ANNUAL REPORT

2005

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

* * *

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* * *

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* * *

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March 1, 2005

To the 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 through December 31, 2004.

Respectfully submitted,

Lawrence S. Goldman, Chair
On Behalf of the Commission

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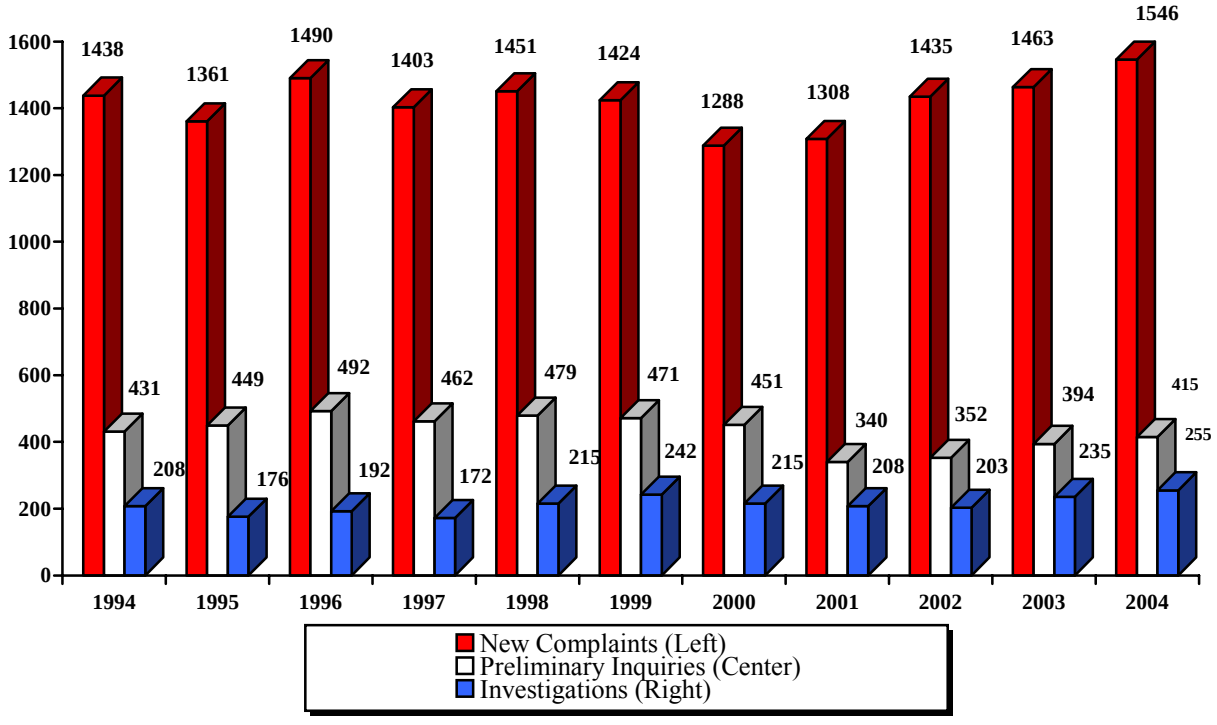
INTRODUCTION TO THE 2005 ANNUAL REPORT

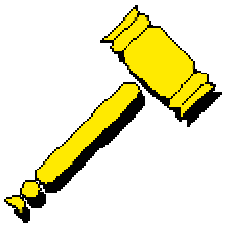
The New York State Commission on Judicial Conduct is the independent agency designated by the State Constitution to review complaints of misconduct against judges of the State Unified Court System, which includes over 3,400 judges and justices. The Commission is not part of the Office of Court Administration. The Commission's objective is to enforce high standards of conduct for judges, who must be free to act independently, on the merits and in good faith, but also must be held accountable by an independent disciplinary system, should they commit misconduct. The text of the Rules Governing Judicial Conduct, promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, is annexed.

The number of complaints received by the Commission in the past 13 years has substantially increased compared to the first 17 years of the Commission's existence. Since 1992, the Commission has averaged over 1400 new complaints per year, 400 preliminary inquiries and 200 investigations. In each of the last 13 years, the number of incoming complaints has been more than double the 641 we received in 1978. Yet our budget has not kept pace – indeed, our staff has decreased from 63 in 1978 to 28 last year, when 255 investigations were authorized. (See the budget analysis on pages 35-36.)

This current Annual Report covers the Commission's activities in the year 2004.

Complaints, Inquiries & Investigations Since 1994





Action Taken in 2004

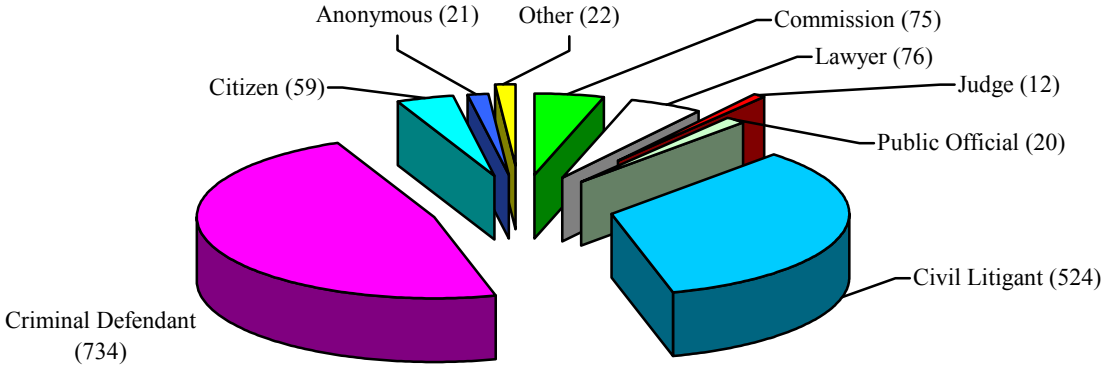
Following are summaries of the Commission's actions in 2004, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

Complaints Received

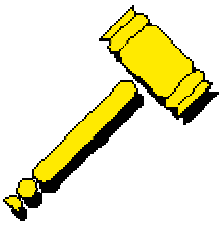
The Commission received 1546 new complaints in 2004. Preliminary inquiries were conducted in 415 of these, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts. In 255 matters, the Commission authorized full-fledged investigations. Depending on the nature of the complaint, an investigation may entail interviewing witnesses, subpoenaing witnesses to testify and produce documents, assembling and analyzing various court, financial or other records, making court observations, and writing to or taking testimony from the judge.

New complaints dismissed upon initial review are those that the Commission deems to be clearly without merit, not alleging misconduct or outside its jurisdiction, including complaints against judges not within the state unified court system, such as federal judges, administrative law judges and New York City Housing Court judges. Absent any underlying misconduct, such as demonstrated prejudice, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate complaints concerning disputed judicial rulings or decisions. The Commission is not an appellate court and cannot reverse or remand trial court decisions.

A breakdown of the sources of complaints received by the Commission in 2004 appears in the following chart.



Complaint Sources in 2004

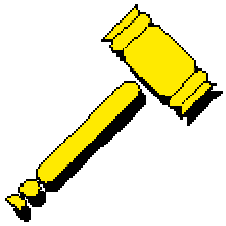


Preliminary Inquiries and Investigations

The Commission's Operating Procedures and Rules authorize "preliminary analysis and clarification" and "preliminary fact-finding activities" by Commission staff upon receipt of new complaints, to aid the Commission in determining whether an investigation is warranted. In 2004, staff conducted 415 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

During 2004, the Commission commenced 255 new investigations. In addition, there were 188 investigations pending from the previous year. The Commission disposed of the combined total of 443 investigations as follows:

- 152 complaints were dismissed outright.
- 33 complaints involving 33 different judges were dismissed with letters of dismissal and caution.
- 7 complaints involving 6 different judges were closed upon the judges' resignation.
- 13 complaints involving 11 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.
- 47 complaints involving 38 different judges resulted in formal charges being authorized.
- 191 investigations were pending as of December 31, 2004.



Formal Written Complaints

As of January 1, 2004, there were pending Formal Written Complaints in 25 matters, involving 14 different judges. During 2004, Formal Written Complaints were authorized in 47 additional matters, involving 38 different judges. Of the combined total of 72 matters involving 52 judges, the Commission made the following dispositions:

- 29 matters involving 20 different judges resulted in formal discipline (admonition, censure or removal from office).
- 2 matters involving 2 judges resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- 2 matters involving 2 judges were closed upon the judge's resignation.
- 39 matters involving 28 different judges were pending as of December 31, 2004.

Summary of All 2004 Dispositions

The Commission's investigations, hearings and dispositions in the past year involved judges at various levels of the state unified court system, as indicated in the following ten tables.

TABLE 1: TOWN & VILLAGE JUSTICES – 2,300*, ALL PART-TIME

	Lawyers	*Non-Lawyers*	*Total*
Complaints Received	74	258	332
Complaints Investigated	22	109	131
Judges Cautioned After Investigation	3	18	21
Formal Written Complaints Authorized	3	19	22
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	5	9	14
Formal Complaints Dismissed or Closed	0	0	0

Note: Approximately 400 town and village justices are lawyers.

TABLE 2: CITY COURT JUDGES – 388, ALL LAWYERS

	Part-Time	*Full-Time*	*Total*
Complaints Received	57	143	200
Complaints Investigated	11	28	39
Judges Cautioned After Investigation	1	5	6
Formal Written Complaints Authorized	0	3	3
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	0	2	2
Formal Complaints Dismissed or Closed	0	1	1

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

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

TABLE 3: COUNTY COURT JUDGES – 127 FULL-TIME, ALL LAWYERS

Complaints Received	205
Complaints Investigated	11
Judges Cautioned After Investigation	2
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

TABLE 4: FAMILY COURT JUDGES – 124, FULL-TIME, ALL LAWYERS

Complaints Received	165
Complaints Investigated	24
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Formal Complaints Dismissed or Closed	0

TABLE 5: DISTRICT COURT JUDGES – 49, FULL-TIME, ALL LAWYERS

Complaints Received	14
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 6: COURT OF CLAIMS JUDGES – 59, FULL-TIME, ALL LAWYERS

Complaints Received	38
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

TABLE 7: SURROGATES – 63, FULL-TIME, ALL LAWYERS

Complaints Received	33
Complaints Investigated	7
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 8: SUPREME COURT JUSTICES – 337, FULL-TIME, ALL LAWYERS

Complaints Received	302
Complaints Investigated	51
Judges Cautioned After Investigation	3
Formal Written Complaints Authorized	8
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	1

TABLE 9: COURT OF APPEALS JUDGES – 7 FULL-TIME, ALL LAWYERS; APPELLATE DIVISION JUSTICES – 57 FULL-TIME, ALL LAWYERS

Complaints Received	33
Complaints Investigated	3
Judges Cautioned After Investigation	1
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	214

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

Note on Jurisdiction

The Commission's jurisdiction is limited to judges and justices of the state unified court system. The Commission does not have jurisdiction over non-judges, retired judges, judicial hearing officers (JHO's), administrative law judges (*i.e.* adjudicating officers in government agencies or public authorities such as the New York City Parking Violations Bureau), housing judges of the New York City Civil Court, or federal judges. Legislation that would have given the Commission jurisdiction over New York City housing judges was vetoed in the 1980s.

Formal Proceedings

The Commission may not impose a public disciplinary sanction against a judge unless a Formal Written Complaint, containing detailed charges of misconduct, has been served upon the respondent-judge and the respondent has been afforded an opportunity for a formal hearing.

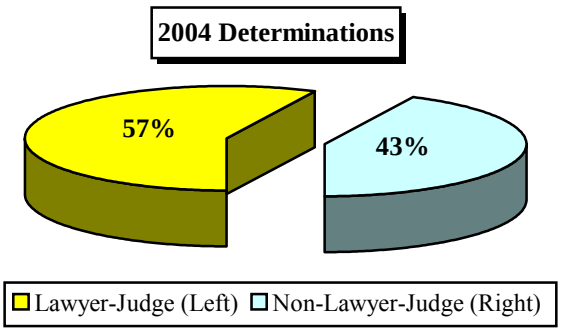
The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibits public disclosure by the Commission of the charges, hearings or related matters, absent a waiver by the judge, until the case has been concluded and a determination of admonition, censure, removal or retirement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

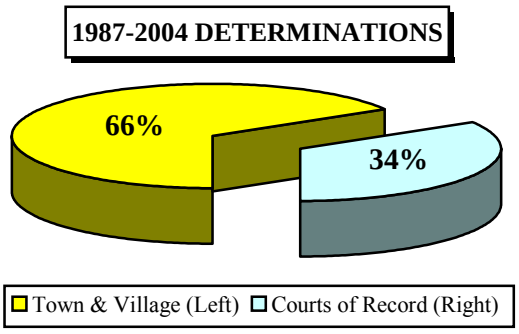
Following are summaries of those matters that were completed and made public during 2004. The actual texts are appended to this Report.

Overview of 2004 Determinations

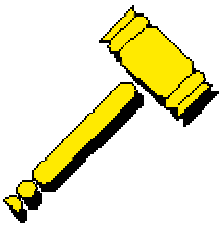
The Commission rendered 20 formal disciplinary determinations in 2004: 2 removals, 10 censures and 8 admonitions. In addition, 1 matter was disposed of by stipulation made public by agreement of the parties. Nine of the 21 respondents were non-lawyer-trained judges, and 12 were lawyers. Fourteen of the respondents were part-time town or village justices, and 7 were judges of higher courts.

To put these numbers and percentages in some context, it should be noted that, of the roughly 3,400 judges in the state unified court system, approximately 67% are part-time town or village justices. About 82% of the town and village justices, *i.e.* 55% of all judges in the court system, are not lawyers. (Town and village justices serve part-time and need not be lawyers. Judges of all other courts must be lawyers.)





Excluding cases from 1978 to 1982 involving ticket-fixing, which was largely a town and village justice court phenomenon – in larger jurisdictions, traffic matters are typically handled by administrative agencies – the overall percentage of town and village justices disciplined since the Commission's inception (66%) is virtually identical to the percentage of town and village justices in the judiciary as a whole (67%). Of course, no set of dispositions in a given year will exactly mirror those percentages. However, from 1987 to 2004, the number of public determinations, when categorized by type of court and judge, has roughly approximated the makeup of the judiciary as a whole: 209 (about 66%) have involved town and village justices, and 109 (about 34%) have involved judges of higher courts.



Determinations of Removal

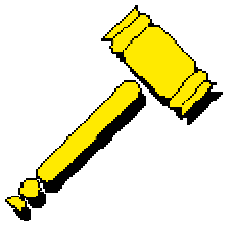
The Commission completed two formal proceedings in 2004 that resulted in determinations of removal. The cases are summarized below, and the texts are appended.

Matter of Henry R. Bauer

The Commission determined on March 30, 2004, that Henry R. Bauer, a Judge of the Troy City Court, Rensselaer County, should be removed for engaging over a two-year period "in a pattern of serious misconduct that repeatedly deprived defendants of their liberty without according them fundamental rights." Judge Bauer *inter alia* failed to advise defendants of their right to counsel, set unreasonably high bail without applying the statutory criteria for bail, and coerced guilty pleas. Judge Bauer requested review by the Court of Appeals, which accepted the Commission determination and removed the judge from office. 3 NY3d 158 (2004).

Matter of C. Ernest Brownell

The Commission determined on December 20, 2004, that C. Ernest Brownell, a part-time Justice of the Junius Town Court, Seneca County, should be removed for mishandling a small claims case by taking testimony from the claimant and issuing a decision without notice to the defendant, and misappropriating court funds to pay the judgment he awarded. Judge Brownell, who is not a lawyer, did not request review by the Court of Appeals.



Determinations of Censure

The Commission completed 10 formal proceedings in 2004 that resulted in determinations of censure. The cases are summarized below, and the texts are appended.

Matter of Bruce M. Barnes

The Commission determined on May 18, 2004, that Bruce M. Barnes, a part-time Justice of the Newfane Town Court, Niagara County, should be censured for abusing his judicial power by issuing an order involving disputed property although no case was pending, and for presiding over a dog-control violation case that arose out of his own complaint. Judge Barnes, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Karl T. Bowers

The Commission determined on November 12, 2004, that Karl T. Bowers, a part-time Justice of the Chemung Town Court, Chemung County, should be censured for engaging in "ticket-fixing" by sending a letter to another judge requesting special consideration of behalf of a defendant charged with Speeding. Judge Bowers, who is not a lawyer, did not request review by the Court of Appeals.

Matter of June P. Chapman

The Commission determined on October 6, 2004, that June P. Chapman, a part-time Justice of the Ellicottville Town Court, Cattaraugus County, should be censured for delays in depositing bail checks, due to poor record-keeping practices, that resulted in significant delays in returning the monies to their rightful owners. Judge Chapman, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Richard T. DiStefano

The Commission determined on November 12, 2004, that Richard T. DiStefano, a part-time Justice of the Colonie Town Court, Albany County, who also practices law, should be censured for neglecting client matters as an attorney and failing to cooperate with the attorney disciplinary committee that was investigating his conduct – conduct as to which he was also censured by the Appellate Division, Third Department. Judge DiStefano did not request review by the Court of Appeals.

Matter of Roy M. Dumar

The Commission determined on May 18, 2004, that Roy M. Dumar, a part-time Justice of the Mohawk Town Court, Montgomery County, should be censured for repeatedly and improperly asserting his judicial office in a dispute with a dealership over payment for snowmobile repairs. Judge Dumar, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Charles E. Dusen

The Commission determined on November 16, 2004, that Charles E.

Dusen, a part-time Justice of the LeRoy Town Court, Genesee County, should be censured for releasing a defendant into the custody of immigration officials in June 2003 by signing an order stating that the defendant had been convicted of Trespass when in fact, the defendant had pled not guilty to the Trespass charge and was being held on bail. Judge Dusen, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Shirley B. Herder

The Commission determined on August 16, 2004, that Shirley B. Herder, a part-time Justice of the Vienna Town Court, Oneida County, should be censured for improperly causing the arrest and incarceration of an individual for declining to disclose the contents of a shopping bag he had brought to court. Judge Herder, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Douglas C. Mills

The Commission determined on December 6, 2004, that Douglas C. Mills, a Judge of the Saratoga Springs City Court, Saratoga County, should be censured for abusing his judicial power by depriving two individuals of their liberty, without just cause or due process, by holding a college student in contempt for interrupting him during a post-acquittal lecture, and causing the arrest of a courtroom spectator for using an expletive in the courthouse parking lot on his way to court. Judge Mills, who is a lawyer, did not request review by the Court of Appeals.

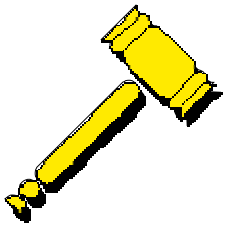
Matter of Ettore A. Simeone

The Commission determined on October 6, 2004, that Ettore A. Simeone, a Judge of the Family Court, Suffolk County, should be censured for presiding over numerous cases involving a youth services facility at a time when he was having a romantic relationship with the director of the facility. Judge Simeone, who is a lawyer, did not request review by the Court of Appeals.

Matter of Joseph C. Teresi

The Commission determined on December 17, 2004, that Joseph C. Teresi, a Justice of the Supreme Court, Albany County, should be censured for having an improper *ex parte* discussion in chambers with a witness scheduled to testify in a trial before him that day, without disclosing the conversation to the attorneys, causing the witness not to testify. Judge Teresi, who is a lawyer, did not request review by the Court of Appeals.

Determinations of Admonition



The Commission completed eight formal proceedings in 2004 that resulted in determinations of public admonition. The cases are summarized below, and the texts are appended.

Matter of Richard L. Campbell

The Commission determined on November 12, 2004, that Richard L. Campbell, a part-time Justice of the Newstead Town Court and Acting Justice of the Akron Village Court, Erie County, should be admonished for engaging in prohibited political activity by endorsing the nomination of two candidates for the town board. Judge Campbell, who is a lawyer, did not request review by the Court of Appeals.

Matter of Mark G. Farrell

The Commission determined on June 24, 2004, that Mark G. Farrell, a part-time Justice of the Amherst Town Court, Erie County, should be admonished for engaging in prohibited political activity by making a lump sum payment to the County Democratic Committee to cover his re-election expenses, without an itemized bill of the expenditures made on his behalf, and by making telephone calls supporting the re-election of the County Democratic Chairman. Judge Farrell, who is a lawyer, did not request review by the Court of Appeals.

Matter of Thomas C. Kressly

The Commission determined on December 17, 2004, that Thomas C. Kressly, a part-time Justice of the Urbana Town Court and Hammondsport Village Court, Steuben County, should be admonished for mishandling a code violation case by holding a trial and rendering a decision without giving notice to the prosecuting authorities. Judge Kressly, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Donald R. Magill

The Commission determined on October 6, 2004, that Donald R. Magill, a part-time Justice of the Maine Town Court, Broome County, should be admonished for improperly asserting his judicial influence in a case involving his wife by *inter alia* appearing at the court where the case was assigned, leaving his judicial business card with a request for an order of protection, and later calling the court to express displeasure with the court's decision not to issue an order of protection. Judge Magill, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Patrick J. McGrath

The Commission determined on November 12, 2004, that Patrick J. McGrath, a Judge of the County Court, Rensselaer County, should be admonished for making comments about a highly publicized murder case during an interview on a national television

program, "Good Morning America," in violation of the rule prohibiting judges from making "any public comment about a pending or impending proceeding." Judge McGrath, who is a lawyer, did not request review by the Court of Appeals.

Matter of David J. Pajak

The Commission determined on October 6, 2004, that David J. Pajak, a part-time Justice of the Pembroke Town Court, Genesee County, should be admonished for being convicted of Driving While Intoxicated, a misdemeanor. Judge Pajak, who is a lawyer, did not request review by the Court of Appeals.

Matter of Scott J. Pautz

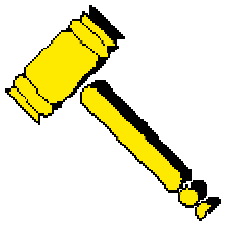
The Commission determined on March 30, 2004, that Scott J. Pautz, a part-time Justice of the Horseheads Town Court, Chemung County, should be admonished for engaging in a series of "annoying acts" towards a woman after the break-up of a personal relationship. Judge Pautz, who is a lawyer, did not request review by the Court of Appeals.

Matter of George J. Pulver, Jr.

The Commission determined on May 18, 2004, that George J. Pulver, Jr., a Judge of the Family, County and Surrogate's Courts, Greene County, should be admonished for engaging in business dealings with an attorney who appeared in his court and issuing rulings in a custody case involving relatives of an individual with whom the judge had financial dealings. Judge Pulver, who is a lawyer, did not request review by the Court of Appeals.

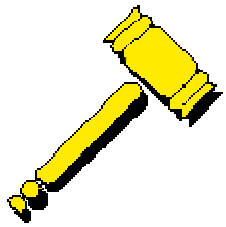
Other Public Dispositions

The Commission completed one other proceeding in 2004 that resulted in a public disposition. The case is summarized below, and the text is appended.



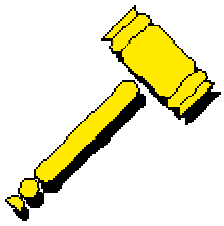
Matter of Cheryl Coleman

Pursuant to a stipulation, the Commission discontinued a proceeding on June 21, 2004, involving Cheryl Coleman, a Judge of the Albany City Court, Albany County, after serving the judge with formal charges alleging that she improperly asserted the influence of her judicial office during a personal dispute with four women at a concert, which resulted in their arrest, and that she was discourteous to various litigants and lawyers. The judge resigned from judicial office and affirmed that she would neither seek nor accept judicial office at any time in the future.



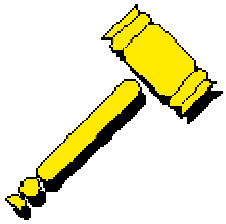
Dismissed or Closed Formal Written Complaints

The Commission disposed of 4 Formal Written Complaints in 2004 without rendering public discipline. Two complaints were closed upon the resignation of the respondent-judge; one of these were closed pursuant to a stipulation in which the judge waived confidentiality and agreed not to seek judicial office in the future. Two complaints were disposed of with a letter of caution, upon a finding by the Commission that judicial misconduct was established but that public discipline was not warranted.



Matters Closed Upon Resignation

Eight judges resigned in 2004 while complaints against them were pending at the Commission. Six of them resigned while under investigation and two resigned while under formal charges by the Commission. The matters pertaining to these judges were closed. By statute, the Commission may continue an inquiry for a period of 120 days following a judge's resignation, but no sanction other than removal from office may be determined within such period. When rendered final by the Court of Appeals, the "removal" automatically bars the judge from holding judicial office in the future. Thus, no action may be taken if the Commission decides within that 120-day period that removal is not warranted.



Referrals to Other Agencies

Pursuant to Judiciary Law Section 44(10), the Commission may refer matters to other agencies. In 2004, the Commission referred 18 matters to other agencies. Sixteen matters were referred to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record keeping or other administrative issues. Two matters were referred to a District Attorney.

Letters of Dismissal and Caution

A *Letter of Dismissal and Caution* contains confidential suggestions and recommendations to a judge upon conclusion of an investigation, in lieu of commencing formal disciplinary proceedings. A *Letter of Caution* is a similar communication to a judge upon conclusion of a formal disciplinary proceeding and a finding that the judge's misconduct is established.

Cautionary letters are authorized by the Commission's rules, 22 NYCRR 7000.1(l) and (m). They serve as an educational tool and, when warranted, allow the Commission to address a judge's conduct without making the matter public.

In 2004, the Commission issued 33 Letters of Dismissal and Caution and two Letters of Caution. Twenty-two town or village justices were cautioned, including three who are lawyers. Thirteen judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct, as the examples below indicate.

Improper *Ex Parte* Communications. Seven town or village justices were cautioned for engaging in unauthorized *ex parte* communications. For example, in separate matters, two judges visited the scene at issue in a pending case without the knowledge or consent of the parties. Another judge held public office hours for people to come in for advice on potential cases or legal issues.

Political Activity. One judge was cautioned for improper political activity. The Rules Governing Judicial Conduct prohibit judges from attending political gatherings, endorsing other candidates or otherwise participating in political activities except for a certain specifically-defined "window period" when they themselves are candidates for elective judicial office. Judicial candidates are also obliged to campaign in a manner that reflects appropriately on the integrity of judicial office, *inter alia* avoiding pledges or promises of conduct and avoiding misrepresentations of their own or their opponent's qualifications. One full-time judge was cautioned for disseminating campaign literature that inaccurately implied he was the incumbent.

Conflicts of Interest. All judges are required by the Rules to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned. In 2004, five judges were cautioned for relatively isolated conflicts of interest. For example, one full-time judge signed a preliminary conference order in a real estate case, despite having an interest in the property at issue. Even though the case was randomly assigned and the order was not on its face substantive, the judge should not have participated, even in a ministerial manner, because of the direct financial interest in the matter in controversy. A part-time town court lawyer-justice was cautioned for presiding over case in which a client of

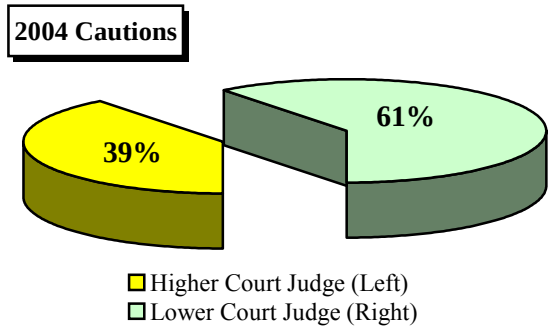
his firm was a substantive witness. Two other part-time town justices were cautioned for presiding over matters involving their co-justices, one of whom was party and the other of whom was a witness.

Inappropriate Demeanor. Two judges were cautioned for discourteous, intemperate or otherwise offensive demeanor toward a litigant, in isolated circumstances rather than as part of a discernible pattern.

Failure to Adhere to Statutory and Other Administrative Mandates. Thirteen judges were cautioned for failing to meet certain mandates of law, either out of ignorance or administrative oversight. For example, four were cautioned for inordinate delays in scheduling or deciding particular cases, typically because of poor records and case management. Another was cautioned for failing to let a litigant have access to public court records in his own case. Another was cautioned for effectuating driver's license suspensions without following appropriate statutory criteria.

Public Comment in Pending Cases. Judges are prohibited by the Rules from making public comments on pending or impending cases in any jurisdiction within the United States. In 2004, two judges were cautioned for doing so.

Miscellaneous. One full-time judge was cautioned for awarding an appointment to an out-of-state attorney who did not meet the legal requirements for practicing law in New York. A part-time town justice was cautioned for accepting more than the statutory $75 fee to officiate at wedding ceremonies outside the court. Another part-time town justice was cautioned for conducting arraignments in a police station rather than in the nearby courtroom.



Follow Up on Caution Letters. Should the conduct addressed by a cautionary letter continue or be repeated, the Commission may authorize an investigation on a new complaint, which may lead to formal charges and further disciplinary proceedings. In certain instances, the Commission will authorize a follow-up review of the judge's conduct, to assure that promised remedial action was indeed taken. In 1999, the Court of Appeals, in upholding the removal of judge who *inter alia* used the power and prestige of his office to promote a particular private defensive driver program, noted that the judge had persisted in his conduct notwithstanding a prior caution from the Commission that he desist from such conduct. *Matter of Assini v. Commission on Judicial Conduct*, 94 NY2d 26 (1999).

COMMISSION DETERMINATIONS REVIEWED BY THE COURT OF APPEALS

Pursuant to statute, 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 2004, the Court decided the two matters summarized below.

Matter of Joseph J. Cerbone

The Commission determined on September 19, 2003, that Joseph J. Cerbone, a part-time Justice of the Mount Kisco Town Court, Westchester County, should be removed for engaging in financial improprieties as an attorney resulting in his suspension from the practice of law for one year, and for using his courtroom as a forum for expressing his personal grievances against the District Attorney.

The Court of Appeals unanimously accepted the determination and removed Judge Cerbone from office in an opinion dated June 3, 2004. 2 NY3d 479 (2004). The Court held that the judge's misconduct and his "extensive prior history" of discipline, including a previous admonition and four letters of dismissal and caution, warranted the sanction of removal (*Id.* at 485).

The Court noted that the judge did not challenge the Commission's findings of fact. The Court stated that the present case, as well as the judge's previous disciplinary transgressions, "involve a common theme: petitioner seems incapable of understanding, despite repeated warnings, that a judge performing judicial duties must both act and appear to act as an impartial arbiter serving the public interest, not someone with an axe to grind" (*Id.*). Concluding that removal was appropriate, the Court stated: "A judge who does not know this, and is not capable of learning it, should not be on the bench" (*Id.*).

Matter of Henry R. Bauer

The Commission determined on March 30, 2004, that Henry R. Bauer, a Judge of the Troy City Court, Rensselaer County, should be removed for engaging in a pattern of conduct that violated the rights of defendants over a two-year period.

The Court of Appeals accepted the determination and removed Judge Bauer from office in an opinion dated October 14, 2004. 3 NY3d 158 (2004).

Finding that the "multiple specifications of severe misconduct" as found by the Commission were "fully borne out by the record," the Court concluded that the record "reveals a pattern of abuse" in that the judge, in numerous cases, not only failed to advise defendants of their right to counsel but "perverted" the statutory requirements, evincing "an intent to defeat, not advance, the right to assigned counsel"; that he set "shockingly high bail," without regard for the required standards; that he remanded defendants to jail for several days for failure to post bail on charges for which imprisonment was not a legally permitted penalty or upon legally insufficient accusatory instruments; that he coerced guilty pleas, inducing unrepresented defendants to plead guilty without informing them that they were entitled to counsel; that he imposed illegally excessive sentences; and that he twice convicted a defendant without pleas of guilty or findings of guilt (*Id.* at 165, 162, 161).

The Court further noted that the judge's "apparent lack of contrition" and his "utter failure to recognize and admit wrongdoing" were significant, strongly suggesting "if he is allowed to continue on the bench, we may expect more of the same" (*Id*. at 165).

In a dissenting opinion in which Judge Graffeo concurred, Judge Read disagreed with the majority in several respects and concluded that the judge's conduct warranted censure. In particular, as to the finding of misconduct based on excessive bail, the dissent questioned whether the Commission's authority extends "to this highly discretionary judicial realm" and concluded that such a finding "impinges on [petitioner's] discretion as a judge and is…outside the Commission's scope of authority" (*Id.* at 165, 166). The dissent also stated that certain of the judge's actions constituted "ordinary legal error," rather than misconduct, and that it could not be concluded that there was a pattern of misconduct (*Id*. at 168).

In a separate dissenting opinion, Judge R. Smith stated that he agreed in substance with Judge Read's dissent and agreed, "by a narrow margin," that censure, rather than removal, was appropriate (*Id.* at 171, 173). Judge Smith stated that judge's misconduct "was somewhat less serious than it appears at first glance," since there was no indication that the judge's failure to recite the litany of rights at arraignment caused any defendant to be sent to jail who would otherwise have avoided incarceration (*Id*. at 171, 171-72).

CONSTITUTIONAL CHALLENGES TO THE RULES GOVERNING JUDICIAL CONDUCT AND RELATED CHALLENGES TO THE COMMISSION'S PROCEDURES

In federal proceedings commenced in 2002 and in state proceedings commenced in 2004 by a respondent judge seeking to enjoin the Commission from disciplining him, the Commission litigated significant constitutional and procedural issues into and throughout 2004, pertaining to the political activity constraints imposed on judges by the Rules Governing Judicial Conduct, and the Commission's authority to enforce those Rules. The challenges relied in part on a June 2002 decision of the United States Supreme Court, *Republican Party of Minnesota v. White*, 536 US 765 (2002), which declared unconstitutional a provision of the Minnesota Code of Judicial Conduct that does not exist in the New York Rules. The provision is the so-called "announce clause," which prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues.

Federal Litigation:
Matter of Spargo et al. v. Commission on Judicial Conduct et al.

On October 17, 2002, United States District Court Judge Lawrence E. Kahn, Northern District of New York, signed an Order to Show Cause with a Temporary Restraining Order, enjoining the Commission from taking any action with respect to a pending Formal Written Complaint against New York State Supreme Court Justice Thomas J. Spargo of Albany County. The TRO effectively postponed a hearing that was scheduled to commence the following Monday in Albany before a referee designated by the Commission.

By commencing federal litigation, Judge Spargo made public that Commission proceedings had been initiated against him. The court papers include descriptions of and documents from the Commission proceedings.

The Formal Written Complaint against Judge Spargo alleged various violations of the political activity restrictions in the Rules Governing Judicial Conduct. Judge Spargo was charged *inter alia* with making $5,000 payments to two individuals who supported his nomination at their parties' judicial nominating conventions in 2001, with participating in a disruptive protest of the 2000 presidential vote recount in Florida, and with distributing items of value, such as coupons for gasoline, coffee and doughnuts, to potential voters. Judge

Spargo was also charged with failing to disclose to the parties in criminal cases that he had performed election law services for the District Attorney and was owed $10,000 for such services.

Judge Spargo's federal action was transferred to United States District Court Judge David N. Hurd, who considered the plaintiffs' motion for a preliminary injunction. The essence of Judge Spargo's claim was that the specific provisions of the judicial conduct rules charged against him were unconstitutional, relying in part on the decision of the United States Supreme Court in *Republican Party of Minnesota v. White, supra*.

Judge Hurd heard oral argument on the issues of law on November 29, 2002, and issued a decision on February 20, 2003. Judge Hurd held that Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) of the Rules Governing Judicial Conduct are unconstitutional and ordered that the Commission is permanently enjoined and restrained from enforcing those sections. The Commission was not enjoined from proceeding as to the charge involving Judge Spargo's failure to disclose his relationship with the District Attorney, since that charge cited other sections of the Rules.

While Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) all explicitly involve prohibitions on political activity by judges and judicial candidates, Sections 100.1 and 100.2(A) impose ethical mandates that are not limited to political activity. For example, they require a judge to "respect and comply with the law," and to observe high standards of conduct in furtherance of the independence, integrity and impartiality of the judiciary. The Commission has relied on Sections 100.1 and 100.2(A) over the years to discipline judges for such off-the-bench conduct as driving while intoxicated or, in the case of part-time judges who practice law, misappropriating law firm or client funds.

The Commission appealed Judge Hurd's decision to the United States Court of Appeals for the Second Circuit.

On December 9, 2003, the Second Circuit vacated the judgment of the District Court and remanded the case to Judge Hurd with the instruction that he abstain from exercising jurisdiction. 351 F3d 65 (2003). Thereafter, Judge Hurd issued an order dismissing the case.

The Second Circuit held that, in declining to abstain under the *Younger* abstention doctrine, the District Court mistakenly concluded there was uncertainty as to whether constitutional claims could be addressed in a judicial disciplinary proceeding.[1] In addition, the New York Court of Appeals had subsequently clarified the scope of available review of constitutional challenges to the Rules Governing Judicial Conduct. *Matter of Raab*, 100

[1] The doctrine derives its name from the federal case in which it is articulated: *Younger v. Harris*, 401 US 37 (1971), holding that federal courts should generally refrain from enjoining pending state court proceedings.

NY2d 305 (2003). The Second Circuit held that Judge Spargo had a sufficient opportunity to raise constitutional claims in proceedings before the Commission and thereafter in the New York State Court of Appeals.

The Second Circuit also held that *Younger* abstention applied to the derivative claims of Judge Spargo's co-plaintiffs, both of whom are non-judges, since their First Amendment interests were inextricably intertwined with the judge's First Amendment interests.

Judge Spargo filed a petition for *certiorari* in 2003, seeking review by the United States Supreme Court. The Court denied his petition on June 7, 2004, thus ending the *Spargo* federal litigation.

State Litigation:
Spargo v. Commission on Judicial Conduct et al.

On August 3, 2004, Judge Spargo commenced proceedings in state court against the Commission. Supreme Court Justice Louis C. Benza of Albany County signed an Order To Show Cause on that date, enjoining the Commission from proceeding as to certain specifications in pending Formal Written Complaints against Judge Spargo. Thereafter, the matter was assigned to Supreme Court Justice Nicholas Colabella of Westchester County.

Judge Spargo's petition alleged *inter alia* that the political activity limitations of the Rules Governing Judicial Conduct charged against him were facially unconstitutional and unconstitutional as applied. On December 9, 2004, Justice Colabella rendered a decision dismissing the petition. The decision noted *inter alia* that the Court of Appeals had already "specifically addressed these issues in *Matter of Raab*, 100 NY2d 305 (2003)…on the identical constitutional grounds asserted by [Judge Spargo] in this proceeding." The decision went on to note that in *Raab* and a companion case, *Matter of Watson*, 100 NY2d 290 (2003), the Court of Appeals applied a strict scrutiny analysis and held that the challenged rules were narrowly tailored to further a number of compelling state interests, "including the state's interest in preventing political bias or corruption of the appearance of political bias or corruption in its judiciary." Moreover, in *Raab*, the Court addressed and distinguished the *White* case on which both Raab and Spargo relied.

