should have known that at the time she signed the release her husband represented the defendant.

As to Charge VI of the Formal Written Complaint:

32. On the evening of January 17, 1979, respondent received a telephone call at her home from the mother of Emory Jackson, requesting Mr. Jackson's release from jail.

33. Mr. Jackson was charged with Assault, First Degree, a felony.

34. Respondent's husband had previously represented Mr. Jackson and members of his family.

35. Respondent called the Buffalo City Police central booking with respect to the Jackson case and then signed an order releasing Mr. Jackson from custody without the requirement of cash bail or bond.

36. On January 18, 1979, respondent's husband appeared before another judge in the Buffalo City Court with Mr. Grant.

37. Respondent knew or should have known that signing the release order outside of court when she was not obligated to do so would lead Mr. Jackson to seek Mr. Sims' representation in court the following day.

As to Charge VII of the Formal Written Complaint:

38. On Sunday, March 18, 1979, respondent received a telephone call at her home from the wife of Cecil Frame, requesting Mr. Frame's release from jail.

39. Mr. Frame was charged with Leaving The Scene Of An Accident and Driving While Intoxicated.

40. Mr. Frame was an acquaintance of respondent's husband. When she called, Ms. Frame told respondent that she knew Mr. Sims.

41. Respondent asked her husband whether he knew Ms. Frame. Mr. Sims said that he did.

42. Respondent then signed an order releasing Mr. Frame from custody without the requirement of cash bail or bond.

43. Respondent gave the order to her husband, who then delivered it to Ms. Frame.

44. On March 19, 1979, Mr. Sims appeared before another judge in the Buffalo City Court with Mr. Frame.

45. Respondent knew or should have known that signing the release outside of court when she was not obligated to do so would lead Mr. Frame to seek Mr. Sims' representation in court the following day.

As to Charge VIII of the Formal Written Complaint:

46. On the night of April 5, 1979, respondent received a telephone call at her home from a Reverend Jones and from Theodore Williams, requesting the release from jail of Mr. Williams' sons, Reginald and Dwayne.

47. Reginald Williams was charged with Reckless Endangerment, First Degree, and Criminal Possession Of A Weapon, Third Degree, both felonies. Dwayne Williams was charged with Criminal Mischief, Fourth Degree, and Assault, Third Degree, both misdemeanors.

48. Mr. Jones was a former client of respondent's husband.

49. Mr. Jones first spoke to respondent, and she agreed to release the defendants. Theodore Williams then spoke to respondent's husband and asked him to represent the defendants. Mr. Williams asked Mr. Sims, "Is your wife going to let them out?"

50. Respondent then signed orders releasing the defendants from custody without the requirement of cash bail or bond.

51. Mr. Jones and Mr. Williams then came to the Sims' home and picked up the release orders.

52. On April 6, 1979, Mr. Sims appeared before another judge in the Buffalo City Court with Reginald and Dwayne Williams.

53. Mr. Sims collected a fee for his legal services in this matter.

54. Respondent knew or should have known that agreeing to sign release orders outside of court when she was not obligated to do so would lead the defendants to seek Mr. Sims' representation in court.

As to Charge IX of the Formal Written Complaint:

55. On December 27, 1979, respondent received a telephone call at her home from Augustine Olivencia, a community leader, requesting the release of Benjamin Rivera from jail.

56. Mr. Rivera was charged with Assault, Second Degree, a felony.

57. Respondent signed an order releasing Mr. Rivera from custody without the requirement of cash bail or bond.

58. On December 28, 1979, respondent's husband appeared before another judge in the Buffalo City Court with Mr. Rivera. Mr. Sims had agreed to represent Mr. Rivera only until his attorney, Loren Lobban, returned from out of town.

59. Respondent knew or should have known that signing the release outside of court when she was not obligated to do so would lead Mr. Rivera to seek Mr. Sims' representation in court the following day.

As to Charge X of the Formal Written Complaint:

60. On December 29, 1979, respondent, at the request of her husband, signed an order releasing Jetrone Jones from custody without the requirement of cash bail or bond.

61. Mr. Jones was charged with Menacing, a misdemeanor, and Harassment, a violation.

62. On December 31, 1979, Mr. Sims appeared before another judge in the Buffalo City Court with Mr. Jones. Mr. Sims had agreed to represent Mr. Jones until his attorney, Loren Lobban, returned from out of town.

