ANNUAL REPORT

1997

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

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801 SECOND AVENUE
NEW YORK, NEW YORK 10017
(PRINCIPAL OFFICE)

38-40 STATE STREET
ALBANY, NEW YORK 12207

277 ALEXANDER STREET
ROCHESTER, NEW YORK 14607

COMMISSION STAFF

GERALD STERN, ESQ.
Administrator and Counsel

ROBERT H. TEMBECKJIAN, ESQ.
Deputy Administrator & Deputy Counsel

CHIEF ATTORNEYS

Stephen F. Downs, Esq. (Albany)
John J. Postel, Esq. (Rochester)

SENIOR ATTORNEYS

Alan W. Friedberg, Esq.
Jean M. Savanyu, Esq.

STAFF ATTORNEY

Cathleen S. Cenci, Esq.

INVESTIGATORS/PARALEGALS

David M. Herr
Donald R. Payette
Rebecca Roberts*
Susan C. Weiser*

ADMINISTRATIVE PERSONNEL

Diane B. Eckert
Lee R. Kiklier
Shelley E. Laterza
Wanita Swinton-Gonzalez

BUDGET OFFICER

Maureen T. Sheehan

CLERK

Miguel Maisonet

SECRETARIES/RECEPTIONISTS

Dawn Ballenberger**
Georgia A. Damino
Lisa Gray
Linda J. Guilyard

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* Denotes individuals employed on a half-time basis.
** Denotes individual who left staff during 1996.

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

801 SECOND AVENUE
NEW YORK, NEW YORK 10017

212-949-8860 TELEPHONE
212-949-8864 FACSIMILE

HENRY T. BERGER, CHAIR
STEPHEN R. COFFEY
MARY ANN CROTTY
LAWRENCE S. GOLDMAN
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ALBERT B. LAWRENCE
CLERK

GERALD STERN
ADMINISTRATOR & COUNSEL

ROBERT H. TEMBECKJIAN
DEPUTY ADMINISTRATOR & DEPUTY COUNSEL

STEPHEN F. DOWNS
CHIEF ATTORNEY, ALBANY

JOHN J. POSTEL
CHIEF ATTORNEY, ROCHESTER

ALAN W. FRIEDBERG
SENIOR ATTORNEY

JEAN M. SAVANYU
SENIOR ATTORNEY

CATHLEEN S. CENCI
STAFF ATTORNEY

March 1, 1997

To Governor of the State of New York,
The Chief Judge of the State of New York and
The Legislature of the State of New York:

Pursuant to Section 42, paragraph 4, of the Judiciary Law of the State of New York, the New York State Commission on Judicial Conduct respectfully submits this Annual Report of its activities, covering the period from January 1, 1996, through December 31, 1996.

Respectfully submitted,

Henry T. Berger, Chair
On Behalf of the Commission

Special Resolution
of the
New York State
Commission on Judicial Conduct

The Members of the New York State Commission on Judicial Conduct, who have had the great pleasure and privilege of being associated with

E. Garrett Cleary,

A distinguished attorney who served with distinction as a member of the Commission from April 1981 to August 1996,

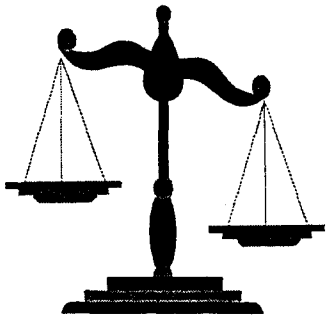
Resolve hereby to memorialize the unfailing good will, kind spirit and gentle manner with which he contributed to the work of the Commission and the administration of justice, and further

Resolve hereby to express to his wife Patricia and their seven children our deepest sympathy on their loss of a devoted husband and father and pillar of the community.

We miss Garrett as a colleague and friend.

March 1, 1997

TABLE OF CONTENTS



Introduction: Twenty-Two Years of Service

The New York State Commission on Judicial Conduct is the disciplinary agency designated by the State Constitution to review complaints of misconduct against judges of the State Unified Court System, which includes approximately 3,300 judges and justices. The Commission's objective is to enforce high standards of conduct for judges. While judges must be free to act independently and in good faith, they must also be held accountable for their misconduct by an independent disciplinary system.

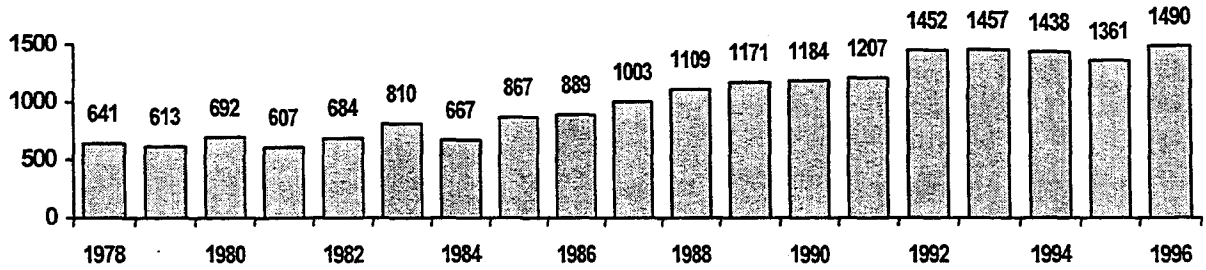
Judicial ethics standards are found primarily in the Rules on Judicial Conduct and the Code of Judicial Conduct. The Rules, which are promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, were most recently amended as of January 1, 1996. The Code was adopted in 1972 by the New York State Bar Association. (The text of the new Rules is annexed to this Report.)

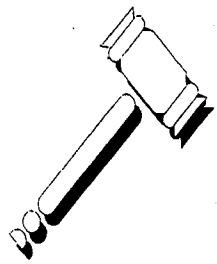
The number of complaints received by the Commission has steadily increased over the 22 years of our operation. *Last year, we received more complaints – 1490 – than we had received in any other year in our history.*

Indeed, in each of the last five years, the number of incoming complaints has been more than double the number received as recently as 1984, as reflected in the chart below. Remarkably, in that same period, both the Commission's staff and annual budget have actually decreased to a significant degree, creating some serious operational problems, as discussed more fully in the Budget section of this Report.

This current Report covers the Commission's activities during calendar year 1996.

Complaints Received Since 1978





Action Taken in 1996

Following are summaries of the Commission's actions in 1996, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

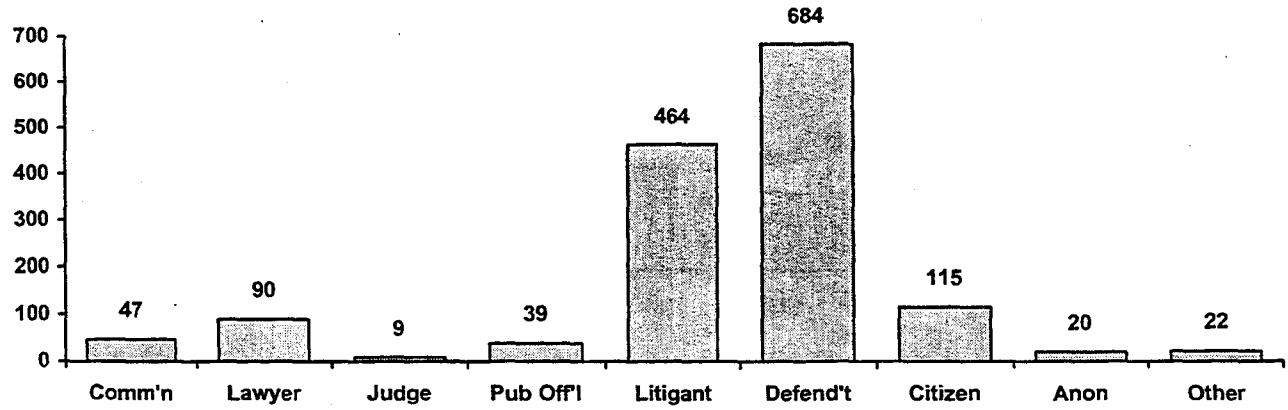
Complaints Received

In 1996, 1490 new complaints were received, marking the fifth consecutive year in which the number of complaints exceeded 1300. Of these, 1298 (87%) were dismissed by the Commission upon initial review, and 192 investigations were authorized and commenced. In addition, 187 investigations and proceedings on formal charges were pending from the prior year.

In 1996, as in previous years, the majority of complaints were received from civil litigants and defendants in criminal cases. Others were received from attorneys, law enforcement officers, civic organizations and concerned citizens not involved in any particular court action. Among the new complaints were 47 initiated by the Commission on its own motion. A breakdown of the source of complaints received in 1996 appears in the following chart.

Many of the new complaints dismissed by the Commission upon initial review were clearly without merit or outside the Commission's jurisdiction, including complaints against judges not within the state unified court system, such as federal judges, administrative law judges and New York City Housing Court judges. The Commission does not investigate complaints concerning judicial decisions, absent any underlying misconduct, such as demonstrated prejudice, conflict of interest or flagrant disregard of fundamental rights,. The Commission is not an appellate court and cannot reverse or remand trial court decisions.

Sources of Complaints Received in 1996



Investigations

On January 1, 1996, 157 investigations were pending from the previous year. During 1996, the Commission commenced 192 new investigations. Of the combined total of 349 investigations, the Commission made the following dispositions:

- 89 complaints were dismissed outright.
- 41 complaints involving 38 different judges were dismissed with letters of dismissal and caution.
- 23 complaints involving 16 different judges were closed upon the judges' resignation.
- 25 complaints involving 19 judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 29 complaints involving 27 different judges resulted in formal charges being authorized.
- 142 investigations were pending as of December 31, 1996.

Formal Written Complaints

On January 1, 1996, Formal Written Complaints from the previous year were pending in 30 matters, involving 21 different judges. During 1996, Formal Written Complaints were authorized in 29 additional matters, involving 27 different judges. Of the combined total of 59 matters involving 48 judges, the Commission made the following dispositions:

- 23 matters involving 15 different judges resulted in formal discipline (admonition, censure or removal from office).
- No matters were dismissed with a letter of dismissal and caution.
- 2 matters involving 1 judge were closed upon the judge's resignation.
- 3 matters involving 3 different judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 3 matters involving 2 different judges resulted in Formal Written Complaints being withdrawn.
- 28 matters involving 27 different judges were pending as of December 31, 1996.

Summary of All 1996 Dispositions

The Commission's dispositions involved judges at various levels of the state unified court system, as indicated in the ten tables on this and the following pages.

TABLE 1: TOWN & VILLAGE JUSTICES -- 2150,* ALL PART-TIME

	Lawyers	*Non-Lawyers*	*Total*
Complaints Received	98	247	345
Complaints Investigated	34	87	121
Judges Cautioned After Investigation	2	30	32
Formal Written Complaints Authorized	6	15	21
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	2	9	11
Formal Complaints Dismissed or Closed	2	2	4

*Refers to the approximate number of such judges in the state unified court system. Approximately 400 of this total are lawyers.

TABLE 2: CITY COURT JUDGES -- 378, ALL LAWYERS*

	Part-Time	*Full-Time*	*Total*
Complaints Received	41	134	175
Complaints Investigated	9	16	25
Judges Cautioned After Investigation	0	2	2
Formal Written Complaints Authorized	1	2	3
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	0	0	0
Formal Complaints Dismissed or Closed	0	0	0

* Approximately 92 of this total serve part-time.

TABLE 3: COUNTY COURT JUDGES – 77 FULL-TIME, ALL LAWYERS*

Complaints Received	122
Complaints Investigated	6
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Formal Complaints Dismissed or Closed	0

* Includes 6 who serve concurrently as County and Family Court Judges.

TABLE 4: FAMILY COURT JUDGES – 118, FULL-TIME, ALL LAWYERS

Complaints Received	157
Complaints Investigated	11
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

TABLE 5: DISTRICT COURT JUDGES – 48, FULL-TIME, ALL LAWYERS

Complaints Received	16
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 6: COURT OF CLAIMS JUDGES -- 51, FULL-TIME, ALL LAWYERS*

Complaints Received	5
Complaints Investigated	2
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

*Complaints against Court of Claims judges who serve as Acting Justices of the Supreme Court were recorded on Table 8 if the alleged misconduct occurred in Supreme Court.

TABLE 7: SURROGATES -- 74, FULL-TIME, ALL LAWYERS*

Complaints Received	35
Complaints Investigated	3
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

*Includes 10 who serve concurrently as Surrogates and Family Court judges, and 30 who serve concurrently as Surrogate, Family and County Court judges.

TABLE 8: SUPREME COURT JUSTICES -- 341, FULL-TIME, ALL LAWYERS

Complaints Received	355
Complaints Investigated	22
Judges Cautioned After Investigation	4
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

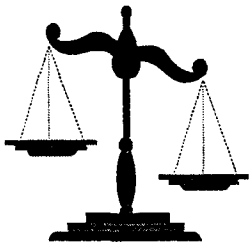
TABLE 9: COURT OF APPEALS JUDGES & APPELLATE DIVISION JUSTICES – 59 FULL-TIME, ALL LAWYERS

Complaints Received	38
Complaints Investigated	0
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 10: NON-JUDGES*

Complaints Received:	242

*The Commission does not have jurisdiction over non-judges, administrative law judges, housing judges of the New York City Civil Court, or federal judges. Such complaints are reviewed, however, to determine whether they should be referred to other agencies.



Formal Proceedings

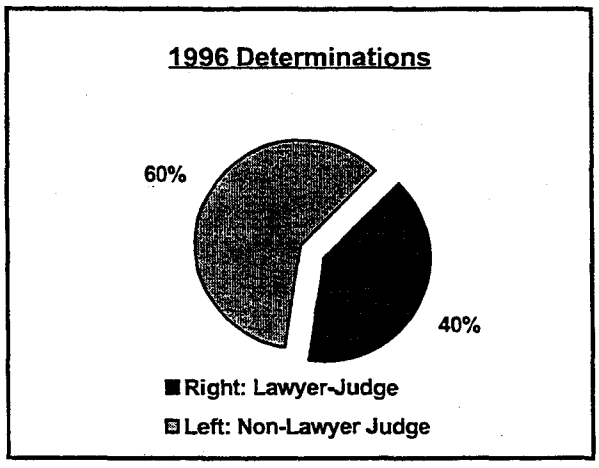
No disciplinary sanction may be imposed by the Commission unless a Formal Written Complaint, containing detailed charges of misconduct, has been served upon the respondent-judge and the respondent has been afforded an opportunity for a formal hearing.

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

Following are summaries of those matters which were completed and made public during 1996. The texts of the determinations are appended to this Report, in alphabetical order.

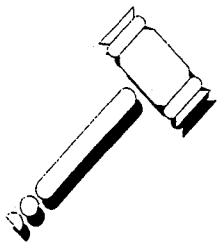
Overview of 1996 Determinations

The Commission rendered 15 formal disciplinary determinations in 1996: five removals, four censures and six admonitions. Nine of the respondents disciplined were non-lawyer judges, and six were lawyer-judges. Eleven of the respondents were part-time town or village justices, and four were judges of higher courts.



To put these numbers and percentages in some context, it should be noted that, of the 3,300 judges in the state unified court system, approximately 65% are part-time town or village justices. Approximately 80% of the town and village justices, and about 55% of all judges in the court system, are not lawyers. (While town and village justices may or may not be lawyers, judges of all higher courts must be lawyers.)

Of course, no set of dispositions in a given year will exactly mirror those percentages. However, since 1986, the total of public determinations, when categorized by type of court and judge, has roughly approximated the makeup of the judiciary as a whole: about 70% have involved town and village justices, and about 30% have involved judges of higher courts. Excluding cases involving ticket-fixing – largely a town and village court phenomenon, since traffic matters are typically handled by administrative agencies in larger jurisdictions – the overall percentage of town and village justices disciplined by the Commission (66%) is virtually identical to the percentage of town and village justices in the judiciary as a whole (65%).



Determinations of Removal

The Commission completed five disciplinary proceedings in 1996 which resulted in determinations of removal. The cases are summarized below.

Matter of Judith A. Carney

The Commission determined on September 19, 1996, that Judith A. Carney, part-time Town Justice of Dansville, Steuben County, should be removed from office for failing to remit court funds in a timely manner to the State Comptroller and failing to cooperate with the Commission during its investigation of the complaint. Judge Carney is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Richard E. Driscoll

The Commission determined on March 20, 1996, that Richard E. Driscoll, part-time Village Justice of Farnham, Erie County, should be removed from office for failing to remit court funds in a timely manner to the State Comptroller and failing to cooperate with the Commission during its investigation of the complaint. Judge Driscoll is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Patrick W. Miller

The Commission determined on January 19, 1996, that Patrick W. Miller, part-time Town Justice of DePeyster, St. Lawrence County, should be removed from office for failing to remit court funds in a timely manner to the State Comptroller and failing to cooperate with the Commission during its investigation of the complaint. Judge Miller is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of B. Marc Mogil

The Commission determined on February 13, 1996, that B. Marc Mogil, a Judge of the County Court, Nassau County, should be removed from office for, *inter alia*, (1) sending numerous harassing, threatening, annoying and otherwise offensive written communications to an attorney who had complained about the judge's conduct and competence, (2) disseminating an offensive statement on his judicial letterhead at a bar association event which *inter alia* threatened lawyers with adverse consequences for

lodging complaints against judges and (3) giving testimony that was false, misleading and lacking in candor during the Commission's investigation.

Judge Mogil requested review by the Court of Appeals, which accepted the Commission's determination and removed him from office.

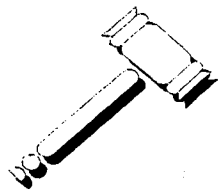
Matter of Ronald C. Robert

The Commission determined on September 17, 1996, that Ronald C. Robert, part-time Town Justice of Chester, Warren County, should be removed from office for presiding over numerous cases involving certain close friends and not disclosing the relationships to the other litigants, and for going to the workplace of a defendant who had criticized him, in order to criticize the defendant. Judge Robert is not a lawyer.

Judge Robert continued to preside over cases involving his friends, notwithstanding that he knew the Commission was examining his conduct. Moreover, the judge declared that he intended to continue presiding in such cases.

Judge Robert requested review by the Court of Appeals, which accepted the Commission's determination and removed him from office.

Determinations of Censure



The Commission completed four disciplinary proceedings in 1996 which resulted in determinations of censure. The cases are summarized below.

Matter of Harold L. Erway

The Commission determined on September 17, 1996, that Harold L. Erway, part-time Town Justice of Roseboom, Otsego County, should be censured for failing to remit court funds in a timely manner to the State Comptroller. Judge Erway is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of John F. Mahon

The Commission determined on August 8, 1996, that John F. Mahon, part-time Town Justice of Mohawk, Montgomery County, should be censured for making unprovoked, loud, angry and profane remarks to and about a traffic defendant and the defendant's mother. Judge Mahon is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Lorraine S. Miller

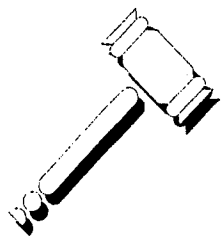
The Commission determined on August 14, 1996, that Lorraine S. Miller, a Justice of the Supreme Court, Kings County, should be censured for (1) sending anonymous, annoying and otherwise offensive communications to and about another Supreme Court Justice who had recently ended a personal relationship of several years with her and (2) failing to advise defense counsel in a criminal case that the jury had sent her a note and directing the prosecutor to proceed with a guilty plea that had been agreed to while the jury was deliberating.

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

Matter of James E. McKevitt

The Commission determined on August 8, 1996, that James E. McKevitt, part-time Town Justice of Malta, Saratoga County, should be censured for deciding a bail request on a basis other than the merits, in that he declined to release a defendant because he was aroused from bed to conduct the arraignment, and for profanity directed toward the County Sheriff. Judge McKevitt is not a lawyer.

The judge did not request review by the Court of Appeals.



Determinations of Admonition

The Commission completed six disciplinary proceedings in 1996 which resulted in determinations of public admonition. The cases are summarized below.

Matter of Bruce R. Bregman

The Commission determined on March 20, 1996, that Bruce R. Bregman, part-time Village Justice of Lynbrook, Nassau County, should be admonished for compelling traffic defendants who had pleaded not guilty by mail to attend coercive plea-inducing "pre-trial conferences" with Village prosecutors, then conducting improper *ex parte* conversations with prosecutors about those cases, rather than promptly setting trial dates as required by law (VTL §1806). Judge Bregman is a lawyer.

The judge did not request review by the Court of Appeals.

Matter of John Carr

The Commission determined on January 22, 1996, that John Carr, part-time Town Justice of Gaines, Orleans County, should be admonished for repeatedly refusing to appoint

an interpreter for a Spanish-speaking defendant and making comments that gave the appearance of an ethnic bias. Judge Carr is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Joseph J. Cerbone

The Commission determined on March 21, 1996, that Joseph J. Cerbone, part-time Town Justice of Mount Kisco, Westchester County, should be admonished for making an improper *ex parte* telephone call to the victim in an assault case which induced her to seek to withdraw her complaint, and for his practice of conducting after-hours and weekend arraignments in the local police station when his courtroom was available in the same building complex. Judge Cerbone is a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Michael L. D'Amico

The Commission determined on March 21, 1996, that Michael L. D'Amico, a Judge of the County Court, Erie County, should be admonished for repeatedly referring to the fact that he was a judge while being arrested and detained for Disorderly Conduct, to which he subsequently pleaded guilty and was fined a total of $145.

Judge D'Amico did not request review by the Court of Appeals.

Matter of David W. Hoag

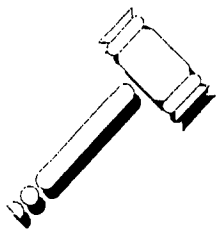
The Commission determined on March 20, 1996, that David W. Hoag, part-time Town Justice of Hardenburgh, Ulster County, should be admonished for filing charges in his own court on behalf of a private club by which he was employed. Judge Hoag is not a lawyer.

The judge did not request review by the Court of Appeals.

Matter of Bruce M. Kaplan

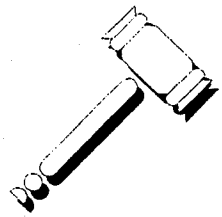
The Commission determined on May 6, 1996, that Bruce M. Kaplan, a Judge of the Family Court, New York County, should be admonished for repeatedly asserting the influence of his judicial office with police officers and professional child welfare case workers, on behalf of a woman with whom he had an intimate relationship, in connection with a child welfare dispute involving the woman and her former husband.

Judge Kaplan requested review by the Court of Appeals, which dismissed the request when the judge failed to perfect it. The judge also commenced a proceeding in Supreme Court to contest the validity of the Commission's determination.



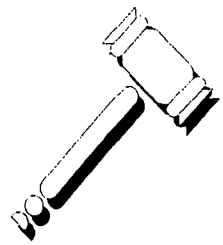
Dismissed or Closed Formal Written Complaints

The Commission disposed of six Formal Written Complaints in 1996 without rendering public discipline. In one of these cases, the judge resigned from judicial office before the matter could be completed. In three cases, the judges vacated office by operation of law, either by retiring or losing a bid for re-election, also before the matters could be completed. In two other matters, the authorization for a Formal Written Complaint was withdrawn; in one of these cases, the judge's term expired without further action being taken; in the other, the Commission authorized a letter of dismissal and caution to the judge.



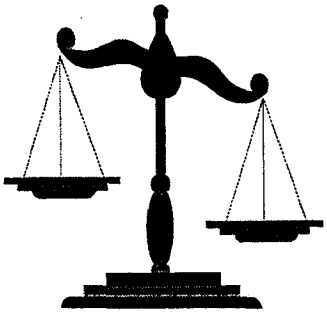
Matters Closed Upon Resignation

Seventeen judges resigned in 1996 while under investigation or formal charges by the Commission. The matters pertaining to these judges were closed. By statute, the Commission may retain jurisdiction over a judge for 120 days following resignation. The Commission may proceed within this 120-day period, but no sanction other than removal from office may be determined within such period. When rendered final by the Court of Appeals, the "removal" automatically bars the judge from holding judicial office in the future. Thus, no action may be taken if the Commission decides within that 120-period that removal is not warranted.



