

NEW YORK STATE

COMMISSION ON JUDICIAL
CONDUCT



ANNUAL REPORT
2009

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT



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*Denotes staff who recently retired or left for other employment



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March 1, 2009

To Governor David A. Paterson,
Chief Judge Jonathan Lippman, and
The Legislature of the State of New York:

Pursuant to Section 42, paragraph 4, of the Judiciary Law of the State of New York, the New York State Commission on Judicial Conduct respectfully submits this Annual Report of its activities, covering the period from January 1 through December 31, 2008.

Respectfully submitted,

Robert H. Tembeckjian, Administrator
On behalf of the Commission

TABLE OF CONTENTS

Introduction to the 2009 Annual Report	1
Bar Graph: Complaints, Inquiries & Investigations in the Last Ten Years	1
Action Taken in 2008	2
Complaints Received	2
Pie Chart: Complaint Sources in 2008	2
Preliminary Inquiries and Investigations	2
Formal Written Complaints	3
Summary of All 2008 Dispositions	4
Table 1: Town & Village Justices	4
Table 2: City Court Judges	4
Table 3: County Court Judges	5
Table 4: Family Court Judges	5
Table 5: District Court Judges	5
Table 6: Court of Claims Judges	6
Table 7: Surrogates	6
Table 8: Supreme Court Justices	6
Table 9: Court of Appeals Judges and Appellate Division Justices	7
Table 10: Non-Judges and Others Not Within the Commission's Jurisdiction	7
Note on Jurisdiction	7
Formal Proceedings	8
Overview of 2008 Determinations	8
Determination of Removal	8
Determinations of Censure	8
Determinations of Admonition	10
Other Public Dispositions	11
Other Dismissed or Closed Formal Written Complaints	12
Matters Closed Upon Resignation	12
Referrals to Other Agencies	12
Letters of Dismissal and Caution	13
Improper <i>Ex Parte</i> Communications	13
Political Activity	13
Failure to Adhere to Statutory and Other Administrative Mandates	13
Demeanor	13
Audit and Control	13
Delay	13
Miscellaneous	13

Follow Up on Caution Letters	14
Commission Determinations Reviewed by the Court of Appeals	14
<i>Matter of Robert M. Restaino</i>	
<i>Matter of Dennis LaBombard</i>	
<i>Matter of David F. Jung</i>	
Observations and Recommendations	15
Public Disciplinary Proceedings	15
Suspension from Office	16
Plea Bargaining with Officers in Vehicle & Traffic Cases	18
Raising Funds for Civic, Charitable or Other Organizations	19
Setting Bail in Only One Form	20
The Commission's Budget	21
Sacrifice in the Coming Year	22
Chart: Selected Budget Figures 1978 to Present	23
Conclusion	23
Appendix A: Biographies of Commission Members	24
Appendix B: Biographies of Commission Attorneys	29
Appendix C: Referees Who Served in 2008	33
Appendix D: The Commission's Powers, Duties and History	34
Appendix E: Rules Governing Judicial Conduct	42
Appendix F: Text of 2008 Determinations Rendered by the Commission	60
<i>Matter of Michael R. Ambrecht</i>	60
<i>Matter of Thomas W. Baldwin</i>	74
<i>Matter of Roland A. Beers</i>	79
<i>Matter of June P. Chapman</i>	81
<i>Matter of Robert G. Dunlop</i>	83
<i>Matter of Linda C. Griffin</i>	90
<i>Matter of Duane A. Hart</i>	97
<i>Matter of David F. Jung</i>	106
<i>Matter of Elissa Y. Killian</i>	118
<i>Matter of Mary Anne Lehmann</i>	120
<i>Matter of Morris H. Lew</i>	130
<i>Matter of Rebecca McGowan</i>	136
<i>Matter of Shawn W. Minogue</i>	138
<i>Matter of Robert C. Murphy</i>	146

<i>Matter of William C. Pelella</i>	148
<i>Matter of Spero Pines</i>	154
<i>Matter of David Ray</i>	160
<i>Matter of Marie Roller</i>	165
<i>Matter of Joan E. Shkane</i>	170
<i>Matter of John L. Taft</i>	174
<i>Matter of Ellen Yacknin</i>	176
Appendix G: Statistical Analysis of Complaints	183
Complaints Pending as of December 31, 2007	183
New Complaints Considered by the Commission in 2008	184
All Complaints Considered in 2008: 1,923 New & 238 Pending from 2007	185
All Complaints Considered Since the Commission's Inception in 1975	186

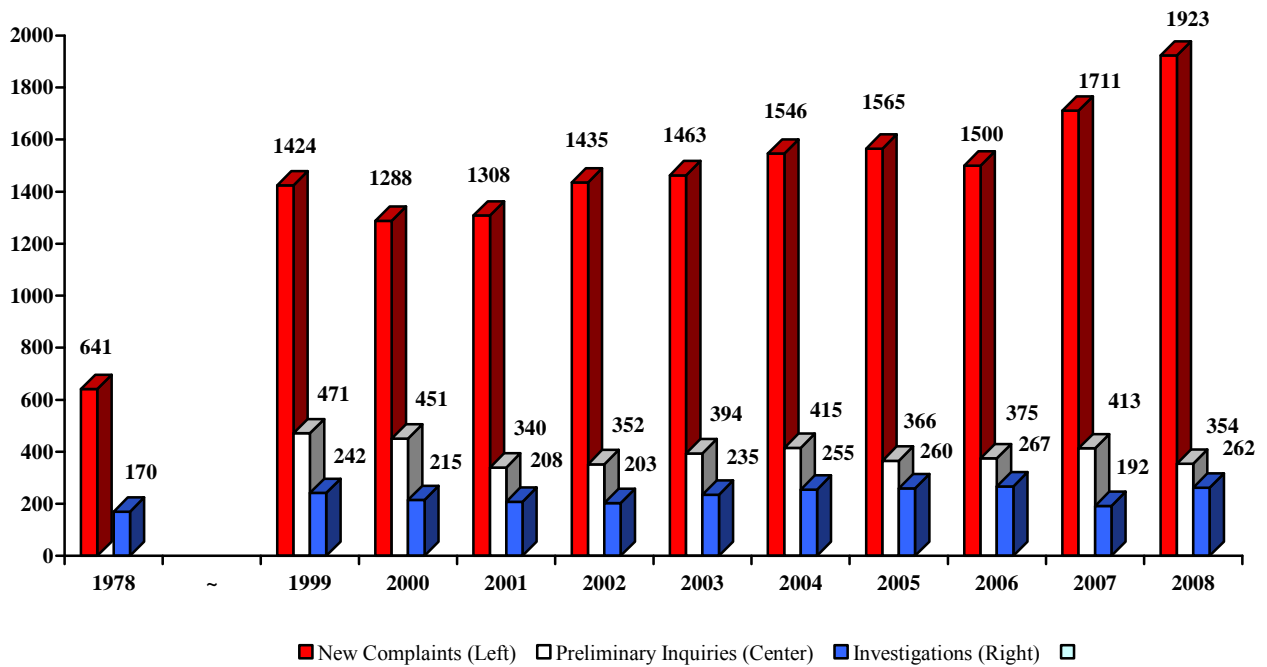
INTRODUCTION TO THE 2009 ANNUAL REPORT

The New York State Commission on Judicial Conduct is the independent agency designated by the State Constitution to review complaints of misconduct against judges and justices of the State Unified Court System and, where appropriate, render public disciplinary determinations of admonition, censure or removal from office. There are approximately 3,500 judges and justices in the system.

The Commission’s objective is to enforce high standards of conduct for judges, who must be free to act independently, on the merits and in good faith, but also must be held accountable should they commit misconduct. The text of the Rules Governing Judicial Conduct, promulgated by the Chief Administrator of the Courts on approval of the Court of Appeals, is annexed.

The number of complaints received annually by the Commission in the past 17 years has substantially increased compared to the first 17 years of the Commission’s existence. Since 1992, the Commission has averaged over 1,480 new complaints per year, 410 preliminary inquiries and 215 investigations. Last year, 1,923 new complaints were received and processed, the most ever, surpassing the prior year’s record of 1,711. Of these new complaints, 262 were investigated, just short of the previous high of 267 in 2006. Recently, for the first time in a generation, the Commission’s budget and staff were significantly increased, and one important result has been a drop in number of complaints pending at year’s end, from 275 in 2006 to 208 in 2008.

This report covers Commission activity in the year 2008.



COMPLAINTS, INQUIRIES & INVESTIGATIONS IN THE LAST TEN YEARS

ACTION TAKEN IN 2008

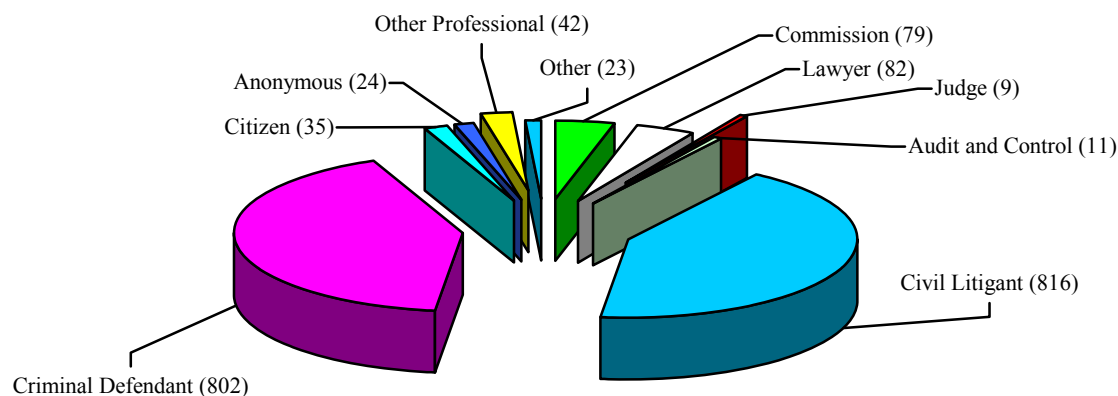
Following are summaries of the Commission's actions in 2008, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

COMPLAINTS RECEIVED

The Commission received 1,923 new complaints in 2008 – the most ever in one year. All complaints are summarized and analyzed by staff and reviewed by the Commission, which decides whether to investigate.

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

A breakdown of the sources of complaints received by the Commission in 2008 appears in the following chart.



COMPLAINT SOURCES IN 2008

PRELIMINARY INQUIRIES AND INVESTIGATIONS

The Commission's Operating Procedures and Rules authorize "preliminary analysis and clarification" and "preliminary fact-finding activities" by staff upon receipt of new complaints, to aid the Commission in determining whether an investigation is warranted. In 2008, staff conducted 354 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

In 262 matters, the Commission authorized full-fledged investigations. Depending on the nature of the complaint, an investigation may entail interviewing witnesses, subpoenaing witnesses to testify and produce documents, assembling and analyzing various court, financial or other records, making court observations, and writing to or taking testimony from the judge.

During 2008, in addition to the 262 new investigations, there were 174 investigations pending from the previous year. The Commission disposed of the combined total of 436 investigations as follows:

- 173 complaints were dismissed outright.
- 33 complaints involving 32 different judges were dismissed with letters of dismissal and caution.
- 21 complaints involving 12 different judges were closed upon the judges' resignation.
- 14 complaints involving 13 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.
- 26 complaints involving 23 different judges resulted in formal charges being authorized.
- 169 investigations were pending as of December 31, 2008.

FORMAL WRITTEN COMPLAINTS

As of January 1, 2008, there were pending Formal Written Complaints in 64 matters, involving 34 different judges. In 2008, Formal Written Complaints were authorized in 26 additional matters, involving 23 different judges. Of the combined total of 90 matters involving 57 judges, the Commission acted as follows:

- 24 matters involving 15 different judges resulted in formal discipline (admonition, censure or removal from office).
- 11 matters involving six judges were closed upon the judge's departure from office, becoming public by stipulation.
- Six matters involving five judges resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- Five additional complaints involving three different judges were closed upon the judge's resignation.
- Five complaints involving three 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.
- 39 matters involving 25 different judges were pending as of December 31, 2008.

SUMMARY OF ALL 2008 DISPOSITIONS

The Commission's investigations, hearings and dispositions in the past year involved judges of various courts, as indicated in the following ten tables.

TABLE 1: TOWN & VILLAGE JUSTICES – 2,250,* ALL PART-TIME

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	123	211	334
Complaints Investigated	44	99	143
Judges Cautioned After Investigation	2	22	24
Formal Written Complaints Authorized	1	13	14
Judges Cautioned After Formal Complaint	1	1	2
Judges Publicly Disciplined	0	6	6
Judges Vacating Office by Public Stipulation	1	4	5
Formal Complaints Dismissed or Closed	1	4	5

NOTE: Approximately 400 town and village justices are lawyers.

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

TABLE 2: CITY COURT JUDGES – 385, ALL LAWYERS

	<i>Part-Time</i>	<i>Full-Time</i>	<i>Total</i>
Complaints Received	61	239	300
Complaints Investigated	11	24	35
Judges Cautioned After Investigation	0	3	3
Formal Written Complaints Authorized	0	1	1
Judges Cautioned After Formal Complaint	2	1	3
Judges Publicly Disciplined	0	3	3
Judges Vacating Office by Public Stipulation	1	0	1
Formal Complaints Dismissed or Closed	0	1	1

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

TABLE 3: COUNTY COURT JUDGES – 129 FULL-TIME, ALL LAWYERS*

Complaints Received	279
Complaints Investigated	23
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	4
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

* Includes 13 who also serve as Surrogates, six who also serve as Family Court Judges, and 38 who also serve as both Surrogates and Family Court judges.

TABLE 4: FAMILY COURT JUDGES – 127, FULL-TIME, ALL LAWYERS

Complaints Received	190
Complaints Investigated	24
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	4
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

TABLE 5: DISTRICT COURT JUDGES – 50, FULL-TIME, ALL LAWYERS

Complaints Received	22
Complaints Investigated	2
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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

Complaints Received	58
Complaints Investigated	2
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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

Complaints Received	38
Complaints Investigated	11
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

* Some Surrogates also serve as County Court and Family Court judges. See Table 3 above.

TABLE 8: SUPREME COURT JUSTICES – 335, FULL-TIME, ALL LAWYERS*

Complaints Received	266
Complaints Investigated	22
Judges Cautioned After Investigation	3
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

* Includes 14 who serve as Justice of the Appellate Term.

**TABLE 9: COURT OF APPEALS JUDGES – 7 FULL-TIME, ALL LAWYERS;
APPELLATE DIVISION JUSTICES – 67 FULL-TIME, ALL LAWYERS**

Complaints Received	40
Complaints Investigated	0
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Vacating Office by Public Stipulation	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

**TABLE 10: NON-JUDGES AND OTHERS NOT WITHIN
THE COMMISSION'S JURISDICTION***

Complaints Received	396
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* The Commission reviews such complaints to determine whether to refer them to other agencies.

NOTE ON JURISDICTION

The Commission's jurisdiction is limited to judges and justices of the state unified court system. The Commission does not have jurisdiction over non-judges, retired judges, judicial hearing officers (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 2008. The actual texts are appended to this Report in Appendix F.

OVERVIEW OF 2008 DETERMINATIONS

The Commission rendered 15 formal disciplinary determinations in 2008: One removal, eight censures and six admonitions. In addition, six matters were disposed of by stipulation made public by agreement of the parties. Ten of the 21 respondents were non-lawyer-trained judges and eleven were lawyers. Eleven of the respondents were town or village justices and ten were judges of higher courts.

DETERMINATION OF REMOVAL

The Commission completed one formal proceeding in 2008 that resulted in a determination of removal. The case is summarized below and the full text can be found in Appendix F.

Matter of David F. Jung

On February 13, 2008, the Commission determined that David F. Jung, a Judge of the Family Court, Fulton County, should be removed from office for depriving litigants of their fundamental rights and for showing a “systematic disregard” for basic legal requirements. Judge Jung requested review by the Court of Appeals, which upheld the Commission’s determination.

DETERMINATIONS OF CENSURE

The Commission completed eight formal proceedings in 2008 that resulted in public censure. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Shawn W. Minogue

On February 21, 2008, the Commission determined that Shawn W. Minogue, a Justice of the Wilmington Town Court, Essex County, should be censured for failing to deposit and report official monies in a timely manner as required by law, and also for dismissing a seat belt charge against her sister-in-law. Judge Minogue, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Duane A. Hart

On March 7, 2008, the Commission determined that Duane A. Hart, a Justice of the Supreme Court, Queens County, should be censured for improperly threatening an attorney with contempt, presiding over a case in which he had a relationship with an attorney, denying an attorney’s

request to make a record, granting a lengthy adjournment for a punitive purpose, and offering to testify on an attorney's behalf in a lawyer disciplinary matter if the attorney testified for him before the Commission. Judge Hart was previously censured by the Commission in 2005. He filed a request of review by the Court of Appeals, which was dismissed for want of prosecution.

Matter of Morris H. Lew

On March 26, 2008, the Commission determined that Morris H. Lew, a Justice of the Farmington Town Court, Ontario County, should be censured for engaging in ticket-fixing by dismissing a speeding ticket for a friend's wife. Judge Lew, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Linda C. Griffin

On May 16, 2008, the Commission determined that Linda C. Griffin, a Judge of the Family Court, Rensselaer County, should be censured. The Commission found that Judge Griffin abused the contempt power by holding litigants in three cases in summary contempt without explicitly warning them of the consequences of their behavior and without an order stating the facts justifying the contempt citation, which is necessary to enable appellate review. Judge Griffin did not request review by the Court of Appeals.

Matter of Marie Roller

On July 7, 2008, the Commission determined that Marie Roller, a Justice of the Veteran Town Court and Acting Justice of the Millport Village Court, Chemung County, should be censured for failing to deposit or not requiring her court staff to deposit thousands of dollars in court funds in a timely manner, in violation of court system rules. There was no indication that any court funds were stolen or otherwise misappropriated. As a result of the Commission's inquiry, all funds were accounted for and deposits were made. Judge Roller, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Robert G. Dunlop

On October 28, 2008, the Commission determined that Robert G. Dunlop, a Justice of the Chazy Town Court, Clinton County, should be censured for accepting a guilty plea from a defendant whom he sentenced to serve 90 days in jail when the defendant was not represented by an attorney and was incapable of understanding the proceedings. Judge Dunlop, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Michael R. Ambrecht

On October 29, 2008, the Commission determined that Michael R. Ambrecht, a Judge of the Court of Claims and Acting Justice of the Supreme Court, New York County, should be censured for presiding over two cases in which his personal attorney appeared, and for making a "misleading" and "deceptive" disclosure about the relationship on the record in one case and failing to disclose it at all in the second case. Judge Ambrecht did not request review by the Court of Appeals.

Matter of Mary Anne Lehmann

On November 10, 2008, the Commission determined that Mary Anne Lehmann, a Judge of the Binghamton City Court, Broome County, should be censured for permitting attorneys from the law firm of her part-time co-judge to appear before her, contrary to law and rules. The judge also

failed to disqualify herself from cases in which the law firm representing her before the Commission appeared as counsel. In some instances she did not disclose the conflict. Judge Lehmann did not request review by the Court of Appeals.

DETERMINATIONS OF ADMONITION

The Commission completed six proceedings in 2008 that resulted in a determination of public admonition. The cases are summarized as follows and the full texts can be found in Appendix F.

Matter of David Ray

On February 26, 2008, the Commission determined that David Ray, a Justice of the Brookfield Town Court, Madison County, should be admonished for convicting and fining the defendants in a code violation case without a trial or guilty plea based on *ex parte* information. Judge Ray, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Spero Pines

On June 17, 2008, the Commission determined that Spero Pines, a Judge of the Family Court, Broome County, should be admonished for speaking to litigants in three separate cases with sarcasm and disrespect, thereby failing to be patient, dignified and courteous as required by the Rules Governing Judicial Conduct. Judge Pines did not request review by the Court of Appeals.

Matter of Thomas W. Baldwin

On August 22, 2008, the Commission determined that Thomas W. Baldwin, a Justice of the Cairo Town Court, Greene County, should be admonished as a result of “significant” delays in three small claims actions filed in his court. Judge Baldwin, who is not a lawyer, did not request review by the Court of Appeals.

Matter of William C. Pellella

On November 10, 2008, the Commission determined that William C. Pellella, a Judge of the Binghamton City Court, Broome County, should be admonished for permitting attorneys from the law firm of his part-time co-judge to appear before him, contrary to law and rules. Judge Pellella did not request review by the Court of Appeals.

Matter of Ellen Yacknin

On December 29, 2008, the Commission determined that Ellen Yacknin, a Judge of the Rochester City Court, Monroe County, should be admonished for improperly seeking political support while on the bench from an attorney who was about to appear before her. Judge Yacknin did not request review by the Court of Appeals.

Matter of Joan E. Shkane

On December 29, 2008, the Commission determined that Joan E. Shkane, a Judge of the Family Court, Oneida County, should be admonished for improperly threatening to hold the Oneida County Advocacy Center and two police investigators in contempt after the investigators took the father in a child neglect case into custody while he was in the courtroom’s waiting area during a pre-hearing conference. Judge Shkane did not request review by the Court of Appeals.

OTHER PUBLIC DISPOSITIONS

The Commission completed six other proceedings in 2008 that resulted in public dispositions. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Elissa Y. Killian

On January 31, 2008, pursuant to a stipulation, the Commission discontinued a proceeding involving Elissa Y. Killian, an Acting Justice of the Liberty Village Court, Sullivan County, after serving her with formal charges alleging that she failed to report and remit fines and fees to the State Comptroller as required by law and failed to cooperate with the Commission's investigation in a timely manner. There was no allegation that the judge misappropriated court funds. The judge, who is a lawyer, resigned and affirmed that she would neither seek nor accept judicial office at any time in the future.

Matter of Roland A. Beers

On March 12, 2008, pursuant to a stipulation, the Commission discontinued a proceeding involving Roland A. Beers, a non-lawyer Justice of the Walton Village Court, Delaware County, after serving him with formal charges alleging that in three cases he violated the rights of defendants and failed to effectuate the defendants' right to counsel, notwithstanding that he had previously been cautioned for such conduct. The judge resigned and affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of John L. Taft

On May 9, 2008, pursuant to a stipulation, the Commission discontinued a proceeding involving John L. Taft, a non-lawyer Justice of the Southport Town Court, Chemung County, after serving him with formal charges alleging that he failed to disqualify himself in a case in which the defendant was his personal physician. The judge also initiated an *ex parte* telephone conversation with the defendant and granted a favorable disposition, *i.e.* an Adjournment in Contemplation of Dismissal. The judge resigned and affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Robert C. Murphy

On May 20, 2008, pursuant to a stipulation, the Commission discontinued a proceeding involving Robert C. Murphy, a part-time Judge of the Binghamton City Court, Broome County, after serving him with formal charges alleging that he permitted his law partners and associates – including a former member of the Commission – to practice in his court, and to appear before him in some instances, contrary to law and promulgated rules. The judge agreed to leave office at the expiration of his term in June 2008 and acknowledged that if he ever returned to judicial office, charges would be reinstated and the Administrator would seek his removal from office.

Matter of June P. Chapman

On June 23, 2008, pursuant to a stipulation, the Commission discontinued a proceeding involving June P. Chapman, a non-lawyer Justice of the Ellicottville Town Court, Cattaraugus County, after serving her with formal charges alleging that she failed to ensure that defendants in three cases had access to counsel in a timely manner or altogether, failed to deposit bail monies in a timely manner in six cases despite the Commission's prior censure of her for such conduct, failed to remit fine receipts in 22 cases to the State Comptroller, and failed to order pre-sentence

investigation reports from the Probation Department so that defendants in three cases could be sentenced in a timely manner. Judge Chapman resigned and affirmed that she would neither seek nor accept judicial office at any time in the future.

Matter of Rebecca McGowan

On August 4, 2008, pursuant to a stipulation, the Commission discontinued a proceeding involving Rebecca McGowan, a non-lawyer Justice of the Jewett Town Court, Greene County, after serving her with formal charges alleging that she granted special consideration to her brother-in-law, failed to disqualify herself from five other matters in which the defendants were either her relatives or a family friend and failed to make timely deposits of court funds from eight cases as required by law. The judge resigned and affirmed that she would neither seek nor accept judicial office at any time in the future.

OTHER DISMISSED OR CLOSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of 11 Formal Written Complaints in 2008 without rendering public discipline or dispositions. Five 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. Three complaints were closed because the respondent-judge's term of office expired. Three complaints were closed without public stipulation when the respondent-judges resigned.

MATTERS CLOSED UPON RESIGNATION

Twenty judges resigned in 2008 while complaints against them were pending at the Commission. Twelve of them resigned while under investigation and eight resigned while under formal charges by the Commission. Five of these resignations were pursuant to a stipulation and are summarized in "Other Public Dispositions" above. 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 2008, the Commission referred 24 matters to other agencies. Nineteen matters were referred to the Chief Administrative Judge or other officials at the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record-keeping or other administrative issues. One matter was referred to an attorney grievance committee. One matter was referred to the Traffic Violations Bureau. One matter was referred to the State Police. Two matters were referred to the State Comptroller.

LETTERS OF DISMISSAL AND CAUTION

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

Cautionary letters are authorized by the Commission's Rules, 22 NYCRR 7000.1(1) and (m). They serve as an educational tool and, when warranted, allow the Commission to address a judge's conduct without making the matter public.

In 2008, the Commission issued 32 Letters of Dismissal and Caution and five Letters of Caution. Twenty-six town or village justices were cautioned, including three who are lawyers. Eleven judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct as indicated below.

Improper *Ex Parte* Communications. Three judges were cautioned for engaging in unauthorized *ex parte* communications. For example, one judge made numerous telephone calls to a defendant while her case was pending, giving rise to an appearance that there was a relationship between them.

Political Activity. Eight judges were 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 judicial office. The eight judges committed isolated and relatively minor violations of the applicable rules.

Failure to Adhere to Statutory and Other Administrative Mandates. Ten judges were cautioned for failing to meet certain mandates of law, either out of ignorance or administrative oversight. For example, four judges were cautioned for having a general practice of requiring defendants who pleaded not guilty by mail in traffic cases to appear for pre-trial conferences instead of scheduling a trial date upon receipt of their pleas.

Demeanor. Four judges were cautioned for being discourteous to litigants, attorneys or witnesses.

Audit and Control. Two judges were cautioned for not ensuring that fines and other court funds were properly and timely recorded, deposited and disbursed.

Delay. Four judges were cautioned for delay in scheduling or disposing of cases, despite prompting from the parties.

Miscellaneous. One judge was cautioned for performing a wedding for a defendant whose case was pending before her.

Follow Up on Caution Letters.

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

**COMMISSION DETERMINATIONS REVIEWED BY
THE COURT OF APPEALS**

Pursuant to statute, a respondent-judge has 30 days to request review of a Commission determination by the Court of Appeals, or the determination becomes final. In 2008, the Court decided the following three Commission matters.

Matter of Robert M. Restaino

On November 13, 2007, the Commission determined that Robert M. Restaino, a Judge of the Niagara Falls City Court, Niagara County, should be removed for engaging in an “egregious and unprecedented abuse of judicial power” by committing 46 defendants into police custody after no one took responsibility for a ringing cell phone in the courtroom.

In an opinion dated June 5, 2008, the Court of Appeals accepted the Commission's decision and removed the judge from office. 10 NY3d 577 (2008). The Court said Judge Restaino displayed “insensitivity, indifference and a callousness so reproachable that his continued presence on the Bench cannot be tolerated.” *Id.* at 590. Judge Restaino had argued that his conduct was an “aberration in an otherwise unblemished judicial career,” *Id.* at 588, but the Court said that in rare cases “no amount of [mitigation] can override inexcusable conduct.” *Id.* at 590 (quoting *Matter of Bauer*, 3 NY3d 158, 166 [2004]).

Matter of Dennis LaBombard

On December 12, 2007, the Commission determined that Dennis LaBombard, a Justice of the Ellenburg Town Court, Clinton County, should be removed for, *inter alia*, sitting on a case in which his two step-grandchildren were defendants, contacting a town court justice assigned to another case involving his step-grandson, presiding over an arraignment and bail proceeding involving a former co-worker's son, and attempting to use the prestige of his judicial office when he was involved in a minor car accident by mentioning that he was a judge.

In an opinion dated October 23, 2008, the Court of Appeals accepted the Commission's decision and removed the judge from office. 11 NY3d 294 (2008). The Court said few principles “are more fundamental to the integrity, fair-mindedness and impartiality of the judiciary than the requirement that judges not preside over or otherwise intervene in judicial matters involving relatives.” *Id.* at 297. The Court said that Judge LaBombard's failure to disqualify himself or

disclose his relationship in the case involving his former co-worker's son resulted in an "appearance of favoritism," and that his "repeated invocation of his judicial status after the motor vehicle accident was improper as it appears to have been an attempt to use the prestige associated with judicial office to intimidate the other motorist." *Id.* at 298.

Matter of David F. Jung

On February 13, 2008, the Commission determined that David F. Jung, a Judge of the Family Court, Fulton County, should be removed for depriving litigants of fundamental rights and for showing a "systematic disregard" of basic due process legal requirements.

In an opinion dated October 28, 2008, the Court of Appeals accepted the Commission's decision and removed the judge from office. 11 NY3d 365 (2008). The Court said Judge Jung's policy of not producing an incarcerated litigant for a proceeding unless he or she specifically asked to be produced "imposed an onerous and unfair burden on litigants who had no way of knowing what was required of them." *Id.* at 374. The Court said this policy, along with the judge's imposition of a two-week time limit on requests for counsel, showed a "pattern of injudicious behavior." *Id.* at 375.

OBSERVATIONS AND RECOMMENDATIONS

PUBLIC DISCIPLINARY PROCEEDINGS

The Commission has commented on the important subject of public hearings in numerous forums and annual reports, as recently as two years ago.

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 waives confidentiality.

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 significant part because of the Commission's painstaking efforts to render a determination that is fair and comports with due process. If the charges and hearing portion of a Commission matter were open, the public would have a better understanding of the entire disciplinary process. The very fact that charges had been served and a hearing scheduled would no longer be secret.

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

judges themselves often consult with judicial colleagues, staff and others, revealing the details of 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.

On several occasions, most recently in 2003, the Legislature has considered bills to open the Commission’s proceedings to the public at the point when formal disciplinary charges are filed against a judge. Such legislation has had support in either the Assembly or the Senate at various times, although never in both houses during the same legislative session.

The Commission itself has long advocated that post-investigation formal proceedings should be made public, as they were in New York State until 1978, and as they are now in 35 other states. It again recommends that the Legislature take up the issue.

SUSPENSION FROM OFFICE

The power to suspend judges from office is another important subject on which the Commission has previously commented.

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 occasionally happen. In 2008, a newly-elected Surrogate’s Court Judge was indicted for allegedly violating campaign finance laws, and was suspended by the Court of Appeals pending trial.

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 Appellate Divisions 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:

- 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
- a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or
- other uncontested evidence of professional misconduct.

Rules of the Appellate Division, First Department, §603.4(e)(1)¹

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

¹ 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).

existing criteria should be expanded. We recommend that the Governor and Legislature consider so empowering the Court.