Justice Colabella's decision also cited the Court of Appeals decision in *Matter of Sims*, 61 NY2d 349, 358 (1984), in which the Court noted it had "repeatedly upheld the appearance of impropriety rules and stated that Judges may be held to this admittedly high standard of conduct in performing their duties or even when performing nonjudicial duties."

Justice Colabella also rejected claims by Judge Spargo that the Commission "as a whole is unconstitutional."

Judge Spargo filed an appeal, which is pending.

OBSERVATIONS AND RECOMMENDATIONS

The Commission traditionally devotes a section of its Annual Report to a discussion of various topics of special note or interest that have come to our attention in the course of various investigations. 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.

PUBLIC HEARINGS

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

The subject of public disciplinary proceedings, for lawyers as well as judges, has been vigorously debated in recent years by bar associations and civic groups, and addressed in newspaper editorials around the state that have supported the concept of public proceedings.

The process of evaluating a complaint, conducting a comprehensive investigation, conducting formal disciplinary proceedings and making a final determination subject to review by the Court of Appeals, takes considerable time. The process is lengthy in part because of the Commission's painstaking efforts to render a determination that is fair and comports with due process, and the lack of adequate funding and staff. If the charges and hearing portion of a Commission matter were open, the public would have a better understanding of the entire disciplinary process. The very fact that charges had been served and a hearing scheduled would no longer be secret.

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

of the proceedings, the chances for "leaks" to the press increase, often resulting in published misinformation and suspicious accusations as to the source of the "leaks." In such situations, both confidentiality and confidence in the integrity of the disciplinary system suffer.

Chief Judge Judith Kaye proposed legislation in 2003, as she had previously, to open the Commission's proceedings to the public at the point that formal disciplinary charges were filed against a judge. The Legislature did not take action. In the past, such legislation has had support in either the Assembly or the Senate at various times, although never in both houses in the same legislative session.

The Commission itself has long advocated that post-investigation formal proceedings should be made public, as they were in New York State until 1978, and as they are now in 38 other states. The Commission hopes that the issue will be revived in the Legislature and not be diverted by ancillary matters or political disputes. The Commission also hopes that renewed efforts to enact such a public proceedings measure will succeed without encumbrances as have been suggested by various legislators in the past, such as the unnecessary introduction of a statute of limitations or increase in the standard of proof from the present "preponderance of the evidence" standard to "clear and convincing evidence."

Interim Suspension of Judge Under Certain Circumstances

The State Constitution empowers the Court of Appeals to suspend a judge from office, with or without pay as it may determine, under certain circumstances:

- while there is pending a Commission determination that the judge be removed or retired,

- while the judge is charged in New York State with a felony, whether by indictment or information,

- while the judge is charged with a crime (in any jurisdiction) punishable as a felony in New York State, or

- while the judge is charged with any other crime which involves moral turpitude.

New York State Constitution, Art.6, §22(e–g)

There is no provision for the suspension of a judge who is charged with a misdemeanor that does not involve "moral turpitude." Yet there are any number of misdemeanor charges that may not be defined as involving "moral turpitude" but that, when brought against a judge, would seriously undermine public confidence in the integrity of the judiciary. Misdemeanor level DWI or drug charges, for example, would seem on their face to fall in this category, particularly where the judge served on a local criminal court and presided over cases involving charges similar to those filed against him or her.

Fortunately, it is rare for a judge to be charged with a crime, but it does happen. In early 1999, one part-time judge of a busy local court was arrested and charged with DWI and drug possession. The judge voluntarily suspended himself from office, did not run for re-election and formally vacated office at the end of the year, when he accepted a plea and sentence on the DWI charge that disposed of the drug charge.

There are non-felony and even non-criminal categories of behavior that seriously threaten the administration of justice and arguably should result in the interim suspension of a judge. Such criteria might well include significant evidence of mental illness affecting the judicial function, or conduct that compromises the essence of the judge's role, such as conversion of court funds or a demonstrated failure to cooperate with the Commission or other disciplinary authorities.

The courts already have discretion to suspend an attorney's law license on an interim basis under certain circumstances, even where no

criminal charge has been filed against the respondent. All four departments of the Appellate Division have promulgated rules in this regard. Any attorney under investigation or formal disciplinary charges may be suspended pending resolution of the matter based upon one of the following criteria:

> (i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Departmental Disciplinary Committee made in connection with any investigation, hearing, or disciplinary proceeding, or
>
> (ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or
>
> (iii) other uncontested evidence of professional misconduct.
>
> Rules of the Appellate Division, First Department, §603.4(e)(1)[2]

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

- a "serious crime," which is defined as a "felony" or a lesser crime that "reflects adversely on the judge's honesty, trustworthiness or fitness as a judge in other respects,"
- "any crime a necessary element of which … involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a 'serious crime'," and
- other misconduct for which there is "sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice."

It would require an amendment to the State Constitution to expand the criteria on which the Court of Appeals could suspend a judge from office. The Commission believes that the limited existing criteria should be expanded. We recommend that the Legislature consider so empowering the Court.

[2] See also, Rules of the Appellate Division, Second Department, §691.4(*l*)(1), Rules of the Appellate Division, Third Department, §806.4(f)(1), and Rules of the Appellate Division, Fourth Department, §1022.19(f)(2).

SUSPENSION FROM JUDICIAL OFFICE AS A FINAL SANCTION

Under current law, the Commission's disciplinary determinations are limited to public admonition, public censure or removal from office for misconduct, and retirement for mental or physical disability.

Prior to 1978, when both the Constitution and the Judiciary Law were amended, the Commission, or the courts in cases brought by the Commission, had the authority to determine that a judge be suspended with or without pay for up to six months. Suspension authority was exercised five times from 1976 to 1978: three judges were suspended without pay for six months, and two were suspended without pay for four months.

Since 1978, neither the Commission nor the courts have had the authority to suspend a judge as a final discipline. While the legislative history of the 1978 amendments is not clear on the reason for eliminating suspension as a discipline, there was some discussion among political and judicial leaders at the time suggesting that, if a judge committed misconduct serious enough to warrant the already momentous discipline of suspension, public confidence in the integrity of that judge was probably irretrievably compromised, thus requiring removal. Nevertheless, at times the Commission has felt constrained by the lack of suspension power, noting in several censure cases in which censure was imposed as a sanction that it would have suspended the disciplined judge if it had authority to do so.

Some misconduct is more severe than would be appropriately addressed by a censure, yet not egregious to the point of warranting removal from office. As it has done previously, the Commission suggests that the Legislature consider the merits of a constitutional amendment, providing suspension without pay as an alternative sanction available to the Commission.

JUDICIAL CANDIDATES IMPLYING THAT THEY ARE INCUMBENTS OF A PARTICULAR COURT

Political activity by judicial candidates, including incumbent judges seeking elective judicial office, is strictly limited by the Rules Governing Judicial Conduct to a "window period" beginning nine months before the nomination date and ending six months after the nomination or general election date. Sections 100.0(Q) and 100.5. Even within that window period, the Rules proscribe certain political activity and impose various obligations on all judicial candidates, whether incumbent or challenger.

Section 100.5(A)(4)(d)(iii) of the Rules states that a judge or judicial candidate "shall not … knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent."

In *Matter of Shanley*, 98 NY2d 310 (2002), a non-lawyer town justice was admonished for misrepresenting her credentials in campaign literature, in that she appeared to say she was a graduate of three institutions of higher education when in fact she had attended clerk's training programs that were held at those institutions.

Although we have commented on this subject before, some judicial candidates have phrased campaign literature in such a way as to appear that they already hold the particular office for which they are running. For example, the Commission has seen campaign posters or literature that read as follows –

John Doe
Family Court Judge
Election Day – November 3rd

– even though candidate "Doe" may actually be a judge of another (typically lower) court or may not be a judge at all. See *Matter of Mullin*, 2001 Annual Report 117. The Commission has also confidentially cautioned a number of judges for misrepresenting their current position in similar fashion, where there were no other violations of the Rules.

All judicial candidates should take steps to make certain that all of the literature, signs and ads that call for their election do not state or imply that they are incumbents of any office that they do not presently hold.

PERSONAL CHECKS IDENTIFYING THE ACCOUNT HOLDER AS A JUDGE

The Commission has been advised that a number of judges identify themselves as such on the heading of their personal checks, and that some also use the name and address of the courthouse rather than their home addresses on such checks. In one such case in 2004, the Commission cautioned a judge who did so, after determining that the use of such checks had been for routine household and family expenses and that public funds were not involved.

Even where the funds in such an account are entirely personal, using such checks to pay personal bills can create the appearance that court funds are being used for personal purposes. The typical payee who receives such a check may well conclude that court funds were being used for such purposes as paying rent or a mortgage, utility bills, college tuition or the like. If the judge were in a bill-paying dispute with a service provider who did not otherwise know the customer was a judge, use of such checks would convey the message and inappropriately introduce the prestige of judicial office to a private dispute. Even if no payee ever complains, the judge is obliged to avoid impropriety and the appearance of impropriety, which in judicial disciplinary cases has always been measured by the Court of Appeals as an objective, not subjective standard. Thus, personal checks that identify the account holder as "Judge" in the title, and/or identify the name and address of the courthouse, appear official and should not be used.

AMENDED DEFINITION OF "ECONOMIC INTEREST"

The Rules Governing Judicial Conduct require that 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 the judge, the judge's spouse or a 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. 22 NYCRR 100.3(E)(1)(c).

On approval of the Court of Appeals, the definition of a judge's disqualifying "economic interest" was amended in 2004. Section 100.0(D) of the Rules originally defined "economic interest" as follows:

> "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.
>
> 22 NYCRR 100.0(D) (emphasis added)

The new definition of "economic interest" replaces the words "however small" in Section 100.0(D) with the phrase "more than a de minimis," as follows:

> "Economic interest" denotes ownership of more than a de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party… (emphasis added).

A definition of "de minimis" was also added to the rule, as follows:

> (5) "de minimis" denotes an insignificant interest that could not raise reasonable questions as to a judge's impartiality.

The remainder of the rule is unchanged.

Under the old definition, a judge with even a single share of stock in a company that was party to a lawsuit would be disqualified from presiding, notwithstanding that the judge's economic interest in the company would not be affected by the litigation.

The new definition adopts the standard proposed by the American Bar Association's Model Code of Judicial Conduct, which recognizes that it is not unusual for a judge or judge's spouse to have a varied investment portfolio, and that it would be onerous to require disqualification for mere ownership of shares in a company that comes before the judge in litigation.

Under either the old or new definition, disqualification would be required in any situation where the judge has an interest that could be "substantially affected by the proceeding," regardless of the extent of the judge's holding. For example, while a judge's ownership of a few shares in a large publicly traded company would not appear to be affected by a small claims or other relatively minor case involving that company, the value of a judge's shares in a co-operative apartment might well be affected by a contractual or other financial dispute between the building and a commercial tenant of that building.

THE COMMISSION'S BUDGET

In numerous recent Annual Reports, we have called attention in this space to the fact that the Commission has been persistently and acutely underfunded and understaffed, for at least a decade. Our projected 2005-06 fiscal year budget of $2.6 million supports a staff of 28½ employees, including 10 lawyers and seven investigators, whereas our 1978-79 appropriation of $1.64 million supported a full-time staff of 63, including 21 lawyers and 18 investigators.

At the same time, the Commission's workload has exploded, from 641 complaints received and 170 investigations commenced in 1978 to 1546 complaints received and 255 investigations commenced in 2004.

The Commission needs at least one additional attorney and one additional investigator in each of its three offices just to keep pace, let alone allocate resources in a way that would enhance our ability to conduct all investigations thoroughly.

Responsible Budget Management

Since its inception 30 years ago, the Commission has managed its finances with extraordinary care. In periods of relative plenty, we kept our budget small; in previous times of statewide financial crisis, we made difficult sacrifices. Our average annual increase since 1978 has been about 1.5% – a no-growth budget which, when adjusted for inflation, has actually meant a major decline in financial resources.

Our record of fiscal prudence was underscored by an exhaustive audit in 1989 by the State Comptroller, which 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 State Comptroller conducted a follow-up review over a two-month period in 2002, with the same excellent result. The Commission's finances were examined for cash management and accounting controls, payroll management and review, purchasing policies and procedures, and equipment purchasing and management. Although the Commission is not a revenue-producing agency, the Comptroller reviewed our procedures and remittal practices for such minor financial transactions as fulfilling requests for photocopying public records. In all categories, the Commission received the highest possible rating.

A comparative breakdown of the Commission's budget and staff over the years appears on the following page in chart form.

Budget Figures, 1978 to Present						
Fiscal Year	Annual Budget	Complaints Received†	New Investigations	Staff Attorneys*	Investigators on Staff	total Staff
1978-79	$1,644,000	641	170	21	18 f/t	63
≈	≈	≈	≈	≈	≈	≈
1988-89	$2,224,000	1109	200	9	12 f/t, 2 p/t	41
≈	≈	≈	≈	≈	≈	≈
1992-93	$1,666,700	1452	180	8	6 f/t, 1 p/t	26
≈	≈	≈	≈	≈	≈	≈
1996-97	$1,696,000	1490	192	8	2 f/t, 2 p/t	20
≈	≈	≈	≈	≈	≈	≈
2003-04	$2,266,000	1463	235	9	6 f/t, 1 p/t	27
2004-05	$2,397,000	1546	255	10	7 f/t	28
2005-06	$2,609,000≠	--	--	10	7f/t	28½

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

CONCLUSION

Public confidence in the independence, integrity, impartiality and high standards of the judiciary, and in an independent disciplinary system that helps keep judges accountable for their conduct, is essential to the rule of law. The members of the New York State Commission on Judicial Conduct are confident that the Commission's work contributes to those ideals, to a heightened awareness of the appropriate standards of ethics incumbent on all judges, and to the fair and proper administration of justice.

Respectfully submitted,

LAWRENCE S. GOLDMAN, CHAIR
FRANCES A. CIARDULLO, VICE CHAIR
STEPHEN R. COFFEY
COLLEEN DiPIRRO
RICHARD D. EMERY
RAOUL L. FELDER
CHRISTINA HERNANDEZ
DANIEL F. LUCIANO
KAREN K. PETERS
ALAN J. POPE
TERRY JANE RUDERMAN

March 1, 2005

APPENDIX

Biographies of Commission Members and Attorneys
Roster of Referees Who Served in 2004
The Commission's Powers, Duties & History
Text of the Rules Governing Judicial Conduct
Text of 2004 Determinations
Statistical Analysis of Complaints

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New York State
Commission on Judicial Conduct

BIOGRAPHIES OF COMMISSION MEMBERS

There are 11 members of the Commission on Judicial Conduct. The Governor appoints four members, the Chief Judge of the Court of Appeals appoints three members, and each of the four leaders of the Legislature appoints one. Members serve terms of four years and are eligible for reappointment.

Lawrence S. Goldman, Esq., *Chair of the Commission,* is a graduate of Brandeis University and Harvard Law School. He is in private practice in New York City, concentrating in white-collar criminal defense. He is a past president of the National Association of Criminal Defense Lawyers, co-chair of its white-collar committee and former chair of its ethics advisory committee. He is also a past president of the New York State Association of Criminal Defense Lawyers and the New York City Criminal Bar Association. He is a member of the Executive Committee of the Criminal Justice Section of the New York State Bar Association, the Advisory Committee on the New York Criminal Procedure Law, and the New York State Commission on the Future of Indigent Defense Services. He has received outstanding criminal law practitioner awards from the National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense Lawyers and the New York Criminal Bar Association. He has lectured at numerous bar associations and law school programs on various aspects of criminal law and procedure, trial tactics and ethics. He was an assistant district attorney in New York County and a consultant to the Knapp Commission. He is an honorary trustee of Congregation Rodeph Sholom in New York City. He and his wife Kathi have two adult children and live in Manhattan.

Honorable Frances A. Ciardullo, *Vice Chair of the Commission*, received her B.A. from Cornell University and her J.D. from Syracuse University College of Law, where she was an Editor on the Law Review. Since 1989 she has served part-time as the Schroeppel Town Justice in Oswego County. She has practiced health law for over 20 years, first as a partner in the law firm of Costello, Cooney & Fearon, LLP and presently as staff counsel with the firm of Fager & Amsler. Justice Ciardullo has served as an Adjunct Professor in Health Law for the Syracuse University College of Law, and has served on the teaching faculty for many educational institutions, including the New School for Social Research, Graduate School of Management in the Master's Degree Program in Health Care Administration, the State University of New York Health Science Center, and the Institute for Health Care Ethics in Syracuse, New York. She is a member of the teaching faculty for the New York State Office of Court Administration certification programs for town and village justices throughout the State. Justice Ciardullo is a past president of the Central New York Women's Bar Association.

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.

Colleen C. DiPirro is President and CEO of the Amherst Chamber of Commerce, which has over 2,300 members. Prior to joining the Chamber, she worked for the Erie County Legislature and as a retail manager. She was the first President of the Western New York Chamber Alliance, an organization for Chamber Executives serving an eight county region. She was identified as one of the 100 most influential people in Western New York by Business First. In 1998, Ms. DiPirro became the first woman honored as the Executive of the Year by the Buffalo Sales and Marketing Executives. That same year Daeman College named her Citizen of the Year. She received the Governor's Award for Excellence in Business in 1999. She served on the Board of Directors of New York State Chamber of Commerce Executives in 1999. Ms. DiPirro serves as event and sponsorship coordinator and a member of the Advisory Board for the Buffalo Bills Alumni and was selected by Bills owner Ralph Wilson to serve on the Project 21 initiative. She served on a committee for Erie County Executive Joel Giambra's Transition Team. She has served on numerous not for profit and community boards of directors, including Western New York Autism Foundation, Hospice Playhouse Project, Executive Women International and the Williamsville Sweet Home Junior Football Association. Additionally, she served as the first Chairwoman of the University of Buffalo Leadership Development Program. Ms. DiPirro was appointed to serve on the Peace Bridge Authority by Governor Pataki in 2002. Ms. DiPirro is the widowed mother of two sons and the proud grandmother of one. She attended Alfred College where she majored in Marketing.

Richard D. Emery, Esq., is a graduate of Brown University and Columbia Law School (*cum laude*), where he was a Harlan Fiske Stone Scholar. He is a partner in the law firm of Emery Celli Brinckerhoff and Abady in Manhattan. *Professional Affiliations:* Association of the Bar of the City of New York, Committee on Election Law, Civil Rights Committee, Advisory Board of the National Police Accountability Project, Criminal Justice Operations Committee, Criminal Advocacy Committee, Criminal Courts Committee, Association of Trial Lawyers of America, Municipal Arts Society Legal Committee, Governor's Commission on Integrity in Government. *Honors:* Common Cause/NY, October

2000, "I Love an Ethical New York" Award for recognition of successful challenges to New York's unconstitutionally burdensome ballot access laws and overall work to promote a more open democracy; New York Magazine, March 20, 1995, "The Best Lawyers In New York" Award for recognition of successful Civil Rights litigation; Park River Democrats Public Service Award, June 1989; David S. Michaels Memorial Award, January 1987, for Courageous Effort in Promotion of Integrity in the Criminal Justice System from the Criminal Justice Section of the New York State Bar Association.

Raoul Lionel Felder, Esq., was appointed to the Commission in 2003 by Governor Pataki. He is a graduate of New York University and the New York University Law School and attended the University of Berne, College of Medicine. He is in private practice in New York City, heading his own law firm. Mr. Felder served previously as an Assistant United States Attorney for the Eastern District of New York. Over the years, he has served on many professional and civic association boards and committees, such as the New York State Trial Lawyers Association, whose Matrimonial Law Committee he chaired, the Association of the Bar of the City of New York, on whose Matrimonial Law Committee he served, the New York State Commission on Child Abuse, the New York City Economic Development Corporation and the New York City Cultural Affairs Advisory Commission. Mr. Felder has received awards from, and been honored by many civic and charitable organizations including: Recipient of Defender of Jerusalem Medal from the Israeli Prime Minister (1990); Chairman of USA Day, Washington, D.C. (1991); Grand Marshal of The Israeli Day Parade (1991); Citation of Merit presented by The National Arts Club (1992); Exhibit of Photographs at The National Arts Club (1992); Volunteer Service Award presented by The National Kidney Foundation (1992); Award, 'Man of the Year' from The Brooklyn School for Special Children (1990); Award, Guest of Honor at The Metropolitan Jewish Geriatric Center's Annual Dinner (1991); Chairman of Dinner for The Jewish Reclamation Project; Co-Director of food drive for New York City Homeless (1991); Member, Board of Trustees, National Kidney Foundation; Member, Board of Advisors, Cop Care; Member, Board of Directors, Big Apple Greeters; Member, Board of Directors, Kidney & Urology Foundation of America, Inc. (2003); Award, 12th Annual Joint Meeting of Brandeis Association and The Catholic Lawyers Guild (1999); Award, Child Abuse Prevention Services ― Child Safety Institute (1998); Award, The Shield Institute for the Mentally Retarded and Developmentally Disabled (1997). He is the author of seven books (including a legal textbook that has been updated 23 times), and numerous articles on the law and public affairs. He appears regularly on television and radio giving commentaries on the law and contemporary events, as well as lecturing at various bar associations.

Christina Hernandez, MSW, is a Board Member of the New York State Crime Victims Board, appointed by Governor George E. Pataki in 1995 and again in 2001. She received a Bachelor of Arts from Buffalo State College, a Masters in Social Work Management from the Rockefeller College School of Social Welfare, State University of New York at Albany and a Certificate of Graduate Study in Women and Public Policy from the Rockefeller College School of Public Affairs and Policy, State University of New York at Albany. Presently she is enrolled in the doctoral program at the School of Social Welfare, pursuing a PhD in Social Work. Ms. Hernandez is a former Fellow of the Center for Women In Government. Currently she serves on the Board of Directors of the National Association of Crime Victim Compensation Boards and is a member of the Capital District Coalition for Crime Victims Rights, the Sex Offender Management Grant Steering Committee, and the New York State Hispanic Heritage Month Committee. A native of New York City, Ms. Hernandez resides in the Capital Region.

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 from August 1954 to July 1956, 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. 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, and served as a Delegate to the House of Delegates of the New York State Bar Association. Justice Luciano served as President and all other elected offices in the Association of Justices of the Supreme Court of the State of New York and is currently a member of the Executive Committee. Justice Luciano was a Director of the Suffolk County Women's Bar Association. Additionally, he is a member of the Dean's Advisory Council of the Touro College, Jacob D. Fuchsberg Law Center. 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 as an Associate Justice of the Appellate Term, Ninth and Tenth Judicial Districts, in April of 1993. On May 30, 1996, Justice Luciano was appointed by Governor George E. Pataki as an Additional Justice to the Appellate Division, Second Judicial Department. After he was re-elected to the Supreme Court in November of 1996, Governor Pataki redesignated him as an Additional

Justice to the Appellate Division, Second Judicial Department. Upon reaching the age of 70, Justice Luciano was Certified by the State of New York Administrative Board of the Courts for an additional two year term as a retired Justice of the Supreme Court, and was redesignated by Governor Pataki to serve as an Additional Justice of the Appellate Division, Second Judicial Department, for a two year term commencing January 1, 2001. In 2002, after having been again Certified by the State of New York Administrative Board of the Courts for an additional two year term as a retired Justice of the Supreme Court, Justice Luciano was redesignated by Governor Pataki to serve as an Additional Justice of the Appellate Division, Second Judicial Department, for a second two year term, commencing January 1, 2003. Justice Luciano was appointed to the Commission by Governor Pataki in 1996, reappointed by Governor Pataki to a four year term in 1999, and reappointed in 2003 for a third term expiring March 31, 2007.

Honorable Karen K. Peters received her B.A. from George Washington University (*cum laude*) and her J.D. from New York University (*cum laude*; Order of the Coif). From 1973 to 1979 she was engaged in the private practice of law in Ulster County, served as an Assistant District Attorney in Dutchess County and was an Assistant Professor at the State University of New York at New Paltz, where she developed curricula and taught courses in the area of criminal law, gender discrimination and the law, and civil rights and civil liberties. In 1979 she was selected as the first counsel to the newly created New York State Division on Alcoholism and Alcohol Abuse and remained counsel until 1983. In 1983 she was the Director of the State Assembly Government Operations Committee. Elected to the bench in 1983, she remained Family Court Judge for the County of Ulster until 1992, when she became the first woman elected to the Supreme Court in the Third Department. Justice Peters was appointed to the Appellate Division, Third Department, by Governor Mario M. Cuomo on February 3, 1994. Justice Peters has served as Chairperson of the Gender Bias Committee of the Third Judicial District, and on numerous State Bar Committees, including the New York State Bar Association Special Committee on Alcoholism and Drug Abuse, and the New York State Bar Association Special Committee on Procedures for Judicial Discipline. Throughout her career, Justice Peters has taught and lectured extensively in the areas of Family Law, Judicial Education and Administration, Criminal Law, Appellate Practice and Alcohol and the Law.

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, and a past member of the Broome County Environmental Management Council.

Honorable Terry Jane Ruderman graduated *cum laude* from Pace University School of Law, holds a Ph.D. in History from the Graduate Center of the City University of New York and Masters Degrees from City College and Cornell University. In 1995, Judge Ruderman was appointed to the Court of Claims and is assigned to the White Plains district. At the time she was the Principal Law Clerk to a Justice of the Supreme Court. Previously, she served as an Assistant District Attorney and Deputy County Attorney in Westchester County, and later she was in the private practice of law. Judge Ruderman is a member of the New York State Committee on Women in the Courts and Chair of the Gender Fairness Committee for the Ninth Judicial District, and she has served on the Ninth Judicial District Task Force on Reducing Civil Litigation and Delay. She is also Vice President of the New York State Association of Women Judges, Assistant Presiding Member of the New York State Bar Association Judicial Section, President of the White Plains Bar Association, a board member and former Vice President of the Westchester Women's Bar Association and a former State Director of the Women's Bar Association of the State of New York. Judge Ruderman also sits on the Alumni Board of Pace University School of Law and the Cornell University President's Council of Cornell Women.

* * *

Henry T. Berger, Esq., was a member of the Commission for 16 years and served as Chair for 13 of those years. His term ended on March 31, 2004. Mr. Berger is a graduate of Lehigh University and New York University School of Law. He is in private practice in New York City, concentrating in labor law and election law. He is a member of the New York State Bar Association and the Association of the Bar of the City of New York, where he chairs the Special Committee on Election Law. Mr. Berger served as a member of the New York City Council in 1977.

BIOGRAPHIES OF COMMISSION ATTORNEYS

Robert H. Tembeckjian, *Administrator and Counsel*, is a graduate of Syracuse University, the Fordham University School of Law and Harvard University's Kennedy School of Government, where he earned a Masters in Public Administration. He was a Fulbright Scholar to Armenia in 1994, teaching graduate courses and lecturing on constitutional law and ethics at the American University of Armenia and Yerevan State University. Mr. Tembeckjian serves on the Advisory Committee to the American Bar Association Commission to Evaluate the Model Code of Judicial Conduct. He also serves on the Government Ethics Committee of the Association of the Bar of the City of New York and on the Board of Directors of the Association of Judicial Disciplinary Counsel. He was previously a Trustee of the Westwood Mutual Funds and the United Nations International School, and on the Board of Directors of the Civic Education Project.

Alan W. Friedberg, *Chief Attorney (New York)*, 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, *Chief Attorney (Albany)*, 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 has been a judge of the Albany Law School moot court competitions and a member of Albany County Big Brothers/Big Sisters.

John J. Postel, *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 served as the advisor to the Sutherland High School Mock Trial Team for eight years. He is the Vice President and a past Treasurer of the Pittsford Golden Lions Football Club, Inc. He is an assistant director and coach for Pittsford Community Lacrosse. He is an active member of the Pittsford Mustangs Soccer Club, Inc.

Vickie Ma, *Staff Attorney*, is a graduate of the University of Wisconsin at Madison and Albany Law School, where she was Associate Editor of the Law Review. Prior to joining the Commission staff, she served as an Assistant District Attorney in Kings County.

Leena D. Mankad, *Staff Attorney*, is a *cum laude* graduate of Union College and the Syracuse University College of Law, where she was the Associate Director of the Moot Court Honor Society, a Teaching Assistant for first-year students, and Student Prosecutor for the College of Law. Prior to joining the Commission staff, she was in private practice as a civil litigation defense attorney. She is a member of the Order of Barristers and the New York State Bar Association.

Kathryn J. Blake, *Staff Attorney*, is a graduate of Lafayette College and Cornell Law School, where she was a Note Editor for the *Cornell Journal of Law and Public Policy* and a member of the Moot Court Board. Prior to joining the Commission staff, she served as an Assistant Attorney General for the State of New York and was in private practice in New York, California and New Jersey.

Jennifer Tsai, *Staff Attorney*, is a graduate of Columbia University and Cornell Law School, where she was an Editor of the Law Review and a member of the Moot Court Board. Prior to joining the Commission's staff, she practiced as a criminal defense attorney at The Legal Aid Society (Appeals Bureau) and the Neighborhood Defender Service of Harlem.

Melissa R. DiPalo, *Staff Attorney*, is a graduate of the University of Richmond and Brooklyn Law School, where she was a Lisle Scholar and a Dean's Merit Scholar. Prior to joining the Commission's staff, she was an Assistant District Attorney (Appeals Bureau) in Bronx County.

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Jean M. Savanyu, *Clerk of the Commission*, is a graduate of Smith College and the Fordham University School of Law (*cum laude*). She joined the Commission's staff in 1977 and served as Senior Attorney until being appointed Clerk of the Commission in 2000. Prior to joining the Commission, she worked as an editor and writer. Since 1990, Ms. Savanyu has taught in the paralegal program at Marymount Manhattan College.

REFEREES WHO SERVED IN 2004

Referee	City	County
Eleanor Breitel Alter, Esq.	New York	New York
Hon. Herbert I. Altman	New York	New York
Mark S. Arisohn, Esq.	New York	New York
William I. Aronwald, Esq.	White Plains	Westchester
G. Michael Bellinger, Esq.	New York	New York
Peter Bienstock, Esq.	New York	New York
A. Vincent Buzard, Esq.	Rochester	Monroe
Jay C. Carlisle, Esq.	White Plains	Westchester
Robert L. Ellis, Esq.	Scarsdale	Westchester
David M. Garber, Esq.	Syracuse	Onondaga
Douglas S. Gates, Esq.	Rochester	Monroe
Thomas F. Gleason, Esq.	Albany	Albany
Ronald Goldstock, Esq.	Larchmont	Westchester
Victor J. Hershdorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
H. Wayne Judge, Esq.	Glens Falls	Warren
Gerard LaRusso, Esq.	Rochester	Monroe
C. Bruce Lawrence, Esq.	Rochester	Monroe
Hon. Herbert J. Lipp		Kings/Nassau
Stanford G. Lotwin, Esq.	New York	New York
Richard M. Maltz, Esq.	New York	New York
Hon. John A. Monteleone	Brooklyn	Kings
James C. Moore, Esq.	Rochester	Monroe
Philip C. Pinsky, Esq.	Syracuse	Onondaga
John J. Poklemba, Esq.	Albany	Albany
Hon. Leon B. Polsky	New York	New York
Hon. Ernst H. Rosenberger	New York	New York
Hon. Eugene M. Salisbury	Buffalo	Erie
Laurie Shanks, Esq.	Albany	Albany
Hon. Felice K. Shea	New York	New York
Shirley A. Siegel, Esq.	New York	New York
Hon. Richard D. Simons	Rome	Oneida
Robert J. Smith, Esq.	Binghamton	Broome
Robert H. Straus, Esq.	New York	Kings
Earl S. Ward, Esq.	New York	New York
Nancy F. Wechsler, Esq.	New York	New York
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

The Commission's Powers, Duties & History

2005 Annual Report

New York State
Commission on Judicial Conduct

The Commission's Powers, Duties and History

Creation of the New York State Commission on Judicial Conduct

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

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

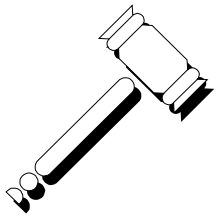
The Commission's Powers, Duties, Operations and History

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

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

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

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



Membership and Staff

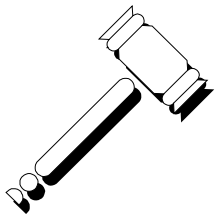
The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one by each of the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and at least two be lay persons. The Commission elects one of its members to be chairperson and appoints an Administrator and a Clerk. The Administrator is responsible for hiring staff and supervising staff activities subject to the Commission's direction and policies.

The following individuals have served on the Commission since its inception. Asterisks denote those members who chaired the Commission.

Hon. Fritz W. Alexander, II (1979-85)
Hon. Myriam J. Altman (1988-93)
Helaine M. Barnett (1990-96)
Herbert L. Bellamy, Sr. (1990-94)
*Henry T. Berger (1988-2004)
*John J. Bower (1982-90)
Hon. Evelyn L. Braun (1994-95)
David Bromberg (1975-88)
Jeremy Ann Brown (1997-2001)
Hon. Richard J. Cardamone (1978-81)
Hon. Frances A. Ciardullo (2001-2005)
Hon. Carmen Beauchamp Ciparick (1985-93)
E. Garrett Cleary (1981-96)
Stephen R. Coffey (1995-present)
Howard Coughlin (1974-76)
Mary Ann Crotty (1994-98)
Dolores DelBello (1976-94)
Colleen C. DiPirro (2004-present)
Richard D. Emery (2004-present)
Hon. Herbert B. Evans (1978-79)
Raoul Lionel Felder (2003-present)
*William Fitzpatrick (1974-75)

*Lawrence S. Goldman (1990-present)
Hon. Louis M. Greenblott (1976-78)
Christina Hernandez (1999-present)
Hon. James D. Hopkins (1974-76)
Hon. Daniel W. Joy (1998-2000)
Michael M. Kirsch (1974-82)
*Victor A. Kovner (1975-90)
William B. Lawless (1974-75)
Hon. Daniel F. Luciano (1995-present)
William V. Maggipinto (1974-81)
Hon. Frederick M. Marshall (1996-2002)
Hon. Ann T. Mikoll (1974-78)
Mary Holt Moore (2002-2003)
Hon. Juanita Bing Newton (1994-99)
Hon. William J. Ostrowski (1982-89)
Hon. Karen K. Peters (2000-present)
Alan J. Pope (1997-present)
*Lillemor T. Robb (1974-88)
Hon. Isaac Rubin (1979-90)
Hon. Terry Jane Ruderman (1999-present)
*Hon. Eugene W. Salisbury (1989-2001)
Barry C. Sample (1994-97)
Hon. Felice K. Shea (1978-88)
John J. Sheehy (1983-95)
Hon. Morton B. Silberman (1978)
Hon. William C. Thompson (1990-1998)
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 intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.

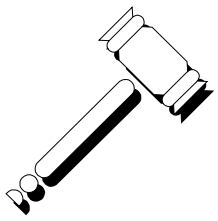
The types of complaints that may be investigated by the Commission include improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off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

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

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

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

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



Procedures

The Commission meets several times a year. At its meetings, the Commission reviews each new complaint of misconduct and makes an initial decision whether to investigate or dismiss the complaint. It also reviews staff reports on ongoing matters, makes final determinations on completed proceedings, considers motions and entertains oral arguments pertaining to cases in which judges have been served with formal charges, and conducts other Commission business.

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

After the Commission authorizes an investigation, the Administrator assigns the complaint to a staff attorney, who works with investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge may be asked to respond in writing to the allegations. In some instances, the Commission requires the appearance of the judge to testify during the course of the investigation. The judge's testimony is under oath, and a Commission member or referee designated by the Commission must be present. Although such an "investigative appearance" is not a formal hearing, the judge is entitled to be represented by counsel. The judge may also submit evidentiary data and materials for the Commission's consideration.

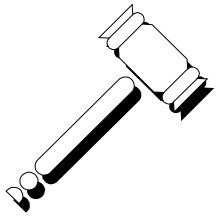
If the Commission finds after an investigation that the circumstances so warrant, it will direct its Administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint institutes the formal disciplinary proceeding. After receiving the judge's answer, the Commission may, if it determines there are no disputed issues of fact, grant a motion for summary determination. It may also accept an agreed statement of facts submitted by the Administrator and the respondent-judge. Where there are factual disputes that make summary determination inappropriate or that are not resolved by an agreed statement of facts, the Commission will appoint a referee to conduct a formal hearing and report proposed findings of fact and conclusions of law. Referees are designated by the Commission from a panel of attorneys and former judges. Following the Commission's receipt of the referee's report, on a motion to confirm or disaffirm the report, both the administrator and the respondent may submit legal memoranda and present oral argument on issues of misconduct and sanction. The respondent-judge (in addition to his or her counsel) may appear and be heard at oral argument.

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

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

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

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



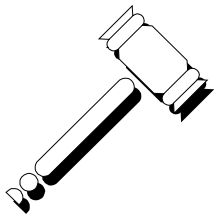
Temporary State Commission on Judicial Conduct

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

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

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

Five judges resigned while under investigation.



Former State Commission on Judicial Conduct

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

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

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

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

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

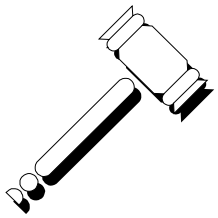
- 15 judges were publicly censured;
- 40 judges were privately admonished;
- 17 judges were issued confidential letters of suggestion and recommendation.

The former Commission also initiated formal disciplinary proceedings in the Court on the Judiciary against 45 judges and continued six proceedings left pending by the temporary Commission. Those proceedings resulted in the following:

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

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

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

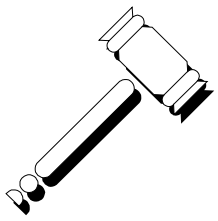


Continuation from 1978 to 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions

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

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

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



The 1978 Constitutional Amendment

The present Commission was created by amendment to the State Constitution, effective April 1, 1978. The amendment created an 11-member Commission (superseding the nine-member former Commission), broadened the scope of the Commission's authority and streamlined the procedure for disciplining judges within the state unified court system. The Court on the Judiciary was abolished, pending completion of those cases that had already been commenced before it. All formal disciplinary hearings under the new amendment are conducted by the Commission.

Subsequently, the State Legislature amended Article 2-A of the Judiciary Law, the Commission's governing statute, to implement the new provisions of the constitutional amendment.

Summary of Complaints Considered Since the Commission's Inception

Since January 1975, when the temporary Commission commenced operations, 32,758 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 26,407 were dismissed upon initial review or after a preliminary review and inquiry, and 6,351 investigations were authorized. Of the 6,351 investigations authorized, the following dispositions have been made through December 31, 2004:

- 874 complaints involving 679 judges resulted in disciplinary action. (See details below and on the following page.)
- 1293 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1203, 70 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.

- 514 complaints involving 365 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 403 complaints were closed upon vacancy of office by the judge other than by resignation.
- 3037 complaints were dismissed without action after investigation.
- 230 complaints are pending.