63. Mr. Sims intended to collect a fee for his legal services in this matter.

64. Respondent knew or should have known that signing the release order would lead Mr. Jones to seek Mr. Sims' representation in court the following day.

As to Charge XI of the Formal Written Complaint:

65. On December 30, 1979, at approximately 2:00 A.M., respondent's husband received a telephone call at home from the mother of O'Connor Bowman, requesting his release from jail. Mr. Sims identified the caller and gave the call to respondent.

66. Mr. Bowman was charged with Criminal Possession Of A Weapon, Fourth Degree, a misdemeanor.

67. Respondent signed an order releasing Mr. Bowman from custody without the requirement of cash bail or bond. Mr. Sims prepared the body of the release for respondent's signature.

68. On December 31, 1979, Mr. Sims appeared before another judge in the Buffalo City Court with Mr. Bowman.

69. Mr. Sims intended to collect a fee for his legal services in the matter.

70. Respondent knew or should have known that signing the release order would lead Mr. Bowman to seek Mr. Sims' representation in court the following day.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1) and 100.3(c)(1)(iv) [formerly Sections 33.1, 33.2, 33.3(a)(1) and 33.3(c)(1)(iv)] of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3C(1)(d) of the Code of Judicial Conduct. Charges II through XI of the Formal Written Complaint are sustained, and respondent's misconduct is established. Respondent's cross-motion is denied.

Respondent released from jail a former client, a client and two former clients of her husband, an acquaintance of her husband and a defendant whose release was sought by a former client of her husband. In one other case, respondent released a defendant from jail at her husband's request. In still two other cases, respondent signed release orders delivered to her and prepared for her by her husband. In these nine cases and in one other in which respondent ordered the release of a defendant, respondent's husband was later retained by the defendants to represent them in court. In most of the ten cases, he appeared in court the very next day with defendants released by respondent.

This pattern created the unmistakable impression that respondent and her husband were acting in concert to free defendants and advocate their positions in court. It appeared that by a single telephone call, a defendant could obtain his release and retain a lawyer to represent him. By retaining Mr. Sims, a defendant could also obtain his release from custody. In the case of Reginald and Dwayne Williams, for example, Mr. Jones, a former client of respondent's husband, elicited respondent's promise to release the defendants, and in the same phone call their father retained Mr. Sims.

The way in which respondent and her husband mingled her judicial functions with his practice of law contributed to the perception that they acted as a team. He prepared release orders at her request; she signed orders for his client and former clients, at his request, and upon his assurance that he was acquainted with a defendant.

Respondent was not obligated to consider the bail applications, contrary to her contentions. Other judges who had no association with her husband were available to consider the applications, and five of the defendants were charged with felonies, for which the law does not require bail or release. By considering their applications outside of court when she was not obligated to do so, she was encouraging the defendants to retain her husband to represent them in later stages of the proceedings.

This was especially so in the seven cases in which the applications were made on behalf of or by former clients of respondent or her husband or by persons with some other connection with her husband.

Such encouragement seriously undermined the integrity and independence of the judiciary in that it created the appearance that respondent was using her judicial office to favor and benefit her husband's law practice. See Sections 100.1, 100.2 and 100.3(a)(1) of the Rules Governing Judicial Conduct.

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

Mr. Bower, Mr. Bromberg, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Shea and Mr. Wainwright concur, except that Mrs. DelBello dissents as to Charge I only and votes to sustain the charge, and Mr. Kovner dissents as to Charges II and IX and votes to dismiss the charges, and dissents as to sanction and votes that respondent be admonished.

Judge Ostrowski abstained.

Mrs. Robb, Judge Alexander and Judge Rubin were not present.

Dated: May 16, 1983

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

BARBARA M. SIMS,

a Judge of the Buffalo City Court, Erie County.

DISSENTING OPINION BY MRS. DEL BELLO

I concur with the majority's findings that Charges II through XI of the Formal Written Complaint are sustained and that Judge Sims should be censured. I respectfully dissent as to the majority's dismissal of Charge I, however, and vote that the charge be sustained.