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. There was also concern about the effect on court administration and public finances, especially in less populous counties and in the town and village courts, where it would be difficult to arrange and pay for temporary replacements, and where case management would be uprooted both when the temporary judge arrived and left.

Nevertheless, at times the Commission has felt constrained by the lack of suspension power, noting in several 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. In several recent cases – *Matter of Cathryn M. Doyle* in 2007, *Matter of William A. Carter* in 2006, *Matter of Ira J. Raab* in 2003 – the Commission explicitly stated that it chose to censure the judge because it lacked the power to suspend.

As it has done previously, the Commission suggests that the Governor and Legislature consider the merits of a constitutional amendment, providing suspension without pay as an alternative sanction available to the Commission.

PLEA BARGAINING WITH OFFICERS IN VEHICLE & TRAFFIC CASES

In view of the very high volume of speeding and other Vehicle & Traffic Law (VTL) cases returnable to town and village courts, and the unlikelihood (due to limited resources) that a District Attorney's office could send assistants to all the courts in a particular county handling traffic matters on a given day or night, it was standard practice until recently for the ticket-issuing officer, typically a State Trooper or a local police officer, to appear in court, meet the motorist before the calendar call and where appropriate negotiate a plea for the judge to consider in lieu of trial.

In 2006, a State Police directive said that a standing policy prohibiting State Troopers from, in effect, plea bargaining or otherwise serving as the *de facto* prosecutor of VTL cases would be enforced. One reason for the policy was a concern that it was a conflict of interest for the ticket-issuing officer, as a witness to the alleged violation, to also play the role of prosecutor. Although the Legislature has passed bills to countermand that policy and permit Troopers to play their traditional role in such matters, the measure has been vetoed each time.

One consequence of the directive has been to put town and village justices in a difficult position. They and their courts do not necessarily have the resources to conduct trials on all the contested VTL cases that appear on their calendars on a given day or night. Yet it would compromise their impartiality to step out of the adjudicative role and negotiate a plea bargain in the manner of a prosecutor.

Since most local police forces have declined to follow the State Police lead on this subject, two traffic tickets returnable to the same court on the same night can result in completely different treatment, as the local officer plea bargains with the motorist charged by a local officer with committing a speeding violation, while the motorist charged by the State Trooper must wait for trial that night or, if time does not permit, return for trial at a later date.

The Commission reminds all town and village justices not only to avail themselves of the resources of the Advisory Committee on Judicial Ethics and the City, Town and Village Resource Center of the Unified Court System for guidance on the appropriate constraints they must exercise in this admittedly vexatious situation, but also to remember to dispose of such cases in a manner consistent with the obligation in the Rules Governing Judicial Conduct to respect, comply with, be faithful to and maintain professional competence in the law.

RAISING FUNDS FOR CIVIC, CHARITABLE OR OTHER ORGANIZATIONS

Section 100.4(C)(3)(b) of the Rules Governing Judicial Conduct governs and severely limits a judge's participation in fund-raising activities for civic, charitable or other worthy organizations. For example, a judge "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." Also, the judge "shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation...."

With limited exceptions, a judge "may not be a speaker or the guest of honor at an organization's fund-raising events, but the judge may attend such events." The exceptions are that a judge may be a speaker or guest of honor at a function held by a bar association, law school or court employee organization. A judge may also accept "at another organization's fund-raising event an unadvertised award ancillary to such event."

Notwithstanding the fact that a judge may attend a law school or bar association fund-raising event, the judge is still prohibited from personally participating in the solicitation of funds or other fund-raising activities associated with the event. Some judges appear unaware of this

limitation or the fact that there is no exception in the Rules permitting one judge to solicit other judges, regardless of whether the soliciting or solicited judges are of equal rank. Indeed, the Advisory Committee on Judicial Ethics has specifically stated that the Rules prohibit a judge from soliciting other judges for contributions to charitable causes, and prohibit a judge from personally participating in the solicitation of funds or other fund-raising activities, even in connection with a bar association event at which the judge may accept an award and speak. Advisory Opinions 96-83 and 98-38.

With regard to events held by other civic or charitable organizations, the Commission has often come across situations in which an organization mails a solicitation that lists a judge as a “host” or a “sponsor” without having checked first with the judge, who may have made a permissible contribution without intending it to result on a solicitation, or who is a member or whose spouse may be a member of the organization. The leaders of a charitable organization are not likely to know the judicial ethics rules or be acquainted with the particular constraints on the use of a judge’s name in fundraising. While an unauthorized use of the judge’s name in that regard would not likely result in discipline without aggravating circumstances, the Commission informally advises judges in such situations to remind the organization’s leaders of the applicable rules. The Commission takes this opportunity to suggest that all judges who join a charitable organization advise its leaders upon joining that they not use the judge’s name in fund-raising appeals.

The Commission has also come across situations in which the judge who accepts a speaking invitation claims later not to have realized the event was a fund-raiser for something other than a bar association, law school or court employee organization. The Commission has advised such judges, usually in letters of dismissal and caution, that they are obliged to make inquiries about the nature of the event before accepting an invitation to speak. A simple inquiry or two may be all that is necessary to determine whether the event is a fund-raiser. For example, the judge should inquire about the price of tickets to the event, though further inquiry may be necessary. An organization may, for example, break even on the ticket price but raise money through ads in a souvenir journal, a raffle, a silent auction or other means.

The Commission has also reminded judges that the prohibition on being a speaker at a fund-raising event is not limited to giving a keynote or featured speech. A judge may not be the emcee or introduce the keynote speaker or similarly perform another ancillary speaking role, such as introducing other judges in the audience.

Where there is any doubt about the propriety of participating, the judge should consult with the Advisory Committee on Judicial Ethics, either by researching its published opinions or requesting a new one specific to the situation: <http://www.nycourts.gov/ip/acje/>.

SETTING BAIL IN ONLY ONE FORM

A judge is obliged by the Sections 100.2(A) and 100.3(B)(1) of the Rules Governing Judicial Conduct to comply with and be faithful to and professionally competent in the law. Section 520.10 of the Criminal Procedure Law states that the only forms of bail are the following:

Subdivision 1:

- (a) Cash bail
- (b) An insurance company bail bond
- (c) A secured surety bond
- (d) A secured appearance bond
- (e) A partially secured surety bond
- (f) A partially secured appearance bond
- (g) An unsecured surety bond
- (h) An unsecured appearance bond
- (i) Credit card or similar device; provided, however, that notwithstanding any other provision of law, any person posting bail by credit card or similar device also may be required to pay a reasonable administrative fee...

Subdivision 2:

The methods of fixing bail are as follows:

- (a) A court may designate the amount of bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one;
- (b) The court may direct that the bail be posted in any one of **two or more** of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms. (Emphasis added.)

Since the 1970s, when the statute was enacted, judicial education and training programs run by the Office of Court Administration have stressed the point, which is also reinforced by the court system's City, Town and Village Resource Center, that setting bail in one form only, typically by announcing "cash only," is contrary to CPL 520.10. In 2007, after stating in an annual report that it agreed with the OCA and Resource Center interpretations, the Commission heard from Supreme Court justices who were concerned that discipline might be imposed against judges who disagree in good faith with that interpretation. The judges observed that a more restrictive interpretation of CPL 520.10, one that would permit bail to be set in one form only, is not precluded by appellate law.

While complaints involving this subject have been investigated, no judge has ever been the subject of a formal disciplinary proceeding over this issue. Where the matter arises in the future, and where the issue is solely a judge's good-faith interpretation of CPL 520.10, without aggravating circumstances that would constitute misconduct, the Commission will express its recommendation in an outright dismissal letter to the judge. By not issuing even a Letter of Dismissal and Caution, the Commission hopes to avoid even a mistaken impression that a judge's independent exercise of discretion based on a good-faith interpretation of the statute is cause for discipline.

THE COMMISSION'S BUDGET

In 2007, for the first time in more than a generation, after a downward budgetary trend of nearly 30 years, the Commission's budget was significantly increased, commensurate with its constitutional mandate and ever increasing caseload. In three out of the past four years, the

Commission has received a record number of new complaints, authorized a record number of investigations, or both. The number of new complaints is now nearly 2,000 a year. At the same time, despite this growing workload, the number of matters pending at year's end is dropping. In less than two years at current staffing levels, the Commission's backlog has been lowered by 24%. With more staff and resources at its disposal, the Commission has been able to cut down significantly the length of time an investigation is pending.

SACRIFICE IN THE COMING YEAR

This year, in light of the significant financial stress constraining all of state government, the Commission, like many agencies, has agreed to its share of sacrifice, while continuing to live up to the extraordinary commitment the Legislature made two years ago.

Over the past two fiscal years, this agency has worked cooperatively and successfully on a range of matters with the offices of the Governor, the Attorney General and the State Comptroller, the Office of Court Administration, the Office of General Services and the Division of Budget (DOB), to devise and implement strategy to make the best possible use of our resources.

Nevertheless, given the harsh realities of diminishing resources throughout government, the Commission, like others, has made important sacrifices.

- Staff will be capped at 49, rather than the allotted 55 – an 11% reduction.
- Through careful stewardship of resources, \$250,000 in capital expenses last year, which were expected to come from other state sources, came out of the Commission's own budget.
- Certain physical assets, such as an agency automobile, have been given up.

A "flat" budget for FY 2009-10, *i.e.* the same \$5.304 million appropriated last year, would result in some belt-tightening, since escalating contractual obligations such as rent would actually increase our costs, even with no new programs. As the economy and state revenues continued to decline, however, the Commission responded to the Governor's renewed message of restraint and proposed a reduction, to \$5.2 million.

While it will not be easy, this proposed level of funding, with prudent management, would nevertheless permit the Commission to live up to its constitutional and legislative mandates to render discipline where appropriate, and dismiss unsubstantiated complaints, as fairly and promptly as possible. The Commission appreciates the advice and support of the Governor and leaders of the Legislature for working with us in this budget process.

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

SELECTED BUDGET FIGURES: 1978 TO PRESENT

FISCAL YEAR	ANNUAL BUDGET*	*NEW COMPL'NTS	NEW INVEST'NS	PENDING YEAR END	PUBLIC DISCIPLINES	**STAFF ATT'YS	INVES'RS FT/PT	TOTAL STAFF
1978	1.644m	641	170	324†	24	21	18	63
1988	2.224m	1109	200	141	14	9	12/2	41
1992	1.667m	1452	180	141	18	8	6/1	26
1996	1.696m	1490	192	172	15	8	2/2	20
2000	1.912m	1288	215	177	13	9	6/1	27
2005	2.609m	1565	260	260	30	10	7	28½
2006	2.8m	1500	267	275	14	10	7	28½
2007	4.795m	1711	192	238	24	17	10	51
2008	5.304m	1923	262	208	21	19	10	49
2009	5.2m††							

* Complaint figures are calendar year (Jan 1 – Dec 31); Budget figures are fiscal year (Apr 1 – Mar 31).

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

† The Commission's jurisdiction was expanded in 1978, and judicial disciplinary matters previously heard by the Court on the Judiciary and the Appellate Divisions were thereafter heard by the Commission.

†† Proposed.

CONCLUSION

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

Respectfully submitted,

HON. THOMAS A. KLONICK, CHAIR
STEPHEN R. COFFEY, ESQ., VICE CHAIR
JOSEPH W. BELLUCK, ESQ.
RICHARD D. EMERY, ESQ.
PAUL B. HARDING, ESQ.
ELIZABETH B. HUBBARD
MARVIN E. JACOB, ESQ.
HON. JILL KONVISER
HON. KAREN K. PETERS
HON. TERRY JANE RUDERMAN

APPENDIX A: BIOGRAPHIES OF COMMISSION MEMBERS

There are 11 members of the Commission on Judicial Conduct. Each serves a renewable four-year term. Four members are appointed by the Governor, three by the Chief Judge, and one each by the Speaker of the Assembly, the Minority Leader of the Assembly, the Temporary President of the Senate (Majority Leader) and the Minority Leader of the Senate.

Of the four members appointed by the Governor, one shall be a judge, one shall be a member of the New York State bar but not a judge, and two shall not be members of the bar, judges or retired judges. Of the three members appointed by the Chief Judge, one shall be a justice of the Appellate Division, one shall be a judge of a court other than the Court of Appeals or Appellate Division, and one shall be a justice of a town or village court. None of the four members appointed by the legislative leaders shall be judges or retired judges.

The Commission elects a Chair and a Vice Chair from among its members for renewable two-year terms, and appoints an Administrator who shall be a member of the New York State bar who is not a judge or retired judge. The Administrator appoints and directs the agency staff. The Commission also has a Clerk who plays no role in the investigation or litigation of complaints but assists the Commission in its consideration of formal charges, preparation of determinations and related matters.

Member	Appointing Authority	Year First App'ted	Expiration of Present Term
Thomas A. Klonick	(Former) Chief Judge Judith S. Kaye	2005	3/31/2009
Stephen R. Coffey	(Former) Senate President Pro Tem Joseph L. Bruno	1995	3/31/2011
Joseph W. Belluck	Governor David A. Paterson	2008	3/31/2012
Richard D. Emery	(Former) Senate Minority Leader Malcolm A. Smith	2004	3/31/2012
Paul B. Harding	Assembly Minority Leader James Tedisco	2006	3/31/2009
Elizabeth B. Hubbard	Governor David A. Paterson	2008	3/31/2011
Marvin E. Jacob	Assembly Speaker Sheldon Silver	2006	3/31/2010
Jill Konviser	(Former) Governor George E. Pataki	2006	3/31/2010
Karen K. Peters	(Former) Chief Judge Judith S. Kaye	2000	3/31/2010
Terry Jane Ruderman	(Former) Chief Judge Judith S. Kaye	1999	3/31/2012
Vacant	Governor David A. Paterson		3/31/2009

Honorable Thomas A. Klonick, *Chair of the Commission*, is a graduate of Lehigh University and the Detroit College of Law, where he was a member of the Law Review. He maintains a law practice in Fairport, New York, with a concentration in the areas of commercial and residential real estate, corporate and business law, criminal law and personal injury. He was a Monroe

County Assistant Public Defender from 1980 to 1983. Since 1995 he has served as Town Justice for the Town of Perinton, New York, and has also served as an Acting Rochester City Court Judge, a Fairport Village Court Justice and as a Hearing Examiner for the City of Rochester. From 1985 to 1987 he served as a Town Justice for the Town of Macedon, New York. He has also been active in the Monroe County Bar Association as a member of the Ethics Committee. Judge Klonick is the former Chairman of the Prosecuting Committee for the Presbytery of Genesee Valley and is an Elder of the First Presbyterian Church, Pittsford, New York. He has also served as legal counsel to the New York State Council on Problem Gambling, and on the boards of St. John's Home and Main West Attorneys, a provider of legal services for the working poor. He is a member of the New York State Magistrates Association, the New York State Bar Association and the Monroe County Bar Association. Judge Klonick lectures in the Office of Court Administration's continuing Judicial Education Programs for Town and Village Justices.

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

Joseph W. Belluck, Esq., graduated *magna cum laude* from the SUNY-Buffalo School of Law in 1994, where he served as Articles Editor of the Buffalo Law Review and where he was an adjunct lecturer on mass torts. He is a partner in the Manhattan law firm of Belluck & Fox, LLP, which focuses on asbestos, consumer, environmental and defective product litigation. Mr. Belluck previously served as counsel to the New York State Attorney General, representing the State of New York in its litigation against the tobacco industry, as a judicial law clerk for Justice Lloyd Doggett of the Texas Supreme Court, as staff attorney and consumer lobbyist for Public Citizen in Washington, D.C., and as Director of Attorney Services for Trial Lawyers Care, an organization dedicated to providing free legal assistance to victims of the September 11, 2001 terrorist attacks. Mr. Belluck has lectured frequently on product liability, tort law and tobacco control policy. He is an active member of several bar associations, and serves on the Boards of the New York State Trial Lawyers Association and the SLAPP Resource Center, an organization dedicated to protecting the right to free speech. He is a recipient of the New York State Bar Association's Legal Ethics Award.

Richard D. Emery, Esq., is a graduate of Brown University and Columbia Law School (*cum laude*), where he was a Harlan Fiske Stone Scholar. He is a partner in the law firm of Emery Celli Brinckerhoff and Abady in Manhattan. Mr. Emery serves on the New York City Bar Association's Committee on Election Law, the Advisory Board of the National Police Accountability Project, and the New York State Commission on Public Integrity. He is also active in the Association of Trial Lawyers of America and the Municipal Arts Society Legal Committee, on the New York County Lawyers Association Committee on Judicial Independence and on the Board of Children's Rights, the national children's rights advocacy organization. His honors include the Common Cause/NY, October 2000, "I Love an Ethical New York" Award for

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

Paul B. Harding, Esq., is a graduate of the State University of New York at Oswego and the Albany Law School at Union University. He is the Managing Partner in the law firm of Martin, Harding & Mazzotti, LLP in Albany, New York. He is on the Board of Directors of the New York State Trial Lawyers Association and the Marketing and Client Services Committee for the American Association for Justice. He is also a member of the New York State Bar Association and the Albany County Bar Association. He is currently on the Steering Committee for the Legal Project, which was established by the Capital District Women's Bar Association to provide a variety of free and low cost legal services to the working poor, victims of domestic violence and other underserved individuals in the Capital District of New York State.

Elizabeth B. Hubbard is a graduate of Smith College (B.A. *summa cum laude*) and the Johns Hopkins School of Advanced International Studies, where she earned a masters degree. She served as Executive Director of the Committee for Modern Courts and is presently a member of the Modern Courts Board of Directors. She served previously as President and Judicial Director of the New York State League of Women Voters, President of the League of Women Voters of Huntington, Founding Chairperson of the Huntington Township Chamber Foundation, a recent President of the Huntington Township Housing Coalition, and a member of her Village Planning Board. Ms. Hubbard has also served as a member of the Dominick Commission to reform the State court system, two gubernatorial judicial screening panels, the State Bar Association's Committee on Courts and the Community and the American Judicature Society. Ms. Hubbard also worked on improving prison conditions when she served as Chair of the Correctional and Osborne Associations.

Marvin E. Jacob, Esq., is a graduate of Brooklyn College and New York Law School (*cum laude*). Mr. Jacob was a partner in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP, until his recent retirement. His practice included litigation in the bankruptcy courts and federal district and appellate courts. Mr. Jacob currently serves as a consultant and mediator in bankruptcy, litigation and SEC matters. Mr. Jacob was formerly Associate Regional Administrator, New York Regional Office, US Securities & Exchange Commission (1964-1979). He has served as adjunct professor of law at New York Law School and recently received a Distinguished Service Award for twenty-five years of service as a faculty member. Mr. Jacob is Chairman of the Board of Legal Assistance for the Jewish Poor, a member of the Advisory Board of Chinese American Planning Council, a member of and counsel to the Board of the Memorial Foundation For Jewish Culture, and Chairman of YouthBridge-NY. Mr. Jacob has published and lectured extensively on bankruptcy issues and has been recognized with many legal and community awards. He is the co-editor of *Reorganizing Failing Businesses*, recently published by the American Bar Association, and *Restructurings*, published by Euromoney Books. Mr. Jacob is listed in, among others, *The Best Lawyers in America* and *The Best Lawyers in New York*.

Honorable Jill Konviser is a graduate of the State University of New York at Binghamton and the Benjamin N. Cardozo School of Law. She was appointed to the Court of Claims by Governor George E. Pataki in 2005, has been designated an Acting Justice of the Supreme Court and currently hears criminal cases in New York City. She served as the Inspector General of the State of New York from December 2002 through March 2005. Prior to that, she served for five years as Senior Assistant Counsel to Governor Pataki, focusing on criminal justice issues. From 1995 until 1997, she was a manager with KPMG, and in 1997, she held the position of Deputy Inspector General of the Metropolitan Transportation Authority. She also served as a New York County Assistant District Attorney from 1990 to 1995, and was an Adjunct Professor at Fordham Law School and Cardozo Law School.

Honorable Karen K. Peters received her B.A. from George Washington University (*cum laude*) and her J.D. from New York University (*cum laude*; Order of the Coif). From 1973 to 1979 she was engaged in the private practice of law in Ulster County, served as an Assistant District Attorney in Dutchess County and was an Assistant Professor at the State University of New York at New Paltz, where she developed curricula and taught courses in the area of criminal law, gender discrimination and the law, and civil rights and civil liberties. In 1979 she was selected as the first counsel to the newly created New York State Division on Alcoholism and Alcohol Abuse and remained counsel until 1983. In 1983 she was the Director of the State Assembly Government Operations Committee. Elected to the bench in 1983, she remained Family Court Judge for the County of Ulster until 1992, when she became the first woman elected to the Supreme Court in the Third Department. Justice Peters was appointed to the Appellate Division, Third Department, by Governor Mario M. Cuomo on February 3, 1994. She was reappointed by Governor George E. Pataki in 1999 and 2004 and by Governor Eliot L. Spitzer in 2007. 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.

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 a Deputy County Attorney in Westchester County, and later she was in the private practice of law. Judge Ruderman is a member of the New York State Committee on Women in the Courts and Chair of the Gender Fairness Committee for the Ninth Judicial District. She has served as President of the New York Association of Women Judges, the Presiding Member of the New York State Bar Association Judicial Section, as a Delegate to the House of Delegates of the New York State Bar Association and on the Ninth Judicial District Task Force on Reducing Civil Litigation Cost and Delay. Judge Ruderman is also a board member and former Vice President of the Westchester Women's Bar Association, was President of the White Plains Bar Association and was a State Director of the Women's Bar Association of the State of New York. She also sits on the Cornell University President's Council of Cornell Women.

RECENT MEMBERS

Colleen C. DiPirro served on the Commission from April 1, 2004 until October 30, 2008. She 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.

APPENDIX B: BIOGRAPHIES OF COMMISSION ATTORNEYS

Robert H. Tembeckjian, *Administrator and Counsel*, is a graduate of Syracuse University, the Fordham University School of Law and Harvard University's Kennedy School of Government, where he earned a Masters in Public Administration. He was a Fulbright Scholar to Armenia in 1994, teaching graduate courses and lecturing on constitutional law and ethics at the American University of Armenia and Yerevan State University. Mr. Tembeckjian served on the Advisory Committee to the American Bar Association Commission to Evaluate the Model Code of Judicial Conduct from 2003-07. He is on the Board of Directors of the Association of Judicial Disciplinary Counsel and the Editorial Board of the Justice System Journal. Mr. Tembeckjian has served on various ethics and professional responsibility committees of the New York State and New York City Bar Associations, and has published numerous articles in legal periodicals on judicial ethics and discipline.

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

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

Edward Lindner, *Deputy Administrator for Litigation*, is a graduate of the University of Arizona and Cornell Law School, where he was a member of the Board of Editors of the Cornell International Law Journal. Prior to joining the Commission's staff, he was an Assistant Solicitor General in the Division of Appeals & Opinions for the New York State Attorney General. He has been a Board Member and volunteer for various community organizations, including Catholic Charities, The Children's Museum at Saratoga, the Saratoga Springs Public Library and the Saratoga Springs Preservation Foundation.

Steven Scheckman, *Deputy Administrator in Charge of the Commission's New York Office*, is a graduate of Ohio University (*cum laude*) and the Tulane University School of Law (*cum laude*). Prior to joining the Commission staff, he served as the Special Counsel to the Judiciary Commission of Louisiana, from 1994-2008, and with his staff was responsible for the investigation and prosecution of cases of judicial misconduct before the Judiciary Commission of Louisiana and the Louisiana Supreme Court. From 1978-1994, Mr. Scheckman was engaged in the practice of law in New Orleans, including as a staff attorney for three years with the New Orleans Legal Assistance Corporation, and then in private practice with an emphasis in the areas of civil rights, civil liberties and juvenile justice issues. He also previously served as an Adjunct

Professor of Law on the faculty of Tulane's Law School and as an *ad hoc* judge for the Orleans Parish Juvenile Court. Mr. Scheckman is currently the President of the Board of Directors of the Association of Judicial Disciplinary Counsel. He was previously a member of the Louisiana State Law Institute, Children's Code Revision Committee, a member of the Louisiana Task Force on Indigent Defense, a Fellow of the Louisiana Bar Foundation, a founding member and former Vice President of CASA New Orleans, a member of the Board of Directors of the Louisiana CASA Association, and a member and Treasurer of the Board of Directors of the Greater New Orleans Fair Housing Action Center.

Jean Joyce, *Senior Attorney*, is a graduate of Hamilton College (Russian Studies) and New York Law School (*cum laude*). Prior to joining the Commission staff, she clerked for Chief Judge Judith S. Kaye of the New York State Court of Appeals, and served as an Assistant District Attorney in the Bronx. She is a member of the New York City Bar Association.

Cheryl L. Randall, *Senior Attorney*, is a graduate of the State University of New York at Oneonta and the University of Connecticut Law School (*cum laude*). Prior to joining the Commission staff, she served as a Senior Attorney handling disciplinary cases for the State Education Department. She has also served as an attorney with the Office of the State Comptroller, the Public Employees Federation, the New York State School Boards Association and the law firm of Whiteman, Osterman & Hanna.

M. Kathleen Martin, *Senior Attorney*, is a graduate of Mount Holyoke College and Cornell Law School (*cum laude*). Prior to joining the Commission's staff, she was an attorney at the Eastman Kodak Company, where among other things she held positions as Legal Counsel to the Health Group, Director of Intellectual Property Transactions and Director of Corporate Management Strategy Deployment. She also served as Vice President and Senior Associate Counsel at Chase Manhattan Bank, and in private practice with the firm of Nixon, Hargrave, Devans & Doyle.

Roger J. Schwarz, *Senior Attorney*, is a graduate of Clark University (*Phi Beta Kappa*) and the State University of New York at Buffalo Law School (*honors*), where he served as editor of the *Law and Society Review* and received the Erie County Trial Lawyers' award for best performance in the law school's trial practice course. For 23 years, Mr. Schwarz practiced law in his own firm, with an emphasis on criminal law and criminal appeals, principally in the federal courts. Mr. Schwarz has also served as an associate attorney for the Criminal Defense Division of the Legal Aid Society in New York City, clerked for Supreme Court Justice David Levy (Bronx County) and was a member of the Commission's staff from 1975-77.

Jill S. Polk, *Senior Attorney*, is a graduate of the State University of New York at Buffalo and the Albany Law School. Prior to joining the Commission staff, she was Senior Assistant Public Defender in Schenectady County. Ms. Polk has also been in private practice, served as Senior Court Attorney to two judges, and was an attorney with the Legal Aid Society of Northeastern New York.

David M. Duguay, *Senior Attorney*, is a graduate of the State University College at Buffalo (*summa cum laude*) and the University at Buffalo Law School. Prior to joining the Commission's staff, he was Special Assistant Public Defender and Town Court Supervisor in the

Monroe County Public Defender's Office. He served previously as a staff attorney with Legal Services, Inc., of Chambersburg, Pennsylvania.

Thea Hoeth, *Senior Attorney*, is a graduate of St. Lawrence University (*cum laude*) and the Albany Law School. Prior to joining the Commission staff, she managed various not-for-profit organizations and most recently served as executive director of *To Life!*, a regional breast cancer education and support organization. Ms. Hoeth served previously in a number of senior state government positions, including executive director of the NYS Ethics Commission (1991 – 94) and the cabinet-level post of executive director of the New York State Office of Business Permits and Regulatory Assistance. She was also in private practice, has lectured and written on topics related to public sector ethics and was an adjunct professor of legal ethics for The Sage Colleges.

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 in the Bronx.

Stephanie A. Fix, *Staff Attorney*, is a graduate of the State University of New York at Brockport and Quinnipiac College School of Law in Connecticut. Prior to joining the Commission staff she was in private practice focusing on civil litigation and professional liability in Manhattan and Rochester. She serves on the Executive Committee of the Monroe County Bar Association Board of Trustees, and the Bishop Kearney High School Board of Trustees. Ms. Fix received the President's Award for Professionalism from the Monroe County Bar Association in 2004 for her participation with the ABA "Dialogue on Freedom" initiative. She is a member of the New York State Bar Association and Greater Rochester Association of Women Attorneys (GRAWA). Ms. Fix is an adjunct professor at St. John Fisher College.

Brenda Correa, *Staff Attorney*, is a graduate of the University of Massachusetts at Amherst and Pace University School of Law in New York (*cum laude*). Prior to joining the Commission staff, she served as an Assistant District Attorney in Manhattan and was in private practice in New York and New Jersey focusing on professional liability and toxic torts respectively. She is a member of the New York State Bar Association and the New York City Bar Association.

Kathy Wu, *Staff Attorney*, is a graduate of New York University and Queens Law School at the City University of New York. Prior to joining the Commission staff, she served as an Assistant District Attorney in Kings County, among other things prosecuting felony gun cases, and was in private practice at Paul Weiss Rifkind Wharton & Garrison, LLP.

Kelvin S. Davis, *Staff Attorney*, is a graduate of Yale University and the University of Virginia Law School. Prior to joining the Commission staff, he served as an Assistant Staff Judge Advocate in the United States Air Force and as Judicial Law Clerk to a Superior Court Judge in New Jersey.

Charles F. Farcher, *Staff Attorney*, is a graduate of the College of St. Rose and the Albany Law School. Prior to joining the Commission staff, he served as an Appellate Court Attorney with the Appellate Division of Supreme Court, Third Department.



Karen Kozac, *Chief Administrative Officer*, is a graduate of the University of Pennsylvania and Brooklyn Law School. Prior to re-joining the Commission staff in June 2007, she was an administrator in the nonprofit sector. She previously served as a Staff Attorney at the Commission, as an Assistant District Attorney in New York County, and in private practice as a litigator.

Beth S. Bar, *Public Information Officer*, is a graduate of Brandeis University, the Newhouse School of Communications at Syracuse University and the Syracuse University Law School. Prior to joining the Commission staff in April 2008, she was a reporter for the New York Law Journal, the Journal News (Westchester) and the Observer-Dispatch (Utica).



Jean M. Savanyu, *Clerk of the Commission*, is a graduate of Smith College and the Fordham University School of Law (*cum laude*). She joined the Commission's staff in 1977 and served as Senior Attorney until being appointed Clerk of the Commission in 2000. Ms. Savanyu teaches in the paralegal studies program at Hunter College and previously taught legal research and writing at Marymount Manhattan College. Prior to joining the Commission staff, she was a travel writer and editor.