Of the 874 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. Also, these figures take into account those decisions by the Court of Appeals that modified a Commission determination.)

- 144 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);
- 264 judges were censured publicly;
- 208 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission.

Text of the Rules
Governing Judicial Conduct

2005 Annual Report

New York State
Commission on Judicial Conduct

THE RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR PART 100

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 more than a de minimis a legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that

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

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

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

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

(5) "de minimis" denotes an insignificant interest that could not raise reasonable questions as to a judge's impartiality.

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

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

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

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

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

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

(K) "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. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

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

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

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

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

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

(b) the judge knows that (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 court employee organization, bar association or law school function or from accepting at another organization's fund-raising event an unadvertised award ancillary to such event;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) ordinary social hospitality;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Text of the Commission's 2004 Determinations

2005 Annual Report

New York State 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. BARNES**, a Justice of the Newfane Town Court, Niagara County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Henry T. Berger, Esq.[1]
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Muscato, DiMillo & Vona, LLP (By George V. C. Muscato) for Respondent

The respondent, Bruce M. Barnes, a Justice of the Newfane Town Court, Niagara County, was served with a Formal Written Complaint dated November 12, 2003, containing two charges. Respondent filed an answer dated December 15, 2003.

On March 18, 2004, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On March 18, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Newfane Town Court, Niagara County since January 1996. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about March 11, 2002, respondent issued an order at the request of Ronald Riel, a Florida resident, directing Clarissa T. Malcolm to turn over to Mr. Riel a horse, a horse trailer and a truck then in Ms. Malcolm's possession.

[1] Mr. Berger's term ended on March 31, 2004. The terms of Ms. DiPirro and Mr. Emery commenced on April 1, 2004. The vote in this matter was taken on March 18, 2004.

3. Respondent issued the order based upon the oral request of Mr. Riel made in respondent's court. Respondent was aware that Mr. Riel had not filed any statement of his cause of action in respondent's court and had not served any summons and complaint in connection with his claim against Ms. Malcolm.

4. During his discussion with Mr. Riel about the claim, respondent learned that Mr. Riel had spoken with the police about the claim. Before issuing the order, respondent spoke with the State Police and Niagara County Sheriff's Department who advised him that there was a dispute between Mr. Riel and Ms. Malcolm about ownership of the property.

5. Documents presented to respondent by Mr. Riel indicated that the trailer had been purchased for $3,850 in February 2000, that the horse was a pure bred, registered Arabian that had been purchased for $1,200 in May 2001 and that the truck was a 1991 Ford F350 pickup.

6. Respondent was aware that no accusatory instrument had been filed in his court in connection with Mr. Riel's claim against Ms. Malcolm. Respondent was not notified that any accusatory instrument had been filed in any other court in connection with Mr. Riel's claim.

7. Respondent was aware that no civil action or small claims action had been filed against Ms. Malcolm in his court.

8. Respondent was not presented with any judgment issued to Mr. Riel against Ms. Malcolm concerning the property he claimed, or any other property.

9. Respondent had no personal jurisdiction over Ms. Malcolm at the time he issued the order against her.

10. Before issuing the order, respondent attempted, unsuccessfully, to contact Ms. Malcolm.

11. Within a few hours after issuing the order on Mr. Riel's behalf against Ms. Malcolm, respondent was contacted by a Niagara County Sheriff's Deputy who advised him that Ms. Malcolm objected to the order.

12. Respondent told the deputy to direct Ms. Malcolm to appear in respondent's court that evening to discuss her possession of the property listed in the order.

13. Respondent acknowledges that he had no criminal or civil personal jurisdiction over Ms. Malcolm at the time that he directed her to appear in his court.

14. Ms. Malcolm appeared before respondent later that day along with Mr. Riel. Ms. Malcolm stated that respondent had no jurisdiction since no claim had been filed. Ms. Malcolm also indicated that the value of the property at issue exceeded $10,000. Respondent realized that he did not have jurisdiction over the matter and vacated the order.

As to Charge II of the Formal Written Complaint:

15. On or about June 11, 2001, respondent contacted the Town of Newfane Dog Control Officer to advise him that the dog owned by respondent's neighbor, Susan Winkley, had been running loose in respondent's yard. Respondent asked the Dog Control Officer to speak with Ms. Winkley about the matter.

16. On or about June 11, 2001, the Dog Control Officer issued Ms. Winkley tickets charging her with Allowing Dog To Run Loose, based on his discussion with respondent, and Unlicensed Dog.

17. On or about June 20, 2001, Ms. Winkley appeared before respondent in response to the tickets. Respondent advised Ms. Winkley of the charges. Respondent observed in the papers that he was listed as the complainant on the Dog Running Loose charge. Respondent did not disclose this to Ms. Winkley.

18. Respondent dismissed the Dog Running Loose charge because the accusatory instrument filed in connection with the charge was unsigned. The defendant pleaded guilty to the Unlicensed Dog charge and respondent fined her $25.

19. Respondent acknowledges that as a consequence of his discussions with the Dog Control Officer about Ms. Winkley's dog, he should not have presided over her matters.

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

Respondent abused his judicial power by issuing an order directing the surrender of disputed property based on an *ex parte* request, notwithstanding that no proceeding was pending before him. Thereafter, when a sheriff's deputy advised him that a party to the dispute had objected to the order, respondent committed further misconduct by directing that the party appear in court to discuss the matter although no action had been filed. Respondent's conduct was not only contrary to law, but compromised his impartiality and conveyed the appearance of favoritism. *See Matter of Colf*, 1987 Ann Rep 71 (Commn on Jud Conduct, Feb 26, 1986) (judge issued an order threatening contempt based on an *ex parte* communication, although no action had been filed). It is a fundamental principle of law that every person with a legal interest in a proceeding must be accorded the right to be heard under the law (*see* Section 100.3[B][6] of the Rules Governing Judicial Conduct).

As a judge for six years, respondent should have recognized that he lacked jurisdiction in the matter. The fact that respondent promptly vacated the order after being reminded of the law mitigates but scarcely excuses his misconduct. As a judge, respondent is required to maintain professional competence in the law (Section 100.3[B][1] of the Rules).

It was also improper for respondent to dispose of a code violation that arose out of his own complaint. Although he dismissed the Dog Running Loose charge which listed him as the

complainant, respondent accepted a guilty plea on a related charge and fined the defendant. Respondent should have recognized the impropriety of presiding over a matter in which he himself was the complainant. A judge's disqualification is required in a proceeding in which the judge's impartiality might be reasonably be questioned, including instances where the judge has personal knowledge of disputed evidentiary facts or is a material witness in the matter (Sections 100.3[E][1][a][ii] and 100.3[E][1][b][iii] of the Rules); *see, e.g., Matter of Tracy*, 2002 Ann Rep 167 (Commn on Jud Conduct, Nov 19, 2001) (judge failed to disqualify himself in cases involving youths who had vandalized the judge's home); *Matter of Ross*, 1990 Ann Rep 153 (Commn on Jud Conduct, Sept 29, 1989) (judge failed to disqualify himself in numerous cases in which his impartiality could reasonably be questioned, including a case in which he was the complaining witness).

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Felder, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Dated: May 18, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **HENRY R. BAUER**, a Judge of the Troy City Court, Rensselaer County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Raoul Lionel Felder, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn Blake, Of Counsel)
Roche, Corrigan, McCoy & Bush (By Robert P. Roche) for Respondent

The respondent, Henry R. Bauer, a judge of the Troy City Court, Rensselaer County, was served with a Superseding Formal Written Complaint dated October 4, 2002, containing 51 charges. Respondent filed an answer dated October 29, 2002.

By Order dated November 21, 2002, the Commission designated Honorable Richard D. Simons as referee to hear and report proposed findings of fact and conclusions of law. After respondent requested a public hearing in the matter by letter dated July 21, 2003, a hearing was held on July 28, 29, 30 and 31 and August 1, 3 and 4, 2003, in Albany, New York. The referee filed a report dated December 12, 2003.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. On January 30, 2004, 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, an attorney, was appointed Troy City Court judge in 1994; later that year he was elected to a ten-year term. Prior to becoming a judge, respondent served as an assistant public defender in Rensselear County. Respondent's judicial salary is $113,900.

2. Respondent sits as a judge Monday through Friday, beginning at 8:30 A.M.

3. Troy City Court is a court of record, and all proceedings are recorded stenographically, unless the stenographer has left for the day or an arraignment is conducted on the weekend.

4. At all times relevant herein, respondent was aware of the statutory requirements of Sections 170.10 and 510.30 of the Criminal Procedure Law (hereinafter "CPL") and was aware that the sole purpose for bail is to ensure the defendant's reappearance in court.

5. With respect to assigning counsel, respondent testified that once a defendant says that he or she is employed, respondent does not generally inquire further into the details of the employment because he is "inclined to give people an appropriate opportunity to retain their own counsel, if they have an ability to do that"; he testified that if a defendant returns to court without an attorney and says that he or she has attempted to hire an attorney but the rates are too high, respondent will reconsider the issue of assigned counsel. He testified further: "[I]t doesn't take much employment to retain one's own attorney… as opposed to saddling the county with the expense of providing him or anybody else with an attorney" and that: "Everyone, virtually everyone, says they can't afford an attorney and everyone has bills."

6. Respondent had only four criminal trials from 2000 through 2002, all of which were nonjury. The vast majority of defendants in respondent's court plead guilty.

As to Charge I of the Formal Written Complaint:

7. On Friday, May 12, 2000, respondent arraigned Daquan Austin, who gave his age as 16, on a charge of Open Container, for allegedly drinking a bottle of beer in a vehicle. (Subsequently, in connection with another matter, respondent learned that the defendant's name was different from the one he gave and that he was actually 19 years old.) Respondent informed the defendant of the charge and then asked the arresting officer whether the defendant had been cooperative. The officer said, "Uncooperative." Respondent then asked the defendant, "Sir, are you getting a lawyer on these matters?" and the defendant answered, "I don't know." Respondent set bail of $500 and told the defendant, "If you get bailed out, be here on Monday. If you can get a lawyer, bring one in on Monday and if you can't, we will assign one on Monday. All right?" The defendant said, "All right." Respondent issued a preliminary Order of Protection directing that the defendant stay away from the location where he was arrested for six months and committed the defendant to jail in lieu of bail until May 15, 2000. Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

8. On the return date, the defendant appeared without counsel; there was no appearance on the record by the prosecution. Respondent advised the defendant that if he pled guilty to the charge, respondent would impose a sentence of time served and a fine of $30. The defendant pled guilty and was sentenced accordingly.

9. Prior to accepting the defendant's guilty plea, respondent did not say anything about the right to counsel and assigned counsel.

As to Charge II of the Formal Written Complaint:

10. On April 29, 2000, respondent arraigned Lucien Battiste, age 20, who was charged with a violation of Trespass. The defendant had been arrested pursuant to the City of Troy Trespass Affidavit Program ("TAP"), based upon an affidavit of a property owner asking

the police to arrest anyone on the property who is not a tenant, according to a list provided, or the guest of a tenant. The defendant gave a Troy address and his occupation as a dishwasher in Latham. There is no transcript of the arraignment.

11. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail until May 5, 2000.

12. On the return date, the defendant was returned to court from jail. Respondent coerced the defendant's guilty plea by advising him that if he pled guilty at that time, respondent would sentence him to time served and a fine of $95. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly.

13. Prior to accepting the defendant's guilty plea, respondent did not say anything about the right to counsel and assigned counsel and did not conduct a meaningful inquiry of the defendant as to whether he understood the consequences of his guilty plea. Respondent failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL.

As to Charge III of the Formal Written Complaint:

14. On May 12, 2000, respondent arraigned Kenneth Brooks, who was charged with Bicycle With No Lights, Bicycle Without Warning Device and Operating Bicycle On Sidewalk. When respondent asked the defendant, "Do you work or go to school?", the defendant answered, "I don't know"; the defendant gave a similar response to an inquiry about his age. Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL. Respondent remanded the defendant to jail in lieu of $25,000 bail and set a return date for one week later, stating, "I will adjourn the case until next Friday and somehow we will figure out how old you are"; he also issued an Order of Protection.

15. On May 19, 2000, the defendant was returned to court from jail. There was no appearance by any prosecutor. Respondent coerced the defendant's guilty plea by telling the defendant that if he pled guilty at that time, respondent would impose a sentence of time served and a fine and would issue a final Order of Protection. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly.

16. Respondent said nothing about the right to counsel and assigned counsel before accepting the unrepresented defendant's guilty plea.

As to Charge IV of the Formal Written Complaint:

17. On April 7, 2000, respondent arraigned John F. Casey, who was charged with Trespass, Loitering, Open Container and Violation of an Order of Protection. After ascertaining that the defendant had not complied with the terms of an earlier sentence to a work order program, respondent told the defendant, "You need a lawyer on these matters. Given your gainful employment, if you can get a lawyer, hire one. And if you can, bring one in on Friday."

The defendant, whom respondent described at the hearing as an alcoholic and a crack addict and a "semi-regular" in the court, was employed by his father's cleaning service and, on some previous occasions, had been represented by the public defender.

18. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000; committed the defendant to jail in lieu of bail until April 14, 2000, without advising him of his right to counsel and assigned counsel; and failed to take affirmative action to effectuate the defendant's right to counsel, as required by Section 170.10 of the CPL.

19. On the return date, April 14, 2000, respondent contacted the jail and directed that the defendant not be returned to court that day. At 8:30 A.M., with no appearance by the defendant, a prosecutor or defense counsel, respondent stated on the record that Mr. Casey "is a plea and time served," entered convictions for the defendant on the charges and issued an order releasing the defendant from jail, notwithstanding that the defendant had not pled guilty and was never brought back before the court.

20. On the record of the proceeding, there is no appearance by the prosecutor or defense counsel, and there is no record that the defendant agreed to the plea.

As to Charge V of the Formal Written Complaint:

21. On June 14, 2000, respondent arraigned John F. Casey on new charges, Open Container and Failure To Appear. After noting the bench warrant based on the defendant's failure to appear a week earlier, respondent asked the defendant, "Do you work or go to school?" and the defendant answered, "I work"; respondent made no other inquiry about the defendant's financial or personal circumstances. Respondent set bail of $500 and committed the defendant to jail in lieu of bail for five days. Respondent said nothing about the right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's right to counsel, as required by Section 170.10 of the CPL.

22. On the return date, June 19, 2000, respondent contacted the jail and directed them not to bring the defendant back to court. Respondent stated on the record, with no appearance by the defendant, a prosecutor or defense counsel: "The matter of People against John Casey was a plea and time served on an open container matter." Respondent entered a conviction for the defendant notwithstanding that the defendant had not appeared and had not pled guilty.

23. Later that day, Mr. Casey, who had been released from jail, came into court and asked what had happened to his case; respondent informed him that the case had been resolved.

24. On the record of the proceeding, there is no appearance by the prosecutor or defense counsel, and there is no record that the defendant agreed to the plea.

As to Charge VI of the Formal Written Complaint:

25. On April 29, 2000, respondent arraigned T'shad Clark, age 16, who was charged with a Trespass violation pursuant to the City of Troy TAP Program (*see* Finding 10, *supra*).

The defendant had no criminal history. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 5, 2000. There is no transcript of the arraignment.

26. On May 5, 2000, the defendant was returned to court from jail. The 16 year old defendant told respondent that he attended GED classes and was supported by his mother. Respondent coerced the defendant's guilty plea by telling him that if he pled guilty at that time, respondent would sentence him to time served and a fine of $95 and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly.

27. At no time did respondent inform the defendant of the right to counsel and assigned counsel, nor did he take affirmative action to effectuate the defendant's rights, as required by Section 170.10 of the CPL.

As to Charge VII of the Formal Written Complaint:

28. On April 29, 2000, respondent arraigned Marquise Eason, age 19, who was charged with a Trespass violation pursuant to the City of Troy's TAP Program (*see* Finding 10). There is no transcript of the arraignment.

29. Respondent set bail of $25,000 and committed the defendant to jail in lieu of bail until May 5, 2000.

30. On May 5, 2000, the defendant was returned to court from jail. Respondent coerced the defendant's guilty plea by telling the defendant that if he pled guilty at that time, respondent would sentence him to time served and a fine of $95 and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly.

31. At no time did respondent inform the defendant of the right to counsel and assigned counsel, nor did he take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

As to Charge VIII of the Formal Written Complaint:

32. On July 7, 2000, respondent arraigned Kenneth Grant, who was charged with Unlawful Possession Of Marijuana. The defendant was one of five persons charged with possession of a single marijuana "cigar" in a motor vehicle (*see also* Charges IX, X and XII). There is no transcript of the arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000 and committed the defendant to jail in lieu of bail until July 10, 2000, notwithstanding that incarceration is not an authorized sentence for a first offense of Unlawful Possession Of Marijuana. Since a parole warrant had been filed against the defendant as a result of his arrest, the defendant would not have been released regardless of the bail set by respondent.

33. On July 10, 2000, the defendant was returned to court from jail. There was no appearance by the district attorney's office or defense counsel. Respondent coerced the defendant's guilty plea by telling the defendant that if he pled guilty at that time, respondent would sentence him to ten days and a fine and the defendant "would be out on Friday." Without the benefit of counsel, the defendant pled guilty.

34. Respondent sentenced the defendant to a fine of $300 (including a $50 surcharge and $10 victim fee) and ten days in jail, notwithstanding that, pursuant to Section 221.05 of the Penal Law, the maximum penalty for a first offense of Unlawful Possession Of Marijuana is a $100 fine and no incarceration, and respondent had no information that would have permitted him to impose a different sentence. Respondent knew or should have known that the sentence he imposed was in excess of the maximum sentence authorized by law.

As to Charge IX of the Formal Written Complaint:

35. On July 7, 2000, respondent arraigned Marilyn Grant, who was charged with Unlawful Possession Of Marijuana. There is no transcript of the arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000 and committed the defendant to jail in lieu of bail until July 10, 2000, notwithstanding that incarceration is not an authorized sentence for a first offense of Unlawful Possession Of Marijuana.

36. On July 10, 2000, the defendant was returned to court from jail. No prosecutor was present. The defendant's attorney, Jill Kehn, Esq., told respondent that she had spoken with the district attorney, who had said that the defendant had no prior convictions and that respondent would offer an adjournment in contemplation of dismissal. Respondent asked the defendant if she had ever been arrested before, and the defendant said no. Respondent then said, "If she pleads to the charge, it will be a fine of $300 and a final Order of Protection to stay out of the area of the alleged incident." The defendant pled guilty, and respondent imposed a sentence of time served plus a $300 fine and issued an Order of Protection.

37. Pursuant to Section 221.05 of the Penal Law, the maximum penalty for a first offense of Unlawful Possession Of Marijuana is a $100 fine and no incarceration, and respondent had no information that would have permitted him to impose a greater fine. Respondent knew or should have known that the sentence he imposed was in excess of the maximum sentence authorized by law.

As to Charge X of the Formal Written Complaint:

38. On July 7, 2000, respondent arraigned Denise Lawrence, who was charged with Unlawful Possession Of Marijuana. There is no transcript of the arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000 and committed the defendant to jail in lieu of bail until July 10, 2000, notwithstanding that incarceration is not an authorized sentence for a first offense of Unlawful Possession Of Marijuana.

39. On July 10, 2000, the defendant was brought to court from jail. There was no

appearance by the district attorney's office or defense counsel. Respondent coerced the defendant's guilty plea by telling her that if she pled guilty at that time, respondent would impose a sentence of time served and a fine and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty to the charge.

40. Respondent sentenced the defendant to a $300 fine, notwithstanding that, pursuant to Section 221.05 of the Penal Law, the maximum penalty for a first offense of Unlawful Possession Of Marijuana is a $100 fine and no incarceration, and respondent had no information that would have permitted him to impose a greater fine. Respondent knew or should have known that the sentence he imposed was in excess of the maximum sentence authorized by law.

As to Charge XI of the Formal Written Complaint:

41. On July 6, 2000, respondent arraigned Robert Mielenz, age 18, a lifelong resident of Troy, who was charged with Harassment after getting into an argument with the mother of his son and allegedly pushing her to the ground. Mr. Mielenz had appeared before respondent on two prior occasions, charged with Loitering and Jaywalking.

42. At the arraignment, respondent ascertained the defendant's age and asked, "Do you work or go to school?" and the defendant replied, "I just got a job, hopefully." After advising the defendant of the charge, respondent asked, "Are you getting a lawyer on these matters?" The defendant replied, "I didn't think I needed one. None of that is actually true." Respondent set bail of $25,000, remanded the defendant to jail in lieu of bail until July 10, 2000, and issued an Order of Protection for him to stay away from the complaining witness for six months. Respondent did not question the defendant about his financial resources or his prior record.

43. Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate his rights as required by Section 170.10 of the CPL. Apart from respondent's question, "Are you getting a lawyer on these matters?" there was no discussion of the right to counsel or assigned counsel.

44. On July 10, 2000, the defendant was returned to court from jail. Respondent coerced the defendant's guilty plea by telling the defendant that if he pled guilty at that time, respondent would impose a sentence of time served and a fine of $200 and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty and was sentenced accordingly. Mr. Mielenz testified that he pled guilty because he "just wanted to go home," and that as a result of his incarceration, he lost the job he had obtained just prior to his arrest.

45. At no time did respondent inform the defendant of the right to counsel and assigned counsel, nor did he take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

As to Charge XII of the Formal Written Complaint:

46. On July 7, 2000, respondent arraigned Shawn Parris, who was charged with

Unlawful Possession Of Marijuana. There is no transcript of the arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000 and committed the defendant to jail in lieu of bail until July 10, 2000, notwithstanding that incarceration is not an authorized sentence for a first offense of Unlawful Possession Of Marijuana.

47. On July 10, 2000, the defendant was returned to court from jail. There was no appearance by the district attorney's office or defense counsel. Respondent coerced the defendant's guilty plea by telling him that if he pled guilty at that time, respondent would sentence the defendant to ten days and a fine and he "would be out on Friday." Without the benefit of counsel, the defendant pled guilty.

48. Respondent sentenced the defendant to ten days in jail and a fine of $300, an excessive sentence under Section 221.05 of the Penal Law, and issued an Order of Protection. Pursuant to Section 221.05 of the Penal Law, the maximum penalty for a first offense of Unlawful Possession Of Marijuana is a $100 fine and no incarceration, and respondent had no information that would have permitted him to impose a greater fine or a jail sentence. Respondent knew or should have known that the sentence he imposed was in excess of the maximum sentence authorized by law.

As to Charge XIII of the Formal Written Complaint:

49. On February 13, 2000, respondent arraigned Shawn Potter of Troy, who was charged with three counts of Disorderly Conduct for allegedly making unreasonable noise, using obscene language and failing to leave the area when told to do so by a police officer. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $50,000 and committed the defendant to jail in lieu of bail until February 15, 2000. Respondent did not have any criminal history for the defendant and erroneously believed that the defendant was on felony probation at the time of arrest. There is no transcript of the arraignment.

50. On February 14, 2000, the defendant was returned to court from jail. There was no appearance by the district attorney's office or defense counsel. Respondent coerced the defendant's guilty plea by plea by telling him that if he pled guilty to one count of Disorderly Conduct at that time, respondent would sentence him to six days in jail and a fine and would issue an Order of Protection, and the defendant "would be out" the next day. Without the benefit of counsel, the defendant pled guilty, and respondent sentenced him accordingly. Respondent issued an Order of Protection for the defendant to stay away from the location of his arrest for one year.

As to Charge XIV of the Formal Written Complaint:

51. On April 25, 2000, respondent arraigned Shawantay Thomas of Troy, who was charged with a Trespass violation pursuant to the City of Troy's TAP Program (*see* Finding 10). The defendant had no criminal history. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent committed the defendant to jail in

lieu of unreasonably high bail of $25,000 until May 2, 2000. There is no transcript of the arraignment.

52. On May 2, 2000, the defendant was returned to court from jail. Respondent coerced the defendant's guilty plea by telling her that if she pled guilty at that time, respondent would impose a sentence of time served and a fine of $95 and would issue an Order of Protection. Without the benefit of counsel, the defendant pled guilty, and respondent sentenced her accordingly.

As to Charge XV of the Formal Written Complaint:

53. On April 25, 2000, respondent arraigned Lashana Bobo, who was charged with a Trespass violation pursuant to the City of Troy's TAP Program (*see* Finding 10). Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent committed the defendant to jail in lieu of unreasonably high bail of $25,000 until May 2, 2000. The arrest report indicates that the defendant lived in Troy and was a nurse employed in Albany. There is no transcript of the arraignment.

54. On May 2, 2000, the defendant was returned to court from jail. The defendant was represented by an assistant public defender. The defendant pled guilty, and respondent sentenced her to time served and a fine of $95 and issued an Order of Protection directing her to stay away from the location of the arrest for one year.

As to Charge XVI of the Formal Written Complaint:

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

As to Charge XVII of the Formal Written Complaint:

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

As to Charge XVIII of the Formal Written Complaint:

57. On December 29, 1999, respondent arraigned Michael Ferguson, who was charged with False Personation, a misdemeanor, after allegedly giving a false name to police when stopped in connection with a burglary investigation. After ascertaining that the defendant worked "off and on" doing hardwood floors, respondent informed the defendant of the charge and then asked, "Ever been arrested before?" The defendant replied, "Colonie, possession of marijuana. And that's about it." Respondent asked the defendant, "Are you getting a lawyer on these matters?" and the defendant responded, "I doubt it." Respondent then stated:

> It's a misdemeanor. So, you do need one. I will set a bail at a thousand dollars. I will adjourn the case until January 6. If you can get a lawyer, do just that. And if you can't, raise the issue of counsel on the 6th.

Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed

to take affirmative action to effectuate those rights as required by Section 170.10 of the CPL. Respondent committed the defendant to jail in lieu of $1,000 bail until January 6, 2000.

58. On January 6, 2000, the defendant was returned to court from jail, and although an assistant public defender was present, respondent told the attorney that he was not in the case yet. Respondent asked the defendant if he worked full time, and the defendant said he did, "under the table, though." Respondent asked, "Are you getting a lawyer?" and the defendant answered, "I don't know. I don't believe I can afford one." Respondent said that he would assign a public defender and had the defendant fill out an affidavit for eligibility for the public defender.

59. Respondent recommitted the defendant to jail until January 13, 2000, when the defendant pled guilty to the charge. Respondent sentenced him to time served and a fine of $90 and issued an Order of Protection for the defendant to stay away from the location of the arrest for three years.

As to Charge XIX of the Formal Written Complaint:

60. On May 25, 2000, respondent arraigned Robert Fogarty, who was charged with Criminal Sale Of Marijuana, a misdemeanor. The defendant, who was on parole, had appeared in court pursuant to an appearance ticket. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $50,000 and committed the defendant to jail in lieu of bail until June 1, 2000. Probation later found the defendant ineligible for pretrial release. On June 1, 2000, the defendant pled guilty, and respondent sentenced him to 90 days in jail and a fine of $200 and issued an Order of Protection.

As to Charge XX of the Formal Written Complaint:

61. Keith Fox and his wife Mae have lived in Troy for several years; he was the foreman at a local construction company. On the night of February 26, 2000, a Saturday, Mr. Fox was arrested for Disorderly Conduct outside his apartment building after getting into an argument with his sister-in-law.

62. The police took the defendant to the police station. The defendant's wallet, which contained over $800 in cash, was taken from him by an officer.

63. Respondent came to the police station and signed an order committing the defendant to the Rensselaer County Jail in lieu of $20,000 bail, with a return date of March 3, 2000. There is no transcript of an arraignment. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $20,000.

64. After being taken to the jail, the defendant called his wife and asked her to go to the police station to get the cash he had had when he was arrested. Ms. Fox went to the jail, where she was issued an appearance ticket on a charge of Disorderly Conduct in connection with the events on the night of her husband's arrest. On Monday, February 28, 2000, when she

appeared before respondent pursuant to the appearance ticket, Ms. Fox told respondent that her husband was still in jail, was not on probation or parole and had no criminal record, and respondent agreed to release Mr. Fox on his own recognizance.

65. On March 3, 2000, Mr. Fox appeared before respondent with a law intern from the public defender's office and pled guilty to an outstanding Open Container charge. Respondent sentenced him to a fine of $30. On March 10, 2000, the Disorderly Conduct charge was adjourned in contemplation of dismissal.

As to Charge XXI of the Formal Written Complaint:

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

As to Charge XXII of the Formal Written Complaint:

67. On May 10, 2001, respondent arraigned Michael Francis, who was charged with an Imitation Controlled Substance, a misdemeanor. After respondent ascertained that the defendant lived in Albany and worked at the Albany Greyhound Bus terminal, that his family was in Troy and that he had been arrested previously, respondent asked him, "Are you getting a lawyer?" and the defendant replied, "I haven't even had a chance to make a phone call yet." Respondent advised the defendant of the charge, said that he was entering a plea of not guilty, issued a preliminary Order of Protection and set bail at $10,000. Respondent told the defendant, "If you can get a lawyer, bring one in next Thursday and we will go from there." Respondent committed the defendant to jail in lieu of bail until May 17, 2001.

68. Respondent did not inform the defendant of the right to counsel and assigned counsel and failed to take affirmative action to effectuate those rights as required by Section 170.10 of the CPL.

69. When the defendant was returned to court from jail on May 17, 2001, respondent asked him, "Have you spoke to an attorney?" The defendant said he had not, and the following ensured:

THE COURT:	Do you intend to get an attorney?
THE DEFENDANT:	I can't afford an attorney.
THE COURT:	Do you wish to apply for the Public Defender?
THE DEFENDANT:	Really, no.
THE COURT:	Do you want a week to file discovery demands?
THE DEFENDANT:	I don't really know what to do. I was here last time with a Public Defender

for two months and he didn't do nothing for me.

Respondent said that he was adjourning the case for another week and told the defendant, "If you want to apply for the Public Defender, you can. If you don't wish to, you don't have to." Respondent recommitted the defendant to jail in lieu of bail.

70. On May 24, 2001, when the defendant was returned to court from jail, respondent again asked the defendant whether he had spoken to an attorney:

THE DEFENDANT:	No. I was supposed to get an attorney today from the court.
THE COURT:	No. You were getting your own attorney.
THE DEFENDANT:	No.
THE COURT:	Do you wish to apply for the Public Defender?
THE DEFENDANT:	That's what you told me last week. You were going to appoint me an attorney this week.
THE COURT:	I don't think I had that indication. Have you filled out an application for the Public Defender?
THE DEFENDANT:	No.
THE COURT:	I will give you a form to fill out. We will evaluate it. I will adjourn the case until next Thursday.
THE DEFENDANT:	Next Thursday? Another week? You told me that last week.
THE COURT:	It could be months before we resolve this. It could be up to a year. So, fill out the form real quick and we will take a look at it.
THE DEFENDANT:	Is there any way I can speak to an attorney today, though?

THE COURT: Probably not, no.

Respondent committed the defendant to jail for another week in lieu of bail.

71. At the defendant's fourth appearance in court on May 31, 2001, he appeared with an assistant public defender and stated that he had lost his job. Respondent refused to release the defendant on the attorney's request and offered a plea to the charge and 90 days in jail, which the defendant refused. Respondent adjourned the case until June 14, 2001, and again committed the defendant to jail in lieu of bail.

72. On June 14, 2001, after the defendant had spent over a month in jail, he was returned to court and appeared with another assistant public defender. Noting that the defendant had a "lengthy history," respondent offered a sentence of 60 days, which the defendant accepted. The defendant pled guilty, and respondent sentenced him to 60 days and a fine of $200 and issued a three-year Order of Protection to stay away from the location of his arrest.

73. Respondent failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL.

As to Charge XXIII of the Formal Written Complaint:

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

As to Charge XXIV of the Formal Written Complaint:

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

As to Charge XXV of the Formal Written Complaint:

76. On April 27, 2000, respondent arraigned Michelle Gillihan, who was charged with the misdemeanor of Loitering, three Vehicle and Traffic violations, and Driving With A Suspended License, an unclassified misdemeanor. Ms. Gillihan had no criminal record and lived in Troy. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 4, 2000. He also issued an Order of Protection for the defendant to stay away from the location of the arrest. There is no transcript of the arraignment. The next day, the defendant was bailed out by a bail bondsman at a cost of approximately $2,500.

77. On May 4, 2000, when the defendant returned to court, she said that she had not yet met with her assigned lawyer, and respondent adjourned the matter. Thereafter, the defendant and/or her attorney made numerous court appearances before respondent adjourned the charges in contemplation of dismissal in March 2001.

As to Charge XXVI of the Formal Written Complaint:

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

As to Charge XXVII of the Formal Written Complaint:

79. On January 3, 2000, respondent arraigned Robert Guynup, who was charged with Harassment and Criminal Contempt for allegedly throwing a magazine at his girlfriend. After ascertaining that the defendant worked full-time at Central Service Center in Albany and lived with his girlfriend, respondent advised him of the charge and asked, "Are you getting a lawyer on these matters?" The defendant said, "Yes, sir."

80. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail for one week.

81. On January 5, 2000, the probation department recommended that the defendant be released due to a good employment history, ties to the community, and no previous criminal history. Respondent released the defendant on January 10, 2000, when he appeared with his retained attorney. Ultimately, the defendant pled guilty to the Contempt charge, and respondent sentenced him to probation and issued a final Order of Protection.

As to Charge XXVIII of the Formal Written Complaint:

82. On April 30, 2000, respondent arraigned David Junco, who was charged with Theft Of Services for allegedly failing to pay a $25 cab fare. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $30,000 and committed the defendant to jail in lieu of bail until the next day, when he was released. There is no transcript of the arraignment.

83. Subsequently, the defendant was arrested on a Disorderly Conduct charge, and he pled guilty to two counts of Disorderly Conduct in satisfaction of both charges. Respondent sentenced him to fines totaling $190.

As to Charge XXIX of the Formal Written Complaint:

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

As to Charge XXX of the Formal Written Complaint:

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

As to Charge XXXI of the Formal Written Complaint:

86. On August 17, 2001, respondent arraigned Daniel Lewis, who was charged with the violations of Unlawfully Dealing With Fireworks and Uninspected Motor Vehicle. After noting that the defendant was on probation and advising him of the charges, respondent told the defendant, "[Y]ou need a lawyer on these matters…. How much time do you need to be back here with a lawyer?" Respondent failed to advise the defendant of his right to assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL. Respondent released the defendant on his own recognizance.

87. When the defendant appeared on the adjourned date, September 18, 2001, respondent asked him, "Have you had the opportunity to speak to an attorney?" and the defendant replied, "No. I called the Public Defender yesterday and they told me just to come in and fill out some paperwork. And then I asked one of the police officers here and they said to come up to the desk." As the defendant repeatedly requested assigned counsel, respondent, after ascertaining that the defendant was employed, repeatedly told him that he needed to hire an attorney:

THE COURT:	Why don't you hire an attorney?
THE DEFENDANT:	I was just going to go with the Public Defender.
THE COURT:	Do you have any minor children?
THE DEFENDANT:	I'm sorry.
THE COURT:	Do you have any children?
THE DEFENDANT:	No.
THE COURT:	You need to hire your own lawyer, wouldn't you?
THE DEFENDANT:	I can't go with the Public Defender?
THE COURT:	Well, how would that -- I mean, if you were indigent, yes, absolutely, but you don't appear to be indigent, meaning lacking money or employment, right?
THE DEFENDANT:	Right.
THE COURT:	So, you need to work and save. Hire a lawyer and bring one in next Tuesday. If it's ultimately impossible to do, we will certainly address that. You are not suggesting you can't do that.
THE DEFENDANT:	I live on my own.
THE COURT:	Okay. Make a good faith effort and we will certainly address the issue as

it comes up, but you need to make an attempt to get a lawyer and bring one in if you can. And if you can't, raise that issue next Thursday.

88. When he appeared the following week, the defendant again asked for assigned counsel, and respondent admonished him that he needed "to save" and that "This would be a bill that would go to the top of the stack":

THE COURT:	Have you spoke to an attorney on these new matters?
THE DEFENDANT:	I spoke to my assigned counselor and he said to come down here and get a public defender.
THE COURT:	You are still working full-time?
THE DEFENDANT:	I can't afford one, Your Honor.
THE COURT:	How much have you saved?
THE DEFENDANT:	I'm sorry.
THE COURT:	How much have you saved?
THE DEFENDANT:	I don't really save.
THE COURT:	That's the problem.
THE DEFENDANT:	Yeah.
THE COURT:	If you did, you would be able to afford an attorney. Do you support any minor children?
THE DEFENDANT:	No. I got insurance, heat bill, rent.
THE COURT:	I wouldn't worry about any of those bills. You need to try to get a lawyer. And I'm going to go until next Tuesday for you to try to get a lawyer.
THE DEFENDANT:	If the Public Defender's office says I'm fit for it--

THE COURT: They can say whatever they want, I suppose. October 2.

THE DEFENDANT: If I'm eligible, I can get one?

THE COURT: I don't know who is telling you you are or what the basis for that is.

THE DEFENDANT: Uh-huh.

THE COURT: I just don't know. You need to save money, you need to get a lawyer, and you need to be back here next Tuesday.

THE DEFENDANT: If they do say I can have one --

THE COURT: It is of no relevance to me what an assigned lawyer in another county -- how he or she evaluates your financial situation.

THE DEFENDANT: Do you evaluate it yourself?

THE COURT: Try to get a lawyer and be here next Tuesday. You have just indicated you pay tons of other bills. This would be a bill that would go to the top of the stack. All right?

THE DEFENDANT: All right.

89. When the defendant did not appear the next week, respondent issued a warrant. Finally, on October 30, 2001, after the defendant told respondent that he had been laid off, respondent gave him a financial affidavit to apply for the public defender. On November 13, 2001, the defendant appeared with an assistant public defender, and the charges were adjourned in contemplation of dismissal.

As to Charge XXXII of the Formal Written Complaint:

90. On May 12, 2000, respondent arraigned Gabriel Lewis, who was charged with Loitering, a misdemeanor. After determining that the defendant was on probation for a drug felony, respondent entered a plea of not guilty for the defendant, announced that he was issuing an Order of Protection and assigned the public defender. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably

high bail of $25,000 and committed the defendant to jail in lieu of bail until May 19, 2000. Respondent made no inquiry of the defendant other than to determine that he was on probation. Respondent believed that the defendant was probably unemployed since there was no entry under "occupation" on the arrest report.

91. On June 16, 2000, the defendant pled guilty to the charge, and respondent sentenced him to 90 days in jail and $200 in court costs.

As to Charge XXXIII of the Formal Written Complaint:

92. On November 14, 2001, respondent arraigned Tice McGee, who was charged with a violation of Harassment 2nd Degree after an argument with his girlfriend's mother. Respondent released the defendant on his own recognizance. There is no transcript of the arraignment. At a court appearance two days later, respondent ascertained that the defendant worked at All Metro Health and asked, "Have you had the opportunity to speak to a lawyer?" The defendant responded, "No, I haven't." Respondent told the defendant, "Given the level of the charge -- it is a violation -- it's up to you as to whether or not you intend to seek the advice of counsel or retain an attorney," and he adjourned the case to December 7, 2001.