Regarding Charge I, respondent signed a "Jane Doe" warrant of arrest in People v. Jeane Ambroselli, notwithstanding that the complaining witness in the case, Frank Sims, was her son.

Frank Sims lives at home with respondent. The name "Frank Sims" is clearly listed on the supporting information which accompanied the warrant that respondent signed. Frank Sims' address is clearly listed on the information, immediately below his name, as "101 Depew". 101 Depew is the respondent's address.

Respondent asserted that she was unaware that her son was the complainant because she always referred to him by the nickname "Billy" and did not call him by his given name "Frank". This defense is incredible.

It is unconvincing that a mother would not recognize the name she gave her own son when it was placed before her in connection with a summons she was about to sign, and it is also incredible that she would not recognize her own address.

Even if respondent's defense is accepted at face value, she has at least violated those sections of the Rules Governing Judicial Conduct which require a judge to be diligent in the discharge of her duties. She failed to observe those standards by not realizing that she was signing a warrant requested by her son, and that such an act would violate the prohibition on a judge's participation in a case involving relatives. Sections 100.3(a)(1), 100.3(b)(1) and 100.3(c)(1)(iv) of the Rules. Indeed, respondent herself acknowledged that she was obliged to review carefully the supporting information before signing an arrest warrant, and

that in this case she actually checked to see that Frank Sims has signed it.

For these reasons I vote that Charge I of the Formal Written Complaint be sustained.

Dated: May 16, 1983

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

BARBARA M. SIMS,

a Judge of the Buffalo City Court, Erie County.

DISSENTING OPINION BY MR. KOVNER

I dissent as to Charges II and IX and find no misconduct. The essence of the misconduct in the other charges was the involvement of Judge Sims' husband, an active practitioner, in her judicial responsibilities where the defendants or their families had been previously represented by respondent's husband.

There was no evidence that Mr. Sims had represented the defendants in Charges II and IX until after the release executed by respondent. Nor was there evidence in those cases that he had called police central booking, prepared the body of the release order, or delivered the release to the defendant. Indeed, in Charge II, the defendant had been subjected to an illegal arrest. Given the limited number of attorneys and judges in the minority community, the mere fact that respondent's husband was engaged to represent these defendants on the day following release by respondent would not necessarily, standing alone, constitute misconduct.

I believe the sanction of admonition would be appropriate.

Dated: May 16, 1983

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

W. HOWARD SULLIVAN,

a Judge of the Norwich City Court, Chenango County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.*

APPEARANCES:

Gerald Stern (Albert B. Lawrence, Of Counsel) for the Commission

McMahon & McMahon (By John L. McMahon) for Respondent

The respondent, W. Howard Sullivan, serves part-time as a Judge of the Norwich City Court. He is also a partner in the law firm of

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*Mr. Wainwright's term as a member of the Commission expired on March 31, 1983. The vote in this case was held on February 16, 1983.

Stratton & Sullivan. Respondent was served with a Formal Written Complaint dated May 10, 1982, alleging inter alia that he failed to disqualify himself in certain cases involving his law firm. Respondent filed an answer dated June 21, 1982.

By order dated July 20, 1982, the Commission designated Bernard Goldstein, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on September 9 and October 8, 1982, and the referee filed his report with the Commission on November 18, 1982.

By motion dated January 21, 1983, the administrator of the Commission moved to confirm in part and to disaffirm in part the referee's report, and for a determination that respondent be censured. Respondent opposed the motion and moved that the referee's report be confirmed and that respondent be admonished. Respondent waived oral argument.

The Commission considered the record of the proceeding on February 16, 1983, and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. In April 1979, Elaine Henderson visited respondent at his law firm, Stratton & Sullivan, for a consultation on a legal matter.

2. In July 1979, Ms. Henderson received a bill from Stratton & Sullivan for $87.50 for the consultation. Ms. Henderson thereafter left a message with the firm that the bill was a mistake because it was her understanding that the consultation was without charge.

3. In December 1979, Ms. Henderson received a second statement from Stratton & Sullivan for the $87.50.

4. Respondent authorized his law firm to refer Ms. Henderson's unpaid bill to a collection agency.

5. In May 1981, Ms. Henderson was served a summons in the matter of Stratton & Sullivan v. Thomas and Elaine Henderson. Stratton & Sullivan was represented in this action by the law firm of Singer, Singer & Larkin.