APPENDIX C: REFEREES WHO SERVED IN 2008

Referee	City	County
Mark S. Arisohn, Esq.	New York	New York
William I. Aronwald, Esq.	White Plains	Westchester
Hon. Frank J. Barbaro	Watervliet	Albany
Peter Bienstock, Esq.	New York	New York
A. Vincent Buzard, Esq.	Pittsford	Monroe
Jay C. Carlisle, Esq.	White Plains	Westchester
William T. Easton, Esq.	Rochester	Monroe
Robert L. Ellis, Esq.	Scarsdale	Westchester
Vincent D. Farrell, Esq.	Mineola	Nassau
Paul Feigenbaum, Esq.	Albany	Albany
Maryann Saccomando Freedman, Esq.	Buffalo	Erie
David Garber, Esq.	Syracuse	Onondaga
Douglas S. Gates, Esq.	Rochester	Monroe
Victor J. Hershendorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
H. Wayne Judge, Esq.	Glens Falls	Warren
Matthew J. Kelly, Esq.	Albany	Albany
Nancy Kramer, Esq.	New York	New York
Sherman F. Levey, Esq.	Rochester	Monroe
Hugh H. Mo, Esq.	New York	New York
James C. Moore, Esq.	Rochester	Monroe
Gary Muldoon, Esq.	Rochester	Monroe
Malvina Nathanson, Esq.	New York	New York
Steven E. North, Esq.	New York	New York
Edward J. Nowak, Esq.	Penfield	Monroe
Philip C. Pinsky, Esq.	Syracuse	Onondaga
John J. Poklemba, Esq.	Saratoga Springs	Saratoga
Roger W. Robinson, Esq.	New York	New York
Hon. Eugene M. Salisbury	Buffalo	Erie
Hon. Richard D. Simons	Rome	Oneida
Robert J. Smith, Esq.	Binghamton	Broome
Robert Straus, Esq.	New York	Kings
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

APPENDIX D: THE COMMISSION'S POWERS, DUTIES AND HISTORY

Creation of the New York State Commission on Judicial Conduct

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

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

The Commission's Powers, Duties, Operations and History

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

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

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

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

Membership and Staff

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

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

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

Hon. Fritz W. Alexander, II (1979-85)
Hon. Myriam J. Altman (1988-93)
Helaine M. Barnett (1990-96)
Herbert L. Bellamy, Sr. (1990-94)
Joseph W. Belluck (2008-present)
*Henry T. Berger (1988-2004)
*John J. Bower (1982-90)
Hon. Evelyn L. Braun (1994-95)
David Bromberg (1975-88)
Jeremy Ann Brown (1997-2001)
Hon. Richard J. Cardamone (1978-81)
Hon. Frances A. Ciardullo (2001-05)
Hon. Carmen Beauchamp Ciparick (1985-93)
E. Garrett Cleary (1981-96)
Stephen R. Coffey (1995-present)
Howard Coughlin (1974-76)
Mary Ann Crotty (1994-98)
Dolores DelBello (1976-94)
Colleen C. DiPirro (2004-08)
Richard D. Emery (2004-present)
Hon. Herbert B. Evans (1978-79)
*Raoul Lionel Felder (2003-08)
*William Fitzpatrick (1974-75)
*Lawrence S. Goldman (1990-2006)
Hon. Louis M. Greenblott (1976-78)
Paul B. Harding (2006-present)
Christina Hernandez (1999-2006)
Hon. James D. Hopkins (1974-76)
Elizabeth B. Hubbard (2008-present)
Marvin E. Jacob (2006-present)
Hon. Daniel W. Joy (1998-2000)
Michael M. Kirsch (1974-82)
*Hon. Thomas A. Klonick (2005-present)
Hon. Jill Konviser (2006-present)
*Victor A. Kovner (1975-90)
William B. Lawless (1974-75)
Hon. Daniel F. Luciano (1995-2006)
William V. Maggipinto (1974-81)
Hon. Frederick M. Marshall (1996-2002)
Hon. Ann T. Mikoll (1974-78)

Mary Holt Moore (2002-03)
Hon. Juanita Bing Newton (1994-99)
Hon. William J. Ostrowski (1982-89)
Hon. Karen K. Peters (2000-present)
*Alan J. Pope (1997-2006)
*Lillemor T. Robb (1974-88)
Hon. Isaac Rubin (1979-90)
Hon. Terry Jane Ruderman (1999-present)
*Hon. Eugene W. Salisbury (1989-2001)
Barry C. Sample (1994-97)
Hon. Felice K. Shea (1978-88)
John J. Sheehy (1983-95)
Hon. Morton B. Silberman (1978)
Hon. William C. Thompson (1990-98)
Carroll L. Wainwright, Jr. (1974-83)

The Commission's Authority

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

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

shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system...and may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.

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

Standards of conduct are set forth primarily in the Rules Governing Judicial Conduct (originally promulgated by the Administrative Board of the Judicial Conference and subsequently adopted by

the Chief Administrator of the Courts with the approval of the Court of Appeals) and the Code of Judicial Conduct (adopted by the New York State Bar Association).

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

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

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

Procedures

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

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

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

If the Commission finds after an investigation that the circumstances so warrant, it will direct its Administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint institutes the formal disciplinary proceeding. After receiving the judge's answer, the Commission may, if it determines there are no disputed issues of fact, grant a motion for summary determination. It may also accept an agreed statement of facts submitted by the Administrator and the respondent-judge. Where there are factual disputes that make summary determination inappropriate or that are not resolved by an agreed statement of facts, the Commission will appoint a referee to conduct a formal hearing and report proposed findings of fact and conclusions of law. Referees are designated by the Commission from a panel of attorneys

and former judges. Following the Commission's receipt of the referee's report, on a motion to confirm or disaffirm the report, both the administrator and the respondent may submit legal memoranda and present oral argument on issues of misconduct and sanction. The respondent-judge (in addition to his or her counsel) may appear and be heard at oral argument.

In deciding motions, considering proposed agreed statements of fact and making determinations with respect to misconduct and sanction, and in considering other matters pertaining to cases in which Formal Written Complaints have been served, the Commission deliberates in executive session, without the presence or assistance of its Administrator or regular staff. The Clerk of the Commission assists the Commission in executive session, but does not participate in either an investigative or adversarial capacity in any cases pending before the Commission.

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

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

Temporary State Commission on Judicial Conduct

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

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

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

Former State Commission on Judicial Conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The 1978 Constitutional Amendment

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

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

Summary of Complaints Considered since the Commission's Inception

Since January 1975, when the temporary Commission commenced operations, 39,457 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 32,125 were dismissed upon initial review or after a preliminary review and inquiry, and 7,332 investigations were authorized. Of the 7,332 investigations authorized, the following dispositions have been made through December 31, 2008:

- 975 complaints involving 751 judges resulted in disciplinary action. (See details below and on the following page.)
- 1,463 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1,359, 82 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 601 complaints involving 421 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 474 complaints were closed upon vacancy of office by the judge other than by resignation.
- 3,611 complaints were dismissed without action after investigation.
- 208 complaints are pending.

Of the 975 disciplinary matters against 751 judges as noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission. (It should be noted that several complaints against a single judge may be disposed of in a single action. This accounts for the apparent discrepancy between the number of complaints and the number of judges acted upon. Also, these figures take into account those decisions by the Court of Appeals that modified a Commission determination.)

- 157 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);
- 300 judges were censured publicly;
- 230 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission.

APPENDIX E: RULES GOVERNING JUDICIAL CONDUCT**22 NYCRR § 100 *et seq.* (2006)****Rules of the Chief Administrator of the Courts Governing Judicial Conduct****Preamble****Section 100.0** Terminology.**Section 100.1** A judge shall uphold the integrity and independence of the judiciary.**Section 100.2** A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.**Section 100.3** A judge shall perform the duties of judicial office impartially and diligently.**Section 100.4** A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.**Section 100.5** A judge or candidate for elective judicial office shall refrain from inappropriate political activity.**Section 100.6** Application of the rules of judicial conduct.**Preamble**

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

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

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

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

Section 100.0 Terminology.

The following terms used in this Part are defined as follows:

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

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

(C) The "degree of relationship" is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Part"-refers to Part 100.

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

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

"Paragraph"-refers to a provision designated by an Arabic numeral (1)

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

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

(R) "Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

(S) An "independent" judiciary is one free of outside influences or control.

(T) "Integrity" denotes probity, fairness, honesty, uprightness and soundness of character. "Integrity" also includes a firm adherence to this Part or its standard of values.

(U) A "pending proceeding" is one that has begun but not yet reached its final disposition.

(V) An "impending proceeding" is one that is reasonably foreseeable but has not yet been commenced.

Historical Note

Sec. filed Feb. 1, 1996 eff. Jan. 1, 1996.

Amended (D) and (D)(5) on Sept. 9, 2004.

Added (R) - (V) on Feb. 14, 2006

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

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

Historical Note

Sec. filed Aug. 1, 1972; renum. 111.1, new added by renum. and amd. 33.1, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

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

(A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

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

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

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

Historical Note

Sec. filed Aug. 1, 1972; renum. 111.2, new added by renum. and amd. 33.2, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

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

(A) Judicial duties in general. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative Responsibilities.

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

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

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

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

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

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

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

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

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

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

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

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

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from

explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not:

- (a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;
- (b) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

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

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(C) Administrative Responsibilities.

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

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

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

(D) Disciplinary Responsibilities.

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

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

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

(E) Disqualification.

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

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

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

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

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

(i) is a party to the proceeding;

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

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

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

(f) the judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to

(i) an issue in the proceeding; or

(ii) the parties or controversy in the proceeding.

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

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

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

Amended 100.3 (B)(9)-(11) & (E)(1)(f) - (g) Feb. 14, 2006

Amended 100.3(C)(3) and 100.3(E)(1)(d) & (e) Feb. 28, 2006

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

(A) Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

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

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

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

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

(C) Governmental, Civic, or Charitable Activities.

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

(2)

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

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

(3) A judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Part.

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

(i) will be engaged in proceedings that ordinarily would come before the judge, or
(ii) if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

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

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

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

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

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

(D) Financial activities.

(1) A judge shall not engage in financial and business dealings that:

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

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

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

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

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

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

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

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

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

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

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

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as

spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

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

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

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

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

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

(E) Fiduciary Activities.

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

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

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

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

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

(H) Compensation, Reimbursement and Reporting.

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

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

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

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

(2) Public Reports. A full-time judge shall report the date, place and nature of any activity for which the judge received compensation in excess of \$150, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

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

Historical Note

Sec. filed Aug. 1, 1972; amd. filed Nov. 26, 1976; renum. 111.4, new added by renum. and amd. 33.4, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996; amds. filed: Feb. 27, 1996; Feb. 9, 1998 eff. Jan. 23, 1998. Amended (C)(3)(b)(ii).

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

(A) Incumbent judges and others running for public election to judicial office.

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by

law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice. Prohibited political activity shall include:

- (a) acting as a leader or holding an office in a political organization;
- (b) except as provided in Section 100.5(A)(3), being a member of a political organization other than enrollment and membership in a political party;
- (c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;
- (d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;
- (e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;
- (f) making speeches on behalf of a political organization or another candidate;
- (g) attending political gatherings;
- (h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or
- (i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

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

- (i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;
- (ii) appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her candidacy;
- (iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

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

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, provided that the cost of the ticket to such dinner or other function shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is \$250 or less. A candidate may not pay more than \$250 for a ticket unless he or she obtains a statement from the sponsor of the dinner or function that the amount paid represents the proportionate cost of the dinner or function.

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

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

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

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

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

(d) shall not:

(i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(ii) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office;

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

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

(f) shall complete an education program, either in person or by videotape or by internet correspondence course, developed or approved by the Chief Administrator or his or her designee within 30 days after receiving the nomination or 90 days prior to receiving the nomination for

judicial office. The date of nomination for candidates running in a primary election shall be the date upon which the candidate files a designating petition with the Board of Elections. This provision shall apply to all candidates for elective judicial office in the Unified Court System except for town and village justices.

(g) shall file with the Ethics Commission for the Unified Court System a financial disclosure statement containing the information and in the form, set forth in the Annual Statement of Financial Disclosure adopted by the Chief Judge of the State of New York. Such statement shall be filed within 20 days following the date on which the judge or non-judge becomes such a candidate; provided, however, that the Ethics Commission for the Unified Court System may grant an additional period of time within which to file such statement in accordance with rules promulgated pursuant to section 40.1(t)(3) of the Rules of the Chief Judge of the State of New York (22 NYCRR). Notwithstanding the foregoing compliance with this subparagraph shall not be necessary where a judge or non-judge already is or was required to file a financial disclosure statement for the preceding calendar year pursuant to Part 40 of the Rules of the Chief Judge. This requirement does not apply to candidates for election to town and village courts.

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

(6) A judge or a non-judge who is a candidate for public election to judicial office may not permit the use of campaign contributions or personal funds to pay for campaign-related goods or services for which fair value was not received.

(7) Independent Judicial Election Qualifications Commissions, created pursuant to Part 150 of the Rules of the Chief Administrator of the Courts, shall evaluate candidates for elected judicial office, other than justice of a town or village court.

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

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

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

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

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

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

Historical Note

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

Amended 100.5 (A)(2)(v), (A)(4)(a), (A)(4)(d)(i)-(ii), (A)(4)(f), (A)(6), (A)(7) Feb. 14, 2006; 100.5(A)(4)(g) Sept. 1, 2006.

Section 100.6 Application of the rules of judicial conduct.

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

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

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

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

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

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

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

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

(E) Relationship to Code of Judicial Conduct. To the extent that any provision of the Code of Judicial Conduct as adopted by the New York State Bar Association is inconsistent with any of these rules, these rules shall prevail.

Historical Note

Sec. filed Aug. 1, 1972; repealed, new added by renum. 100.7, filed Nov. 26, 1976; renum. 111.6, new added by renum. and amd. 33.6, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

Amended 100.6(E) Feb. 14, 2006

APPENDIX F:**TEXT OF 2008 DETERMINATIONS RENDERED BY THE COMMISSION**

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to MICHAEL R. AMBRECHT, a Judge of the Court of Claims and Acting Justice of the Supreme Court, New York County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Edward Lindner and Brenda Correa, Of Counsel) for the Commission
Martin & Obermaier LLC (by John S. Martin, Jr.), Olshan Grundman Frome Rosenzweig & Wolosky LLP (by Jeffrey A. Udell), and Joseph W. Bellacosa for the Respondent

The respondent, Michael R. Ambrecht, a Judge of the Court of Claims and an Acting Justice of the Supreme Court, New York County, was served with a Formal Written Complaint dated February 12, 2007, containing two charges. The Formal Written Complaint alleged that respondent initiated an investigation and issued an opinion which were or appeared to be motivated by political purposes (Charge I), and that he presided over two cases in which his personal attorney appeared (Charge II). Respondent filed a Verified Answer dated April 24, 2007.

By Order dated April 27, 2007, the Commission designated Honorable Richard D. Simons as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 13, 14, 15 and 16 and December 5, 2007, in New York City. The referee filed a report on January 18, 2008.

The parties submitted briefs with respect to the referee's report. On June 19, 2008, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the Court of Claims since 2002 and is assigned to the criminal term of the Supreme Court in New York County.

As to Charge I of the Formal Written Complaint:

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

As to Charge II of the Formal Written Complaint:

3. Respondent and Paul Shechtman, Esq., worked for the New York County district attorney's office when Mr. Shechtman was counsel to the district attorney and respondent was an assistant district attorney. After leaving the district attorney's office in 1995, respondent and Mr. Shechtman both worked for Governor Pataki in Albany.

4. In February 2006 respondent retained Mr. Shechtman to represent him in connection with an investigation by the Commission. Mr. Shechtman charged respondent his reduced rate for public employees, \$250 per hour, as opposed to his usual fee of \$600 per hour.

5. Mr. Shechtman represented the defendant in *People v. Numark*. Mr. Shechtman and assistant district attorney Brenda Fisher negotiated a plea agreement in which the defendant would waive prosecution by indictment, would plead guilty to a felony charge of offering a false instrument for filing and would pay a fine and/or restitution in lieu of serving jail time.

6. On June 15, 2006, Mr. Shechtman and Ms. Fisher appeared before respondent on the plea agreement in *Numark*. Shortly before the appearance, Mr. Shechtman told respondent that he had a matter before him on an agreed upon plea and asked respondent whether he felt comfortable presiding over it. Respondent said he felt he could keep the matter and would make a disclosure.

7. At the outset of the proceeding on June 15, 2006, respondent stated on the record:

“in the interest of full disclosure I want to put on the record that Mr. Shechtman and I have known each other for over 15 years, during which time we've had a professional and personal relationship which continues until today. Does anyone have any objection to that?”

Ms. Fisher responded, “No, your honor.” Respondent then accepted the plea agreement.

8. On its face, respondent's disclosure was incomplete and deceptive in that respondent did not disclose that he had recently retained Mr. Shechtman to represent him and was paying him for his services.

9. In June 2006 Mr. Shechtman also appeared before respondent in *People v. Kurland*, in connection with a violation of probation. The Department of Probation was seeking a Declaration of Delinquency based on allegations that the defendant, who had pleaded guilty in 2005 to Criminal Possession of Marijuana in the Second Degree and had been sentenced by respondent to five years' probation, had traveled outside the United States and did not provide his itinerary, in violation of restrictions imposed at sentencing. On June 19, 2006, the day before

the scheduled appearance, Mr. Shechtman telephoned respondent's chambers, spoke to respondent and requested a one-week adjournment because he was out of town. The next day, Mr. Shechtman sent a letter to respondent confirming the request for an adjournment and stating that he had advised the defendant that his appearance was not required on June 20th. Mr. Shechtman's letter was not copied to the prosecution or the Department of Probation.

10. On June 20, 2006, respondent ordered a bench warrant for the defendant based on his non-appearance, and a Declaration of Delinquency was issued.

11. On June 23, 2006, respondent, represented by Mr. Shechtman, gave testimony at the Commission office.

12. On June 27, 2006, Mr. Shechtman and the defendant appeared before respondent in *Kurland*. Assistant district attorney Lisa Zito urged that the defendant be incarcerated and reminded respondent that at sentencing respondent had told the defendant that he faced incarceration if he violated the terms of his probation. Mr. Shechtman argued against incarceration.

13. Respondent vacated the bench warrant, stating that Mr. Shechtman had contacted the Court prior to the June 20th scheduled appearance and had requested that the defendant's appearance be excused. Respondent adjourned the matter to September 19, 2006, imposed additional travel restrictions and directed that the defendant be monitored by the Department of Probation.

14. Respondent did not disclose that Mr. Shechtman was then representing him or make any mention of his relationship with Mr. Shechtman.

15. Mr. Shechtman was paid \$25,000 for his representation of the defendant in *Numark* and \$15,000 for his representation of the defendant in *Kurland*.

16. On June 28, 2006, respondent received a mass e-mail from the Advisory Committee on Judicial Ethics that included a recent advisory opinion (Op. 06-22), stating that a judge's recusal was required on all matters involving his or her attorney until two years after the termination of the representation. Respondent sent the e-mail to Mr. Shechtman on July 17, 2006.

17. Respondent testified that before he received this e-mail he believed that his disqualification was not required when his personal attorney appeared before him if the relationship was disclosed and the conflict was waived.

18. From July 17 to September 19, 2006, respondent took no action on *Kurland*, did not disqualify himself from the case, and made no disclosure that Mr. Shechtman was his attorney. The defendant remained at liberty during this period.

19. On September 19, 2006, respondent transferred the *Kurland* case to Acting Supreme Court Justice William A. Wetzel. Mr. Shechtman contacted Ms. Zito after the

proceeding and told her that the matter had been transferred since he represented respondent on “a small civil matter.”

20. In proceedings before the Commission, respondent testified that at the time he made his disclosure in *Numark*, he believed the disclosure was sufficient, but that he now recognizes that it was inadequate and that, even with full disclosure, he was prohibited from sitting on his attorney’s cases. As to the *Kurland* case, respondent claimed that he did not disclose his relationship with Mr. Shechtman in June 2006 because he confused the case with *Numark* and mistakenly believed he had already made a disclosure.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1), 100.3(B)(6)(a) and 100.3(E)(1) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge II of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent’s misconduct is established. Charge I is not sustained and therefore is dismissed.

A judge’s disqualification is required in any matter in which the judge’s impartiality “might reasonably be questioned” (Rules, §100.3[E][1]). Under guidelines provided in numerous opinions of the Advisory Committee on Judicial Ethics, disqualification in matters involving the judge’s personal attorney is required during the period of representation and thereafter for two years (*see, e.g.*, Adv. Op. 92-54, 93-09, 97-135, 99-67). *See also, Matter of Merrill*, 2008 Annual Report 181 (Comm on Judicial Conduct); *Matter of Ross*, 1990 Annual Report 153 (Comm on Judicial Conduct); *Matter of Phillips*, 1990 Annual Report 145 (Comm on Judicial Conduct). Respondent violated these standards by failing to disqualify himself in two cases in which the defendants were represented by an attorney who was contemporaneously representing respondent in connection with a Commission investigation.

A few months after he had retained Mr. Shechtman to represent him, respondent accepted a plea from the defendant in *People v. Numark*, with Mr. Shechtman standing before him. Although respondent has testified that a judge’s role with respect to such pleas is “almost ministerial,” convicting and sentencing a defendant indisputably requires the exercise of judicial power and discretion. More to the point, it is manifestly improper for a judge to sit on a case in which the judge’s personal attorney appears, regardless of the nature of the case. Here, the impropriety was exacerbated by respondent’s misleading disclosure on the record that he and Mr. Shechtman “have had a professional and personal relationship which continues until today.” By not stating that Mr. Shechtman was then representing him, respondent’s disclosure was not just incomplete but deceptive, since it could be viewed as referring solely to a relationship arising out of their previous public employment.

While respondent now acknowledges the impropriety of sitting on his attorney’s cases, he testified that when Mr. Shechtman appeared before him, he believed that the conflict was waivable and that he could hear Mr. Shechtman’s cases if disclosure of the relationship was made. It is difficult to understand how any judge – particularly a judge with respondent’s experience and talents – could fail to recognize, even without the guidance provided by the

Advisory Opinions, that such a conflict required prompt recusal or, at the very least, presented a significant issue that warranted exploration. Even a telephone call to the Advisory Committee would likely have provided appropriate guidance. Moreover, in light of respondent's proffered rationale, his inadequate disclosure was particularly serious. By failing to disclose that Mr. Shechtman was his attorney, respondent appeared to be concealing the most significant aspect of their relationship and thus deprived the district attorney of a meaningful opportunity to object to the judge's participation.

A short time later, respondent handled *People v. Kurland*, in which the defendant represented by Mr. Shechtman was accused of a probation violation. Mr. Shechtman initially contacted respondent *ex parte* to request an adjournment, a contact which should have alerted respondent to the conflict in this case. Respondent ordered a bench warrant when the defendant failed to appear and, a week later, sat on the case when Mr. Shechtman appeared with the defendant. (In the intervening week, respondent testified at the Commission office, with Mr. Shechtman at his side.) Without making any disclosure of his relationship with the defendant's attorney, respondent vacated the bench warrant, noting Mr. Shechtman's earlier request for an adjournment. Respondent then rejected the district attorney's request that the defendant be incarcerated and put the case over for three months.

Respondent claims that he confused the *Kurland* case with *Numark* and, as a result, mistakenly believed he had already placed his relationship with Mr. Shechtman on the record. In any case, disclosure would have been inadequate since respondent should not have sat on Mr. Shechtman's cases even with full disclosure. Moreover, the record reflects that subsequently, after learning that he was prohibited from sitting on his attorney's cases, respondent took no action to recuse himself or otherwise transfer the *Kurland* case until two months later, when the case was again on the court calendar. In the interim, the defendant remained at liberty as a result of respondent's exercise of discretion.

Throughout this period, respondent, who was paying Mr. Shechtman a reduced rate for his services, regularly conferred with the attorney, who was earning substantial fees from the defendants in *Numark* and *Kurland*. Under the circumstances, respondent's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]), and his actions conveyed the appearance of favoritism. Although respondent maintains that his handling of both cases was routine and did not afford any special treatment to Mr. Shechtman's clients, respondent's insensitivity to his ethical responsibilities created an appearance of impropriety permitting an adverse inference to be drawn. This departure from the high standards of conduct required of judges jeopardizes the public's respect for the judiciary as a whole.

In considering the sanction, we note that respondent has acknowledged his misconduct and pledges that he will not repeat it. In view of these factors, we conclude that censure is appropriate.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Ms. DiPirro, Mr. Harding, Ms. Hubbard and Judge Peters concur, except that Judge Klonick, Ms. DiPirro and Ms. Hubbard dissent as to Charge I and vote to sustain the charge.

Mr. Emery, Judge Konviser and Judge Ruderman did not participate.

Mr. Jacob was not present.

Dated: October 29, 2008

CONCURRING OPINION BY MR. BELLUCK

I write to explain my concurrence in the Commission's vote not to sustain Charge I and to clarify my concurrence in sustaining Charge II.

The chilling effect on judges if the Commission were to sustain Charge I should be intolerable to anyone who believes in a healthy democratic society and a vibrant judiciary free to function without the threat of retaliation.

Judicial independence has been a cornerstone of our American democracy since its founding over 200 years ago. It was recognized by our founding fathers. The Declaration of Independence, in criticizing King George III for making "judges dependent upon his will alone for the tenure of their offices and the amount and payment of their salaries," testifies to this fact. In 1789, Thomas Jefferson wrote to James Madison: "The judiciary... is a body which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity." The Constitution protected judicial independence because the founders had firsthand experience being a persecuted minority in courts unfairly controlled by a ruling party. Indeed, the Constitutional safeguards of appointments for life, a difficult impeachment process and non-diminishment of salaries were specifically designed to protect the independence of the judiciary. Throughout our country's history, our greatest legal scholars and jurists have been staunch defenders of this independence. "I have always thought, from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary" (Excerpt from John Marshall, address to the Virginia State Convention of 1829-30, Proceedings and Debates of the Virginia State Convention of 1829-30 at 616 [1830]). In more than 200 years, only 13 attempts have been made to formally impeach federal judges, and only seven judges have been convicted and removed from office—none because Congress disagreed with a judge's judicial philosophy or with a particular decision. Emerging democracies look to our system of an independent judiciary as a model.

Against this backdrop, a charge was brought against Judge Ambrecht for issuing a decision that allegedly was politically motivated.

The history of the United States is paved with judicial opinions that expressed unpopular political viewpoints or that had political facets and impact. *E.g., Plessy v. Ferguson* and *Brown v. Board of Education*. While the facts and issues in the underlying matter handled by

respondent may not have great societal import, punishing the judge for the contents of his opinion most certainly would have. To be sure, a judicial opinion is not so sacrosanct that it can never be the basis for a misconduct finding, *e.g.*, if it was demonstrably motivated by an improper purpose. This case could not be further from such a patently offensive scenario.

At its core, the Formal Written Complaint in this matter alleged that respondent issued a judicial opinion with the intent to influence a political election. After a lengthy hearing, it became clear that the argument for misconduct was based on (i) the contents of the opinion (critical of a public official), (ii) the timing of the opinion (issued six days before a primary election) and (iii) respondent's frank acknowledgment that he was aware that the opinion might have a political impact. Moreover, it was written in response to an application to withdraw a pending motion. A finding of misconduct based on such slender facts would indeed be a grave threat to the independence of the judiciary. Therefore, as to Charge I of the Formal Written Complaint, I concur with the majority that the charge should not be sustained.

The facts underlying this matter are as follows.

From 1993 to 1997, a group of defendants plead guilty and paid restitution in *People v. Alvarez*, a case involving kickbacks to real estate managers. In 1996 Acting Supreme Court Justice Leslie Crocker Snyder appoints a special master to oversee the restitution fund. In 1997 certain records related to the restitution fund are sealed by an Appellate Division justice.

In early 2005, incumbent District Attorney Robert M. Morgenthau is challenged in a Democratic primary by former Judge Snyder.

In March 2005 the District Attorney begins to investigate the restitution fund. The District Attorney's office is unable to locate the pertinent records in its own files and is told by a court clerk that the *Alvarez* file is sealed. The District Attorney's office then applies *ex parte* to respondent, a former assistant district attorney in Morgenthau's office, to unseal the *Alvarez* records. Respondent refuses to sign an *ex parte* order and requires the District Attorney to file an Order to Show Cause, on notice, to unseal these records.

In a telephone conference on July 14, the parties agree that ADA Dugan can review the *Alvarez* records at the special master's law firm.

On July 21, ADA Dugan goes to the firm and spends several hours reviewing and copying records. Thereafter, Dugan advises the Court that, based on his review, he has determined that most of the documents covered by the unsealing request were not sealed, including Judge Snyder's orders related to the special master's compensation. The ADA states that only eleven requests for compensation appear to be sealed and, therefore, he is narrowing the unsealing request to those documents only. The attorney for the special master vigorously disputes the ADA's representations and argues that the application is politically motivated.

On August 15, a newspaper article appears in the *New York Post* regarding Judge Snyder's role in the *Alvarez* matter. The article contains specific details about eleven Snyder orders approving compensation to the special master.

On August 16, the special master's lawyer asks respondent to take sworn statements regarding the leak of sealed information to the *New York Post*. Respondent, believing that he was being manipulated and that the court's jurisdiction to rule on the unsealing application had been circumvented by whoever had provided the information to the *Post*, orders a hearing on the apparent breach of the sealing order.

On August 19, 2005, respondent holds a hearing at which the attorneys appear. ADA Dugan tells the Court that the Chief of the Investigations Division had asked him in early 2005 to review the file in *Alvarez*, a matter that had concluded some years earlier.

On August 31, 2005, respondent issues 26 written interrogatories to the Chief of the Investigations Division regarding the unsealing request in *Alvarez* and the documents Dugan had obtained from the special master's law firm. Respondent directs a response by September 2, 2005.

On September 2, the District Attorney commences an Article 78 proceeding in the Appellate Division, First Department, challenging respondent's authority to issue the written interrogatories. At an appearance before Justice James M. Catterson, an oral agreement is reached between the District Attorney and the Attorney General's office, appearing on behalf of respondent, calling for respondent to withdraw the interrogatories and for the District Attorney to withdraw the Article 78 proceeding and the unsealing application. The results of this conference are communicated to respondent by telephone.

On September 6, 2005, the District Attorney writes to respondent withdrawing the application to unseal documents in *Alvarez*.

On September 7, 2005, respondent issues a six-page decision which grants the application to withdraw the unsealing request and criticizes the District Attorney for an "apparent misuse of a public office for inappropriate political purposes."

On September 13, 2005, the primary election for the Democratic nomination for District Attorney is held.

The issue is whether the proof established that respondent issued a decision that was motivated by political considerations. As the record here reveals, such proof on balance was conspicuously absent.

There is no persuasive evidence in the record to disprove respondent's claim that he acted consistently to protect the integrity of his court. It is clear that respondent felt he was being manipulated by the District Attorney's office. It is undisputed that he believed that the District Attorney's office had misused its office for political purposes, leaked sealed court records containing information detrimental to the District Attorney's opponent in the primary election and, subsequently, interfered with the Court's attempt to determine who at the office was responsible for these acts. It is also undisputed that respondent issued written interrogatories to the District Attorney's office in an attempt to resolve unanswered questions about the source of the leaked material, that he had authority to inquire into the apparent leak of sealed material, and

that he had authority to issue a decision on the application to withdraw the unsealing request. Respondent's commentary in his six-page decision expresses his views regarding this sequence of events:

The Court, while lacking all the necessary facts to determine the source of the leaked information, is compelled to express its concern over the apparent misuse of a public office for inappropriate political purposes. Though ADAs Dugan and Dwyer consistently denied a political facet to the investigation, the Court finds such assertion totally incredible and belied by the People's own actions. Moreover, the Court can only conclude that ADA Castleman's refusal to answer the submitted interrogatories was intended to prevent the Court from completing the fact finding required for it to determine whether and by whom the sealing order had been violated.