93. On the return date, on the recommendation of the district attorney's office, respondent imposed an adjournment in contemplation of dismissal and issued an Order of Protection for one year. Respondent never raised the issue of assigned counsel with the unrepresented defendant and failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL.

94. Respondent testified that the defendant, who worked full-time as a nurse's aide, did not qualify for the public defender because he was "gainfully employed." Respondent also testified that he does not advise defendants of the right to assigned counsel if they are not "exposed" to jail time.

As to Charge XXXIV of the Formal Written Complaint:

95. On April 27, 2000, respondent arraigned Mark Monge, who was charged with Loitering, a misdemeanor. The defendant lived in Troy, and the arrest report indicated that he was a bricklayer. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail for one week. There is no transcript of the arraignment.

96. On the return date, respondent recommitted the defendant for another two weeks. On May 15, 2000, the probation department recommended that the defendant be released under their supervision because he was not a flight risk.

97. On May 18, 2000, the defendant appeared with his attorney, and respondent proposed a plea with a sentence of 90 days in jail. The defendant's attorney asked the court to consider something less than the maximum time. The defendant stated that he had just started a new job and had a baby on the way, and he asked if there was any way he could do weekends so that he could get back to work. Respondent replied, "Weekends are a disaster for everyone."

Ultimately, the defendant pled guilty, and respondent sentenced him to 60 days in jail and a final Order of Protection for him to stay away from the location of the arrest.

As to Charge XXXV of the Formal Written Complaint:

98. On August 4, 2000, respondent arraigned Scott Morgan of Troy, who was charged with Petit Larceny, a misdemeanor. The defendant said that he had worked at Skyway Roofing but had just quit his job. Respondent told the defendant, "If you can get a lawyer, bring one in next Friday. If you can't, we will assign a lawyer to represent you." Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

99. Respondent set bail of $25,000 and committed the defendant to jail in lieu of bail for a week.

100. Probation found the defendant ineligible for pretrial release. An 18B attorney was assigned, and on August 11, 2000, the defendant appeared with counsel. In September, the director of the TASC substance abuse treatment program wrote to respondent requesting that the defendant be released so that a County Court could send him to a treatment program. On October 6, 2000, after being incarcerated for two months, the defendant pled guilty, and respondent sentenced him to five months in jail and a $200 fine. There is no appearance on the record by defense counsel or a prosecutor.

As to Charge XXXVI of the Formal Written Complaint:

101. On April 27, 2000, respondent arraigned Richard Myers, Jr., of Troy, who was charged with Imitation Controlled Substance, an unclassified misdemeanor. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000, committed the defendant to jail in lieu of bail until May 2, 2000, and issued an Order of Protection for the defendant to stay away for six months from the area where he had been arrested. There is no transcript of the arraignment.

102. On May 2, 2000, respondent recommitted the defendant to jail for another week. On the return date, the defendant, appearing with the public defender, pled guilty and was sentenced to 30 days in jail and $90 in court costs, and respondent issued a final Order of Protection.

As to Charge XXXVII of the Formal Written Complaint:

103. The charge was not sustained and is therefore dismissed.

As to Charge XXXVIII of the Formal Written Complaint:

104. On April 8, 2000, respondent arraigned Earnest Pinsonneault, who was charged with two counts of Harassment, a violation. Respondent committed the defendant to jail in lieu of bail of $1,500 and issued an Order of Protection for the defendant to stay away from the two complaining witnesses. There is no transcript of the arraignment.

105. The defendant was released from jail after a bail bond was posted. When the defendant appeared on April 10, 2000, he asked if he needed an attorney, and respondent told him, "If you need one, you can hire one":

THE COURT:	Where do you work?
THE DEFENDANT:	Carter's Machinery, Watervliet, Elm Street.
THE COURT:	Are you on probation or parole?
THE DEFENDANT:	No.
THE COURT:	Sir, these charges are violations. I will enter pleas of not guilty. I will tell you that if you plead guilty, I will impose fines of $95 on each and issue limited final orders of protection, which means you could be in their company, but there can't be any trouble. And if there is, it would make things a lot more serious in the future.
THE DEFENDANT:	Well, I had him removed from my home and she still lives with me. We are still together.
THE COURT:	Is that proposal acceptable?
THE DEFENDANT:	Yeah. We get along. They got me bailed out.
THE COURT:	How do you then plea to both harassment charges?
THE DEFENDANT:	I don't feel that I'm guilty.
THE COURT:	Okay.
THE DEFENDANT:	I mean, it was my home. I got grabbed by the neck and everything. All I did was defend myself and pushed him away.
THE COURT:	How old is he?

THE DEFENDANT: 23 years old.

THE COURT: Do you want to settle this matter up for trial in a few weeks? Given the level of the charge, there is not much to do with it. Be back here on May 8 at 9 o'clock. Let me give you a slip as a reminder.

THE DEFENDANT: Do I need an attorney?

THE COURT: If you want one, you can hire one.

THE DEFENDANT: I don't have the money to hire one.

THE COURT: You will get it. You are working. It will be up to you. If you want to get a lawyer, you can get one. And if you don't want to, given the level of the charge, you don't have to. It is up to you.

THE DEFENDANT: Okay. Thanks.

THE COURT: Here is a slip that reminds you to be here on May 8.

106. On May 8, 2000, the date scheduled for trial, the unrepresented defendant appeared, and respondent asked him if he wanted his trial that morning; the defendant said "yes." Respondent asked the defendant to "give us a few minutes" to see if the district attorney was ready to proceed; the defendant asked to use the bathroom and respondent said, "Sure. We won't do anything without you." Respondent discussed the case with the assistant district attorney, who said that she was "inclined to let him plea to one count of harassment"; thereafter, respondent advised the defendant that if he pled guilty, respondent would impose a fine of $95 and would issue a final Order of Protection. The defendant said that respondent's proposal was "Acceptable," then during the colloquy he repeated that he "didn't harass anyone":

THE COURT: Are you aware that there is a preliminary Order of Protection in effect now; correct?

THE DEFENDANT: I guess. I'm not sure.

THE COURT: Now, is that proposal acceptable or unacceptable?

THE DEFENDANT: Acceptable.

THE COURT: I ask you, then, is it a fact on April 7 of this year, 2250 p.m., at 1002 2nd Avenue here in the City of Troy, did you at that date, place and time harass James Sweeney?

THE DEFENDANT: No.

THE COURT: Did you have an argument with him?

THE DEFENDANT: There was words. There was a lot of drinking that night.

THE COURT: Do you acknowledge in the course of whatever was going on that you harassed him?

THE DEFENDANT: I did not harass him. No, I didn't. He was harassed --

THE COURT: Who is he in relation to you?

THE DEFENDANT: My girlfriend's son.

THE COURT: How old is he?

THE DEFENDANT: 25.

THE COURT: 25?

THE DEFENDANT: 25, 26.

THE COURT: Then who did you harass that night?

THE DEFENDANT: I didn't harass anybody. It was a lot of argument. He was drinking and I got taken out of my house. It is my house and my girlfriend lives there with me. He was staying there temporarily and he didn't have a place to live.

THE COURT: Okay. And there is one involving her,

too?

MS. MERKLEN: Right.

THE COURT: In the course of this evening of festivities did you have a discussion with a Donna Butler and during the course of that discussion, and at least as you have described the drinking that had been going on, did you harass her?

THE DEFENDANT: We both yelled at each other.

THE COURT: And do you admit during the course of that you harassed her, for the purpose of this resolution?

THE DEFENDANT: Yes.

THE COURT: On the admission how do you plea to the one count of harassment involving a Donna Butler?

THE DEFENDANT: Guilty.

THE COURT: I will accept the plea of guilty. Can the fine of $95 be paid by September 1? You have June, July and August.

THE DEFENDANT: September 1? Sure.

107. Respondent did not advise the defendant of the right to counsel and assigned counsel before accepting the defendant's guilty plea, never explored the issue of assigned counsel with the defendant, and failed to take affirmative action to effectuate the defendant's right to counsel as required by Section 170.10 of the CPL.

108. Respondent testified that he attempted to assign the public defender at arraignment but determined on April 10 that the defendant was ineligible; he adjourned the case for a month to give the defendant the "opportunity" to figure out if he could hire a lawyer. Respondent testified that he did not believe he had a "technical obligation" to revisit the issue of counsel prior to accepting the defendant's guilty plea.

As to Charge XXXIX of the Formal Written Complaint:

109. On March 9, 2000, respondent arraigned Sean Quackenbush, who was charged with Disorderly Conduct, a violation, and Resisting Arrest, a misdemeanor. After ascertaining that the defendant was not on probation or parole and was self-employed as a carpenter, respondent asked him, "Are you getting a lawyer?" and the defendant replied, "No." Respondent told the defendant, "If you can get a lawyer, I would, because you need one." Respondent failed to properly advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

110. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail for one week. Later that day, a bail bond was posted and the defendant was released.

111. On March 10, 2000, respondent signed an Application for Assignment of Public Defender and/or Assigned Counsel. On March 30, 2000, the defendant appeared in court with retained counsel and pled guilty to Disorderly Conduct in satisfaction of both charges. Respondent imposed a fine of $95 and issued a final Order of Protection for the defendant to stay away from the location of the arrest for one year.

As to Charge XL of the Formal Written Complaint:

112. Adam Russell, a senior program analyst for the state Department of Labor, has resided in the Capital District his entire life. In the summer of 2000, he was living at a friend's apartment in Troy while a student at Springfield College and was working at two jobs: at All Sports Pub in Troy and Domino's Pizza in Albany. He had no criminal record.

113. On the night of August 4, 2000, Mr. Russell left All Sports Pub with a friend and headed home; when the two men stopped at a market to pick up sandwiches, Mr. Russell's friend got into an argument with some people, one of whom left and returned shortly with a group of men who "jumped" Mr. Russell and his friend. Mr. Russell was beaten with a baseball bat, which caused lacerations on his head and chest. When the police arrived, an officer told Mr. Russell to leave the scene, but as he started to leave, another officer told him to sit down on the sidewalk. When the first officer noticed him sitting on the sidewalk, the officer arrested him for Loitering after being told to leave the area.

114. The defendant was taken to the police station, where he was held until the next morning, when he and other defendants were transported to the court for arraignment.

115. At the arraignment, respondent ascertained that the defendant attended college, had two jobs and had never been arrested before. Respondent then asked him, "Are you getting a lawyer on these matters?" and the defendant responded, "If needed." Respondent adjourned the case for a week and told the defendant, "And, again, you need to be here next Friday with a lawyer." Respondent failed to advise the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendants' rights as required by Section 170.10 of the CPL.

116. Respondent stated that he determined that the defendant was not eligible for assigned counsel since he attended college and had two jobs. That determination was not based on any meaningful inquiry into the defendant's ability to afford counsel, as required by statute.

117. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $10,000 and committed the defendant to jail in lieu of bail until August 11, 2000.

118. Respondent issued a preliminary Order of Protection, which required the defendant to stay away from the location of his arrest for six months. This was difficult, since the defendant lived only a block away from that location.

119. The defendant had been cooperative during his arrest and was cooperative and polite at the arraignment.

120. The defendant remained in jail for 14 hours until his bail was posted through a bail bondsman, who had been paid $1,000 by Mr. Russell's employer.

121. The defendant retained an attorney. On August 11, 2000, the Loitering charge was adjourned in contemplation of dismissal.

As to Charge XLI of the Formal Written Complaint:

122. On January 7, 2000, respondent arraigned Wayne Skaarup of Troy, who had been arrested on a bench warrant for Aggravated Unlicensed Operation and, after marijuana was found, was also charged with Unlawful Possession Of Marijuana. The defendant's probation officer had written a note indicating that the defendant would be violated for failure to report. After the defendant told respondent that he was employed at Quad Graphics in Saratoga, respondent asked, "Are you getting a lawyer?" and the defendant replied, "I would like to try, yes." Respondent set bail of $25,000, remanded the defendant to jail in lieu of bail and adjourned the case for a week, telling the defendant, "You need to see a lawyer, you need to bring a lawyer back next Friday."

123. On the return date, respondent adjourned the case to the following week and issued another commitment order to hold the defendant in jail.

124. On January 21, 2000, the defendant appeared with retained counsel, who requested an adjournment because the defendant was attempting to resolve traffic charges that were pending in other courts. On February 4, 2000, the defendant pled guilty to the Aggravated Unlicensed Operation charge, and respondent imposed a fine of $225 and dismissed the marijuana charge.

125. Respondent never properly advised the defendant of his right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

As to Charge XLII of the Formal Written Complaint:

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

As to Charges XLIII and XLIV of the Formal Written Complaint:

127. On April 25, 2000, respondent arraigned Kamika Thomas, who was charged with a violation of Trespass under the City of Troy TAP Program (*see* Finding 10 above) and with Bicycle On The Sidewalk, a violation of the Troy City Ordinance. According to the arrest report, the 19 year old defendant lived in Troy and was a babysitter. There is no transcript of the arraignment.

128. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000, committed the defendant to jail in lieu of bail until May 2, 2000, and issued a preliminary Order of Protection for the defendant to stay away from the location of the arrest.

129. On April 27, 2000, the probation department recommended that the defendant be released because she had no criminal record, worked part time and lived with her sister. On April 28, 2000, another judge ordered her release.

130. On April 29, 2000, Ms. Thomas was arrested again for Trespass on the basis of another TAP "owner affidavit." Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 5, 2000. Respondent issued an Order of Protection for the defendant to stay away from the location of the arrest. There is no transcript of the arraignment.

131. On May 5, 2000, the defendant returned to court. There was no appearance by a prosecutor or defense counsel. Respondent advised the defendant that if she pled guilty, he would sentence her to time served and a fine of $95 and would issue a final Order of Protection directing her to stay away from the location of her arrest for one year. The defendant pled guilty and was sentenced accordingly.

132. Prior to accepting the defendant's guilty plea, respondent said nothing about the right to counsel and assigned counsel and failed to take affirmative action to effectuate the defendant's rights as required by Section 170.10 of the CPL.

133. Court records indicate that the defendant pled guilty to the first Trespass charge on May 2, 2000, and that the bicycle charge was dismissed.

As to Charge XLV of the Formal Written Complaint:

134. After Jose Velez failed to appear pursuant to an appearance ticket issued for Unlawful Possession Of Marijuana, respondent issued a bench warrant. The arrest report indicates that the 18 year-old defendant, who had a Brooklyn address, "may have something pending in NYC." On May 24, 2000, respondent arraigned the defendant. The defendant said that he went to school; when respondent asked why he had not appeared as required in February, the defendant replied that he had been away because his grandfather had died, that he had

returned on Wednesday, and that he had been picked up when his friend was stopped for driving without a license. Respondent asked the defendant how he supported himself, and the defendant replied that his friend bought him "food and stuff." Respondent then said that he would enter a plea of not guilty and assign counsel. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until May 26, 2000.

135. On that date, the defendant was returned to court from jail. Respondent told the defendant, who was represented by an assistant public defender, that if he pled guilty to the charge, respondent would sentence him to time served and a fine of $150 and would issue an Order of Protection for him to stay away from the location of his arrest. The defendant pled guilty, and respondent sentenced him accordingly.

136. Respondent testified that he did not allow the defendant to plead guilty to the marijuana charge at the arraignment because "it doesn't look right."

As to Charge XLVI of the Formal Written Complaint:

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

As to Charge XLVII of the Formal Written Complaint:

138. On February 4, 2000, respondent arraigned Carl Wallace of Troy, who was charged with Imitation Controlled Substance, a misdemeanor. After the defendant said that he worked in a barber shop and had never been arrested before, respondent advised him of the charge and asked, "Are you getting a lawyer on these matters?" and the defendant replied, "Yeah, I guess so." Respondent said, "Your own or do you wish to have one assigned?" The defendant said, "Wish to have one assigned," and respondent said he would assign the public defender.

139. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $10,000 and committed the defendant to jail in lieu of bail until February 10, 2000. On that date, there were no appearances, but respondent noted on the record: "Carl Wallace. Plea and 90 days and a week to decide on the offer"; the defendant remained committed to jail.

140. On February 14, 2000, probation recommended that the defendant be released to Honor Court for drug treatment, and by letter of the same date, the Honor Court made the same recommendation. Respondent did not release the defendant; when the defendant returned to court with the public defender on February 17, 2000, respondent advised the defendant that if he pled guilty, respondent would sentence him to 90 days and $90 court costs and would issue an Order of Protection. The defendant said, "90 days?" Respondent said he would adjourn the matter for a week. Later that day, the defendant pled guilty, and respondent sentenced him to 90 days in jail and $90 in court costs and issued a final Order of Protection for him to stay away from the location of the arrest for three years.

As to Charge XLVIII of the Formal Written Complaint:

141. On July 11, 2000, respondent arraigned James Williams, Jr., who was charged with Petit Larceny, a misdemeanor, and Open Container, a violation. According to the arrest report, the defendant worked as a cook. Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $25,000 and committed the defendant to jail in lieu of bail until July 18, 2000. There is no transcript of the arraignment.

142. On the return date, the defendant returned to court, represented by the public defender, and pled guilty to the Petit Larceny charge. Respondent sentenced the defendant to six months in jail and a fine of $200 and issued a final Order of Protection for the defendant to stay out of the store where he was arrested for three years.

As to Charge XLIX of the Formal Written Complaint:

143. On February 4, 2000, respondent arraigned Leroy Williams of Troy, who was charged with Imitation Controlled Substance, a misdemeanor, after allegedly attempting to sell the substance to an undercover police officer. The defendant stated that he was not on probation or parole and that he worked full-time; the arrest report indicated that he was a carpenter. Respondent asked the defendant, "Are you getting a lawyer?" and the defendant replied, "Child support got my money." Without due consideration of the factors of pretrial release set forth in Section 510.30(2) of the CPL, respondent set unreasonably high bail of $10,000 and committed the defendant to jail in lieu of bail until February 10, 2000. Respondent assigned the public defender.

144. On the return date, respondent adjourned the matter to the following week for an "offer conference" and stated that the "court position on that is 60 days."

145. On February 17, 2000, the defendant appeared with the public defender. Respondent told the defendant that the proposal was a plea of guilty with 60 days in jail, and the defendant asked if he could serve weekends so that he did not lose his job. Respondent said, "See, I don't do weekends because it never works out," and the defendant said, "It will work out with me, sir." Respondent said, "No, because people make you smuggle drugs in the jail"; the defendant said, "Never," and respondent said:

> Always. Weekends are a disaster for everybody and people don't do them. They do a couple and don't do the rest and it creates all sorts of security problems at the jail and hassles for everybody else.

Later that day, after 13 days in jail, the defendant pled guilty to the charge, and respondent sentenced him to 60 days in jail and $90 in court costs and issued a final Order of Protection for the defendant to stay out of the area of the arrest for three years.

146. Respondent testified that he did not know the defendant's criminal history, but the defendant "was known to the court on some level." Respondent stated, "[I]t's not always one hundred percent clear on the record as to how I come up with a bail figure on arraignment."

As to Charge L of the Formal Written Complaint:

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

As to Charge LI of the Formal Written Complaint:

148. As demonstrated by the conduct set forth above, respondent engaged in a pattern of disregarding basic, fundamental rights of defendants.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(4) and 100.3(B)(6) of the Rules Governing Judicial Conduct. Respondent's misconduct is established, and the following charges of the Superseding Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions: I through XV, XVIII through XX, XXII, XXV, XXVII, XXVIII, XXXI through XXXVI, XXXVIII through XLI, XLIII through XLV, XLVII through XLIX and LI. Charges XVI, XVII, XXI, XXIII, XXIV, XXVI, XXIX, XXX, XXXVII, XLII, XLVI and L are not sustained and are therefore dismissed.

The record establishes that over a two-year period, respondent engaged in a pattern of serious misconduct that repeatedly deprived defendants of their liberty without according them fundamental rights. Respondent ignored well-established law requiring judges to advise defendants of the right to counsel and to take affirmative action to effectuate that right. In numerous cases he set exorbitant, punitive bail for defendants charged with misdemeanors and violations, even where incarceration was not an authorized sentence. He coerced guilty pleas from incarcerated, unrepresented defendants who, if they refused to accept respondent's plea offer, faced continued incarceration because of the unreasonably high bail he had set. He imposed illegal sentences in four marijuana cases, and on two separate occasions he convicted an incarcerated defendant in the defendant's absence by announcing that the case was "a plea and time served," although the defendant had not pled guilty. Respondent's failure to recognize the impropriety of his procedures compounds his misconduct and suggests that defendants in his court will continue to be at great risk. Viewed in its totality, respondent's conduct demonstrates a sustained pattern of indifference to the rights of defendants and establishes that his future retention in office "is inconsistent with the fair and proper administration of justice." *Matter of Reeves*, 63 NY2d 105, 111 (1984).

The transcripts of arraignments conducted by respondent depict proceedings that bear scant resemblance to the procedures required by law. At arraignment, a judge is obliged to advise every defendant of the right to counsel and, except for traffic infractions, the right to have an attorney assigned by the court if he or she is "financially unable to obtain the same"; in addition, the judge must "take such affirmative action as is necessary to effectuate" those rights (CPL §170.10). We agree with the referee's finding that, despite respondent's familiarity with this critically important statute, respondent "did not fulfill his obligations under the statute either at the time of the arraignment or at subsequent court appearances" (Rep. 4) and committed

numerous defendants to jail in lieu of bail without affording them this fundamental right.[2]

In case after case, respondent ignored the statutory requirements, often commencing by asking the defendant, "Are you getting a lawyer on these matters?" without advising the defendants their rights. In many cases, from the arraignment through a plea of guilty days or weeks later, there was no mention whatsoever of the right to counsel at each and every stage of the proceeding and often no reference to the possibility of assigned counsel. Respondent effectively shifted the burden to defendants to inquire about assigned counsel, although often, even when defendants did so, respondent directed them to first make an effort to hire an attorney prior to the next scheduled court appearance; in the meantime, the defendants were often remanded to jail for several days or up to one week. At the hearing, respondent testified that he is "inclined to give people an appropriate opportunity to retain their own counsel, if they have an ability to do that"; he added, "Everyone, virtually everyone, says they can't afford an attorney…" and asserted that "it doesn't take much employment to retain one'sown attorney…as opposed to saddling the county with the expense…." Respondent's conduct, and his explanation for his actions, show a profound misunderstanding of a fundamental principle of law that goes to the heart of a fair proceeding.

To be sure, not every defendant who requests assigned counsel may be deemed financially eligible, but that determination cannot be made without a full evaluation of the defendant's personal circumstances, a procedure that respondent often ignored or postponed until the defendant had been incarcerated for days or even weeks. Respondent's explanation about giving defendants an "opportunity" to retain counsel in order to avoid "saddling the county with the expense" suggests that he placed his personal views above the law he is sworn to administer, and his practice in that regard is contrary to both the letter and the spirit of the statutory requirements. When defendants facing incarceration indicated that they had low-wage jobs, or worked part-time, or asserted that they could not afford to hire an attorney, or pleaded to have an attorney assigned, the circumstances cried out for affording them a prompt opportunity to apply for assigned counsel, whereby a formal assessment of their eligibility could be made. Instead, respondent repeatedly told defendants to "come back with a lawyer" or that it was "up to you" whether to get a lawyer, without advising them of the right to assigned counsel if they could not afford one or giving them an opportunity to apply for assigned counsel.

Respondent's omissions in this regard are an inexcusable lapse, regardless of whether, as he asserted at the hearing, some defendants knew their rights from previous court experiences, or were too intoxicated to understand the advice, or indicated that they would attempt to hire an attorney without being told of the right to assigned counsel. It is noteworthy that some defendants who initially indicated that they would try to get a lawyer were unrepresented when they returned to court, yet respondent never revisited the right to counsel and the possibility of assigned counsel before accepting their guilty pleas. As an experienced judge who had previously served as an assistant public defender, respondent should appreciate the importance

[2] We are unpersuaded by respondent's testimony that in cases where there are no transcripts of the arraignments, he properly advised defendants of their rights. The available transcripts -- which respondent similarly defends -- consistently demonstrate the impropriety of his procedures at arraignment. Moreover, in a number of cases, transcripts of the defendants' subsequent court appearances clearly establish violations of the right to counsel.

of ensuring that every defendant has been fully apprised of his or her rights as required by law.

The law requires defendants charged with misdemeanors or violations to be released on recognizance or to have bail set, determined on the basis of numerous statutory criteria, including the defendant's character, employment, financial resources, ties to the community, criminal history and record of appearing in court when required (CPL §510.30[2]). In setting bail, "the only matter of legitimate concern" for the court is fixing an amount that "is necessary to secure [the defendant's] court attendance when required" (CPL §510.30[2][a]; *Matter of Sardino*, 58 NY2d 286, 289 [1983]). A bail determination cannot be motivated by bias or used to punish, to coerce pleas of guilty, or as preventive detention. *See, Matter of Sardino, supra*; *Matter of LaBelle*, 79 NY2d 350 (1992).

The conclusion is inescapable that respondent abused the bail process by using bail in a coercive, punitive manner. Repeatedly, after making no more than a perfunctory inquiry into the defendant's personal circumstances, respondent set bail in amounts for violations and misdemeanors that were so exorbitant that they were tantamount to no bail, bore no reasonable relation to the statutory criteria and compel an inference that respondent's purpose was an improper one. In many cases, defendants were unemployed or indigent, and thus their appearance in court could have been secured by a much lesser bail amount.

For example, one defendant charged with a violation of Disorderly Conduct after an altercation with a relative was remanded to jail on $20,000 bail, notwithstanding that he was a long-time resident of Troy, was employed and had no prior record except for an outstanding Open Container violation (Charge XX). Another defendant charged with Disorderly Conduct was held on $50,000 bail because respondent erroneously believed he was on felony probation (Charge XIII). A college student charged with Loitering, who had no prior criminal history, was held on $10,000 bail (Charge XL). Defendants charged with Trespass violations were committed to jail on $25,000 bail; defendants charged with Unlawful Possession Of Marijuana were held on bail of $20,000 or more, notwithstanding that incarceration is not an authorized sentence for a first or second conviction for that offense.

While bail in such amounts for a relatively minor offense can be justified in some instances, the pattern of these exceptionally high amounts in cases that presented no extraordinary circumstances compels the conclusion that respondent did not set bail in accordance with the statutory guidelines, to insure that the defendants would return to court, but that his purpose was punitive: he wanted to insure that these defendants spent time in jail. This is particularly so given the totality of this record, suggesting that the bail determinations were part of a punitive, biased pattern.

We emphasize that we do not propose to substitute our judgment for that of an arraigning judge in the absence of persuasive evidence that the judge was motivated by bias, or acted with a punitive or other improper intent, or acted with reckless disregard for the basic, fundamental rights of litigants. A bail determination is a significant exercise of discretion, circumscribed by the statutory guidelines, which can be reviewed in the courts and reduced if the reviewing court deems the amount excessive. However, when defendants were remanded on exorbitant bail without being advised of the right to counsel or the possibility of having counsel assigned, the

combination of those elements was coercive and punitive, creating a system of assembly-line justice that flourished in respondent's court.

While the record does not establish that respondent was motivated by bias against particular defendants or a class of defendants, the inexorable results of this coercive pattern seemed particularly harsh on defendants who could not an afford to hire an attorney to assert their rights. Thus, an incarcerated defendant, remanded on high bail, without the assistance of counsel and with no indication from the court that assigned counsel could be provided, faced the stark reality that a plea of guilty was probably the only way to get out of jail anytime soon. Instead of recognizing the significant potential for injustice in these circumstances, respondent proposed and accepted guilty pleas from such defendants. Regardless of whether respondent had a specific intent to coerce guilty pleas, his conduct created a significant risk of that result, which he could scarcely have failed to recognize.

On two occasions respondent convicted an incarcerated defendant in the defendant's absence by announcing on the record that the case was "a plea and time served." We are unpersuaded by respondent's explanation that on both occasions an assistant public defender consented to the procedure for security reasons, particularly since there is no appearance by defense counsel on the record and no indication that the defendant was even represented by the public defender's office in these matters. In any event, such a procedure -- admittedly concocted to avoid another court appearance by a defendant whom respondent described as a "semi-regular" in his court -- was completely inappropriate in the absence of any documentation that the absent defendant had actually consented to the plea.

In four cases where defendants were charged with Unlawful Possession Of Marijuana, respondent committed the defendants to jail in lieu of high bail and, thereafter, after they had spent several days in jail, he imposed fines that exceeded the legal maximum and jail sentences of time served or ten days, notwithstanding that incarceration is not authorized for a first or second conviction of this offense. Significantly, respondent testified that he would probably not have accepted their guilty pleas at the arraignment, thereby insuring that these defendants would spend time in jail for an offense deemed so minor that incarceration is not an authorized sentence. An experienced judge who presumably has handled many cases involving this charge should be fully cognizant of the authorized sentences. As a judge, respondent is required to maintain professional competence in the law (Section 100.3[B][1] of the Rules Governing Judicial Conduct). We conclude that the illegal sentences by respondent were not merely an error of law, but part of a pattern of improper conduct that violated the rights of defendants.

In considering an appropriate sanction, we are mindful that the Court of Appeals has stated that the purpose of disciplinary sanctions is not punishment, but "to safeguard the bench from unfit incumbents." *Matter of Reeves, supra,* 63 NY2d at 111, quoting *Matter of Waltemade*, 37 NY2d [a], [lll]. Here, respondent has demonstrated that he is apt to continue to violate the rights of unrepresented defendants. At no stage of this proceeding did respondent give any persuasive indication that he recognized the impropriety of his conduct. Even at the oral argument, after the referee had sustained most of the charges, respondent adhered to his position that on undisputed facts (*i.e.*, his failure to advise defendants of their right to counsel and assigned counsel and his responsibility to effectuate the right to counsel), his conduct was

appropriate. In responding to the Commission's questions, he had the opportunity to demonstrate that he understood the importance of strict adherence to the statutory mandates and recognized that his procedures were inadequate, but he appeared unwilling or unable to do so. *See, e.g., Matter of Sims*, 61 NY2d 349, 357 (1984); *Matter of Aldrich*, 58 NY2d 279, 283 (1983); *Matter of Shilling*, 51 NY2d 397, 401 (1980). The conclusion is inescapable that respondent's future retention on the bench would continue to place the rights of defendants in serious jeopardy. Accordingly, we conclude that the appropriate disposition is removal from office.

The members of the Commission concur with the above findings and conclusions, except as follows:

As to Charge II, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge; Mr. Berger dissents only as to the bail allegation and votes to dismiss that allegation; and Mr. Coffey dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge III, Mr. Coffey, Mr. Felder and Ms. Hernandez dissent only as to the bail allegation and vote to sustain that allegation; Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge IV, Mr. Goldman, Judge Peters and Judge Ruderman dissent only as to the bail allegation and vote to dismiss that allegation.

As to Charge VI, Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge VII, Mr. Berger, Judge Ciardullo, Mr. Coffey and Mr. Felder dissent only as to the bail allegation and vote to sustain that allegation; Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge VIII, Mr. Goldman and Judge Peters dissent only as to the bail allegation and the coercion of a guilty plea and vote to dismiss those allegations.

As to Charge IX, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge X, Judge Peters dissents only as to the bail allegation and the coercion of a guilty plea and votes to dismiss those allegations; Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge XI, Mr. Goldman dissents only as to the coercion of a guilty plea and votes to dismiss that allegation.

As to Charge XII, Mr. Goldman and Judge Peters dissent only as to the coercion of a guilty plea and vote to dismiss that allegation.

As to Charge XIII, Mr. Goldman dissents and votes to dismiss the charge; Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge XIV, Mr. Goldman and Judge Peters dissent only as to the coercion of a guilty plea and vote to dismiss that allegation.

As to Charge XVII, Mr. Pope dissents and votes to sustain the charge.

As to Charge XIX, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XX, Mr. Coffey and Judge Peters dissent only as to the bail allegation and vote to dismiss that allegation.

As to Charge XXIV, Mr. Berger, Judge Ciardullo, Mr. Coffey and Mr. Felder dissent and

vote to sustain the charge.

As to Charge XXV, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XXVI, Mr. Coffey and Mr. Felder dissent only as to the bail allegation and vote to sustain that allegation.

As to Charge XXVII, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge XXVIII, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XXXII, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XXXIV, Judge Peters dissents and votes to dismiss the charge.

As to Charge XXXV, Mr. Goldman dissents only as to the right to counsel allegation and votes to dismiss that allegation.

As to Charge XXXVI, Mr. Goldman, Ms. Hernandez and Judge Peters dissent and vote to dismiss the charge.

As to Charge XXXVIII, Mr. Coffey and Mr. Goldman dissent and vote to dismiss the charge.

As to Charge XXXIX, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation; Mr. Coffey dissents only as to the right to counsel allegation and votes to dismiss that allegation.

As to Charge XL, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge XLI, Judge Ciardullo, Mr. Coffey and Mr. Felder dissent only as to the bail allegation and vote to sustain that allegation.

As to Charge XLIII, Judge Peters dissents and votes to dismiss the charge.

As to Charge XLIV, Judge Peters dissents only as to the bail allegation and votes to dismiss that allegation.

As to Charge XLV, Mr. Goldman and Judge Peters dissent and vote to dismiss the charge.

As to Charge XLVI, Judge Ciardullo, Mr. Felder and Mr. Pope dissent and vote to sustain the charge.

As to Charge XLVII, Mr. Goldman, Ms. Hernandez and Judge Peters dissent and vote to dismiss the charge.

As to Charge XLVIII, Judge Peters dissents and votes to dismiss the charge.

As to Charge XLIX, Ms. Hernandez and Judge Peters dissent and vote to dismiss the charge.

As to Charge L, Mr. Berger, Judge Ciardullo, Mr. Felder, Mr. Pope and Judge Ruderman dissent and vote to sustain the charge.

As to sanctions, Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Felder, Mr. Pope and Judge Ruderman concur as to the sanction of removal. Mr. Goldman, Ms. Hernandez and Judge Peters dissent and vote that appropriate sanction is censure.

Judge Luciano was not present.

Dated: March 30, 2004

CONCURRING OPINION BY MR. FELDER

In his presentation to the Commission, respondent poses the question (twice):

> "On a very basic level, I've asked myself…the following question: can one be both a very good judge and a bad judge at the same time?"
> (Oral argument, p. 62)

> "Can a person be both a good judge and a bad judge at the same time?"
> (Oral argument, pp. 62-63)

He correctly answers his own question: "I respectfully suggest that one cannot" (Oral argument, p. 63).

The problem lies not in respondent's answer, but in his reasoning. By respondent's logic, he has dispensed more "good" justice than "bad," and, therefore, he is a "good" judge. Suggesting that his good works as a judge outweigh his shortcomings, respondent cites his accomplishments, *e.g.*, establishing a drug court and a domestic violence court. He treats "good" justice and "bad" justice as fungible commodities, and whichever is paramount in the mix characterizes the whole.

The reason one cannot be both a good judge and a bad judge is because the public is entitled not to have justice improperly dispensed, in respondent's words, by "a bad judge," notwithstanding the judge's good works. We do not expect our judges to be perfect instruments of the law, but we do expect them to follow the law as it clearly should be comprehended, and then apply to this understanding of the law the judge's full and honest intellectual capacity.

Respondent engaged in consistent, pernicious and unremitting violations of the rights of defendants who appeared before him. The pattern was that defendants were arrested for rather minimal infractions of the law, including those for which there was no jail sentence applicable as a punishment. Since the defendants were virtually all poor persons or persons of modest financial ability, bail was set in such an amount that would be impossible for them to meet. Not having the ability to post bail, they would be incarcerated, and, usually after a weekend or more in jail, on the return date, respondent would make them aware that if they pled guilty, a fine would be set and they would be sentenced to time already served, able to walk out of the courthouse immediately. In the words of one defendant, "I just wanted to go home" (Tr. 105).

Additionally, many defendants were not effectively advised of their right to counsel or to have assigned counsel. It is noteworthy that on the occasions respondent claims he did proceed appropriately, there were no transcripts made of the proceedings.

As the Commission's decision states: "This…coercive pattern seemed particularly harsh on defendants who could not afford to hire an attorney to assert their rights."

The financial ability or lack of it by defendants was the linchpin in respondent's panoply of wrongdoings. The inescapable leitmotif throughout respondent's justice-dispensing scheme is that the defendants were poor. Without this central component, respondent's methodology

would fail. To set $25,000 bail for persons because of whom they associate with, or for riding a bicycle on the sidewalk, or on a 16 or 19 year old for trespassing, or for a violation that by law carries with it no jail time, would be, given the financial realities of the defendants' lives, as insurmountable an obstacle as if bail were set at $25,000,000. In short, it was effectively a way to put people in jail (assisted by lack of counsel) without any practical recourse.

Parenthetically, I do not believe that respondent's unfailing use of the word "sir" in addressing a defendant demonstrates his politeness. The word "sir," when coupled with a colloquy that, in substance, denied the defendants their right to counsel, is akin to the police officer who stops a driver and, with all the attendant intimidation of flashing lights, gun on belt and uniform, asks for a driver's license or tells the driver to "Get out of the car, *Sir*." While on paper the words may convey courtesy and respect, the tone of the actual encounter may be quite different.

Respondent's general approach to his duties did, however, accomplish one thing. It enabled him to deal with a large volume of cases and to conduct four trials in three years.

What is disturbing is that respondent, at this late time, neither acknowledges his mistakes nor clearly indicates that he has any intention of changing his methodology. At oral argument, I asked him the question directly, twice:

> MR. FELDER: Judge, may I ask you something? Since you received notification from the Commission of these things, have you changed your bail practice or your methodology for advising people of their rights to counsel?
>
> (Oral argument, p. 66)

> MR. FELDER: But do you, since this stuff began here, since this little proceeding we have, have you plainly advised them that if they can't afford an attorney, that an attorney will be obtained for them?"
>
> (Oral argument, p. 68)

Respondent's answers were cloudy and certainly less than satisfactory. He did not inspire confidence that he has learned anything from the proceeding, and it is established law in New York that a judge's "failure to recognize the inappropriateness of his actions or attitudes" compounds the impropriety. *Matter of Aldrich*, 58 NY2d 279, 283 (l983).

What happened here, to paraphrase Shakespeare,[3] is not the stuff of justice. For much of the world, who do not enjoy the legal protections afforded to Americans, justice is the stuff of dreams. What happened here is the stuff of, at least, troubled sleep.

Dated: March 30, 2004

[3] "…such stuff as dreams are made on…" (*The Tempest*, Act IV, Sc. 1)

CONCURRING AND DISSENTING OPINION BY JUDGE PETERS

I agree with many of the findings of fact reached by the majority, but disagree with certain determinations of misconduct and the majority's conclusion that the appropriate sanction is removal. I concur in all respects with the dissenting opinion filed by Ms. Hernandez. I concur in the dissenting opinion filed by Mr. Goldman except to the extent that he fails to find that the respondent coerced guilty pleas.