6. On May 19, 1981, Ms. Henderson paid the $87.50 directly to Stratton & Sullivan by delivering to the firm's mailbox two money orders totaling that amount. Approximately one week later, Ms. Henderson received a letter from Singer, Singer & Larkin, acknowledging the $87.50 payment and seeking an additional $21.70 in costs.

7. On June 23, 1981, respondent authorized his court clerk to sign a default judgment against Ms. Henderson, notwithstanding that he knew

his firm was the plaintiff in the matter, and notwithstanding that the debt had already been paid to his firm. Respondent knew at the time it was improper for him to authorize entry of the judgment.

8. On August 5, 1981, Ms. Henderson called the president of the Chenango County Bar Association, Edmund Lee, to file a complaint against respondent. Mr. Lee did not advise Ms. Henderson of the procedure for filing a complaint. He offered to call respondent to see what could be done to resolve the matter.

9. Respondent and Mr. Lee discussed the matter and agreed that the matter should be settled on an informal basis. Respondent authorized Mr. Lee to negotiate with Ms. Henderson to try to resolve the matter. Respondent told Mr. Lee he was willing to pay Singer, Singer & Larkin their expenses, and to have the judgment against Ms. Henderson vacated. Respondent proposed that, in return, Ms. Henderson not file any charges against him.

10. Mr. Lee advised Ms. Henderson of respondent's position, and on August 12, 1981, he advised Ms. Henderson's attorney, Mary Beth Fleck, of respondent's position.

11. On October 5, 1981, after an inquiry from Singer, Singer & Larkin, respondent sent that firm a check to cover its expenses in handling the Stratton & Sullivan v. Henderson case. On October 9, 1981, Singer, Singer & Larkin entered a satisfaction of judgment in the case, and on October 15, 1981, Ms. Henderson was notified thereof.

12. Respondent did not vacate the default judgment he had ordered against the Hendersons on June 23, 1981.

As to Charge II of the Formal Written Complaint:

13. Respondent presided over the following traffic matters, notwithstanding that, as an attorney, he had previously represented each of the defendants:

(a) People v. Tim B. Danaher, June 11, 1981;

(b) People v. Dan Ohl, June 18, 1981;

(c) People v. Wilma F. Yocum, June 18, 1981;

(d) People v. Daniel M. Anderson, June 26, 1981;

(e) People v. Megan M. Martin, June 26, 1981;

(f) People v. Bruce A. Osterhout, June 29, 1981; and

(g) People v. Flora S. Evans, August 25, 1981.

As to Charge III of the Formal Written Complaint:

14. Roger Monaco is an associate at respondent's law firm. Mr. Monaco appeared before an acting Norwich City Court judge in summary proceedings as to Edwards v. McKenna and Cooper v. Butts. Respondent failed to take appropriate steps to prohibit an associate of his from practicing in the Norwich City Court, as required by the Rules Governing Judicial Conduct.

As to Charge IV of the Formal Written Complaint:

15. On September 10, 1981, respondent presided over a non-jury trial in Miles v. Cappadonia. The plaintiff in this case was represented by Singer, Singer & Larkin. At the time of the trial, Singer, Singer & Larkin was also representing respondent's law firm in Stratton & Sullivan v. Thomas and Elaine Henderson.

16. Respondent did not inform the parties in Miles v. Cappadonia of his association with Singer, Singer & Larkin. After presiding over the trial, respondent entered a judgment in favor of the plaintiff.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Section 14 of the Judiciary Law, Sections 100.1, 100.2, 100.3(a)(1), 100.3(c)(1) and 100.5(f) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3C(1) of the Code of Judicial Conduct. Charges I through IV of the Formal Written Complaint are sustained (except for those portions of Charge II relating to People v. Russell McIntyre and People v. Betty S. Martin, which are not sustained and therefore are dismissed), and respondent's misconduct is established.

A judge's obligation to be and appear impartial in matters before the court is fundamental to public confidence in the administration of justice. Specifically, a judge is prohibited from participating in any case in which he has an interest or in which his impartiality might otherwise be reasonably questioned. (Section 14 of the Judiciary Law and Section 100.3[c] of the Rules Governing Judicial Conduct.) In addition, a part-time judge who also practices law is prohibited from practicing in his own court, and he is obliged to ensure that his partners and associates do not practice in his court, regardless of who presides. (Section 100.5[f] of the Rules.)