The Court further takes issue with the People's completely illogical position, proffered only after the Court had initiated an inquiry regarding the leak, that Mr. Hershmann's compensation applications and Judge Snyder's Orders were never under seal and were thus available to the New York Post and the public in general and the unsealing order which they sought was unnecessary. It is undisputed that the entire purpose of the Order to Show Cause was to determine which documents were encompassed by the sealing order. For the People to now make a unilateral determination that the subject Orders were not sealed is presumptuous and denigrating to the very Court which the People enlisted to make that determination. (Comm. Ex. 25)

Based on the evidence adduced at the hearing, the attempt to attribute respondent's acts and the above-quoted decision to an improper motivation was no more than speculative and was properly rejected by the Commission.

Far from there being proof that respondent was politically motivated to issue his decision, the record is clear that he was a supporter of Mr. Morgenthau and, indeed, would have voted for him if he lived in Manhattan. For example, respondent testified at the hearing:

"I hold Mr. Morgenthau in high esteem. I worked for him for many, many years, he gave me great opportunities in my career." (Tr. 146)

"Q. [W]ould you compare your relationship with Leslie Crocker Snyder and your relationship with Robert M. Morgenthau?

A. There is no comparison. I knew Leslie simply because she was a colleague and we had brief interactions at judicial functions. I looked upon Mr. Morgenthau as a father figure for many years. Having worked for him

while in college, and I was always very grateful for the many opportunities he gave me to be exposed to the practice of law at such an early age ending college, which is what prompted me to pursue a career in law." (Tr. 236-37)

[After testifying that he votes in Nassau County, respondent was asked:]

"Q. If you had been able to vote the primary election in 2005 between Mr. Morgenthau and Justice Snyder, for whom would you have voted?

A. Robert Morgenthau.

Q. And why is that?

MR. FRIEDBERG: Move to strike. It's speculative.

JUDGE SIMONS: Strike it out.

Q. When that election was going on, who did you hope would win that election?

A. Robert Morgenthau.

Q. And why is that?

A. I hold Robert Morgenthau in the highest esteem. He is someone that gave me not just one opportunity, but many opportunities through the course of my education and career to give public service and to learn the practice of law. And I admire and supported him throughout the years.

Q. Did you ever work on any of his campaigns?

A. I did.

Q. Do you recall how many of those campaigns you worked on?

A. Well, I only worked on the 1985 campaign. And I was a college student at the time, and I was on the non-legal staff. So it was permissible at that time to volunteer on your own time to work on Mr. Morgenthau's campaign." (Tr. 813-14)

[Respondent states that subsequently the district attorney "implemented a revised rule that basically barred any assistant district attorney from working voluntarily or otherwise on his future campaigns."]

"...Q. Did you ever contribute to Mr. Morgenthau's campaigns?

A. Well, you were allowed to contribute financially, and I always did that, yes.

Q. Did that continue after you left the office but before you became a judge?

A. Correct. I contributed even while on the Governor's staff." (Tr. 815-16)

Respondent's law clerk was asked:

"Q. During the entire time that the *Alvarez* matter was pending before him, did Justice Ambrecht ever indicate to you what his personal views were regarding the merits of the candidacies of Judge Leslie Crocker Snyder on the one hand and Robert Morgenthau on the other in that primary race?

A. No.

Q. Have you ever heard to this day Justice Ambrecht express the view that he supported the candidacy of Leslie Crocker Snyder for the District Attorney in New York County?

A. Never.

Q. And during the entire time that the matter was pending before you, have you ever heard Justice Ambrecht express any intent whatsoever to assist Justice Snyder in her candidacy or quest to become District Attorney of New York County?

A. No. To the contrary. The gist of any conversation we ever had and not even about this election but about -- let me rephrase that. The conversations that I had with Judge Ambrecht would have led me to believe to the contrary, that he would have -- may have been a supporter of Robert Morgenthau. He appreciated several career opportunities that the District Attorney had given him, he had fond feelings for the office, and respected Mr. Morgenthau. And I never had any reason to believe otherwise, until this time." (Tr. 563-65)

No contrary evidence concerning respondent's personal political views, or any supposed bias, was presented.

The dissent argues that respondent issued a decision in a matter that had already been concluded (Dissenting opinion, p. 3). Not so. During the oral argument on this matter, Commission counsel acknowledged that the September 6, 2005 letter from the District Attorney withdrawing the unsealing request was in fact an "application" to withdraw a motion (Oral argument, p. 19). Commission counsel also acknowledged that respondent, and, indeed, any

judge, has the authority to issue a decision on an application to withdraw an unsealing request (*Id.* at 18-19).

The fact that the referee concluded that “Circumstances did not require a written decision” (Referee’s report, p. 3) does not speak to whether respondent had the right to issue such a decision. Nor did the fact that Justice Catterson had apparently brokered an agreement amongst the parties, and had commented that he wanted the matter to “go away,” preclude respondent from writing an opinion. Respondent was not subject to any order by the Appellate Division or any other legal bar that would preclude him from issuing a decision addressing the matters before him.

As to the argument that the timing of the decision (six days before the primary) is conclusive evidence of an improper purpose, a judge might equally be subject to criticism for delaying a decision which might be detrimental to a candidate until after an election. Whenever the opinion was issued, the timing would be perceived by some as politically motivated, regardless of the judge’s intent. In that regard, I cannot agree with the dissent’s view that since it was unnecessary for respondent to issue such a decision shortly before the election, it must be concluded that he did so for the purpose of influencing the election.

Nor is there merit to Commission counsel’s insistence that respondent admitted criticizing the District Attorney’s office “without facts to back it up.” While the opinion states that the court “lack[s] all the necessary facts to determine the source of the leaked information,” respondent has explained that he believed the facts before him pointed to the District Attorney’s office as the source of the leak, though he lacked adequate facts to accuse a particular individual. The very fact that a judge has been called upon to explain and justify statements in a judicial opinion, on these facts, graphically demonstrates the impropriety of this unprecedented intrusion into judicial independence.

While I strongly believe that investigation into these matters was unwarranted, it is important to underscore that this decision fulfills the Commission’s mandate to promote public confidence in the integrity of the judiciary, which includes not only holding judges accountable for misconduct but, equally important, dismissing meritless complaints.

For these reasons, I concur that Charge I should not be sustained.

With respect to Charge II, I concur in the sanction with some reservation. The majority determination lays out the facts regarding the appearances of Mr. Shechtman before respondent in two cases after respondent had retained Mr. Shechtman to represent him with respect to Charge I.

It is indeed troubling that respondent would allow his own attorney to appear before him. It is not a credible defense to this charge that respondent was not aware of the specific rules or Advisory Opinions prohibiting such conduct. It simply does not pass the smell test for any judge to allow his or her own attorney to appear on a pending matter without, at the very least, making full disclosure of the relationship.

My reservations in sustaining Charge II are as follows.

In my view, the fact that Charge I was even investigated by the Commission was an encroachment into the independence of the judiciary, and since it is clear that Charge II would never have arisen had it not been for the investigation into Charge I, I am troubled by upholding any charges against respondent. While it is often the case that the cover-up is worse than the crime, in this case, the “crime” should never have been charged.

Secondly, I am troubled by the apparent conduct of Mr. Shechtman. While Mr. Shechtman was not subject to the jurisdiction of the Commission and, therefore, had no opportunity to defend his actions, the appearance of what occurred here is not good. Mr. Shechtman, well known as an ethics advisor and indeed a former chair of the State Ethics Commission, was hired by respondent for the express purpose of representing him with respect to Charge I. Notwithstanding this, it appears that Mr. Shechtman placed respondent in the very situation which gave rise to further charges of wrongdoing. Moreover, Mr. Shechtman profited handsomely from this. Indeed, he earned over \$40,000 on the two cases in which he appeared before respondent while serving as respondent’s attorney. While it does not alleviate the burden on respondent to avoid any appearance of impropriety, in my view Mr. Shechtman bears a considerable portion of the blame.

Dated: October 29, 2008

OPINION BY JUDGE KLONICK, DISSENTING AS TO CHARGE I AND CONCURRING AS TO SANCTION

As to Charge I of the Formal Written Complaint, I respectfully dissent.

Specifically, the Complaint alleged that the Respondent, acting or appearing to act for politically motivated reasons, publicly accused the New York County District Attorney’s Office of abusing its authority in an effort to embarrass the candidate then running against the incumbent DA in the 2005 Democratic primary. The Referee concluded, following an extensive hearing, that this charge had been sustained and that Respondent’s intent was to affect the election. I agree.

A brief recitation of the facts is necessary to put the Respondent’s actions into context.

In 2005, incumbent DA Robert M. Morgenthau was challenged in the Democratic primary by former Judge Leslie Crocker Snyder. With respect to a matter which was pending before him involving a fiduciary appointment Judge Snyder had made to a firm she later joined, the Respondent was obviously disturbed by an alleged leak of information to the media. The resulting media articles portrayed former Judge Snyder in a negative light. The Respondent, in an effort to find the source of this breach of confidentiality, issued interrogatories, on the Court’s own motion, directed to the District Attorney’s Office.

The District Attorney’s Office opposed answering these interrogatories and initiated an Article 78 proceeding before the Appellate Division, First Department, challenging the

Respondent's authority to issue such interrogatories. An appearance on Friday, September 2, 2005 before Appellate Division Justice James M. Catterson resulted in a settlement of the matter. The District Attorney's Office agreed to withdraw the Article 78 proceeding immediately and to also withdraw the application to unseal certain documents which was pending before the Respondent. In return, the Attorney General's Office, appearing on behalf of the Respondent, agreed to withdraw the interrogatories. Judge Catterson made it clear to the attorneys the matter was over and that he did not want to see any more publicity about it. The results of the proceeding at the Appellate Division were communicated that day by the Assistant Attorney General to the Respondent's Law Clerk, as well as directly to the Respondent by telephone. The Respondent's Law Clerk even remarked to the Assistant Attorney General after being told of the resolution: "That's fine, I don't have to write an opinion over the weekend" (Referee's Report, Appendix A ¶48; Tr. 689).

The District Attorney's Office then withdrew its application before the Respondent on September 6, 2005. The next day, September 7, 2005 and six days before the primary election, the Respondent issued a six-page Decision wherein he severely criticized the incumbent District Attorney and his office. The Decision, *inter alia*, criticized the District Attorney's Office for its "apparent misuse of a public office for inappropriate political purposes" (Referee's Report, Appendix A ¶54; Ex. 25, 50).

Based upon testimony and evidence given at the hearing in this matter before Referee Simons, it appears that many of the conclusions in the Respondent's Decision issued on September 7, 2005 are based upon speculation and innuendos, without any basis in fact.

The Referee concluded that: "The circumstances did not require a written decision, let alone one which, based solely on Respondent's speculations, castigated a public officer for abuse of office, or at a minimum, improper conduct. The error was compounded when Respondent knowing the decision would become public issued it a few days before the District Attorney faced an opponent in a primary election" (Referee's Report, p. 3).

It is clear that the matter pending before the Respondent had been concluded by a settlement between the parties before the issuance of the Decision. Information concerning the settlement had been communicated directly to the Judge and his Law Clerk several days before he issued his Decision, a decision which was highly critical of an elected official on the eve of a contested primary election. Since there was no necessity for such a written Decision, one is left with but one conclusion: The Respondent, by his after-the-fact decision, was attempting to enter the political arena and influence the election.

A judge is required to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules Governing Judicial Conduct, §100.2[A]). In fact, "[t]he ability to be impartial is an indispensable requirement for a judicial officer." *Matter of Sardino*, 58 NY2d 286, 290 (1983).

The Respondent certainly had the authority to inquire into and discipline alleged attorney misconduct after any settlement. He could have held a hearing to determine the source of the alleged leaks of the purportedly sealed documents and then discipline any of the parties

appropriately. He chose, instead, to issue a decision in a matter which had already been concluded.

I can only conclude, as the Referee did, that the Respondent's actions were politically motivated and a blatant attempt to influence an election. I vote to sustain Charge I and that the appropriate sanction is censure.

Dated: October 29, 2008



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to THOMAS W. BALDWIN, a Justice of the Cairo Town Court, Greene County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cheryl L. Randall, Of Counsel) for the Commission
Honorable Thomas W. Baldwin, *pro se*

The respondent, Thomas W. Baldwin, a Justice of the Cairo Town Court, Greene County, was served with a Formal Written Complaint dated March 5, 2008, containing four charges. The Formal Written Complaint alleged that respondent improperly delayed three small claims actions and engaged in an improper *ex parte* communication in a landlord-tenant case. Respondent filed an answer dated April 4, 2008.

On July 22, 2008, 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 July 31, 2008, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent is not an attorney. He has served as Cairo Town Justice for more than 25 years, having assumed his judicial position on January 1, 1982. His current term began on January 2, 2006, and will expire on December 31, 2009.

As to Charge I of the Formal Written Complaint:

2. On August 31, 1998, Fabrizio Fuel (a corporation) sued Kenneth Kligerman in Cairo Town Court for recovery of an allegedly unpaid balance of \$1,598.06 for fuel delivery. Plaintiff was represented by David Shults, Esq., of Shults and Shults, P.C.

3. By letter dated October 7, 1998, respondent set a trial date for October 13, 1998.

4. By letter dated October 13, 1998, a paralegal from plaintiff's attorney's office wrote to respondent stating that Mr. Shults was requesting an adjournment of the trial date and asking respondent to notify the defendant regarding the adjournment. The letter also indicated that Mr. Shults would contact the court for another trial date. The letter was not copied to the defendant.

5. During the next three years, the plaintiff never requested another trial date. Respondent never took any further action to reschedule the matter.

6. Three years later, on November 28, 2001, attorney Michael Esslie wrote to the court on behalf of the plaintiff inquiring as to the status of the action.

7. By letter dated December 18, 2001, respondent generated a written notice of a hearing to be scheduled for January, 8, 2002. Although it lists the addresses of each party, the notice was copied only to the plaintiff.

8. On January 21, 2002, Mr. Esslie filed a Proposed Order, stating that the defendants had not appeared at trial on January 8, 2002, that plaintiff had given "due proof" on the issue of damages and that the court had assessed the damages at \$1,598.06.

9. On January 25, 2002, respondent signed the Order.

10. On March 19, 2002, Mr. Esslie filed a default judgment with the County Clerk. On the same day, the defendant told respondent, while in court on another matter, that he had never received notice of the January 8, 2002 hearing date in *Fabrizio Fuel v. Kligerman*.

11. On March 26, 2002, Mr. Esslie sent a letter addressed to the Cairo Town Court Clerk, stating that he learned the judgment debtor had raised the issue of notice and that he would not oppose a proper motion to vacate the default judgment provided the judgment debtor would agree to no further adjournments of the trial date.

12. Mr. Esslie's March 26, 2002 letter was not copied to the defendant. Respondent never received Mr. Esslie's March 26, 2002 letter as it was addressed to the court clerk.

13. On April 22, 2002, after checking the court file and noting that no summons or Affidavit of Service had been mailed to the defendant, respondent vacated the default judgment *sua sponte*. Respondent also set a new trial date for May 14, 2002.

14. On May 7, 2002, the defendant filed a motion to dismiss the complaint as abandoned. On May 9, 2002, respondent sent notice to both parties that the trial date would be adjourned to June 11, 2002.

15. On June 11, 2002, Mr. Esslie filed an affidavit in opposition to the motion to dismiss, noting that “all that remains is for the court to rule on the motion.”

16. On June 25, 2002, the defendant filed a corrected motion to dismiss, correcting one numbered provision of the CPLR.

17. To date, respondent has failed to rule on the May 2002 motion to dismiss and has failed to correspond with the parties since that time.

As to Charge II of the Formal Written Complaint:

18. On September 5, 2000, respondent presided over a trial in *Veverka v. Burstell*, a small claims action for non-payment of \$3,000 for the installation of a modular home, as to which the defendant counterclaimed for \$3,000 for alleged defects.

19. On September 9, 2000, upon consent of the parties, respondent made a post-trial visual inspection of the premises in question and determined there was still outstanding work to be completed.

20. On or about September 23, 2000, the parties sent additional post-trial materials to the court.

21. Respondent has lost or misplaced the file associated with the case and, to date, has failed to issue a decision in the matter.

As to Charge III of the Formal Written Complaint:

22. On August 13, 2002, respondent’s co-judge awarded the claimant in *Chubb v. Palson* a default judgment in a small claims action for an unreturned deposit in the amount of \$855.

23. On March 12, 2003, the claimant’s attorney, Michael Esslie, served an information subpoena upon the judgment debtor.

24. On May 27, 2003, Mr. Esslie filed a notice of motion to punish for contempt for the judgment debtor’s noncompliance with the information subpoena.

25. On June 24, 2003, respondent presided over a contempt proceeding. While the judgment debtor responded to the majority of questions posed by the information subpoena,

respondent ordered him to provide additional information to the claimant prior to the end of June 2003, regarding ownership of a snowmobile.

26. On July 8, 2003, Mr. Esslie sent a letter to respondent stating that the judgment debtor had not provided the additional information pertaining to the snowmobile and requesting that the debtor be incarcerated for contempt.

27. On July 14, 2003, respondent signed an Order to Show Cause requiring the judgment debtor to appear in court on July 22, 2003, unless he provided the requested information.

28. On July 21, 2003, Mr. Esslie wrote to respondent to ask whether his attendance in court for the Order to Show Cause hearing was mandatory and to state that he would not be in attendance if it was not. Respondent orally advised Mr. Esslie that he did not have to appear for a hearing.

29. On July 25, 2003, Mr. Esslie wrote to respondent, informing him that the defendant had still refused to supply the requested information or to pay off the judgment. He further asked respondent to advise him of the court's decision on the contempt motion.

30. To date, respondent has failed to issue a decision on the motion for contempt. Nor has he taken any other action in connection with the proceeding.

31. Respondent chose not to find the defendant in contempt or incarcerate him because he believed that the unresolved issue of the snowmobile could have been determined "very easily" by counsel. He has not communicated his decision to the parties.

As to Charge IV of the Formal Written Complaint:

32. On November 9, 2004, respondent presided over a trial in *Fava v. Schnur*, a summary proceeding to recover possession of real property by evicting tenants who were renting the subject premises with an option to buy.

33. On November 15, 2004, respondent signed a warrant of eviction awarding delivery and possession of the premises to the petitioners by December 28, 2004, along with the sum of \$2,600.

34. On January 20, 2005, the warrant was served upon the tenants.

35. On or about January 21, 2005, respondent signed an order staying the warrant of eviction until February 1, 2005. The order indicates that it was based upon the "oral application of Jens Lobb," attorney for the respondents, and "on telephone notice" to Mr. Esslie's law office, which was representing the petitioners.

36. On the same day, January 21, 2005, Mr. Esslie wrote to respondent objecting to the fact that there was no motion for a stay before the court and that he had had no opportunity to object to the stay.

37. Respondent failed not only to provide proper notice of the tenants' application for an order staying the eviction to the petitioners, but also to require the tenants to make a deposit with the court, as required by Section 751 of the Real Property Actions and Proceedings Law.

38. On February 7, 2005, Mr. Esslie wrote to the Greene County Sheriff's office withdrawing the warrant of eviction. Shortly thereafter, the tenants purchased the property from the petitioner.

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

The record establishes that respondent was responsible for significant delays in three small claims actions that were filed in his court. In one case respondent failed to issue a decision after a hearing, apparently because of a lost file; in another case he failed to rule on a motion to dismiss; and in a third case he failed to rule on a request for a contempt finding. These delays, in cases that have been pending for several years, deprived the parties of the opportunity to have their claims resolved in a timely manner. *See Matter of Scolton*, 2008 Annual Report 209 (Comm on Judicial Conduct) (delays in scheduling a hearing and issuing decisions in six small claims actions); *Matter of Robichaud*, 2008 Annual Report 205 (Comm on Judicial Conduct) (poor management resulting in delayed decisions and failure to report the delays to court administrators as required); *Matter of Leonard*, 1986 Annual Report 137 (Comm on Judicial Conduct) (delays in 14 small claims actions, despite numerous calls and letters from the litigants).

The ethical standards require every judge to dispose of court matters "promptly, efficiently and fairly" (Rules, §100.3[B][7]). The "informal and simplified" procedures for small claims are intended to provide litigants with an efficient and just resolution to their legal disputes (Uniform Justice Court Act §1804). This goal is thwarted when cases are unduly delayed through no fault of the parties. Respondent has acknowledged his responsibility for the delayed matters.

It was also improper for respondent to stay a warrant of eviction in a landlord-tenant case based upon an *ex parte* communication and to fail to require the holdover tenant to make a deposit with the court, as required by law. A judge is required to maintain professional competence in the law and to accord all legally interested persons or their attorney the right to be heard according to law (Rules, §§100.3[B][1] and 100.3[B][6]).

In admonishing respondent, who has served as a judge since 1982, we note that he has acknowledged his misconduct and that his derelictions, as depicted in the record before us, appear to be relatively isolated and limited to the matters described herein.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Ms. DiPirro, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: August 22, 2008



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to ROLAND A. BEERS, a Justice of the Walton Village Court, Delaware County.

DECISION AND ORDER

BEFORE:

Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Honorable Roland A. Beers, pro se

The matter having come before the Commission on March 12, 2008; and the Commission having before it the Formal Written Complaint dated October 31, 2007, and the Stipulation dated February 1, 2008; and respondent having resigned from judicial office effective January 31, 2008, and having affirmed that he will neither seek nor accept judicial office in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if accepted by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the Stipulation is accepted and that the pending matter closed based upon the Stipulation; and it is

SO ORDERED.

Dated: March 12, 2008

STIPULATION

Subject to the approval of the Commission on Judicial Conduct ("Commission"):

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission, and the Honorable Roland A. Beers (“respondent”) as follows:

1. Respondent has been a Justice of the Walton Village Court since 1993. He is not an attorney. He was formerly a Delaware County Deputy Sheriff and a Walton Village Police officer.
2. On November 5, 2007, respondent was served by the Commission with a Formal Written Complaint, containing four charges, a copy of which is annexed as Exhibit A.
3. Respondent did not answer the Formal Written Complaint, and pursuant to 22 NYCRR 7000.9(b), failure to answer the Formal Written Complaint is deemed an admission of its allegations.
4. By letter dated January 11, 2008, a copy of which is annexed as Exhibit B, respondent resigned his judicial office, effective January 31, 2008.
5. Respondent affirms that he will neither seek nor accept judicial office in the future.
6. In view of the foregoing, all parties to this Stipulation respectfully request that the Commission close the pending matter based upon this Stipulation.
7. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if accepted by the Commission.

Dated: February 1, 2008

s/ **Roland A. Beers**
Respondent

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

EXHIBIT A: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.

EXHIBIT B: JUDGE'S LETTER OF RESIGNATION: Available at www.scjc.state.ny.us.

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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.

DECISION AND ORDER

BEFORE:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Hogan Willig (by Diane R. Tiveron) for the Respondent

The matter having come before the Commission on June 18, 2008; and the Commission having before it the Formal Written Complaint dated March 5, 2008, respondent's Answer dated March 27, 2008, and the Stipulation dated May 20, 2008; and respondent having resigned from judicial office by letter dated April 24, 2008, effective April 28, 2008; and respondent having affirmed that she will neither seek nor accept judicial office in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if approved by the Commission; now, therefore, it is

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

SO ORDERED.

Dated: June 23, 2008

STIPULATION

Subject to the approval of the Commission on Judicial Conduct ("Commission"):

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission on Judicial Conduct ("Commission"), the Honorable June P. Chapman ("respondent"), and her attorney, Diane R. Tiveron, Esq., as follows.

1. Respondent has served as a Justice of the Ellicottville Town Court since January 1994. Respondent is 71 years old. She is not an attorney. Her current term of office expires on December 31, 2011.

2. Respondent was served by the Commission with a Formal Written Complaint dated March 5, 2008, which alleged *inter alia* that respondent failed to effectuate the right to counsel in a timely manner or altogether in three cases, with the result that three defendants each spent a week in jail; and failed to administer her court properly, with the result that bail monies in six cases were not deposited in a timely manner despite the Commission's prior Censure for such conduct, fine receipts in 22 cases were not remitted to the State Comptroller, a criminal case was dismissed because of the respondent's failure to take action, and sentencing dates in three cases were delayed for months because the respondent failed to order the pre-sentence investigation reports from the Probation Department. The Formal Written Complaint is appended hereto as Exhibit 1.

3. Respondent submitted an Answer dated March 27, 2008. The Answer is appended hereto as Exhibit 2.

4. Respondent tendered her resignation from judicial office on April 24, 2008, effective April 28, 2008, and has submitted copies to the Ellicottville Town Court and the Office of Court Administration. A copy of respondent's resignation letter is appended hereto as Exhibit 3.

5. Pursuant to Section 47 of the Judiciary Law, the Commission's jurisdiction over a judge continues for 120 days after resignation from office.

6. Respondent affirms that she will neither seek nor accept judicial office in the future.

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

8. 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: May 20, 2008

s/ **Honorable June Chapman**
Respondent

s/ **Diane R. Tiveron**
Attorney for Respondent

s/ **Robert H. Tembeckjian**
Administrator & Counsel to the Commission
John J. Postel, Of Counsel

EXHIBIT 1: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.

EXHIBIT 2: ANSWER: Available at www.scjc.state.ny.us.

EXHIBIT 3: JUDGE'S LETTER OF RESIGNATION: Available at www.scjc.state.ny.us.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to ROBERT G. DUNLOP, a Justice of the Chazy Town Court, Clinton County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cheryl L. Randall and Cathleen S. Cenci, Of Counsel) for the Commission
Stephen A. Johnston for Respondent

The respondent, Robert G. Dunlop, a Justice of the Chazy Town Court, Clinton County, was served with a Formal Written Complaint dated January 25, 2007, containing two charges. The charges alleged that in two cases respondent accepted a guilty plea and sentenced to jail an unrepresented defendant who was incapable of understanding the proceedings, without making a searching inquiry into whether the defendant's waiver of the right to counsel and the guilty plea were knowing and intelligent. Respondent filed a verified Answer dated March 20, 2007.

By Order dated May 29, 2007, the Commission designated David M. Garber, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 22 and 23, 2008, in Plattsburgh. The referee filed a report dated May 20, 2008.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Respondent's counsel waived oral argument. On September 18, 2008, the Commission heard oral argument by Commission counsel and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a Justice of the Chazy Town Court and has served in that capacity since January 1, 2005. Prior to that, he was a Justice of the Beekmantown Town Court from 1992 to 2000. Respondent is a retired New York State trooper. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On August 15, 2005, at approximately 4:20 A.M., U. S. Border Patrol agents found Jordan Marsh, age 19, lying in the middle of a road in the Town of Champlain. Mr. Marsh was in an intoxicated condition, having been drinking heavily over the previous two days.

3. When Mr. Marsh was 17 years old, he had been involved in an accident resulting in a traumatic brain injury, which left him somewhat cognitively impaired.^[1]

4. Two State troopers were called to the scene. Trooper Ryan Fountain concluded that Mr. Marsh was intoxicated, based upon the smell of alcohol and Mr. Marsh's overall appearance. Trooper Eric L. Brown likewise concluded that Mr. Marsh was intoxicated based upon Mr. Marsh's "deer-in-the-headlights look."

5. The Border Patrol agents informed the troopers that they had found a marijuana pipe in Mr. Marsh's backpack. When Trooper Fountain attempted to search the backpack, Mr. Marsh ran away and threw his backpack into a river. Trooper Fountain chased Mr. Marsh, ultimately tackling him. While Trooper Fountain struggled with Mr. Marsh to handcuff him, Trooper Brown pepper-sprayed Mr. Marsh.

6. Troopers Fountain and Brown transported Mr. Marsh to the New York State Police Chazy substation, where Trooper Fountain prepared Informations charging Mr. Marsh with Disorderly Conduct, a violation under Section 240.20 of the Penal Law, and Resisting Arrest, a misdemeanor under Section 205.30 of the Penal Law. In the Information charging Marsh with Disorderly Conduct, Trooper Fountain affirmed that "it was determined subject [Mr. Marsh] was intoxicated/ alcohol."

7. Troopers Fountain and Brown also prepared an Incident Report, which stated that Mr. Marsh "appears to be impaired with drugs" and that "US Border Patrol advised the subject [Mr. Marsh] is intoxicated and has a smoking pipe in his back pack."

8. In an Arrest Report, which Trooper Fountain executed after respondent had arraigned and sentenced Mr. Marsh, Trooper Fountain stated that Mr. Marsh "appears to be impaired with alcohol."

9. According to Trooper Fountain, neither of the Town Justices for the Town of Champlain or the adjoining Town of Mooers answered the troopers' telephone calls when they called them to arraign Mr. Marsh, so the troopers contacted respondent, who agreed to arraign Mr. Marsh.

10. Trooper Fountain transported Mr. Marsh to the Chazy Town Court for arraignment. Respondent arraigned Mr. Marsh at approximately 6:45 A.M.

11. Prior to the arraignment, Trooper Fountain provided respondent with the two Informations and Mr. Marsh's "rap sheet." Respondent reviewed the Informations and was aware that Mr. Marsh had been found lying in the middle of a road, that Trooper Fountain had determined that Mr. Marsh was intoxicated when he was arrested, and that he had a marijuana pipe in his backpack. Respondent also was aware that the troopers had pepper-sprayed Mr. Marsh to subdue him.

12. At the arraignment, respondent informed Mr. Marsh of the charges, asked if he understood the charges and informed him of the maximum penalty that could be imposed. He also informed Mr. Marsh that he had a right to an attorney and that if he could not afford an attorney, respondent would appoint one for him. Mr. Marsh stated that he did not want an attorney.

13. Respondent inquired as to whether Mr. Marsh understood what it meant to proceed without the advice of legal counsel, and Mr. Marsh replied that he did. Respondent told Mr. Marsh that he would have a criminal record if he pled guilty. Respondent asked Mr. Marsh how he wanted to plead and Mr. Marsh stated that he was pleading guilty.

14. Respondent did not question Mr. Marsh about his alcohol consumption or mental competency, notwithstanding that (i) respondent had read the Information stating that Marsh had been found lying in the middle of a roadway and was intoxicated at the time of his arrest; (ii) Mr. Marsh, according to respondent, looked as if he "had been up all night" and had "partied into the wee hours"; and (iii) respondent suspected that Mr. Marsh had substance abuse problems.

15. After Mr. Marsh pled guilty, respondent asked him if he was employed or attending school. Mr. Marsh responded that he was unemployed and was not attending school.

16. Respondent then sentenced Mr. Marsh to a term of 90 days of incarceration on the Resisting Arrest charge and to a term of 15 days on the Disorderly Conduct charge, to run concurrently.

17. Mr. Marsh served 60 days in the Clinton County Jail on the sentence imposed by respondent.

18. Respondent testified that he was aware of the requirements of Section 170.10 of the Criminal Procedure Law, which provides that at arraignment upon an Information a defendant has the right to counsel and to have counsel assigned if he or she cannot afford one and that the court must "take such affirmative action as is necessary to effectuate" the defendant's rights.

19. Respondent failed to conduct a searching inquiry to determine whether Mr. Marsh competently, intelligently and voluntarily waived his right to counsel and pled guilty, and he failed to take the affirmative action mandated by law to effectuate Mr. Marsh's rights.

20. Respondent's testimony that Mr. Marsh was not intoxicated at the arraignment, that he fully understood his rights and the charges against him and that he knowingly and intelligently waived his right to counsel and pled guilty is not credible.