Throughout its history, the Commission has cautiously refrained from intruding into areas that encroach upon judicial discretion. Expressing its reluctance to review a judge's bail determinations, the Commission stated in its 1991 annual report: "Although the Commission has no authority to consider complaints that judges have abused their discretion in setting bail, it may consider complaints that judges have used the bail procedure for other than its intended purpose," *e.g.*, to punish a defendant or coerce a guilty plea. I subscribe to this limitation upon our authority and review the charges concerning bail, mindful that the Commission should not substitute its judgment for that of an arraigning Magistrate, absent persuasive evidence that such Magistrate's intent was improper.

Within these constraints, I agree with the majority's conclusion that the bail set by respondent in most of the cases that are the subject of charges was excessive but dissent from their findings of misconduct which are grounded solely upon that fact. In numerous cases, the record indicates that a defendant had a parole hold, was on probation, had a history of bench warrants, or that some other factor was present which could be expected to move a bail amount to the higher end of the spectrum.[4] With one or two exceptions, the public defender's office never moved to reduce the amount of bail that had been set and there is no indication that a reviewing court ever found respondent's bails to be excessive. He was neither charged with harboring a discriminative intent when setting bail nor was such intent revealed by testimony; no evidence of racial or ethnic prejudice or bias was presented. For these reasons, I cannot conclude that respondent acted with bias or improper intent, but rather had a sincere, if misguided, belief that the bail amounts he set were appropriate and necessary to ensure the defendant's return to court.

In a few cases, however, it is glaringly apparent that respondent's conduct in setting extremely high bail, combined with a violation of the right to counsel, constituted misconduct. There, defendants were remanded on high bail after respondent failed to advise them of their right to counsel and assigned counsel. Later, while still incarcerated, they were returned to court and accepted respondent's offer of a plea for time served. I believe those plea were presumptively coerced. Therefore, as to the charges concerning those defendants, I concur with the majority's finding that respondent engaged in serious misconduct which violated the statutory and constitutional rights of those individuals.

I also agree with the bulk of the majority's findings concerning respondent's violation of CPL 170.10. Substantial record evidence and the respondent's own testimony reveal his repeated

[4] Moreover, there is no statutory or decisional requirement that a judge articulate the factors considered on the record when setting bail.

failure to properly advise defendants of their right to have counsel assigned if they were unable to afford an attorney and respondent's repeated failure to effectuate that right. In this arena, his explanations and excuses ring hollow.

Finally, addressing sanction, I join with my colleagues Hernandez and Goldman in concluding that censure is the appropriate penalty. While I am mindful that judges have been removed for engaging in a pattern of egregious misconduct that violates the right of defendants, including the right to counsel (*e.g., Matter of Esworthy*, 77 NY2d 280 [1991]; *Matter of Reeves*, 63 NY2d 105 [1984]; *Matter of Sardino*, 58 NY2d 286 [1983]), I note that each of those cases involved significant misconduct and exacerbating factors that are not present here. Respondent did not demean or disparage defendants and there is no indication that he presumed their guilt or elicited incriminating admissions at arraignment. Nothing in this record suggests that he was "vindictive, biased, abusive or venal" (*Matter of LaBelle*, 79 NY2d 350, 363 [1993]). Rather, he was consistently courteous. I believe that he will adjust his practices as guided by our determination.

For these reasons, I would censure, rather than remove, respondent.

Dated: March 30, 2004

DISSENTING OPINION BY MR. GOLDMAN

I concur in the majority's findings of misconduct with respect to many of the charges in the complaint. I respectfully dissent, however, from the majority with respect to some of the charges.

First, the complaint alleged, *inter alia*, that respondent set "unreasonably high" bail "without considering" the statutory factors. The majority, after considering the briefing and hearing oral argument, essentially amended these allegations, *sua sponte*, by finding that respondent imposed unreasonably high bail without giving "*due* consideration" to the statutory factors.

With respect to these charges, I disagree with the majority in those cases in which the record reveals that the defendant had a history of bench warrants or other factors that supported a conclusion that the defendant had little respect for court orders. I also disagree with the majority in those cases in which the defendant was on probation and parole or had a more serious pending case. In those two classes of cases, I cannot say that the bails set, even though in my view excessive, were so "unreasonably high" that they constituted judicial misconduct. Further, even under the majority's questionable expansion of these allegations to failure to give "*due* consideration," I am not prepared to say that respondent did not acceptably consider the statutory factors in those cases. I believe that the Commission, in order to assure judicial independence, should be extremely hesitant before it finds misconduct in an area of discretionary decision-making, such as bail-setting, and I believe that, in finding misconduct in these cases, it goes too far.

Second, the complaint alleged that respondent intentionally coerced defendants into pleading guilty. With respect to these charges, I certainly believe that respondent created an

inherently coercive situation by setting inordinately and often unjustifiably high bails, denying indigent defendants the assistance of counsel, and then offering incarcerated defendants the Hobson's choice of pleading guilty and being released immediately, or refusing to plead and remaining in jail. Defendants in such situations will often choose to plead guilty to gain their freedom – even if they are actually innocent. Nevertheless, I cannot find any evidence in the record that respondent had the *intent* to coerce guilty pleas. Absent such evidence, I find the Commission has not met its burden of proving judicial misconduct on these charges.

Third, the Commission heard charges that respondent failed to assign counsel to defendants. With respect to these charges, I dissent in those cases in which the defendants specifically declined counsel as well as those cases in which respondent asserts that he did in fact, or made some effort to, assign counsel. As to cases for which there is no transcript, I find an insufficient evidentiary basis to reject respondent's accounts of the facts.

Respondent's misconduct in setting unreasonable and inordinately high bail, and in depriving indigent defendants of assigned counsel, resulted in an unconstitutional deprivation of liberty and thus is extremely serious. Nonetheless, I dissent from the sanction of removal and vote for censure. There are few clear guidelines, either in statutory or case law, as to what particular amounts of bail should be set; judges are afforded considerable discretion. Further, it appears that no appellate court has ever suggested that respondent change his bail practices. Further still, this Commission has never publicly sanctioned a judge for setting high bail, as opposed to no bail. Under these circumstances, respondent's removal is unnecessary.

I also disagree with the majority view that respondent's failure to acknowledge the impropriety of his conduct should be a significant factor in determining an appropriate sanction in this case. In my view, a judge who sincerely believes he or she acted correctly should not be penalized for challenging the allegations against him and thus not admitting impropriety, or for not expressing remorse inconsistent with his or her defense. Respondent's defense of his bail decisions (although not of his clearly inappropriate procedures with respect to the right to counsel) raised legitimate legal and factual issues. The Commission should be careful not to send a message that discourages judges from offering a vigorous defense of their actions.

Accordingly, I would censure, and not remove, respondent.

Dated: March 30, 2004

DISSENTING OPINION BY MS. HERNANDEZ

I concur that respondent's pervasive record of misconduct warrants a severe sanction. It is a judge's obligation to uphold the law he is sworn to administer and to ensure that all individuals appearing before him are afforded the constitutional rights and justice they are entitled to. Nor should his concern be to avoid "saddling the county with the expense" of providing an eligible individual with assigned counsel.

In concluding that censure, rather than removal from office, is the appropriate sanction, I

have considered several factors. The record indicates that respondent treated defendants in a courteous manner, and there is no persuasive evidence that respondent was "vindictive," "abusive or venal," or motivated by bias. *See, Matter of LaBelle*, 79 NY2d 350, 363 (1992); *compare, Matter of Sardino,* 58 NY2d 286 (1983). Nor can I find that respondent intentionally disregarded the law.

In carrying out his duties, respondent has not demonstrated that he acted with malicious intent, but acted with misguided zeal in protecting his community. In my opinion, respondent's conduct, while serious, does not demonstrate that he is unfit for judicial office or that he is unwilling or unable to learn from these proceedings. I would hope that we can anticipate that he will learn from this experience and change his practices, and if he does not, I would not hesitate to take further action.

Accordingly, I respectfully conclude that respondent should be censured.

Dated: March 30, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **KARL T. BOWERS**, a Justice of the Chemung Town Court, Chemung County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Moriarty & Eraca-Cornish, LLP (by Richard C. Moriarty) for Respondent

The respondent, Karl T. Bowers, a justice of the Chemung Town Court, Chemung County, was served with a Formal Written Complaint dated July 9, 2004, containing one charge. Respondent filed an answer dated July 28, 2004.

On September 14, 2004, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On September 23, 2004, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a justice of the Chemung Town Court, Chemung County since January 1, 2001. Respondent is not an attorney.

2. On January 14, 2004, respondent was contacted by John McCormick, a business acquaintance, about a Speeding ticket (79 mph in a 55 mph zone) that Mr. McCormick had received in the Town of Wayland, Steuben County.

3. Respondent, who works as a private business consultant through a local employment agency, knew Mr. McCormick through respondent's former employment at Weyheauser Corporation, where Mr. McCormick is employed in a managerial position. Respondent has continued to maintain a business relationship with Weyheauser Corporation through his private consulting business.

4. Mr. McCormick sought respondent's assistance in obtaining a reduction of the Speeding charge. Respondent agreed to contact the presiding judge on Mr. McCormick's behalf and notify him of the harm that a conviction could have on Mr. McCormick's private employment. Respondent understood that Mr. McCormick's private employment required extensive driving.

5. Between January 19, 2004, and January 25, 2004, respondent twice called the Wayland Town Court in unsuccessful attempts to speak with Wayland Town Justice Thomas Recktenwald about Mr. McCormick's case.

6. On or about January 25, 2004, respondent sent a letter on judicial stationery to Judge Recktenwald, requesting special consideration on behalf of Mr. McCormick. Respondent attached a copy of Mr. McCormick's ticket to the letter.

7. Respondent's letter stated:

> I am the Judge from the Town of Chemung, Chemung County. I would like to ask if you would consider in reviewing the attached ticket that my relative had received while enroute to his residence from the Chemung County area.
>
> I don't normally request help in matters like this one, but he is a manager with a large paper company in Rochester and he needs to avoid any points. His company is Weyheauser Packaging.
>
> I had called your office, but you were not available. I will have John send in his yellow copy this week.
>
> Again, if you can help out I would appreciate this, and if not, I will understand.

8. Respondent signed the letter as "Judge Karl T. Bowers Sr."

9. In his letter, respondent falsely identified Mr. McCormick as his "relative."

10. After receiving respondent's letter, Judge Recktenwald promptly disqualified himself from the case and transferred it to his co-judge, Charles W. Lander.

11. On January 25, 2004, without any knowledge of respondent's having sent the letter on his behalf, Mr. McCormick mailed a plea of guilty to the Speeding charge to the Wayland Town Court.

12. On February 13, 2004, Judge Lander imposed a $125 fine and a $55 surcharge on Mr. McCormick, which he paid.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C) and 100.4(A)(1) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section

22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

It is improper for a judge to ask another judge to grant special consideration to a defendant. By making such a request, respondent violated the Rules enumerated above and engaged in ticket-fixing, which is a form of favoritism that has long been condemned. In *Matter of Byrne*, 47 NY2d (b), (c) (1979), the Court on the Judiciary declared that "a judicial officer who accords or requests special treatment or favoritism to a defendant in his court or another judge's court, is guilty of *malum in se* misconduct constituting cause for discipline." Ticket-fixing was equated with favoritism, which the Court stated "is wrong, and has always been wrong" (*Id*. at [b]).

In the 1970s and 1980s, the Commission uncovered a widespread pattern of ticket-fixing throughout the state and disciplined nearly 150 judges for the practice. With the benefit of a significant body of case law, every judge in the state should be well aware that such conduct is prohibited.

Here, respondent acceded to the request of a business acquaintance for assistance with a Speeding ticket. Respondent had ample opportunity to reflect upon the impropriety of asking for special consideration since, over a period of several days, he made two telephone calls but was unable to reach the presiding judge. Finally, he sent a letter on judicial stationery that was clearly a request for special consideration. Underscoring the personal basis of the favor he requested, respondent falsely described the defendant, who was actually a business acquaintance, as "my relative." Respondent's letter prompted the presiding judge, upon receipt of respondent's letter, to disqualify himself from the case.

In *Matter of Reedy v. Comm. on Judicial Conduct*, 64 NY2d 299, 302 (1985), the Court of Appeals stated that '[t]icket-fixing is misconduct of such gravity as to warrant removal," even for a single transgression. (In *Reedy*, the judge had engaged in a new ticket-fixing episode after being censured for such conduct.) The Court reiterated that view in *Matter of Edwards v. Comm. on Judicial Conduct*, 67 NY2d 153, 155 (1986), stating that "as a general rule, intervention in a proceeding in another court should result in removal," although mitigating factors in the case warranted a reduced sanction (censure). In *Edwards*, a town justice called the judge handling his son's traffic case, inquired about procedures and sent a note stating, "Any assistance you may render will be greatly appreciated"; while such conduct was improper, the Court held that in light of mitigating factors (the judge was cooperative and contrite, had an unblemished record in 21 years on the bench, and his judgment was "somewhat clouded by his son's involvement"), the conduct was not "so egregious as to warrant his removal from the Bench" (*Id*. at 155, 154). *See also Matter of Steria*, unreported (Comm. on Judicial Conduct, Nov 13, 1981) (judge was "severely censured" for a single instance of ticket-fixing after sending a letter to another judge on behalf of a defendant, asking to "see what you can do for her"; the judge knowingly engaged in misconduct, having recently been advised at a training course that use of official stationery to request special consideration was improper).

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Judge Luciano, Judge Peters and Judge Ruderman concur.

Ms. Hernandez and Mr. Pope were not present.

Dated: November 12, 2004

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

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Trevett Lenweaver & Salzer (By Lawrence J. Andolina) for Respondent

The respondent, C. Ernest Brownell, a justice of the Junius Town Court, Seneca County, was served with a Formal Written Complaint dated November 12, 2003, containing one charge. Respondent filed an answer dated January 15, 2004.

On August 31, 2004, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts. The Commission approved the agreed statement on September 23, 2004. Each side submitted memoranda as to sanction. Oral argument was waived.

On November 4, 2004, the Commission considered the record of the proceeding and made the following determination.

1. Respondent has been a justice of the Junius Town Court, Seneca County, since 1981. Respondent is not an attorney.

2. On July 18, 2002, Mark C. Jameson filed a small claim against Paul Hefferon in the Junius Town Court seeking judgment in the amount of $1,165 for damage allegedly done to Mr. Jameson's automobile.

3. On August 22, 2002, respondent scheduled a hearing in the case for September 5, 2002, but did not send the Notice of Claim or a Notice of Hearing to Mr. Hefferon.

4. On September 5, 2002, Mr. Jameson appeared before respondent. Mr. Hefferon did not appear, nor did anyone on his behalf. Nevertheless, at respondent's direction, Mr. Jameson gave testimony concerning his claim. Respondent advised Mr. Jameson that he would separately obtain Mr. Hefferon's testimony.

5. At some time between September 5, 2002, and January 31, 2003, respondent happened to meet Mr. Hefferon on a local street and advised him about the *Jameson* claim. Respondent took no action to provide Mr. Hefferon with the Notice of Claim or schedule an adjourned hearing date. Respondent was aware that this discussion did not provide Mr. Hefferon with his right to present a defense to the claim or to testify on his own behalf.

6. On January 31, 2003, respondent issued a decision in favor of Mr. Jameson and awarded him $365.60. Respondent never notified Mr. Hefferon that he had ruled in Mr. Jameson's favor.

7. On January 31, 2003, respondent issued Mr. Jameson a check in the amount of $365.60, drawn on the town court bank account, notwithstanding that respondent had not collected any funds from Mr. Hefferon concerning the matter. Respondent issued the check in an attempt to remedy the harm caused to Mr. Jameson by respondent's failure to have acted properly and promptly in the matter. Respondent knew that it was improper to use courts funds in such a manner.

8. Respondent does not have a social, personal, professional or political relationship with either party. He has no excuse for his actions in this case, other than the time demands placed upon him by his personal employment. After learning of the Commission's investigation, respondent reimbursed the court $365.60 from his personal funds on October 14, 2003.

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

Respondent's misconduct demonstrates a serious misunderstanding of fundamental principles of law and of his responsibilities as a judge.

From start to finish, respondent mishandled the *Jameson* case, committing a series of errors that violated basic concepts of notice and an opportunity to be heard. After scheduling a hearing, respondent failed to send the Notice of Claim to the defendant; thus, respondent's court never had jurisdiction over the defendant, who learned of the case only months later, in a chance encounter with respondent. On the scheduled hearing date, respondent took *ex parte* testimony from the claimant and told the claimant that he would take the defendant's testimony separately. Respondent took no further action in the case until five months later when, without ever hearing from the defendant or conducting a proper trial, he issued a decision awarding the claimant

$365.60. These errors of law were fundamental and constitute judicial misconduct. *See, Matter of McCall*, 2004 Annual Report 135 (Comm. on Judicial Conduct) (judge commenced a hearing and heard evidence in a small claims case before the defendant's arrival at the scheduled time).

After totally mishandling the *Jameson* case and awarding a judgment without any lawful basis, respondent misappropriated court funds to pay the judgment. Having awarded a judgment that he must have known was unenforceable, respondent made an inexcusable decision to use court funds to pay the claimant the amount awarded. Without collecting any funds from the defendant or even notifying him of the judgment, respondent issued a check from the court account to pay the claimant in an ill-conceived effort to remedy the harm caused by his own improprieties. Even though the funds did not go into respondent's own pocket, such an unauthorized use of official monies constitutes egregious misconduct.

Town and village justices are responsible for monies collected in the performance of their duties and entrusted to their care (*see*, State Compt. Op. 79-285; 22 NYCRR §214.9; Town Law §27; UJCA §§2020, 2021[1]). The mishandling of court funds by a judge constitutes serious misconduct, even when not done for the judge's personal benefit. *Bartlett v. Flynn*, 50 AD2d 401, 404 (4th Dept 1976). Monies in a court account, consisting mostly of fines, surcharges and bails collected by the court, can only be withdrawn for purposes permitted by law (22 NYCRR §214.9[b]). The monies respondent withdrew from the court account were not his to disburse, and created a deficiency for which he was responsible. Significantly, respondent did not reimburse the court, from his personal funds, until more than eight months later, after learning of the Commission's investigation.

In determining an appropriate sanction, we are mindful that removal from office is not normally imposed for conduct that amounts to poor judgment, even extremely poor judgment. *See*, *Matter of Sims*, 61 NY2d 349, 356 (1984). Here, respondent's misconduct transcends poor judgment. We reject the argument that respondent's misconduct can be attributed to his unfamiliarity with small claims procedures, the demands of his personal employment and his health problems in 2002. While those factors may have contributed to respondent's delays in handling the *Jameson* case, they do not excuse his misappropriation of court funds. A judge is required to be faithful to the law and maintain professional competence, and the judicial responsibilities of a judge take precedence over all the judge's other activities (Sections 100.3[A] and 100.3[B][1] of the Rules Governing Judicial Conduct). Moreover, having served as a judge since 1981, respondent should be familiar with fundamental principles of law and the appropriate uses of court funds. Indeed, respondent has conceded that he knew it was improper to use court funds in such a manner.

Respondent's misconduct, especially his misappropriation of court monies for an unauthorized purpose, seriously erodes public confidence in his ability to safeguard public monies and to properly administer his court. We conclude that such egregious misconduct "goes beyond 'simple careless inattention to the applicable ethical standards'" and demonstrates that respondent is unfit to serve as a judge. *Matter of Gibbons*, 98 NY2d 448, 450 (2002), quoting *Matter of Steinberg*, 51 NY2d 74, 81 (1980).

We base our determination of removal solely upon the misconduct demonstrated in this record. However, in view of the statements in respondent's brief that respondent "has never before been the subject of a disciplinary action, investigation, or complaint" and has "twenty two years of unblemished service as a Town Court Justice" (Respondent's brief, pp. 4, 11), we are constrained to note that respondent has previously received two letters of dismissal and caution in connection with the performance of his official duties. We did not consider these two prior letters of dismissal and caution in concluding that respondent should be removed from office.

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

Mr. Goldman, Judge Ciardullo, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Coffey and Ms. DiPirro were not present.

Dated: December 20, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RICHARD L. CAMPBELL**, a Justice of the Newstead Town Court and Acting Justice of the Akron Village Court, Erie County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Honorable Richard L. Campbell, *pro se*

The respondent, Richard L. Campbell, a Justice of the Newstead Town Court and Acting Justice of the Akron Village Court, Erie County, was served with a Formal Written Complaint dated March 2, 2004, containing one charge. Respondent filed a verified answer dated April 22, 2004.

On June 11, 2004, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On June 17, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Newstead Town Court, Erie County, since 1991 and an acting justice of the Akron Village Court, Erie County, since 2003. Respondent is an attorney.

2. Respondent was a candidate for the Newstead Town Republican Party's nomination for town justice in the primary election held on September 9, 2003.

3. On or about September 3, 2003, respondent signed and issued a campaign letter in which he specifically endorsed the nomination of Joan Glor and Scott Chaffee as the Republican candidates for nomination for the Newstead Town Board in the primary election to be held on September 9, 2003.

4. On or about September 5, 2003, respondent signed and issued a campaign letter in which he again specifically endorsed the nomination of Joan Glor and Scott Chaffee as the Republican candidates for nomination for the Newstead Town Board in the primary election to be held on September 9, 2003.

5. In the campaign letter dated September 5, 2003, respondent specifically opposed the nomination and criticized the campaign of David L. Cummings, a candidate for Newstead Town Board.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.5(A)(1)(e) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Judges are prohibited from engaging in political activity, except for certain, limited activity in connection with the judge's own campaign for office. The ethical rules explicitly prohibit a judge from publicly endorsing or opposing other candidates for public office (Section 100.5[A][1][e] of the Rules Governing Judicial Conduct). Respondent's campaign letters endorsing two candidates for the town board and criticizing another candidate clearly violated that provision and constitute misconduct. *See Matter of Cacciatore*, 1999 Annual Report 85 (Comm. on Judicial Conduct); *Matter of Decker*, 1995 Annual Report 111 (Comm. on Judicial Conduct); *Matter of Crnkovich*, 2003 Annual Report 99 (Comm. on Judicial Conduct).

Referring to the candidacies of two individuals for the town board, respondent praised their abilities and qualifications and asked local residents to "support our entire ticket" in the upcoming primary election. In a second letter, he not only explicitly asked residents to vote for those two individuals, but made disparaging and accusatory statements about another candidate. Notwithstanding that respondent's letters did not make specific reference to his judicial office, it can be assumed that many residents of respondent's town would know that he is a town justice. By signing his name to such letters, respondent improperly interjected himself and his judicial prestige into the political campaigns of others.

Participation by judges and judicial candidates in the political campaigns of other candidates is strictly prohibited; a judge may not even make anonymous telephone calls while participating in a telephone bank on behalf of a candidate for public office. *Matter of Raab v. Comm. on Judicial Conduct*, 100 NY2d 305 (2003). When a judge voices support for other candidates or public officials, the judge not only puts the prestige and integrity of the court behind the endorsement but may also convey the impression that the judge is engaging in political alliances with individuals who might influence the judge in future cases.

We are constrained to reply to our colleague's opinion that, in light of the decision in *Republican Party of Minnesota v. White*, 536 US 765 (2002), New York's political activity restrictions are an unconstitutional abridgment of a judicial candidate's First Amendment rights. In our view, nothing in *White* permits a judge to endorse other candidates for public office, as respondent did here. We accept the Court's specific statements that it has not intended to address

issues that were not presented by the facts in the *White* case. We refrain from treating the decision in *White* as though it covered every aspect of campaign activity. It is premature and entirely speculative to assume that *White* will ultimately be given such a broad sweep.

We believe that New York's rules prohibiting political activity by judges (with certain defined exceptions during a judge's own campaign for election) are not only constitutionally sound, but fair and necessary to "preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State's court system," as the Court of Appeals has held (*Matter of Raab, supra*, 100 NY2d at 312). The alleged anomalies in the rules, cited in the concurring opinion, do not invalidate the entire body of the rules, which address "the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary" (*Id.* at 316). The New York rules recognize that the system of election of judges requires that candidates should be permitted to engage in limited political activity.

We deal here with whether the rule against endorsing other candidates serves a valid State objective. We believe it does, and we believe the rules are narrowly drawn**.** The conduct here, endorsing candidates and criticizing a candidate for legislative office, was not considered by the Supreme Court in *White*. The majority in *White* addressed content-based speech that was intended to let voters know a judicial candidate's views on issues that could come before him or her as a judge. The constitutionality of Minnesota's "announce clause" was at issue, not all of the restrictions that could be imposed in judicial campaigns. The majority specifically stated that it was not taking a position on whether judicial candidates had the same First Amendment rights as candidates in campaigns for legislative office: "[W]e neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office" (536 US at 783).

The New York Constitution mandates elections for most judicial positions. The rules governing political activity for judges and judicial candidates seek to achieve a reasonable balance between the goals of prohibiting judges from being involved in politics and permitting judges to campaign effectively. We see nothing in *White* that would strike down existing rules in New York that permit the voters to elect its judiciary. While the system is not perfect, it is not unconstitutional. *Matter of Raab, supra*; *Matter of Watson v. Comm. on Judicial Conduct*, 100 NY2d 290 (2003). To the extent that any aspect of the present system is constitutionally challenged, we believe that the courts are in the best position to make such a determination. We once again abide by *Matter of Raab*, a decision that makes excellent sense and protects the public, the judiciary and potential litigants.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Felder, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Emery concurs in the disposition and files a concurring opinion.

Ms. Hernandez was not present.

Dated: November 12, 2004

CONCURRING OPINION BY MR. EMERY

The Commission admonishes Judge Campbell for publicly endorsing and criticizing various candidates for office in a town board election. The Commission suggests that by doing so, Judge Campbell "improperly interjected himself and his judicial prestige into the political campaigns of others," thereby creating the appearance of "political bias or corruption" (Determination at 4, 5).

The Commission's Determination begs two important questions. First, how exactly did it create the appearance of "political bias or corruption" when Judge Campbell made public comments about town board candidates who were not in any way related to any litigation pending before him? Second, if preventing the appearance of "political bias or corruption" is really so sacred, why does Rule 100.5 permit Judge Campbell to purchase tickets to and attend political fundraisers thrown on behalf of any candidates for office, including the very town board candidates at issue in this case; to appear at political functions and in media advertisements with any candidates for office who are part of his slate; and to accept non-anonymous campaign contributions from litigants and lawyers who regularly appear before him, as well as by the very town board candidates he is being disciplined for supporting?

Because there are no satisfactory answers to these questions, and for all of the reasons set forth at length in my concurrence in *Matter of Farrell*, 2004 Annual Report __ (Comm. on Judicial Conduct, June 24, 2004), I believe that Rule 100.5 is both overinclusive and underinclusive, and that it therefore fails the strict scrutiny test that applies under *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

My colleagues refuse to apply *White* "as though it covered every aspect of campaign activity" (Determination at 5). But *White* unquestionably *does* apply to "every aspect of campaign activity" in one inescapable sense: under *White*, strict scrutiny is triggered any time the State suppresses the core political speech of a judicial candidate. The point is not, as my colleagues would have it, whether judicial candidates have the same First Amendment rights as candidates "for legislative office"; they plainly do not. The point, rather, is whether Rule 100.5 can survive the searching inquiry that the Court in *White* indisputably held applies to *all* restrictions on the political activities of judicial candidates.

With all due respect to my colleagues, they have not given appropriate scrutiny to Rule 100.5, much less the *strict scrutiny* that is required. Their statements that the Rule is "fair" and that it strikes a "reasonable balance" are the hallmarks of rational basis review, not strict scrutiny, and their statement that the Rule is "narrowly drawn" because it prohibits political activity "with certain defined exceptions during a judge's own campaign for election" is tautological and fails to consider the overinclusiveness and underinclusiveness of the Rule.

Because I am bound by the contrary decision of the New York Court of Appeals in *Matter of Raab v. Comm. on Judicial Conduct*, 100 NY2d 305 (2003), I am constrained to concur in Judge Campbell's admonition. But I believe that the Supreme Court's analysis in *White* of the manner in which judicial First Amendment claims must be analyzed compels the opposite result.

Dated: November 12, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JUNE P. CHAPMAN**, a Justice of the Ellicottville Town Court, Cattaraugus County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Honorable June P. Chapman, *pro se*

The respondent, June P. Chapman, a justice of the Ellicottville Town Court, Cattaraugus County, was served with a Formal Written Complaint dated May 25, 2004, containing three charges. Respondent filed an answer dated June 21, 2004.

On August 31, 2004, the administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On September 23, 2004, 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 Ellicottville Town Court, Cattaraugus County since 1993. Respondent is not an attorney.

2. On or about January 1, 2001, Brian Stasiak and Hugh Jenkins were each charged with Criminal Mischief, 2nd Degree, and Criminal Possession Of Stolen Property, 5th Degree, in connection with damages caused to certain vehicles in the parking lot of a ski resort. Respondent arraigned the defendants and set $1,500 bail for each defendant. Respondent committed the defendants to the custody of the Cattaraugus County Sheriff's Department in lieu of bail.

3. On or about January 4, 2001, the Sheriff's Department forwarded to respondent two checks, each in the amount of $1,500, representing bail that had been posted on behalf of each defendant. Respondent received both bail checks.

4. On February 8, 2001, each defendant pleaded guilty to Criminal Mischief, 4th Degree, in satisfaction of all charges and was sentenced to community service and restitution. At the conclusion of proceedings on February 8, 2001, each defendant requested the return of bail. Respondent did not return bail at that time, indicating that she was not then in possession of her court account checkbook.

5. On February 12, 2001, respondent deposited into her court account the bail check received from the Sheriff's Department concerning Mr. Stasiak.

6. In March 2001 and June 2001, Bryan Milks, the attorney for Mr. Stasiak, contacted respondent to request that she return the bail. He did not speak with respondent but left messages on her answering machine.

7. On June 22, 2001, Thomas Trace, the Cattaraugus County Assistant District Attorney assigned to respondent's court, sent a letter to respondent requesting that she return the bail for each defendant and advising respondent that only Mr. Stasiak's check had been deposited.

8. On September 20, 2001, Susan Stasiak, Mr. Stasiak's mother, called respondent's home and left a message on her answering machine requesting that respondent return the bail.

9. On October 2, 2001, Mr. Milks sent respondent a letter requesting the return of Mr. Stasiak's bail.

10. On October 23, 2001, respondent contacted the Sheriff's Department and indicated that she had not received bail for Mr. Stasiak or Mr. Jenkins and requested that such monies be forwarded to her.

11. On October 26, 2001, the Sheriff's Department again sent respondent two checks, each in the amount of $1,500, for the defendants.

12. Respondent thereafter "voided" the check from the Sheriff's Department dated October 26, 2001, concerning Mr. Stasiak and returned it to the Sheriff's Department indicating that she had received the original check. On October 30, 2001, respondent deposited into her court account the check from the Sheriff's Department, dated October 26, 2001, concerning Mr. Jenkins.

13. On October 30, 2001, respondent returned $1,500 bail to each defendant.

14. On November 24, 2003, respondent deposited into her court account the original check issued by the Sheriff's Department for Mr. Jenkins on January 4, 2001.

As to Charges II and III of the Formal Written Complaint:

15. From on or about January 8, 2001, to June 23, 2004, as set forth in Schedule A, respondent failed to deposit into her court account within 72 hours of receipt, $6,750 in bail monies received from the Cattaraugus County Sheriff's Department for twelve defendants, notwithstanding her obligation to do so pursuant to Section 214.9(a) of the Uniform Civil Rules for the Justice Courts.

Supplemental Findings:

16. There is no indication that respondent used the funds at issue in Charges I through III for personal or otherwise inappropriate purposes. The failure to properly safeguard and deposit checks appears to have resulted from poor administration and record-keeping. With respect to the bail checks received from the Cattaraugus County Sheriff's Department that respondent did not deposit in a timely manner, respondent had misplaced the checks among her court files.

17. As a result of the Commission's investigation, respondent has taken action to improve her record-keeping and depositing practices, with the result that she has now deposited all bail checks received from the Cattaraugus County Sheriff's Department and recognizes that any and all bail checks received must be deposited into her court account as required by Section 214.9(a) of the Uniform Civil Rules for the Justice Courts.

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

Town and village justices are required to deposit all monies received in their judicial capacity "as soon as practicable," and no later than 72 hours after receipt (22 NYCRR §214.9[a]).

Respondent's delays in depositing bail checks clearly violated that requirement and resulted in significant delays in returning the monies to their rightful owners. Numerous checks were not deposited until months or even years after they were received. Respondent's poor record-keeping and mishandling of two $1,500 checks required the issuance of duplicate checks (notwithstanding that one of the checks had already been deposited), and respondent deposited both the duplicate check and the original check (35 months after receiving it) in the same matter. Although these problems appear to have resulted from inadequate record-keeping and there is no indication that the funds were used for inappropriate purposes, the mishandling of public funds by a judge is misconduct, even when not done for personal profit and even when all the funds are eventually accounted for. *Bartlett v. Flynn*, 50 AD2d 401, 404 (4th Dept 1976). Depositing official monies promptly is essential to ensure public confidence in the integrity of the judiciary. The failure to deposit funds in a timely manner constitutes neglect of a judge's administrative duties and warrants public discipline (*see, e.g., Matter of Hamel*, 1991 Annual Report 61 [Commn on Jud Conduct]; *Matter of Jurhs*, 1984 Annual Report 109 [Commn on Jud Conduct];

Section 100.3[C][1] of the Rules Governing Judicial Conduct). Judicial responsibilities must take precedence over all the judge's other activities (Section 100.3[B][1] of the Rules).

Respondent's problems appear limited to the handling of bail funds, and all the mishandled monies were checks, not cash, and have now been deposited. We note further, in mitigation, that respondent has taken action to improve her record-keeping and depositing practices.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Judge Luciano, Judge Peters and Judge Ruderman concur.

Ms. Hernandez and Mr. Pope were not present.

Dated: October 6, 2004

SCHEDULE A

Defendant	Date Bail Remitted to Court	Amount	Sheriff Dept. Check No.	Date of Deposit
Jason Davenport	01/04/01	$ 750	4315	11/24/03
Daniel Grice	01/04/01	750	4314	11/24/03
James Schwartz	01/04/01	750	4312	11/24/03
Linda Panoutsopoulos	07/05/01	1,000	4526	06/23/04
Mellisa Cass	05/16/02	50	4959	05/19/04
Michael Hebdon	06/07/02	750	4985	05/19/04
Commie Noah	08/29/02	550	5088	05/09/03
William Burton	10/20/02	500	5180	05/19/03
Paul Luczak	11/25/02	350	5227	05/19/03
John Evanston	01/03/03	700	5267	05/19/03
Paul Paulucci	03/03/03	400	5359	05/19/03
Michael Neri	06/02/03	200	5523	11/24/03

DECISION AND ORDER

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **CHERYL COLEMAN**, a Judge of the Albany City Court, Albany County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
William J. Dreyer and Larry J. Rosen for Respondent

The matter having come before the Commission on June 17, 2004; and the Commission having before it the Formal Written Complaint dated December 22, 2003, respondent's Verified Answer dated March 26, 2004, the Supplemental Formal Written Complaint dated May 6, 2004, and the Stipulation dated June 10, 2004; and the Commission, by order dated April 6, 2004, having designated C. Bruce Lawrence, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and a hearing been scheduled to commence in August 2004; and respondent having resigned from judicial office by letter dated June 10, 2004, effective August 13, 2004, and having affirmed that she will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if accepted by the Commission; now, therefore, it is

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

SO ORDERED.

Dated: June 21, 2004

STIPULATION

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **CHERYL COLEMAN,** a Judge of the Albany City Court, Albany County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter "Commission"), the Honorable Cheryl Coleman, the respondent in this proceeding, and her attorneys William J. Dreyer and Larry J. Rosen.

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

2. Respondent has been a Judge of the Albany City Court, Albany County, since January 1, 2002. Respondent is an attorney and was admitted to the bar of the State of New York in 1986. Prior to becoming a judge, respondent served as an Assistant District Attorney in Albany County.

3. In December 2003, respondent was served by the Commission with a Formal Written Complaint, alleging *inter alia* that in March 2003, respondent improperly asserted the prestige and influence of her judicial office during a personal dispute between respondent and four women at a concert at the Pepsi Arena in Albany, which resulted in the arrest of the four women; that in August 2002, respondent was discourteous to an attorney during a small claims hearing in which the attorney was representing a party and that respondent improperly found the attorney in contempt; that in September 2002, respondent was discourteous to a *pro se* defendant charged with parking violations; and that in October 2002, respondent was undignified and discourteous to the claimant in a small claims matter.

4. In May 2004, the Commission served Judge Coleman with a Supplemental Formal Written Complaint, which alleged that in August 2002, during the course of an arraignment of a defendant on felony and misdemeanor charges, respondent was impatient, discourteous and undignified toward the defendant, and summarily sentenced the defendant to 300 days in jail for ten counts of contempt.

5. The Commission designated C. Bruce Lawrence, Esq., as referee to hear and report to the Commission with respect to all of the charges against respondent. The referee has scheduled a hearing to be held in August 2004.

6. Respondent tendered her resignation, dated June 10, 2004, effective August 13, 2004, and affirms that she will neither seek nor accept judicial office at any time in the future. A copy of respondent's letter of resignation is attached.

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

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

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

Dated: June 10, 2004

s/ Cheryl Coleman, Respondent

s/ William J. Dreyer, Esq., Dreyer Boyajian, LLP, Attorney for Respondent

s/ Larry J. Rosen, Esq., Attorney for Respondent

s/ Robert H. Tembeckjian, Esq., Administrator & Counsel to the Commission
(Cathleen S. Cenci, Esq., Of Counsel)

LETTER OF RESIGNATION

June 10, 2004

Honorable Jonathan Lippman, Chief Administrative Judge
25 Beaver Street
New York City, New York 10004

Dear Judge Lippman:

The ease with which I made the transition from prosecutor to defense attorney did not prepare me for the difficulties in transitioning from advocate to judge. The qualities which had made me so successful as a lawyer were the same qualities which had enabled me to survive the toughest blows that life can, and did, hand out.

Unfortunately, these same traits were my weaknesses as a judge. In the beginning, my instinct was to confront, to cross-examine, and to meet disrespect with sarcasm or confrontation. My inability to back down when confronted, both on and off the bench, made some question whether I was right for the job.

Of course, I was determined to prove them wrong. For over a year, I tried as hard as I could to fight my instincts and display the kind of even-tempered calmness and patience the position requires. I learned how to diffuse and de-escalate situations. While everyone noticed the change, I felt overwhelmingly at odds with myself. I felt like I was constantly holding back, thinking one thing but saying another; feeling like I would burst. I began to wonder why I had left something I was great at to do something in which I had to try as hard as I could just to be adequate. Ironically, my professional self-esteem was at an all-time low.