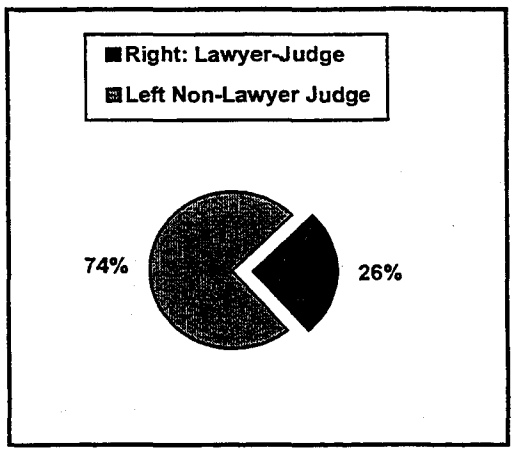
Referrals to Other Agencies

Pursuant to Judiciary Law Section 44(10), the Commission, when appropriate, refers matters to other agencies. In 1996, the Commission referred 33 matters to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor records keeping or other administrative issues. Seven matters were referred to attorney disciplinary committees, and one matter was referred to a District Attorney.



Letters of Dismissal and Caution

A *Letter of Dismissal and Caution* constitutes the Commission's written confidential suggestions and recommendations to a judge. It is authorized by Commission rule, 22 NYCRR 7000.1(l). Where the Commission determines that a judge's conduct does not warrant public discipline, it will issue a letter of dismissal and caution, privately calling the judge's attention to ethical violations which should be avoided in the future. Such a communication has value not only as an educational tool but also because it is essentially the only method by which the Commission may address a judge's conduct without making the matter public.



In 1996, the Commission issued 38 letters of dismissal and caution, all of which were issued upon conclusion of an investigation; none was issued upon disposition of a Formal Written Complaint. Thirty-two town or village justices were cautioned, including four who are lawyers. Six judges of higher courts – all lawyers – were also cautioned. The caution letters addressed various types of conduct, as the examples below indicate.

Political Activity. Five judges were cautioned for improper political activity. The Rules on Judicial Conduct prohibit judges from attending political gatherings or otherwise participating in political activities except for certain specifically-defined periods when they themselves are candidates for elective judicial office. Two judges who were not candidates for judicial office were cautioned for attending political gatherings, and two others were cautioned for contacting voters on behalf of political candidates. A fifth judge was cautioned for making statements and taking actions which made it appear that a political party leader was dictating the judge's choice in filling a particular court position.

Unauthorized *Ex Parte* Communications. Several judges were cautioned for having unauthorized substantive *ex parte* communications on pending matters. One judge, for example, routinely conferred on criminal cases with an Assistant District Attorney assigned to his court and discussed the merits of pending matters, outside the presence of defense counsel. Another was cautioned for threatening a potential civil-case defendant with arrest in a property dispute before the plaintiff had even filed the claim.

Conflicts of Interest. Several judges were cautioned for presiding over cases without disclosing actual or potential conflicts. For example, one part-time town justice who also practices law failed to recuse himself in a case involving a party to whom he had given legal advice relative to the same dispute. Two part-time town justices presided over cases involving their own court employees. A fourth part-time justice presided over a case in which the spouse of one of the litigants was an employee of the judge's pri-

vate business. A fifth part-time judge presided over a case in which a major witness was an employee of the judge's private business. Another part-time judge presided over a matter even though he was representing the alleged victim in a related proceeding. Another part-time judge presided over a case which involved the family of one of his students.

Public Comments in Pending Cases. Five judges were cautioned for improperly commenting in public on pending cases, contrary to the Rule which prohibits a judge from commenting on anything other than procedures with respect to pending cases in any court. Whether by letter to the editor, or commentary on television, or remarks to a journalist, etc., such public comment is prohibited.

Audit and Control. Four part-time town justices were cautioned for failing to make prompt deposits and remittances to the State Comptroller of court-collected funds, such as traffic fines. There was no indication of misappropriated funds, and the judges all took appropriate administrative steps to avoid such problems in the future.

Inappropriate Demeanor. Several judges were cautioned for exhibiting discourteous, intemperate or otherwise offensive demeanor to those with whom they deal in their official capacity. For example, one judge was cautioned for making snide remarks about the weight of a defendant in a traffic case. Another was cautioned for making offensive comments to women employees. A third was cautioned for making rude and profane comments to a court officer.

Poor Administration; Failure to Comply with Law. Several judges were cautioned for failing to meet certain mandates of law, either out of ignorance or administrative oversight. For example, one town justice improperly ordered license suspensions on defendants in speeding cases who timely pleaded not guilty by mail. Another town justice failed to order such license suspensions, as required by law, on defendants who did not respond to speeding tickets.

Two town justices were cautioned for dismissing cases or granting Adjournments in Contemplation of Dismissal without notice to the District Attorney. Even where the charge is relatively minor, the law requires the prosecutor's consent to an ACD, except in certain limited circumstances which did not apply here.

Another judge refused to order interpreters for two defendants who demonstrated the need for one.

Follow-Up on Cautions. Should the conduct addressed by a letter of dismissal and caution continue or be repeated, the Commission may authorize an investigation on a new complaint which may lead to a Formal Written Complaint and further disciplinary proceedings.

Last year, the Commission cautioned a town justice whose administration of a busy court with a small staff was so poor that numerous case files were lost and the final disposition of cases was seriously delayed. The Commission also referred the matter to the Office of Court Administration, which helped the judge set up a case management and records keeping system. A follow-up review six months later indicated that the judge was maintaining the system and was current.

Commission Determinations Reviewed by the Court of Appeals

Pursuant to statute, Commission determinations are filed with the Chief Judge of the Court of Appeals, who then serves the respondent-judge. The respondent-judge has 30 days to request review of the Commission's determination by the Court of Appeals, or the determination becomes final. In 1996, the Court decided the two matters summarized below.

Matter of Lester C. Hamel v. State Commission on Judicial Conduct

The Commission determined on November 3, 1995, that Lester C. Hamel, part-time Town Justice of Champlain, Clinton County, should be removed from office for summarily sentencing two individuals to jail – one for 15 days and the other for 22 days – without hearings, based on out-of-court *ex parte* communications alleging that they had not paid restitution. Judge Hamel effected the appearance of these two individuals by issuing arrest warrants predicated on the defendants' purported failure to appear for a fictitious court date. Moreover, he acted notwithstanding the fact that one of the individuals had in fact paid restitution, and the other had made out a *prima facie* case that she could not afford to make payment. Judge Hamel had been censured in 1991 and again in 1992 for failures related to the prompt deposit and remittal of court funds.

The Court of Appeals accepted the Commission's determination and removed Judge Hamel from office on June 5, 1996. The Court held that Judge Hamel's conduct evinced a "pervasive lack of regard for the most elementary procedural rules and rights of the individuals who appeared before him" resulting, *inter alia*, in the "unjust jailing of an individual for nonpayment of fines and restitution amounts that had, in fact, been paid." 88 NY2d 317, 320 (1996).

The Court stated:

> Moreover, [the judge] conducted the two described cases with complete disregard for fundamental principles. He sentenced the defendants to jail for purported nonpayment of court-imposed penalties without considering their ability to pay [citations omitted]; he wrongly used his power of summary contempt (*see*, Judiciary Law § 751[1]), thwarted the defendants' attempts to exercise their right to counsel, sentenced an individual without a conviction ever having been obtained or recorded, and arbitrarily issued arrest warrants on the basis of casual *ex parte* out-of-court discussions. *Id.* at 320.

Matter of B. Marc Mogil v.
State Commission on Judicial Conduct

The Commission determined on February 13, 1996, that B. Marc Mogil, a Judge of the County Court, Nassau County, should be removed from office for, *inter alia*, (1) sending numerous harassing, threatening, annoying and otherwise offensive written communications to an attorney who complained about the judge's conduct and competence, (2) disseminating an offensive statement on his judicial letterhead at a bar association event which *inter alia* threatened lawyers with adverse consequences for lodging complaints against judges and (3) giving testimony that was false, misleading and lacking in candor during the Commission's investigation.

The Court of Appeals accepted the Commission's determination and removed Judge Mogil from office on October 15, 1996.

The Court held that the evidence established the judge's misconduct. The Court rejected the judge's claim that the Commission failed to sustain its burden of proof because the evidence adduced in the case was circumstantial. The Court found not only that some of the charges were established by direct as well as circumstantial evidence, but that as to those charges for which there was only circumstantial evidence, the quality and quantity of the proof was sufficient to sustain the allegations.

The Court stated:

> In contending that the Commission failed to sustain its burden of proof, petitioner relies on the fact that the findings in this case rest largely on circumstantial evidence and credibility determinations. Petitioner errs, however, to the extent that he claims that the *nature* of the proof alone is sufficient to undermine the Commission's findings. There is no question that misconduct need only be established by a preponderance of the evidence (*Matter of Seiffert,* 65 N.Y.2d 278, 280, 491 N.Y.S.2d 145, 480 N.E.2d 734 [Commission's rule requiring proof only by preponderance of the evidence satisfies constitutional requirements]. Nor can there be any doubt that the Commission may meet its burden of proof with either circumstantial or direct evidence [Citations omitted]. Thus, the only evidentiary issue we examine is whether the proof establishes by a preponderance of the evidence that petitioner engaged in the acts of misconduct in the six charges sustained by the Referee and Commission. We conclude that it does. 88 NY2d 749, 752 (1996).

The Court also noted:

> Moreover, the quantity and quality of proof linking petitioner to the anonymous communications underlying Charge I, although circumstantial, leads directly to the inference that petitioner was the source of these communications. Notably, there are striking similarities between the anonymous communications and the documents that petitioner admittedly prepared. There is a strong resemblance not only in tone and style, but also in subject matter (dwelling on retaliation for outspoken comments against the judiciary including public revelation of the complainant's personal indiscretions), and in addition, there is overlap in the specific language, symbols and references used. *Id.* at 753-54.

Challenges to Commission Procedures

In addition to *Matter of Mogil* in the Court of Appeals, *supra*, which *inter alia* addressed such issues as (1) the appropriateness of rendering disciplinary determinations on the preponderance of the evidence and (2) sustaining misconduct charges on circumstantial evidence, the Commission staff litigated other matters in 1996 involving important constitutional and statutory issues and procedures.

Mogil v. Stern et al.

In September 1995, on the same day that his misconduct hearing was commenced before a Referee, County Court Judge B. Marc Mogil filed a complaint in District Court in the Eastern District of New York, seeking $60 million in damages against the Commission's Administrator, its Deputy Administrator, and an investigator. The complaint alleged that those individuals violated his civil rights under 42 U.S.C. §1983, by their actions in investigating and bringing disciplinary charges against him, which he characterized as "false" and "moronic".

In November 1995, the defendants filed a motion to dismiss on the grounds of absolute immunity and qualified immunity, the doctrine of abstention, lack of subject matter jurisdiction, and failure to assert any colorable constitutional claims.

In January 1996, the plaintiff filed a motion to disqualify the Attorney General's office from representing the defendants, on the grounds that the Attorney General had previously represented the plaintiff in prior (unrelated) matters. The defendants opposed the motion.

On September 23, 1996, Federal District Court Judge Leonard Wexler, granted the defense motion and dismissed the $60 million suit.

Matter of Honorable John Doe (An Individual Requesting Anonymity) v. Commission

On May 19, 1996, Family Court Judge Bruce M. Kaplan commenced an Article 78 proceeding in Supreme Court, New York County, seeking to overturn the Commission's determination that he be admonished, to remand to the Commission for a new hearing, and to stay release of the determination. (Although the petitioner was identified as Judge Kaplan throughout the papers, the action was commenced under the name

of "Doe.") The petitioner argued that the determination was "fatally defective" because Helaine Barnett, one of the six members to vote for admonition, was not a member of the Commission on May 6, the date the determination was filed. (The vote for admonition was taken on March 14, and Ms. Barnett's term as a member of the Commission expired on March 31. No other vote was taken in the matter.)

Supreme Court Justice Edward H. Lehner issued a decision on May 24, 1996, denying the request for a stay and denying the request to seal the record. An interim stay was granted in the Appellate Division, First Department on May 30, 1996, then vacated on July 18, 1996, when the judge's motion was denied in its entirety. (Thus, *inter alia*, notwithstanding the use of the name "John Doe" in the caption, the judge's request for anonymity was denied.)

On August 16, 1996, Judge Lehner issued a decision holding that the Commission's determination was invalid and remanded the matter to the Commission. The Court held that there was no six-member majority, as required by Judiciary Law 41(6), at the Commission's meeting on April 19, when some essential "act of approval" of the determination took place. As to Commission counsel's argument that the Court of Appeals has exclusive jurisdiction to review the validity of Commission determinations pursuant to Constitution and statute, the Court stated that it was acting to avoid "delay in the final adjudication of this controversy," while conceding that it was "unlikely" that the Court of Appeals, "with its broad powers of review," would impose a sanction without reviewing the procedural validity of the determination.

Commission counsel filed a notice of appeal, and the judge's attorney filed a notice of cross-appeal of the judgment insofar as it denied his request for dismissal of the formal written complaint and directed that the matter be remanded to the Commission. The Commission's brief and record were filed on April 8, 1997. The matter is scheduled for the October Term.

Matter of Honorable John Doe v. Commission

In August 1996 a Supreme Court Justice under investigation by the Commission commenced an Article 78 proceeding by order to show cause in Supreme Court, Queens County, seeking to stay his scheduled appearance to testify before a member of the Commission, to dismiss the complaint before the Commission, or in the alternative to require the Commission to amend the complaint to make it more "specific." The matter was transferred to New York County, where Commission counsel filed a motion to dismiss. The matter was discontinued by stipulation on September 10, 1996.

Amendments to the Rules on Judicial Conduct

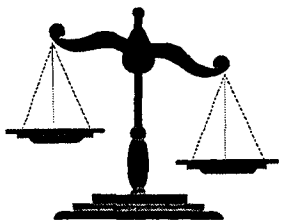
Effective January 1, 1996, new Rules on Judicial Conduct went into effect, upon approval of the Court of Appeals. In addition to certain substantive changes, the Rules were re-organized and renumbered. The full text is appended to this Report. Among the new provisions are the following.

RULE NUMBER	SUBSTANCE OF NEW PROVISION
100.2(D)	Prohibits membership by a judge in any organization which practices invidious discrimination.
100.3(B)(4)	Requires a judge to perform judicial duties without bias or prejudice.
100.3(B)(5)	Requires a judge to require lawyers to refrain from manifesting bias or prejudice in the judge's court.
100.3(B)(6)(a)-(e)	Authorizes certain *ex parte* communications.
100.3(B)(7)	Requires a judge to dispose of all judicial matters "promptly, efficiently and fairly."
100.3(B)(8)	Prohibits a judge from making public comments about a pending or impending matter in any court within the United States.
100.3(B)(9)	Prohibits a judge from criticizing or commending jurors for their verdict.
100.3(B)(10)	Prohibits a judge from disclosing or using non-public information acquired in a judicial capacity.
100.3(C)(1) & (2)	Require a judge and judge's staff to avoid bias or prejudice in the course of discharging administrative responsibilities.

RULE NUMBER	SUBSTANCE OF NEW PROVISION
100.3(D)(1)&(2)	Require a judge to report misconduct by lawyers and judges when there is evidence of a "substantial likelihood" of a "substantial violation" of a rule.
100.3(E)(1)(f)	Allows a judge to eliminate a personal or family financial conflict of interest that would otherwise require disqualification by disposing of the interest.
100.4(C)(3)(b)	Clarifies the limitations on a judge's civic and charitable activities with respect to fund-raising; permits a judge to accept an unadvertised award at an organization's fund-raising event.
100.4(D)(2)&(3)(b)	Provides that a judge may hold and manage family investments, including real estate.
100.4(D)(5)	Relaxes the restrictions on gifts or loans to judges and increases the threshold on reporting such gifts or loans to $150.
100.5(A)	Revises the rules on political activity; requires a judge or candidate for judicial office to maintain certain standards of conduct; prohibits inappropriate campaign pledges; permits comment in response to personal attacks.
100.5(C)	Requires a judge to prohibit his or her staff from engaging in certain political activity, such as contributing more than $500 a year to political campaigns.

Special Topics and Recommendations

In the course of its inquiries and other duties, the Commission has identified issues and patterns of conduct that require discussion outside the context of a specific disciplinary proceeding. We do this for public education purposes, to advise the judiciary so that potential misconduct may be avoided, and pursuant to our authority to make administrative and legislative recommendations.



Political Activity by a Judge's Appointees

Most of the judgeships throughout New York State are filled by election. The Rules on Judicial Conduct (Section 100.5) prohibit a judge from participating in political events or activities, except for certain specifically defined periods of time when the judge is a candidate for elective judicial office. A judge may not even participate in a non-political event sponsored by a political organization, and the organization need not be a major political party for the stricture to apply. (For example, in Opinion 92-95, the Advisory Committee on Judicial Ethics ruled that a judge could not attend a picnic sponsored by a major local employer, because the event was under the aegis of the company's political activities committee.)

The Rules also require a judge to impose certain constraints on his or her staff. Section 100.5(C) prohibits the judge's personal appointees from the following:

- holding elective office in a political organization, except as a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee;

- contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political func-

tions, except that this $500 limitation shall not apply to an appointee's contributions to his or her own campaign...; and

- personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club.

A judge is also obliged to assure staff compliance with Section 25.39 of the Chief Judge's Rules, which *inter alia* prohibit court employees from directly or indirectly using the influence of office to induce political contributions, or condition employment on an applicant's political affiliation.

The Commission cautioned five judges 1996 on politically-related issues. Two judges who were not candidates for judicial office were cautioned for attending political gatherings. Two others were cautioned for contacting voters on behalf of political candidates. A fifth judge was cautioned for making statements and taking actions which made it appear that a political party leader was dictating the judge's choice in filling a particular court position.

During the course of a recent investigation, the Commission became aware that the personal appointee of one judge was paid several thousand dollars by a second judge to assist in the second judge's re-election campaign. The appointee apparently did the political work on his own time and did not use court facilities in connection with the partisan political activity.

While the Rules prohibit a judge's personal appointee from *"contributing"* money or other valuable consideration to political campaigns in excess of $500 a year, there is no explicit prohibition on moonlighting for pay in this fashion. The Commission was advised by the Office of Court Administration that, in view of the foregoing, there did not appear to be a basis to act against the employee.

Certainly it is anomalous for a full-time court employee to earn several thousand dollars for work on a political campaign when that same employee is prohibited from contributing more than $500 a year to all political campaigns combined. An individual's remunerated contribution to the strategy and management of a campaign may be far more valuable than the maximum cash contribution of $500. Moreover, even if the employee were scrupulously to avoid using court facilities or doing political work on court time, there would appear to be an unseemly nexus

between politics and the courthouse in such a situation, with potential for at least the appearance of impropriety in any number of scenarios.

For example, the Rules prohibit the employee's direct participation in fundraising. Yet if the employee is paid for producing campaign literature which is used in fundraising, or directs other campaign employees on fund raising techniques, the rule would appear to be violated in spirit, if not explicitly in letter. Or, if the candidate-judge were prominently identified with a particular issue which the court employee helped to promote politically, and the employer-judge were subsequently to preside over a case involving that same issue, would the employee's advice to the judge be impartial and appear so to the litigants? Would the litigants even know that the judge's appointee had a political interest in the matter?

We respectfully suggest that the Office of Court Administration review the political activity rule and consider a prohibition or limitation on the political work in which a full-time court employee may engage, and at least impose a stricture on *paid* political work that would correspond to the very tight limits on political *contributions*.

The Right to a Public Trial

Despite lengthy discussions in our previous annual reports, and several confidential cautions and public disciplines, some judges continue to conduct arraignments and other court proceedings in private or otherwise inappropriate settings, when by law they should be open and accessible to the public.

With certain rare and specific exceptions, state law requires that all court proceedings be public (Section 4 of the Judiciary Law). Court decisions as early as 1971 have further addressed the issue, specifically holding that a judge may not hold court in a police barracks or schoolhouse.[1] Unfortunately, these standards are not uniformly observed throughout the state. Last year, for example, the Commission publicly admonished a town justice who, *inter alia*, conducted arraignments in the police station part of the local justice complex, notwithstanding the avail-

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

ability of his courtroom on the same floor of the same complex. *See, Matter of Cerbone*, summarized and reprinted in this report. The Commission also recently cautioned a judge who ordered the preliminary hearing in a major felony case closed to the public without holding a hearing on the closure, without permitting the press to address the issue and without maintaining a record of the matter or announcing his reasons for the closure in open court, apparently because the judge was unfamiliar with relevant law which required all these things. Indeed, as far back as 1983, the Commission publicly admonished a judge for effectively making his courtroom private by deliberately and wrongfully excluding a newspaper reporter. (See *Matter of Burr* in our 1984 Annual Report.)

Absent a controlling exception, all criminal and civil proceedings should be conducted in public settings which do not detract from the impartiality, independence and dignity of the court.

Over the last several years, the Office of Court Administration has made special efforts to improve the facilities available to full-time judges around the state. But OCA's role is limited, since it is the local municipality, not the state government, which is responsible for providing appropriate space.

Some municipalities do not provide court facilities for their town and village justices, thereby requiring them to use other settings such as their homes or places of business – a practice which impairs not only the participant's right to a public trial but also the public's right to access, as well as effective oversight of court business by court administrators. Even if in theory such sessions are open to the public, few people are likely to know about or attend proceedings in a judge's house or place of business.

In view of these realities, OCA should continue to give special emphasis in its judicial training and education programs for town and village justices on the subject of proper, public settings for arraignments and other court proceedings.

Improperly Barring Children from the Court

Over the past several years, the Commission has become aware of a practice by some judges of excluding children from the courtroom, whether or not the children are behaving disruptively. In some instances, signs have been posted outside courtroom doors, stating that children are not permitted to enter. These exclusion-

ary practices and notices do not distinguish the reasons for the child's presence or the type of case involved: for example, the child may be accompanying a parent who is in court to dispose of a traffic ticket, or the child may be brought by one parent as a spectator in a case involving the other parent. Nor do these practices readily identify the age of the children to be excluded. Often, the parents do not even know until they arrive at court that their children will not be permitted inside.

While judges are responsible for the decorum of their courts and have discretion to act in order to maintain the dignity of proceedings, *e.g.* by excusing disruptive individuals from the courtroom, there is no rule or policy that permits the automatic exclusion of children or other individuals, regardless of the nature of the proceeding. Indeed, several recent appellate decisions have addressed the subject:

> *People v. Miller*, 639 NYS2d 50 (2nd Dept 1996), in which the Appellate Division held that exclusion of a defendant's 12-year-old child from the courtroom merely on the basis of the child's age was reversible error.
>
> *People v. James*, 645 NYS2d 300 (1st Dept 1996), in which the Appellate Division held that exclusion of a defendant's 8-year-old child was reversible error.
>
> *People v. Kan*, 78 NY2d 817 (1991), *People v. Cole*, 207 AD2d 273 (1st Dept 1994) and *People v. Gutierrez*, 86 NY2d 817 (1995), in which the Court of Appeals and the Appellate Division have held it reversible error to exclude members of the defendant's family.

Part 700 of the Rules of the Appellate Division, Second Department, pertaining to "Court Decorum" applicable to all courts of the Second Department, *inter alia* prohibits "disruptive conduct" while court is in session, and defines "disruptive conduct" as "any *intentional* conduct by any person in the courtroom that *substantially* interferes with the dignity, order and decorum of judicial proceedings" (§700.3, emphasis added). No provision of law or court rules permits the *preventive* exclusion of any person or class of persons from a public proceeding.