Respondent violated the applicable ethical provisions cited above (i) by authorizing a judgment against the defendant in a case in which his own law firm was the plaintiff, (ii) by presiding over seven cases involving clients of his law firm, (iii) by allowing one of his associates to appear in two cases before a co-judge in respondent's own court and (iv) by presiding over a case involving a law firm which was contemporaneously representing respondent's own firm in another matter. See, Matter of Harris v. State Commission on Judicial Conduct, 56 NY2d 365 (1982).

Respondent exacerbated his misconduct by suggesting that he would withdraw the judgment he authorized against the defendants in Stratton & Sullivan v. Thomas and Elaine Henderson in return for Ms. Henderson's foregoing any grievances or legal claims against him. The powers and prestige of judicial office are not meant as barter for the advancement of a judge's personal interests. (Section 100.2 of the Rules.)

The Commission notes that respondent acknowledges his misconduct and expresses his intention to adhere to the applicable rules.

By reason of the foregoing, the Commission determines that respondent should be censured.

Mrs. Robb, Judge Alexander, Mr. Bower, Mr. Bromberg, Mrs. DelBello, Judge Ostrowski, Judge Shea and Mr. Wainwright concur.

Mr. Cleary, Mr. Kovner and Judge Rubin were not present.

Dated: April 22, 1983

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

DONALD E. WHALEN,

a Justice of the Ticonderoga Town Court, Essex County.

Determination

THE COMMISSION:

Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
John J. Bower, Esq.
David Bromberg, Esq.
E. Garrett Cleary, Esq.
Dolores DelBello
Victor A. Kovner, Esq.
Honorable William J. Ostrowski
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Albert B. Lawrence, Of Counsel) for the Commission

Gerald J. Lawson for Respondent

The respondent, Donald E. Whalen, a part-time justice of the Ticonderoga Town Court, Essex County, was served with a Formal Written Complaint dated March 15, 1982, alleging that he presided over 37 matters in May 1981 in which his employer was a party. Respondent filed an answer dated April 5, 1982.

By order dated April 22, 1982, the Commission designated Michael Whiteman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on June 1 and 2, 1982, and the referee filed his report with the Commission on September 27, 1982.

By motion dated October 27, 1982, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent cross-moved on November 16, 1982, to disaffirm the referee's report and for dismissal of the Formal Written Complaint. The Commission heard oral argument on the motion on November 29, 1982, at which respondent appeared by counsel, thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a town justice of Ticonderoga since July 1977. He is not a lawyer. He serves as town justice part-time.

2. Respondent is also an x-ray technician at the Moses Ludington Hospital in Ticonderoga, a position he has held since 1966.

3. Respondent has successfully completed the judicial training courses required of all non-lawyer town and village justices by the state Constitution. He is familiar with the Rules Governing Judicial Conduct and the annual reports of this Commission.

4. In May 1981, the controller of the Moses Ludington Hospital filed 37 claims with the clerk of the Ticonderoga Town Court. The hospital was not represented by an attorney.

5. On May 11, 1981, respondent signed 37 summonses with respect to the claims filed by the Moses Ludington Hospital. All 37 summonses were made returnable before respondent on June 4, 1981, based on respondent's instructions to the court clerk.

6. On May 19, 1981, Francis Barnes was served with a summons signed by respondent regarding the claim of the Moses Ludington Hospital that he owed a balance of $130.13. On that date, Mr. Barnes telephoned respondent and advised him that the hospital's bill had been paid. Mr. Barnes was aware at the time that respondent was employed by the hospital. (The evidence is not sufficient to establish whether the payment took place before or after the telephone call.) Respondent did not inform Mr. Barnes that he was employed by the hospital at any time during the telephone call or at any other time in the proceeding. Respondent did not disqualify or offer to disqualify himself from the case.

7. During the telephone conversation on May 19, 1981, Mr. Barnes told respondent that his participation in the case created a conflict of interest.