Fortunately, what sets me apart from most is not that I don't have weaknesses, but that I have always managed to face up to them, and thus become stronger. Over the last several months, I have made peace with myself by acknowledging who I am, and who I am not. I am not a judge; Not really.

Kindly accept my resignation from my position as Albany City Court Judge effective at close of business, August 13, 2004.

Very truly yours,

s/ Cheryl F. Coleman
Albany City Court Judge

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **RICHARD T. DI STEFANO**, a Justice of the Colonie Town Court, Albany County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Honorable Richard T. Di Stefano, *pro se*

The respondent, Richard T. Di Stefano, a justice of the Colonie Town Court, Albany County, was served with a Formal Written Complaint dated May 6, 2004, containing one charge. Respondent filed a verified response dated June 7, 2004.

By motion dated July 7, 2004, the administrator of the Commission moved for summary determination, pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR 7000.6[c]). By letter dated July 27, 2004, respondent advised the Commission that he did not oppose the motion. By decision and order dated August 9, 2004, the Commission granted the administrator's motion and determined that the factual allegations were sustained and that respondent's misconduct was established.

The parties filed briefs with respect to the issue of sanctions. On September 23, 2004, the Commission heard oral argument, at which respondent appeared. Thereafter, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Colonie Town Court, Albany County since January 2002.

2. At all times relevant to these proceedings, respondent was an attorney in the practice of law as a partner with JoAnne W. DiStefano, Esq., in a firm by the name of DiStefano & DiStefano, located in the Town of Colonie, Albany County.

3. In July 2000, Robert and Donald Suhocki retained respondent to defend them in an action in Supreme Court, Saratoga County, commenced by their sister regarding their mother's finances. By verified complaint dated June 22, 2000, the Suhockis were alleged to have abused their authority as attorney in fact in converting funds belonging to their mother. Respondent

failed to appear, and plaintiff Gloria Devoe, as attorney in fact for Sophie Suhocki, filed a motion for a default judgment dated November 2, 2000. Respondent did not oppose the motion, and the court entered a default judgment on December 22, 2000. In so doing, respondent neglected civil matters handled on behalf of his clients, in violation of Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility [22 NYCRR 1200.30].

4. By letter dated November 28, 2001, the Committee on Professional Standards (hereinafter "Committee") requested respondent to provide information with respect to the inquiry of Robert J. Suhocki. He failed to do so, and by letter dated January 4, 2002, respondent was directed to respond within ten days or an application would be made for a subpoena directing his appearance to be examined under oath. Respondent submitted an untimely response received by the Committee on January 22, 2002. In so doing, respondent failed to cooperate with the Committee in its investigation of client complaints, in violation of Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility [22 NYCRR 1200.3].

5. Robert and Donald Suhocki telephoned respondent and sent him faxes upon their receipt of notice of the default judgment entered on December 22, 2000. Respondent failed to respond. In so doing, respondent failed to communicate with his clients, in violation of Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility [22 NYCRR 1200.3].

6. In January 2000, prior to their marriage, Michelle M. Rigney and her fiancé (now husband) retained respondent for Mr. Rigney's adoption of Ms. Rigney's two daughters. Respondent failed to timely proceed with the matters despite receipt of a Letter of Caution dated October 26, 2001, from the Committee for neglecting the same adoptions and failing to communicate with Mr. or Ms. Rigney. In so doing, respondent neglected civil matters handled on behalf of his clients, in violation of Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility [22 NYCRR 1200.30].

7. More than two years after being retained in the Rigney matters, respondent advised the Committee, by letter dated May 3, 2002, that "Since October 2001, the [adoption] papers were filed. They were returned in November, and since that time, I have been waiting for documentation from the Office of Court Administration, and we have re-filed the green card filing with the Office of Court Administration to obtain their approval to proceed with this matter." Respondent further advised that he "had left several messages, both on [Ms. Rigney's] home answering machine and at her work in an attempt to update her, but did not hear from her." These statements were not true. In so doing, respondent attempted to mislead and deceive the Committee, in violation of Disciplinary Rule 1-102(A)(4)(5) and (7) of the Code of Professional Responsibility [22 NYCRR 1200.3].

8. By letter dated June 6, 2002, respondent advised the Committee that the Rigney adoption papers "were filed in Albany County Family Court in September of 2001 and were returned to my office for changes to be made in October. They were then returned again in late November for additional changes to be made." Respondent reiterated statements made in his May 3, 2002, letter as to awaiting documentation from the Office of Court Administration and leaving phone messages with Ms. Rigney. These statements were not true. In so doing, respondent attempted to mislead and deceive the Committee, in violation of Disciplinary Rule 1-102(A)(4)(5) and (7) of the Code of Professional Responsibility [22 NYCRR 1200.3].

9. By letter dated August 23, 2002, respondent advised the Committee in the Rigney matters that Albany County Family Court failed to notify him of a July 2, 2001, return date. This statement was not true. In so doing, respondent attempted to mislead and deceive the Committee, in violation of Disciplinary Rule 1-102(A)(4)(5) and (7) of the Code of Professional Responsibility [22 NYCRR 1200.3].

10. Respondent advised the Committee by letter dated May 3, 2002, that "Since October 2000 the [adoption] papers were filed. They were returned in November, and since that time, I have been waiting for documentation from the Office of Court Administration, and we have re-filed the green card filing with the Office of Court Administration to obtain their approval to proceed with this matter." These statements were not true. Respondent sent a copy of this letter to Ms. Rigney in an effort to mislead and deceive her. In so doing, respondent attempted to mislead and deceive his clients, in violation of Disciplinary Rule 1-102(A)(4)(5) and (7) of the Code of Professional Responsibility [22 NYCRR 1200.3].

11. Respondent advised the Committee by letter dated June 6, 2002, that the Rigney adoption papers "were filed in Albany County Family Court in September of 2001 and were returned to my office for changes to be made in October. They were then returned again in late November for additional changes to be made." Respondent reiterated statements made in his May 3, 2002, letter as to awaiting documentation from the Office of Court Administration. These statements were not true. Respondent sent a copy of this letter to Ms. Rigney in an effort to mislead and deceive her. In so doing, respondent attempted to mislead and deceive his clients, in violation of Disciplinary Rule 1-102(A)(4)(5) and (7) of the Code of Professional Responsibility [22 NYCRR 1200.3].

12. By letter dated March 29, 2002, the Committee forwarded to respondent correspondence from Ms. Rigney and requested him to submit a reply within 20 days. He failed to do so, and by letter dated April 26, 2002, respondent was directed by the Committee to respond within ten days or an application would be made for a subpoena directing his appearance to be examined under oath. Respondent submitted an untimely response received by the Committee on May 7, 2002. In so doing, respondent failed to cooperate with the Committee in its investigation of client complaints, in violation of Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility [22 NYCRR 1200.3].

13. By letter dated May 13, 2002, from the Committee, respondent was requested within seven days to set forth the dates he filed the Rigneys' adoption papers. He failed to do so, and by letter dated June 4, 2002, the Committee directed respondent to respond within ten days or an application would be made for a subpoena directing his appearance to be examined under oath. Respondent responded by letter dated June 6, 2002, received by the Committee on June 12, 2002. In so doing, respondent failed to cooperate with the Committee in its investigation of client complaints, in violation of Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility [22 NYCRR 1200.3].

14. By letter dated July 22, 2002, from the Committee, respondent was requested to provide, within two weeks, documentation relating to the Rigneys' adoptions. He failed to do so, and by letter dated August 12, 2002, the Committee directed respondent to respond within ten days or an application would be made for a subpoena directing his appearance to be examined

under oath. Respondent submitted an untimely response received by the Committee on August 27, 2002. In so doing, respondent failed to cooperate with the Committee in its investigation of client complaints, in violation of Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility [22 NYCRR 1200.3].

15. From January 2000 through October 2002, respondent failed to return telephone calls from Michelle M. Rigney. In so doing, respondent failed to communicate with his clients, in violation of Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility [22 NYCRR 1200.3].

16. By letter dated October 3, 2002, respondent was directed by the Committee to provide Stephen Nohai with fee arbitration notice and information and to copy the Committee in providing same. He failed to do so, and by letter dated October 29, 2002, respondent was directed by the Committee to comply within seven days. Respondent failed to comply. In so doing, respondent failed to cooperate with the Committee in its investigation of client complaints, in violation of Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility [22 NYCRR 1200.3].

17. As a result of respondent's conduct as set forth above, and following formal disciplinary proceedings, respondent was censured for his professional misconduct by Opinion and Order of the Appellate Division, Third Department, dated October 28, 2003. The Appellate Division found *inter alia* that respondent "attempted to mislead and deceive" the Committee and "failed to cooperate with [its] investigation."

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

By neglecting client matters and by failing to cooperate with the attorney disciplinary committee investigating his conduct, respondent engaged in misconduct as an attorney that resulted in his censure by the Appellate Division, Third Department. Relying upon the findings of the Appellate Division (*see, Matter of Embser v. Comm. on Judicial Conduct*, 90 NY2d 711 [1997]), we conclude that respondent's misconduct is established. Respondent's misbehavior as an attorney, which occurred both before and after he became a judge, also violates the ethical rules for judges, who are required to respect and comply with the law and to maintain high standards of conduct both on and off the bench (Rules Governing Judicial Conduct, §§100.1 and 100.2[A]). A judge may be disciplined for such transgressions, including misconduct that predates the judge's ascension to judicial office (*Matter of Tamsen v Comm. on Judicial Conduct*, 100 NY2d 19 [2003]), "notwithstanding that all of the wrongdoings related to conduct outside his judicial office" (*Matter of Boulanger v Comm. on Judicial Conduct*, 61 NY2d 89, 92 [1984]).

As a lawyer and a judge, respondent is required to cooperate with investigating authorities. *See,* Code of Professional Responsibility, DR1-103; *Matter of Mason v Comm. on*

Judicial Conduct, 100 NY2d 56 (2003). Respondent's lack of cooperation with the disciplinary committee -- including his failure to submit timely responses to its inquiries and his misleading statements with respect to the status of two matters -- reflects upon his ability to perform as a judge, who is "sworn to uphold the law and seek the truth" (*Matter of Myers v Comm. on Judicial Conduct*, 67 NY2d 550, 554 [1986]; *Matter of Mason*, *supra*).

With respect to the issue of sanctions, we have concluded that respondent's misdeeds as an attorney, while warranting strong rebuke, do not require his removal as a judge. We reach this conclusion upon consideration of several factors.

First, we are mindful that the Appellate Division, Third Department, based upon a hearing, a referee's report and consideration of the entire record, determined that a public censure, rather than disbarment or suspension, was appropriate. In this regard, we further note that, since respondent has been publicly disciplined as an attorney, "there is no reason to fear that the public will perceive that [respondent] is going unpunished or that the matter is being suppressed," if he is not removed (*Matter of Kelso v. Comm. on Judicial Conduct,* 61 NY2d 82, 87-88 [1984]; *Matter of Barlaam*, 1995 Annual Report 105 [Comm. on Judicial Conduct]). In *Barlaam*, a case strikingly similar to this matter, a lawyer-judge who had been censured as an attorney for neglecting an estate matter and for giving misleading testimony to the Grievance Committee was censured pursuant to a joint recommendation by Commission counsel and the judge.

Second, respondent's misdeeds as an attorney did not involve venality, misappropriation of client monies, or other conduct that would irrevocably damage public confidence in his integrity or ability to serve as a judge. *Compare, Matter of Tamsen, supra*; *Matter of Embser, supra*; *Matter of Boulanger, supra*.

Third, we have considered in mitigation that respondent has acknowledged his misconduct and has been contrite, forthright and cooperative throughout this proceeding. *See, Matter of Barlaam*, *supra*.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Judge Luciano and Judge Ruderman concur.

Judge Peters did not participate.

Ms. Hernandez and Mr. Pope were not present.

Dated: November 12, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROY M. DUMAR**, a Justice of the Mohawk Town Court, Montgomery County.

THE COMMISSION

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Honorable Roy M. Dumar, *pro se*

The respondent, Roy M. Dumar, a Justice of the Mohawk Town Court, Montgomery County, was served with a Formal Written Complaint dated February 10, 2004, containing one charge. Respondent filed an answer dated March 3, 2004.

On April 16, 2004, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On May 6, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Mohawk Town Court since September 1999. He is not an attorney. He has attended and successfully completed all required training sessions for judges.

2. Prior to February 2003, respondent purchased two snowmobiles, on an "as is" basis, from Gable Motor Sports, Inc., in Cobleskill, New York. Respondent nevertheless believed from his discussions with the salesman that Gable Motor Sports would take care of any problems that arose with the snowmobiles.

3. In or about February 2003, respondent went to Gable Motor Sports, spoke to Chris Gerkin, a salesman, and said that he wanted reimbursement for repairs to the snowmobiles that had been performed at another establishment.

4. When Mr. Gerkin replied that he could not reimburse respondent,

respondent stated that he was a judge and that he would take the matter to small claims court.

5. Thereafter, on or about February 26, 2003, respondent returned to Gable Motor Sports, complained to Sandra Campbell, a secretary, that he would take the matter to small claims court if he did not get reimbursement for the snowmobile repairs, and gave Ms. Campbell his judicial business card, identifying himself as a Mohawk Town Justice.

6. On or about February 28, 2003, respondent again visited Gable Motor Sports, spoke with manager Bob Philips, again demanded reimbursement, stated repeatedly that he was a judge, and said that he did not want to "bad mouth" Gable Motor Sports and that he knew how "the system" worked.

7. On or about March 2, 2003, respondent telephoned the residence of Joseph Gable, the proprietor of Gable Motor Sports, identified himself to Mr. Gable's wife as "Judge Dumar," and left a message with her that he wanted to speak with Mr. Gable. In at least one subsequent conversation with Joseph Gable on the subject of reimbursement for the snowmobile repairs, respondent identified himself as a judge.

8. Respondent left voice messages on the telephone answering system at Gable Motor Sports on one or more occasions, identifying himself as a judge.

9. On or about March 11, 2003, respondent went to the Cobleskill Town Court to file a small claims court action against Gable Motor Sports and left his judicial business card with the court clerk along with the paperwork for filing the claim.

10. On April 17, 2003, prior to the small claims court hearing, respondent introduced himself as a judge to one of the justices of the Cobleskill Town Court. Respondent did not know at the time which Cobleskill town justice would be hearing the claim. As it resulted, the other town justice heard the claim and later dismissed it.

11. On or about April 20, 2003, in a conversation with a New York State Consumer Protection Board representative, respondent identified himself as a judge while making a complaint concerning Gable Motor Sports.

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

By repeatedly invoking his judicial status in connection with a private dispute, respondent attempted to use the prestige of his judicial office to advance his personal interests, in violation of well-established ethical standards (Rules Governing Judicial Conduct §100.2[C]).

During a series of encounters while negotiating with a dealership in an attempt to be reimbursed for snowmobile repairs, respondent made numerous, gratuitous references to his judicial position. His repeated, pointed references to his judicial status -- to a salesman, a

secretary, the manager and the proprietor -- could well be perceived as intimidating, especially in the context of demanding reimbursement for the repairs, threatening a lawsuit and saying that he knew how "the system" worked. Respondent underscored his judicial status by leaving his judicial business card at the dealership. Regardless of his intent, such conduct creates the appearance that he was attempting to use his judicial prestige to further his personal interests, which is prohibited. *See, e.g., Matter of Werner*, 2003 Ann Rep 198 (Commn on Jud Conduct, Oct 1, 2002) (judge displayed his judicial ID card during a traffic stop); *Matter of Ohlig*, 2002 Ann Rep 135 (Commn on Jud Conduct, Nov 19, 2001) (judge intervened in a fee dispute involving his wife and left his judicial business card at the office of his wife's adversary). Respondent's judicial status was irrelevant to the merits of his claim for reimbursement, and it was unnecessary and inappropriate for respondent to remind the dealership on repeated occasions that he is a judge.

Respondent continued to flaunt his judicial status when he left his business card with the clerk of the court while filing his small claims action, when he introduced himself to a judge of the court where the case was pending, and when he identified himself as a judge while making a complaint about the dealership to a state agency. Viewed in its totality, respondent's conduct showed insensitivity to the special ethical obligations of judges.

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

Mr. Goldman, Judge Ciardullo, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Judge Luciano dissent and vote to reject the agreed statement of facts on the basis that the disposition is too harsh.

Mr. Pope was not present.

Dated: May 18, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **CHARLES E. DUSEN**, a Justice of the LeRoy Town Court, Genesee County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Boylan, Morton & Whiting, LLP (by Paul S. Boylan) for Respondent

The respondent, Charles E. Dusen, a justice of the LeRoy Town Court, Genesee County, was served with a Formal Written Complaint dated July 15, 2004, containing one charge. Respondent filed an answer dated August 5, 2004.

On October 6, 2004, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On November 4, 2004, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a justice of the LeRoy Town Court, Genesee County since January 1, 1988. Respondent is not an attorney.

2. On or about June 17, 2003, in connection with *People v. Constantino Bahena-Ponce*, respondent arranged for the release of the defendant from the Genesee County Jail by preparing and issuing an order that falsely stated that the defendant had been convicted of Trespass and sentenced to time served, notwithstanding that respondent knew that: (a) respondent had arraigned the defendant on the Trespass charge the prior evening, at which time the defendant pleaded not guilty; (b) the defendant had not been convicted of Trespass and had not been sentenced to time served; and (c) the charge against the defendant had not been adjudicated, and the case was pending before respondent.

3. Respondent engaged in the conduct set forth above in response to a request from agents of the United States Immigration and Naturalization Service (INS) that he order the defendant released so that the INS agents could arrest the defendant.

4. Respondent felt pressured by the INS agents' request for immediate action. The agents were waiting at the jail for the defendant to be released.

5. Respondent now realizes that he could have simply indicated on the release form that the defendant "be released from custody," without indicating the basis for the release, and that the defendant would then have been released and taken into custody.

6. On July 3, 2003, respondent was contacted by Giovanna Macri, Esq., the attorney representing the defendant in his federal deportation proceeding. Respondent acknowledged to Ms. Macri that the defendant had not been convicted, but that he had believed that it was the only way for him to immediately effectuate the defendant's release for the purpose of his being taken into custody by the INS. Respondent offered to send a letter to Ms. Macri acknowledging that the defendant had not been convicted. On July 8, 2003, respondent sent such a letter to Ms. Macri, and on July 14, 2003, he dismissed the charge against the defendant in the interest of justice.

7. The defendant was found to have no legal status in the United States and was deported on August 7, 2003.

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

Having decided to release a defendant in response to a request from immigration officials, respondent prepared a release order that falsely stated that the defendant had been convicted of Trespass and sentenced to time served. Respondent not only checked a box on the order form stating that the defendant had been convicted, but added details about the fictitious conviction. The form had another box that, if checked, would have accomplished the release without employing the fiction that the defendant had been convicted. By issuing an order under a pretext that he knew to be false, respondent engaged in misconduct.

In considering an appropriate sanction, we are mindful that removal from office is an extreme sanction to be imposed "only in the event of truly egregious circumstances" and "not normally to be imposed for poor judgment, even extremely poor judgment" (*Matter of Cunningham v. Comm. on Judicial Conduct*, 57 NY2d 270, 275 [1982]; *Matter of Sims v. Comm. on Judicial Conduct*, 61 NY2d 349, 356 [1984]). Although respondent's conduct amounts to extremely poor judgment, removal is not appropriate under the circumstances presented here. Respondent, who is not an attorney, made a decision to accommodate immigration officials, and he erroneously believed that entering a conviction on the release order was the only way to effectuate the defendant's release. Upon being contacted by the defendant's attorney and

realizing that his conduct was improper, he attempted to correct his error by advising the attorney in writing that the defendant had not been convicted, and he dismissed the charge in the interest of justice. Respondent has served as judge for 16 years and has acknowledged his misconduct. In light of these factors, we conclude that respondent should be censured.

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

Mr. Goldman, Judge Ciardullo, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Coffey and Ms. DiPirro were not present.

Dated: November 16, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MARK G. FARRELL**, a Justice of the Amherst Town Court, Erie County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Hon. Mark G. Farrell, *pro se*

The respondent, Mark G. Farrell, a justice of the Amherst Town Court, Erie County, was served with a Formal Written Complaint dated October 28, 2003, containing one charge. Respondent filed an answer dated January 16, 2004.

On April 28, 2004, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On May 6, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Amherst Town Court, Erie County since 1993. Respondent is an attorney.

2. Respondent was a candidate for the Erie County Democratic party's nomination for Erie County Supreme Court Justice in 1999.

3. At the request of G. Steven Pigeon, the Chairman of the Erie County Democratic Committee in September 1999, respondent, in an attempt to help secure the Chairman's support for his nomination, made calls to approximately 50 members of the Amherst Democratic Committee but was able to speak with only 20 members. During discussions with those 20 members, respondent solicited their support for the Chairman's re-election by telling them that the Chairman was expecting a call of support from each of them. Respondent also advised the members that they should use their own judgment in determining whether to vote for the Chairman. Respondent did not have follow-up discussions with anyone that he called.

4. Respondent did not identify himself as a judge during any of these calls. He referred to himself as "Mark Farrell." Respondent believed that some of the members he called knew him to be an Amherst town justice.

5. At the time respondent made these calls, he was aware of the prohibitions against engaging in partisan political activity and permitting his name to be used in connection with the activity of a political organization.

6. On September 27, 1999, respondent's campaign committee contributed $7,500 to the Erie County Democratic Committee. Respondent's committee had never received an itemized bill or invoice relating to services provided to it by the Erie County Democratic Committee, and the amount of the $7,500 payment exceeded the reasonable value of any services provided by the Erie County Democratic Committee to respondent's election campaign.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(1)(c), 100.5(A)(1)(d) and 100.5(A)(1)(h) of the Rules Governing Judicial Conduct and should be disciplined for cause pursuant to Article 6, Section 22 of the New York State Constitution and Section 44(1) of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

While permitting judges and judicial candidates to engage in significant political activity on behalf of their own campaigns for judicial office, the ethical standards strictly prohibit their participation in the political campaigns of others (Section 100.5[A][1][c] and [d] of the Rules Governing Judicial Conduct). These provisions address "the State's compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary" and were designed to minimize the risk that judges could be perceived "as beholden to a particular political leader or party after they assume judicial duties." *Matter of Raab v. Commn on Jud Conduct*, 100 NY2d 305, 316 (2003).

Notwithstanding that he had been a judge for six years and was aware of the restrictions on his political activity, respondent, at the request of the County Party Chairman, made numerous calls to party officials supporting the Chairman's re-election. Respondent's partisan political activity conveyed an impression of allegiance to the party leader and clearly violated the ethical rules. *See Matter of Raab, supra; Matter of Cacciatore*, 1999 Ann Rep 85 (Commn on Jud Conduct, Feb 6, 1998); *Matter of Decker*, 1995 Ann Rep 111 (Commn on Jud Conduct, Jan 27, 1994). Although respondent did not identify himself as a judge during the calls, he believed that some of the party officials he called knew of his judicial status. Respondent should not have permitted his name and judicial prestige to be used in promoting the political interests of another.

It was also improper for respondent's campaign committee to make a $7,500 payment to the County Democratic Committee without an itemized bill of the services provided to support the expenditure. As respondent has stipulated, the amount exceeded the reasonable value of any services actually provided by the Committee to respondent's election campaign. Such a payment was not a mere technical violation of the ethical rules, but a prohibited political contribution. *See* Section 100.5(A)(1)(h) of the Rules; *Matter of Salman*, 1995 Ann Rep 134 (Commn on Jud

Conduct, Jan 26, 1994); *Matter of Raab, supra*. Prohibiting such payments is essential to maintaining public confidence in the integrity of the judiciary, as the Court of Appeals stated in *Matter of Raab*:

> The contribution limitation is intended to ensure that political parties cannot extract contributions from persons seeking nomination for judicial office in exchange for a party endorsement. It achieves this necessary objective by preventing candidates from making contributions in an effort to buy -- and parties attempting to sell -- judicial nominations. It also diminishes the likelihood that a contribution, innocently made and received, will be perceived by the public as having had such an effect. Needless to say, the State's interest in ensuring that judgeships are not -- and do not appear to be – "for sale" is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function.
>
> 100 NY2d at 316

Respondent has not challenged the constitutionality of the rules under which he has been charged with misconduct. Indeed, he has joined the Administrator of the Commission in petitioning us to accept an agreed statement of facts and proposed sanction of admonition. Under the circumstances, in response to the concurrence, we need only note that it is our obligation to accept the law as interpreted by the State's highest court.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Emery filed a concurring opinion, in which Mr. Coffey and Ms. DiPirro join.

Mr. Pope was not present.

Dated: June 24, 2004

CONCURRING OPINION BY MR. EMERY, IN WHICH MR. COFFEY AND MS. DIPIRRO JOIN

Today the Commission admonishes Judge Mark G. Farrell because he engaged in political activity – making telephone calls supporting his party leader's bid for re-election, and effectively making a financial contribution to his party – during a time when he was a candidate for Supreme Court. Judge Farrell acknowledges that he was aware of Rule 100.5, and that he knowingly violated it. Because Judge Farrell has not argued that Rule 100.5 violates the First Amendment, and because the New York Court of Appeals recently rejected such an argument in *Matter of Raab v. Commn on Judicial Conduct*, 100 NY2d 305 (2003), I am compelled to concur in his admonition. I write separately, however, to express my firm conviction that Rule 100.5 is unconstitutional.

I emphasize at the outset that to the extent Judge Farrell is a political animal, he plainly is a political animal of the State's own creation. After all, New York has chosen to inject its judiciary into the political process by affirmatively requiring most judges to run for office in partisan judicial elections. It is no secret that, owing to the nature of New York's closed judicial nominating conventions, and the domination of those conventions by party leaders, judges who wish to sit on the Supreme Court have virtually no chance of being nominated – let alone elected – without the support of their local party leaders. It is therefore no wonder that Judge Farrell felt compelled to make phone calls on the leader's behalf, and to make what amounted to a donation to the party's general fund. Judge Farrell may not have acted in a manner that is conducive to a healthy judiciary, but he did precisely what our system of judicial selection effectively requires of judicial candidates.

In any event, it is clear to me that under any fair reading of *Republican Party of Minnesota v. White*, 536 US 765 (2002), the Rule Judge Farrell has been admonished for violating cannot survive First Amendment scrutiny.

There is no doubt that Rule 100.5 is subject to strict scrutiny, for it imposes content-based restrictions on the ability of judges to exercise their right to speak. Judges may speak, but only so long as the subject matter of their speech is not political. *See* Rule 100.5(A)(1) (judges and judicial candidates shall not "directly or indirectly engage in any political activity"); Rule 100.5(A)(1)(a)-(i) (prohibiting judicial candidates from being a member of, acting as a leader of, or holding office in a "political organization"; from engaging in "partisan political activity" or "participating in any political campaign," including "publicly endorsing or publicly opposing" other candidates for public office; from "attending political gatherings" or "making speeches on behalf of" another candidate; and from "soliciting funds for" political candidates, including "purchasing tickets for politically sponsored dinners"). During the "Window Period," judges may engage in certain types of political speech, but only so long as the subject matter of their speech relates to their own campaigns and not to the campaigns of other elected officials. *See* Rule 100.5(A)(2) (allowing a judicial candidate to "participate in his or her own campaign" for judicial office during the window period). The fact that Rule 100.5 restricts speech on the basis of content is more than sufficient to trigger strict scrutiny. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 US 803, 811-12 (2000).

Strict scrutiny is warranted for the independent and even more fundamental reason that Rule 100.5 restricts speech that is "at the core of our First Amendment freedoms – speech about the qualifications of candidates for public office." *White*, 536 US at 774 (quotation omitted). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 US 214, 218 (1966). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 US 64, 74-75 (1964). Because freedom of speech is valuable not only as a personal liberty but also for the role it plays in the proper functioning of our entire democratic form of government, the Supreme Court has repeatedly recognized that the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco Democratic Comm.*, 489 US 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 US 265, 272 [1971]). For these reasons, the State bears the

heavy burden of proving that Rule 100.5 is narrowly tailored to serve a compelling government objective. This is a particularly exacting standard.

The first task in applying strict scrutiny is to identify the objective that is served by the Rule. The Commission has previously stated that the purpose of Rule 100.5 is to safeguard the "independence and integrity of a judiciary whose decisions are or may reasonably appear to be subject to undue political influence." *See* NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, 25TH ANNUAL REPORT (2000) at 30. I take the Commission's statement regarding the need to protect judges from "undue political influence" to mean that one purpose behind Rule 100.5 is to remove the judiciary from the political process – *i.e.*, to insulate judges from the compromises of consensus building, from *quid pro quo* politics, and from the flow of money that is the lifeblood of political campaigns.

I agree that the State has a compelling interest in removing judges from the political process *altogether* – as the federal government and many state governments have done – in order to ensure that judges decide cases without reference to the politics of how their decisions will be received by their potential supporters and by the electorate. But New York has affirmatively chosen not to go that route; to the contrary, we have chosen to throw most of our judges headfirst into the political process by requiring them to run in partisan judicial elections. We could have opted to appoint our judges, or to follow the so-called "Missouri Plan" (through which judges are appointed and then stand for unopposed retention elections), or at least to elect our judges in non-partisan elections. Given the choice that New York has made, the State – and, by the same token, our Commission – cannot now complain, against the backdrop of its own self-imposed system of selecting judges through popular elections, that it is entitled to forbid its judges from engaging in core political expression on the theory that doing so would allow judges to be too "political."

This is precisely what the Supreme Court held in *White*. *White* held that the First Amendment forbids a state from compelling judicial candidates to run for office and then unnecessarily restricting the scope of their core political expression:

> If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles. *White*, 536 US at 788.

As Justice O'Connor put it in her concurring opinion:

> [By] cho[osing] to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system . . . the State has voluntarily taken on the risks to judicial bias . . . . As a result, the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, *it is largely one the State brought upon itself by continuing the practice of popularly electing judges*. *Id.* at 792 (O'Connor, J.,

> concurring) (emphasis added); *see also id.* at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech"). If the State were genuinely concerned about insulating its judges from politics, then the State could, and would, abolish judicial elections altogether.

The Commission's statement of purpose also reveals that Rule 100.5 is designed to safeguard the "independence and integrity" of the judiciary. Thus, the Rule has a second purpose: to preserve the impartiality, and the appearance of impartiality, of the judiciary. The State certainly has a compelling interest in ensuring that its judges are not, and do not appear to be, biased for or against particular parties appearing before them. As in *White*, however, Rule 100.5 is nowhere near narrowly tailored to achieve even this laudable goal.

Rather than drawing a distinction between a judge's political expression that is likely to implicate the interests of litigants who might appear before him versus the kind of political expression that is not likely to do so, Rule 100.5 instead draws an irrelevant distinction – between judicial candidates engaging in political activity on their *own* behalf versus judicial candidates engaging in political activity on behalf of *other* candidates for elected office. Judge Farrell may conduct a phone bank on his own behalf – indeed, he may make non-anonymous calls directly to voters, even those who are lawyers and litigants who regularly appear before him – but Judge Farrell may not even set foot in a room in which a phone bank for his party's leader is taking place. Judge Farrell may contribute generously to his own campaign for judicial office, but if he reimburses his party for expenditures made on his behalf, he must take care to get an itemized accounting of such expenditures in order to ensure that he is not overpaying, and thus effectively contributing to the campaigns of other candidates.

By drawing this basic distinction between personal politicking and politicking for others, Rule 100.5 is anything but narrowly tailored to the goal of ensuring that judges are not, and do not appear to be, biased for or against particular parties to judicial proceedings. To begin with, this Rule is enormously overinclusive. How does prohibiting a judge from making phone calls on behalf of another candidate for office even begin to avoid bias against particular litigants, when the vast majority of such other candidates would never be interested in, much less parties to, any litigation pending before that judge? What does the fact that Judge Farrell over-reimbursed his party have to do with litigants that might appear before him?

Because of this fundamental disconnect between means and end – between the goal of avoiding judicial bias for or against *litigants*, and the scheme of regulating judges' conduct vis-a-vis fellow *candidates* – Rule 100.5 proscribes a wide array of protected expression that has no connection whatsoever with the State's compelling interest in safeguarding judicial impartiality. If the concern is that a judge might preside over a case involving a candidate or political party the judge has supported, a Rule requiring recusal would be the appropriate narrowly tailored response.

In addition to this obvious overinclusiveness, Rule 100.5 is also, to quote *White* again, "woefully underinclusive." *White*, 536 US at 780. Judicial candidates are forbidden from "making speeches on behalf of . . . another candidate" for public office and from "attending

political gatherings," Rule 100.5(A)(1)(f), (g), but in connection with his or her own campaigns, a judicial candidate is expressly permitted to "attend and speak to gatherings on his or her own behalf." Rule 100.5(A)(2)(i). Judicial candidates are forbidden from contributing to the campaigns of other candidates for elected office, but judicial candidates are expressly permitted to contribute to their own campaigns and to accept campaign contributions from others. *See* Rules 100.5(A)(2) and (A)(5). Judicial candidates are even permitted to accept campaign donations (through appropriate committees) from lawyers and litigants *who regularly appear before them and who are likely to appear before them in the future*, and there is no prohibition on judicial candidates knowing the identity of such donors and exactly how much they contributed.

Of particular significance in this case, the Rules permit Judge Farrell to solicit and accept (through an appropriate campaign committee) non-anonymous campaign contributions *from the very party leader the Commission is now admonishing him for assisting*. *See* Rule 100.5(A)(5). How is it even rational, let alone narrowly tailored to the goal of safeguarding judicial impartiality, for the Rules to forbid Judge Farrell from making phone calls on behalf of the party leader, but to allow the judge to solicit and accept non-anonymous campaign contributions from that very party leader?

If safeguarding impartiality really is the goal, then there cannot possibly be any principled basis for prohibiting judges from contributing to or campaigning on behalf of others, but allowing them to raise money in this manner and campaign for themselves. As the Supreme Court has made clear time and again, such glaring underinclusiveness is constitutionally fatal, because it "diminish[es] the credibility of the government's rationale for restricting speech." *See, e.g., City of Ladue v. Gilleo*, 512 US 43, 52-53 (1994).

Making matters even worse, Rule 100.5 is not merely overinclusive and underinclusive, but also internally contradictory. Despite the ban on contributing to the campaigns of other candidates – a ban purportedly so crucial to the "independence and integrity" of the judiciary that it justifies compromising the rights of judicial candidates to engage in core political expression – judicial candidates are nonetheless expressly permitted to purchase two tickets (but in no case more than two tickets) to a politically sponsored dinner on behalf of another candidate. *See* Rule 100.5(A)(2)(v). Indeed, it does not matter how much these two tickets cost, and it is not a problem if the cost of the tickets far exceeds the actual cost of the food and beverages served. *See id.*

There is no attempt to disguise the fact that this provision effectively allows judicial candidates to contribute to the campaigns of other candidates; to the contrary, this provision obviously was crafted to facilitate such contributions, albeit under carefully controlled circumstances. Again, however, there cannot possibly be any principled basis for forbidding judicial candidates from making political contributions but allowing them to buy two $500-per-plate tickets to a political dinner – much less a basis for allowing judicial candidates to purchase two $500-per-plate tickets but not three $50-per-plate tickets. It is difficult to imagine how the State could even begin to contend that this Rule is "narrowly tailored" under the strict scrutiny test that applies here.

Tellingly, the Rules contain numerous other provisions that demonstrate how easy it is to craft prohibitions that, at least arguably, do not restrict more speech than is necessary to preserve the integrity and impartiality of the judiciary. *See* Rule 100.3(B)(8) (prohibiting a judge from commenting publicly on pending proceedings); Rule 100.3(B)(9) (prohibiting a judge from criticizing jurors for their verdict other than in a court order or opinion); Rule 100.3(B)(4) (prohibiting a judge from manifesting bias or prejudice against or in favor of parties). *This* is the stuff of narrow tailoring – at least arguably – for each of these subsections of Rule 100.3 is based upon an obvious connection between the prohibited conduct and the effect it might have on judicial impartiality. The stark contrast between the narrow focus of Rule 100.3 and the utter lack of focus of Rule 100.5 demonstrates why the latter cannot survive the searching constitutional scrutiny that the Supreme Court requires.

Far from narrowly tailored, Rule 100.5 regulates the political activities of judges in precisely the opposite way one would expect in order to safeguard judicial integrity. The State should forbid judicial candidates from accepting campaign contributions from lawyers and litigants who might appear before them, but allow judges to make otherwise lawful campaign contributions to candidates they find worthy of support. The State should relieve judges of the burden of worrying about how their decisions will be received by a fickle, often uninformed electorate, but allow them to support the campaigns of other candidates who have nothing whatsoever to do with anything that goes on in their courtrooms.

As I acknowledged at the outset, and as the Commission understandably emphasizes, the New York Court of Appeals recently rejected a constitutional challenge to Rule 100.5 in *Raab* on very similar facts to those presented here. With all due respect to the Court of Appeals, however, its opinion in *Raab* comes nowhere close to explaining how Rule 100.5 can possibly be deemed narrowly tailored when it prohibits judges from – at *worst* – becoming "beholden to a particular political leader or party" (*id.* at 316), but permits judges to accept *non-anonymous campaign donations* from lawyers and corporations *that regularly litigate before them*, not to mention *from the very party leaders* to whom we purportedly are so concerned judges will become beholden. That glaring omission continues to baffle me.

The Commission relies on *Raab* and, inferentially, on *White*. But *White* emphasizes repeatedly that elected judges have First Amendment rights; that the states cannot restrict the political activities of elected judges except in a manner that is narrowly tailored to a compelling objective; and that narrow tailoring requires not just that the restriction address the problem, but that it address the problem in a manner that is neither overinclusive nor underinclusive. *White* is certainly distinguishable on its facts, but there is no way that Rule 100.5 can survive constitutional scrutiny under the analytical methodology that *White* requires.

It is no secret that my law firm represented the petitioner in *Raab* before I was appointed to this Commission, and the views I express in this concurrence are animated in large part by my experience in that case. I certainly accept the decision of the Court of Appeals in *Raab*, and I acknowledge the Commission and I are bound by it. For this reason, I concur rather than dissent. But I cannot in good conscience stand mute on an issue with such important First Amendment implications. *Raab* simply cannot be reconciled with *White*, and I believe that a federal court would (and will) strike down Rule 100.5 as unconstitutional.

Dated: June 24, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **SHIRLEY B. HERDER**, a Justice of the Vienna Town Court, Oneida County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the Commission
Melvin & Melvin, PC (by Ronald S. Carr)

The respondent, Shirley B. Herder, a Justice of the Vienna Town Court, Oneida County, was served with a Formal Written Complaint dated May 24, 2004, containing two charges.