As to Charge II of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and 100.3(B)(6) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established. Charge II is not sustained and therefore is dismissed.

Respondent deprived a young defendant of his due process rights and liberty when, in the absence of counsel and with good cause to believe that the defendant was intoxicated and incapable of understanding and asserting his rights, he accepted a guilty plea at the arraignment and sentenced the defendant to 90 days in jail. The record establishes that respondent failed to make any significant inquiry into whether the defendant was capable of entering a plea or appreciated the "dangers and disadvantages" of waiving the fundamental right to the assistance of counsel (*People v. Smith*, 92 NY2d 516, 520 [1998]). By flagrantly disregarding his obligations under well-established law, respondent engaged in misconduct and abused the power of his office.

At an arraignment upon an Information, a judge must not only advise a defendant of the right to counsel and to have counsel assigned if he or she cannot afford one, but must "take such affirmative action as is necessary to effectuate" the defendant's rights; the court may permit a defendant to proceed without an attorney only "if it is satisfied that [the defendant] made such decision with knowledge of the significance thereof" (CPL §170.10[4][a], [6]). To determine whether a defendant has knowingly and intelligently waived this fundamental right, the court must "undertake a sufficiently "searching inquiry"" in order to be "reasonably certain" that a defendant appreciates the risks inherent in proceeding without an attorney (*People v. Smith*, *supra*, 92 NY2d at 520). While there is no rigid formula for such an inquiry, the record as a whole must reflect that the court has explored the relevant factors bearing on an intelligent and voluntary waiver of the right to counsel, including the defendant's age, education, occupation and previous exposure to legal procedures (*People v. Arroyo*, 98 NY2d 101, 104 [2002]; *People v. Smith*, *supra*; *People v. Providence*, 2 NY3d 579, 582 [2004]).

In the instant case, where the circumstances should have immediately raised serious questions as to the defendant's competence to proceed, respondent simply ignored the warning signs that the defendant was intoxicated and incapable of understanding and asserting his rights. In view of the Information stating that Marsh had been found lying on a road in an intoxicated condition about two hours earlier, and respondent's own testimony that he suspected that the defendant had substance abuse issues and that the defendant looked as if he "had been up all night" and had "partied into the wee hours," it should have been clear that the defendant was not

competent to waive counsel and enter a plea.^[2] As the Court of Appeals has stated, if a defendant is “not alert enough to understand the advice” as to his or her rights, the judge “must make sure the defendant *does* understand before proceeding, even – if necessary – briefly deferring the arraignment.” *Matter of Bauer*, 3 NY3d 158, 160 (2004). Instead, after asking a few perfunctory questions, respondent accepted the defendant’s guilty plea, in the absence of counsel, to charges of Disorderly Conduct and Resisting Arrest and sentenced the defendant to 90 days in jail. Respondent’s testimony that he simply concluded, based on his expertise as a former trooper, that the defendant was not intoxicated is unpersuasive in view of convincing evidence to the contrary and the lack of any searching inquiry in the record into whether this vulnerable defendant was competent to proceed.

Although respondent, after accepting the plea, asked the defendant about his education and employment, this belated inquiry did nothing to protect the youthful defendant’s rights. Significantly, the defendant’s responses (that he was not attending school and was unemployed) did not trigger any concern about his competence to waive the right to counsel and to enter a guilty plea. To the contrary, those responses were apparently an aggravating factor in respondent’s decision to impose a 90-day sentence, which was the maximum permitted without a presentence report (CPL §390.20). As respondent testified during the investigation apropos of Mr. Marsh: “[S]omebody just floundering around with no job or anything else, what good is it going to do to leave him out on the street...?” (Tr. 248).

Depriving a litigant of fundamental rights not only constitutes legal error, but may also constitute judicial misconduct. *See, Matter of Reeves*, 63 NY2d 105, 109-10 (1984); *see also, Matter of Feinberg*, 5 NY3d 206, 215 (2005) (legal error and misconduct “are not necessarily mutually exclusive”). In numerous cases the Court of Appeals and the Commission have held that a pattern of violating fundamental rights of litigants constitutes serious misconduct warranting removal from office. *E.g., Matter of Bauer, supra; Matter of Reeves, supra; Matter of Sardino*, 58 NY2d 286 (1983); *Matter of McGee*, 59 NY2d 870 (1983); *Matter of Ellis*, 1983 Annual Report 107 (Comm on Judicial Conduct). Yet even a single instance of such behavior constitutes misconduct especially where, as here, there is an egregious violation of well-established legal principles, resulting in a proceeding that was patently lacking in fundamental fairness.

The conclusion is inescapable that respondent, an experienced jurist, willfully ignored the law and, thus, violated his duty to be faithful to the law (Rules, §100.3[B][1]).

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Peters and Judge Ruderman concur, except that Judge Klonick and Ms. Hubbard dissent as to Charge II and vote to sustain the charge, and Mr. Belluck, Mr. Emery and Mr. Harding dissent as to the sanction and vote that respondent be removed.

Ms. DiPirro and Judge Konviser were not present.

Dated: October 28, 2008

DISSENTING OPINION BY MR. EMERY, IN WHICH MR. BELLUCK AND MR. HARDING JOIN

Respondent Dunlop cavalierly sent an unrepresented, almost certainly incompetent, defendant to prison for 90 days absent even a modicum of due process. He is being censured. Justice Laura D. Blackburne released an innocent defendant, whom police wanted to arrest in her courtroom. She was removed from the bench for frustrating law enforcement procedure. *Matter of Blackburne*, 7 NY3d 213 (2006). Because we should not be operating in parallel universes where good faith lapses of judgment in favor of liberty are punished more severely than similar lapses of judgment in favor of loss of liberty, I must dissent.

When the 19 year old defendant appeared before respondent for arraignment at 6:45 A.M. on August 15, 2005 after State troopers had called respondent an hour or so earlier to arrange the hastily convened court proceeding, what respondent knew was as follows: the defendant, two hours earlier, was found drunk lying in the middle of the road; he had a marijuana pipe; he looked like a “deer in the headlights”; he appeared to have substance abuse problems; and the troopers had to pepper spray him to subdue him. Instead of letting this defendant dry out to collect his wits, respondent extracted a superficial “waiver” of his right to counsel and a guilty plea. By 7:00 A.M. this defendant was sentenced to 90 days in jail. He served two months.

A knowing and voluntary waiver of such profoundly important rights as the right to counsel and the right to a trial before conviction of a crime and the infliction of jail are fundamental to our system of justice and values. Respondent knew this, and he knowingly and intentionally ignored it. It was perfectly plain that when he extracted these waivers from this inebriated young man, the defendant had no idea what was going on. Why the rush? Why was it necessary to arraign the defendant, take a plea and impose a lengthy jail sentence, all within the space of a few minutes? The record does not clearly answer these questions, but the fact that respondent is a former State trooper and that the troopers who had arrested this defendant had a physical confrontation with him before they brought him before this judge might explain, in part, these hastily extracted waivers as well as the lengthy sentence he received. The record also suggests another explanation.

When asked what led him to impose a 90-day jail sentence on this defendant, the judge candidly acknowledged, “That was the maximum I could impose without a presentence investigation” (Tr. 247). He added: “[T]his will resolve the case and he does 60 days then, this particular fellow, it’s not going to bother him to do 60 days in jail in my opinion, you know?” Referring to “a bunch of crack heads in downtown Plattsburgh” who are “collecting welfare checks and...working part-time jobs for cash and buying their crack cocaine with that,” the judge added: “So, somebody just floundering around with no job or anything else, what good is it going to do to leave him out on the street, you know?” (Tr. 248). Those comments strongly suggest that the judge acted out of bias, rather than based on a good faith determination that the defendant competently waived his rights. Viewed in that light, the judge’s admitted eagerness to “resolve the case” without counsel or a presentence report, at the cost of sending the defendant to jail without careful scrutiny, is particularly suspect, and the judge’s rationale that, based on his

brief appraisal, “it’s not going to bother [the defendant] to do 60 days in jail” provides a troubling undercurrent for the judge’s actions. The conclusion is inescapable that the judge did not wish to be obstructed by either counsel or a presentence report before he sentenced this defendant to jail.

It is this type of impulsivity in abusing power that the Commission sanctioned in *Blackburne* and other cases involving a single instance of misconduct that resulted in removal. See, e.g., *Matter of Ellis*, 2008 Annual Report 123 (Comm on Judicial Conduct) (ordered eviction without due process and used religious slur); *Matter of Brownell*, 2005 Annual Report 129 (Comm on Judicial Conduct) (awarded a judgment with no lawful basis, then issued court check to pay the judgment); *Matter of Levine*, 74 NY2d 294 (1989) (made *ex parte* promise to political leader to adjourn a case); *Matter of Molnar*, 1989 Annual Report 115 (Comm on Judicial Conduct) (solicited sexual favor from a defendant); *Matter of Reedy*, 64 NY2d 299 (1985) (attempted to fix son’s ticket).

By contrast, Justice Blackburne’s good faith was far clearer than respondent’s, notwithstanding that her conduct was impulsive and lacked judgment. She supervised a drug treatment court that attempted to wean addicts by giving them an opportunity to avoid convictions on pending charges if they successfully completed treatment and regularly reported to her court. On one such reporting day a police officer, who suspected that a defendant who was a participant in the program had committed an unrelated crime, came to the court to arrest him. Once Justice Blackburne understood what the officer wanted, she reacted angrily, refusing to allow the arrest in her court, and arranged for the defendant to elude the police by leaving through a back door. The suspect was arrested the next day and turned out to be innocent. Notwithstanding that Justice Blackburne quickly acknowledged that she had made a serious mistake, the Commission removed her. I dissented. See *Matter of Blackburne*, 2006 Annual Report 103. The Court of Appeals affirmed the Commission (*supra*, 7 NY3d 213).

In my universe, what’s good for the goose is good for the gander. Respondent’s lawless and reactive abuse of power was at least as profoundly aberrant as Justice Blackburne’s and had more severe consequences. A young man spent 60 days in jail absent due process in this case. By contrast, no one suffered, other than from a one day shock of public outrage, from Justice Blackburne’s misconduct. To me, punishing an individual absent due process is far worse than setting free a suspect absent due process. Consequences mean something. Appearances, though extremely important, should not drive our decisions. Here, I am afraid an incident of extremely serious abuse of power with profound consequences to its victim is being implicitly tolerated by too much leniency. Respondent should be removed because he is unfit to serve as a judge. Therefore, I dissent.

Dated: October 28, 2008

^[1] The referee, describing Mr. Marsh’s testimony at the hearing, noted that the witness did not comprehend many questions asked of him, that his responses “were often not logical, relevant or coherent,” that he “had extreme difficulty in expressing himself,” and that he “testified in a halting, barely audible mumble which sometimes was unintelligible” (Referee’s report, p. 5).



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to LINDA C. GRIFFIN, a Judge of the Family Court, Rensselaer County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

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

The respondent, Linda C. Griffin, a Judge of the Family Court, Rensselaer County, was served with a Formal Written Complaint dated August 21, 2007, containing three charges. The Formal Written Complaint alleged that in three cases respondent held litigants in summary contempt in contravention of statutory requirements. Respondent filed an answer dated September 7, 2007.

On April 29, 2008, 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 May 7, 2008, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent was admitted to the practice of law in New York in 1978 and has been a Judge of the Family Court, Rensselaer County, since 1994. Respondent has been an Acting Justice of the Supreme Court since 2001. Her current term expires in 2013.

As to Charge I of the Formal Written Complaint:

2. On July 21, 2005, respondent presided over *Vesna Russo v. Scott Russo*, a custody matter which was scheduled for trial on that date. The parties shared joint legal and physical custody of their eight-year-old son. In addition to respondent, the following were present: Ms. Russo and her attorney Robert E. Molloy, Mr. Russo and his attorney Andrew S. Jacobs, the child's law guardian Eugene P. Grimmick, and court reporter Shannon Swart.

3. Ms. Russo testified on direct, *inter alia*, that she was an immigrant from Croatia, that she had been gainfully employed for years and that, after her estrangement from Mr. Russo, he made a complaint about her to the FBI alleging that she was a murderer, arsonist and terrorist who planned to kidnap their son. As a result, the FBI interviewed her twice at her place of employment, but no charges were ever brought against her.

4. During Ms. Russo's testimony, the attorneys for both parties agreed to play in open court recordings of certain conversations between Ms. Russo and Mr. Russo that Ms. Russo had made.

A. *Background*: The child alternated residing with his two parents. When he was with Mr. Russo, Ms. Russo was permitted to speak with him on the telephone between 7:30 PM and 8:00 PM. Ms. Russo testified that it was not unusual for her to call Mr. Russo's home during those hours and either leave a message that was not returned or speak to Mr. Russo but not her son.

B. *Recording of March 26, 2005*: The recording was played without interruption. It purports to be a phone conversation initiated by Ms. Russo for the purpose of speaking with her son. Ms. Russo repeatedly asks to speak with the child, and Mr. Russo appears to insist that she listen to his proposal for modifying the custody arrangement. Ms. Russo agrees to listen to the proposal, which Mr. Russo appears to read aloud. The two then argue over the proposal, and Ms. Russo continues to ask to speak to the child, says she will call the police if Mr. Russo does not put the boy on the phone, then hangs up without the child having been given the phone.

C. *Recording of March 29, 2005*: The recording purports to be a conversation outside Mr. Russo's apartment, where Ms. Russo had gone to pick up things belonging to her son that had not been sent with him when he returned to her home from Mr. Russo's. The child was at Ms. Russo's apartment and was not present for the conversation. Ms. Russo repeatedly indicates she wants to pick up the boy's belongings and go home. Mr. Russo repeatedly asks her to talk. He says *inter alia* that she is "savage" and that she "killed" somebody, which she denies. She repeatedly asks to be let go. The following colloquy then occurs on the recording:

Mr. Russo: I'm going to tell you something right now, and this isn't a threat, I want to tell you something --

Ms. Russo: I just want to go home.

Mr. Russo: -- because these are my last words to you ever, and I intend to have my son taken away from you because you are indeed a savage, but I want to tell you and I want you to worry about it and to suffer the way that you and -- me and my son have suffered without you, you remember this, you told me something, I gave them as much information as I can because if you're going to do this to my son and me and my family --

Ms. Russo: Your family?

Mr. Russo: Then you deserve to get what you have coming to you, hon. I'm going to make sure the FBI locks you up --

Ms. Russo: Okay.

Mr. Russo: -- or removes you from this country, I promise you, and I will not stop until that's done. And at the same time, if you want to stop this charade of calling me a bad guy when you know that you are no angel, hon. I love you, and that's how bad I want you. I want you so bad --

5. At that point, respondent interrupted the recording and the following occurred:

Respondent: Excuse me. Stop the tape. I'm going to send Mr. Russo for a psychiatric evaluation --

Mr. Jacobs: I'm going to object. This is something that --

Respondent: That's fine. You can object. I've had some questions about his mental stability for some time now, and this about seals the deal. That we're several months after the divorce making -- and he still doesn't get it. He's making these kinds of accusations --

6. When Mr. Jacobs objected to the evaluation and indicated that there was a good faith basis for his client's allegations against the petitioner, respondent said she would not reconsider ordering the evaluation. When Mr. Russo interjected, respondent stated, "No sir, I'm not asking you to say anything," and, "Mr. Russo, if you don't shut your mouth right now, you'll be leaving in handcuffs with the court officer." When Mr. Russo twice again interrupted respondent and attempted to speak on his own behalf, respondent summarily held him in contempt of court, without explicitly warning him of a summary citation for criminal contempt or giving him an opportunity to defend himself against the charge by making a statement. Respondent then sentenced Mr. Russo to one day in the Rensselaer County Correctional Facility.

7. After Mr. Jacobs asked to be heard on the issue of contempt, respondent replied that a hearing was not necessary because the contempt "occurred in the presence of the Court."

8. Respondent issued a commitment order, improperly indicating that Mr. Russo was found in "civil" contempt. Respondent failed to comply with Sections 752 and 755 of the Judiciary Law, which provide that the court must prepare an order "stating the facts which constitute the offense" thus enabling judicial review.

9. Respondent never ordered a psychiatric examination of Mr. Russo, although she did order an update to a previous mental health evaluation of the family members. Mr. Russo later moved for respondent's recusal from the custody matter, alleging that she was biased because of her actions on July 21, 2005, and respondent denied the motion. The parties later settled the matter.

10. Mr. Russo spent less than one hour at the jail. After he was booked and processed, he was released due to the computation of time off for good behavior.

11. Respondent recognizes the impropriety of her conduct.

As to Charge II of the Formal Written Complaint:

12. On October 13, 2004, respondent presided over *Rensselaer County DSS SCU o/b/o* [Department of Social Services Support Collection Unit on behalf of] *Victoria Danish v. Dee E. Bowen*, a child support matter. In addition to respondent, the following were present: Ms. Danish, Timothy Connell of the Rensselaer County DSS, Carol Collier of the SCU, Mr. Bowen (the child's father), his attorney Charles W. Thomas of the Rensselaer County Public Defender's Office, and court reporter Shannon Swart.

13. The proceeding was a confirmation hearing on a support magistrate's determination that Mr. Bowen had failed to pay support in the amounts ordered by the court. The support magistrate had recommended a sentence of 60 days incarceration. Mr. Bowen disputed the amount of child support payments purportedly made. After the various participants tallied Mr. Bowen's recent payments, his lawyer stated that Mr. Bowen now owed \$2,400 in child support and was prepared to make regular payments of \$73 a week.

14. Respondent asked the petitioner, Ms. Danish, if she wanted to give Mr. Bowen "more time to see if he comes up with more money, or are you at the end of your rope?" When Mr. Connell of DSS said he was "at the end of [his] rope," respondent began to hear testimony from Ms. Collier, the SCU representative. Mr. Bowen's attorney interrupted the testimony to ask if the court would be willing to reduce Mr. Bowen's sentence if he were to admit without a hearing, to which respondent proposed a jail sentence of 45 days. Mr. Bowen then said, "I really don't understand. I'm not a lawyer. I'm sorry. I'm in the dark."

15. Respondent then allowed Mr. Bowen to speak with his attorney off the record. Respondent went back on the record to issue a warning to Mr. Bowen, stating, "You're going to be in contempt of Court if you open your mouth. You expect to come in and pretend you don't have the faintest idea what's going on when you're practically a professional respondent in the support part? You've been here repeatedly, been told repeatedly over a period of years you need to make payments on time, in full."

16. Mr. Bowen and his attorney again spoke to each other off the record. When respondent resumed the proceeding, Mr. Bowen immediately stated, "That was wrong, your Honor. I calculated myself --", at which point respondent cut him off and said, "Take him into custody."

17. Respondent then sentenced Mr. Bowen to seven days in the county jail for contempt of court without giving him an opportunity to defend himself against the charge by making a statement. She did ask Mr. Thomas, his attorney, whether he had "any alternative thoughts on this," to which he replied "no." Respondent adjourned the confirmation hearing for the parties to appear after Mr. Bowen completed his sentence.

18. Respondent issued a commitment order, improperly indicating that Mr. Bowen was found in "civil" contempt. Respondent failed to comply with Sections 752 and 755 of the

Judiciary Law, which provide that the court must prepare an order “stating the facts which constitute the offense” thus enabling judicial review.

19. On October 20, 2004, after serving his sentence for contempt, Mr. Bowen reappeared before respondent with his attorney and agreed to pay at least \$1,000 toward the arrears by December 22, 2004, the adjourned date.

20. Respondent recognizes the impropriety of her conduct.

As to Charge III of the Formal Written Complaint:

21. On June 8, 2004, C. S., a 16-year-old appearing on a Person In Need of Supervision (PINS) petition, was brought before respondent, in custody, for having run away from the Wynantskill juvenile detention facility. In addition to respondent, the following were present: an assistant county attorney (whose appearance was not noted on the transcript), Ms. S, her law guardian Arthur G. Dunn (who was substituting for Ms. S’s regularly assigned law guardian), her mother and court reporter John W. Koletas. Ms. S had appeared before respondent on numerous prior PINS and Juvenile Delinquency matters, dating back to 2001. Respondent had issued two prior warrants for Ms. S, one of which was outstanding until May 19, 2004, when it was vacated and she was remanded to non-secure detention. Respondent issued a warrant the following day, on May 20, 2004, after Ms. S ran away. It was this warrant that brought Ms. S before respondent on June 8, 2004.

22. On June 8, 2004, the assistant county attorney was requesting that Ms. S be remanded to the Wynantskill juvenile facility. Ms. S stated at the beginning of the hearing that “I ain’t going back” to Wynantskill again, and she asked to be sent “someplace else.” Respondent replied by warning her twice that if she caused a disruption in the building or courthouse, she would be held in contempt and remanded to jail rather than returned to the juvenile facility.

23. Respondent spoke very bluntly to Ms. S, telling her to “close your mouth,” not say anything and “listen to me.” Respondent explained to Ms. S that she could go to jail for escaping from a juvenile detention facility and urged her to “follow the rules and then you could be picking out where you’d like to go to college instead of where you’d like to be detained.”

24. Respondent then ordered Ms. S remanded to the Wynantskill juvenile detention facility and said “we’ll see you on the 22nd,” referring to the next scheduled court appearance in the matter.

25. As she was led away, Ms. S replied, “maybe” and, addressing her mother, “Bye, Mom.”

26. Respondent heard Ms. S’s remark, and said the following.

Respondent: Okay. Bring her back. [Ms. S] has been previously warned that any outburst or misbehavior would be followed by a finding of contempt. She’s held in contempt of court and is remanded to the Rensselaer County Jail for 14 days, at which point the Rensselaer

County Sheriff is directed to transport her back to the Family Court Center for an appearance at 11:00 in the morning. 14 days.

Ms. S's Mother: Thank you, Judge. Thank you.

Respondent: The record should reflect that the last outburst by [Ms. S] was in a loud and disruptive tone of voice, nearing a shout. Thank you.

27. Respondent issued a commitment order that failed to state the facts constituting the offense, as required by Sections 752 and 755 of the Judiciary Law.

28. Ms. S served seven days of her jail sentence at the Rensselaer County Jail before respondent ordered her produced in court on June 14, 2004. On that date, respondent signed an order for Ms. S's transport from the jail to the Wynantskill juvenile detention facility on the following day.

29. The contempt did not result in any additional incarceration of Ms. S; even if she had not been remanded to jail for contempt, she would have spent those seven days in custody at the juvenile detention facility.

30. Respondent recognizes the impropriety of her conduct.

Supplemental Findings:

31. Respondent acknowledges that she was impatient with the litigants in the above cases, that she did not properly warn them that they faced contempt, that she did not offer them the opportunity to make a statement on their own behalf before she executed the contempt rulings, and that she sentenced them without a proper mandate of commitment that specifically set forth the circumstances of their contempt so as to enable appellate review.

32. In January 2006, respondent attended a program on criminal contempt sponsored by the Office of Court Administration and asserts that she has a better understanding of the laws and rules pertinent to contempt.

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

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

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

The exercise of the enormous power of summary contempt for an offense that occurs in the judge's presence requires strict compliance with mandated safeguards, including giving the accused an appropriate warning and an opportunity to desist from the supposedly contumacious conduct and requiring the court to prepare an order "stating the facts which constitute the offense" and "specifically prescribing the punishment," thus enabling appellate review (Jud Law §§752, 755; *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]). Respondent did not comply with these procedural safeguards in the three cases depicted herein.

As the Court of Appeals has stated, "It is the need for the preservation of the immediate order in the courtroom which justifies the summary procedure..." (*Katz v. Murtagh*, 28 NY2d 234, 238 [1971]). In *Doyle*, the Third Department in 1995 held that the standards adopted by Rule in the First and Second Departments, limiting the exercise of the summary contempt power to "exceptional and necessitous circumstances" (22 NYCRR §§604.2[a][1]; 701.2[a]) when the court "reasonably believes that a prompt summary adjudication of contempt may aid in maintaining or restoring and maintaining proper order and decorum" (22 NYCRR §§604.2[a][1][ii]; 701.2[a][2]), were "consistent with and required by the holding in *Matter of Katz v Murtagh*" (*supra*, 216 AD2d at 635). In applying this extraordinary remedy, every judge must scrupulously observe the procedural safeguards.

Regardless of whether the parties' initial behavior provided sufficient basis for a contempt holding, it was respondent's obligation to warn them explicitly that the conduct could result in a summary citation for criminal contempt resulting in incarceration and to give an opportunity to desist from the conduct. Respondent was also required to prepare an order stating the facts justifying the contempt citation, which is required for purposes of enabling appellate review. Although she issued a temporary commitment order in the cases, none of the orders specified the facts justifying the contempt citation.

While the litigants in these cases may have been contentious to varying degrees, it is clear that respondent abused the contempt power by failing to observe these mandated procedures, which resulted in the litigants' incarceration. One litigant was held in jail for an hour as a result of the contempt citation; the other two were held for seven days at the jail.

Respondent's failure to adhere to mandated contempt procedures constitutes misconduct warranting public discipline. *See, e.g., Matter of Van Slyke*, 2007 Annual Report 151 (Comm on Judicial Conduct); *Matter of Lawrence*, 2006 Annual Report 206 (Comm. on Judicial Conduct); *Matter of Mills*, 2005 Annual Report 185 (Comm on Judicial Conduct); *Matter of Teresi*, 2002 Annual Report 163 (Comm on Judicial Conduct); *Matter of Recant*, 2002 Annual Report 139 (Comm on Judicial Conduct).

In mitigation, we note that respondent is contrite and has acknowledged that she was impatient with the litigants and did not comply with statutory mandates. We also note that she has been cooperative throughout the proceedings and has assured the Commission that such lapses will not recur.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Ms. DiPirro was not present.

Dated: May 16, 2008



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to DUANE A. HART, a Justice of the Supreme Court, Queens County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg and Jean Joyce, Of Counsel) for the Commission
Herzfeld & Rubin, P.C. (by Lawton W. Squires) for the Respondent

The respondent, Duane A. Hart, a Justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated December 1, 2006, containing six charges. The Formal Written Complaint alleged that respondent, *inter alia*: (i) improperly threatened an attorney with contempt; (ii) presided over a case in which he had a relationship with an attorney; (iii) offered to testify on an attorney's behalf in a disciplinary matter if the attorney would testify on his behalf; (iv) denied an attorney's request to make a record; (v) stayed an eviction without legal basis and granted a lengthy adjournment to punish the bank; and (vi) refused to walk through a courthouse magnetometer. Respondent filed an Answer dated December 19, 2006, which was verified on January 8, 2007.

By Order dated December 27, 2006, the Commission designated Honorable Felice K. Shea as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 17, 18, 22, 23, 24 and 25, 2007, in New York City. The referee filed a report dated October 16, 2007.

The parties submitted briefs with respect to the referee's report. On December 6, 2007, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Supreme Court, Queens County, since 2002. Prior to that, he served for two years as a Judge of the Civil Court of the City of New York.

As to Charge I of the Formal Written Complaint:

2. *Rini v. Blanck*, a medical malpractice case, first came before respondent in March 2002. The plaintiff was represented by Michael Flomenhaft, Esq.; the defendants were represented by Peter Bower, Esq. A trial before respondent ended in a mistrial on March 21, 2002. After numerous delays and adjournments, respondent scheduled a new trial to commence March 5, 2003.

3. On March 5, 2003, Barry Myrvold, Esq., an associate in Mr. Flomenhaft's firm, appeared before respondent and requested an adjournment because Mr. Flomenhaft was on trial in Suffolk County. Mr. Myrvold told respondent that he was not prepared to try the case and that there were no other attorneys at the firm capable of trying the case at that time. Mr. Myrvold told respondent that he had worked at the firm for only two or three weeks, that he had tried 10 to 15 cases but had never tried a medical malpractice case, and that he was not competent to try the case.

4. Respondent directed Mr. Myrvold to proceed and begin jury selection, and stated that if he did not do so, respondent would hold him in contempt and "fine and/or jail" him. Respondent stated to Mr. Myrvold:

"You are picking a jury... Have a seat, you can participate or you can not participate. You are picking a jury... Have a seat. Officer Battle, help this gentleman take a seat... Sir, you don't have a choice... Counsel, I am directing you to participate in the jury selection or else I will hold you in contempt and I will fine and/or jail you personally."

5. Respondent was angry and insistent. He ordered a court officer to stand behind Mr. Myrvold so he could not leave the courtroom. Respondent told Mr. Myrvold that if he did not promise as an officer of the court to return after lunch, Mr. Myrvold would "spend lunchtime downstairs in jail." Jury selection began.

6. After lunch the matter was adjourned to the following day. The next day, Mr. Myrvold continued to protest that he was not competent to try the case and said he would not participate. Respondent dismissed the case, with prejudice, and ordered a sanctions hearing. He directed that no motion to vacate the dismissal would be heard until the sanctions hearing was held.

7. The sanctions hearing was repeatedly postponed and was never held. A new trial in the *Rini* case commenced in September 2005.

As to Charge II of the Formal Written Complaint:

8. Beginning in 2004, respondent presided over *Wilkins v. Dillon et al.*, a real estate fraud case involving use of a “straw buyer” to defeat a mortgage foreclosure. While the case was pending, Argent Mortgage Company brought a foreclosure action against the property in question, and plaintiff Wilkens’ attorney, Nishani Naidoo, Esq., moved by Order to Show Cause to consolidate the *Wilkins* case with the foreclosure matter.

9. The Order to Show Cause, which contained a stay against Argent, was signed by respondent and was returnable May 4, 2005. Argent was represented by Helmut Borchert, Esq.

10. At the May 4th appearance, which was not on the record, a motion by defendant Dillon to vacate a default was also on the calendar, and Ms. Naidoo submitted opposition papers on behalf of the plaintiff. Upon seeing Mr. Borchert in the audience, respondent said, “Oh, Mr. Borchert, you are in this case too?” Respondent then stated, in open court, that Mr. Borchert had represented respondent’s sister and that he would not recuse himself. No motion was made for his recusal.

11. Helmut Borchert had represented respondent’s sister in 2002-03, and respondent paid Mr. Borchert’s legal fees of \$5,000. Mr. Borchert gave respondent baseball tickets, and they attended some games together in 2003 and 2004. Respondent did not disclose these facts to the attorneys in *Wilkins* and did not place these facts on the record.

12. Prior to the *Wilkins* case, respondent had recused himself in every case in which Mr. Borchert had appeared.

13. Respondent did not ask the attorneys in *Wilkins* whether they consented or objected to his presiding over the case.

14. Mr. Borchert made three appearances in the *Wilkins* case, including the one on May 4, 2005. On June 8, 2005, the matter was settled. The Stipulation of Settlement bore the captions of both actions.

As to Charge III of the Formal Written Complaint:

15. On August 11, 2005, respondent learned that the Commission was investigating his conduct with respect to *Wilkins v. Dillon et al.* He telephoned Ms. Naidoo, the plaintiff’s attorney in the *Wilkins* case, and asked whether she was aware that her client had filed a complaint against him with the Commission. Respondent told Ms. Naidoo that he might need her to testify on his behalf before the Commission.

16. Ms. Naidoo told respondent that she was receiving calls “all the time” from the Grievance Committee and the State Banking Commission because they were investigating the *Wilkins* matter. Respondent told Ms. Naidoo, “If you testify on my behalf, I will testify on your behalf if you get called before the Grievance Committee.”