8. On June 4, 1981, Mr. Barnes appeared before respondent pursuant to the summons. The Barnes case was the first one heard by respondent on that date. Mr. Barnes offered evidence that the hospital bill had been paid. Respondent thereupon dismissed the claim. Prior to

leaving the courtroom, Mr. Barnes again stated that respondent had a conflict of interest in the case.

9. On June 4, 1981, Earl Gould, Jr., appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that Mr. Gould owed a balance of $482.36. When Mr. Gould first saw respondent in court, he recognized him as the hospital's x-ray technician and thought he was appearing for the hospital. He did not know respondent was a judge and he was confused as to whether the ensuing events were indeed a court proceeding. Respondent never offered to disqualify himself or transfer the case to another judge. Mr. Gould paid the hospital bill in full, as respondent noted on his docket in this case.

10. On May 12, 1981, a summons signed by respondent was served on Sarah Wescott regarding the claim of Moses Ludington Hospital that she owed a balance of $674.89. Sometime thereafter, Mrs. Wescott's husband, Ellis Wescott, spoke with respondent at the hospital and told him the bill would be paid. Respondent did not advise Mr. Wescott at any time during that conversation or thereafter that his employment by the hospital might create a conflict of interest for him as the presiding judge. Respondent did not at any time disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $674.89 plus costs.

11. On June 4, 1981, Ernest Fleury appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $519.37. When his case was called by respondent, Mr. Fleury discussed the matter first with respondent and thereafter with the hospital's controller, who was present. Respondent did not at any time disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $519.37 plus costs.

12. On June 4, 1981, Rose St. Andrews appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that she owed a balance of $200.87. Ms. St. Andrews advised respondent that Medicaid was to have paid her bill. Respondent said he would inquire into the matter. Although Ms. St. Andrews was aware that respondent was employed by the hospital, respondent did not at any time mention that fact, nor did he disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $200.87 plus costs.

13. On June 4, 1981, Harry Gould, Sr., appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $410.87. Mr. Gould advised respondent that the bill from the hospital was inconsistent with an earlier statement sent by the hospital. Respondent said he would inquire into the matter. Although Mr. Gould was aware that respondent was employed by the hospital, respondent did not at any time mention that fact, nor did he disqualify or

offer to disqualify himself from the case. One June 10, 1981, respondent entered judgment in favor of the hospital for $410.87 plus costs.

14. On June 4, 1981, Ida Mae Bazan appeared in court pursuant to a summons signed by respondent and issued to her husband, Raymond, on a claim by Moses Ludington Hospital that Mr. Bazan owed a balance of $111.28. When she appeared on behalf of her husband, Mrs. Bazan paid the claimed amount to the hospital's controller, who was present. Respondent advised Mrs. Bazan that he was employed by the hospital, but he at no time disqualified or offered to disqualify himself from the case, which he marked on his docket as paid in full.

15. On June 4, 1981, Benjamin O'Dell appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $2,420.37. In response to questioning by respondent, Mr. O'Dell stated that he owed the amount claimed and would pay it. Respondent told Mr. O'Dell that he was employed by the hospital, which Mr. O'Dell already knew. Respondent did not at any time disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $2,420.37 plus costs.

16. On June 4, 1981, James M. Taylor appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $1,139.51. In response to questioning by respondent, Mr. Taylor stated that he could afford to pay something toward the claimed amount and that he could make monthly payments of $5. Although Mr. Taylor was aware that respondent was employed by the hospital, respondent did not at any time mention that fact, nor did he disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $1,139.51 plus costs.

17. On June 4, 1981, Trustan Whittemore appeared in court pursuant to a summons signed by respondent on a claim by Moses Ludington Hospital that he owed a balance of $467.49. Mr. Whittemore told respondent that he had not paid the bill because his employer's insurance was responsible for payment. Respondent advised Mr. Whittemore to retain a lawyer in this matter. Respondent did not advise Mr. Whittemore that he was employed by the hospital, although Mr. Whittemore may have known it. Respondent did not at any time disqualify or offer to disqualify himself from the case. On June 10, 1981, respondent entered judgment in favor of the hospital for $467.49 plus costs.