On July 1, 2004, the Administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On August 5, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a Justice of the Vienna Town Court, Oneida County, since January 1, 1980. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about July 30, 2002, Martin Droz appeared before respondent for his arraignment on an appearance ticket alleging a violation of the Town of Vienna's zoning ordinance. Mr. Droz appeared without an attorney and refused to enter a plea. John Anderson, the code enforcement officer who had written the appearance ticket and was Mr. Droz's adversary in the matter, attended the arraignment. Respondent questioned Mr. Droz about the alleged work performed on his property in putative violation of the zoning code. When Mr. Droz refused to respond to the inquiry, Mr. Anderson presented Mr. Droz with two additional appearance tickets for alleged zoning code violations. Respondent adjourned the proceeding to August 13, 2002.

3. Notwithstanding that Mr. Droz had not admitted to the original code violation and that respondent had not received any offer of proof as to the additional alleged zoning code violations, respondent ordered Mr. Droz to obtain a permit for "whatever" work he was performing on his property and to provide proof of such permit when he returned to court on August 13, 2002.

4. On at least one occasion between July 30, 2002, and August 13, 2002, respondent engaged in an unauthorized *ex parte* communication with Mr. Anderson, for the purpose of ascertaining whether Mr. Droz had in fact sought the permit in compliance with her order. When Mr. Droz appeared on August 13, 2002, respondent was aware that he had not obtained the permit.

As to Charge II of the Formal Written Complaint:

5. On August 13, 2002, Martin Droz appeared in the Vienna town hall to await his appearance before respondent in response to the zoning violations alleged against him. Code Enforcement Officer John Anderson was again present. Mr. Anderson approached Mr. Droz, who was reading notices posted on a bulletin board, and asked Mr. Droz to reveal the contents of a shopping bag in his possession, which Mr. Droz declined to do. Mr. Droz did not threaten Mr. Anderson or any other individual, and no court process was disrupted by the brief exchange.

6. Prior to the convening of the court, Mr. Anderson met with respondent in her office and, in an *ex parte* conversation, alleged that Mr. Droz had declined to disclose to him the contents of a shopping bag he was carrying. Respondent agreed with Mr. Anderson that Mr. Droz should be reported to the State Police.

7. Thereafter, Mark Murray, the town supervisor, telephoned the State Police, and Trooper P. J. McCadden was dispatched to the Vienna Town Court. Trooper McCadden spoke to respondent about Mr. Droz, and respondent confirmed that she wanted him arrested for Contempt. Trooper McCadden then confronted Mr. Droz, determined that the shopping bag contained a tape recorder and note pad and arrested Mr. Droz. Trooper McCadden transported Mr. Droz to the State Police barracks, where he was detained for several hours awaiting arraignment on the Contempt charge.

8. During Mr. Droz's detention at the police barracks, Trooper McCadden telephoned respondent and, in an *ex parte* conversation, respondent advised Trooper McCadden to charge Mr. Droz with Criminal Contempt, Second Degree, pursuant to Section 215.50(1) of the Penal Law, for "disorderly, contemptuous or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings." Trooper McCadden so charged Mr. Droz.

9. Mr. Droz was returned to court for arraignment on the charge of Criminal Contempt later on August 13, 2002, at which time respondent failed to disqualify herself, although she was a potential witness and had conferred *ex parte* on the matter with both Mr. Droz's adversary in the zoning case and the arresting officer on the Contempt charge.

10. At arraignment, notwithstanding that respondent knew that the contents of the

shopping bag were innocuous and that Mr. Droz had not disrupted the court proceedings or otherwise been contemptuous, respondent committed Mr. Droz to jail for two weeks in lieu of $500 cash bail. Respondent did not set bail in an alternative form, despite the requirement of Section 520.10(2) of the Criminal Procedure Law that a judge set bail in more than one form.

11. On or about August 27, 2002, Mr. Droz appeared before respondent on the Contempt charge, represented by assistant public defender Tina Hartwell, Esq., and, upon recommendation of the district attorney, respondent accepted the disposition of the Contempt matter by Adjournment in Contemplation of Dismissal.

12. On or about August 30, 2002, Mr. Anderson withdrew one of the zoning violations pending against Mr. Droz. Respondent subsequently disqualified herself from presiding over the trial of the remaining zoning violations, and the matters were transferred to another judge.

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

Respondent's gross mishandling of proceedings involving Martin Droz constituted an abuse of judicial power and conveyed the appearance of bias.

When the defendant appeared as scheduled before respondent on zoning violation charges, respondent caused his arrest based on *ex parte* information that he had refused to disclose the contents of a shopping bag. Even after the police had detained the defendant and determined that the shopping bag contained only a note pad and tape recorder, respondent told the police that she wanted him arrested for Criminal Contempt. As a result, the defendant was charged, pursuant to Penal Law Section 215.50(1), with engaging in "disorderly, contemptuous or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings," notwithstanding that he had not been disruptive and had not engaged in contemptuous behavior in the court's "immediate view and presence." Respondent had no reasonable basis to cause the defendant's arrest, and she compounded her misconduct by arraigning the defendant on the Contempt charge and committing him to jail for two weeks in lieu of $500 cash bail, although the Criminal Procedure Law requires that bail be set in more than one form.

The totality of respondent's conduct toward Mr. Droz conveyed the appearance that she was biased against him, not only because of the "shopping bag" incident but also because of his failure to respond to questions at the arraignment and his lack of compliance with respondent's order to obtain a permit. The requirement of impartiality and the protections of the law apply equally to all litigants, including those who may be annoying or difficult. Respondent's conduct violated her duty not only to be impartial, but to avoid even the appearance of partiality (Sections 100.2 and 100.3[B][4] of the Rules Governing Judicial Conduct).

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Emery dissents and votes to reject the agreed statement of facts on the basis that the disposition is too lenient.

Judge Luciano was not present.

Dated: August 16, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **THOMAS C. KRESSLY**, a Justice of the Urbana Town Court and Hammondsport Village Court, Steuben County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel)
Peter J. Degnan for Respondent

The respondent, Thomas C. Kressly, a justice of the Urbana Town Court and Hammondsport Village Court, Steuben County, was served with a Formal Written Complaint dated July 15, 2004, containing one charge. Respondent filed an answer dated October 8, 2004.

On November 17, 2004, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 10, 2004, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a justice of the Urbana Town Court, Steuben County since 1996 and the Hammondsport Village Court, Steuben County since 1986. Respondent is not an attorney.

2. On or about August 26, 2003, Marvin Rethmel, the Town of Urbana Code Officer, filed an Information and Supporting Deposition in the Urbana Town Court, charging Lynwood Hough with violating Section 88-6(A) of the Urbana Town Code. The charge alleged that the defendant changed the usage of his property to include boat storage and sales, without prior approval of the town planning board. Section 88-6(A) of the Urbana Town Code provides that violators may be fined or sentenced to jail.

3. Mr. Rethmel served an appearance ticket on the defendant, which scheduled his

appearance in the Urbana Town Court for September 8, 2003.

4. The purpose of the September 8th appearance was for respondent to arraign the defendant, advise the defendant of his rights, take the defendant's plea and consider bail. The September 8th proceeding was not for the purpose of conducting a trial. No trial notices had been sent to either party.

5. On September 8, 2003, the defendant appeared in court with his attorney, but respondent did not conduct an arraignment. Instead, the defendant pleaded not guilty and requested an immediate trial.

6. Respondent agreed to the request and heard sworn testimony from the defendant and two defense witnesses. The defendant introduced and respondent received into evidence two site plan maps and a site plan checklist.

7. At the conclusion of the defendant's presentation to the court, respondent granted a motion by the defendant's attorney to dismiss the charge.

8. Respondent acknowledges that he held the trial and rendered a decision in *People v. Lynwood Hough* on September 8, 2003, notwithstanding the following:

A. No trial notice had been sent to the town's code enforcement officer or the town attorney.

B. Respondent understood that no representative of the town was present at the proceeding.

C. The town's representatives, as the prosecuting authority, were not provided with an opportunity to present evidence in furtherance of establishing the defendant's alleged violation.

D. The town's representatives were not afforded an opportunity to be heard in response to the evidence presented by the defendant, including being denied the opportunity to cross-examine the defendant's three witnesses or object to the introduction of the documentary evidence offered by the defendant.

E. No notice of the defendant's motion to dismiss was provided to the town's representatives, and the town's representatives were not afforded an opportunity to be heard on defense counsel's motion to dismiss.

5. Respondent recognizes that he should not have conducted a trial in the *Hough* case without having provided notice to the town representatives so that they could have had an opportunity to be present, to present proof and to rebut the defendant's motion.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(6) and 100.3(C)(1) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of

the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

A judge is required to accord to all interested parties a full right to be heard under the law (Section 100.3[B][6] of the Rules Governing Judicial Conduct). By conducting a trial and dismissing the charge in a code violation case without notice to the prosecuting authorities and in the absence of any representative of the town, respondent deprived the town of an opportunity to be heard according to law. Such conduct violates fundamental legal principles and warrants public discipline. *See*, *Matter of McCall*, 2004 Annual Report 135 (Comm. on Judicial Conduct) (judge commenced a hearing and heard evidence in a small claims case before the defendant's arrival at the scheduled time); *Matter of More*, 1996 Annual Report 99 (Comm. on Judicial Conduct) (judge dismissed charges in three traffic cases without notice to the prosecutor).

In imposing sanction, we have considered that there is no indication in the record that respondent's misconduct was based on favoritism. It appears that respondent, a non-lawyer, may have misunderstood the correct procedures in a code violation case. Respondent's misconduct is limited to a single instance. Accordingly, the sanction of admonition is appropriate.

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

Mr. Goldman, Judge Ciardullo, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Mr. Coffey was not present.

Dated: December 17, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DONALD R. MAGILL**, a Justice of the Maine Town Court, Broome County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Hinman, Howard & Kattell, LLP (by Philip J. Kramer) for Respondent

The respondent, Donald R. Magill, a Justice of the Maine Town Court, Broome County, was served with a Formal Written Complaint dated July 17, 2003, containing three charges. Respondent filed an answer dated August 12, 2003.

By Order dated September 11, 2003, the Commission designated A. Vincent Buzard, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 2 and 3, 2003, in Syracuse, New York, and the referee filed his report dated May 10, 2004, with the Commission.

The parties submitted briefs with respect to the referee's report. On August 5, 2004, the Commission heard oral argument, at which respondent and his attorney appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Maine Town Justice since the late 1980s. He has attended and successfully completed all required training sessions for judges, as well as some additional courses.

As to Charge I of the Formal Written Complaint:

2. On January 1, 2001, respondent's wife, Patricia Magill, received a telephone call from Mary Abell that was allegedly harassing; Ms. Abell made accusations concerning Ms. Magill's daughter. Respondent listened to part of the telephone call on an extension in their home. He called the police, and a sheriff's deputy came to respondent's home. Respondent's wife signed a complaint charging Ms. Abell with Aggravated Harassment, a misdemeanor. The deputy issued an appearance ticket to Ms. Abell, returnable in the Maine Town Court on January 25, 2001.

3. Respondent called Marcy Cox, the supervising Assistant District Attorney for the local courts, to inquire as to how the case should be handled. Ms. Cox advised respondent to send a letter to her saying that the case should not be in his court. Respondent sent a letter to her as requested.

4. The District Attorney moved pursuant to Section 170.15(3) of the Criminal Procedure Law for the removal of the *Abell* case from the Maine Town Court. By order dated January 12, 2001, signed by Broome County Court Judge Patrick H. Matthews, the case was transferred to the Endicott Village Court.

5. After the County Court ordered that the *Abell* case be transferred, respondent personally delivered the case file to the Endicott Village Court on January 17, 2001, and gave the file to the court clerk, Kathy Sangiouliano. Ms. Sangiouliano noted on the file that it had been delivered by respondent, whom she knew to be a judge of the Maine Town Court.

6. When he delivered the *Abell* file, respondent gave the Endicott court clerk his judicial business card, on which respondent had written a request for an Order of Protection in favor of his wife and her daughter.

7. The court clerk advised the Endicott Village Justice, Debra Jo Harter, that respondent had delivered the *Abell* file and had left his business card with a request for an Order of Protection.

8. On January 31, 2001, respondent telephoned the Endicott Village Court to ask about the status of the case and inquired of the court clerk, Kristen McNamara, why an Order of Protection had not been issued. Ms. McNamara informed respondent that Judge Harter does not normally issue Orders of Protection unless someone had been threatened and that Judge Harter had issued a strong verbal warning to the defendant not to have any contact with any member of the victim's family. Respondent replied by strongly requesting a written Order of Protection and said that he would contact the district attorney's office. Ms. McNamara noted respondent's reply on the case file.

As to Charge II of the Formal Written Complaint:

9. In the fall of 2001, Michelle McPherson, who was then around 19 years old, and her fiancé visited Ms. McPherson's mother, Maine court clerk Seanne McPherson, at the court offices. In the presence of respondent and his co-judge, Michelle mentioned that she and her fiancé were planning to go to a local theater. Respondent stated that the theater had been a "porn" theater, known for having shown the movie "Deep Throat." In response to a question by Michelle about the movie's plot, respondent described the movie's plot in graphic terms. Respondent also told Michelle to "watch out for the sticky floors" in the theater.

As to Charge III of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C) and 100.4(A)(2) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22 of the New York State Constitution and Section 44(1) of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings, and respondent's misconduct is established. Charge III is not sustained and is therefore dismissed.

On two occasions respondent interjected himself and his judicial prestige into a case in which his wife was the complaining witness. Such conduct violates well-established ethical standards prohibiting a judge from lending the prestige of judicial office to advance private interests (Section 100.2[C] of the Rules Governing Judicial Conduct).

After the case was transferred from his own court, respondent was obliged to refrain from any conduct that might convey an appearance that he was attempting to curry special treatment because of his judicial status. Instead, he personally delivered the case file to the transferee court and gave the court clerk his judicial business card, on which he had written a request for an Order of Protection for his wife and daughter. Under the circumstances here, his personal delivery of the file could reasonably be construed as demonstrating his personal interest in the outcome of the case. That interest was reinforced by respondent's use of his judicial business card on which he noted a request for an Order of Protection. That request – which was not contained within the file itself – should properly have come from respondent's wife or her attorney. Coming from respondent, it appeared to be a blatant assertion of judicial influence for the benefit of his relatives, conduct that is expressly barred by Section 100.2(C). As a non-attorney, respondent could not act as his wife's legal advocate; and even a lawyer-judge may not act as an attorney in a case that had originated in the judge's own court (Jud Law §16).

Several weeks later, respondent again interjected himself into the case by calling the transferee court and expressed displeasure to the court clerk that an Order of Protection had not been issued. The court clerk noted respondent's comments on the case file. We agree with the referee's conclusion that respondent's call "was part of an overall transaction in which he made clear that he was a judge and was attempting to help his wife" (Rep. 5).

As the Court of Appeals has stated, "[A]ny communication from a judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office." *Matter of Lonschein*, 50 NY2d 569, 572 (1980). As an experienced judge, respondent should have recognized that his conduct constituted an improper assertion of his judicial influence and could be perceived as an implicit request for favorable treatment. It is not an excuse that respondent was simply trying to assist his wife in connection with the case, since any such "assistance" is patently impermissible when the power and prestige of judicial office are invoked. *See, e.g. Matter of Edwards*, 67 NY2d 153 (1986) (judge initiated several *ex parte* contacts with a judge who was presiding over his son's traffic case); *Matter of Ohlig*, 2002 Annual Report 135 (Commn on Jud Conduct) (judge's conduct towards an attorney who was involved in a fee dispute with the judge's wife created the appearance that he was using his judicial status to advance his wife's interests).

As to respondent's comments in the court office about a pornographic movie, we find

that they were injudicious and are deserving of rebuke. Respondent should not have initiated a discussion about the movie, and he should have recognized that his remarks might cause embarrassment and discomfort and thus were inappropriate for the work environment.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur, except as follows.

Mr. Goldman, Mr. Coffey and Judge Peters dissent as to Charge II, paragraph 7, with respect to the conclusion that respondent's comments about the movie and theater constitute misconduct, and vote that the allegations be dismissed.

Mr. Felder and Ms. Hernandez dissent as to Charge II, paragraph 8, and vote that the allegation be sustained.

Mr. Coffey dissents, in part, as to Charge I, paragraph 4(B) and votes to sustain the allegation only insofar as respondent's delivery of the file and note created an appearance of impropriety, and dissents as to the sanction on the basis that the disposition is too harsh.

Judge Luciano was not present.

Dated: October 6, 2004

DISSENTING OPINION BY MR. GOLDMAN, IN WHICH MR. COFFEY AND JUDGE PETERS JOIN

I respectfully dissent from the Commission's finding that respondent's comments about the film and theater are misconduct. The remarks were made off the bench (but in the courthouse), and not in the judge's official capacity, to a young adult with whom the judge was acquainted in the presence of her fiancé and others. The young woman was neither offended nor upset.

While the remarks were in questionable taste, I do not believe that, under the circumstances, they rise to the level of judicial misconduct.

Dated: October 6, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **PATRICK J. McGRATH**, a Judge of the County Court, Rensselaer County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the Commission
Anderson, Moschetti & Taffany, PLLC (by Peter J. Moschetti, Jr.) for Respondent

The respondent, Patrick J. McGrath, a judge of the County Court, Rensselaer County, was served with a Formal Written Complaint dated July 1, 2004, containing one charge.

On August 31, 2004, the administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On September 23, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Rensselaer County Court since 1994 and was re-elected to a ten-year term on November 4, 2003.

2. Between May 12, 2003 and September 4, 2003, respondent presided over a highly publicized murder trial, People v. Christine Wilhelm. Respondent was a candidate for re-election in that time period.

3. In the course of the Wilhelm trial, several days were devoted to hearings regarding the admissibility of certain evidence relevant to the defendant's assertion of an insanity defense. Respondent ruled against the defendant on this issue; the evidence was not suppressed and was presented to the jury.

4. On July 9, 2003, the defendant was found guilty. Immediately following the announcement of the guilty verdict, defense counsel told reporters at the back of the courtroom that respondent's suppression ruling "was flat-out wrong" and cost his client her freedom.

5. Thereafter, on July 9, 2003, reporters questioned respondent at the courthouse about the defense attorney's statement that the suppression ruling "was flat-out wrong." Respondent replied and was quoted in local newspapers as stating, "I'm comfortable with my decision." Respondent believed that his statement was in response to a personal attack on his judicial record, and therefore permissible under Section 100.5(A)(4)(e) of the Rules Governing Judicial Conduct ("Rules") because he was a candidate for public office.

6. On September 3, 2003, respondent sentenced defendant Christine Wilhelm to the maximum term allowed, 50 years to life in prison. Later that day, respondent was shown on several news broadcasts in the Albany/Rensselaer area, making a statement on the bench during sentencing in which he said, inter alia, that he had "no room for mercy" for the defendant.

7. On September 4, 2003, respondent appeared on the nationally televised program "Good Morning America." Excerpts from the sentencing in the Wilhelm trial were shown, including respondent's graphic description of the crime and his statement from the bench that he had "no room for mercy." The following interview occurred and was broadcast:

Interviewer:	I was curious about something you said… I'm curious about what you meant. Are you saying that the law *required* that sentence, or, having sat through the trial, you *feel* no mercy for this woman?
Respondent:	I felt no mercy for her, after listening to the testimony, and the horror and – that she put Peter through and Luke through – I didn't feel as though mercy was – should have been shown in this case. It was my personal choice.
Interviewer:	When you cover a trial, and as a reporter, I've covered many, you almost sit there and you wonder, "what is the judge thinking," and this one obviously got to you.
Respondent:	This was a very emotional trial. At the end of the day I was physically and emotionally drained. I've sat through many murder trials, but this was probably the worst.
Interviewer:	The defendant in this case tried the insanity defense, which the jury rejected, but any doubt, in your mind, that she suffers from mental illness?

Respondent:	There's no doubt, I don't think in anyone's mind, that she suffers from a mental illness, but the issue was did that mental illness prevent her from knowing the nature and consequences of her act, or that they were wrong?
Interviewer:	And you're convinced she knew both – the consequences and that it was wrong?
Respondent:	Well, it wasn't my decision. The jury was convinced that she didn't meet her burden of proof and in New York the burden is on the defendant to prove the insanity defense.
Interviewer:	Is there any thought in your mind that perhaps she belongs in a hospital and not in a jail?
Respondent:	Not based upon the jury verdict. I have to accept the verdict as it's delivered, and the law requires that I treat this defendant the same way I would any other defendant convicted of a crime.
Interviewer:	But I heard you say earlier, given the fact that you really felt no mercy, going through the horror of this crime as you watched it, that you think that jail is the appropriate place for her to be?
Respondent:	I do.

At the time respondent made the comments set forth in paragraph 7 above, he knew or should have known that an appeal would likely ensue and that the subjects discussed could be raised in such an appeal. Notice of Appeal was filed in *Wilhelm* on September 10, 2003.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(8) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above facts, and respondent's misconduct is established.

It is improper for a judge to make "any public comment about a pending or impending proceeding" (Section 100.3[B][8] of the Rules Governing Judicial Conduct; *Matter of McKeon*, 1999 Annual Report 117 [Comm. on Judicial Conduct]). "The rule is clear and unequivocal and makes no exception…for explanations of a judge's 'decision-making process.'" *Matter of O'Brien*, 2000 Annual Report 135, 137 (Comm. on Judicial Conduct).

Since the defendant's appeal of her conviction was likely, respondent's comments even after imposing sentence were impermissible and could compromise the proper administration of justice.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Judge Luciano, Judge Peters and Judge Ruderman concur.

Ms. Hernandez and Mr. Pope were not present.

Dated: November 12, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DOUGLAS C. MILLS**, a Judge of the Saratoga Springs City Court, Saratoga County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn Blake, Of Counsel) for the Commission
Jones Ferradino (by Matthew J. Jones) for Respondent

The respondent, Douglas C. Mills, a judge of the Saratoga Springs City Court, Saratoga County, was served with a Formal Written Complaint dated July 17, 2003, containing two charges. Respondent filed an answer dated August 29, 2003.

By Order dated September 8, 2003, the Commission designated Michael J. Hutter, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 14, 2003, in Saratoga Springs, New York, and the referee filed his report dated May 24, 2004, with the Commission.

The parties submitted briefs with respect to the referee's report. On August 5, 2004, the Commission heard oral argument, at which the respective 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 Saratoga Springs City Court since 1988. Until 1999, respondent was an appointed part-time judge; since then, he has served full-time. Prior to becoming a full-time judge, respondent was a practicing attorney.

As to Charge I of the Formal Written Complaint:

2. On October 5, 1999, Jason Kalenkowitz appeared before respondent for a non-jury trial on a charge of Possession Of An Open Container in violation of Section 61-1 of the Code of the City of Saratoga Springs. Mr. Kalenkowitz, who was a full-time student at Skidmore College in Saratoga Springs, appeared *pro se*. Assistant District Attorney David Harper called one witness, police officer Eileen Cotter, who had arrested Mr. Kalenkowitz. Mr. Kalenkowitz testified on his own behalf and called two witnesses.

3. During Mr. Harper's cross-examination of a defense witness, the following occurred:

> Q. You testified there is a sidewalk there. Was she [police officer Cotter] standing on the house side of the sidewalk or in the pavement, on the side of the sidewalk?
>
> A. Probably on the house --
>
> MR. KALENKOWITZ: This is ridiculous.
>
> THE COURT: Really? The next time you have an outburst like that, I will hold you in contempt, and sentence you to ten days in the Saratoga County jail.
>
> Want to state your reasoning on the record?
>
> MR. KALENKOWITZ: Because he's going on to something that's already been said. He's asking questions about calling somebody a bitch. That is irrelevant. He's using -- trying to get something that is irrelevant. I believe the cops in the front yard saw me walk out. I don't see how, me calling somebody a bitch, that I testified to, has anything to do with their testimony.
>
> THE COURT: That's what you're concluding, that all these proceedings are ridiculous?
>
> MR. KALENKOWITZ: Also, me, you, probably, and him, probably, have had a drink - and me being arrested for drinking in the front yard.
>
> THE COURT: That's why we have a court. I am warning you, if you interrupt me, you will go to jail.
>
> MR. KALENKOWITZ: You asked me a question. I am answering it.
>
> THE COURT: Good idea. Because you will go to jail.
>
> MR. HARPER: No further questions.
>
> THE COURT: Want to make any concluding remarks?
>
> MR. KALENKOWITZ: I just made them.
>
> THE COURT: Mr. Harper?
>
> MR. HARPER: I will waive a closing statement.

4. Mr. Kalenkowitz spoke the words "This is ridiculous" as his way of objecting that Mr. Harper's cross-examination of the witness was irrelevant.

5. Respondent gave no prior warning to Mr. Kalenkowitz not to interrupt him or not to disrupt the proceedings before him. There was no prior conduct by Mr. Kalenkowitz that would have warranted any such warning. To the extent that Mr. Kalenkowitz may have made noises like "tsk", "ah" or shook his head while police officer Cotter testified for the prosecution, respondent never warned Mr. Kalenkowitz about refraining from such conduct.

6. At the conclusion of the trial, respondent found Mr. Kalenkowitz not guilty.

7. The following then occurred:

> THE COURT: However, Mr. Kalenkowitz, the Court is not going to avoid having a conversation with you about your attitude, which is much more important to me than this whole proceeding.
>
> MR. KALENKOWITZ: I am sorry. I am frustrated with the whole ordeal. I am missing classes for this court date, and it is the second charge I was brought up against, in Saratoga, that I was not guilty of, and it's taken a lot of time and money out of my hands.
>
> THE COURT: Does that mean you can be disrespectful to the Court and declare this whole thing is a joke on the record?
>
> Do you think that [endears] yourself --
>
> MR. KALENKOWITZ: No. I --
>
> THE COURT: Now we're going to have a contempt hearing. You've again interrupted me.
>
> The Court finds you are in contempt of Court. The Court has previously warned the Defendant, several times, not to interrupt the Court, and he did so again. So I will sentence the Defendant to three days in the county jail.
>
> Please take the Defendant into custody.
>
> You will have to learn your lesson the hard way.
>
> MR. KALENKOWITZ: You're a good man for doing this.
>
> THE COURT: Mr. Kalenkowitz, you're an obnoxious young man.
>
> MR. KALENKOWITZ: You're [an] obnoxious old man.
>
> THE COURT: I will sentence the Defendant to three more days in the Saratoga County Jail, to total six days.

8. Mr. Kalenkowitz's words, "No. I--", were not, and were not intended to be, an interruption of respondent, but rather his response to what he perceived to be respondent's questions, "Does that mean you can be disrespectful to the Court and declare this whole thing is a joke on the record? Do you think that [endears] yourself --."

9. Respondent gave Mr. Kalenkowitz no opportunity to explain his conduct or otherwise defend himself before holding him in contempt.

10. In summarily finding Mr. Kalenkowitz to be in contempt of court, without a hearing, respondent determined that he was guilty of Criminal Contempt in the second degree in violation of Penal Law Section 215.50, as stated in a commitment order dated October 5, 1999.

11. A Court Information and New York State Incident Report were prepared and filed by Saratoga Springs police officer Warren Wildy on October 5, 1999, after Mr. Kalenkowitz was

found guilty of contempt. The Information charged Mr. Kalenkowitz with Criminal Contempt for engaging in "disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority" and stated that Mr. Kalenkowitz was charged for "constantly verbally interrupting" respondent, "in direct violation of verbal orders…to cease such behavior." The Incident Report alleged that the defendant interrupted respondent "after repeated statements by Judge Mills to not interrupt him."

12. Mr. Kalenkowitz's conduct that formed the basis of respondent's finding of contempt, the purported interruption after the trial was over, cannot be found as a matter of law to rise to the level of contumacious behavior encompassed by Penal Law Section 215.50.

13. The Information charging Mr. Kalenkowitz with Criminal Contempt in the second degree was filed after Mr. Kalenkowitz was found guilty. The transcript of the proceeding does not support the Information's allegations or those set forth in the Incident Report.

14. Upon respondent's finding of contempt, Mr. Kalenkowitz was handcuffed and taken to a holding cell and then to the Saratoga County Jail, where he was held in solitary confinement for four days. Mr. Kalenkowitz did not have any contact with an attorney while in jail and was not aware of any means of refuting the contempt charge and getting himself out of jail.

15. On October 6, 1999, the day after respondent's finding of contempt, respondent realized that he was in error in finding Mr. Kalenkowitz guilty of Criminal Contempt in the second degree because Mr. Kalenkowitz was not informed that he was being charged with that crime and there was no trial on a properly filed accusatory instrument. Instead of releasing him from custody, respondent, *sua sponte* and in Mr. Kalenkowitz's absence, decided to dismiss the Criminal Contempt charge and to charge Mr. Kalenkowitz with contempt in violation of Judiciary Law Section 750. The sentence remained the same. Respondent issued a commitment order dated October 6, 1999, which stated that Mr. Kalenkowitz was convicted of contempt in violation of Judiciary Law Section 750 and was sentenced to a term of six days. No new trial or hearing on this charge was held.

16. On October 7, 1999, Mr. Kalenkowitz, still in custody and unrepresented by an attorney, appeared before respondent. Respondent advised Mr. Kalenkowitz of his right to an attorney, but did not ask if he wanted an attorney. Assistant District Attorney Harper moved to dismiss the criminal contempt charge on the ground of double jeopardy, apparently on the belief that on October 5, 1999, Mr. Kalenkowitz had been found guilty of contempt under Judiciary Law Section 750. Respondent dismissed the charge, but the defendant was returned to jail on the commitment order dated October 6, 1999, which reflected a conviction and sentence for contempt under Section 750 of the Judiciary Law.

17. At the October 7, 1999 court appearance, Mr. Kalenkowitz again apologized to respondent. Respondent stated, "Thank you very much" and remanded him to the jail to serve out his sentence.

18. In summarily convicting Mr. Kalenkowitz of contempt, respondent failed to give

Mr. Kalenkowitz any opportunity to make a statement in his defense and failed to make a mandate of commitment as required by Judiciary Law Section 752.

19. Mr. Kalenkowitz was released from custody after four days of incarceration. The invalid contempt finding and subsequent incarceration caused Mr. Kalenkowitz numerous personal repercussions.

As to Charge II of the Formal Written Complaint:

20. On September 24, 2002, Anthony Caton was scheduled to appear in Saratoga Springs City Court regarding various Vehicle and Traffic Law tickets he had received. His parents, Terry and Laura Caton, had retained attorney Jake Hogan to represent him in connection with the tickets. Anthony drove himself to court that day and appeared in court with his attorney.

21. On September 24, 2002, Terry and Laura Caton drove together to the Saratoga Springs City Court in order to support their son during his court appearance.

22. Terry and Laura Caton have been married for 22 years. They reside with their son in Round Lake, Saratoga County. During their marriage they have argued frequently but have had no physical altercations.

23. During the drive to the courthouse, the Catons argued about personal matters.

24. When they arrived at the parking lot next to the courthouse in Saratoga Springs, Ms. Caton said, "Fuck you" to her husband. Mr. Caton repeated those words to his wife in a raised, but not screaming, voice as he was getting out of the car. Ms. Caton was still in the car and her husband was about twelve feet away. The Catons were not physically fighting and did not make any threatening gestures. Neither party was afraid of the other, nor felt threatened at the time. The Catons did not notice anyone else in the vicinity, and no one approached them to find out what was occurring or to complain about any perceived disturbance.

25. Respondent, as he was walking to the courthouse through the parking lot about 50 feet away, overheard Mr. Caton's comment to his wife and the car door slam.

26. Respondent did not approach the Catons or request any assistance, but continued walking out of the parking lot and stopped in a coffee shop on his way to the courthouse. Respondent saw Mr. and Ms. Caton as they walked by the coffee shop in an orderly fashion, and he noted that there did not seem to be any threat of physical violence at that time.

27. Mr. and Ms. Caton entered the courthouse and sat together towards the back of the courtroom near their son Anthony. Anthony went up to the bench for the plea, which his attorney had negotiated with Assistant District Attorney David Harper. After the plea allocution had transpired, respondent asked Laura Caton to approach the bench. Respondent asked her if Anthony's father was in the courtroom, and when she said he was, respondent requested that he also approach the bench.

28. When Terry Caton approached the bench, respondent stated on the record:

> I'd like this man arrested for disorderly conduct for yelling in the parking lot. He yelled at her in a loud, obnoxious voice, "fuck you". I heard it. I was within 50 feet. If I was within three feet of him like you were I would be scarred [sic] to death. He scarred [sic] me a distance of 50 feet.
>
> Charge him with disorderly conduct. That happened this morning. The time is approximately 9:05. I want a temporary order of protection in favor of her against him. He's barred from the house. We'll talk about it later.
>
> You're going to behave like that around me, you're going to be under arrest.

29. Laura Caton had not made any complaint to anyone concerning her husband and did not want him arrested. After ascertaining that Ms. Caton wanted him to represent her husband, Mr. Hogan asked for bail and tried unsuccessfully to secure Mr. Caton's release:

> MR. HOGAN: Bail your Honor.
>
> THE COURT: Have to draw up a complaint. Talk about it in a few hours. Have to run his criminal history -
>
> MR. HOGAN: I have to ask that you be disqualified, your Honor since you are a witness to the matter.
>
> THE COURT: We'll talk about in a while after you see the complaint.
>
> MR. HOGAN: We done with Mr. -
>
> THE COURT: We're done. We're finished.

30. Terry Caton was handcuffed in the courtroom, taken into custody by two police officers and led out the back door of the courtroom. He was taken downstairs to a desk and then placed in a cell. Mr. Caton had medical problems that had recently required surgery and caused seizures, for which he took medication. He did not have access to his medication while in the cell.

31. Later that day, respondent signed a Court Information charging Terry Caton with Disorderly Conduct, a violation of Penal Law Section 240.20(3), for yelling "Fuck you" to his wife while in a public place and causing respondent "to become annoyed and alarmed."

32. Laura Caton waited with her son in Mr. Hogan's office for several hours and did not see her husband again until he was released. During this time, at the request of Judge Doern, Mr. Harper called Mr. Hogan and inquired as to whether Ms. Caton believed an Order of Protection was necessary. Ms. Caton said that she did not want an Order of Protection.

33. Mr. Harper arranged to have Mr. Caton arraigned by Judge Doern, and Mr. Caton was arraigned after spending approximately three hours in a jail cell. Judge Doern released him on his own recognizance and issued a Temporary Order of Protection in favor of Laura Caton, which required that Mr. Caton refrain from, *inter alia*, "any and all offensive conduct."

34. The Saratoga County District Attorney recused his office in the case, and the Warren County District Attorney was assigned. The case was transferred to the Glens Falls City Court, where it was dismissed on motion of the District Attorney.

35. Terry Caton incurred $1,500 in legal fees to defend himself in the case against him.

36. Respondent caused and directed the unjustified arrest and detention without bail of Terry Caton because he was personally offended by Terry Caton's use of profanity.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(3), 100.3(B)(6), 100.3(E)(1)(a)(ii) and 100.3(E)(1)(d)(iv) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the above findings, and respondent's misconduct is established. Charge I, paragraph 4A is not sustained and is therefore dismissed.

On two occasions, respondent abused his judicial power by depriving individuals of their liberty, without just cause or due process. One individual, held in contempt for interrupting respondent during a post-acquittal lecture, was held in jail for several days; another individual, a courtroom spectator, was held in custody for three hours for using an expletive to his spouse in the courthouse parking lot. In both instances, respondent's conduct was a mean-spirited, substantial overreaction to conduct that in no way warranted such extreme punitive measures.

Respondent summarily sentenced Jason Kalenkowitz to jail for contempt, ostensibly for violating "several" warnings against interrupting respondent. The record does not substantiate respondent's portrayal of the events, neither as to his warnings or as to any behavior by the defendant that would justify respondent's actions. As the transcript shows, the defendant, a college student who had successfully defended himself on an Open Container charge, was apparently attempting to respond to respondent's questions during a sermon about the defendant's "attitude." Respondent's exercise of the summary contempt power in such circumstances, without complying with statutory due process, was a gross abuse of judicial authority. Compounding his misconduct, when he later realized he had wrongly convicted Mr. Kalenkowitz of Criminal Contempt under the Penal Law, respondent did not release him when he was brought back to court the following day, but simply changed the commitment order to reflect a conviction under a different statute and sent the defendant back to jail, where he remained in solitary confinement, without access to an attorney, for another three days. Even with an opportunity to reflect on his actions, and even when the defendant had apologized for a second time, respondent failed to remedy the harsh consequences of his actions in sending an acquitted defendant to jail.

The exercise of the enormous power of summary contempt requires strict compliance

with statutory safeguards, including giving the accused an appropriate warning and the opportunity to desist from the supposedly contumacious conduct and preparing an order setting forth the basis for the ruling (Jud Law §§750, 755; *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]; *Loeber v. Teresi*, 256 AD2d 747 [3d Dept 1998]). Here, respondent not only wielded the power without reasonable basis, but failed to adhere to mandated procedures. Such conduct constitutes an abuse of the summary contempt power and warrants discipline. *Matter of Teresi*, 2002 Annual Report 163 (Comm. on Judicial Conduct); *Matter of Meacham*, 1994 Annual Report 87 (Comm. on Judicial Conduct); *Matter of Recant*, 2002 Annual Report 139 (Comm. on Judicial Conduct).

In a second incident, respondent caused the arrest and detention, without bail, of Terry Caton because respondent was personally offended by Mr. Caton's use of an expletive to his spouse in the courthouse parking lot. Respondent's claim that he was "alarmed" about a domestic violence situation is belied by the fact that he neither promptly interceded nor called for assistance, and took no action until later that morning. If he actually believed that a danger existed or a crime had occurred, respondent, as a private citizen, could have reported the incident to the police; instead; respondent waited until he was on the bench and then used his judicial authority to cause Mr. Caton's immediate detention. Respondent's own words – "You're going to behave like that around me, you're going to be under arrest" – strongly suggest that his actions arose not, as he claimed, from a "heightened sensitivity" to domestic violence, but because he viewed Mr. Caton's use of profanity as a personal affront. Mr. Caton was handcuffed, held in custody for three hours and required to hire an attorney before the meritless charge was eventually dismissed.

As an experienced judge, respondent should be familiar with statutory procedures and should understand that his duty to act in a patient, neutral, judicious manner must always take precedence over impulses arising from personal pique or offense. Here, respondent's disregard of due process in both matters resulted in a travesty of justice and was inconsistent with the fair and proper administration of justice.

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

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur as to respondent's misconduct, except that Mr. Goldman, Judge Ciardullo, Mr. Coffey and Mr. Pope dissent as to Charge I, paragraph 5, alleging that respondent failed to prepare a mandate as required by law, and vote to dismiss the allegation.

Mr. Goldman, Judge Ciardullo, Mr. Coffey, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur as to the sanction and vote that respondent be censured. Ms. DiPirro, Mr. Emery and Mr. Felder dissent as to the sanction and vote that respondent be removed from office. Mr. Felder files a dissenting opinion in which Ms. DiPirro and Mr. Emery join.