The blanket exclusion of all children concerns not only their right to be present at a public proceeding, but also the right of their custodians to be present. Automatically excluding a child who has accompanied a parent, or ordering a parent with a

well-behaved child to leave, without even advance notice, deprives the parent of the right to be present for *other* public cases heard in court that day, as well as the right to be present for his or her own case or the case of a family member or friend.

The Commission is aware that some administrative judges, upon learning of such blanket exclusions, have advised their colleagues to terminate the practice and limit such exclusions to disruptive children or other individuals. We suggest that, in communications with administrative judges and as part of its judicial training and education programs, the Office of Court Administration remind judges of the impropriety of preventively excluding children or anyone else from the courtroom.

The Need for Recording Official Proceedings in Town and Village Courts

In its 1994 Annual Report, the Commission commented extensively on the need for town and village courts to record official proceedings. The topic has generated much discussion among court officials and local judges and was recently featured in an article in *The Magistrate* (January/February 1997 edition). In the article, by Nancy M. Sunukjian, Senior Counsel to the Town and Village Courts Resource Center, judges were advised that, where such recordings exist, the court should permit members of the public who wish to do so to make copies of the tapes. The article points out that no authority can be found for denying access to such recordings to any person.

The problem is that, in most town and village courts, recordings are still not made, and problems persist as a result. For that reason, the Commission again presents its views on this matter and urges action.

Town and village courts, which account for two-thirds of the New York State judiciary, are not required to make verbatim transcripts or tape recordings of proceedings. Some courts do, but most do not.

Where tape recordings are made, they are not considered to be the official record but rather an assistance to the judge in subsequent proceedings. The practice varies as to making tapes available to parties and their lawyers.

Over the years, the Commission has come across cases in which the recollections of various witnesses and the judge are so disparate as to suggest that someone is not telling the truth, such as whether the defendant pleaded guilty at arraignment, or whether the judge advised the defendant of the right to counsel, or whether the judge used ethnic epithets or other inappropriate language in the course of proceedings. Where a tape or verbatim transcript exists, of course, the Commission can more accurately determine what actually occurred and make an appropriate finding. The absence of a record may give some judges undue license to make prejudicial statements or take prejudicial action against defendants. It may also encourage a complainant to make unsubstantiated misconduct claims against the judge. A record protects everyone, including the judge.

The problem is especially significant in traffic and criminal cases because fundamental liberty interests are at stake and, *inter alia,* the incarceration of the defendant may result.

For years, the Commission has identified situations in which judges of local courts have failed to provide the most fundamental rights to defendants in criminal and Vehicle and Traffic Law (V&T) matters. Defendants in some instances have been convicted without trial or pleas of guilty, or have not been properly advised of or afforded their rights, such as the rights to bail and counsel. The absence of a record increases the likelihood that such unfortunate abuses will not be detected. In principle, no defendant should be arraigned, tried or allowed to plead guilty without a record made of the event.

Town and village courts are funded by the municipalities in which they are located, not by the State. The Commission is aware of the financial constraints under which most town and village courts operate. Nevertheless, the need for recording criminal and V&T proceedings is too important to be avoided for financial reasons. Indeed, with the universal availability of inexpensive, simple tape recording equipment, such as portable cassette players, the expense should not be prohibitive and funding should be made available.

We again suggest that the Office of Court Administration work with the Legislature, the State Magistrates Association, the Association of Towns and other relevant organizations to facilitate the goal of recording all criminal and V&T proceedings in town and village courts, and, if possible, civil cases as well. OCA might also issue guidelines for using and preserving tapes of proceedings, such as

(1) an announcement by the judge that the proceeding is being recorded and (2) preservation for some reasonable period. How such tapes would be maintained and made available to the defendant, the public and, on request, to the appellate court would also be a matter for OCA to consider. The recent article in *The Magistrate* was an important step in the right direction.

Improper Delegation of Judicial Duties

It is fundamental to the maintenance of an impartial and independent judiciary for a judge to exercise the powers of office without undue or unauthorized reliance upon nonjudges. From time to time, the Commission has investigated cases in which judges have actually or effectively ceded certain sacrosanct non-transferable duties to others. Last year, the Commission authorized formal charges against a town justice who allegedly signed blank arrest warrants and left them with his court clerk for issuance as requested by the police or otherwise needed. The matter is still pending.

In *Matter of Greenfeld,* 71 NY2d 389 (1988), a village justice was removed from office for, *infer alia,* improperly permitting the deputy village attorney to perform judicial duties in certain cases, including accepting guilty pleas, determining the amount of fines to be paid by defendants, and entering dispositions on official court records.

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

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

In 1992, the Commission admonished 11 non-lawyer town and village justices in Cayuga County for delegating to the county sheriff's department the authority to review and approve bail bonds and sign the judges' names to release the defendants. The judge's responsibility to ensure that a bail bond provides adequate protection that a defendant will return to court cannot be delegated. In the 11 Cayuga County cases, numerous defendants were, in fact, released on legally insuffi-

cient bail bonds at the discretion of the sheriff's department, without review by a judge.

Such improper delegations of power undermine a fundamental judicial obligation to hear both sides in a dispute independently and impartially and to render decisions accordingly.

Selected Comments on
New Provisions in the Rules

As effective on January 1, 1996, the Rules on Judicial Conduct contain some new provisions and at least one renewed provision that require special attention.

A Judge's Obligation to Avoid Bias
And Prevent Displays of It by Others

Section 100.3(B)(4) of the Rules, *inter alia*, explicitly requires a judge to "perform judicial duties without bias or prejudice against or in favor of any person," and not to manifest bias or prejudice, including but not limited to the following bases: "age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status."

Significantly, the new Rules also require a judge to require staff, court officials, lawyers engaged in proceedings before the judge, and others subject to the judge's control, to refrain from such conduct. Section 100.3(B)(4) & (5).

The new Rule appropriately recognizes that public confidence in the integrity and impartiality of the judiciary and the justice system can be undermined not only by impropriety that a judge commits, but also by the impropriety that a judge permits. The courtroom participant or spectator forms an opinion of the system not only by the behavior of the judge but by the totality of the circumstances attending a proceeding. It would be bad enough, of course, for a judge to convey bias or prejudice by word or conduct. Indeed, over the years, the Commission has disciplined numerous judges for such behavior. *See, e.g., Matter of Agresta v. Commission*, 64 NY2d 327 (1985) (judge disciplined for referring to "another nigger in the woodpile" during court proceedings), and *Matter of Aldrich v. Commission*, 58

NY2d 279 (1983) (judge disciplined *inter alia* for telling juveniles that they would be jailed with "the blacks from New York City" who "will rape the shit out of you"). It would be little better, of course, for a judge to tolerate such conduct from others as engage in it directly, and the new Rule obliges all judges to insure the cooperation of all in maintaining an atmosphere in court free of bias and prejudice.

Limitations on a Judge's Comments To a Jury After Verdict Is Rendered

In several recent annual reports, the Commission reminded judges not to praise or criticize jurors for particular verdicts but simply to thank them for their service, (1) consistent with a provision of the old Rules which required a judge to be patient, dignified and courteous toward jurors and others, and (2) consistent with the American Bar Association Standards on the Function of the Trial Judge.

The Commission is pleased that Section 100.3(B)(9) of the new Rules explicitly adopts this standard:

> A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Even if done in a temperate manner, a judge's criticism of jurors who perform their lawful function in good faith is improper and can undermine public confidence in an essential element of the legal process: participation by average citizens in the justice system. Jurors who leave jury service, having been told by the judge, for example, that they acquitted a guilty person, are apt to remember that message if they are called again for jury service. Similarly, jurors who convict a defendant might be more inclined to convict again if praised by the judge for their action. Though it has been rare in our experience for jurors to be praised for an acquittal, such commentary by a judge may also leave an impression that might influence their subsequent service.

Public Reports of Gifts and Compensation

Both the old Rules and the new placed certain limitations on the nature of gifts and compensation that a judge may permissibly receive, and both required that certain gifts and compensation be publicly reported. (For example, a judge may receive a gift from a relative or friend that is fairly commensurate with the occa-

sion and the relationship, such as an anniversary or birthday gift from a spouse, and such gifts need not be reported.) However, a *full-time* judge is required to report the date, place and nature of any compensation in excess of $150, as well as some categories of gifts in excess of $150, according to Sections 100.4(D)(5)(h) and 100.4(H)(2) of the Rules. Such reports must be made at least annually and shall be filed as a public document in the office of the clerk of the judge's court or other office as may be designated by law.

It has been the Commission's experience that many full-time judges do not comply with this requirement, either because they are unaware of it or because they wrongly assume the requirement is met by the filing of an annual financial disclosure statement to the Ethics Commission for the Unified Court System, pursuant to Part 40 of the Rules of the Chief Judge. The various reporting requirements both of the Rules on Judicial Conduct and the Rules of the Chief Judge bear special attention by OCA in its judicial training and education programs.

Construing Advisory Opinions Narrowly

For ten years, the Advisory Committee on Judicial Ethics has been issuing and publishing formal opinions to members of the judiciary who seek advice as to whether certain prospective behavior would comport with the Rules on Judicial Conduct. Pursuant to law, for purposes of disciplinary action by the Commission, a judge who adheres to an advisory opinion on a specific set of facts is presumed to have acted within the Rules on Judicial Conduct.

The critical features of this presumption are (1) that it is rebuttable, and (2) that it applies to the specific facts as presented in the opinion. In some instances, the Advisory Committee, based on unique considerations, authorizes conduct that might not apply to other judges. The Advisory Committee's opinions are based on the facts as they are presented to the Committee. If, for example, it turned out that the facts presented by the requesting judge were inaccurate, or incomplete, or otherwise materially deficient, the judge's adherence to the opinion would not necessarily be dispositive upon review by the Commission.

A purposefully misleading request for opinion would be rare. However, it is not unusual for a judge under investigation by the Commission to rely on a subjective interpretation of advisory opinions issued to other judges, covering different sub-

jects. For example, a judge who was recently asked to respond to an allegation of improper activity at a political organization recited a number of advisory opinions which permitted judges to engage in certain civic activities sponsored by non-political organizations.

The Commission encourages judges to seek advisory opinions whenever there is any doubt about prospective activity. The Commission also cautions judges to construe narrowly the published advisory opinions, recognizing that the opinions address specific fact patterns, and that few if any fact patterns are identical.

Legislative Recommendations

In previous annual reports, the Commission has made various recommendations to the Legislature for passage of laws affecting the Commission's operation. In the past two years, there has been considerable discussion about certain potential statutory amendments affecting confidentiality, the standard of proof at hearings, and the power to suspend a judge from office under certain circumstances.

Public Hearings and the Standard of Proof

At present, under law, all Commission investigations and hearings are confidential. Commission activity is only made public at the end of the disciplinary process – when a determination of public admonition, public censure or removal from office is rendered and filed with the Chief Judge pursuant to statute – or when the accused judge requests that the formal disciplinary hearing be public.

In 1996, the Senate Judiciary Committee, chaired by Senator James Lack, reported a bill which was passed by the Senate that would have made all Commission proceedings public at the stage that formal charges were served by the Commission on a judge. The Legislature adjourned without the matter being taken up by the Assembly.

While some facets of the bill raised concerns – particularly the provisions to raise the standard of proof from "preponderance of the evidence" to "clear and convincing evidence," and the imposition of a six-year statute of limitations in most cases – the bill was an important step forward. The Commission has long advocated that post-investigation formal proceedings be public, as they were in New York State until 1978, and as they are in 34 other states.

Senator Lack reintroduced his bill this year – with an even more problematic four-year statute of limitations – coupled with proposed legislative changes in the attorney disciplinary process which, among other things, would make formal proceedings in those cases public as well.

Suspension of Judges from Office

At present, there are two circumstances in which a judge may be suspended from office, with or without pay. The Court of Appeals may suspend a judge from office should the judge be charged with a felony. The Court may also suspend a judge pending its review of a Commission determination that the judge be removed from office.

Until 1978, in addition to the power to determine that a judge be admonished, censured or removed from office, the Commission had the power to determine that a judge be suspended from office for up to six months, with or without pay, as a discipline. The Commission recommends that suspension be reinstated as one of the permissible disciplines imposed on a judge. There is some misconduct which warrants discipline more serious than a censure but that does not warrant removal from office, particularly where the judge's effectiveness has not been irreparably compromised.

There are also some circumstances where a judge's alleged misconduct is so serious or repetitive that suspension as an interim remedy might be appropriate, upon application to the Court of Appeals.

The Commission recommends that the Legislature review the relevant constitutional and statutory provisions and consider authorizing suspension both as a final discipline and as an interim remedy.

The Commission's Budget

Since 1978, when the present system for disciplining judges was implemented, the Commission has managed its finances with extraordinary care. In periods of relative plenty, we nevertheless kept our budget small; in times of financial crisis, we made difficult sacrifices. Our average annual increase since 1978 was less than one percent. The actual dollar amount of our annual budget – *without adjusting for inflation* – is virtually the same as it was 20 years ago.

A 25% Reduction
Over Seven Years

Since 1990, the Commission has been under virtually unrelenting budgetary pressure. From a high of $2.3 million, our funding has been reduced by about 25%. Our funding level is now set at about $1,736,500 – which is barely more than the $1,644,000 we had in 1978. At the same time, the number of complaints received and reviewed in a year has more than doubled (to nearly 1500 per year), and the number of investigations authorized and conducted in a year has increased more than 22%. The number of judges under the Commission's jurisdiction is approximately 3,300. Managing such an increased workload in so large a system, with steadily dwindling resources, has been formidable and not without sacrifices to our efficiency.

For example, we have only one lawyer and one part-time investigator in our Rochester office, covering the entire Fourth Judicial Department. We have only one part-time investigator in our New York office, which covers the First and Second Departments. Moreover, Commission members serve without compensation.

A No-Growth Budget

The Commission's total budget for 1978-79 was $1,644,000, or $92,500 less than our budget for 1997-98. In some years, our budget was increased in small increments, primarily to reflect obligations applicable to all state agencies, such as contractually-mandated cost-of-living raises and annual rent increases. *Six times since 1979, we voluntarily requested budgets no greater* ***or even less*** *than the previous year's amount.* We were apprised by the Division of the Budget that we were the only agency to do so, at a time in the 1980s when such sacrifices were not mandated by fiscal emergencies. Moreover, an exhaustive audit in 1989 by the State Comptroller found that the Commission's finances were in order, that our budget practices were all consistent with state policies and rules, and that no changes in our fiscal practices were recommended.

The extraordinary task of maintaining a virtually no-growth budget over 18 years has left no "fat" to be trimmed from our operation. The financial cuts that state agencies have endured in recent years continue to hit hard, and among agencies such as the Commission which have demonstrated austerity in pre-crisis times, the current cuts have a disproportionately greater impact. Steep cuts in both personnel and non-personal services were necessary to accomplish past cutbacks. Over the last ten years, we cut our staff by more than 50%, dramatically reduced our office space and rent, and otherwise reduced

expenditures. Our statewide staff has been reduced from 41 in 1988, to 26 in 1992, to 20 this year, two of whom are part-time. Some investigations have already been limited because we do not have adequate funds to permit staff travel for witness interviews, review of court records, observation of court proceedings and the like, particularly where overnight lodging is required.

For the fiscal year beginning April 1, 1997, our budget was increased by $40,500 (2.4%), which is a step in the right direction. We are still concerned that our budget is less than what we need to perform our constitutional mandate, and we will continue to request an appropriate level of funding in the future.

The Declining Budget of the State Commission on Judicial Conduct

Fiscal Year	Annual Budget	Complaints Received	Attorneys on Staff	Investigators on Staff	Total Staff
1978-79	$1,644,000	641	21	18 f/t	63
≈	≈	≈	≈	≈	≈
1988-89	$2,224,000	1109	8	12 f/t, 2 p/t	41
1989-90	$2,211,500 ↓1.4%	1171	8	9 f/t, 2 p/t	41
1990-91	$2,261,700 ↑2.2%	1184	8	8 f/t	37
1991-92	$1,827,100 ↓19.2%	1207	7	7 f/t	32
1992-93	$1,666,700 ↓8.7%	1452	7	6 f/t, 1 p/t	26
1993-94	$1,645,000 ↓1.3%	1457	7	4 f/t, 1 p/t	26
1994-95	$1,778,400 ↑8.1%	1438	7	4 f/t, 1 p/t	26
1995-96	$1,584,100 ↓10.9%	1361	7	3 f/t, 1 p/t	21
1996-97	$1,696,000 ↑7%	1490	7	2 f/t, 2 p/t	20
1997-98	$1,736,500 ↑2.4%	* *	7	2 f/t, 2 p/t	20

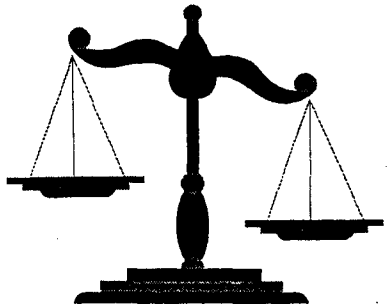
Conclusion

Public confidence in the high standards, integrity and impartiality of the judiciary, and in an independent disciplinary system which keeps judges accountable for their conduct, is essential to the rule of law. The members of the New York State Commission on Judicial Conduct are proud of the Commission's contributions not only to that ideal, but also to a heightened awareness of the appropriate ethics standards incumbent on all judges, and to the fair and proper administration of justice.

Respectfully submitted,

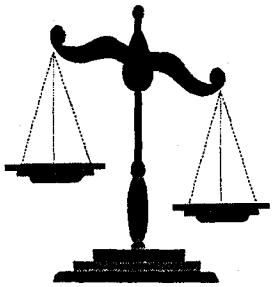
HENRY T. BERGER, CHAIR
STEPHEN R. COFFEY
MARY ANN CROTTY
LAWRENCE S. GOLDMAN
DANIEL F. LUCIANO
FREDERICK M. MARSHALL
JUANITA BING NEWTON
ALAN J. POPE
EUGENE W. SALISBURY
WILLIAM C. THOMPSON

APPENDIX



Commission Member Biographies
Staff Biographies
Roster of Referees
The Commission's Powers, Duties & History
Text of the Rules on Judicial Conduct
Commission Determinations Rendered in 1996
Statistical Analysis of Complaints

1997 Annual Report
New York State
Commission on Judicial Conduct



Biographies of Commission Members

There are eleven members of the Commission on Judicial Conduct: four appointed by the Governor, three by the Chief Judge, and one each by the four leaders of the Legislature. Following are biographies of the current Commission members and legal staff, as well as two members whose tenures on the Commission ended during this past year: Barry C. Sample and E. Garrett Cleary. At press time, there was one vacancy on the Commission.

HENRY T. BERGER, ESQ., is a graduate of Lehigh University and New York University School of Law. He is a partner in the firm of Fisher, Fisher and Berger. He is a member of the Association of the Bar of the City of New York and serves on the Committee on International Human Rights and the Task Force on the Constitutional Convention. Mr. Berger served as a member of the New York City Council in 1977.

E. GARRETT CLEARY, ESQ., served on the Commission from 1981 until his death in 1996. He attended St. Bonaventure University and the Albany Law School. He was an Assistant District Attorney in Monroe County from 1961 through 1964, when he resigned as Second Assistant District Attorney to enter private practice. He was a partner in the law firm of Harris, Beach & Wilcox in Rochester until his death. He was twice appointed by Governor Nelson A. Rockefeller as a Special Assistant Attorney General to investigate matters in Hamilton County and Ontario County, and as a Special Prosecutor in Schoharie County. Mr. Cleary was a member of the Monroe County Bar Association and served on its governing body, the Monroe County Bar Foundation , St. John Fisher College (where he served a term as Chairman of the Board), Better Business Bureau of Rochester, and the Monroe County Advisory Committee for the Title Guarantee Company and as a trustee to Holy Sepulchre Cemetery. He and his wife Patricia raised their seven children in Rochester.

STEPHEN R. COFFEY, ESQ., is a graduate of Siena College and the Albany Law School at Union University. He is a partner in the law firm of O'Connell and Aronowitz in Albany. He was an Assistant District Attorney in Albany County from 1971-75, serving as Chief Felony Prosecutor in 1974-75. He has also been appointed as a Special Prosecutor in Fulton and Albany Counties. Mr. Coffey is a member of the New York State Bar Association, where he serves on the Criminal Justice Section Executive Committee and lectures on Criminal and Civil Trial Practice, the Albany County Bar Association, the New York State Trial Lawyers Association, the New York State Defenders Association, and the Association of Trial Lawyers of America.

MARY ANN CROTTY is a graduate of the State University of New York at Albany, where she earned a Bachelor of Science degree (*cum laude*) and a Masters in Public Administration. She is Vice President of PB Aviation, an international engineering consulting firm. Ms. Crotty served previously in the office of Governor Mario M. Cuomo as Director of Policy Management, as Deputy Director of State Operations and Policy Management, and as Assistant Secretary to the Governor for Transportation. She has also served as Deputy Budget Director and Senior Legislative Budget Analyst for the New York State Assembly Ways and Means Committee, and as a Budget Examiner in the New York State Division of the Budget. Ms. Crotty is a recipient of the Governor Nelson A. Rockefeller Distinguished Alumni Award.

LAWRENCE S. GOLDMAN, ESQ. is a graduate of Brandeis University and Harvard Law School. Since 1972, he has been a partner in the criminal law firm of Goldman & Hafetz in New York City. From 1966 through 1971, he served as an assistant district attorney in New York County. He has also been a consultant to the Knapp Commission and the New York City Mayor's Criminal Justice Coordinating Council. Mr. Goldman is currently a director of the National Association of Criminal Defense Lawyers and co-chairman of its continuing legal education committee, former chairperson of its white-collar committee and of its ethics advisory committee, a member of the executive committee of the criminal justice section of the New York State Bar Association and a member of the advisory committee on the Criminal Procedure Law. He is a past president of the New York State Association of Criminal Defense Lawyers, and a past president of the New York Criminal Bar Association. He has lectured at numerous bar association and law school programs on various aspects of criminal law and procedure, trial tactics, and ethics. He has received the Outstanding Practitioner Awards of the New York State Bar Association Criminal Justice Section and the New York Criminal Bar Association. He is a director of The Bronx Defenders and an honorary trustee of Congregation Rodeph Sholom in New York City. He and his wife Kathi have two children and live in Manhattan.

HONORABLE DANIEL F. LUCIANO was educated in the public schools of the City of New York and attended Brooklyn College, from which he received a Bachelor of Arts degree. He thereafter attended Brooklyn Law School, earning a Bachelor of Laws degree in 1954. After serving in the United States Army in Europe, he entered the practice of law, specializing in tort litigation, real property tax assessment certiorari and general practice. He was engaged as trial counsel to various law firms in litigated matters. Additionally, he served as an Assistant Town Attorney for the Town of Islip, representing the Assessor in real property tax assessment certiorari from 1970 to 1982, and chaired the Suffolk County Board of Public Disclosure from 1980 to 1982. He was elected a Justice of the Supreme Court in 1982 and presided over a general civil caseload. In May 1991 he was appointed to preside over Conservatorship and Incompetency proceedings, later denominated Guardianship Proceedings in Suffolk County. He was appointed an Associate Justice of the Appellate Term, Ninth and Tenth Judicial Districts, in April of 1993. On May 30, 1996, he

was appointed by Governor George E. Pataki as an Associate Justice of the Appellate Division, Second Judicial Department. Justice Luciano is one of the founders of the Alexander Hamilton Inn of Court and served as a Director of the Suffolk Academy of Law. He was the Presiding Member of the New York State Bar Association Judicial Section, is currently a Delegate to the House of Delegates of the New York State Bar Association and holds the position of First Vice President of the Association of Justices of the Supreme Court of the State of New York. Justice Luciano has held the positions of Director of the Suffolk County Women's Bar Association, and Secretary and Treasurer of the Association of Justices of the Supreme Court of the State of New York. Additionally, he is a member of the Advisory Council of the Touro College, Jacob D. Fuchsberg Law Center.