17. Ms. Naidoo did not agree to testify for respondent. There is no evidence in the record that any complaint was pending against Ms. Naidoo with the Grievance Committee.

18. There had been a Stipulation of Settlement in the *Wilkins* case in June 2005, two months before respondent made the call to Ms. Naidoo. In September 2005, a month after respondent asked Ms. Naidoo to testify on his behalf, Ms. Naidoo appeared before respondent in connection with the *Wilkins* case to attempt to collect monies owed by the defendant pursuant to the settlement.

As to Charge IV of the Formal Written Complaint:

19. On September 14, 2005, Ms. Naidoo appeared before respondent in connection with *Wilkins v. Dillon et al.* to attempt to collect for the plaintiff monies owed by defendant Dillon pursuant to the settlement that had been reached. In addition, she was hoping to secure leniency for her client with regard to interest and bank charges.

20. Ms. Naidoo was not able to make her arguments. Respondent appeared only interested in the fact that Ms. Naidoo's client had not applied for a mortgage. When Ms. Naidoo asked to go on the record so that her requests for relief would be preserved, respondent refused to permit her to do so.

As to Charge V of the Formal Written Complaint:

21. On June 17, 2004, City Marshal George Essock went to the residence of Emilio Celestin to execute a "legal possession" following foreclosure by Chase Manhattan Bank. Mr. Celestin's daughter came to the door when the marshal arrived and then telephoned her father, who arrived shortly thereafter.

22. Mr. Celestin told the marshal that he had filed a bankruptcy petition. The marshal showed Mr. Celestin a copy of an order by Bankruptcy Judge Cornelius Blackshear dated May 20, 2004, which directed that there was to be no automatic stay of eviction proceedings upon further bankruptcy filings. Mr. Celestin called his attorney, and the marshal read Judge Blackshear's order to the attorney. Soon thereafter Mr. Celestin and his daughter left the premises.

23. Later that day, respondent signed an Order to Show Cause, supported by an affidavit from Mr. Celestin alleging that the eviction was illegal because a bankruptcy petition filed by him created an automatic stay. The Order to Show Cause, which ordered that "pending a hearing on this motion, the marshal shall reinstate the defendants to the demise[d] premises without the defendants paying any fees," was returnable on July 14, 2004.

24. The allegation that respondent stayed an eviction proceeding without legal basis is not sustained and therefore is dismissed.

25. On the July 14, 2004 return date, Gregory Peirez, Esq. appeared on behalf of Chase Manhattan Bank with papers in opposition to the *Celestin* motion. Respondent told Mr. Peirez that he had a big problem with the case because "You evicted a sick twelve year old girl." Mr. Peirez argued that he had an affidavit from the marshal stating that the eviction had been conducted appropriately. Mr. Peirez asked respondent the basis of his knowledge concerning "a sick twelve year old," and respondent replied, "I know the daughter." Respondent later testified

before the Commission that he knew the Celestins only from their prior court appearances before him and that he understood that Mr. Celestin's daughter was asthmatic and had been put out without her medication.

26. Mr. Peirez tried to explain that according to the marshal no one had been sick at the time of the eviction.

27. Respondent adjourned the case to October 6, 2004. The relatively long adjournment of the case, from July 14 to October 6, 2004, was ordered by respondent to punish the bank. When asked during his investigative testimony, "Was the long date intended to punish the bank?", respondent stated under oath, "Yes, because they put this child out in the street ... I gave them a long day [sic] because I knew Mr. Celestin was going to lose eventually, but I was so – I was angry that they threw this child out in the street."

As to Charge VI of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1), 100.3(B)(2), 100.3(B)(3), 100.3(B)(6), 100.3(B)(7), 100.3(E)(1) and 100.3(F) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through V of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge VI is not sustained and therefore is dismissed.

In a series of incidents over a period of two and a half years, respondent engaged in conduct demonstrating insensitivity to the high ethical standards required of judges.

Every judge is required to be an exemplar of dignity and patience in presiding over disputes (Rules, §100.3[B][3]). At all times, a judge must not only be, but appear to be, a neutral, unbiased arbiter (Rules, §100.2[A]). Respondent violated these standards by his punitive, intemperate behavior in the *Rini* and *Celestin* cases.

In *Rini*, respondent's bullying tactics were directed towards an attorney who had been sent by his firm to request an adjournment. Notwithstanding that Mr. Myrvold advised respondent that he was unprepared to try the case, respondent threatened the attorney with contempt or jail if he did not proceed in the matter. Respondent underscored his threats by directing his court officer to stand near Mr. Myrvold to prevent him from leaving. We agree with the referee that however dilatory Mr. Myrvold's employer may have been, this does not excuse respondent's abusive treatment of an attorney who had done nothing improper. Respondent had adequate means available to deal with the reluctance of counsel to proceed with the scheduled trial, including the imposition of sanctions (*see* 22 NYCRR §§125.1, 130-2.1). The threat of contempt or jail against Mr. Myrvold was excessive and inappropriate, notwithstanding that respondent did not act on his threat. *See, Matter of Waltemade*, 37 NY2d (nn), (iii) (Ct on the Judiciary 1975) (judge engaged in misconduct by angrily and

inappropriately threatening lawyers and witnesses with “sanctions” and contempt, even though his threats were never followed by a contempt citation or any other disciplinary action).

Respondent also acted improperly in the *Celestin* case when he granted an adjournment of nearly three months in an eviction proceeding for a punitive, retaliatory purpose. Although the evidence was uncontroverted that the eviction had been carried out in a lawful and appropriate manner, respondent granted a purposefully lengthy adjournment because, as he himself testified, he was angry at the bank for supposedly having “put [a] child out in the street” (Ex. 29 at p. 127). Respondent’s actions “created the impression that he was using his judicial office to retaliate” and thereby conveyed an appearance of impropriety. *See, Matter of Schiff*, 83 NY2d 689, 694 (1994). He compounded this impression by advising counsel that he had personal knowledge that the defendant’s child was ill.

It was also improper for respondent to preside over a matter in which he had a relationship with an attorney, Helmut Borchert, without fully disclosing the relationship and giving the parties a meaningful opportunity to seek his recusal. As respondent has acknowledged, Mr. Borchert had recently represented respondent’s sister; respondent had paid his fee; and respondent had been Mr. Borchert’s guest at baseball games and received tickets from him. Because of this relationship, respondent had disqualified himself on every other occasion when Mr. Borchert appeared before him. Under those circumstances, respondent’s impartiality in the *Wilkins* case “might reasonably be questioned,” and thus he could preside in the case only after making full disclosure on the record and with the parties’ consent (Rules §§100.3[E][1], 100.3[F]). Respondent’s disclosure was plainly inadequate: he stated in an off-hand manner, off the record, that Mr. Borchert had represented his sister, while making it clear to the attorneys that he would not disqualify himself. We are unpersuaded by respondent’s argument that his recusal was unnecessary because Mr. Borchert’s role in the case was a minor and ministerial one. The record is clear that Mr. Borchert appeared before respondent three times in connection with the matter, and he appeared as an attorney on the Stipulation of Settlement. The circumstances warranted, at the very least, making full disclosure and providing an opportunity for the attorneys either to consent to his participation or to seek his recusal. *See, Matter of Merkel*, 1989 Annual Report 111 (Comm on Judicial Conduct); *Matter of Valcich*, 2008 Annual Report ___ (Comm on Judicial Conduct).

Respondent has acknowledged that two months after the settlement in the *Wilkins* case, he contacted the plaintiff’s attorney, Nashani Naidoo, and asked her to testify on his behalf in connection with the Commission’s investigation of a complaint concerning his actions in the case. The record also establishes that, in the same conversation, he offered to testify on Ms. Naidoo’s behalf in a Grievance Committee proceeding if she would testify for him. It is particularly troubling that respondent personally reached out to Ms. Naidoo at a time when she was still appearing before him in connection with the *Wilkins* case. Although a Stipulation of Settlement had been executed in the case a few months earlier, the record shows that Ms. Naidoo appeared before respondent a month after this incident to attempt to collect monies owed by the defendant pursuant to the settlement. Under these circumstances, respondent’s call to Ms. Naidoo, and the message he conveyed, were especially improper. We note, however, with respect to his offer to testify on Ms. Naidoo’s behalf, that there is no indication in the record of

any pending complaint against the attorney; nor is there any claim that respondent asked the attorney to give untruthful testimony on his behalf.

The record also establishes that, without good cause, respondent denied Ms. Naidoo's legitimate request to make a record of her arguments on behalf on her client. Since that episode occurred a short time after his telephone call to Ms. Naidoo, he conveyed the appearance that he was treating her summarily because she had not accepted his request that she testify on his behalf.

The improprieties depicted in this record represent a significant departure from the proper role of a judge, and thus we conclude, based on the totality of the record, that respondent's conduct warrants censure. In considering the sanction, we note that although respondent was previously censured for improperly holding a litigant in summary contempt (*Matter of Hart*, 7 NY3d 1 [2006]), all of the misconduct in this case predates the Commission's determination in the earlier matter. Thus, there is no indication that respondent has disregarded a previous disciplinary warning. We trust that respondent now recognizes the necessity for scrupulously observing the relevant judicial standards in the future.

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

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

As to Charge I, Mr. Coffey, Mr. Emery and Mr. Jacob dissent and vote to dismiss the charge. Judge Klonick, Judge Konviser and Judge Ruderman dissent only as to the dismissal of the allegation that respondent threatened to dismiss and then dismissed the *Rini* case in retaliation for a mistrial motion, and vote to sustain the allegation.

As to Charge II, Mr. Emery and Mr. Jacob dissent and vote to dismiss the charge.

As to Charge IV, Mr. Coffey, Mr. Emery, Mr. Harding and Mr. Jacob dissent and vote to dismiss the charge.

As to Charge V, Judge Klonick, Ms. DiPirro and Mr. Jacob dissent and vote to dismiss the charge. Mr. Coffey, Judge Konviser and Judge Ruderman dissent only as to the dismissal of the allegation that respondent stayed an eviction proceeding without legal basis, and vote to sustain the allegation.

As to Charge VI, Judge Klonick, Mr. Coffey, Judge Konviser and Judge Ruderman dissent and vote to sustain the charge.

As to the sanction, Judge Klonick, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Coffey dissents as to the sanction and votes that respondent be removed.

Mr. Felder was not present.

Dated: March 7, 2008

CONCURRING OPINION BY MR. EMERY

This proceeding presents a fundamental and recurring issue: when does a judge's imperious and arrogant behavior cross the line from judicial independence into the realm of misconduct that requires removal? There are very few anchors for our decisions in this shoal-strewn sea. Here are standards I would apply.

The basic rule that any judicial behavior that personally benefits the judge or his/her family or friends presumptively warrants removal is not at issue in this case. *See Matter of Clark*, 2007 Annual Report 93 (Comm on Judicial Conduct) (Emery Dissent); *Matter of LaClair*, 2006 Annual Report 199 (Comm on Judicial Conduct) (Emery Dissent). No one has alleged, and the evidence does not support, that Judge Hart acted for selfish reasons. From beginning to end, his questionable actions were all in service of his good faith belief that what he was doing was right – even if his beliefs were misguided.

The constellation of charges arising out of his efforts to get the *Rini* case to trial demonstrates extreme measures in service of unassailably proper goals. The judge was seeking to provide a trial to the litigants before him but he faced a counsel for the plaintiff who effectively frustrated the judge's Herculean efforts. This lawyer, in an attempt to undermine a prior proper ruling on the use of an expert witness, persisted in manipulative actions in order to delay the proceedings. The fact that Judge Hart resorted to extreme threats and measures to push the case to trial was probably called for and certainly not misconduct in my view. Any independent, responsible judge would likely make similar efforts, and certainly many federal and state judges take their obligation to move cases to trial similarly seriously. In any event, Judge Hart's actions, including a threat of contempt and direction that a stand-in counsel pick a jury, did not cross the line.

But for two ill-advised acts in the remaining cases before us, I reach similar conclusions.

The record demonstrates that when attorney Helmut Borchert appeared in the *Wilkins* case to deliver a payoff letter from the bank, Judge Hart disclosed that Borchert had represented his sister, and the judge gave counsel an opportunity to object to his hearing the matter. The fact that the judge handled this disclosure in a summary fashion is a function of the fact that he determined that Borchert's role in the case was a ministerial one that would not pose a conflict. Borchert's peripheral role in the case is undisputed in this record, notwithstanding that he made three appearances in connection with the matter. If other parties had a basis to question the judge's bias, they had every opportunity to do so but never raised an objection after disclosure was made. Moreover, there is not the slightest indication that the judge's decisions favored, or could have favored, Borchert in any way. Under these circumstances, I cannot find misconduct.

Similarly, the allegation that the judge engaged in misconduct by refusing to allow counsel for the plaintiff, Nishani Naidoo, to make a record is meritless. A judge is not required

to interrupt proceedings to allow counsel to make a record at any point that counsel demands. Significantly, Commission counsel cited no authority for arguing that proposition. When Judge Hart declined to allow her to make a record regarding her informal application, it was in the course of his attempt to resolve the issues she raised. In the judge's view, a record was unnecessary since Ms. Naidoo had in fact extracted the very relief she sought. While some details of this proceeding are unclear, the record supports the judge's testimony as to the favorable outcome on behalf of her client. It appears that Ms. Naidoo got what she wanted. This is a non-issue.

By contrast, Judge Hart's unseemly phone call to Ms. Naidoo requesting that she testify for him in this Commission's proceedings – in the course of which he offered to testify for her in bar proceedings that apparently never were initiated – *is* misconduct. This call and offer were improper, though it should be noted that *counsel* for Judge Hart could have called Ms. Naidoo and sought her testimony, and that Judge Hart never asked or appeared to ask for untruthful testimony. However, his call was improper. A judge cannot call counsel for an active litigant before him/her and seek assistance of any type, let alone in a collateral judicial disciplinary matter. *See, Matter of Spargo*, 2007 Annual Report 127 (Comm on Judicial Conduct) (judge directly and indirectly solicited funds for his personal benefit from attorneys who had pending matters before him); *Matter of Katz*, 1985 Annual Report 157 (Comm on Judicial Conduct) (judge solicited a loan from an attorney who appeared before him).

In the *Celestin* case, as the majority has found, the judge's refusal to allow a speedy eviction in the wake of a foreclosure of a *pro se* homeowner who he believed had a sick child is not misconduct. His issuance of an order to show cause on behalf of the homeowner was indisputably not improper at the time it was issued. At a minimum there was substantial confusion as to the effect of the automatic stay in the parallel bankruptcy proceeding. This confusion and the fact that clarification occurred after the judge issued his order, in my view, insulate the judge from any misconduct. He had no obligation to alter his order on his own motion. In any event his exercise of discretion here was appealable and does not present any ethical issues.

On the other hand, it *was* misconduct a month later in *Celestin* for the judge, in retaliation for the legitimate eviction claims of the bank, to grant a lengthy adjournment to the tenants. The judge forthrightly admitted that he was doing just that (Determination, p. 8, par. 27). His exercise of discretion for an admittedly punitive purpose is clear misconduct. Even though this ruling was appealable, the judge's imperious and arrogant abuse of discretion in service of his anger against the bank is opprobrious.

Judge Hart presents the picture of a thorough, conscientious, well-prepared and empathic jurist who is stubbornly convinced of the rectitude of his judgments and self-righteous about their implementation. The varied and multiple events comprising the allegations before us now, as well as his prior discipline before this Commission (*see Matter of Hart*, 7 NY3d 1 [2006]), confirm this conclusion.

Judge Hart has pressed his authority right to the limit. Had he been guilty of more than two instances of misconduct in the panoply of charges before us, I would have voted to remove

him even though each of his actions was taken, in his view, in the appropriate exercise of his judicial responsibilities. That is not good enough in our constitutional system of judicial discipline. Judges can and do cross the line even when they believe they are acting appropriately, and even appealable, good faith behavior may be sufficiently aberrant to warrant removal. *E.g.*, *Matter of McGee*, 59 NY2d 870 (1983). Luckily for Judge Hart, his arrogance and impetuosity so far have led to behavior that lurks just below the removal surface. I hope that he will temper himself so that he will not break through.

I concur.

Dated: March 7, 2008

DISSENTING OPINION BY MR. COFFEY

The man who appeared before us at oral argument was a far different individual from the one who presented himself at the hearing and investigative appearance. Personally unimpressed and believing that the majority of the charges against respondent were serious and proven, I vote to remove him. I am also deeply troubled by respondent's testimony at the hearing, which was evasive and inconsistent, and I am unpersuaded that he will modify his conduct in the future.

Dated: March 7, 2008



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to DAVID F. JUNG, a Judge of the Family Court, Fulton County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Edward Lindner and Kathryn J. Blake, Of Counsel)
for the Commission
Capasso & Massaroni LLP (by Vincent Capasso, Jr.) for the Respondent

The respondent, David F. Jung, a Judge of the Family Court, Fulton County, was served with a Formal Written Complaint dated December 6, 2006, containing five charges. The Formal Written Complaint alleged that in five cases respondent violated fundamental due process rights

of litigants, including the right to be heard and the right to counsel. Respondent filed a Verified Answer dated December 22, 2006.

By Order dated January 27, 2007, the Commission designated Honorable Frank J. Barbaro as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 26, 2007, in Albany. The referee filed a report dated September 7, 2007.

The parties submitted briefs with respect to the referee's report. On November 2, 2007, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the Family Court, Fulton County, since 1990.

As to Charge I of the Formal Written Complaint:

2. On March 3, 2005, respondent presided over *Wendy Hohenforst v. Thomas DeMagistris*, in which the parties were scheduled to appear for trial on custody, visitation and family offense petitions and counter-petitions. The case was scheduled to commence at 9:00 A.M.

3. Ms. Hohenforst was represented by Ronald Schur, Esq., and Mr. DeMagistris was represented by Brian Toal, Esq.

4. Prior to the scheduled proceeding, while respondent was in his chambers, Mr. DeMagistris was involved in an incident near the entrance to the courthouse in which he allegedly threatened Mr. Schur. Mr. DeMagistris was taken into custody by a court officer and was placed in a holding cell in the courthouse, awaiting arrest by the Johnstown police.

5. Immediately following the incident, Mr. Schur, Mr. Toal and the law guardian met with respondent in chambers and advised respondent that Mr. DeMagistris had threatened Mr. Schur a short time earlier in the presence of a court officer and had been taken into custody. A court officer confirmed to respondent that such an incident had occurred and that Mr. DeMagistris had been arrested and was in custody awaiting the arrival of local police.

6. At a court appearance two months earlier, Mr. DeMagistris had physically accosted Mr. Schur in the courtroom in respondent's presence.

7. Respondent convened the proceeding in the courtroom. The attorneys, the law guardian and Ms. Hohenforst were present. Respondent stated on the record that Mr. DeMagistris was not present. He stated that it had been "brought to [his] attention" that Mr. DeMagistris had threatened Mr. Schur a short time earlier and had been placed under arrest for "criminal behavior." Respondent further stated, "Now, that is not the basis for an adjournment at the request of Mr. DeMagistris. If he's unable to proceed because of his own conduct that is not excusable, in the view of the Court, and these cases must proceed."

8. Respondent knew at that time that Mr. DeMagistris was in custody, either in a holding cell at the courthouse or in the custody of local police.

9. At the parties' previous court appearance, respondent had advised the parties that if they were not present on the trial date, absent a good excuse, the other side could proceed and the relief requested could be granted in their absence.

10. Counsel for both parties made motions to withdraw as counsel for their respective clients, which respondent granted. In granting Mr. Toal's motion to withdraw as Mr. DeMagistris' counsel, respondent did not inquire whether Mr. Toal had advised his client that he was seeking to withdraw, and respondent did not know whether Mr. DeMagistris knew that his attorney intended to withdraw. After granting Mr. Schur's application to withdraw as Ms. Hohenforst's attorney, respondent asked Ms. Hohenforst if she wanted an adjournment, and she stated that she wished to proceed without an attorney. Respondent took no affirmative steps to advise Mr. DeMagistris that the proceeding was going forward without him or his counsel.

11. Following an inquest by the law guardian on behalf of the parties' children, respondent declared Mr. DeMagistris in default and granted the relief requested in Ms. Hohenforst's petitions, including divesting Mr. DeMagistris of custody of his children and issuing a three-year order of protection. Respondent dismissed the petition filed by Mr. DeMagistris for failure to prosecute. Respondent then sentenced Mr. DeMagistris *in absentia* to two consecutive 180-day terms in jail for family offenses and violation of an order of protection.

12. Pursuant to the sentence imposed by respondent, Mr. DeMagistris served five months in jail before being released on a writ of *habeas corpus*. On October 18, 2007, the Appellate Division, Third Department reversed respondent's decision, vacating the default judgment and remitting the proceedings for a new hearing before a different judge.

13. As a result of the incident at the courthouse on March 3, 2005, Mr. DeMagistris pleaded guilty in the Johnstown City Court to Harassment in the Second Degree and Disorderly Conduct and was sentenced to 15 days in jail to be served concurrently with the sentence imposed by respondent.

As to Charge II of the Formal Written Complaint:

14. On April 11, 2005, respondent presided over *Matter of Angelic Constantino*, which concerned custody and visitation petitions and a charge that Ms. Constantino had violated an order of protection.

15. Ms. Constantino did not appear in court on that date because she was incarcerated at the Schenectady County Jail on unrelated charges. Five days earlier, Ms. Constantino had been served at the jail with a summons, directing her appearance in the Fulton County Family Court on April 11, 2005. The summons form states that the Family Court may conduct a hearing and grant the relief requested if the party does not appear.

16. It was respondent's policy that when an incarcerated individual was scheduled to appear in Family Court, respondent would issue an order to produce only upon receiving a

request from the individual requesting such an order. Unless the Family Court received such a request, an order to produce would not be issued and thus an incarcerated individual could not appear.

17. Although respondent's policy was not specified on the summons she received, Ms. Constantino attempted to have jail officials contact the Family Court on her behalf to have herself produced in court on April 11th. No notice of any such request was received by the Family Court, and respondent did not issue an order to produce.

18. When respondent convened the *Constantino* matter on April 11, 2005, the father and grandparents of the children, their attorneys, the law guardian and representatives of the Department of Social Services were present. Respondent inquired if Ms. Constantino was present, and the attorney for the father and grandparents told respondent on the record that she was in the Schenectady County Jail.

19. Respondent examined the summons and affidavit of service to confirm that Ms. Constantino had been properly served. The summons indicated that Ms. Constantino had been served at the Schenectady County Jail on April 6, 2005.

20. Respondent declared Ms. Constantino in default. Although respondent knew she had been served at the jail, and had been advised by the attorney that she was in jail, he chose not to make any further inquiry to confirm whether she was incarcerated and did not take any action to produce her in court.

21. After an inquest by the attorney for the Department of Social Services, respondent granted the relief requested in the petition, including terminating Ms. Constantino's right to joint custody of her children, finding a willful violation of an order of protection and imposing a 180-day sentence of incarceration.

22. The next day, according to notations on Family Court records, Ms. Constantino called the court from jail and inquired as to why she had not been brought to court the previous day. Court staff told her that it is the court's policy that an inmate must make a request to be produced and further told her that "if she disagrees with the court policy she is to put her concerns in writing and forward them to the court."

23. On April 15, 2005, Van Zwisohn, Esq., Ms. Constantino's assigned counsel in a Saratoga County Family Court matter, sent a letter to respondent stating that Ms. Constantino was incarcerated and asking that respondent produce her to inquire into the matter and assign counsel in the proceeding. By letter dated April 25, 2005, the Chief Clerk replied to the letter, stating that "it is the policy of this Court that if an inmate wishes to be present for any court proceeding that he or she make that request in writing to the Court. That request is then put before the Judge for consideration." Respondent testified at the Commission hearing that he did not see Mr. Zwisohn's letter at the time and was unaware of the Chief Clerk's response. Respondent did not take any action to bring Ms. Constantino before the court.

24. Ms. Constantino was released on a writ of *habeas corpus* by a Supreme Court Justice entered June 28, 2005. She did not move to vacate the default. On April 27, 2006, the Appellate Division, Third Department, affirmed the judgment granting the writ.

As to Charge III of the Formal Written Complaint:

25. On April 28, 2005, respondent presided over *Julie A. Dacre v. Dennis A. DaCorsi, Jr.*, in which the parties were scheduled to appear on a custody petition and allegations that Mr. DaCorsi had violated an order of child support.

26. On that date, Ms. Dacre, her attorney and the law guardian were present. Mr. DaCorsi, who had been served with the petition, was not present because he was incarcerated at the Fulton County Jail, pursuant to commitments from another court. At a prior appearance, the parties had been advised that if they were not present on the scheduled date, absent a good excuse, the other side could proceed and the relief requested could be granted in their absence.

27. On April 27, 2005, according to notations on the court disposition sheet, a woman identifying herself as Mr. DaCorsi's sister had called the court and stated that her brother had been arrested earlier that week and had to be in Family Court the next day; a court clerk told the caller that either Mr. DaCorsi or the police would have to contact the court and ask that he be produced. Respondent testified that the updated disposition sheet was probably not in the court file when the case was before him on April 28, 2005, and that he was unaware at the time of the phone call.

28. On April 28, 2005, after checking the affidavit of service to confirm that Mr. DaCorsi had been properly served, respondent declared Mr. DaCorsi in default. Respondent either knew or should have known that Mr. DaCorsi was incarcerated.

29. Respondent advised Ms. Dacre's attorney and the law guardian that they could either proceed or have an adjournment, and they elected to proceed. After testimony was taken, respondent granted the relief requested in the petition, declaring that Mr. DaCorsi had willfully failed to pay child support, terminating Mr. DaCorsi's custody of his child and sentencing him *in absentia* to two consecutive terms of incarceration, of 90 days and 180 days.

30. On June 16, 2006, respondent granted Mr. DaCorsi's motion to vacate the default and disqualified himself from the case.

As to Charge IV of the Formal Written Complaint:

31. On January 12, 2005, in *Dale A. Rulison v. Nickie L. Smith*, the parties appeared before a support magistrate on a petition alleging that Ms. Smith had violated an order of support and was in contempt. The support magistrate advised the parties of the right to counsel and to have counsel assigned if they could not afford one. Ms. Smith stated that she wanted an attorney to represent her. She was provided with an application for the public defender and was advised that the application had to be filed within 14 days. A trial was scheduled for April 27, 2005. The parties received and signed a written notice of the trial date.

32. It was respondent's policy that a litigant requesting representation by the public defender was required to submit an application within 14 days of being advised of his or her rights at the initial appearance. According to respondent, this policy was based on the need to move cases expeditiously and to comply with procedural mandates that require *inter alia* a trial

in a support matter to take place within 30 days of the initial appearance, that no more than one adjournment to obtain counsel be permitted absent good cause, and that no adjournment exceed 14 days (22 NYCRR §205.43).

33. On February 8, 2005, Ms. Smith submitted an application for representation by the public defender in the support matter. On February 14, 2005, respondent denied the application as untimely, notwithstanding that the trial in the support matter was not scheduled to be held until April 27, 2005.

34. On February 14, 2005, the parties appeared before respondent in another matter, involving custody and visitation issues. Respondent advised them of their rights, and Ms. Smith applied for representation by the public defender in that matter. Respondent approved the application on February 18, 2005.

35. On April 27, 2005, Ms. Smith failed to appear for the scheduled trial before the support magistrate. By decision and order dated April 27, 2005, the support magistrate declared Ms. Smith in default and recommended that she be held in contempt for willful and intentional failure to pay child support and that she be sentenced to 90 days in jail. The support magistrate also set a “purge” amount, which could be paid prior to confirmation to avoid incarceration.

36. On May 18, 2005, respondent presided at a confirmation proceeding on the decision and order of the support magistrate.

37. Respondent testified before the Commission that a confirmation proceeding has a “very narrow” purpose: to review the decision and order of the support magistrate^[1] and to provide the litigant with an opportunity to pay the “purge” amount set by the support magistrate to avoid incarceration; it is not an evidentiary hearing, and no testimony is taken. Respondent testified that it was his practice to give litigants an opportunity to address the court at a confirmation proceeding although he was not required by law to do so.

38. Ms. Smith appeared without counsel at the confirmation proceeding. She attempted to defend herself against the petition, disputing the amount of arrears and stating that she had made partial payments through friends, who were waiting for cancelled checks from the bank. Respondent told her that the exact amount owed did not matter; “[T]he point is...it hasn’t been paid.”

39. Ms. Smith stated that she had sought representation by the public defender but had heard nothing from that office. Respondent told her that she would “have to take that up with” the public defender’s office.

40. At the proceeding, Ms. Smith did not indicate that she was represented by the public defender in the custody and visitation matter. Respondent testified before the Commission that he was unaware that Ms. Smith was represented by the public defender in another proceeding; that information was probably in the court file before him but he “didn’t catch it.” He testified that since many litigants are involved in multiple proceedings, it is his policy to have an attorney assigned by the public defender represent a litigant in all pending Family Court cases and that had he known that Ms. Smith had such counsel in another matter, he would have assigned that attorney in the support matter.

41. Respondent reviewed the decision and order of the support magistrate, confirmed the decision and sentenced Ms. Smith to 90 days jail; he also set a “purge” amount of \$1,000, which could be paid to avoid incarceration. Ms. Smith did not appeal or move to vacate respondent’s decision. She was released from jail after paying the “purge” amount.

As to Charge V of the Formal Written Complaint:

42. On January 20, 2005, in *Timothy Foote v. Karrie Foote*, the parties appeared before a support magistrate on a petition alleging that Karrie Foote had violated an order of support and was in contempt. The support magistrate advised the parties of the right to counsel and to have counsel assigned if they could not afford one. Ms. Foote stated that she wanted an attorney to represent her. She also told the support magistrate that she could not read. She was given an application for the public defender and was advised that the application had to be filed within 14 days. A trial was scheduled for May 11, 2005. The parties were given oral and written notice of the trial date, which stated that if a party failed to appear, the court may proceed in their absence.

43. On April 4, 2005, the parties appeared before respondent in another matter, in which Ms. Foote was seeking to modify custody. Respondent advised the parties of their rights and told Ms. Foote that she could apply for representation by the public defender. He also advised the parties that mediation was available. The parties met with a court mediator, which resulted in a resolution of the custody dispute. Ms. Foote did not file an application for the public defender.

44. On May 11, 2005, Ms. Foote failed to appear on the date scheduled for trial on the support matter. By decision and order dated May 13, 2005, the support magistrate declared Ms. Foote in default and recommended that she be held in contempt for willful and intentional failure to pay over \$4,000 in child support. The support magistrate also set a “purge” amount, which could be paid prior to confirmation to avoid incarceration.

45. On May 25, 2005, respondent presided over a confirmation proceeding on the decision and order of the support magistrate.

46. Under the statewide system of Standards and Goals promulgated by the Chief Administrative Judge, there is a 180-day time frame in Family Court from the date of filing of the petition to the disposition. The relevant dates under the Standards and Goals for each case are noted on respondent’s daily calendar. On May 25, 2005, the *Foote* case was more than 170 days past the filing date of the petition.