18. The remaining claims filed by Moses Ludington Hospital and returnable before respondent pursuant to summonses he had signed on May 11, 1981, were against the following defendants: Sylvia Anderson, Deborah Bain, William Ball, Hazelton Belden, George Besson, Thomasina Buckman, Gladys Burger, Camp Adirondack, Michael Coffin, Kenneth Frasier, William Gibbs, John Hunsdon, Faith Lincourt, Peter Mars, Gloria Morse, Ernest Plumley, Douglas Russell, Jennie Savage, Dennis Scuderi, Harriett

Stevenson, Colleen Stone, Leslie Taylor, David Thompson, Josephine Thompson, Allan Trombley, William C. Wilson and Carl Woodard.

19. On June 10, 1981, respondent entered judgments in favor of the hospital against Ms. Anderson, Ms. Bain, Mr. Ball, Ms. Buckman, Mr. Coffin, Mr. Frasier, Mr. Gibbs, Mr. Hunsdon, Ms. Lincourt, Mr. Plumley, Mr. Russell, Ms. Stevenson and Ms. Stone.

20. On June 10, 1981, respondent entered default judgments in favor of the hospital against Ms. Beldon, Ms. Taylor and Mr. Woodard.

21. Respondent's dockets as to the remaining cases record the following. The case against Camp Adirondack was "dismissed by hospital." The case against Mr. Wilson was marked "no service dismissed." The cases against Mr. Besson, Mr. Scuderi, Ms. Thompson and Mr. Trombley were marked "Pd in full." The cases against Mr. Mars, Ms. Morse and Mr. Thompson were marked "moved to New Mexico," "moved to New Hampshire" and "moved to Oklahoma," respectively. The case against Ms. Burger was marked "bankrupt." The case against Ms. Savage was marked "deceased."

22. In each instance in which a judgment was entered, the judgment itself was prepared by the court clerk, on the basis of docket entries made by her from bench notes made by respondent. In those cases in which judgments were not entered, docket entries were made by the court clerk from bench notes made by respondent. The dockets were signed in respondent's name by the clerk, with respondent's knowledge and permission.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3C(1) of the Code of Judicial Conduct. The Charge in the Formal Written Complaint is sustained and respondent's misconduct is established.

Respondent was disqualified by his employment relationship with Moses Ludington Hospital from participating in any way in any cases involving that hospital. Nevertheless, in one day respondent signed 37 summonses on claims brought by the hospital, insured that all 37 matters were returnable before him one month later, and thereafter disposed of all 37 cases, typically by finding in the hospital's favor for the full amount of the claim, plus costs. Respondent did not disqualify or offer to disqualify himself from these cases, despite the rules requiring him to do so and despite the assertion of at least one defendant that his presiding created a conflict of interest.

The role of a judge in our legal system is to preside over legal disputes in an impartial, dispassionate manner. Public confidence in the integrity of the judiciary and the entire legal system is diminished when a judge has an interest in a matter over which he presides.

Respondent's conduct both was improper and appeared to be improper. Even had his role in these 37 cases been strictly ministerial, it would have been inappropriate and contrary to the rules for him to participate. In fact, respondent played an active role in the hospital's pursuit of its payment claims, some of which were disputed by defendants who appeared in his court. The summary manner in which respondent disposed of even the disputed claims evinced his predisposition to favor his employer-plaintiff. Indeed, his bias was so obvious and his courtroom decorum so unjudicial that one defendant thought respondent was representing the hospital and was unaware he was the judge.

In essence, respondent acted as his employer's debt-collector, abusing the power and prestige of his judicial office to advance a private interest, in clear violation of the applicable ethical standards. By his conduct, respondent has compromised the integrity and independence of the judiciary.

In determining the appropriate sanction, we have considered the extreme seriousness of respondent's misconduct but note that it was limited to a single episode.

By reason of the foregoing, the Commission determines that respondent should be severely censured.

Judge Alexander, Mr. Bromberg, Mr. Cleary, Mr. Kovner, Judge Ostrowski, Judge Shea and Mr. Wainwright concur.

Mrs. Robb, Mr. Bower and Mrs. DelBello dissent as to sanction and vote that respondent should be removed from office.

Judge Rubin was not present.

Dated: January 20, 1983

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

DONALD E. WHALEN,

a Justice of the Ticonderoga Town Court, Essex County.

DISSENTING OPINION BY MRS. DEL BELLO, IN WHICH MRS. ROBB AND MR. BOWER JOIN

I respectfully dissent from the majority determination and vote that respondent be removed from office.