HONORABLE FREDERICK M. MARSHALL attended the University of Buffalo and is a graduate of its law school. He is admitted to practice in all courts of the State of New York as well as the Federal Courts. He is Of Counsel to the law firms of Kinney, Buch, Mattrey & Marshall and Kobis & Marshall in Buffalo and East Aurora. He has served as Chief Trial Assistant in the Erie County District Attorney's office, Senior Erie County Court Judge, President of the New York County Judges Association, Supreme Court Justice of the State of New York, and President of the State Association of Supreme Court Justices. Justice Marshall has served as Administrative Judge of the Eighth Judicial District and Administrative Justice of the Narcotics Court in the Fourth Judicial Department. In addition to his 30 year tenure in the judiciary, Justice Marshall has been an instructor in constitutional law at the State College at Buffalo, Chairman of the Advisory Council of the Political Science Program at Erie Community College, Chairman of the New York State Bar Association Judicial Section, and has been designated Outstanding Citizen of the Year by the Buffalo News. In 1989 the Bar Association of Erie County presented Justice Marshall with the Outstanding Jurist Award. The University of Buffalo Alumni Association has conferred upon him its Distinguished Alumni Award. He served as a First Lieutenant in the Infantry in World War II. Justice Marshall and his wife have three sons and live in Orchard Park, New York, and Bradenton, Florida.

HONORABLE JUANITA BING NEWTON is a graduate of Northwestern University and the Columbus Law School of The Catholic University of America. She is a Judge of the Court of Claims and an Acting Justice of the Supreme Court. Judge Newton serves as the Administrative Judge, First Judicial District, Supreme Court, Criminal Branch. Previously, she served as Executive Assistant to the Deputy Chief Administrative Judge for the New York City Courts, as Executive Director and General Counsel to the New York State Sentencing Guidelines Committee, as an Assistant District Attorney in Bronx County and as a high school social studies teacher. She is a member of the National Association of Women Judges, the Judicial Friends and the Association of Court of Claims Judges, which she serves as Treasurer. Judge Newton serves on numerous New York State judicial committees and programs, including the Judicial Committee on Women in the Courts, the

Judicial Commission on Minorities, the Advisory Committee on Criminal Practice and Procedure, the Anti-Bias Committee and Panel of the Supreme Court (New York County) and the Drug Policy Task Force of the New York County Lawyers Association. Judge Newton and her husband Eddie have a son, Jason, and reside in New Rochelle.

ALAN J. POPE, ESQ. is a graduate of the Clarkson College of Technology (*cum laude*) and the Albany Law School. He is a member of the Broome County Bar Association, where he co-chairs the Environmental Law Committee; the New York State Bar Association, where he serves on the Insurance, Negligence and Compensation Law Section, the Construction and Surety Division, and the Environmental Law Section; and the American Bar Association, where he serves on the Tort & Insurance Practice Section and the Construction Industry Forum Committee. Mr. Pope is also an Associate Member of the American Society of Civil Engineers, a member of the New York Chapter of the General Contractors Association of America, an Associate Member of the Building Contractors of Triple Cities, and a member of the Broome County Environmental Management Council.

HONORABLE EUGENE W. SALISBURY is a graduate of the University of Buffalo (*cum laude*) and the University of Buffalo Law School (*cum laude*). He is Senior Partner in the law firm of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria of Buffalo and New York City. He has also been the Village Justice of Blasdell since 1961. Since 1963, Judge Salisbury has served as a lecturer on New York State Civil and Criminal Procedure, Evidence and Substantive Criminal Law for the State Office of Court Administration. He has served as President of the State Magistrates Association and in various other capacities with the Association, as Village Attorney of Blasdell and as an Instructor in Law at SUNY Buffalo. Judge Salisbury has authored published volumes on forms and procedures for various New York courts, and he is Program Director of the Buffalo Area Magistrates Training Course. He serves or has served on various committees of the American Bar Association, the New York State Bar Association and the Erie County Bar Association, as well as the Erie County Trial Lawyers Association and the World Association of Judges. Judge Salisbury served as a U.S. Army Captain during the Korean Conflict and received numerous Army citations for distinguished and valorous service. Judge Salisbury and his wife reside in Hamburg, New York.

BARRY C. SAMPLE is a graduate of the State University of New York at Albany, where he earned Bachelor of Arts (*magna cum laude*) and Masters degrees, as well as a Masters in Criminal Justice. He is Director of Program Development and Planning for Instructional Systems, Inc. Mr. Sample served previously as Deputy Director of the New York State Division of the Budget under Governor Mario M. Cuomo. He also served in the New York State Division of Criminal Justice Services as Deputy Director of Criminal Justice, Executive Deputy Commissioner, and Chief of Program Development and Planning. Mr. Sample was also an instructor in the Department of Afro-American Studies at SUNY at

Albany, where he also served as Associate Coordinator of the Center on Minorities and Criminal Justice.

HONORABLE WILLIAM C. THOMPSON is a graduate of Brooklyn College and Brooklyn Law School. He was elected to the New York State Senate in 1965, and served until 1968. He was Chairman of the Joint Legislative Committee on Child Care Needs, and over 25 bills sponsored by him were signed into law. He served on the New York City Council from 1969 to 1973. He was elected a Justice of the Supreme Court in 1974 and was designated as an Associate Justice of the Appellate Term, 2nd and 11th Districts (Kings, Richmond and Queens counties) in November 1976. In December 1976 he was appointed Assistant Administrative Judge in charge of Supreme Court for Brooklyn and Staten Island. On December 8, 1980, he was designated by Governor Carey as Associate Justice of the Appellate Division, Second Department. Justice Thompson is one of the founders with the late Robert F. Kennedy of the Bedford Stuyvesant Restoration Corporation, one of the original Directors of the Bedford Stuyvesant Youth-In-Action, and a former Regional Director of the NAACP He is a Director of the Bedford Stuyvesant Restoration Corporation; Daytop Village, Inc.; Brookwood Child Care; Vice-President, Brooklyn Law School Alumni Association; Past President of the New York State Senate Club; and a member of the American Bar Association, Brooklyn Bar Association and the Metropolitan Black Bar Association. He is Co-Chairman of Blacks and Jews in Conversation, Inc., and Treasurer of Judges and Lawyers Breast Cancer Alert.

Clerk of the Commission

ALBERT B. LAWRENCE holds a B.S. in journalism from Empire State College, an M.A. in criminal justice from Rockefeller College and a J.D. from Antioch University. He joined the Commission's staff in 1980 and has been Clerk of the Commission since 1983. He is also on the associate faculty at Empire State College in Albany, teaching legal studies and journalism. In 1995, he was named a distinguished graduate of the college, and he was honored for excellence in teaching in 1996. A former newspaper reporter, Mr. Lawrence was awarded the New York State Bar Association Certificate of Merit "for constructive journalistic contributions to the administration of justice."

Commission Attorneys

GERALD STERN, Administrator and Counsel, is a graduate of Brooklyn College, the Syracuse University College of Law and the New York University School of Law, where he earned 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.

ROBERT H. TEMBECKJIAN, Deputy Administrator and Deputy Counsel, is a graduate of Syracuse University, the Fordham University School of Law, and the Kennedy School of Government at Harvard, where he earned a Masters in Public Administration. He has been Clerk of the Commission, publications director for the Council on Municipal Performance, staff director of the Ohio Governor's Cabinet Committee on Public Safety and special assistant to the Deputy Director of Economic and Community Development. He served on the Committee on Professional and Judicial Ethics and the Committee on Professional Discipline of the Association of the Bar of the City of New York. He was a Fulbright Scholar in 1994, teaching courses on law and ethics at the American University of Armenia.

STEPHEN F. DOWNS, Chief Attorney (Albany), 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.

JOHN J. POSTEL, Chief Attorney (Rochester), is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission's staff in 1980 as an assistant staff attorney in Albany. He has been Chief Attorney in charge of the Commission's Rochester office since 1984. Mr. Postel is a past president of the Governing Council of St. Thomas More R.C. Parish. He is a former officer of the Pittsford-Mendon Ponds Association and a former President of the Stonybrook Association. He is the advisor to the Sutherland High School Mock Trial Team.

JEAN M. SAVANYU, Senior Attorney, is a graduate of Smith College and the Fordham University School of Law (*cum laude*). She joined the Commission's staff in 1977 and has been a senior attorney since 1986. Prior to joining the Commission, she worked as an editor and writer. Ms. Savanyu teaches in the paralegal program at Marymount Manhattan College and is a member of its advisory board.

ALAN W. FRIEDBERG, Senior Attorney, is a graduate of Brooklyn College, the Brooklyn Law School and the New York University Law School, where he earned an LL.M in Criminal Justice. He previously served as a staff attorney in the Law Office of the New York City Board of Education, as an adjunct assistant professor of business law at Brooklyn College, and as a junior high school teacher in the New York City public school system.

CATHLEEN S. CENCI, Staff Attorney, graduated *summa cum laude* from Potsdam College in 1980. In 1979, she completed the *course superior* at the Institute of Touraine, Tours, France. Ms. Cenci received her JD from Albany Law School in 1984 and joined the Commission as an assistant staff attorney in 1985. Ms. Cenci is a judge of the Albany Law School moot court competitions and a member of Albany County Big Brothers/Big Sisters.

Referees Who Presided Over Commission Hearings in 1996

The following individuals presided over Commission hearings in 1996.

NAME	CITY	COUNTY
Patrick C. Berrigan, Esq.	Niagara Falls	Niagara
Bruno Colapietro, Esq.	Binghamton	Broome
Vincent D. Farrell, Esq.	Mineola	Nassau
Paul Feigenbaum, Esq.	Albany	Albany
Honorable Bertram Harnett	New York	New York
Honorable Matthew J. Jasen	Buffalo	Erie
H. Wayne Judge, Esq.	Glens Falls	Warren
Robert M. Kaufman, Esq.	New York	New York
Honorable Leon D. Lazer	Huntington	Suffolk
Travis H. D. Lewin, Esq.	Syracuse	Onondaga
Laurie Shanks, Esq.	Albany	Albany
Edward S. Spector, Esq.	Buffalo	Erie

The Commission's Powers, Duties and History

Creation of the New York State Commission on Judicial Conduct

For decades prior to the creation of the Commission on Judicial Conduct, judges in New York State were subject to professional discipline by a patchwork of courts and procedures. The system, which relied on judges to discipline fellow judges, was ineffective. In the 100 years prior to the creation of the Commission, only 23 judges were disciplined by the patchwork system of *ad hoc* judicial disciplinary bodies. For example, an *ad hoc* Court on the Judiciary was convened only six times prior to 1974. There was no staff or even an office to receive and investigate complaints against judges.

Starting in 1974, the Legislature changed the judicial disciplinary system, creating a temporary commission with a full-time professional staff to investigate and prosecute cases of judicial misconduct. In 1976 and again in 1977, the electorate overwhelmingly endorsed and strengthened the new commission, making it permanent and expanding its powers by amending the State Constitution.

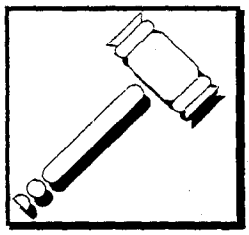
The Commission's Powers, Duties, Operations and History

The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of judicial misconduct in New York State. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding their right to decide cases independently. The Commission does not act as an appellate court. It does not review judicial decisions or alleged errors of law, nor does it issue advisory opinions, give legal advice or represent litigants. When appropriate, it refers complaints to other agencies

By offering a forum for citizens with conduct-related complaints, and by disciplining those judges who transgress ethical constraints, the Commission seeks to insure compliance with established standards of ethical judicial behavior, thereby promoting public confidence in the integrity and honor of the judiciary.

All 50 states and the District of Columbia have adopted a commission system to meet these goals.

In New York, a temporary commission created by the Legislature in 1974 began operations in January 1975. It was made permanent in September 1976 by a constitutional amendment. A second constitutional amendment, effective on April 1, 1978, created the present Commission with expanded membership and jurisdiction. (For clarity, the Commission which operated from September 1976 through March 1978 will be referred to as the "former" Commission.)



Membership and Staff

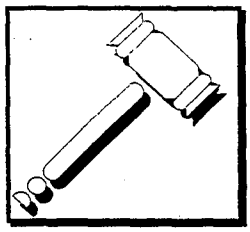
The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one each by the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and 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 following individuals have served on the Commission since its inception. Asterisks denote those members who chaired the Commission.

Hon. Fritz W. Alexander, II (1979-85)
Hon. Myriam J. Altman (1988-93)
Helaine M. Barnett (1990-95)
Herbert L. Bellamy, Sr. (1990-94)
*Henry T. Berger (1988-present)
*John J. Bower (1982-90)
Hon. Evelyn L. Braun (1994-95)
David Bromberg (1975-88)
Hon. Richard J. Cardamone (1978-81)
Hon. Carmen Beauchamp Ciparick (1985-93)
E. Garrett Cleary (1981-96)
Stephen R. Coffey (1995-present)
Howard Coughlin (1974-76)
Mary Ann Crotty (1994-present)
Dolores DelBello (1976-94)
Hon. Herbert B. Evans (1978-79)
*William Fitzpatrick (1974-75)
Lawrence S. Goldman (1990-present)

Hon. Louis M. Greenblott (1976-78)
Hon. James D. Hopkins (1974-76)
Michael M. Kirsch (1974-82)
*Victor A. Kovner (1975-90)
William B. Lawless (1974-75)
Hon. Daniel F. Luciano (1996-present)
William V. Maggipinto (1974-81)
Hon. Frederick M. Marshall (1996-present)
Hon. Ann T. Mikoll (1974-78)
Hon. Juanita Bing Newton (1994-present)
Hon. William J. Ostrowski (1982-89)
Alan J. Pope (1997-present)
*Lillemor T. Robb (1974-88)
Hon. Isaac Rubin (1979-90)
Hon. Eugene W. Salisbury (1989-present)
Barry C. Sample (1994-97)
Hon. Felice K. Shea (1978-88)
John J. Sheehy (1983-96)
Hon. Morton B. Silberman (1978)
Hon. William C. Thompson (1990-present)
Carroll L. Wainwright, Jr. (1974-83)

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



The Commission's Authority

The Commission has the authority to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings thereon, subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges within the state unified court system. This authority is derived from Article 6, Section 22, of the Constitution of the State of New York, and Article 2-A of the Judiciary Law of the State of New York.

By provision of the State Constitution (Article 6, Section 22), the Commission:

> shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system...and may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual in-

> temperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.

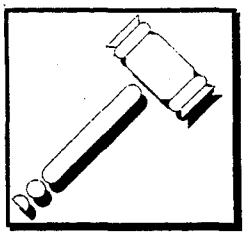
The types of complaints that may be investigated by the Commission include improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off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

Standards of conduct are set forth primarily in the Rules Governing Judicial Conduct (originally promulgated by the Administrative Board of the Judicial Conference and subsequently adopted by the Chief Administrator of the Courts with the approval of the Court of Appeals) and the Code of Judicial Conduct (adopted by the New York State Bar Association).

If the Commission determines that disciplinary action is warranted, it may render a determination to impose one of four sanctions, subject to review by the Court of Appeals upon timely request by the respondent-judge. If review is not requested within 30 days of service of the determination upon the judge, the determination becomes final. The Commission may render determinations to:

- admonish a judge publicly;
- censure a judge publicly;
- remove a judge from office;
- retire a judge for disability.

In accordance with its rules, the Commission may also issue a confidential letter of dismissal and caution to a judge, despite a dismissal of the complaint, when it is determined that the circumstances so warrant. In some cases the Commission has issued such a letter after charges of misconduct have been sustained.



Procedures

The Commission meets several times a year. At its meetings, the Commission reviews each new complaint of misconduct and makes an initial decision whether to investigate or dismiss the complaint. It also reviews staff reports on ongoing matters, makes final determinations on completed proceedings, considers motions and entertains oral arguments pertaining to

cases in which judges have been served with formal charges, and conducts other Commission business.

No investigation may be commenced by staff without authorization by the Commission. The filing of formal charges also must be authorized by the Commission.

After the Commission authorizes an investigation, the Administrator assigns the complaint to a staff attorney, who works with investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge may be asked to respond in writing to the allegations. In some instances, the Commission requires the appearance of the judge to testify during the course of the investigation. The judge's testimony is under oath, and 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.

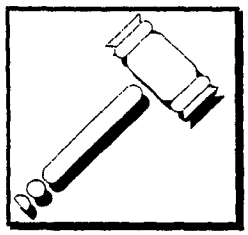
If the Commission finds after an investigation that the circumstances so warrant, it will direct its Administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint institutes the formal disciplinary proceeding. After receiving 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 will appoint a referee to conduct a formal hearing and report proposed findings of fact and conclusions of law. Referees are designated by the Commission from a panel of attorneys and former judges. Following the Commission's receipt of the referee's report, on a motion to confirm or disaffirm the report, both the administrator and the respondent may submit legal memoranda and present oral argument on issues of misconduct and sanction. The respondent-judge (in addition to his or her counsel) may appear and be heard at oral argument.

In deciding motions, considering proposed agreed statements of fact and making determinations with respect to misconduct and sanction, and in considering other matters pertaining to cases in which Formal Written Complaints have been served, the Commission deliberates in executive session, without the presence or assistance of its Administrator or regular staff.

The Clerk of the Commission assists the Commission in executive session, but does not participate in either an investigative or adversarial capacity in any cases pending before the Commission.

The Commission may dismiss a complaint at any stage during the investigation or adjudication.

When the Commission determines that a judge should be admonished, censured, removed or retired, its written determination is forwarded to the Chief Judge of the Court of Appeals, who in turn serves it upon the respondent-judge. Upon completion of service, the Commission's determination and the record of its proceedings become public. (Prior to this point, by operation of the strict provisions in Article 2-A of the Judiciary Law, all proceedings and records are confidential.) The respondent-judge has 30 days to request full review of the Commission's determination by the Court of Appeals. The Court may accept or reject the Commission's findings of fact or conclusions of law, make new or different findings of fact or conclusions of law, accept or reject the determined sanction, or make a different determination as to sanction. If no request for review is made within 30 days, the sanction determined by the Commission becomes effective.



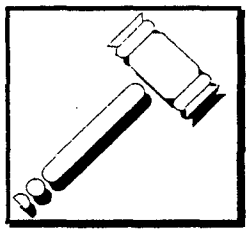
Temporary State Commission on Judicial Conduct

The Temporary State Commission on Judicial Conduct was established in late 1974 and commenced operations in January 1975. The temporary Commission had the authority to investigate allegations of misconduct against judges in the state unified court system, make confidential suggestions and recommendations in the nature of admonitions to judges when appropriate and, in more serious cases, recommend that formal disciplinary proceedings be commenced in the appropriate court. All disciplinary proceedings in the Court on the Judiciary and most in the Appellate Division were public.

The temporary Commission was composed of two judges, five lawyers and two lay persons. It functioned through August 31, 1976, when it was succeeded by a permanent commission created by amendment to the State Constitution.

The temporary Commission received 724 complaints, dismissed 441 upon initial review and commenced 283 investigations during its tenure. It admonished 19 judges and initiated formal disciplinary proceedings against eight judges, in either the Appellate Division or the Court on the Judiciary. One of these judges was removed from office and one was censured. The remaining six matters were pending when the temporary Commission was superseded by its successor Commission.

Five judges resigned while under investigation.



Former State Commission on Judicial Conduct

The temporary Commission was succeeded on September 1, 1976, by the State Commission on Judicial Conduct, established by a constitutional amendment overwhelmingly approved by the New York State electorate and supplemented by legislative enactment (Article 2-A of the Judiciary Law). The former Commission's tenure lasted through March 31, 1978, when it was replaced by the present Commission.

The former Commission was empowered to investigate allegations of misconduct against judges, impose certain disciplinary sanctions and, when appropriate, initiate formal disciplinary proceedings in the Court on the Judiciary, which, by the same constitutional amendment, had been given jurisdiction over all 3,500 judges in the unified court system. The sanctions that could be imposed by the former Commission were private admonition, public censure, suspension without pay for up to six months, and retirement for physical or mental disability. Censure, suspension and retirement actions could not be imposed until the judge had been afforded an opportunity for a full adversary hearing. These Commission sanctions were also subject to a *de novo* hearing in the Court on the Judiciary at the request of the judge.

The former Commission, like the temporary Commission, was composed of two judges, five lawyers and two lay persons, and its jurisdiction extended to judges within the state unified court system. The former Commission was authorized to continue all matters left pending by the temporary Commission.

The former Commission considered 1,418 complaints, dismissed 629 upon initial review, authorized 789 investigations and continued 162 investigations left pending by the temporary Commission.

During its tenure, the former Commission took action which resulted in the following:

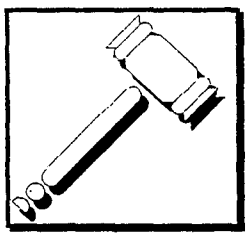
- 15 judges were publicly censured;
- 40 judges were privately admonished;
- 17 judges were issued confidential letters of suggestion and recommendation.

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 of the judge;
- 2 cases closed upon expiration of the judge's term;
- 1 proceeding closed without discipline and with instruction by the Court on the Judiciary that the matter be deemed confidential.

The remaining 32 proceedings were pending when the former Commission expired. They were continued by the present Commission.

In addition to the ten judges who resigned after proceedings had been commenced in the Court on the Judiciary, 28 other judges resigned while under investigation by the former Commission.

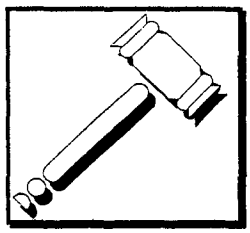


Continuation from 1978 to 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions

Thirty-two formal disciplinary proceedings which had been initiated in the Court on the Judiciary by either the temporary or former Commission were pending when the former Commission was superseded on April 1, 1978, and were continued without interruption by the present Commission.

The last five of these 32 proceedings were concluded in 1980, with the following results, reported in greater detail in the Commission's previous annual reports:

- 4 judges were removed from office;
- 1 judge was suspended without pay for six months;
- 2 judges were suspended without pay for four months;
- 21 judges were censured;
- 1 judge was directed to reform his conduct consistent with the Court's opinion;
- 1 judge was barred from holding future judicial office after he resigned; and
- 2 judges died before the matters were concluded.



The 1978 Constitutional Amendment

The present Commission was created by amendment to the State Constitution, effective April 1, 1978. The amendment created an 11-member Commission (superseding the nine-member former Commission), broadened the scope of the Commission's authority and streamlined the procedure for disciplining judges within the state unified court system. The Court on the Judiciary was abolished, pending completion of those cases 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.

Summary of Complaints Considered Since the Commission's Inception

Since January 1975, when the temporary Commission commenced operations, 21,440 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 16, 833 (78.5%) were dismissed upon initial review and 4607 investigations were authorized. Of the 4607 investigations authorized, the following dispositions have been made through December 31, 1996:

- 2204 were dismissed without action after investigation;
- 889 were dismissed with letters of caution or suggestions and recommendations to the judge; the actual number of such letters totals 824, 50 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct;

- 361 were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings; the actual number of such resignations was 254;
- 331 were closed upon vacancy of office by the judge other than by resignation;
- 650 resulted in disciplinary action; and
- 172 are pending.

Of the 650 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission. (It should be noted that several complaints against a single judge may be disposed of in a single action. This accounts for the apparent discrepancy between the number of complaints and the number of judges acted upon.)

- 119 judges were removed from office;
- 3 judges were suspended without pay for six months (under previous law);
- 2 judges were suspended without pay for four months (under previous law);
- 199 judges were censured publicly;
- 133 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission.