Judge Luciano was not present.

Dated: December 6, 2004

DISSENTING OPINION BY MR. FELDER, IN WHICH MS. DIPIRRO and MR. EMERY JOIN

Tyrants come in more varieties than Baskin-Robbins has flavors. The ultimate protection a free society has against a tyrant, is a judicial system that acts as the last barrier to a tyrant's will. Therefore, it is immeasurably worse when the tyrant is the judge himself. Our sensibilities are even more offended at a time when our treasure and youth have been spent to remove a far-away tyrant on the simple premise that in the modern world, the velocity of events is such that evil in one place eventually becomes evil touching everyplace. Just as there is no small death, there is no small tyranny.

Respondent acted in tyrannical fashion. His will was the law, and to the degree that *his* law conflicted with the actual one, he was above the law.

A college student, Jason Kalenkowitz, attempting to represent himself on a minor charge, did little more than offend the judge and, for doing that, ended up in jail in solitary confinement for four days without counsel or any way of representing himself. When respondent realized that he had jailed the student on the wrong statute, he simply changed the charge but nevertheless forced the defendant to serve out the remainder of the previously ordered sentence. Along the way, at each opportunity, the defendant was denied his constitutional and statutory rights. Further confirming respondent's bad faith, he refused to reconsider his harsh and illegal "sentence" even after Mr. Kalenkowitz apologized to him not once but twice. Respondent's utter failure to recognize wrongdoing in his handling of the case "strongly suggests that, if he is allowed to continue on the bench, we may expect more of the same." *Matter of Bauer*, __NY2d__, No. 125, Slip op. at 14 (Oct. 14, 2004).

In the matter of Terry Caton, respondent, some 50 feet away from Mr. Caton in a parking lot, overheard a verbal disagreement between Mr. Caton and his wife, who were on the way to respondent's courtroom in connection with traffic tickets their son had received. Respondent did not interfere in the Catons' argument but rather continued to walk to a coffee shop. Indeed, respondent essentially lied by stating in an information that he had been "alarmed" by Mr. Caton's conduct, when the record is clear that respondent was, at most, personally offended by Mr. Caton's conduct.

Later, when respondent saw the Catons sitting in his courtroom, he had Mr. Caton arrested and charged with Disorderly Conduct, although Mrs. Caton had made no complaint about her husband's conduct. Mr. Caton spent several hours in jail (without his necessary medication) until released by another judge.

I strongly believe that respondent is not fit to remain a judge. Arrogance and narcissism are not uncommon human qualities, but this judge's sense of self is so inflated that he chose to fuel his ego by burning the fundamental rights of citizens in his courtroom. I can think of no greater transgression by a jurist entrusted with the responsibility of ensuring that justice is dispensed with basic fairness. Respondent is not just an embarrassment to his fellow jurists. He is dangerous, and he should be removed.

Dated: December 6, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DAVID J. PAJAK**, a Justice of the Pembroke Town Court, Genesee County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Michael M. Mohun for Respondent

The respondent, David J. Pajak, a justice of the Pembroke Town Court, Genesee County, was served with a Formal Written Complaint dated April 19, 2004, Genesee County, containing one charge. Respondent filed an answer dated June 4, 2004.

On August 3, 2004, the administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On September 23, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Pembroke Town Court, Genesee County since 1993. Respondent is an attorney.

2. On or about April 12, 2003, respondent operated a motor vehicle in the Town of Batavia while under the influence of alcohol, with the result that respondent was involved in a property damage accident with another motorist and was charged with Driving While Intoxicated, a violation of Section 1192(3) of the Vehicle and Traffic Law; Refusing To Take A Breath Screening Test, a violation of Section 1194 of the Vehicle and Traffic Law; Consumption of Alcohol, a violation of Section 1227(1) of the Vehicle and Traffic Law; and Failure To Keep Right, a violation of Section 1120A of the Vehicle and Traffic Law.

3. On or about November 19, 2003, respondent pleaded guilty in the Bergen Town Court to Driving While Intoxicated, a misdemeanor, in full satisfaction of all charges. Respondent paid a $500 fine and $125 surcharge.

4. During the course of the proceeding in Bergen Town Court, respondent completed an alcohol evaluation program, in which it was determined that he did not suffer from an alcohol-related pathology and that he did not need treatment.

5. There is no indication that, at the scene of the accident, in court or otherwise, respondent exerted or appeared to exert the influence of his judicial office for his own benefit, or for anyone else's benefit or detriment.

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

A judge who operates a motor vehicle while under the influence of alcohol violates the law and imperils public safety. *Matter of Henderson*, 1995 Annual Report 118 (Commn on Jud Conduct). Respondent's unlawful conduct resulted in an accident, which caused property damage. By failing to abide by laws that he is called upon to apply in court, respondent undermined his effectiveness as a judge and brought the judiciary as a whole into disrepute.

In determining an appropriate disposition in such cases in the past, the Commission has considered mitigating and/or aggravating circumstances, including the level of intoxication, whether the judge's conduct caused an accident or injury, whether the conduct was an isolated instance or part of a pattern, the conduct of the judge during arrest, and the need and willingness of the judge to seek treatment. *See, e.g., Matter of Siebert*, 1994 Annual Report 103 (Commn on Jud Conduct) (judge was convicted of Driving While Ability Impaired after causing a three-car accident [admonition]); *Matter of Henderson*, *supra* (judge was convicted of Driving While Intoxicated, identified himself as a judge and asked, "Isn't there anything we can do?" [admonition]); *Matter of Barr*, 1981 Annual Report 139 (Commn on Jud Conduct) (judge had two alcohol-related convictions, asserted his judicial office and was abusive and uncooperative during his arrests, but had made "a sincere effort to rehabilitate himself" [censure]).

In recent years, in the wake of increased recognition of the dangers of Driving While Intoxicated and the toll it exacts on society, alcohol-related driving offenses have been regarded with particular severity. We conclude, even in the absence of exacerbating factors, that public discipline is appropriate in this case. *See Matter of Burns*, 1999 Annual Report 83 (Commn on Jud Conduct). Such a result not only underscores the seriousness of such misconduct, but also serves as a reminder to respondent and to the public that judges are held to the highest standards of conduct, both on and off the bench (Section 100.1 of the Rules Governing Judicial Conduct).

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

Mr. Goldman, Judge Ciardullo, Ms. DiPirro, Mr. Emery, Mr. Felder, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Coffey dissents and votes to reject the agreed statement of facts on the basis that the disposition is too lenient.

Ms. Hernandez and Mr. Pope were not present.

Dated: October 6, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **SCOTT J. PAUTZ**, a Justice of the Horseheads Town Court, Chemung County.

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Raoul Lionel Felder, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Hon. Scott J. Pautz, *pro se*

The respondent, Scott J. Pautz, a Justice of the Horseheads Town Court, Chemung County, was served with a Superseding Formal Written Complaint dated April 2, 2003, containing one charge. Respondent filed a verified answer dated November 19, 2003.

On March 1, 2004, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On March 18, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Horseheads Town Court, Chemung County since 1998. Respondent is an attorney. Respondent has attended and successfully completed all required training sessions for judges.

2. Prior to September 2000, respondent had been involved in an intimate personal relationship with Darlene Fivie.

3. From June 2000 through August 2000, respondent's relationship with Ms. Fivie entered a period of significant disagreement during which they unsuccessfully attempted, a number of times, to terminate the relationship.

4. The relationship thereafter concluded and on October 4, 2000, Ms. Fivie sent respondent a letter directing him to desist from all further contact with her.

5. On October 10, 2000, respondent sent Ms. Fivie a letter in which he castigated her for having ended their relationship and indicated that she might be incorrect about the statement in her letter that respondent would never again be a part of her life.

6. On October 12, 2000, respondent followed Ms. Fivie during her workout at the Club Nautilus fitness center by using equipment located adjacent to the equipment Ms. Fivie was using during her workout and thereafter left a soda can for Ms. Fivie at her vehicle.

7. On October 21, 2000, and October 28, 2000, at 5:29 A.M. and 12:45 A.M., respectively, respondent made "hang-up" calls to Ms. Fivie's residence.

8. On November 18, 2000, at approximately 2:30 A.M., respondent sat in his vehicle in the parking lot opposite the rear entrance of the Hanover Grille, where Ms. Fivie was employed, and drove away quickly when he was approached by Ms. Fivie.

9. On or about November 21, 2000, the charge of Harassment, Second Degree, a violation of Section 240.26(3) of the Penal Law, was filed against respondent based upon a criminal complaint filed by Ms. Fivie in connection with the incident on November 18, 2000. On or about January 9, 2001, respondent was granted an Adjournment in Contemplation of Dismissal as to the charge.

10. Respondent satisfied the conditions of the Adjournment in Contemplation of Dismissal and had no further contact with Ms. Fivie. In July 2001, the Harassment, Second Degree charge was dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent engaged in misconduct as defined by Article 6, Section 22 of the New York State Constitution and Section 44(1) of the Judiciary Law and violated Sections 100.1, 100.2, 100.2(A) and 100.4(A)(2) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings, and respondent's misconduct is established.

Both on and off the bench, judges are held to standards of conduct "much higher than for those of society as a whole." *Matter of Kuehnel v. Commn on Jud Conduct*, 49 NY2d 465, 469 (1980). Even personal conduct by a judge unrelated to judicial office may be subject to discipline. *See, e.g.*, *Matter of Miller*, 1997 Annual Report 108 (Commn on Jud Conduct) (judge sent anonymous, harassing mailings concerning an individual with whom she had had a personal relationship); *Matter of Cipolla*, 2003 Annual Report 84 (Commn on Jud Conduct) (judge wrote a letter under false pretenses seeking personal information about a woman he was dating); *Matter of Roepe*, 2002 Annual Report 153 (Commn on Jud Conduct) (judge threatened his wife with a knife during an angry confrontation).

For several weeks following the break-up of a personal relationship, respondent engaged in a series of annoying acts toward his Ms. Fivie, notwithstanding that she had sent him a letter directing him to desist from further contact with her. Respondent's behavior detracted from the dignity of judicial office and constitutes a departure from the exacting standards of personal conduct required of judges (Section 100.4[A][2] of the Rules). As respondent has stipulated, his

acts constitute misconduct notwithstanding the dismissal of criminal charges (*see, e.g., Matter of Roepe, supra* [Menacing charge was dismissed]; *Matter of Ciganek*, 2002 Annual Report 85 [Commn on Jud Conduct] [judge fired a gun several times near a highway to scare a wild turkey; Reckless Endangerment charge was adjourned in contemplation of dismissal]).

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

Mr. Berger, Judge Ciardullo, Mr. Coffey, Mr. Felder, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

Dated: March 30, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **GEORGE J. PULVER, JR.**, a Judge of the Family, County and Surrogate's Courts, Greene County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Henry T. Berger, Esq. [5]
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Roemer, Wallens & Mineaux, LLP (by James W. Roemer, Jr.)for Respondent

The respondent, George J. Pulver, Jr., a judge of the Family, County and Surrogate's Courts, Greene County, was served with a Superseding Formal Written Complaint dated January 12, 2004, containing three charges. Respondent filed a verified answer dated January 30, 2004.

On March 17, 2004, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On March 18, 2004, the Commission approved the agreed statement and made the following determination.

As to Superseding Charges I and II of the Formal Written Complaint:

1. Respondent has been a full-time judge of the Greene County, Family and Surrogate's Courts since January 1, 1996. Prior to that time, respondent was a practicing attorney, and partners with Edward Stiefel and John Winans in the law firm of Pulver and Stiefel. Respondent and Edward Stiefel owned, as tenants in common in a real property entity doing business as "Stiefel and Pulver," the building located at 331 Main Street in Catskill, New York (hereinafter "the building") which housed the law firm as well as other tenants.

[5] Mr. Berger's term ended on March 31, 2004. The terms of Ms. DiPirro and Mr. Emery commenced on April 1, 2004. The vote in this matter was taken on March 18, 2004.

2. Respondent withdrew from the law partnership of Pulver and Stiefel in August of 1995, prior to his election as a judge of the aforementioned courts of Greene County. Effective this date, the partnership of Pulver and Stiefel was dissolved, and although there was not a written dissolution of partnership, the terms and conditions of such dissolution to which Edward Stiefel, John Winans and respondent all agreed were, *inter alia*, as follows:

(a) Effective immediately, respondent agreed to convey his interest in all personalty owned by the law firm of Pulver and Stiefel to the partnership of Stiefel and Winans.

(b) Effective immediately, respondent agreed to convey to the partnership of Stiefel and Winans his interest in Pulver and Stiefel's good will, files, client lists and accounts receivable (except for several designated cases from which respondent would receive future proceeds).

(c) Effective immediately, respondent agreed to convey his interest in the building to John Winans.

(d) Respondent would sign any necessary documents to effectuate this agreement, including the deed transferring his interest in the building to John Winans.

(e) Effective immediately, respondent would receive no income from, and pay no expenses associated with, the building.

(f) Part of the consideration for respondent's actions was that John Winans would assume respondent's liability on the building's outstanding mortgage.

(g) This agreement was motivated, in part, by respondent's promise and desire to continue the tradition associated with this law firm, the oldest New York law firm in continuity, an interest in which respondent had himself been gratuitously given by former law firm partner H. Milton Chadderdon.

3. Immediately after the dissolution of the law firm of Pulver and Stiefel, the new law firm, known as Stiefel and Winans, created a separate real property business entity entitled Winans and Stiefel for the purpose of managing the building. The creation of this entity is evidence of the intent of all the parties that respondent's real property interests be immediately transferred to John Winans; however, the ministerial act effectuating the transfer of respondent's legal interest in the building did not occur until December 1999, by deed duly recorded in the Greene County Clerk's Office.

4. Respondent asserts, and John Winans confirms, that between November 1995 and December 1999, respondent repeatedly asked John Winans to draw up the deed in order to effectuate the agreement.

5. Since 1988, respondent has been one of the three principals of GEF Development, a "doing business as (D/B/A)" entity duly filed in the Greene County Clerk's Office. This filing put the general public on notice of the relationship. The other two principals of GEF Development are Frank Porto and Edward Stiefel.

6. The sole asset of GEF Development, purchased in 1988 for $210,000 (one third of the cost borne by each principal), was a 106 acre parcel of real property located in the Town of Coxsackie, Greene County. This property was then subdivided into nine lots with the associated costs also equally borne by the principals. Annual real property taxes were also equally shared.

7. Between 1988 and January 1, 1996, when respondent became a judge of Greene County, three parcels of land (constituting approximately 52.50 acres) were sold for a total sum of $107,000. In the time since respondent became a judge to the present, one additional parcel of land (9.05 acres) has been sold for a sum of $13,000. Thus, GEF Development's gross proceeds were $120,000. To the present, the sales have accounted for approximately 61.55 acres, and there are approximately 44.45 unimproved acres still remaining as an asset of GEF Development.

8. Respondent had no personal involvement in any of the sales other than signing the requisite documents. GEF Development never did any advertising to attempt to sell any of the parcels. GEF Development had no place of business, and no business meetings were ever conducted. Edward Stiefel had *carte blanche* authority with regard to GEF Development.

9. Each year since becoming a judge, respondent consistently disclosed his one-third interest in GEF Development on the annual disclosure forms which he is required to file with the Office of Court Administration.

10. In accordance with controlling ethical opinions, no partner or associate attorney in the firm of Stiefel and Winans appeared in any court proceeding before respondent for the first two years of respondent's term of office, namely from January 1, 1996 through December 31, 1997.

11. From January 1, 1998 to the present, respondent presided over the cases set forth in Schedules A, B, C and D of the Superseding Formal Written Complaint in which a party/interested person was represented by Edward Stiefel or a member of his law firm. The overwhelming majority of these appearances by Edward Stiefel or a member of his law firm were as law guardians for minors involved in Family Court proceedings.

12. Although Family Court staff selected the law guardian assigned to each case, respondent ratified these selections by affixing his signature to the Orders of Appointment.

13. The fees paid to the law guardians in such proceedings were $25 for each hour expended out of court and $40 for each hour expended in court.

14. In none of the cases in which members of Edward Stiefel's law firm appeared did respondent disclose his participation in GEF Development. Prior to December 1999, respondent did not disclose his status as an owner of record of the building housing the law firm and respondent's liability on the mortgage thereon.

As to Superseding Charge III of the Formal Written Complaint:

15. "A." is the biological daughter of teenage parents Joshua Apjohn and Summer Stafford. Sherry Stafford is "A.'s" maternal grandmother; Roseann Rock is "A.'s" maternal great-grandmother; and Marie and Patsy Porto are "A.'s" paternal great-grandparents.

16. On May 4, 2000, Albany Family Court granted temporary joint legal and physical custody of four-day-old "A." to her maternal great-grandmother (Roseann Rock) and mother (Summer Stafford) based on a neglect petition filed that same day by the Albany County Department of Social Services.

17. On February 13, 2001, paternal great-grandparents, Marie and Patsy Porto, filed a petition against Joshua Apjohn and Summer Stafford in Greene County Family Court seeking custody of "A." This verified petition, which is annexed as Exhibit 1 to the Superseding Formal Written Complaint, included a request for immediate temporary relief. Therefore, Family Court staff assigned the case to respondent in accordance with the policy of alternating new cases between the two Family Court Judges.

18. On February 16, 2001, believing that the allegations in the custody petition constituted the requisite extraordinary circumstances which permitted an *ex parte* ruling transferring temporary custody, respondent signed an *ex parte* Temporary Order transferring custody to Marie and Patsy Porto, without notice to the child's parents or joint custodian maternal great-grandmother Roseann Rock, and notwithstanding the following:

A. At the time of his February 16, 2001, ruling, respondent was unaware of the existence of the Albany order granting to maternal great-grandmother, Roseann Rock, temporary joint legal custody of "A." with Summer Stafford.

B. The paternal great-grandparents, Marie and Patsy Porto, had no standing to seek custody of "A." under Article 6 of the Family Court Act. Respondent would testify at a hearing that he believed that extraordinary circumstances existed and that the best interests of the child warranted the temporary relief granted.

C. Marie and Patsy Porto are the aunt and uncle of Frank Porto. Respondent would testify at a hearing that, at the time of his granting the *ex parte* Temporary Order, he did not associate Marie and Patsy Porto with GEF Development principal Frank Porto, since Porto is not an uncommon name in Greene County.

D. Insofar as respondent believed that extraordinary circumstances existed which dispensed with the requirement of conducting an evidentiary hearing before issuing a Temporary Order, Marie and Patsy Porto did not appear and testify before respondent in support of their petition, nor was any evidentiary hearing held. In sum, respondent issued the *ex parte* Temporary Order of custody based solely upon the allegations contained in the petition which is attached as Exhibit 1 to the Superseding Formal Written Complaint.

19. After reflecting upon the allegations in the petition, respondent believed that "A." was in imminent danger to her physical and emotional well-being and, having found that the above constituted extraordinary circumstances, therefore granted an *ex parte* Temporary Order of custody.

20. On February 16, 2001, Dale Dorner was appointed Law Guardian for "A." The Law Guardian was instructed to investigate and report as to the allegations contained in the petition and the adequacy of the Portos' household.

21. While respondent did direct the Law Guardian to conduct an immediate investigation of the situation, nonetheless, respondent failed to set a prompt hearing date after issuing the Temporary Order. In this regard, respondent notes that the March 19, 2001 return date for the Portos' petition was issued by Family Court staff and that Family Court sessions are conducted only once a week (each Monday) insofar as each judge sits in Family, County and Surrogate's Courts.

22. On March 19, 2001, the return date on the Portos' custody petition, [6] Marie and Patsy Porto appeared before respondent with their attorney, Assistant Public Defender Janet Schwarzenegger, who stated: "Your Honor, the Portos applied to our office for services. However, we realized after they were there, there was a conflict of interest. So they need to have an attorney assigned by the Court." Therefore, Janet Schwarzenegger's presence in Court on March 19, 2001 was the result of the Portos' having applied to, and been found eligible for services by, the Greene County Public Defender's Office. Respondent orally granted Janet Schwarzenegger's request that alternate counsel be assigned.

23. The March 19, 2001 court appearance was cut short, in part, by respondent's recusal, which was based on his having recognized Patsy Porto when seeing him in court for the first time, to be one of Frank Porto's relatives. However, during this brief court appearance, respondent failed to advise biological parents, Joshua Apjohn and Summer Stafford, of their rights to counsel in violation of Section 262(a) of the Family Court Act.

24. After recess to chambers, an off-the-record conference was conducted in the presence of Dale Dorner, Janet Schwarzenegger and Jeffrey Bagnoli, the attorney for Roseann Rock and Sherry Stafford, at which respondent disclosed that he was recusing himself and transferring the case to the Honorable Daniel K. Lalor because respondent was a friend of Frank Porto and in this apparently contentious case there might be an appearance of impropriety. Respondent acknowledges that at no time did he place this reasoning or his recusal on the record in open court.

25. On March 20, 2001, respondent issued an Order assigning counsel to Marie and Patsy Porto due to the Public Defender's Office conflict of interest referenced by Janet Schwarzenegger.

26. In accordance with Greene County custom and policy, following respondent's March 19, 2001 oral recusal, Law Guardian Dale Dorner drafted and submitted the order of transfer. For reasons unknown to respondent, this order was not submitted until April 10, 2001 and did not recite the reason for the transfer (presumably through inadvertence insofar as respondent had clearly stated the reason for his recusal in conference).

[6] March 19, 2001 was also the return date on a cross-petition for custody filed by maternal great-grandmother Roseann Rock and maternal grandmother Sherry Stafford.

27. However, respondent's recusal was effective March 19, 2001. Illustrative of this point is the fact that the Family Court file was transmitted forthwith to Judge Lalor. Additionally, Judge Lalor issued an April 5, 2001 Temporary Order granting Summer Stafford supervised visitation and an April 9, 2001 Order appointing counsel for Summer Stafford (both prior to respondent's signature of the Order of Transfer).

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

It was improper for respondent to engage in continuing business and financial dealings with an attorney appearing in respondent's court and, correspondingly, to permit the attorney and his law firm to appear before him at a time when respondent and the attorney were business partners. Well-established ethical standards require a judge's disqualification in a matter in which the judge's impartiality might reasonably be questioned, unless the parties consent to the judge's participation after full disclosure is made (Sections 100.3[E][1] and 100.3[F] of the Rules Governing Judicial Conduct). A judge is also barred from engaging in financial and business dealings that involve the judge in "continuing business relationships" with lawyers likely to come before the judge's court (Section 100.4[D][1][c] of the Rules; *Matter of Torraca*, 2001 Ann Rep 125 (Commn on Jud Conduct, Nov 7, 2000).

Notwithstanding respondent's efforts to terminate his business dealings with his former law partner Mr. Stiefel, respondent continued to have a financial relationship with the attorney for a significant period after becoming a full-time judge. Nonetheless, Mr. Stiefel and his firm appeared before respondent in scores of cases, and respondent never disclosed his participation with Mr. Stiefel in GEF Development and his status as the owner of the building housing Mr. Stiefel's firm. Although most of the appearances by Mr. Stiefel and his firm were as law guardians for minors in Family Court proceedings and there is no indication in the record that respondent's rulings in the matters were affected by his relationship with Mr. Stiefel, all the parties involved had a right to know of the judge's relationship with the Stiefel firm. Even if respondent believed that he could be impartial in the matters, he had an ethical duty to avoid any appearance of impropriety (Section 100.2[A] of the Rules).

Respondent's handling of a custody matter involving relatives of his business partner conveyed the appearance of partiality. Dispensing with the requirement of conducting an evidentiary hearing, respondent issued an *ex parte* order transferring temporary custody to his partner's relatives based solely on the allegations contained in the petition and failed to set a prompt hearing date in the matter. Thereafter, when the parties appeared in court, respondent assigned counsel for his partner's relatives while failing to advise the other parties of the right to counsel as required by law, and then recused himself after recognizing his partner's relative, who was in the courtroom. Under the circumstances, the series of rulings by respondent favoring the petitioners create an appearance of favoritism, notwithstanding respondent's claims that his rulings were appropriate on the merits and that he was unaware of the petitioners' relationship to

his business partner. Respondent's conduct violated his ethical duty to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Section 100.2[A] of the Rules).

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

Mr. Berger, Judge Ciardullo, Mr. Felder, Mr. Goldman, Ms. Hernandez, Judge Luciano, Judge Peters, Mr. Pope and Judge Ruderman concur.

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

Dated: May 18, 2004

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ETTORE A. SIMEONE**, a Judge of the Family Court, Suffolk County.

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Jennifer Tsai, Of Counsel) for the Commission
Vincent J. Messina, Jr., for Respondent

The respondent, Ettore A. Simeone, a judge of the Family Court, Suffolk County, was served with a Formal Written Complaint dated May 26, 2004, containing one charge. Respondent filed an answer dated June 7, 2004.

On September 14, 2004, the administrator of the Commission, respondent and respondent's counsel entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be either admonished or censured and waiving further submissions and oral argument.

On September 23, 2004, the Commission approved the agreed statement and made the following determination.

1. Respondent was admitted to the practice of law in New York in 1981. He has been a judge of the Family Court, Suffolk County, since August 1997.

2. Suzanne Mitsos is not an attorney. She is the director of Montfort House, a residential youth services facility in Suffolk County.

3. Respondent and Ms. Mitsos first met at a professional conference in 1998, when Ms. Mitsos was associated with Hope House Ministries, an affiliate of Montfort House.

4. In December 2001, the relationship between respondent and Ms. Mitsos became romantic.

5. From on or about December 21, 2001, to in or about May 2003, respondent remanded numerous Persons in Need of Supervision (PINS) to non-secure detention. The Department of

Probation assigned some of the PINS to Montfort House, one of two primary residential youth services facilities in Suffolk County. Respondent was aware of the assignments. Respondent continued to preside over matters involving PINS remanded to Montfort House, notwithstanding that he was involved in a romantic relationship with Ms. Mitsos, the director of Montfort House.

6. From on or about December 21, 2001, to in or about May 2003, when she appeared in respondent's court on matters related to Montfort House, Ms. Mitsos sat at the same table with and consulted with Jane Bernstein, Esq., the law guardian representing PINS remanded to Montfort House. Ms. Mitsos sometimes addressed the court on the record to advocate positions in substantive cases on which respondent had to pass judgment. In many cases, Ms. Mitsos submitted behavioral reports concerning PINS to the court. Her stated views sometimes opposed the recommendations of the county attorney, the Probation Department, Child Protective Services, and the Office of Children and Family Services.

7. Respondent never disclosed to the parties and the attorneys his relationship with Ms. Mitsos.

8. Respondent recognizes the impropriety and appearance of impropriety in his conduct, notwithstanding his effort in every case to render decisions on the merits.

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

A judge's disqualification is required in any matter where the judge's impartiality might reasonably be questioned (Section 100.3[E][1] of the Rules Governing Judicial Conduct). As respondent has stipulated, he violated that standard by presiding over numerous matters involving a youth services facility at a time when he was romantically involved with the facility's director. Over a period of 17 months, respondent remanded youths who were then assigned to the facility, and he continued to preside over proceedings involving those youths, notwithstanding his personal relationship with the facility's director, who appeared in respondent's court, filed reports and advocated positions on which he had to pass judgment. On occasion, those positions were contrary to those of the County Attorney and other advocates in respondent's court. Notwithstanding respondent's efforts to be impartial, respondent's conduct violated his duty to avoid impropriety and the appearance of impropriety, and each time he favored the position advocated by the facility's director, he raised a suspicion that his ruling was influenced by personal considerations. Sections 100.1 and 100.2 of the Rules; *Matter of Robert*, 1997 Annual Report 127, *accepted*, 89 NY2d 745 (1997); *Matter of DiBlasi*, 2002 Annual Report 87 (Commn on Jud Conduct).

In *DiBlasi*, a judge was disciplined, *inter alia*, for presiding for two months over cases involving an attorney for a social services agency with whom he had a romantic relationship, notwithstanding the judge's prompt efforts to be transferred out of the attorney's part. Here, there is no such mitigation, and respondent continued to preside over his friend's cases for a significant period. Each time his friend appeared in his court, respondent should have been

reminded of the conflict presented and should have recognized his ethical obligation not to preside in cases involving the facility.

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

Mr. Goldman, Judge Ciardullo, Ms. DiPirro, Mr. Felder, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Emery vote to accept the agreed statement of facts but dissent from the sanction and vote to admonish respondent.

Judge Luciano did not participate.

Ms. Hernandez and Mr. Pope were not present.

Dated: October 6, 2004

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

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn Blake, Of Counsel)
Roche, Corrigan, McCoy & Bush (By Robert P. Roche) for Respondent

The respondent, Joseph C. Teresi, a Justice of the Supreme Court, Albany County, was served with a Formal Written Complaint dated July 1, 2004, containing one charge. Respondent filed an answer dated July 14, 2004.

On November 2, 2004, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and waiving further submissions and oral argument. The administrator recommended that respondent be censured, and respondent's attorney recommended that respondent receive a sanction less than removal.

On November 4, 2004, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Supreme Court, Albany County since 1994.

2. From June 23, 2003, through June 26, 2003, respondent presided over the trial of *People v. Jeffrey Grune*, in which the defendant was charged with two felony DWI counts.

3. On the morning of June 25, 2003, counsel for the defendant, Randall Kehoe, advised respondent that he intended to call Sister Phyllis Herbert, a registered nurse and Roman Catholic nun, to testify as an expert witness on behalf of the defendant. Sister Herbert is the director of the Albany Honor Court, a program of the State Division of Probation and Correctional Alternatives, and in that capacity has worked with respondent for several years. Sister Herbert was called by defense counsel to be available for that afternoon. Respondent directed that the attorneys refrain from addressing the witness as "Sister" while she testified.

4. During the lunch recess on June 25, 2003, Sister Herbert visited respondent in

chambers to discuss an Honor Court case pending before respondent. No one else was present. In the course of their discussion, Sister Herbert told respondent that she was asked to be a witness in the pending case that afternoon.

5. Although Mr. Kehoe had informed respondent that morning that Sister Herbert was a proposed witness for the defense in *Grune*, respondent indicated surprise that she would be a witness and stated that he was unaware Sister Herbert "did that"; respondent further stated that he thought she normally remained "neutral." Sister Herbert told respondent that she had testified in one other drug case and then stated to respondent that she was asked to testify in *Grune* regarding the defendant's blood/alcohol content.

6. Respondent did not interrupt Sister Herbert or otherwise indicate that they should not discuss her impending testimony, nor did he discuss whether Sister Herbert could qualify as an expert witness.

7. Following her conversation with respondent, Sister Herbert decided that she would not testify on behalf of the defendant. Sister Herbert expressed grave concerns that her testimony might affect her neutrality in Albany Honor Court matters. Sister Herbert approached Mr. Kehoe in the courthouse hallway and told him that she had seen respondent and that she would not be able to testify as an expert witness for him because she was uncomfortable and was concerned it might somehow cause "a conflict of interest." Sister Herbert gave Mr. Kehoe the name of another potential expert witness and left the courthouse.

8. When the *Grune* trial resumed that afternoon, Mr. Kehoe stated on the record that Sister Herbert had abruptly withdrawn and requested an adjournment to locate another expert witness, which respondent denied. Mr. Kehoe's first choice of witnesses had not been able to testify due to a scheduling conflict and Mr. Kehoe could not represent to respondent whether he would be able to locate another expert witness without delaying the trial. The defendant did not present expert testimony on the subject matter at issue and was later convicted.

9. Respondent did not disclose his *ex parte* communication with Sister Herbert on the record, nor did he disclose it off the record to either the prosecutor or defense counsel. Although respondent did not view his exchange with Sister Herbert as a prohibited *ex parte* communication at the time, in hindsight respondent would have put it on the record, to err on the side of caution. Following the trial, the defendant filed a motion in County Court to vacate the judgment, citing respondent's conversation in chambers with Sister Herbert. The motion was denied.

10. Respondent now appreciates that he should have been sensitive to the appearances of his in-chambers *ex parte* conversation with a potential expert witness in a case before him. Respondent acknowledges that he was censured by the Commission in February 2001, in part for *ex parte* communications with the parties in a pending case, and in part for excluding a defense attorney from a substantive, in-chambers conversation that occurred immediately following the testimony of the plaintiff's expert witness in a pending case.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(6) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of

the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

It was improper for respondent to have an *ex parte* discussion in chambers with a witness scheduled to appear before him later that day. Such conduct violates Section 100.3(B)(6) of the Rules Governing Judicial Conduct, which specifically prohibits a judge from initiating, permitting or considering *ex parte* communications.

When Sister Herbert, the director of the Albany Honor Court, advised respondent that she was scheduled to be an expert witness for the defendant, respondent not only failed to terminate the discussion promptly, but expressed surprise and commented that he thought she normally remained "neutral." In fact, the defendant's attorney had stated earlier that day that he intended to call Sister Herbert as a witness in the case, so it appears that respondent should have known even before she spoke to him that she was about to testify in the pending proceeding. Respondent made no effort to interrupt her comments about her impending testimony and her role as an expert witness. The stipulated facts, including Sister Herbert's subsequent comments to the defendant's attorney about her conversation with respondent, make it clear that respondent's comments influenced her decision not to testify in the case.

Once respondent had spoken to the witness, he had an obligation to place the *ex parte* contact on the record and to hear objections to his continuing to preside in the case. *See, Matter of Cerbone*, 1997 Annual Report 83 (Comm. on Judicial Conduct). Respondent failed to disclose the *ex parte* contact, even when the defendant's attorney announced in court that the witness had abruptly withdrawn. Respondent's conduct created an appearance of impropriety and shows insensitivity to the high ethical standards required of judges. Compounding the harm caused by respondent's misconduct, he denied the defense request for an adjournment to get another expert witness, notwithstanding that he should have known that his *ex parte* conversation with Sister Herbert caused her not to testify.

In imposing sanction, we note that respondent had previously been warned of the impropriety of *ex parte* activity. In a determination dated February 8, 2001, respondent was censured, in part, for engaging in *ex parte* communications in a pending case and was specifically advised that such conduct is prohibited by Section 100.3(B)(6). *Matter of Teresi*, 2002 Annual Report 163 (Comm. on Judicial Conduct). In view of his prior discipline, respondent should have been especially sensitive to the high standards of conduct expected of judges and, in particular, the prohibition against improper *ex parte* discussions.

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

Mr. Goldman, Judge Ciardullo, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur.

Mr. Pope dissents from the disposition and votes that respondent be admonished.

Mr. Coffey and Ms. DiPirro were not present.

Dated: December 17, 2004

Statistical Analysis of Complaints

2005 Annual Report

New York State
Commission on Judicial Conduct

COMPLAINTS PENDING AS OF DECEMBER 31, 2003

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIM'RY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		12	29	8	3	5	4	61
DELAYS		2	2	3	0	1	1	9
CONFLICT OF INTEREST		8	10	3	0	0	2	23
BIAS		1	5	2	0	1	0	9
CORRUPTION		9	1	0	0	0	3	13
INTOXICATION		1	0	0	0	0	1	2
DISABILITY/QUALIFICATIONS		0	0	0	0	0	0	0
POLITICAL ACTIVITY		5	7	1	0	1	2	16
FINANCES/RECORDS/TRAINING		2	6	0	1	2	2	13
TICKET-FIXING		0	0	0	0	0	1	1
ASSERTION OF INFLUENCE		3	5	1	1	0	1	11
VIOLATION OF RIGHTS		8	23	9	0	2	10	52
MISCELLANEOUS		1	0	1	0	1	0	3
TOTALS		52	88	28	5	13	27	213

*Matters are "closed" upon vacancy of office for reasons other than resignation. "Action" includes determinations of admonition, censure and removal from office by the Commission since its inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by the temporary and former commissions on judicial conduct operating from 1975 to 1978.

NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 2004

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIM'RY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	671							671
NON-JUDGES	214							214
DEMEANOR	141	65	20	3	0	0	1	230
DELAYS	46	18	7	0	0	0	0	71
CONFLICT OF INTEREST	29	8	9	1	0	0	0	47
BIAS	67	14	5	0	0	0	0	86
CORRUPTION	10	9	0	0	0	0	0	19
INTOXICATION	2	1	0	0	0	0	0	3
DISABILITY/QUALIFICATIONS	3	0	0	0	0	0	0	3
POLITICAL ACTIVITY	5	8	3	1	1	0	0	18
FINANCES/RECORDS/TRAINING	9	12	4	0	2	0	0	27
TICKET-FIXING	0	3	0	0	0	0	1	4
ASSERTION OF INFLUENCE	7	10	0	1	0	0	0	18
VIOLATION OF RIGHTS	79	28	13	0	1	0	0	121
MISCELLANEOUS	8	2	3	1	0	0	0	14
TOTALS	1291	178	64	7	4	0	2	1546

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ALL COMPLAINTS CONSIDERED IN 2004: 1546 NEW & 213 PENDING FROM 2003

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIM'RY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	671							671
NON-JUDGES	214							214
DEMEANOR	141	77	49	11	3	5	5	291
DELAYS	46	20	9	3	0	1	1	80
CONFLICT OF INTEREST	29	16	19	4	0	0	2	70
BIAS	67	15	10	2	0	1	0	95
CORRUPTION	10	18	1	0	0	0	3	32
INTOXICATION	2	2	0	0	0	0	1	5
DISABILITY/QUALIFICATIONS	3	0	0	0	0	0	0	3
POLITICAL ACTIVITY	5	13	10	2	1	1	2	34
FINANCES/RECORDS/TRAINING	9	14	10	0	3	2	2	40
TICKET-FIXING	0	3	0	0	0	0	2	5
ASSERTION OF INFLUENCE	7	13	5	2	1	0	1	29
VIOLATION OF RIGHTS	79	36	36	9	1	2	10	173
MISCELLANEOUS	8	3	3	2	0	1	0	17
TOTALS	1291	230	152	35	9	13	29	1759

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ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR AFTER PRELIM'RY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*DISMISSAL & CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	12,369							12,369
NON-JUDGES	3792							3792
DEMEANOR	2730	77	942	272	97	88	204	4410
DELAYS	1140	20	112	58	21	14	18	1383
CONFLICT OF INTEREST	540	16	391	136	45	20	110	1258
BIAS	1690	15	223	50	26	16	25	2045
CORRUPTION	368	18	95	9	34	13	30	567
INTOXICATION	48	2	33	7	9	3	22	124
DISABILITY/QUALIFICATIONS	53	0	31	2	16	10	6	118
POLITICAL ACTIVITY	264	13	226	154	11	19	36	723
FINANCES/RECORDS/TRAINING	223	14	236	155	113	81	92	914
TICKET-FIXING	23	3	73	157	39	61	162	518
ASSERTION OF INFLUENCE	153	13	115	59	11	7	49	407
VIOLATION OF RIGHTS	2314	36	330	154	66	32	63	2995
MISCELLANEOUS	700	3	230	80	26	39	57	1135
TOTALS	26,407	230	3037	1293	514	403	874	32,758

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