Unfitness for judicial office should be a primary consideration in determining sanction. See, Matter of Kane v. State Commission on Judicial Conduct, 50 NY2d 360 (1980). If unfitness is established, then removal from office is clearly warranted. A lesser discipline as censure or admonition is in order when unfitness has not been established.

In this case, respondent presided over 37 cases brought by his employer. He virtually turned his courtroom into a collection agency and did so even after a question was raised by an involved party as to his conflict of interest. To further compound his actions, respondent's testimony at the hearing was found by the referee to be lacking in credibility in several key areas.

Respondent has exhibited his unfitness for office by the manner in which he used his courtroom and by not acknowledging the impropriety of presiding over 37 cases in which he had an interest due to his employment and by his lack of candor at the hearing in this matter. He has exhibited an affront and insensitivity to judicial ethical standards.

For these reasons, I believe that the integrity of respondent's court has been irreparably compromised and that removal from office is appropriate.

Dated: January 20, 1983

TABLE OF CASES PENDING AS OF DECEMBER 31, 1982.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling								
Non-Judges								
Demeanor		13	14	7	2		6	42
Delays			1	1				2
Confl./Interest		1	6	4	1		6	18
Bias		2	1					3
Corruption		1			1		2	4
Intoxication		1	4					5
Disable/Qualif.			1					1
Political Activ.		9		18				27
Finances, Records, Training		9	3	4	3		5	24
Ticket-Fixing								
Miscellaneous		4	8	2			2	16
TOTALS		40	38	36	7		21	142

* Investigations closed upon vacancy of office other than by resignation.
** Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.

TABLE OF NEW CASES CONSIDERED BY THE COMMISSION IN 1983.

SUBJECT OF COMPLAINT	*DISMISSED UPON INITIAL REVIEW*	*STATUS OF CASES INVESTIGATED*						*TOTALS*
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION***	
Incorrect Ruling	452							452
Non-Judges	36							36
Demeanor	57	53	8	5		2		125
Delays	27	2						29
Confl./Interest	13	31	5	4	3	1		57
Bias	10	1	1					12
Corruption	2	1	1					4
Intoxication			4					4
Disable/Qualif.	1	1			2			4
Political Activ.	8	11	1	1				21
Finances, Records, Training	7	22	2			1	1	33
Ticket-Fixing		2						2
Miscellaneous	1	27	2			1		31
TOTALS	614	151	24	10	5	5	1	810

* *Investigations closed upon vacancy of office other than by resignation.*
** *Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.*

IN 1983: 810 NEW COMPLAINTS AND 142 PENDING FROM 1982.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling	452							452
Non-Judges	36							36
Demeanor	57	66	22	12	2	2	6	167
Delays	27	2	1	1				31
Confl./Interest	13	32	11	8	4	1	6	75
Bias	10	3	2					15
Corruption	2	2	1		1		2	8
Intoxication		1	8					9
Disable/Qualif.	1	1	1		2			5
Political Activ.	8	20	1	19				48
Finances, Records, Training	7	31	5	4	3	1	6	57
Ticket-Fixing		2						2
Miscellaneous	1	31	10	2		1	2	47
TOTALS	614	191	62	46	12	5	22	952

* *Investigations closed upon vacancy of office other than by resignation.*

** *Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.*

ALL CASES SINCE THE INCEPTION OF THE TEMPORARY COMMISSION (JANUARY 1975).

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling	2693							2693
Non-Judges	269							269
Demeanor	387	66	335	47	20	15	81	951
Delays	186	2	32	10	3		7	240
Confl./Interest	129	32	196	47	22	7	58	491
Bias	156	3	32	1	3		2	197
Corruption	49	2	33		7	2	6	99
Intoxication	6	1	15		2		10	34
Disable/Qualif.	19	1	17	1	9	3	6	56
Political Activ.	53	20	31	52	3	2	6	167
Finances, Records, Training	98	31	63	26	33	29	33	313
Ticket-Fixing	15	2	53	149	33	56	154	462
Miscellaneous	63	31	47	15	4	5	8	173
TOTALS	4123	191	854	348	139	119	371	6145

* *Investigations closed upon vacancy of office other than by resignation.*

** *Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.*