PART 100 OF THE RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS GOVERNING JUDICIAL CONDUCT

PREAMBLE

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

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

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

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

§100.0 Terminology. The following terms used in this Part are defined as follows:

(A) A "candidate" is a person seeking selection for or retention in public office by election. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions.

(B) "Court personnel" does not include the lawyers in a proceeding before a judge.

(C) The "degree of relationship" is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party,

counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

(D) "Economic interest" denotes ownership of a legal or equitable interest, however small, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge's spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

(E) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

(F) "Knowingly", "knowledge", "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(G) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(H) "Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(I) "Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(J) "Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(K) "Non-public information" denotes information that, by law, is not available to the public. Non-public information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.

(L) A "part-time judge", including an acting part-time judge, is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment.

(M) "Political organization" denotes a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

(N) "Public election" includes primary and general elections; it includes partisan elections, non-partisan elections and retention elections.

(O) "Require". The rules prescribing that a judge "require" certain conduct of others, like all of the rules in this Part, are rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(P) "Rules"; citation. Unless otherwise made clear by the citation in the text, references to individual components of the rules are cited as follows:

"Part" - refers to Part 100

"section" - refers to a provision consisting of 100 followed by a decimal (100.1)

"subdivision" - refers to a provision designated by a capital letter (A).

"paragraph" - refers to a provision designated by an arabic numeral (1).

"subparagraph" - refers to a provision designated by a lower-case letter (a).

(Q) "Window Period" denotes a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported the judge's or non-judge's candidacy, and ending, if the judge or non-judge is a candidate in the general election for that office, six months after the general election, or if he or she is not a candidate in the general election, six months after the date of the primary election, convention, caucus or meeting.

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

§100.2 A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES. (A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

(D) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

§100.3 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY. (A) Judicial duties in general. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative responsibilities. (1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A judge shall require order and decorum in proceedings before the judge.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation or socioeconomic status, or other similar factors are issues in the proceeding.

(6) a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed- upon matters.

(e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This

paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(10) A judge shall not disclose or use, for any purpose unrelated to judicial duties, non-public information acquired in a judicial capacity.

(C) Administrative responsibilities. (1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered. A judge shall not appoint or vote for the appointment of any person as a member of the judge's staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the sixth degree of relationship of either the judge or the judge's spouse or the spouse of such a person. A judge shall refrain from recommending a relative within the sixth degree of relationship of either the judge or the judge's spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the appointment of relatives of judges.[1] Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

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

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[1]A new Part 8 of the Chief Judge's Rules has been proposed that prohibits the appointment of court employees who are relatives of any judge of the same court within the judicial district in which the appointment is to be made.

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

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

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

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

(b) the judge knows that (1) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;

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

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

(i) is a party to the proceeding;

(ii) is an officer, director or trustee of a party;

(iii) has an interest that could be substantially affected by the proceeding;

(iv) is likely to be a material witness in the proceeding;

(e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(f) Notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as a fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

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

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

§100.4. A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS. (A) Extra-judicial activities in general. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

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

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

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

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

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

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

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

(3) A judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal

system or the administration of justice or of an educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Part.

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

(i) will be engaged in proceedings that ordinarily would come before the judge, or

(ii) if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

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

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

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

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

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such an organization. Use of an organization's regular letterhead for fund-raising or membership solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

(D) Financial activities. (1) A judge shall not engage in financial and business dealings that:

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

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

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

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

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

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

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

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

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

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

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

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

(c) ordinary social hospitality;

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

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

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

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

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

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

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

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

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

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

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

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

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's

spouse or guest. Any payment in excess of such an amount is compensation.

(c) No full-time judge shall solicit or receive compensation for extra-judicial activities performed for or on behalf of: (1) New York State, its political subdivisions or any office or agency thereof; (2) a school, college or university that is financially supported primarily by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for a lecture or for teaching a regular course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties; or (3) any private legal aid bureau or society designed to represent indigents in accordance with Article 18-B of the County Law.

(2) Public reports. A full-time judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

(I) Financial disclosure. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this section and in section 100.3(F), or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.

§100.5 A JUDGE OR CANDIDATE FOR ELECTIVE JUDICIAL OFFICE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

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

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

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

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

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

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

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

(g) attending political gatherings;

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

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

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

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

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

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

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

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions even where the cost of the ticket to such dinner or other function exceeds the proportionate cost of the dinner or function.

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

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

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of

the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

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

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

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent; but

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

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees may solicit and accept such contributions and support only during the Window Period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(B) Judge as candidate for nonjudicial office. A judge shall resign from judicial office upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) Judge's staff. A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

(1) holding an elective office in a political organization, except as a delegate to a

judicial nominating convention or a member of a county committee other than the executive committee of a county committee;

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions, except that this $500 limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference also shall be made to appropriate sections of the Election Law;

(3) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club; or

(4) political conduct prohibited by section 25.39 of the Rules of the Chief Judge (22 NYCRR 25.39).

§100.6 APPLICATION OF THE RULES OF JUDICIAL CONDUCT. (A) General application. All judges in the unified court system and all other persons to whom by their terms these rules apply, e.g., candidates for elective judicial office, shall comply with these rules of judicial conduct, except as provided below. All other persons, including judicial hearing officers, who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct.

(B) Part-time judge. A part-time judge:

(1) is not required to comply with sections 100.4(C)(1), 100.4(C)(2)(a), 100.4(C)(3)(a)(ii), 100.4(E)(1), 100.4(F), 100.4(G), and 100.4(H);

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

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

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

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

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

(E) Relationship to Code of Judicial Conduct. To the extent that any provision of the Code of Judicial Conduct as adopted by the New York State Bar Association is inconsistent with any of these rules, these rules shall prevail, except that these rules shall apply to a non-judge candidate for elective judicial office only to the extent that they are adopted by the New York State Bar Association in the Code of Judicial Conduct.

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

BRUCE R. BREGMAN,

a Justice of the Lynbrook Village Court, Nassau County.

Determination

APPEARANCES:

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

Charles F. Brennan for Respondent.

The respondent, Bruce R. Bregman, a justice of the Lynbrook Village Court, Nassau County, was served with a Formal Written Complaint dated August 14, 1995, alleging that he compelled defendants in traffic cases to attend "pre-trial conferences" in order to negotiate pleas with prosecutors, then conducted ex parte communications with the prosecutors. Respondent did not answer the Formal Written Complaint.

On January 3, 1996, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On January 11, 1996, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Lynbrook Village Court since 1989.

2. Between January 1, 1989, and April 20, 1995, respondent failed to advise defendants in traffic cases of a trial date upon receipt of pleas of not guilty, as required by Vehicle and Traffic Law §1806. Instead, respondent authorized his court staff to send notices requiring the defendants to appear for "pre-trial conferences" with village prosecutors.

3. The prosecutors met with defendants in traffic cases and in cases alleging violations of village ordinances, negotiated plea reductions and advised respondent of the proposed reductions during ex parte conversations.

4. Respondent decided during the ex parte conversations whether to approve the plea reductions. He set fines in cases in which he approved the reductions without hearing from the defendants. On occasion, the prosecutors recommended fines to respondent. The prosecutors relayed respondent's decisions to the defendants.

5. On April 21, 1995, after his appearance before a Commission member in connection with the investigation of this matter, respondent changed the procedure. He advised his court staff and the prosecutors that notices should no longer be sent by the court but that the prosecutors should write to defendants to schedule pre-trial conferences. Respondent continued to meet ex parte with the prosecutors.

6. On June 7, 1995, respondent again changed the procedure. Thereafter, he opened court sessions with the announcement that he would be available in chambers for defendants to appear before him. He advised prosecutors to tell defendants during pre-trial conferences that respondent would be available to speak with them at their option. Prosecutors continued to meet privately with respondent to discuss proposed plea reductions. Respondent indicated whether the pleas were acceptable and set fines.

7. Respondent has stipulated in this proceeding that he will no longer meet privately with prosecutors concerning pending cases.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(4) [now Section 100.3(B)(6)], and Canons 1, 2A[1] and 3A(4) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

When a defendant in a traffic case pleads not guilty by mail, the law requires that the judge immediately set a trial date. (Vehicle and Traffic Law §1806). It does not provide for "pre-trial conferences" at which defendants are required by the court to negotiate pleas. It is misconduct for a judge to require such proceedings on a regular basis. (See, Matter of Masner, 1990 Ann Report of NY Commn on Jud Conduct, at 133, 134). Such a practice is an unnecessary burden on defendants and is per se coercive; respondent should have known that defendants charged with minor infractions, carrying the likelihood of only small fines, would choose to plead guilty rather than to return to court in order to exercise their right to a trial. (See, Matter of Cavotta, 1996 Ann Report of NY Commn on Jud Conduct, at 75, 78).

It was also improper for respondent to discuss privately with prosecutors the proposed plea reductions and to hear recommendations for fines in ex parte sessions with prosecutors. (See, Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.3[a][4],

[1]The Formal Written Complaint cites Canon 2B of the Code of Judicial Conduct. By the agreed statement of facts, the parties stipulated that this was a typographical error and that the charges should be amended. The Formal Written Complaint is hereby amended to reflect a violation of Canon 2A.

now Section 100.3(B)(6); see also, Matter of Greenfeld v State Commission on Judicial Conduct, 71 NY2d 389, 391; Matter of Sardino, 1983 Ann Report of NY Commn on Jud Conduct, at 173, 187, accepted, 58 NY2d 286).

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present.

Judge Luciano was not a member of the Commission when the vote was taken in this matter.

Dated: March 20, 1996

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

JUDITH A. CARNEY,

Determination

a Justice of the Dansville Town Court, Steuben County.

APPEARANCES:

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

No appearance by Respondent.

The respondent, Judith A. Carney, a justice of the Dansville Town Court, Steuben County, was served with a Formal Written Complaint dated April 1, 1996, alleging that she failed to remit court funds promptly to the state comptroller and that she failed to cooperate in the Commission's investigation. Respondent did not answer the Formal Written Complaint.

By motion dated July 5, 1996, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be deemed established. Respondent did not oppose the motion or file any papers in response thereto. By determination and order dated August 8, 1996, the Commission granted the motion.

The administrator filed a memorandum as to sanction. Respondent did not file any papers and did not request oral argument.

On September 12, 1996, 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. Respondent has been a justice of the Dansville Town Court during the time herein noted.

2. Between April 1995 and August 1995, respondent failed to report cases and remit court funds to the state comptroller by the tenth day of the month following collection, as required by UJCA 2021(1), Town Law §27(1) and Vehicle and Traffic Law §1803(8). Respondent's reports for April through August 1995 were submitted on September 27, 1995. The April 1995 report was 140 days late; the May 1995 report was 109 days late; the June 1995

report was 79 days late; the July 1995 report was 48 days late; the August 1995 report was 17 days late.

As to Charge II of the Formal Written Complaint:

3. Respondent failed to cooperate in the Commission's investigation of her conduct in that she:

a) failed to respond to letters sent by staff counsel on October 25, 1995, November 15, 1995, and December 9, 1995; and,

b) failed to appear on January 31, 1996, for the purpose of giving testimony in connection with the investigation, even though she was directed to do so by letter sent certified mail by staff counsel on January 22, 1996.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(b)(1) [now Section 100.3(C)(1)], and Canons 1, 2A and 3B(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A town justice is required to remit court funds to the state comptroller by the tenth day of the month following collection. (UJCA 2021[1]; Town Law §27[1]; Vehicle and Traffic Law §1803[8]). The mishandling of public funds by a judge is misconduct, even when not done for personal profit. (Bartlett v Flynn, 50 AD2d 401, 404 [4th Dept]). The failure to remit funds to the comptroller constitutes neglect of administrative duties, even if the money is accounted for and on deposit. (Matter of Ranke, 1992 Ann Report of NY Commn on Jud Conduct, at 64, 65). Such misconduct generally warrants admonition or censure. (See, Matter of Ranke, supra; Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101).

However, respondent's failure to cooperate in the investigation of her conduct by refusing to answer inquiries and to appear for the purpose of giving testimony shows contumacious disregard for the responsibilities of her judicial office. The underlying misconduct, with her failure to cooperate, warrants her removal. (See, Matter of Driscoll, unreported, NY Commn on Jud Conduct, Mar. 20, 1996; Matter of Miller, unreported, NY Commn on Jud Conduct, Jan. 19, 1996).

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

Mr. Berger, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present.

Dated: September 19, 1996

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

JOHN CARR,

Determination

a Justice of the Gaines Town Court, Orleans County.

APPEARANCES:

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

Heath & Martin (By Douglas M. Heath) for Respondent.

The respondent, John Carr, a justice of the Gaines Town Court, Orleans County, was served with a Formal Written Complaint dated June 8, 1995, alleging that he refused to appoint an interpreter for a defendant who does not speak English, as required by law. Respondent filed an answer dated July 14, 1995.

On September 15, 1995, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On October 30, 1995, the Commission considered the record of the proceeding and made the following determination.

1. Respondent has been a justice of the Gaines Town Court since 1960.

2. On August 29, 1993, Transito Vasquez, a migrant farm worker, was charged with Driving With Blood Alcohol Content In Excess of .10 Percent, Driving While Intoxicated, Leaving The Scene Of A Personal Injury Accident and Uninspected Motor Vehicle. The case was returnable in respondent's court.

3. Mr. Vasquez does not speak English.

4. On September 2, 1993, Leslie Vasquez of Rural Opportunities, Inc., an agency that provides services to farm workers, contacted respondent and asked him to appoint a court interpreter for Transito Vasquez, as required by Judiciary Law §387.

5. Respondent refused to do so and said, in reference to Transito Vasquez, "If he can get around in a car, why can't he provide his own interpreter."

6. Also on September 2, 1993, Mark J. Van Derwater, another representative of Rural Opportunities, Inc., contacted respondent and asked him to appoint a court interpreter for Transito Vasquez.

7. Respondent refused and, with reference to Transito Vasquez and other Spanish-speaking farm workers, stated that:

a) they had always brought friends to translate before;

b) Mr. Vasquez would have to find somebody; and,

c) these people are lucky to be here and to have jobs.

8. On September 9, 1993, Transito Vasquez appeared before respondent and asked him to provide a court interpreter. Respondent refused and, in reference to the defendant, said, "How does he get jobs if he can't speak English." Respondent adjourned the case without taking any action.

9. On September 23, 1993, respondent accepted Transito Vasquez's guilty plea to Driving While Ability Impaired and Leaving The Scene Of A Property Damage Accident, even though respondent had refused to appoint a court interpreter. Respondent relied on a 17-year-old friend of Transito Vasquez to serve as an unofficial interpreter.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1), 100.3(a)(3) and 100.3(a)(4), and Canons 1, 2A, 3A(1), 3A(3) and 3A(4) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

In a court in which there is no official interpreter, a judge is required to appoint a temporary interpreter whenever one is needed. (Judiciary Law §387). Respondent's repeated refusal to provide an interpreter for Transito Vasquez violated the law and denied him the right to fully participate in the proceedings against him. Respondent's remarks concerning the defendant and other Spanish-speaking farm workers gave the appearance of ethnic bias.

A judge must be and appear to be unbiased at all times so that "the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property." (Matter of Sardino v State Commission on Judicial Conduct, 58 NY2d 286, 290-91). Remarks by a judge that convey the appearance of ethnic bias are "undesirable, inappropriate and inexcusable." (Matter of Cunningham, 1995 Ann Report of NY Commn on Jud Conduct, at 109, 110; see also, Matter of Ain, 1993 Ann Report of NY Commn on Jud Conduct, at 51).

Respondent's conduct is mitigated by the facts that he has a long and heretofore unblemished record on the bench (see, Matter of Abbott, 1990 Ann Report of NY Commn on Jud Conduct, at 69, 71-72) and that he has been cooperative in this proceeding (see, Matter of Rath, 1990 Ann Report of NY Commn on Jud Conduct, at 150, 152).

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

Mr. Berger, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Mr. Sample and Judge Thompson concur.

Ms. Barnett and Judge Salisbury were not present.

Dated: January 22, 1996

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

JOSEPH J. CERBONE,

Determination

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

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission.

Kitson & Kitson (By Kevin J. Kitson and Catherine McCaffrey) for Respondent.

The respondent, Joseph J. Cerbone, a justice of the Mount Kisco Town Court, Westchester County, was served with a Formal Written Complaint dated March 23, 1995, alleging that he made an improper, ex parte telephone call to the victim in an assault case and that he conducted arraignments in a police station. Respondent filed an answer dated April 19, 1995.

By order dated May 9, 1995, the Commission designated Robert L. Ellis, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 23, July 12 and August 8 and 16, 1995, and the referee filed his report with the Commission on October 12, 1995.

By motion dated November 30, 1995, 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 December 19, 1995. The administrator filed a reply dated December 22, 1995.

On January 11, 1996, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Mount Kisco Town Court for 17 years. He is a part-time judge who also practices law in Mount Kisco.

2. On May 24, 1994, respondent signed a warrant for the arrest of Edward Hicinbothem on a charge of Assault, Third Degree. Mr. Hicinbothem was accused of assaulting Susan McKee.

3. Respondent was acquainted with Mr. Hicinbothem's parents, who live across the street from close friends of respondent. As an attorney, respondent prepared a will for Mr. Hicinbothem's mother on February 3, 1986, and a will for his father on October 8, 1987. Respondent represented Mr. Hicinbothem's brother in the purchase of a home in March 1992.

4. On May 24, 1994, Edward Hicinbothem was arrested and arraigned before respondent, who recognized the name and assumed that the defendant was related to his former clients. Respondent released Mr. Hicinbothem on his own recognizance and orally issued an Order of Protection in favor of Ms. McKee. The Order of Protection was reduced to writing the following day.

5. On May 25, 1994, respondent called Ms. McKee by telephone. There were no other parties to the conversation, and neither the prosecution nor the defense was given notice that the call would be made. Respondent told Ms. McKee that she could choose whether to continue the case in his court or have it transferred to Family Court. Respondent also said that Mr. Hicinbothem appeared to be a "decent guy" who had "made a mistake" and did not pose a future threat to Ms. McKee. Respondent stated that he felt that Mr. Hicinbothem was "sincere about not causing any more trouble." Respondent also asked Ms. McKee whether she intended to permit Mr. Hicinbothem to visit their two-year old son and suggested that he might modify the Order of Protection to permit visitation.

6. As a result of the telephone conversation, Ms. McKee "felt that I had no one behind me, no support, and, by getting a phone call from a judge, I felt that maybe I was making a mistake by going through with these charges."

7. On August 11, 1994, Ms. McKee appeared before respondent and asked that the charge against Mr. Hicinbothem be dropped. However, the assistant district attorney handling the case objected. Without conducting a trial, respondent dismissed the charge.

8. At no time during the proceedings did respondent disclose that he had spoken with Ms. McKee or that he had previously represented Mr. Hicinbothem's family. He did not offer to disqualify himself.

As to Charge II of the Formal Written Complaint:

9. Between November 1993 and May 1994, respondent conducted night-time and weekend arraignments in the Mount Kisco police station, even though a courtroom was available in the same building. At various times, respondent arraigned defendants in the police station lobby, in the detectives' office and in a holding cell.

10. Since he was told in May 1994 that the police chief objected to the procedure, respondent has conducted all arraignments in the courtroom.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a), 100.2(b), 100.2(c), 100.3(a)(4) [now Section 100.3(B)(6)] and 100.3(c)(1) [now Section 100.3(E)(1)], and Canons 1, 2A, 2B, 3A(4) and 3C(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

It was improper for respondent to make an ex parte call to a witness in a criminal case before him and to make favorable comments about the defendant that might induce the witness to withdraw her complaint. (See, Matter of McCormick, 1994 Ann Report of NY Commn on Jud Conduct, at 84; see also, Matter of Abbott, 1990 Ann Report of NY Commn on Jud Conduct, at 69). A judge should not interfere in the presentation of a party's case (Matter of Finley, 1981 Ann Report of NY Commn on Jud Conduct, at 123, 128) and should not engage in communications that lend or appear "to lend the prestige of his office to advance...private interests" in a court proceeding. (Matter of Kiley v State Commission on Judicial Conduct, 74 NY2d 364, 368).

The appearance of favoritism is exacerbated in this situation because of respondent's past association with members of the defendant's family and because he eventually dismissed the charge without trial over the objection of the prosecutor.

Because respondent had previously represented the defendant's parents and his brother, respondent's impartiality might reasonably be questioned. (See, Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.3[c][1]; now Section 100.3[E][1]). Although his disqualification was not mandatory, he should have disclosed the prior business relationship and should have considered any objections to his presiding. (See generally, Matter of LaMountain, 1989 Ann Report of NY Commn on Jud Conduct, at 99; Matter of Merkel, 1989 Ann Report of NY Commn on Jud Conduct, at 111).

Once he had spoken to Ms. McKee, he also had an obligation to disclose the conversation and to hear objections to his continuing to preside. (See, Matter of LaMountain, supra).

As to Charge II, it is improper for a judge to hold court proceedings in a police station lobby, office or cell. (People v Schoonmaker, 65 Misc2d 393, 396 [Greene Co Ct]).

Criminal arraignments must be open to the public. (Judiciary Law §4; see, Matter of Burr, 1984 Ann Report of NY Commn on Jud Conduct, at 72). "Absent a controlling exception, arraignments should be conducted in public settings. They should also be conducted in an appropriate place that does not detract from the impartiality, independence and dignity of the court." ("Police Court Arraignments," 1989 Ann Report of NY Commn on Jud Conduct, at 37).

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur as to sanction.

Judge Salisbury dissents only as to the allegations in Paragraph 4 of Charge I concerning the favorable comments by respondent concerning Mr. Hicinbothem and votes that those allegations be dismissed.

Mr. Cleary dissents only as to the allegations in Paragraph 7 of Charge I concerning respondent's failure to disclose and offer to disqualify himself and votes that those allegations be dismissed.

Ms. Crotty and Mr. Sample were not present.

Judge Luciano was not a member of the Commission when the vote in this matter was taken.

Dated: March 21, 1996

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

MICHAEL L. D'AMICO,

Determination

a Judge of the County Court, Erie County.

APPEARANCES:

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

Connors & Vilardo (By Terrence M. Connors) for Respondent.

The respondent, Michael L. D'Amico, a judge of the County Court, Erie County, was served with a Formal Written Complaint dated December 21, 1995, alleging that he was arrested and that he mentioned his judicial office to police. Respondent did not answer the Formal Written Complaint.

On December 30, 1995, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4), stipulating that the Commission make its determination based upon the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On January 11, 1996, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Erie County Court since January 1, 1987.

2. On June 14, 1994, at about 8:15 P.M., respondent entered the Island Park in Amherst in order to determine whether it had suitable facilities for a family picnic.

3. Respondent stepped off a roadway into some bushes and, while standing next to a large tree, raised the shorts that he was wearing and exposed his penis.

4. As he was leaving the park, he was arrested by two Amherst police officers, one of whom had observed him in the bushes. Respondent asked why he was being arrested and told the officers that he was an Erie County Court judge. He had not been asked about his occupation.

5. Respondent was taken to police headquarters by two other police officers. En route, he advised those officers that he was an Erie County Court judge, even though he had not been asked about his occupation.

6. At the police station, respondent spoke to a lieutenant and stated that his arrest would be devastating because of his judicial position.

7. On July 6, 1994, respondent pleaded guilty in the Amherst Town Court to Disorderly Conduct and was fined $100, plus a $45 mandatory state surcharge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1 and 100.2(a), and Canons 1 and 2A of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

"A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function." (Matter of Kuehnel v State Commission on Judicial Conduct, 49 NY2d 465, 469; see also, Matter of Quinn v State Commission on Judicial Conduct, 54 NY2d 386). A judge is "governed by exacting standards of honor and propriety" and is obligated to act at all times with "respect for the letter and spirit of the law." (Matter of Backal v State Commission on Judicial Conduct, 87 NY2d 1, 7).