47. Ms. Foote appeared without counsel. She told respondent that she did not know that she had a trial date on May 11, 2005, and that she had lost her job. She also told respondent that she did not want to proceed without a lawyer; she said, referring to the support magistrate, “I told her that I wanted a lawyer.” Respondent replied that “it’s too late” since the support magistrate had issued a decision. Respondent confirmed the decision and order of the support magistrate and sentenced Ms. Foote to 180 days in jail.

48. Respondent then stated that he would give Ms. Foote “a break” in that she could avoid incarceration by immediately paying the arrears of \$4,488. When Ms. Smith began to explain why she had difficulty making the support payments, respondent said, “You have to think about your ability...to support children before you have them. You don’t think about that after.”

49. After respondent had sentenced Ms. Foote to jail, her mother, Karen O’Brien, asked to address the court. Ms. O’Brien stated that her daughter has a learning disability, did not understand the papers and needed an attorney; she also stated that her daughter had “a fourth grade reading level” and believed that the support issues had been resolved earlier. Respondent replied that the support magistrate had heard the case, that Ms. Foote had been advised of her rights, including the right to counsel, and that there was no indication in the record that Ms. Foote had applied for assigned counsel.

50. Ms. Foote served for two months in jail on the sentence imposed by respondent before being released on July 21, 2005, on a writ of *habeas corpus*. The Appellate Division, Third Department, affirmed on April 13, 2006, holding that the writ was properly granted.

51. Shortly after the Appellate Division decision in *Foote*, respondent issued a press release. The press release states, *inter alia*, that “to further streamline and simplify” procedures, in future cases respondent will issue a written confirmation of a support magistrate’s decision without a court appearance of the parties unless he determines that the support magistrate has erred.

Supplemental findings:

52. Following criticism of his decision in *Matter of Constantino*, respondent modified his procedures in the following manner with respect to the production of an incarcerated person. On the forms for a summons and the notice to appear in court, language was added in bold stating: “If you are incarcerated, you must contact the Court and ask to be produced.” Also, a form was created for Family Court staff to fill out upon receiving notice by telephone that an individual is incarcerated, and the completed form is promptly given to the judge. Another form was created and distributed to correctional facilities, to be made available to inmates, whereby an inmate with a scheduled appearance in Family Court can request to be produced; the form states that the inmate must ask to be produced.

53. Respondent states that following the decision of the Appellate Division in *Matter of Constantino*, he further modified his procedures with respect to the production of an incarcerated person and now issues an order to produce *sua sponte* upon receiving any notification, hearsay or otherwise, that an individual is incarcerated.

54. Respondent states that following the decision of the Appellate Division in *Matter of Foote*, he modified his procedures with respect to the assignment of counsel and that he now assigns a public defender immediately upon request, subject to completion of a financial application to be reviewed by the court and/or the public defender.

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

In five cases respondent deprived litigants in Family Court proceedings of fundamental constitutional and statutory rights, including, significantly, the right to be heard and the right to be represented by counsel, while depriving them of liberty and, in three cases, their parental rights. Respondent’s handling of these matters was patently lacking in fundamental fairness and showed a profound disregard for the rule of law and for the basic rights of the individuals before him. Such a systematic disregard of basic legal requirements constitutes serious misconduct (*see Matter of Bauer*, 3 NY3d 158 [2004]).

On three occasions, respondent conducted proceedings in the absence of the litigants, sentencing them to jail and divesting them of custody of their children, although he knew or should have known that the litigants were incarcerated or otherwise in custody and therefore unable to appear. Respondent took no action to determine whether the parties had voluntarily waived their right to be present and to be heard when their parental rights were being litigated.

In *DeMagistris*, despite knowing that the litigant had just been taken into custody for allegedly threatening his former wife’s attorney, respondent proceeded in the litigant’s absence, declaring that Mr. DeMagistris was in default and that his “criminal behavior” provided no excuse for an adjournment. His actions appeared retaliatory for the litigant’s alleged criminal acts that had not yet even been charged, let alone proved. Compounding the proceeding’s patent unfairness, respondent permitted Mr. DeMagistris’ attorney to withdraw from the case without ascertaining whether Mr. DeMagistris had notice of the attorney’s intended withdrawal. Respondent proceeded to divest the unrepresented and absent litigant of custody, dismissed his petition for failure to prosecute and sentenced him to two consecutive 180-day terms in jail.

We reject respondent’s argument that his actions in *DeMagistris* did not constitute misconduct because, in an emotionally charged situation, he acted in a good faith belief that the litigant had forfeited his right to be heard by engaging in the conduct that led to his arrest. No fair-minded person even cursorily versed in legal process could reasonably regard the litigant’s alleged behavior – at that point based only on hearsay – as an effective legal waiver of the right to be present and the right to be represented by counsel on matters involving custody and a likely lengthy jail sentence for family offenses. It is fundamental that regardless of the allegations against Mr. DeMagistris, he was entitled to due process and all the protections afforded by law, including the right to the assistance of counsel (*see* Family Ct Act §262). Moreover, respondent’s conclusory pronouncement, based on the hearsay accounts presented to him, as to Mr. DeMagistris’ “criminal behavior” suggests that his erroneous determination to proceed in the litigant’s absence was tainted by prejudice.

In *Constantino* and *DaCorsi*, respondent proceeded in the absence of litigants who were incarcerated without ascertaining whether they had effectively and knowingly waived their right to be present. It was respondent’s policy that an incarcerated litigant would not be brought to

court unless the litigant had specifically asked to be produced. The patent unfairness of that policy was demonstrated in *Constantino*, where a litigant incarcerated in another county had unsuccessfully attempted to contact the court to ask to be produced. Notwithstanding that respondent knew that the litigant had been served in jail and notwithstanding that an attorney for one of the parties told respondent that the litigant was at that moment in jail, respondent ignored that information and held the absent litigant in default, divesting her of custody and sentencing her to 180 days in jail. Respondent's claim that he did not have actual notice that she was incarcerated is disingenuous; indeed, it is striking that in this case he rejected the attorney's statement as "hearsay," although he readily accepted the attorneys' account of Mr. DeMagistris' behavior as true. More to the point, it appears that in view of respondent's "policy," such notice was irrelevant to his decision since the court required a specific "request" for an order to produce and had not received one. Respondent's "policy" thus elevated form over substance where liberty and parental rights hung in the balance.

Respondent claims that he was unaware of subsequent efforts by Ms. Constantino and by an attorney on her behalf to advise the court of her circumstances and to urge him to bring her to court and inquire into the matter. At best, he studiously ignored the litigant's efforts to secure her rights. Similarly, as to *DaCorsi*, another case in which he declared the absent litigant in default, respondent claims that he was unaware that a woman identifying herself as the litigant's sister had called the court the day before his scheduled appearance and said that he had been arrested. Even if true, those claims do not relieve respondent of responsibility for practices that had the effect of depriving litigants of fundamental rights.

In two matters involving alleged violations of orders of support, respondent deprived the litigants of the right to counsel. It was respondent's policy that a party who wanted to have counsel assigned was required to submit an application within 14 days of being advised initially of the right to counsel. Respondent has asserted that such a policy was based on the need to move cases expeditiously and to comply with statutory mandates as well as the Standards and Goals prescribed by court administrators. However laudable those goals, they do not excuse failing to protect the fundamental constitutional and statutory right of counsel. *See, e.g., Matter of Bauer, supra*, 3 NY3d at 164 ("The right to counsel, in practical respects, remains absolutely fundamental to the protection of a defendant's other substantive rights..."). The right to counsel cannot be forfeited by the imposition of restrictive and arbitrary policies, the sole purpose of which is to move cases.

In *Rulison v. Smith*, respondent denied an application for assigned counsel as untimely because it was filed 13 days after the 14-day deadline he routinely imposed. Although respondent's purported rationale for such a deadline was the requirement that the trial be commenced within 30 days of the petition (*see* 22 NYCRR §205.43[b]), that rationale did not apply in this case since, at the time he denied the application, the trial date was more than two months away. Without counsel, Ms. Smith defaulted before the support magistrate. When Ms. Smith appeared before respondent for confirmation of the support magistrate's decision, respondent brushed aside her comment that she had not heard from the public defender's office, callously telling her "to take it up with" that office, before summarily sentencing her to 90 days in jail. It is a judge's responsibility to determine whether a litigant is eligible for assigned counsel; that responsibility cannot be delegated. This is especially so when a litigant is facing a

jail sentence. Respondent also appears to blame Ms. Smith for not volunteering that she was represented by the public defender in another matter. Respondent's failure to ask that question is part and parcel of his policies and behavior that unduly restricted the right to counsel. In the interests of moving cases quickly and, as he testified, "protecting the taxpayers' pocketbook," respondent chose to sacrifice defendants' fundamental rights.

In *Foote*, respondent deprived another litigant of the right to counsel at a confirmation proceeding when he disregarded her request for an attorney, again stating that it was "too late," before sentencing her to 180 days in jail based on her default before the support magistrate. Even after Ms. Foote's mother told him that Ms. Foote mistakenly believed that the support issues had been resolved at an earlier proceeding and, moreover, that she had "a fourth grade reading level" and did not understand the papers, respondent did not reconsider his decision, appoint counsel or remand the matter to the support magistrate for further proceedings. Respondent's explanation that the case was near the end of the 180-day time frame imposed by Standards and Goals in no way excuses his failure as a judge to protect the rights of a vulnerable, unrepresented litigant. Moreover, respondent's snide remark to Ms. Foote that she should have thought about her ability to support children before she had them was a condemnation of an entire class of litigants who appear in Family Court, suggesting invidious assumptions and hostility for parents who are unable to provide adequate financial support for a child.

While we note that respondent's decisions in *Foote*, *Constantino* and *DeMagistris* were later criticized by other courts, those appellate decisions do not establish respondent's misconduct. More importantly, we do not accept respondent's claim that the law became clear only after his actions were subjected to appellate review. Each of these matters involved principles of well-established constitutional and statutory law, and any judge should have known that those principles must override concerns about economy and avoiding perceived delays. It was an abuse of power for respondent to elevate his "policies" above the right to counsel and the right to be heard on matters of paramount importance to litigants in Family Court. Respondent should have known that he was violating core rights at the heart of the proceedings. His policies were his own arbitrary inventions to effectuate a waiver of the rights of litigants who were incarcerated, unrepresented or unfamiliar with court procedures, and the resulting "waivers" were neither knowing, voluntary nor legally sufficient. It is well-established that legal error and judicial misconduct "are not necessarily mutually exclusive" (*Matter of Feinberg*, 5 NY3d 206 [2005]; *Matter of Reeves*, 63 NY2d 105, 109-10 [1983]; see also, *Matter of Bauer*, *supra*). In this case they overlap.

As the Court of Appeals has stated, a pattern of conduct that "necessarily has the effect of leaving litigants with the impression that our judicial system is unfair and unjust...would be unacceptable if engaged in by any member of the judiciary; for a Judge of the Family Court, where matters of the utmost sensitivity are often litigated by those who are unrepresented and unaware of their rights, it is simply intolerable." *Matter of Esworthy*, 77 NY2d 280, 283 (1991). To be sure, Family Court judges face significant challenges on a daily basis in balancing their judicial and administrative responsibilities with the demands of a crowded calendar. But among a judge's responsibilities, none has a higher priority than protecting the basic rights of every litigant. Here, the record demonstrates that the rights of litigants were sacrificed repeatedly.

Due process when it comes to protecting parental rights and depriving an individual of liberty is not a balancing test; its protections are sacrosanct.

The record in its totality shows a judge who not only callously disregarded the rights of litigants, but who continued to defend his practices after three writs of *habeas corpus* were issued, who changed his procedures only reluctantly after sharp criticism by the Appellate Division, and whose conduct still suggests an insensitivity to the importance of ensuring that every litigant is accorded all the protections provided by law. Significantly, respondent's press release in response to the appellate decision in *Footte* declared that in the future he will simply issue written confirmations of a support magistrate's findings rather than provide an opportunity for the parties to personally appear, as he had previously done. It was at such appearances that Ms. Footte and Ms. Smith had asked for assigned counsel. Respondent's press release also stated that while he had changed his policy on assigning counsel in accordance with the appellate criticism, his new policy will be more costly and will also mean that "parties seeking assigned lawyers will be less encouraged to be responsible." That language is consistent with the mean-spirited, insensitive jurist depicted in this record who is more concerned with fiscal matters than with protecting the basic rights of every litigant.

In considering an appropriate sanction, we note that as a consequence of respondent's disregard of fundamental rights, five litigants were sentenced to significant terms of incarceration, and the record indicates that at least three of those litigants served several months in jail on the unlawful sentence he imposed. We also note that although respondent modified his procedures after criticism by the Appellate Division, his continued insistence that his actions were consistent with the law and his insensitivity to the overriding importance of protecting the rights of litigants, as shown by this record, "strongly suggest[] that, if he is allowed to continue on the bench, we may expect more of the same" (*Matter of Bauer, supra*, 3 NY3d at 165). In view of the totality of this record, we find respondent's belated expression of contrition at oral argument unconvincing. The conclusion is inescapable that respondent's future retention on the bench would continue to place the rights of litigants in serious jeopardy.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Judge Konviser and Judge Ruderman concur.

Judge Peters did not participate.

Mr. Felder and Ms. DiPirro were not present. Mr. Jacob was present for the oral argument but did not participate in the decision.

Dated: February 13, 2008

Note: The Court of Appeals upheld the removal on October 28, 2008.

^[1] A party may file “specific written objections” to the support magistrate’s decision and order; the judge may confirm the support magistrate’s findings and recommendations in whole or in part or, in the alternative, modify or refuse to confirm such findings and refer the matter back to the support magistrate for further proceedings (Fam Ct Act §439[a], [e]; 22 NYCRR §205.43[i]). The court “may, if necessary, conduct an evidentiary hearing” (22 NYCRR §205.43[i]).



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to ELISSA Y. KILLIAN, an Acting Justice of the Liberty Village Court, Sullivan County.

DECISION AND ORDER

BEFORE:

Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Melissa DiPalo, Of Counsel) for the Commission
Honorable Elissa Y. Killian, *pro se*

The matter having come before the Commission on January 29, 2008; and the Commission having before it the Formal Written Complaint dated January 12, 2007, respondent’s Answer dated March 12, 2007, the Second Formal Written Complaint dated January 2, 2008, and the Stipulation dated January 23, 2008; and the Commission having designated Steven E. North, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and no hearing having been held to date; and respondent having acknowledged that she will not defend against the two pending Complaints; and respondent having affirmed that she will neither seek nor accept reappointment as an Acting Justice of the Liberty Village Court upon the expiration of her current term on April 1, 2008, and that she will neither seek nor accept judicial office or a position as a judicial hearing officer 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 approved by the Commission; now, therefore, it is

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

SO ORDERED.

Mr. Coffey and Judge Peters dissent and vote to reject the Stipulation.

Dated: January 31, 2008

STIPULATION

Subject to the approval of the Commission on Judicial Conduct (“Commission”):

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission, and the Honorable Elissa Y. Killian (“respondent”), as follows:

1. This Stipulation is presented to the Commission in connection with Formal Written Complaints pending against respondent.

2. Respondent was admitted to the practice of law in New York in 1988. She served as a Justice of the Liberty Village Court from April 1999 to April 2003. Since April 1, 2003, respondent has been appointed to five successive one-year terms as Acting Justice of the Liberty Village Court. Her current term expires on April 1, 2008.

3. Respondent was served with a Formal Written Complaint dated January 12, 2007, containing two charges. Charge I alleged that respondent failed to report and remit fines and fees to the State Comptroller as required by the Uniform Justice Court Act § 2021(1), Village Law § 4-410, and Vehicle and Traffic Law § 1803. There was no allegation that respondent misappropriated court funds. Charge II alleged that respondent failed to timely cooperate with the Commission’s investigation of the allegations in Charge I. The Formal Written Complaint is annexed hereto as Exhibit A.

4. Respondent submitted a Verified Answer dated March 12, 2007, in which she admitted certain facts, denied certain other facts, denied that her conduct violated the Rules Governing Judicial Conduct, and asserted as a defense that her failure to report and remit court funds was due to an antiquated computer system and insufficient bookkeeping procedures that were in place when she assumed office. The Answer is annexed hereto as Exhibit B.

5. On March 26, 2007, the Commission designated Steven E. North, Esq. as Referee to hear and report proposed findings of fact and conclusions of law with respect to the Formal Written Complaint. A hearing before the Referee was scheduled for November 15 and 16, 2007.

6. On November 8, 2007, the Commission advised respondent that it was investigating a new complaint alleging that she received a six-month stayed suspension from the practice of law from the Appellate Division, Third Department. The November 15-16 hearing was postponed, pending investigation of the new matter.

7. Respondent was served with a Second Formal Written Complaint dated January 2, 2008, which alleged *inter alia* that respondent failed to timely cooperate with investigations by the Committee on Professional Standards into her alleged professional misconduct, that she was suspended from the practice of law in March 2007 for professional misconduct and, notwithstanding that the suspension was stayed contingent on respondent’s satisfaction of certain

conditions, such suspension reflected adversely on her fitness to serve as a judge. The Second Formal Written Complaint is annexed hereto as Exhibit C. Respondent has not answered the Second Complaint.

8. Respondent acknowledges by this Stipulation that she will not defend against the two pending Complaints.

9. Respondent hereby affirms that she will neither seek nor accept reappointment as an Acting Justice of the Liberty Village Court, Sullivan County, upon the expiration of her current term on April 1, 2008.

10. Respondent hereby affirms that she will neither seek nor accept judicial office or a position as a Judicial Hearing Officer at any time in the future.

11. In view of the foregoing, all parties to this Stipulation respectfully request that the Commission close the pending matter based on this Stipulation.

12. 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: January 23, 2008

s/ **Honorable Elissa Y. Killian**
Respondent

s/ **Robert H. Tembeckjian, Esq.**
Administrator & Counsel to the Commission
(**Melissa DiPalo**, Of Counsel)

EXHIBIT A: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.

EXHIBIT B: ANSWER: Available at www.scjc.state.ny.us.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to MARY ANNE LEHMANN, a Judge of the Binghamton City Court, Broome County

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro^[1]

Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Charles Farcher, Of Counsel) for the Commission

Dreyer Boyajian LLP (by William J. Dreyer) for the Respondent

The respondent, Mary Anne Lehmann, a Judge of the Binghamton City Court, Broome County, was served with a Formal Written Complaint dated June 15, 2007, containing one charge. The Formal Written Complaint alleged that respondent permitted her co-judge's law partners and associates to appear before her in the Binghamton City Court. Respondent filed a Verified Answer dated July 20, 2007. Respondent was served with a second Formal Written Complaint dated January 9, 2008, containing one charge. The second Formal Written Complaint alleged that respondent permitted the law partners and associates of her personal attorney to appear before her in the Binghamton City Court. Respondent filed a Verified Answer dated February 5, 2008.

On June 6, 2008, 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 providing for written and oral argument on the issue of sanctions. The Commission accepted the Agreed Statement on June 18, 2008. Each side submitted memoranda as to sanction.

On September 18, 2008, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been an elected full-time Judge of the Binghamton City Court since 1997. She was admitted to the practice of law in New York in 1984.

As to Charge I of the Formal Written Complaint:

2. John T. Hillis was a full-time Binghamton City Court Judge for many years until his retirement in July 2004. He was succeeded by David F. Crowley, who served by appointment on an interim basis from July to December 2004.

3. William C. Pelella has been an elected, full-time Binghamton City Court Judge since January 1, 2005.

4. Robert C. Murphy was an appointed, part-time Binghamton City Court Judge from June 14, 2002, to June 14, 2008. During that time, he was in private practice as an attorney with a law office in Binghamton.

5. Throughout 2002, Robert C. Murphy and Kurt D. Schrader were of counsel to the law firm of O'Connor, Gacioch, Pope & Tait. Alan J. Pope and Jeffrey A. Tait were partners of the firm, and Linda Blom Johnson and Andrea Sarra were salaried associates of the firm.

6. On January 1, 2003, Judge Murphy and Messrs. Pope and Tait formed the law firm of Pope, Tait & Murphy, each as capital partners. Mr. Schrader was of counsel to the firm, and Ms. Sarra and Ms. Johnson were salaried associates of the firm. On July 7, 2003, James A. Sacco joined Pope, Tait & Murphy, of counsel. During 2003, the partners, members and associates of Pope, Tait & Murphy were persons connected in law business with Judge Murphy.

7. In January 2004 Mr. Tait became a Supreme Court Justice, and Ms. Sarra became his full-time law clerk.

8. During 2003, Mr. Pope, Mr. Schrader, Mr. Sacco, Ms. Johnson and Ms. Sarra generated revenue through the practice of law in the Binghamton City Court, and this revenue was included in the gross income of Pope, Tait & Murphy. Judge Murphy received a distribution of net income derived from the revenue generated by these attorneys through their practice of law in the Binghamton City Court.

9. On January 1, 2004, Judge Murphy and Messrs. Pope, Schrader and Sacco formed the law firm of Pope, Schrader & Murphy. Judge Murphy and Messrs. Pope and Schrader were capital partners, and Mr. Sacco was of counsel.

10. The gross income of Pope, Schrader & Murphy included 100% of all fees received for legal services performed. Each partner, including Mr. Sacco, was responsible for an equal share of common general overhead expenses. Each partner was also individually responsible for his own expenses incurred on behalf of the firm or on his own behalf or in connection with one of his cases, though the firm might advance sums for costs and disbursements.

11. The law firm of Pope, Schrader & Murphy remained in existence until June 1, 2006, when Murphy left the firm and became a sole practitioner. After that date, the firm became and remains the law firm of Pope, Schrader & Sacco.

12. From at least 2002 to about June 1, 2006, respondent knew Messrs. Pope, Tait, Schrader and Sacco professionally and knew that each was in the practice of law with Judge Murphy.

13. From in or about June 2002, when Judge Murphy became a judge, until in or about March 2006, respondent permitted the partners and associates of Judge Murphy to appear before her in the Binghamton City Court in 81 criminal cases and nine civil cases, as set forth more fully in the Agreed Statement of Facts.

14. From July 25, 2002, to January 17, 2006, respondent assigned Mr. Sacco and/or Mr. Schrader to represent defendants before her in 45 cases, as set forth more fully in the Agreed Statement of Facts, notwithstanding that Mr. Schrader and Mr. Sacco were law partners of Judge Murphy.

15. At all times relevant to the matters herein, the process for assigning counsel in Binghamton City Court was as follows. Court staff would consult a list of attorneys who had declared themselves available for assignment and would telephone lawyers on that list in rotation until one was available to serve in the particular matter at hand. Respondent generally did not participate in this process, except to sign the assignment letter as to those cases on her docket where such assignment was necessary.

16. There is no indication that any of these assignments were made other than in the ordinary course, or that Mr. Schrader or Mr. Sacco was given preferential treatment over other attorneys who were receiving court assignments, or that either was reimbursed for his work in excess of reasonable and justifiable fees. Mr. Schrader's total compensation in these matters was \$5,136.25. Mr. Sacco's total compensation was \$3,648.23.

17. In *RPI Construction, Inc., v. A. Anthony Corporation*, the defendant's principal, Anthony Serdula, moved by letter dated December 20, 2005, to the Binghamton City Court to reopen the matter after an arbitrator had issued a judgment in favor of the claimant. Judge Murphy placed a note in the file recusing himself as "Mr. Serdula has been represented by my partner." By letter dated January 26, 2006, the chief clerk wrote to District Administrative Judge Judith F. O'Shea, enclosing the letter requesting reopening of the case and stating:

"Anthony Serdula, the President of A. Anthony Corp. is well known in Binghamton – Judge Lehmann knows him fairly well, Judge Pelella and he were neighbors and Judge Murphy's law firm has represented him in the past. Therefore, they have recused themselves from hearing this motion. I am not sure if Judicial Hearing Officer David F. Crowley will have a similar conflict of interest or not. Please advise."

Judge O'Shea designated Cortland City Court Judge Elizabeth A. Burns to hear the *RPI* matter. Judge Burns sent letters scheduling the matter for February 10, 2006, and again for March 22, 2006. On March 22, 2006, Mr. Pope appeared before Judge Burns, representing the defendant. Also on March 22, 2006, Mr. Schrader appeared before Judge Burns in the Binghamton City Court on behalf of the plaintiff in *Pope, Schrader & Murphy LLP v. Lown*, a commercial claim. Judge Burns adjourned both cases to review the issue of whether or not attorneys from Pope, Schrader & Murphy could practice law in the Binghamton City Court in light of Judge Murphy's status as a part-time judge of that court.

20. On March 24, 2006, Judge Burns entered an Order disqualifying Pope, Schrader & Murphy from representing the defendant in the *RPI* matter because Section 100.6 of the Rules Governing Judicial Conduct ("Rules") prohibits the law partners and associates of a part-time judge from practicing law in that judge's court. Judge Burns directed the defendant either to

appear *pro se* or to retain new counsel. On March 29, 2006, Judge Burns dismissed *Pope, Schrader & Murphy LLP v. Lown*, without prejudice.

21. As a result of Judge Burns' Order in the *RPI* matter, by letter dated March 30, 2006, respondent and Judge Pelella advised the attorneys at Pope, Schrader & Murphy that their firm was prohibited from practicing law in the Binghamton City Court, directed the firm to take steps to withdraw from any civil actions then pending in the court and to inform criminal defendants that the Pope firm could no longer represent them, and gave notice to the firm that new counsel would be assigned to criminal defendants whose cases had been assigned to the firm.

22. By letter dated May 4, 2006, respondent reported Judge Murphy's conduct to the Commission for, *inter alia*, allowing his partners and associates to practice law in the Binghamton City Court.

23. Notwithstanding that as early as June 2002, respondent was aware that Messrs. Pope, Schrader and Sacco had appeared in the Binghamton City Court and respondent later concluded that in doing so, they had likely committed substantial violations of Section 471 of the Judiciary Law and the New York Lawyer's Code of Professional Responsibility, respondent did not take appropriate action to prohibit these attorneys from practicing in the court until March 30, 2006, and did not act to refer the information to an appropriate lawyers' disciplinary or grievance committee.

24. Notwithstanding that respondent received information indicating a substantial likelihood that Judge Murphy had committed a substantial violation of the Rules by not prohibiting his law partners and associates from practicing in the Binghamton City Court, contrary to the requirements of Section 471 of the Judiciary Law and Section 100.6(B)(3) of the Rules, respondent failed to take appropriate action, such as referring the information to the Commission, until May 4, 2006.

As to Charge II of the Second Formal Written Complaint:

25. By letter dated May 16, 2006, the Commission's Administrator notified respondent that the Commission had received her complaint against Judge Murphy and that, on its own motion, the Commission had authorized an investigation of respondent for having permitted Judge Murphy's law partners and associates to practice law in the Binghamton City Court. By letter dated August 7, 2006, respondent was asked to respond in writing to the allegations. Respondent's written responses were sent to the Commission with a letter dated September 12, 2006, from John L. Perticone, a partner in the Binghamton law firm of Levene, Gouldin & Thompson ("the Levene firm"). The Levene firm consists of approximately 39 partners and approximately 17 associates or other attorneys.

26. Following its investigation, the Commission authorized the first Formal Written Complaint, which was served upon Mr. Perticone as counsel for respondent on June 21, 2007. On July 20, 2007, Mr. Perticone filed respondent's Verified Answer. By letter dated July 25, 2007, he demanded discovery from Commission counsel.

27. Between July 2006 and September 2007, while she was represented by Mr. Perticone with regard to the Commission's inquiry, respondent allowed members of the Levene firm to appear before her on behalf of defendants in six criminal cases, as set forth below.

28. In *People v. William C. Balshuweit*, Judge Pelella arraigned the defendant on charges of Criminal Mischief in the Fourth Degree and Criminal Contempt in the Second Degree, remanded the defendant to jail in lieu of bail and referred the case to respondent's domestic violence court. By letter dated July 13, 2006, on the Levene firm letterhead, associate Jacinta M. Testa noted that firm's appearance as retained counsel for the defendant and requested an adjournment. On September 19, 2006, the defendant appeared before respondent with Ms. Testa and entered a guilty plea to Criminal Contempt, and in December 2006 respondent remanded him to jail to await sentencing. In February 2007 the defendant appeared with new counsel not affiliated with the Levene firm, and respondent sentenced the defendant to six months in jail. Respondent did not disclose to the District Attorney's office or the domestic violence resource coordinator that she was represented by the Levene firm.

29. In *People v. Trevor L. Gordineer*, respondent sentenced the defendant to a conditional discharge in March 2006 on a reduced charge of Harassment and ordered him to attend domestic violence court on May 16, 2006, and September 19, 2006. The defendant was represented by Dorian D. Ames, a partner in the Levene firm. On September 22, 2006, respondent issued a bench warrant for the defendant's failure to appear on September 19, 2006.

30. In *People v. Derman K. Lewis*, the defendant was charged with Assault in the Second Degree in February 2005. He was represented by Scott R. Kurkowski, a partner in the Levene firm. In October 2005 the District Attorney's office amended the charge to a misdemeanor Assault. On February 17, 2006, the defendant appeared before respondent with Mr. Kurkowski and entered a plea of Not Responsible by Reason of Mental Disease or Defect. After the defendant was evaluated, by letter dated November 29, 2006, to Mr. Kurkowski, the assistant district attorney and the assistant attorney general, respondent scheduled a hearing for December 12, 2006. On that date, respondent disclosed on the record that she was represented by the Levene firm but did not provide any details of the nature of the representation. Respondent issued an order pursuant to Section 330.20 of the Criminal Procedure Law, requiring the defendant to, *inter alia*, attend outpatient treatment.

31. By letter dated November 14, 2006, on the Levene firm letterhead, associate Jacinta M. Testa informed the court that the firm had been retained to represent the defendant in *People v. Norman Rudin*, who was charged with Leaving the Scene of a Property Damage Accident. Respondent presided over a pretrial conference on February 26, 2007, and noted on the court's record, "set trial/parties may work it out." Respondent did not disclose to the District Attorney's office that the Levene firm was representing her. The case was later disposed of by the defendant's mail-in plea to a reduced charge, which was authorized by Assistant District Attorney Michael Garzo and sent to the court by Ms. Testa. A fine was imposed by a court clerk pursuant to a uniform schedule.

32. By letter dated August 16, 2007, on the Levene firm letterhead, partner Kevin T. Williams noted the firm's appearance as retained counsel for the defendant in *People v.*

Christopher Bellingham, who was charged with Driving While Intoxicated, Failing to Keep Right and Disobeying Traffic Control Device, and stated that he would appear with the defendant the following day for the scheduled arraignment. Mr. Williams appeared with the defendant for arraignment before respondent, who released the defendant on recognizance. By letter dated August 28, 2007, on the Levene firm letterhead and copied to the Binghamton City Court, Mr. Williams wrote to ADA Garzo, confirming a plea offer. On September 5, 2007, Mr. Williams, Mr. Garzo and the defendant appeared before respondent. At the outset of the proceeding, respondent stated:

“Levene, Gouldin & Thompson is my family attorney and...they are presently doing some litigation on my behalf and certainly the District Attorney has the right to have this case heard before a judge who is not represented by Levene, Gouldin & Thompson, so I want to place that on the record.”