Not only did respondent plead guilty to Disorderly Conduct following his arrest, respondent's repeated references to his judicial position during his arrest constituted an obvious attempt to gain special consideration. Such conduct by a judge is wrong, even in the absence of a specific request for a favor (see, Matter of Edwards v State Commission on Judicial Conduct, 67 NY2d 153, 155) and even though there was no threat or other abuse of the police (see, Matter of Henderson, 1995 Ann Report of NY Commn on Jud Conduct, at 118).

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present. Judge Luciano was not a member of the Commission when the vote in this matter was taken.

Dated: March 21, 1996

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

RICHARD E. DRISCOLL,

Determination

a Justice of the Farnham Village Court, Erie County.

APPEARANCES:

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

No appearance by Respondent.

The respondent, Richard E. Driscoll, a justice of the Farnham Village Court, Erie County, was served with a Formal Written Complaint dated July 25, 1995, alleging that he failed to remit court funds in a timely manner to the state comptroller and that he failed to cooperate with the Commission. Respondent did not answer the Formal Written Complaint.

By motion for summary determination dated September 22, 1995, the administrator of the Commission moved for a finding that respondent had engaged in judicial misconduct. Respondent did not file any papers in response thereto. By determination and order dated November 3, 1995, the Commission granted the administrator's motion.

The administrator filed a memorandum on sanction. Respondent neither filed a memorandum nor requested oral argument.

On January 11, 1996, 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. Respondent has been a justice of the Farnham Village Court during the time herein noted.

2. Between September 1994 and December 1994, respondent failed to remit court funds to the state comptroller by the tenth day of the month following collection, as required by UJCA 2020 and 2021(1), Vehicle and Traffic Law §1803(8) and Village Law §4-410(1)(b).

3. On February 27, 1995, respondent remitted court funds for the months of September, November and December 1994. The September 1994 report to the comptroller was 140 days late; the November 1994 report was 79 days late; the December 1994 report was 48 days late. On February 28, 1995, respondent remitted court funds for October 1994, 110 days late.

As to Charge II of the Formal Written Complaint:

4. Respondent failed to respond to letters sent certified mail by staff counsel on February 21, March 10 and March 28, 1995, in connection with a duly-authorized investigation. Respondent failed without explanation to appear for the purpose of giving testimony on June 5, 1995, as directed by certified letter dated May 24, 1995.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(b)(1) [now Section 100.3(C)(1)], and Canons 1, 2A and 3B(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

A village justice is required to remit court funds to the state comptroller by the tenth day of the month following collection. (UJCA 2021[1]; Village Law §4-410[1][b]; Vehicle and Traffic Law §1803[8]). The mishandling of public funds by a judge is misconduct, even when not done for personal profit. (Bartlett v Flynn, 50 AD2d 401, 404 [4th Dept]). The failure to remit funds to the comptroller constitutes neglect of administrative duties, even if the money is accounted for and on deposit. (Matter of Ranke, 1992 Ann Report of NY Commn on Jud Conduct, at 64, 65). Such misconduct generally warrants admonition or censure. (See, Matter of Ranke, supra; Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101).

However, respondent's failure to cooperate in the staff's investigation of this matter by refusing to answer inquiries and to appear for the purpose of giving testimony exacerbates his misconduct and demonstrates unfitness for office. (See, Matter of Reese, 1985 Ann Report of NY Commn on Jud Conduct, at 217, 220). The failure to cooperate with the Commission is conduct prejudicial to the administration of justice that warrants removal. (See, Matter of Miller, unreported, NY Commn on Jud Conduct, Jan. 19, 1996).

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present. Judge Luciano was not a member of the Commission when the vote was taken in this matter.

Dated: March 20, 1996

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

HAROLD L. ERWAY,

Determination

a Justice of the Roseboom Town Court, Otsego County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission.

Green & Gibbons (By Lynn E. Green, Jr.) for Respondent.

The respondent, Harold L. Erway, a justice of the Roseboom Town Court, Otsego County, was served with a Formal Written Complaint dated April 26, 1996, alleging that he failed to remit court funds to the state comptroller on a timely basis. Respondent filed an answer dated June 3, 1996.

On July 30, 1996, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On September 12, 1996, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Roseboom Town Court since 1973.

2. By letter dated October 24, 1988, the Commission cautioned respondent to report cases and remit funds to the state comptroller on a timely basis.

3. Between January 1995 and January 1996, respondent failed to report dispositions and remit funds to the state comptroller within ten days of the month following collection, as required by UJCA 2020 and 2021(1), Town Law §27(1) and Vehicle and Traffic Law §1803(8).

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1) [now Section 100.3(B)(1)] and 100.3(b)(1) [now Section 100.3(C)(1)], and Canons 1, 2A, 3A(1) and 3B(1) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

A town justice is required to remit court funds to the state comptroller by the tenth day of the month following collection. (UJCA 2021[1]; Town Law §27[1]; Vehicle and Traffic Law §1803[8]). The mishandling of public funds by a judge is misconduct, even when not done for personal profit. (Bartlett v Flynn, 50 AD2d 401, 404 [4th Dept]). The failure to remit funds promptly to the state comptroller constitutes neglect of administrative duties, even if the money is accounted for and on deposit. (Matter of Ranke, 1992 Ann Report of NY Commn on Jud Conduct, at 64, 65).

"The failure to heed a Commission warning [to] comply with remitting requirements exacerbates the misconduct." (Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101, 102).

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

Mr. Berger, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present.

Dated: September 17, 1996

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DAVID W. HOAG,

Determination

a Justice of the Hardenburgh Town Court, Ulster County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci) for the Commission.

Howard C. St. John and Associates (John J. Cook, Of Counsel) for Respondent.

The respondent, David W. Hoag, a justice of the Hardenburgh Town Court, Ulster County, was served with a Formal Written Complaint dated September 6, 1995, alleging that he engaged in private employment in which he was responsible for filing charges in his own court. Respondent filed an answer dated October 12, 1995.

On December 26, 1995, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On January 11, 1996, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Hardenburgh Town Court since 1992.

2. Respondent, a part-time judge, has been employed for many years as superintendent of the Balsam Lake Club, a private club in the Town of Hardenburgh. Among respondent's duties is patrolling the club's property and apprehending trespassers.

3. Between 1992 and 1995, respondent signed as complaining witness and filed with the other judge of his court 30 informations against individuals that respondent had apprehended on the club's property. Three of the defendants, Frank P. DelDeo, Thomas Pendred and Edmund S. Yankov, were detained by respondent on club property before the charges were filed.

4. In letters dated July 25, 1992, November 8, 1993, September 27, 1994, and March 11, 1995, to his fellow judge, Vincent W. Prior, and in letters dated December 27, 1994, and January 17, 1995, to District Attorney Michael Kavanagh in connection with the cases, respondent used his judicial stationery.

5. Respondent has promised to refrain from apprehending trespassers and from acting as complaining witness in cases in his court.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.5(h)*, and Canons 1 and 2A of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

"A part-time judge may accept private employment...provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties." (Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.5[h] [now Section 100.6(B)(4)]). As superintendent of a private club in the town in which he sits, respondent apprehended and charged trespassers on the club's property. This was incompatible with his role as a judge and conflicted with his judicial duties.

Respondent's enforcement duties compromised his impartiality in other cases. "A judge cannot be considered neutral and detached if he or she acts as a police officer." (Matter of Rones, 1995 Ann Report of NY Commn on Jud Conduct, at 126, 128). He placed himself in a position in which he was a witness in his own court and, thus, could not preside over these cases. (See, Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.3[c][1][i] [now Section 100.3(E)(1)(a)(ii)]; Matter of Ross, 1990 Ann Report of NY Commn on Jud Conduct, at 153, 156). It would also be imprudent for the only other judge of the court to hear them since his "impartiality might reasonably be questioned" in view of his relationship to respondent, and his disqualification would also be required. (See, 22 NYCRR 100.3[c][1] [now Section 100.3(E)(1)]; see also, Matter of Harris v State Commission on Judicial Conduct, 56 NY2d 365, 367). Consequently, a significant number of cases for a town court--30 in three years--would have to be transferred to another jurisdiction for disposition, an unnecessary burden on the administration of justice.

It was also wrong for respondent to use judicial stationery in connection with these private disputes. (See, Matter of Tyler v State Commission on Judicial Conduct, 75 NY2d 525, 527).

The Commission has taken into account that respondent has vowed to avoid this conduct in the future.

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur.

Mr. Sample was not present.

Judge Luciano was not a member of the Commission when the vote was taken in this matter.

Dated: March 20, 1996

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

BRUCE M. KAPLAN,

Determination

a Judge of the Family Court, New York County.

APPEARANCES:

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

Godosky & Gentile, P.C. (By Richard Godosky) for Respondent.

The respondent, Bruce M. Kaplan, a judge of the Family Court, New York County, was served with a Formal Written Complaint dated October 31, 1994, alleging that he improperly intervened on behalf of a friend in an investigation of a child welfare matter. Respondent filed an answer dated December 9, 1994.

By order dated December 19, 1994, the Commission designated Daniel G. Collins, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 14, 20 and 21, June 6 and July 7, 1995, and the referee filed his report with the Commission on October 26, 1995.

By motion dated December 8, 1995, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, for a finding that respondent had engaged in misconduct and for a determination that he be censured. Respondent opposed the motion by cross motion on February 2, 1996. The administrator filed a reply on February 16, 1996. Respondent replied on March 6, 1996.

On March 14, 1996, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a judge of the New York City Family Court since December 1977.

2. In April 1992, respondent presided over a number of ex parte applications in a family offense proceeding involving Nancy Carol X and Joseph X. The case was eventually consolidated with another case involving the Xes in Supreme Court.

3. The Xes were divorced in March 1993. In July 1993, respondent met Ms. X at a party and began an intimate relationship with her that lasted until November 1993.

4. In 1993, the Xes lived on separate floors of a divided duplex apartment in Manhattan. Ms. X had custody of their children, a daughter who was 9 in October 1993, and a son who was then 7. Mr. X had visitation rights ordered by the Supreme Court.

5. On October 30, 1993, respondent was present in Ms. X's apartment when she called police and reported that her daughter, who was at a scheduled visitation with Mr. X, could be heard yelling in the apartment above.

6. After two police officers arrived at Ms. X's home, the daughter returned. Respondent was introduced to the officers as a family friend who was a Family Court judge. When a police sergeant arrived at the home, respondent introduced himself as a family friend who was a Family Court judge.

7. The police, Ms. X and respondent then took the daughter to Mount Sinai Hospital for examination. She was found to have abrasions, redness and tenderness about the neck, back and extremities.

8. The incident was reported to the Central Register of the State Department of Social Services as mandated by law and was reported to the Emergency Children Services unit of the New York City Child Welfare Administration. The unit is responsible for investigating and preventing imminent abuse of children. The unit generally does not conduct field visits in cases in which the child is not in the physical custody of the alleged abuser and is not at "high risk" of continued abuse.

9. Yejide Ojo, a unit caseworker, spoke with the attending physician at the hospital, Dr. Donald Barton. Dr. Barton, whom respondent had advised that he was a Family Court judge, put respondent on the telephone with Ms. Ojo, who indicated that she did not intend to make a field visit that night. Respondent repeatedly challenged that decision. He stated that he was a Family Court judge with experience in child abuse cases and indicated that he knew the commissioner and deputy commissioner of Ms. Ojo's agency, the Human Resources Administration, and might have to call their attention to the case. He asked to speak with Ms. Ojo's supervisor.

10. Respondent then spoke with Celia Garrett, a casework manager, and identified himself as a Family Court judge. Respondent said that the daughter had been locked in a closet by the father and had been subjected to his continuing emotional and physical abuse. He repeated to Ms. Garrett that he was acquainted with her commissioner and deputy commissioner, as well as then-Mayor David Dinkins.

11. After speaking with respondent, Ms. Garrett discussed the matter with Ms. Ojo and a casework supervisor, who recommended that no emergency field visit be made. Ms. Garrett rejected the recommendation--the first time she had ever overruled the supervisor's decision--and ordered that an emergency field visit be made. In making her decision, Ms. Garrett gave "credence" to respondent's opinion because he was a Family Court judge and was experienced in child abuse cases.

12. The Child Welfare Administration appears regularly in connection with matters in Family Court.

13. Ms. Ojo and James Mramor made an emergency field visit to Mount Sinai Hospital and spoke with respondent. Respondent described Mr. X as "violent." He said that he had previously presided over a proceeding involving the Xes and had learned that Mr. X had assaulted Ms. X. He relayed other derogatory information about Mr. X that he said he had learned from another judge's decision and from a newspaper report. Respondent urged the caseworkers to prevent Mr. X from visiting the children as scheduled for the following day. At the time, respondent knew that prior complaints of abuse of the children by Mr. X had been determined to have been unfounded.

14. In the early hours of October 31, 1993, the participants left the hospital and returned to Ms. X's apartment. Ms. Ojo told Ms. X and respondent that a supervisor had determined that, if the Xes could not reach an agreement concerning visitation scheduled for later in the day, the children would be removed from Ms. X's custody and placed in foster care. Respondent twice expressed disbelief that such a recommendation could be made.

15. At about 11:15 A.M., police officers came to Ms. X's apartment concerning the children's visitation with their father. Respondent introduced himself as a Family Court judge. One of the officers concluded that respondent was the judge presiding over the Xes' visitation matter. A police sergeant, Patrick McAndrews, arrived, and respondent again introduced himself as a Family Court judge. During the discussion of the children's scheduled visitation, Sergeant McAndrews sought respondent's opinion as to whether court-ordered visitation must be adhered to in all instances or whether a court order could be "superseded" in "exigent circumstances." Respondent indicated that circumstances could countermand a court order. Sergeant McAndrews then went to Mr. X's home and told him that he would not enforce visitation rights on that day.

16. The allegations in Paragraph 12 of Charge I are not sustained and are, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.2(c), and Canons 1, 2A and 2B of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

Although he may have been understandably concerned for Ms. X and her daughter, respondent's advocacy exceeded the limitations placed upon judges. He went beyond permissible advocacy when, having made himself known as a Family Court judge, he used the influence and prestige of that office to advance the cause of his friend and her daughter.

It was not improper per se for respondent to identify himself as a judge, even in a situation in which intervention by public officials was being sought, and, of course, respondent could not prevent others from making his judicial position known. But once he was so identified to authorities, respondent was obligated to be circumspect in his advocacy in order to avoid gaining an advantage for his friends' private interests because of his position. (See, Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.2[c], renumbered 100.2[C], eff. Jan. 1, 1996). This was especially so in his dealings with the personnel of the Emergency Children Services unit since it has regular contacts with respondent's court.

In attempting to persuade unit caseworkers to investigate Ms. X's claims of child abuse, respondent suggested that his views carried special weight because of his familiarity with child abuse cases and with this case in particular, and he attempted to assert influence by intimating that he might tell the caseworkers' superiors about their refusal to conduct a field visit. These remarks were improper. It was also wrong for respondent to tell the caseworkers that, as the judge who presided over the family offense proceeding in this case, he had obtained negative information about Mr. X. Even if, as he now argues, he had independent knowledge of such allegations, respondent improperly created the appearance that he was using information obtained in court for private purposes. Moreover, even if he had been justified in imparting information that he had obtained as a judge, he should not have been one-sided in his presentation; he would have been duty-bound to disclose information favorable to Mr. X, as well, such as his knowledge that prior complaints of child abuse had been determined to have been unfounded.

The deference that a judge receives in such circumstances is illustrated by Ms. Garrett's decision to overrule the recommendation of two subordinates and order an emergency field visit when no apparent emergency existed. In Matter of Steinberg v State Commission on Judicial Conduct (51 NY2d 74, 81), the Court of Appeals held:

> Wherever he travels, a Judge carries the mantle of his esteemed office with him, and, consequently, he must always be sensitive to the fact that members of the public, including some of his friends, will regard his words and actions with heightened deference simply because he is a Judge.

That respondent may have lost sight of his ethical obligations because of his relationship with and concern for Ms. X and her daughter constitutes a mitigating factor affecting the sanction to be imposed, but it does not excuse his wrongdoing. (See, Matter of Kiley v State Commission on Judicial Conduct, 74 NY2d 364, 370; Matter of Edwards v State Commission on Judicial Conduct, 67 NY2d 153, 155; Matter of Figueroa, 1980 Ann Report of NY Commn on Jud Conduct, at 159, 161). This is particularly so because respondent overstepped his bounds in

a non-emergency situation. The child was in the custody of her mother and was in no imminent danger of abuse.

> [N]o Judge should ever allow personal relationships to color his conduct or lend the prestige of his office to advance the private interests of others...Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved...Thus, any communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office. That is not to say, of course, that Judges must cloister themselves from the day-to-day problems of family and friends. But it does necessitate that Judges must assiduously avoid those contacts which might create even the appearance of impropriety.
>
> Matter of Lonschein v State Commission on Judicial Conduct, 50 NY2d 569, 571-72

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Goldman, Judge Newton and Judge Salisbury concur.

Mr. Coffey dissents as to sanction only and votes that the appropriate disposition would be a confidential letter of dismissal and caution.

Judge Luciano, Mr. Sample and Judge Thompson dissent and vote that the Formal Written Complaint be dismissed.

Ms. Crotty was not present.

Dated: May 6, 1996

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

BRUCE M. KAPLAN,

a Judge of the Family Court, New York County.

OPINION BY
MR. COFFEY

I concur that respondent's conduct constituted a violation of the Rules Governing Judicial Conduct, but I give more weight than does the majority to the mitigating fact that his behavior was driven by his concern for the plight of the child, and I believe that a confidential letter of dismissal and caution would be sufficient redress.

I also feel that the majority goes too far in concluding, as it appears to, that respondent's conduct was especially egregious because no emergency situation existed. The child was returned to her mother crying and with abrasions and redness about her body. It seems to me that Ms. X and respondent might well have had a good-faith concern about the child being returned to the father for visitation the following day. While it might not have been the kind of life-or-death situation that the child welfare caseworkers were accustomed to dealing with, I do not believe that the Commission should fault respondent for perceiving it as a serious situation that deserved a remedy. His only fault lies in his use of the prestige of his office to try to obtain that remedy.

Dated: May 6, 1996

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

BRUCE M. KAPLAN,

a Judge of the Family Court, New York County.

DISSENTING OPINION
BY JUDGE THOMPSON

The majority concludes that the respondent's conduct gave the appearance that he was using his position in order to "gain[ ] an advantage for his friends' private interests." I disagree. In my view, the respondent at all times acted appropriately and in good faith with the objective of obtaining assistance for Ms. X's 9 year old daughter based only upon what he believed to be the merits of the case.

The events of October 30-31 support the inference that the respondent reasonably believed that the child might be exposed to danger without some type of definitive intervention from the proper authorities. In this respect, the record before the Commission indicates that Ms. X heard her daughter yelling from her husband's apartment. As found by the referee, when the police arrived and prepared to enter Mr. X's apartment, the child came running into Ms. X's apartment in a dishevelled state and crying hysterically. Subsequently, when the respondent and Ms. X took the child to Mount Sinai Hospital for an examination, she was found to have abrasions, redness and tenderness about the neck, back and extremities.

Under these circumstances, the respondent understandably employed every reasonable effort to protect a child whom he believed could have been abused. These facts support the conclusion that the respondent was motivated by a sincere and overriding concern for the child's welfare, not by the desire to further a personal agenda through the use of his judicial office.

The majority concedes that it was not improper per se for the respondent to identify himself as a judge, but then narrowly concludes that he was not sufficiently "circumspect" in doing so. The majority's opinion, fashioned with the advantages of hindsight analysis, fails to assign proper weight to the relevant factors and draws an unwarranted inference of impropriety. In this respect I concur in the well-reasoned conclusion of the referee that the respondent's status as a judge was "legitimately relevant to the weight to be given to the conclusion[s] he expressed to Police, medical and child welfare personnel concerning [the daughter's] situation" (Ref opn at 14-15). As an experienced Family Court Judge, the respondent not only had considerable experience with matters concerning child abuse, he had previously observed and heard Ms. X when she had

appeared before him seeking an order of protection. Moreover, based on his knowledge of Mr. X, the respondent had reason to believe that he could be volatile.

The fact that the child had been returned for that day to Ms. X does not establish that the respondent's subsequent efforts on behalf of the child were unnecessary or that they were personally motivated. It was reasonable for him, in light of the signs of potential abuse, to take steps to ensure that any evidence of potential abuse was contemporaneously documented and assessed by the appropriate authorities at a time when it was still possible to do so. Moreover, the level of concern and urgency underlying the matter was heightened by the fact that the respondent could anticipate that Mr. X would be pressing for his scheduled visitation with the child the very next day. This consideration, taken together with the fact that Mr. X lived in the same building, justified respondent's sense of concern and desire to err on the side of caution with respect to the child's safety.

In sum, the respondent was confronted with what he reasonably believed to be a situation which merited action in order to ensure the safety of a child. I believe it is inappropriate to punish him merely because he maintained a personal relationship with the child's mother. Accordingly, I agree with the referee that the respondent's actions "represented a determined effort by a citizen, and a citizen who as a Family Court Judge was better informed than most citizens about the problems of child abuse, to protect what he believed were the best interests of a child" (Ref opn at 15-16).

Under the circumstances, I find no misconduct in the respondent's actions and vote to dismiss the complaint.

Dated: May 6, 1996

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

JOHN F. MAHON,

Determination

a Justice of the Mohawk Town Court, Montgomery County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission.

Honorable John F. Mahon, pro se.

The respondent, John F. Mahon, a justice of the Mohawk Town Court, Montgomery County, was served with a Formal Written Complaint dated May 9, 1995, alleging improper demeanor. Respondent answered the complaint by letter dated June 12, 1995.

By order dated July 20, 1995, the Commission designated John T. O'Friel, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on September 14, 1995, and the referee filed his report with the Commission on March 19, 1996.

By motion dated April 23, 1996, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be censured. Respondent did not file any papers in response thereto and did not request oral argument.

On June 6, 1996, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Mohawk Town Court since June 1988.

2. On February 13, 1995, Eileen Dumar went to the Mohawk Town Court to pay a fine for her son, Chad, who had previously pleaded guilty by mail to Failure To Affix Registration Sticker and Expired Inspection. Respondent had imposed a fine with instructions that it could be paid by mail.

3. Respondent was acquainted with the Dumar family.

4. Respondent asked Ms. Dumar why she had come to court; she replied that she intended to pay her son's fine. Respondent said that he did not want "mom or dad" to pay the fine.

5. Without provocation, respondent loudly and angrily called Ms. Dumar a "god-damn, interfering, middle-aged bitch" and her son a "stupid shit."

6. The remarks were overheard by Ronald Hinkle, who was elsewhere in the building on town business. Mr. Hinkle was concerned that Ms. Dumar was so upset and shaken by the incident that she could not drive safely.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(3) [Now Section 100.3(B)(3)], and Canons 1, 2A and 3A(3) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

A judge must be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...." (Rules Governing Judicial Conduct, 22 NYCRR 100.3[B][3]). Respondent violated this standard by the unprovoked and unjustified vulgarities and vitriol to which he subjected Ms. Dumar, who had merely come to court to pay a fine.

Even off the bench, angry and profane language by a judge is inappropriate. (See, Matter of Cerbone v State Commission on Judicial Conduct, 61 NY2d 93, 95; Matter of Kuehnel v State Commission on Judicial Conduct, 49 NY2d 465, 468; Matter of Gloss, 1994 Ann Report of NY Commn on Jud Conduct, at 67, 69). In connection with official duties, it is especially serious. (See, Matter of Aldrich v State Commission on Judicial Conduct, 58 NY2d 279, 281-82).

Self-evidently, breaches of judicial temperament are of the utmost gravity.

> As a matter of humanity and democratic government, the seriousness of a Judge, in his position of power and authority, being rude and abusive to persons under his authority--litigants, witnesses, lawyers--needs no elaboration.
>
> It impairs the public's image of the dignity and impartiality of courts, which is essential to their fulfilling the court's role in society.
>
> Matter of Mertens, 56 AD2d 456, 470 (1st Dept)

By reason of the foregoing, the Commission determines that the appropriate sanction is censure. All concur.

Dated: August 8, 1996

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

JAMES E. MC KEVITT,

Determination

a Justice of the Malta Town Court, Saratoga County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission.

Riebel Law Firm (By David L. Riebel) for Respondent.

The respondent, James E. McKevitt, a justice of the Malta Town Court, Saratoga County, was served with a Formal Written Complaint dated March 26, 1996, alleging that he stated that he was refusing to release a defendant because he had been required to get out of bed to conduct the arraignment. Respondent filed an answer dated April 26, 1996.

On June 6, 1996, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On June 6, 1996, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Malta Town Court since 1990.

2. On August 13, 1994, at approximately 11:30 P.M., respondent arraigned Timothy Walsh on a charge of Driving While Intoxicated. Respondent told Mr. Walsh's father that he intended to remand the defendant to jail. When the father asked respondent to release the defendant on his own recognizance, respondent replied that he was denying the request because he had had to get out of bed for the arraignment.

3. Respondent then set bail at $1,000 cash or $2,000 bond. The defendant posted bail the following day and was released.

4. Respondent and staff counsel have stipulated that, because of the nature of the charges, it is likely that bail would have been set in the Walsh case, even if respondent had not expressed pique at having been called to conduct the arraignment.

5. After the arraignment in Walsh, in the presence of the defendant and his father, respondent spoke to the deputy sheriff who was transporting the defendant. Respondent asked whether he was being "black-balled" by the sheriff's department inasmuch as he had not been contacted to conduct many arraignments recently. Respondent referred to the Saratoga County Sheriff as a "fucking asshole."

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(3) [now Section 100.3(B)(3)], and Canons 1, 2A and 3A(3) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

"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." (Matter of Friess, 1984 Ann Report of NY Commn on Jud Conduct, at 84, 88). A judge who makes, or appears to make, decisions for reasons other than the merits demeans the judicial process and diminishes respect for the courts. (See, Matter of Myers, 1985 Ann Report of NY Commn on Jud Conduct, at 203, 207; Matter of Friess, supra). It is especially improper for a judge to create the impression that a decision is being made out of personal irritation with a party. (See, Matter of Schiff v State Commission on Judicial Conduct, 83 NY2d 689, 693-94; Matter of Miller, 1981 Ann Report of NY Commn on Jud Conduct, at 121, 122).

By his angry and profane remark concerning the sheriff, respondent violated his obligation to be patient, dignified and courteous in carrying out judicial duties. (See, Rules Governing Judicial Conduct, 22 NYCRR 100.3[B][3]; Matter of Aldrich v State Commission on Judicial Conduct, 58 NY2d 279, 281-82).

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

Mr. Berger, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Luciano, Judge Marshall, Judge Newton, Judge Salisbury and Mr. Sample concur.

Judge Thompson was not present.

Dated: August 8, 1996

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

LORRAINE S. MILLER,

Determination

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

APPEARANCES:

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

Lankenau Kovner & Kurtz (Richard D. Emery, Of Counsel) for Respondent.

The respondent, Lorraine S. Miller, a justice of the Supreme Court, 2d Judicial District, was served with a Formal Written Complaint dated May 31, 1996, alleging two charges of misconduct. Respondent did not answer the Formal Written Complaint.

On May 31, 1996, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4), stipulating that the Commission make its determination based on the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On June 6, 1996, the Commission approved the agreed statement and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Supreme Court since January 1991. She was a judge of the Civil Court of the City of New York from January 1, 1980, to December 31, 1990.

2. Respondent and Supreme Court Justice S. Barrett Hickman had a close, personal and intimate relationship from July 1987 until early 1992.

3. In January 1992, Judge Hickman met Valerie Abroms; they were married later in 1992.

4. Respondent had confidential records from Valerie Abroms Hickman's New York matrimonial proceeding, including the divorce papers and an unsigned draft of a property settlement agreement.

5. Between January 1992 and December 1992, respondent made numerous inquiries concerning Valerie Hickman's travel plans, her home, her pending divorce proceeding and her prior marriages.

6. Between January 1, 1992, and March 3, 1993, respondent sent approximately 60 anonymous and harassing, annoying and offensive mailings to various newspapers, businesses and individuals, including Judge and Ms. Hickman and their relatives, friends and neighbors. The mailings contained characterizations of Judge and Ms. Hickman which were malicious, vituperative and derisive. Some of the mailings included Valerie Hickman's New York divorce papers and characterizations of her that had been alleged in divorce papers from proceedings in New York and South Africa.

7. Respondent's conduct was motivated by anguish over her break-up with Judge Hickman. She now regrets it and agrees that she will not engage in similar or other harassing conduct toward the Hickmans.

As to Charge II of the Formal Written Complaint:

8. In late August and early September of 1992, respondent presided over the jury trial of Wilfredo Sorrentino, who was charged with Criminal Possession Of A Weapon. While the jury was deliberating, respondent and the attorneys discussed a plea offer.

9. On September 3, 1992, while the defendant was considering the offer, the jury submitted a note to respondent. While defense counsel was outside the courtroom, respondent told Assistant District Attorney Jeffrey Mueller inside the courtroom to proceed with the guilty pleas.

10. Respondent did not advise Wayne Wiseman, defense counsel, of the jury's note.

11. Respondent accepted the defendant's pleas to two counts of Criminal Possession Of A Weapon in satisfaction of the charge on trial and one in another criminal case involving him. The defendant was subsequently incarcerated.

12. As they were leaving the courthouse, Mr. Mueller told Mr. Wiseman about the note. Mr. Wiseman has indicated that he was satisfied with the result; he did not seek to withdraw the guilty pleas.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(4) [now Section 100.3(B)(6)], and Canons 1, 2A 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.

On or off the bench, a judge is held to exacting standards of honor and propriety. (Matter of Backal v State Commission on Judicial Conduct, 87 NY2d 1, 7; see, Matter of Kuehnel v State Commission on Judicial Conduct, 49 NY2d 465, 469). Even wholly personal conduct by a judge has resulted in discipline. (See, Matter of Benjamin v State Commission on Judicial Conduct, 77 NY2d 296 [judge removed for sexual and physical abuse of an unwilling victim]; Matter of Bailey v State Commission on Judicial Conduct, 67 NY2d 61 [judge removed for engaging in a fraudulent scheme to obtain hunting licenses]; Matter of Smith, 1995 Ann Report of NY Commn on Jud Conduct, at 137 [judge censured for, inter alia, engaging in an angry confrontation at a street fair]; Matter of Gloss, 1994 Ann Report of NY Commn on Jud Conduct, at 67 [judge removed who used a shotgun, physical threats, vulgarities and verbal intimidation in personal, property dispute]; Matter of Siebert, 1994 Ann Report of NY Commn on Jud Conduct, at 103, and Matter of Innes, 1985 Ann Report of NY Commn on Jud Conduct, at 152 [judges admonished for driving while highly intoxicated and causing accidents]; Matter of Dudzinski, 1986 Ann Report of NY Commn on Jud Conduct, at 93 [judge removed for accepting unlawful gratuities in connection with his private employment]). Such conduct affects public confidence in the integrity of the judiciary, even if it is removed from court proceedings and judicial duties, does not obstruct justice or does not involve the use of the prestige of judicial office.

It was especially inappropriate for respondent to use confidential court documents to which she had access in order to further her campaign of personal vengeance.

In the Sorrentino matter, it was improper for respondent to fail to advise both counsel of the jury's note and to accept a bargained guilty plea from the defendant, knowing that he was not aware of the note. Her conduct constituted an improper ex parte communication (see, Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.3[a][4], renumbered Section 100.3[B][6] effective Jan. 1, 1996), compromised her impartiality and impaired confidence in her integrity and independence. "The critical consideration is that a fair trial be afforded to both parties, and, thus, high ethical standards must be observed...." (Matter of Rider, 1988 Ann Report of NY Commn on Jud Conduct, at 212, 215; see also, Matter of Klein, 1985 Ann Report of NY Commn on Jud Conduct, at 167).

Although serious and extensive, respondent's malicious harassment of the Hickmans does not constitute conduct that destroys her effectiveness on the bench. This is so, in part, because it was personal in nature and did not involve misuse of her administrative powers or her influence as a judge. (See, contra, Matter of Gelfand v State Commission on Judicial Conduct, 70 NY2d 211; Matter of Lo Russo, 1994 Ann Report of NY Commn on Jud Conduct, at 73). "Although high standards of conduct are expected and required of all judges because of

their special place in this society, those who hold judicial office are subject to the same fallibilities of human nature as anyone else." (Matter of Figueroa, 1980 Ann Report of NY Commn on Jud Conduct, at 159, 161).

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

Mr. Berger, Mr. Cleary, Mr. Coffey, Ms. Crotty, Judge Luciano, Judge Marshall, Judge Newton, Mr. Sample and Judge Thompson concur.

Mr. Goldman and Judge Salisbury dissent for the reasons set forth in the appended opinion.

Dated: August 14, 1996

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

LORRAINE S. MILLER,

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

OPINION BY
MR. GOLDMAN IN WHICH
JUDGE SALISBURY JOINS

I concur in the finding of misconduct as to Charge I and agree that respondent should be censured. I dissent, however, as to Charge II (the Sorrentino matter) because of what I believe to be the inadequacy of the agreed-upon record as it pertains to that charge. I therefore vote to reject the proposed statement of facts and would refer the matter for a full hearing on the complaint before a referee.

I ordinarily give considerable deference to an agreement between the Commission staff and a respondent judge since I believe that such agreements are necessary for the efficient and expeditious processing of cases by the Commission, especially in view of the severe budget cuts over the years that have decimated the Commission staff. I am unable to do so in this instance, however, because the proposed statement of facts with regard to Charge II fails to resolve critical points concerning respondent's conduct.

The agreed statement of facts (which, if accepted, would constitute the entire record in this matter) provides that during the jury deliberations the defendant was considering a plea offer. The jury submitted a note to respondent, the existence of which respondent concealed from defense counsel and, in the absence of defense counsel, told the prosecutor to go forward with the guilty plea. The defendant, apparently unaware of the note, pleaded guilty and was subsequently sentenced to a term of imprisonment.

The agreed statement fails to address, first, whether respondent was aware of the contents of the note, and, second, what the contents were. If the note was innocuous, seeking, for instance, information about when the judge planned to allow the jurors to break for a meal, respondent's failure to notify the defendant and his counsel of the note would have been of little moment and, in my view, not misconduct. If, in the other extreme, respondent knew that the note disclosed that the jury had reached a verdict and deliberately concealed that fact from the defendant and his counsel, that act would have constituted serious misconduct. For such misconduct, censure might well be too lenient a sanction.

With such major omissions from the proposed statement of facts as to Charge II, I am unable to vote to approve the statement. The crucial issues discussed above should be resolved at a hearing, and the Commission should make its determination on a full record.

Dated: August 14, 1996

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

PATRICK W. MILLER,

Determination

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

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission.

No appearance by Respondent.

The respondent, Patrick W. Miller, a justice of the DePeyster Town Court, St. Lawrence County, was served with a Formal Written Complaint dated July 3, 1995, alleging that he failed to remit court funds promptly to the state comptroller and that he failed to cooperate with the Commission. Respondent did not answer the Formal Written Complaint.

By motion dated August 3, 1995, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct had been established. Respondent did not oppose the motion or file any papers in response thereto. By determination and order dated September 1, 1995, the Commission granted the administrator's motion.

The administrator filed a memorandum on sanction. Respondent neither filed any papers nor requested oral argument.

On October 30, 1995, 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. Respondent has been a justice of the DePeyster Town Court during the time herein noted.

2. From December 1993 until May 1995, respondent failed to remit court funds to the state comptroller by the tenth day of the month following collection, as required by UJCA 2021(1), Town Law §27(1) and Vehicle and Traffic Law §1803(8). With the exception of April 1994, respondent was between five and 158 days late in remitting money during this period, even though he handled an average of only four cases a month.

3. After respondent was notified on January 30, 1995, that the Commission had authorized an investigation into his alleged failure to remit court funds promptly, he continued to turn over money to the state comptroller on a untimely basis.

As to Charge II of the Formal Written Complaint:

4. Respondent failed to respond to letters sent certified mail by staff counsel on January 30, February 16 and March 7, 1995, in connection with a duly-authorized investigation. Respondent failed without explanation to appear for the purpose of giving testimony on May 31, 1995, as directed by certified letter dated May 12, 1995.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a) and 100.3(b)(1), and Canons 1, 2A and 3B(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A town justice is required to remit court funds to the state comptroller by the tenth day of the month following collection. (UJCA 2021[1]; Town Law §27[1] and Vehicle and Traffic Law §1803[8]). The mishandling of public funds by a judge is misconduct, even when not done for personal profit. (Bartlett v Flynn, 50 AD2d 401, 404 [4th Dept]). The failure to remit monies to the comptroller constitutes neglect of administrative duties, even if the money is accounted for and on deposit. (Matter of Ranke, 1992 Ann Report of NY Commn on Jud Conduct, at 64, 65). Such misconduct generally warrants admonition or censure. (See, Matter of Ranke, supra; Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101).

However, respondent's failure to cooperate in the staff's investigation of this matter by refusing to answer inquiries and to appear for the purpose of giving testimony exacerbates his misconduct and demonstrates unfitness for judicial office. (See, Matter of Reese, 1985 Ann Report of NY Commn on Jud Conduct, at 217, 220). As has been held in the discipline of attorneys, the failure to cooperate in a duly-authorized investigation constitutes serious misconduct, in and of itself (Matter of Burger, 182 AD2d 52, 54 [2d Dept]; Matter of Feit, 156 AD2d 810, 811 [3d Dept]) and is deemed to be conduct prejudicial to the administration of justice (Matter of Weidlich, 200 AD2d 123, 127 [1st Dept]).

In other jurisdictions, courts have considered the failure of a judge to respond to investigative inquiries as the basis for holding the judge in contempt (In re Judge Anonymous, 590 P2d 1181 [Okla]) or as a strong factor in support of a finding that a judge be removed from office (In re Corning, 538 SW2d 46, 51 [Mo]).

By reason of the foregoing, the Commission determines that the appropriate sanction is removal. Mr. Berger, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Mr. Sample and Judge Thompson concur.

Ms. Barnett and Judge Salisbury were not present.

Dated: January 19, 1996

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

B. MARC MOGIL,

Determination

a Judge of the County Court, Nassau County.

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Alan W. Friedberg and Jean M. Savanyu, Of Counsel) for the Commission.

Jacob R. Evseroff (Paul S. Clemente and James J. McCrorie, Of Counsel) for Respondent.

The respondent, B. Marc Mogil, a judge of the County Court, Nassau County, was served with a Formal Written Complaint dated May 15, 1995, alleging that he sent numerous harassing, threatening, annoying or otherwise offensive communications to an attorney and that he gave testimony during the Commission's investigation that was false, misleading and lacking in candor. Respondent filed an answer dated June 13, 1995.

By motion dated June 14, 1995, respondent moved to dismiss the Formal Written Complaint. The administrator of the Commission opposed the motion by affirmation dated June 16, 1995. By determination and order dated June 30, 1995, the Commission denied the motion.

By order dated June 26, 1995, the Commission designated the Honorable Matthew J. Jasen as referee to hear and report proposed findings of fact and conclusions of law. By letter signed by respondent and his attorneys and dated September 1, 1995, respondent waived confidentiality in this proceeding. A public hearing was held on September 11, 12, 13, 14, 15, 18, 19, 20, 21 and 22, 1995, and the referee filed his report with the Commission on December 15, 1995.

By motion dated December 15, 1995, the administrator moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on January 3, 1996. The administrator filed a reply dated January 4, 1996.

On January 11, 1996, the Commission heard oral argument in public session, 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. Respondent has been a judge of the Nassau County Court since January 1991. He was a judge of the District Court, Nassau County, from 1987 to 1990.

2. Respondent and attorney Thomas F. Liotti have been critical of each other in an exchange of several pointed communications over various issues since 1991, including an invitation extended by Mr. Liotti to William Kunstler to address a meeting of the Criminal Courts Bar Association of Nassau County ("CCBA"). Respondent did not approve of this invitation.

3. Mr. Liotti became President of the CCBA for a one-year term in 1993 and 1994. During that time, respondent criticized Mr. Liotti's policies and practices as CCBA President and advised Mr. Liotti and others that he was suspending his participation in the CCBA during Mr. Liotti's term of office.

4. On December 6, 1993, Mr. Liotti sent a letter to respondent's administrative superiors, Supreme Court Justices Leo F. McGinity and Marie G. Santagata, in which he sharply criticized respondent's conduct and his mental and professional fitness to serve as a judge.

5. Judge Santagata thereafter met with respondent and showed him a copy of the letter from which Mr. Liotti's name and letterhead were redacted. Nevertheless, respondent recognized the letter as being from Mr. Liotti.

6. On December 30, 1993, Mr. Liotti sent a second letter to Judges Santagata and McGinity which criticized respondent and alluded to him as "dangerous."

7. On January 4, 1994, Mr. Liotti spoke at induction ceremonies for the newly elected judges of respondent's court. Between 300 and 500 people attended, including respondent. In a speech containing 13 points on how to avoid being a bad judge, Mr. Liotti, inter alia, criticized respondent, albeit without mentioning him by name, for outfitting his car with a "vanity" license plate reading "GUILTY."

8. About January 14, 1994, Mr. Liotti received an anonymous, one-page letter, signed by the "Wyatt Earp Association," which, inter alia, referred to Mr. Liotti as a "Donkey-turd" who thinks of himself as a "defense superstar," criticized Mr. Liotti for his recent induction speech, called him a "motor mouth," alleged certain personal and unprofessional activities by Mr. Liotti in Denver, called Mr. Liotti a "traffic court jerk" and a "LAUGHING-STOCK," referred to Mr. Liotti's "idiotic and laughable brickbat letters sent behind our backs," asked

whether Mr. Liotti's family or Newsday or "disciplinary commissions" would like to learn about his "Bimbos and Feds and threats" in Denver, and warned Mr. Liotti that "People in glass houses should be VERY careful...."

9. On January 29, 1994, Mr. Liotti received an anonymous, two-page facsimile, the first page of which was written in German and, inter alia, referred to Mr. Liotti as a "Motor-Mund," and the second page of which purported to be a "Certificate of Upgrade to Complete Asshole" signed by "Wyatt Earp." Respondent studied German in college.

10. On March 3, 1994, Mr. Liotti received an anonymous, one-page facsimile from "A Long Islander," which, inter alia, referred to Mr. Liotti's "mug" being in the newspaper "with your baby killer and translator," asked "How did the Newsday photographer KNOW exactly when to show up," asked whether it was because of a "LEAK" to the press, and asked whether "Trying your case in the press and getting yourself publicity" isn't "unethical."

11. About March 16, 1994, Mr. Liotti received an anonymous post-card, which contained a decal of a leprechaun and a telephone number belonging to the CIA. Respondent has directly or indirectly alluded to his purported ties to the U.S. intelligence community. He told Newsday that he may have been affiliated with U.S. intelligence; in a 1993 letter to court officers, he boasted that his previous "affiliation" with "federal agencies" qualified him to train court officers in anti-terrorism, and he has alluded to once having been "a U.S. intelligence agent."

12. In mid-March 1994, Mr. Liotti received an envelope from an anonymous sender bearing a phone number belonging to the CIA and four decals of a leprechaun and containing three pills. The pills were Prozac, Diazepam (Valium) and Anafranil. Respondent was at the time a daily prescription user of Prozac, and he has had a prescription for Valium.

13. About March 16, 1994, Mr. Liotti received an anonymous, one-page letter and an accompanying business card which stated, inter alia, "HAVE MOUTH, WILL TRAVEL," bore Mr. Liotti's name, and referred to him as "Superstar." The letter, inter alia, stated that the business card would be "in the hands of EVERY lawyer in Nassau County..." and said that the business card was produced in a "'private' printshop in Virginia." CIA headquarters is located in Langley, Virginia.

14. About March 31, 1994, Mr. Liotti received an anonymous, one-page letter, which, inter alia, referred to a Newsday photo of Mr. Liotti with clients and stated, "DO YOU SEE HOW EASY IT IS TO DISAPPEAR FROM THE FACE OF THE EARTH, TOMMY BOY?"

15. On May 2, 1994, Mr. Liotti received an anonymous, one-page facsimile from "W.E. Assn," which, inter alia, referred to Mr. Liotti as a "PUTZ" and to his "call" for assistance from the FBI, "Sniff dogs" and others. The fax also included decal-like representations of the American flag and a cartoon character known as the "Tasmanian Devil."

16. On June 16, 1994, respondent signed and sent to Mr. Liotti a one-page RSVP for the bar association's annual golf outing and dinner event. The facsimile included handwritten comments by respondent, including: "I wouldn't miss this night for the world!" The fax also included identical representations of the American flag and Tasmanian Devil as appear on the anonymous fax of May 2, 1994.

17. On June 23, 1994, at the bar association's annual dinner, respondent made available for distribution 50 copies of a four-page statement which he had drafted and typed himself on court stationery, entitled "13 SUGGESTIONS FOR 'CONFRONTATIONAL' OR INTENTIONALLY OFFENSIVE CRIMINAL DEFENSE ATTORNEYS." The document was interpreted by several readers, including Mr. Liotti, as containing numerous, indirect criticisms of Mr. Liotti. Respondent's statement bore decal-like representations of the American flag on each page. It discussed "leaks" by attorneys who play to the press. The "13 Suggestions" referred to lawyers who are "nihilistic" and "[n]arcissists" and consider themselves as "superstar[s]." The statement threatened lawyers against "grossly contrived complaints" against the judiciary. It referred to "19th Century Tombstone, Arizona," the F.B.I and an "official who may to your surprise have once been a U.S. intelligence agent." Respondent denigrated village courts and suggested that their justices are lower on the "food chain" than other judges. His statement alluded to "medications." Among the "13 Suggestions" was one which warned against "antics" in "Montana," a reference which respondent acknowledges was "inspired in part" by remarks that he had heard concerning Mr. Liotti's behavior in Denver.

18. On June 24, 1994, respondent sent to Mr. Liotti a two-page facsimile which, inter alia, contained an ad for the movie "Wyatt Earp," a handwritten message signed by respondent which states that "Earp was a real character who never let up until someone coming after him was FINISHED," and a printed message stating "DON'T SAY I DIDN'T WARN YOU..." on top of the ad.

19. On August 18, 1994, Mr. Liotti received an anonymous, one-page facsimile from the "Wyatt Earp Assn." which, inter alia, claimed credit for distributing the mock business card at the June 23 bar association event, stated that the card was printed "at our Langley HQ" and asserted that Mr. Liotti is still a "vociferous letter writer, and attacker of the innocent." The fax also contains an identical depiction of the Tasmanian Devil as appears on the anonymous fax of May 2, 1994, and on respondent's June 16 RSVP.

20. In September 1994, Mr. Liotti received an anonymous, one-page facsimile, which purports to be "THE LIOTTI GAZETTE" and, inter alia, contains mock articles about Mr. Liotti being "investigated" for child abuse and under inquiry by the IRS in connection with his trip to Denver.

21. Also in September 1994, Mr. Liotti received an envelope from an anonymous sender containing a document with a street map of Garden City with an "x" marking the spot where Mr. Liotti's office is located and a street map of Westbury with a circle marking the spot

where Mr. Liotti's home is located. The stamps on the envelope had not been cancelled by the post office.

22. There are numerous similarities in language, tone, style and references between the anonymous communications and respondent's speech to the bar association and the communications that he acknowledges sending on June 16 and 24, 1994. These, as well as the other factors and circumstances of this case, lead the Commission to find that respondent sent the anonymous communications to Mr. Liotti.

As to Charge II of the Formal Written Complaint:

23. The document that respondent distributed at the June 23, 1994, CCBA event was written on his judicial stationery, identified him as a County Court judge, was printed on multi-colored paper and had an American flag decal affixed to the top of each page.

24. Respondent's statement called the "Victim Rage" defense "quixotic, obtuse and moronic," notwithstanding that he knew that it was a strategy being considered by the defense in People v Colin Ferguson, a highly publicized case then pending before another judge of respondent's court.

25. Respondent warned attorneys about the consequences of making complaints against or otherwise offending judges. He stated, for example, that it is "axiomatic that one never...writes paranoid or grossly contrived complaints about or against a colleague, adversary or judge." Respondent further warned complaining attorneys:

a) that their "target" will find out, "despite your desire to remain anonymous;" they "will be identified"; and,

b) to "remember" that "swords have two blades, and every action has an equal and opposite reaction."

26. Respondent's statement declared that making an unfounded complaint against a judge would provoke retaliation by the judge's colleagues, who would be "galvanize[d]... against you..." "Risking professional problems will be the least of your possible difficulties...." Respondent underscored this point by describing "Mogil's Law": if your "first figurative blow" does not "put the person 'down for the count'... you've had it!"

27. Respondent's statement said that an "offended official" could "find out more about you than your mother knows," and he threatened to raise embarrassing questions about lawyers who offend public officials:

a) "Is there anything in your background that you would prefer your colleagues or loved ones not know?";

b) "How are your tax returns for the last several years?";

c) "Are you taking any medications you would prefer remain a private matter?"; and,

d) "Would you like to see every item charged for the last 10 years on your credit cards scrutinized by the Feds?"

28. Respondent threatened complaining lawyers with exposure in The New York Times for extra-marital liaisons, "alcoholic over-indulgences" and other behavior. He also warned lawyers that making a complaint may "unwittingly trigger the wheels of a deadly serious defensive scenario."

29. Respondent's statement called some lawyers "sociopathic," "traitorous" and "[n]arcissists," and it called cases adjudicated in village courts "trivial." Mr. Liotti is a part-time village justice.

As to Charge III of the Formal Written Complaint:

30. On April 22, 1994, respondent opened an account with America Online, through which he sends and receives messages electronically ("e-mail"), via a modem in his personal computer. The "screen name" that he uses for his e-mail messages is "JUDGEMOJO." In order to access his account, he must use, not only his screen name, but a self-selected secret password; the password is typed but is not visible on the computer screen. The only person to whom respondent ever confided his password was his secretary, Patricia Riehl, who never used it and never revealed it to anyone.

31. On September 16, 1994, at 10:59 A.M. Eastern Daylight Time, respondent sent an e-mail message from "JUDGEMOJO" of America Online to President Clinton, and it was received on the White House e-mail system. The body of the message specifically stated that the sender was "Judge B. Marc Mogil" of Great Neck. Respondent was "logged on" to the American Online e-mail system at the time that the message to the White House was sent and received. The text of the message contained critical comments about President Clinton and his policy toward Haiti. In response, the White House sent an acknowledgment letter to respondent, with the President's signature, on October 3, 1994.

32. In the second week of October 1994, respondent gave the White House letter to Nassau County Police Detective Robert Tedesco and claimed that he had never communicated with the President on any subject. Respondent said someone had communicated to the White House in his name, and he specifically mentioned Thomas Liotti as a possibility.

33. In a letter to staff counsel on November 8, 1994, respondent falsely stated that he had not communicated with the White House and that someone else had done so fraudulently in his name.

As to Charge IV of the Formal Written Complaint:

34. On January 24, 1995, respondent gave testimony in the course of the Commission's investigation of this matter. Respondent falsely testified that:

a) he never communicated in any manner with President Clinton or the White House on any subject;

b) he did not send President Clinton an e-mail message;

c) he did not know how the White House came to have his name and home address;

d) he did not know why President Clinton sent him the letter; and,

e) some other person sent a communication in his name to the President.

As to Charge V of the Formal Written Complaint:

35. On June 24, 1994, respondent sent a two-page facsimile to Mr. Liotti's office containing a handwritten message and a movie ad about Wyatt Earp. The fax was addressed to respondent's former secretary, Bonnie Nohs, who was then working in Federal District Court in Brooklyn. Ms. Nohs had never been employed by Mr. Liotti, nor had she ever received faxes or other communications via Mr. Liotti's office. Respondent and his secretary knew where Ms. Nohs was working, and, on previous occasions, respondent had faxed documents to Ms. Nohs at her own fax number. Respondent had never before sent any communications to Ms. Nohs in care of Mr. Liotti's office.

36. On January 24, 1995, during the Commission's investigation of the matters herein, respondent falsely testified that:

a) at the bar association event on June 23, 1994, Ms. Nohs asked him for a movie recommendation and said that her husband liked westerns, to which respondent replied by mentioning the movies "Wyatt Earp" and "Tombstone";

b) respondent told her at the bar association event that he would fax her information the next day about the particular movie that he was recommending;

c) respondent sent the two-page fax to Mr. Liotti's office because he expected Mr. Liotti to forward the document to Ms. Nohs, notwithstanding the absence of any cover memo or request for such a referral from respondent to Mr. Liotti;

d) he did not add the words "DON'T SAY I DIDN'T WARN YOU..." above the movie ad;

e) he wrote the words, "I've heard Earp was a real character who never let up until someone coming after him was FINISHED", not as a message to Mr. Liotti, but to Bonnie Nohs;

f) he had his secretary look up Mr. Liotti's fax number and send the fax to Mr. Liotti's office because he and his secretary were so busy with a homicide trial before a jury that day that they did not have the time to look up Ms. Nohs's fax number; respondent's official court calendar shows that no jury trial was scheduled for June 24, 1994, that all six cases on his docket for the day were adjourned and that no cases of any type were heard; and,

g) the ad and the message were not intended for Mr. Liotti and respondent did not intend for Mr. Liotti to see or know about the fax.

As to Charge VI of the Formal Written Complaint:

37. The charge is not sustained and is, therefore, dismissed.

As to Charge VII of the Formal Written Complaint:

38. The charge is not sustained and is, therefore, dismissed.

As to Charge VIII of the Formal Written Complaint:

39. During the Commission's investigation of this matter, respondent falsely testified on January 24, 1995, that Mr. Liotti was the only person other than his doctor and his family who knew that respondent was taking the drug Prozac.

40. Respondent testified that:

a) in June or July 1993, he caught Mr. Liotti in chambers, alone, standing next to the full flight suit which respondent keeps hanging in chambers;

b) Mr. Liotti had unzipped the top of the flight suit to uncover a medical alert tag which respondent kept tucked inside the flight suit; and,

c) Mr. Liotti was reading the tag, which indicated that respondent used Prozac.

41. Respondent produced a tag at his investigative appearance which he said was the tag, bearing the word "Prozac," which Mr. Liotti had seen in June or July 1993. However, Prozac was not prescribed for respondent until June 26, 1993; he did not order the tag until July

20, 1994, and he did not receive it until September 1994, more than a year after he originally claimed that Mr. Liotti had seen it.

42. At the hearing before the referee, respondent testified that it was not the tag that he had previously produced, but an earlier tag, that Mr. Liotti had seen. Respondent had been issued a medical alert tag by the same company in 1991, but respondent was not taking Prozac in 1991.

43. Mr. Liotti did not examine respondent's flight suit in June or July 1993, did not read his medical alert tag and did not know the medications that respondent was taking.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a) and 100.3(a)(6), and Canons 1, 2A and 3A(6)* of the Code of Judicial Conduct. Charges I, II, III, IV, V and VIII of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charges VI and VII are dismissed.

The evidence clearly demonstrates that respondent engaged in a vituperative campaign against a lawyer with whom he had a personal feud by sending numerous harassing, threatening and disparaging anonymous communications to the lawyer and disseminating widely a speech in which he impliedly disparaged the attorney. Such disreputable conduct demeans the judiciary as a whole and impairs public confidence in respondent's integrity and judgment. His extensive fabrications in testimony before this Commission further demonstrate that he is not fit to be a judge.

On and off the bench, judges are held to "higher standards of conduct than members of the public at large and [] relatively slight improprieties subject the judiciary as a whole to public criticism and rebuke." (Matter of Aldrich v State Commission on Judicial Conduct, 58 NY2d 279, 283). Respondent's pernicious attacks on Mr. Liotti--whatever the provocation--were offensive, hateful and intimidating. His behavior fell well below that expected of any citizen; coming from a judge, it was inexcusable.

Judges have been sanctioned for abusive and threatening remarks and actions off the bench (see, Matter of Kuehnel v State Commission on Judicial Conduct, 49 NY2d 465), including those directed at attorneys (see, Matter of Mahar, 1983 Ann Report of NY Commn on Jud Conduct, at 139; Matter of Hopeck, 1981 Ann Report of NY Commn on Jud Conduct, at 133) and others (see, Matter of Smith, 1995 Ann Report of NY Commn on Jud Conduct, at 137; Matter of Gloss, 1994 Ann Report of NY Commn on Jud Conduct, at 67).

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*The Formal Written Complaint erroneously refers to Section 100.3(b)(6) and Canon 3B(6). These are apparently typographical errors. The charges are hereby amended to reflect the appropriate sections.

Respondent's public dissemination of the 13 points criticizing the criminal defense bar compromised his impartiality. (See, Paragraphs 25-29, supra). He publicly criticized a defense being raised in a pending proceeding before his court (see, Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][6]; Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135) and graphically threatened attorneys against bringing complaints against judges (see, Matter of Sullivan, 1984 Ann Report of NY Commn on Jud Conduct, at 152, 156).

Furthermore, respondent's false report to a police official and the series of elaborate untruths that he advanced during the investigation of this matter constitute serious misconduct. Such deception "is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." (Matter of Myers v State Commission on Judicial Conduct, 67 NY2d 550, 554).

Our review of the record of this proceeding, consisting of 77 exhibits and 1,651 pages of testimony from 42 witnesses, including character witnesses called on respondent's behalf, during a ten-day hearing, convinces us that respondent's misconduct was established by a preponderance of the evidence (see, Commission's Operating Procedures and Rules, 22 NYCRR 7000.6[i]; Matter of Seiffert v State Commission on Judicial Conduct, 65 NY2d 278, 279-80). Among the reasons for this conclusion are the striking and numerous similarities in language, tone, style and references between the anonymous communications to Mr. Liotti and the three documents that respondent admits to preparing. Respondent's argument that Mr. Liotti sent the anonymous communications to himself, presumably to fabricate evidence against respondent, is implausible; eight of the communications were received before respondent circulated his "13 Suggestions" letter, which covers many of the same themes in similar language. Had Mr. Liotti been sending bogus communications to himself, he certainly could not have mimicked in January, March and May attacks that respondent did not make publicly until June.

Taken as a whole, respondent's attacks toward Mr. Liotti, his criticisms and threats against the criminal defense bar in general, his false report to the police and his false testimony to the Commission constitute conduct prejudicial to the proper administration of justice warranting removal. This is so regardless of respondent's reputation in the legal community. (See, Matter of Gelfand v State Commission on Judicial Conduct, 70 NY2d 211, 213; Matter of Shilling v State Commission on Judicial Conduct, 51 NY2d 397, 399).

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

Mr. Berger, Ms. Barnett, Mr. Cleary, Mr. Coffey, Ms. Crotty, Mr. Goldman, Judge Newton, Judge Salisbury and Judge Thompson concur.

Ms. Barnett and Mr. Goldman dissent only as to the majority's findings that respondent sent the communication referred to in Paragraph 4R of Charge I [reflected in Paragraph 21 of the findings herein] and that he falsely testified as to the statement in Paragraph 13(i) of Charge V [reflected in Paragraph 36(a) of the findings herein] and vote that those allegations be dismissed.

Ms. Crotty dissents only as to the majority's finding that respondent sent the communication referred to in Paragraph 4R of Charge I and votes that that allegation be dismissed.

Judge Salisbury dissents only as to Paragraph 13(i) of Charge V and votes that that allegation be dismissed.

Mr. Sample was not present.

Dated: February 13, 1996

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

RONALD C. ROBERT,

Determination

a Justice of the Chester Town Court, Warren County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the Commission.

Honorable Ronald C. Robert, pro se.

The respondent, Ronald C. Robert, a justice of the Chester Town Court, Warren County, was served with a Formal Written Complaint dated October 19, 1995, alleging that he presided over numerous cases involving close friends and that he went to her place of employment to criticize a defendant who had made remarks critical of respondent. Respondent filed an answer dated November 20, 1995.

By order dated December 14, 1995, the Commission designated Vincent D. Farrell, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 8, 1996, and the referee filed his report with the Commission on May 15, 1996.

By motion dated July 3, 1996, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent did not file any papers in response thereto and waived oral argument.

On September 12, 1996, 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. Respondent has been a justice of the Chester Town Court since January 1, 1992.

2. Respondent has known Charles Redmond since about 1970, when respondent was an environmental conservation officer and Mr. Redmond was a state trooper. Respondent and Mr. Redmond took a cross-country motorcycle trip together in 1978. They have fished

together and have socialized in each other's homes. He and Trooper Redmond often had coffee together in a local diner. Respondent has characterized their relationship as "good friends" and has described Trooper Redmond as a "personal friend."

3. Between September 15, 1993, and August 1995, respondent presided over four criminal cases and 17 contested motor vehicle cases in which Trooper Redmond was the arresting officer. In People v Steven R. Harding on February 1, 1994, respondent conducted a trial in which Trooper Redmond acted as prosecutor and the sole prosecution witness. Respondent found Mr. Harding guilty.

4. Respondent never advised Mr. Harding or the 20 other defendants of his relationship with Trooper Redmond, who has since retired from the state police.

5. Respondent has known James Panos since 1992. He also has coffee regularly with Mr. Panos, and they discuss their common interest in guns.

6. Respondent has known Mr. Panos's son, James G. Panos, since 1993. They also have coffee together at the diner. Respondent and the younger Mr. Panos have hunted and fished together. Respondent buys equipment from the younger Mr. Panos and visits him at his place of business. They have visited each other's homes and, on two or three occasions, respondent rode with Mr. Panos on a 75-mile trip to Ticonderoga. On February 14, 1994, respondent had his snowblower lifted to the roof of Mr. Panos's building and removed the snow for him as a favor. Respondent has described James G. Panos as "a friend of mine."

7. Notwithstanding his relationships with James Panos and James G. Panos, respondent presided over 17 cases in which John Panos was the defendant. John Panos is the son of James Panos and the brother of James G. Panos.

8. James G. Panos is the animal control officer for the Town of Chester. Notwithstanding his relationship with James G. Panos, respondent has presided over five animal control violation cases filed by Mr. Panos. Respondent never notified any of the defendants of his relationship with Mr. Panos.

9. Respondent was notified on July 14, 1994, that the Commission was investigating his handling of cases brought by Trooper Redmond and those involving the Panos family. He gave testimony during the investigation on January 5, 1995. Thirteen of the cases involving Trooper Redmond and 17 of the cases involving the Panos family were heard by respondent after July 1994.

10. At the hearing in this matter on February 8, 1996, respondent testified that he did not believe it was improper for him to preside over cases involving Trooper Redmond and the Panos family, and he said that he would not disqualify himself from such cases in the future.

As to Charge II of the Formal Written Complaint:

11. On March 21, 1994, the North Country Gazette published a letter by Hilda J. VanDerwarker in which she was critical of respondent's handling of her Speeding ticket.

12. The following day, respondent went to the dentist's office where Ms. VanDerwarker was employed as a dental assistant and spoke to her and her employer. Ms. VanDerwarker testified that respondent said that he was "hurt" by her letter to the editor of the newspaper; respondent testified that he did not mention the letter and maintained that he went to the dentist's office to complain that Ms. VanDerwarker had discussed his handling of her case with a patient.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct then in effect, 22 NYCRR 100.1, 100.2 and 100.3(c)(1) [now Section 100.3(E)(1)], and Canons 1, 2 and 3C(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein[2], and respondent's misconduct is established.

Respondent's attempt to stifle Ms. VanDerwarker's criticism of him was grossly improper whether he was--as she testified--attacking her letter to the editor or--as he insists--discouraging her from talking about his handling of her case. In either event, by going to her place of employment and talking to her employer, respondent was attempting to inhibit Ms. VanDerwarker in her exercise of a fundamental constitutional protection: the right of the citizenry to criticize public officials.

Respondent's handling of cases involving Trooper Redmond and the Panos family was also wrong. "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." (Rules Governing Judicial Conduct, 22 NYCRR 100.3[E][1], formerly Section 100.3[c][1]). A defendant might reasonably question whether a judge could be impartial in a matter in which the arresting officer and prosecuting authority was a close friend with whom the judge took trips, went fishing, regularly had coffee and visited in his home. Thus, respondent should have disqualified himself in cases brought to his court by Trooper Redmond.

Respondent's relationships with James Panos and his son, James G. Panos, also involve hunting and fishing and other trips, personal favors and socializing in homes and

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[2] Charge I refers to a Letter of Dismissal and Caution sent to respondent on September 14, 1993, at the conclusion of an earlier investigation. The Commission's Operating Procedures and Rules, 22 NYCRR 7000.4, do not permit us to consider that Letter of Dismissal and Caution in this proceeding. Section 7000.4 provides that a Letter of Dismissal and Caution issued prior to a hearing in an earlier proceeding may not be used to establish misconduct in a subsequent proceeding unless the conduct that was at issue in the earlier proceeding is charged and proven in the subsequent proceeding. Since the conduct underlying the caution was not charged in this proceeding, respondent has had no due-process opportunity to contest the earlier conduct. Only in that event may the prior Letter of Dismissal and Caution "be considered by the commission in determining the sanction to be imposed." Therefore, we may not consider in this proceeding that the conduct charged here is exacerbated by the fact that it may be a repetition of earlier conduct.

restaurants. These associations raise similar issues concerning his handling of John Panos's cases and those brought by James G. Panos as animal control officer.

It is beside the point that none of the litigants complained about these relationships--a fact that respondent did not divulge--and that he showed no favoritism or prejudice, as respondent has testified was the case. The Rules Governing Judicial Conduct counsel a judge to avoid even the appearance of impropriety (22 NYCRR 100.2), and they require disqualification whenever the judge's impartiality is in question. Respondent is unable to make the distinction between the fact of bias and its appearance.

Judges have been sanctioned for presiding in cases involving friends or others with close associations, even when there is no evidence of favoritism. (See, Matter of Fabrizio v State Commission on Judicial Conduct, 65 NY2d 275 [judge presided over small claims case brought by his dentist of ten years]; Matter of Wright, 1989 Ann Report of NY Commn on Jud Conduct, at 147 [judge decided, inter alia, motions in housing matter involving tenant on whose behalf he had written letters eight years earlier]; Matter of Merkel, 1989 Ann Report of NY Commn on Jud Conduct, at 111 [judge presided over case in which her court clerk was complaining witness]; Matter of Mills, 1985 Ann Report of NY Commn on Jud Conduct, at 196 [judge arraigned a defendant five days after they had engaged in sexual relations]).

Respondent's misconduct is compounded by the fact that he continued to hear cases involving Trooper Redmond and the Panos family after he knew that the Commission was investigating the complaint that led to this proceeding. (See, Matter of Sims v State Commission on Judicial Conduct, 61 NY2d 349, at 357). His failure to recognize that this conduct is improper and his insistence that he will continue to hear such cases lead us to conclude that he lacks sensitivity to the ethical constraints placed upon him as a judge and that he should be removed. (See, Matter of Shilling v State Commission on Judicial Conduct, 51 NY2d 397, at 404; Matter of Sims, supra).

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

Mr. Berger, Mr. Coffey, Ms. Crotty, Judge Luciano, Judge Marshall and Judge Thompson concur, except that Judge Marshall and Judge Thompson would also base the sanction on a finding that respondent previously received a Letter of Dismissal and Caution concerning similar conduct.

Mr. Goldman, Judge Newton and Judge Salisbury dissent as to sanction only and vote that respondent be censured.

Mr. Sample was not present.

Dated: September 17, 1996

COMPLAINTS PENDING AS OF DECEMBER 31, 1995

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		12	16	8	4	7	9	56
DELAYS		3	3					6
CONFLICT OF INTEREST		2	3	6	1		2	14
BIAS		2	1	1		1	1	6
CORRUPTION		3	3			1		7
INTOXICATION		2			1		1	4
DISABILITY/QUALIFICATIONS						2		2
POLITICAL ACTIVITY		3	7	4	1	1		16
FINANCES/RECORDS/TRAINING		2	3	5	3	1	4	18
TICKET-FIXING		1		1	1			3
ASSERTION OF INFLUENCE		2		1		1	2	6
VIOLATION OF RIGHTS		10	12	6	6	6	3	43
MISCELLANEOUS			1	1	1	2	1	6
TOTALS		42	49	33	18	22	23	187

*Matters are "closed" upon vacancy of office for reasons other than resignation. "Action" includes determinations of admoniton, censure and removal from office by the Commission since its inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by the temporary and former commissions on judicial conduct operating from 1975 to 1978.

NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 1996

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	466							466
NON-JUDGES	242							242
DEMEANOR	163	40	13	5	1	4		226
DELAYS	37	4	2		2			45
CONFLICT OF INTEREST	22	16	4		1	1		44
BIAS	72	6	2					80
CORRUPTION	28	2			2			32
INTOXICATION		1	1					2
DISABILITY/QUALIFICATIONS	4		1			1		6
POLITICAL ACTIVITY	13	9	5	1				28
FINANCES/RECORDS/TRAINING	12	7	2	1				22
TICKET-FIXING		2						2
ASSERTION OF INFLUENCE	10	6	1					17
VIOLATION OF RIGHTS	217	30	8	1	1	1		258
MISCELLANEOUS	12	3	1					20
TOTALS	1298	130	40	8	7	7		1490

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ALL COMPLAINTS CONSIDERED IN 1996: 1490 NEW & 187 PENDING FROM 1995

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	466							466
NON-JUDGES	242							242
DEMEANOR	163	52	29	13	5	11	9	282
DELAYS	37	7	5		2			51
CONFLICT OF INTEREST	22	18	7	6	2	1	2	58
BIAS	72	8	3	1		1	1	86
CORRUPTION	28	5	3		2	1		39
INTOXICATION		3	1		1		1	6
DISABILITY/QUALIFICATIONS	4		1			3		8
POLITICAL ACTIVITY	13	12	12	5	1	1		44
FINANCES/RECORDS/TRAINING	12	9	5	6	3	1	4	40
TICKET-FIXING		3		1	1			5
ASSERTION OF INFLUENCE	10	8	1	1		1	2	23
VIOLATION OF RIGHTS	217	40	20	7	7	7	3	301
MISCELLANEOUS	12	7	2	1	1	2	1	26
TOTALS	1298	172	89	41	25	29	23	1677

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ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	8123							8123
NON-JUDGES	2257							2257
DEMEANOR	1624	52	721	175	59	64	136	2831
DELAYS	783	7	80	40	11	11	16	948
CONFLICT OF INTEREST	356	18	308	106	41	18	94	941
BIAS	1053	8	174	31	18	14	16	1314
CORRUPTION	227	5	70	6	23	11	15	357
INTOXICATION	33	3	28	7	5	3	15	94
DISABILITY/QUALIFICATIONS	40		25	2	15	10	6	98
POLITICAL ACTIVITY	165	12	127	106	6	15	14	445
FINANCES/RECORDS/TRAINING	160	9	129	79	85	67	78	607
TICKET-FIXING	20	3	69	154	36	60	159	501
ASSERTION OF INFLUENCE	108	8	87	38	8	6	28	283
VIOLATION OF RIGHTS	1256	40	171	73	32	16	17	1605
MISCELLANEOUS	628	7	215	72	22	36	56	1036
TOTALS	16,833	172	2204	889	361	331	650	21,440

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