33. Respondent asked if Mr. Garzo had “any objection or concerns along those lines,” and he said he did not. Respondent accepted the defendant’s plea to a reduced charge of Driving While Ability Impaired in satisfaction of the charges and sentenced him to a one-year conditional discharge, attendance at the victim impact panel and a fine of \$300 plus surcharge.

34. In *People v. Philip J. O.*, Judge Murphy had arraigned the defendant on a charge of Patronizing a Prostitute. On August 28, 2007, the defendant appeared before respondent, represented by retained counsel Kevin T. Williams of the Levene firm. Also present was ADA Garzo. The defendant pled guilty to a reduced charge of Disorderly Conduct, and respondent sentenced him to a fine of \$100, plus surcharge and a one-year conditional discharge. Respondent did not disclose to Mr. Garzo that she was represented by a member of the Levene firm.

35. By letter dated October 4, 2007, Judge Murphy filed a complaint with the Commission, alleging that respondent had allowed Mr. Williams, the law partner of her attorney John Peticone, to appear before her.

Supplemental findings:

36. Before Judge Burns issued her Order in *RPI Construction v. A. Anthony Corporation* in March 2006, respondent was not aware of Section 471 of the Judiciary Law or Section 100.6(B)(3) of the Rules. Respondent concedes that she was obliged to be aware of and to ensure compliance with the statutes and the Rules and that she failed to be so aware and compliant during the period at issue.

37. Judge Burns’ action impressed upon respondent that it was improper for lawyers associated with the Pope law firm to appear in the Binghamton City Court. Respondent acted promptly thereafter to prohibit appearances in her court by lawyers of that firm.

38. There is no indication that respondent conferred any preferential treatment or special beneficial disposition, or unfavorable treatment, upon Judge Murphy’s partners and

associates, or any of their respective clients, in any of the cases in which those attorneys appeared before her, or that she acted in those cases in any manner other than impartially and in the ordinary course. Respondent nevertheless recognizes that public confidence in the judiciary requires both impartiality and the appearance of impartiality and that her conduct did not satisfy this standard.

39. Respondent was not aware of the pertinent Opinions of the Advisory Committee on Judicial Ethics, which provide that a judge should not preside over cases in which the judge's personal attorney, or that attorney's firm, appears, for a period of two years following the representation. Respondent had not previously been represented by counsel in any matters. Respondent believed that her disclosure in the *Bellingham* case was sufficient notice to the District Attorney's office as to all cases that she was represented by the Levene firm.

40. There is no indication that respondent gave favorable consideration to the clients of the Levene law firm or acted in any manner other than impartially and in the ordinary course.

41. Respondent did not intend to violate the ethical Rules.

42. Respondent has been candid and cooperative with the Commission throughout this proceeding.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1), 100.3(D)(1), 100.3(D)(2) and 100.3(E)(1) of the Rules and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint and Charge II of the Second Formal

Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

It is well-established that the law partners and associates of a part-time judge who is permitted to practice law are barred from practicing law in the judge's court (Jud. Law §471). This statutory prohibition is reflected in the ethical rules, which provide that such a part-time lawyer-judge "shall not permit his or her partners or associates," or those of a co-judge, to practice in the judge's court (Rules, §100.6[B][3]). Public confidence in the courts is diminished by the appearance of favoritism when a judge presides over a case in which a party is represented by the law partners of his or her judicial colleague.

For nearly four years, in 81 criminal cases and nine civil matters, respondent allowed to appear before her in the Binghamton City Court law partners and associates of her co-judge, Robert C. Murphy. In 45 of the criminal cases, she actively facilitated these improper appearances by assigning Judge Murphy's partner or associate to represent the defendants. By permitting these attorneys to appear before her though they were statutorily barred from doing so, respondent was complicit in persistent violations of the law. *See, Matter of Harris*, 56 NY2d 365 (1982); *Matter of Falsioni*, 1982 Annual Report 123 (Comm on Judicial Conduct).

The statutory prohibition (Jud. Law §471) is clear. It applies to all judges, making no distinction between appearances before part-time and full-time judges. Thus, although the Rule prohibiting a judge from sitting on a co-judge's partners' cases applies on its face only to part-time judges (§100.6[B][3]), the obligation to implement the statutory prohibition is not limited to part-time judges. *See*, Adv. Op. 05-124, 06-61.

It has been stipulated that respondent was unaware of these specific prohibitions regarding the appearances of her co-judge's partners and associates. Even without specific knowledge of the applicable law, it should have been readily apparent to respondent that such appearances not only would provide a direct financial benefit to her co-judge, but would create an unacceptable perception that parties represented by her co-judge's partners might receive special treatment. In this regard it is noteworthy that a visiting judge assigned to handle two cases involving Judge Murphy's firm immediately recognized the impropriety of such appearances, issuing an order disqualifying the firm from one case and dismissing the second case without prejudice. Moreover, as the Court of Appeals has stated, ignorance does not excuse violations of legal or ethical mandates since every judge is required to maintain professional competence in the law. *See*, *Matter of VonderHeide*, 72 NY2d 658, 660 (1988); *Matter of Kane*, 50 NY2d 360, 363 (1980); Rules, §100.3(B)(1). Further, since she was unaware of the applicable law, respondent did not bar the attorneys from appearing in the court or report the conduct of Judge Murphy to the Commission until the spring of 2006 (Rules, §100.3[D][1], [2]), thereby permitting the improper practice to continue for nearly four years.

The appearances by Judge Murphy's firm in the Binghamton City Court began during respondent's tenure as a judge, when Judge Murphy joined the court where respondent had been serving for five years. As an experienced judge, respondent should have immediately questioned the practice, rather than participating in it for the next four years. There is no indication in the record that, over that period, respondent ever considered whether the practice might be improper, notwithstanding that these attorneys personally appeared before her and corresponded with the court on law firm stationery that listed her co-judge as a partner.

After this systematic misconduct came to light, at a time when she was under investigation by the Commission, respondent failed to disqualify herself and permitted the partners and associates of the attorney who was then representing her before the Commission to appear before her in six criminal matters. By permitting her attorney's law firm to appear before her, respondent created an appearance of impropriety, conveyed the appearance that these attorneys were in a special position to influence her and failed to disqualify herself in cases where her impartiality might reasonably be questioned (Rules, §§100.2[A], 100.3[E][1]).

Under guidelines provided in numerous opinions of the Advisory Committee on Judicial Ethics, disqualification in matters involving the judge's personal attorney is required if the representation occurred within the past two years; where the attorney's partners or associates appear, disqualification is subject to remittal, which requires fully disclosing the relationship on the record (Rules, §100.3[F]) (Adv. Op. 92-54, 93-09, 97-135, 99-67, 91-10). *See also*, *Matter of Merrill*, 2008 Annual Report 181 (Comm on Judicial Conduct); *Matter of Ross*, 1990 Annual Report 153 (Comm on Judicial Conduct); *Matter of Phillips*, 1990 Annual Report 145 (Comm on Judicial Conduct). There can be no substitute for fully disclosing such a conflict in order to

ensure that the parties are fully aware of the pertinent facts and have an opportunity to consider whether to seek the judge's recusal.

In two cases of the six cases in which her attorney's firm appeared before her, respondent disclosed that the firm was representing her; in the remaining cases, she made no disclosure whatsoever of her relationship with the firm. We reject, as a mitigating factor, the suggestion that respondent believed that her disclosure in the Bellingham case "was sufficient notice to the District Attorney's office as to all cases that she was represented by the Levene firm" (Agreed Statement, par. 114). As the record makes clear, this disclosure occurred in September 2007, after the firm had already appeared before her, without disclosure, in four cases.

This misconduct occurred at a time when respondent, who was under investigation by the Commission, should have been especially sensitive to her ethical obligations. Given that the subject of the Commission's investigation focused on potential conflicts with attorneys appearing before her and the appearance of bias which flows therefrom, this continuing lapse of judgment on respondent's part is inexcusable and profoundly troubling.

This case presents the Commission with an extremely difficult and close decision between removal and censure. Respondent's misconduct as documented and admitted is longstanding and severe. Appearances do matter. The appearance here is that the Murphy firm, because of its relationship with a judge of the City Court, had a unique and enviable status in that court. At the very least, it seems clear that the firm's connection to a judge of the court could be perceived as advantageous to the firm's clients. Certainly the firm, which frequently appeared in the court, would benefit from that perception, notwithstanding that there is no evidence in this record that the firm's clients were actually treated any differently from any other litigants. Respondent did nothing to redress this plain and obvious conflict of interest over a four-year period.

We note, however, various factors in mitigation. There is no indication that respondent conferred any preferential treatment upon Judge Murphy's associates or their respective clients in the cases cited herein. Moreover, when the impropriety of the appearances by the Murphy firm was brought to respondent's attention, she took prompt action to bar the firm from appearing in the court in the future and reported Judge Murphy's conduct to the Commission.

We also note that throughout this proceeding respondent has been cooperative and contrite and has forthrightly acknowledged her misconduct. *See, e.g., Matter of LaBelle*, 79 NY2d 350, 363 (1992); *Matter of Allman*, 2006 Annual Report 83 (Comm on Judicial Conduct).

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Peters and Judge Ruderman concur.

Ms. DiPirro and Judge Konviser were not present.

Dated: November 10, 2008

[¹] Ms. DiPirro resigned from the Commission on October 30, 2008. The vote in this matter was taken on September 18, 2008.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to MORRIS H. LEW, a Justice of the Farmington Town Court, Ontario County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and Stephanie A. Fix, Of Counsel) for the Commission
Honorable Morris H. Lew, *pro se*

The respondent, Morris H. Lew, a Justice of the Farmington Town Court, Ontario County, was served with a Formal Written Complaint dated December 6, 2006, containing one charge. The Formal Written Complaint alleged that respondent granted special consideration to a defendant in a Speeding case based on *ex parte* communications from a friend. Respondent filed an Answer dated December 26, 2006.

By Order dated January 3, 2007, the Commission designated Sherman F. Levey, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 6, 2007, in Rochester. The referee filed a report dated November 29, 2007.

The parties submitted briefs with respect to the referee's report. On January 30, 2008, the Commission heard oral argument by Commission counsel; respondent waived oral argument and was not present. Thereafter, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Farmington Town Court, Ontario County, since 2003. He is not an attorney.

2. Respondent regularly presides on Wednesday night, and his co-justice presides on Monday night. Respondent's co-justice in 2005 was Charles R. Cooksey.

3. On August 19, 2005, in the Town of Farmington, Lori Gilmore was charged with Speeding for driving 80 mph in a 65 mph zone, in violation of Section 1180(d) of the Vehicle and Traffic Law. The ticket, issued by State Trooper Paul A. O'Bine, was returnable on Monday, September 26, 2005, in the Farmington Town Court.

4. Ms. Gilmore contacted her husband, Martin Gilmore, who was then serving in the U.S. Army in Iraq, and told him about the ticket. Mr. Gilmore asked his wife to scan the ticket and e-mail it to him, and she did so.

5. After reviewing the ticket, Mr. Gilmore searched on the Internet for the Farmington Town Court website, and on or about August 29, 2005, he contacted the court by e-mail regarding his wife's ticket.

6. Mr. Gilmore had previously served in the U.S. Army or Army Reserves with respondent. As a result of that service, Mr. Gilmore and respondent became and remain friends.

7. Between August 29 and August 31, 2005, Mr. Gilmore and respondent exchanged a series of e-mails regarding Ms. Gilmore's Speeding charge. In one e-mail, referring to the ticket issued to Ms. Gilmore, Mr. Gilmore stated, "I was wondering what could be done."

8. By e-mail on August 30, 2005, respondent asked Mr. Gilmore for the ticket number, the officer's name and where the ticket was returnable. Respondent told Mr. Gilmore, "Get me that info and I will work the issue."

9. Mr. Gilmore sent respondent by e-mail a copy of Ms. Gilmore's ticket. On August 31, 2005, respondent replied by e-mail stating:

"It is not written to me but the other judge in town, which makes it a little harder, but I will see what I can do. I know the trooper well and I am pretty sure worst case will be a reduction to a broken speedometer which is no points and a lower fine. I will get back to you."

10. Shortly thereafter, respondent sent an e-mail to his court clerk, Claudia Seehoffer, asking that Ms. Gilmore's case be transferred to him from Judge Cooksey. Respondent's e-mail stated:

"Claudia, please talk with Linda, I need a favor. I would like to have traffic ticket (speeding) transferred from Dick's court to mine. Ticket LV1296260 to Lori Gilmore written by Officer O'Bine. Scheduled for 9/26/05. Will she transfer it for me? Thanks, Morris."

11. After receiving respondent's e-mail, Ms. Seehoffer asked Linda Ingram, Judge Cooksey's court clerk, to transfer the case from Judge Cooksey's docket to respondent's docket. Ms. Ingram arranged for the transfer of the case, and Ms. Seehoffer placed it on respondent's calendar for that night, August 31, 2005.

12. No notice was given to Ms. Gilmore or Officer O’Bine that the *Gilmore* case had been placed on respondent’s calendar for August 31, 2005.

13. Respondent never contacted Judge Cooksey about transferring the case. Judge Cooksey, upon learning of the transfer, filed a complaint against respondent with the Commission.

14. On August 31, 2005, Officer O’Bine appeared before respondent in connection with another case, *People v. Benante*, which was scheduled for trial that night.

15. After the completion of the *Benante* case, while Officer O’Bine was at the bench, respondent initiated a conversation with the trooper regarding the *Gilmore* case.

16. Officer O’Bine testified that respondent told him that respondent was going to dismiss the charge against Ms. Gilmore unless the officer objected, and that respondent did not ask for his recommendation as to the disposition. Respondent testified that, after disclosing the e-mail communications from Mr. Gilmore, he asked the officer, consistent with his usual practice, “Is there an offer?”, and that the officer responded, “It is up to you,” after which the officer waved his hand and said, “Dismiss the ticket.”

17. Respondent dismissed the Speeding charge against Ms. Gilmore in the interest of justice under Section 170.40(2) of the Criminal Procedure Law. Respondent did not set forth in court records the basis for the dismissal, as required by the statute.

18. The next day, respondent sent Mr. Gilmore an e-mail message stating in part:

“The ticket has been dismissed. Please consider it a very small token of thanks for your efforts in uniform.”

19. Ms. Gilmore never entered a plea with respect to the Speeding charge and never appeared in court in connection with the case.

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

It was egregious misconduct for respondent to dismiss the Speeding charge in the *Gilmore* case based upon *ex parte* communications with his friend, the defendant’s husband. Such conduct constitutes 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...is guilty of *malum in se* misconduct constituting cause for discipline”; such conduct, the Court stated, “is wrong, and has always been wrong.” *See also, e.g., Matter of Bulger*, 48 NY2d 32

(1979). By granting such special consideration, respondent engaged in conduct that subverts the entire system of justice, which is based on the impartiality and independence of the judiciary, and that undermines respect for the judiciary as a whole.

In the late 1970s, the Commission uncovered a widespread pattern of ticket-fixing in New York State. As the Commission stated in a special report about the assertion of influence in traffic cases, ticket-fixing results in “two systems of justice, one for the average citizen and another for people with influence.” The report noted: “While most people charged with traffic offenses accept the consequences, including the full penalties of the law ... some are treated more favorably simply because they are able to make the right ‘connections’” (“*Ticket-Fixing: The Assertion of Influence in Traffic Cases*,” Interim Report, June 20, 1977, p. 16). By the early 1980s, the Commission had publicly disciplined over 140 judges for the practice of ticket-fixing. With the benefit of a significant body of case law, every judge should be well aware that such conduct is prohibited.

Here, the record establishes that respondent circumvented the normal judicial process in order to grant special consideration to the defendant, the wife of his friend and former military colleague. After Mr. Gilmore contacted him by e-mail about his wife’s Speeding ticket, respondent reached out to take jurisdiction of the case from his co-justice, re-scheduled the case without notice to the trooper or the defendant, and then dismissed the charge after a brief conversation with the trooper, who happened to be in court that night on another case. While the substance of their conversation is somewhat unclear, Officer O’Bine’s testimony strongly suggests that he acquiesced to the dismissal only after respondent made clear that he wanted that disposition. Moreover, the record indicates that respondent did not fully disclose to the trooper his relationship with the defendant’s husband or the e-mail messages he had received, and he did not set forth in court records the basis for the dismissal as required by law (Crim Proc Law §170.40[2]). It is clear from this record that the extremely lenient disposition accorded to this defendant – outright dismissal of the Speeding charge, without even the necessity of entering a plea or appearing in court – was based not on the merits of her case, but on having the right “connections.” This constitutes favoritism, and it is profoundly wrong.

The Court of Appeals has stated that even a single incident of ticket-fixing “is misconduct of such gravity as to warrant removal” (*Matter of Reedy v. Comm on Judicial Conduct*, 64 NY2d 299, 302 [1985]), although mitigating factors may warrant a reduced sanction (see, *Matter of Edwards*, 67 NY2d 153 [1986] [censure]; see also, e.g., *Matter of Cook*, 2006 Annual Report 119, and *Matter of Bowers*, 2005 Annual Report 125 [Comm on Judicial Conduct] [censure in both cases based on a joint recommendation]).

Several factors in this case indicate that censure, rather than removal, is appropriate. It is apparent that respondent was motivated in significant part by the desire to provide “a very small token of thanks” to an acquaintance in the military who was then serving in Iraq. While this does not excuse respondent’s actions, it appears that his judgment was clouded by that fact and by his desire to make what he viewed as a patriotic gesture. We also note that respondent has an otherwise unblemished record in five years as a town justice. Thus, after a careful review of the facts, we conclude that this episode warrants censure, rather than removal from office. We continue to regard ticket-fixing as extremely serious misconduct and underscore that such conduct will be condemned with strong measures.

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

Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Harding, Judge Peters and Judge Ruderman concur.

Mr. Emery and Judge Konviser dissent only as to the sanction and vote that respondent be removed.

Mr. Felder and Mr. Jacob were not present.

Dated: March 26, 2008

DISSENTING OPINION BY MR. EMERY

Judge Lew fixed a ticket for the wife of a friend. No more should need to be said to remove him from the bench. This is a category of misconduct that strikes at the heart of our justice system, and removal is the only sanction that is commensurate with the corrosive effect of judicial decision-making perverted by a judge's personal interests. *See, Matter of Cook*, 2006 Annual Report 119 (Comm on Judicial Conduct) (Emery Dissent); *see also, Matter of Reedy v. Comm on Judicial Conduct*, 64 NY2d 299, 302 (1985) (even a single incident of ticket-fixing "is misconduct of such gravity as to warrant removal").

When removal is called for by the judge's conduct, the only remaining issue is whether there are any circumstances, such as remorse, that should permit the judge to remain on the bench. *Matter of Edwards v. Comm on Judicial Conduct*, 67 NY2d 153, 155 (1986). Here, no such circumstances exist. Indeed, there are significant exacerbating circumstances that underscore why the sanction of removal is required.

First, the judge's testimony as to the circumstances surrounding his dismissal of Mrs. Gilmore's ticket was sharply at odds with that of the trooper, who happened to be present that night on another case. In his sworn testimony, the judge all but blamed the trooper for the lenient disposition, repeatedly claiming that the trooper had urged that the ticket be dismissed, while the trooper insisted that the judge had announced that disposition as a *fait accompli*. The judge's strenuous efforts to foist responsibility for the lenient disposition on the trooper are astounding, given the judge's *ex parte* emails with the defendant's husband in which he had promised, "I will work the issue" and "I will see what I can do" (Ex. 6). The testimonial discrepancies, which regrettably the referee deemed insignificant, suggest the strong possibility that the judge lied under oath in an attempt to deflect responsibility for his malfeasance.

Second, the judge clearly fails to recognize that even if the trooper *had* suggested a lenient disposition, the judge should never have disposed of his friend's wife's case. Incredibly, the judge maintained that because of his relationship with the defendant's husband he would not have sat on the case had it gone to trial, yet he saw nothing wrong with dismissing his friend's wife's ticket because, he claims, the trooper supported the disposition. Even under the judge's

distorted view of these events, this suggests that he completely fails to recognize that he did anything wrong, and thus is apt to repeat the misconduct.

Finally, the record is clear that the judge viewed his choice to honor his friend's service in Iraq by dismissing a speeding ticket for his friend's wife as a supervening duty that obviates his obligation to apply law evenhandedly. In advising his friend of the favor he had granted, the judge sanctimoniously attributed the disposition to his personal version of patriotism: "The ticket has been dismissed. Please consider it a very small token of thanks for your efforts in uniform" (Ex. 6). While the majority apparently regards this as mitigating factor (Determination, p. 8), I reach a contrary conclusion. What Judge Lew forgot to consider is that his friend in Iraq, as well as many in the armed services, likely believe they are fighting to protect their country and the freedom guaranteed to each of its citizens by the Constitution of the United States. By intentionally violating the basic precepts of due process and equal protection, the judge may have done a favor that even his distorted vision of patriotism should abhor. Under these circumstances, I do not see how this Commission can subject the public to Judge Lew, who promises to wield his authority in violation of his oath of office when he believes his brand of patriotism demands it.

And there is more that renders Judge Lew not qualified for duty. Though pretending to stand on the high moral ground of what he calls patriotism, he tried to have it both ways in defending himself. On the one hand, he justifies his behavior as a patriotic act. On the other, he asserts that he did nothing out of the ordinary because speeding tickets are regularly accorded lenient dispositions under similar circumstances. When confronted with the proof by Commission staff, however, Judge Lew could not adequately explain the uncontroverted facts: that he had to arrange for transfer of Mrs. Gilmore's case from his co-judge's calendar to his own without his co-judge's knowledge; that Mrs. Gilmore had not been notified and had not appeared; that the prosecuting officer had no notice of the case; and that, as even the judge was forced to concede, the usual disposition in such cases – *had the defendant appeared* – was a plea to an equipment violation, not outright dismissal. His expedient excuses to counter his blatant violations of simple basic due process and respect for the trooper who regularly appears before him belie his posture of moral rectitude.

As Jack Nicholson's military command character in "A Few Good Men" said under withering cross-examination, "You can't handle the truth." Nor can Judge Lew. The truth is that Judge Lew is guilty of ticket-fixing and much more: his mendacious defense of patriotism and propriety clash and conflict, revealing a judge who is a danger to a public that he will serve only when it is convenient for him to follow the law. He should be removed.

Dated: March 26, 2008

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to REBECCA MCGOWAN, a Justice of the Jewett Town Court, Greene County.

DECISION AND ORDER

BEFORE:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk, Of Counsel) for the Commission
Roche, Corrigan, McCoy & Bush, PLLC (by Scott W. Bush) for the Respondent

The matter having come before the Commission on July 31, 2008; and the Commission having before it the Formal Written Complaint dated October 19, 2007, respondent's Answer filed on November 28, 2007, and the Stipulation dated July 17, 2008; and the Commission, by order dated March 6, 2008, having designated Jay C. Carlisle, Esq., as referee to hear and report proposed findings of fact and conclusions of law, and no hearing having been held to date; and respondent having resigned from judicial office by letter dated July 15, 2008, effective July 31, 2008, 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 approved by the Commission; now, therefore, it is

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

SO ORDERED.

STIPULATION

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission on Judicial Conduct (hereinafter "Commission"), the Honorable Rebecca McGowan, the respondent in this proceeding, and her attorney, Scott W. Bush, of Roche, Corrigan, McCoy & Bush, PLLC.

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

2. Respondent is not and has never been an attorney. She has been a Justice of the Jewett Town Court, Greene County, since January 2005. Her current term of office expires on December 31, 2008.

3. Respondent was served with a Formal Written Complaint dated October 19, 2008, a copy of which is annexed as Exhibit A.

4. Respondent submitted an Answer on November 28, 2008, a copy of which is annexed as Exhibit B.

5. By Order dated March 6, 2008, the Commission designated Jay C. Carlisle, Esq., as referee to hear and report proposed findings of fact and conclusions of law. The referee has scheduled a hearing to be held on July 17-18, 2008.

6. Respondent tendered her resignation, dated July 15, 2008, effective July 31, 2008, 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 annexed as Exhibit C.

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: July 17, 2008

s/ **Honorable Rebecca McGowan**
Respondent

Scott W. Bush Esq.
Roche, Corrigan, McCoy & Bush, PLLC
Attorney for Respondent

Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(**Jill S. Polk**, Of Counsel)

EXHIBIT A: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.

EXHIBIT B: ANSWER: Available at www.scjc.state.ny.us.

EXHIBIT C: LETTER OF RESIGNATION: Available at www.scjc.state.ny.us.

Dated: August 4, 2008



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to SHAWN W. MINOGUE, a Justice of the Wilmington Town Court, Essex County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Bruce D. Lennard, Of Counsel) for the Commission
Favor J. Smith for the Respondent

The respondent, Shawn W. Minogue, a Justice of the Wilmington Town Court, Essex County, was served with a Formal Written Complaint dated August 21, 2007, containing four charges. The Formal Written Complaint alleged that respondent: (i) failed to make timely deposits in 18 cases; (ii) failed to report and remit in a timely manner to the State Comptroller a total of \$415 in six cases; (iii) failed to keep a complete and accurate cashbook; and (iv) presided over and disposed of a case in which her sister-in-law was charged with a seat belt violation. Respondent filed a Verified Answer dated September 20, 2007.

On January 22, 2008, 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 January 29, 2008, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been an elected Justice of the Wilmington Town Court, Essex County, from January 2005 to the present. Her current term ends in December 2008. She is not an attorney.

As to Charge I of the Formal Written Complaint:

2. From in or around January 2005 to in or around November 2006, as set forth in Schedule A to the Formal Written Complaint, respondent failed to deposit court funds within 72 hours of receipt, exclusive of Sundays and holidays, notwithstanding the requirements of Section 214.9(a) of the Uniform Civil Rules for the Justice Courts (22 NYCRR §214.9[a]).

3. In *People v. Gordon Hewey*, respondent collected \$65.00 from the defendant on January 27, 2005. Respondent deposited that \$65.00 payment into her court checking account on February 11, 2005, 15 days later.

4. In *People v. Kenneth Dalton*, respondent collected \$75.00 from the defendant and issued him a signed Receipt for Fine, number 006, dated March 25, 2005. Respondent deposited that \$75.00 payment into her court checking account on April 8, 2005, 14 days later.

5. In *People v. Elmer Guy*, respondent collected \$85.00 from the defendant and issued him a signed Receipt for Fine, number 007, dated March 22, 2005. Respondent deposited that \$85.00 payment into her court checking account on April 8, 2005, 17 days later.

6. In *People v. Richard James*, respondent collected \$60.00 from the defendant on March 22, 2005. Respondent deposited that \$60.00 payment into her court checking account on April 8, 2005, 17 days later.

7. In *People v. Valeriy Kapustin*, respondent collected \$320.00 from the defendant and issued him a signed Receipt for Fine, number 008, dated March 24, 2005. This \$320.00 payment was for two fines of \$85.00 and \$235.00, respectively. Respondent timely deposited \$85.00 into her court checking account on March 25, 2005. Respondent did not deposit the remaining \$235.00 of the amount collected into her court checking account. Instead, respondent retained the money and eventually returned it to Mr. Kapustin after she dismissed the charge upon which the fine was levied.

8. In *People v. Andrea Villiere*, respondent collected \$60.00 from the defendant and issued her a signed Receipt for Fine, number 009, dated March 24, 2005. Respondent deposited that \$60.00 payment into her court checking account on April 8, 2005, 15 days later.

9. In *People v. Mikhail Sobolkov*, respondent collected \$85.00 from the defendant and issued him a signed Receipt for Fine, number 014, dated April 7, 2005. Respondent deposited that \$85.00 payment into her court checking account on July 29, 2005, 113 days later.

10. In *People v. Thomas Sarchioto*, respondent collected \$35.00 from the defendant and issued him a signed Receipt for Fine, number 016, dated April 7, 2005. Respondent deposited that \$35.00 payment into her court checking account on July 29, 2005, 113 days later.

11. In *People v. Christina Carpenter* and *People v. Harry Rosco*, respondent collected \$50.00 from the defendants for two fines of \$25.00 each and issued them a signed Receipt for Fine, number 034, dated July 14, 2005. Respondent deposited that \$50.00 payment into her court checking account on July 29, 2005, 15 days later.

12. In *People v. Dewey Trudeau*, respondent collected \$25.00 from the defendant and issued him a signed Receipt for Fine, number 035, dated July 14, 2005. Respondent deposited that \$25.00 payment into her court checking account on July 29, 2005, 15 days later.

13. In *People v. B. Locklin*, respondent collected \$105.00 from the defendant and issued the defendant a signed Receipt for Fine, number 050, dated September 22, 2005. Respondent collected the \$105.00 from defendant Locklin for her co-justice. Respondent did not deposit that \$105.00 payment into her court checking account; instead, respondent put the money in an envelope and left it for her co-justice.

14. In *People v. Erin Haley*, respondent collected \$60.00 from the defendant and issued her a computer generated receipt, number 067, dated September 22, 2005. Respondent deposited that \$60.00 payment into her court checking account on December 30, 2005, 99 days later.

15. In *People v. Jeffery Webber*, respondent collected \$85.00 from the defendant and issued him a computer generated receipt, number 073, dated November 17, 2005. Respondent deposited that \$85.00 payment into her court checking account on December 5, 2005, 18 days later.

16. In *People v. Joseph Pafundi*, the defendant provided the court with a money order dated January 4, 2006, in the amount of \$25.00 in connection with a Simplified Traffic Information adjudicated on December 15, 2005. Respondent did not deposit the \$25.00 collected from Mr. Pafundi into her court checking account.

17. In *People v. Randall Smith*, respondent collected \$35.00 from the defendant in February 2006. As of November 21, 2006, respondent had not deposited that \$35.00 payment into her court checking account.

18. In *People v. Christopher Hozley*, respondent collected \$75.00 from the defendant and issued him a receipt, number 144, dated July 13, 2006. Respondent timely deposited \$70.00 of that \$75.00 payment into her court checking account on July 14, 2006. Respondent did not deposit the remaining \$5.00 of that \$75.00 payment into her court checking account.

19. In *People v. David Johnson*, respondent collected \$110.00 from the defendant and issued him a receipt, number 144, dated July 13, 2006. Respondent timely deposited \$105.00 of that \$110.00 payment into her court checking account on July 14, 2006. Respondent did not deposit the remaining \$5.00 of that \$110.00 payment into her court checking account.

20. In all cases, respondent stored the undeposited funds in her locked briefcase, which she kept in her courtroom, under her bench. The courtroom is routinely locked when not in use but does on occasion serve as a community center used by a number of groups at times when neither respondent nor court staff were present. Respondent understands the need to

safeguard undeposited court funds in a more secure manner and affirms that she now does so by locking them in her briefcase, which she keeps with her until the following day, when she deposits the funds in the bank.

As to Charge II of the Formal Written Complaint:

21. From in or around March 2005 to in or around June 2006, as set forth in Schedule B to the Formal Written Complaint and more fully in paragraphs 22 through 39 below, respondent failed to report and remit^[1] to the State Comptroller a total of \$415.00 from six cases, notwithstanding the requirements of Section 27(1) of the Town Law, Sections 2020 and 2021 of the Uniform Justice Court Act, and Section 1803 of the Vehicle and Traffic Law.

22. By letter dated June 13, 2005, a clerk of the Justice Court Fund in the Office of the State Comptroller advised respondent that her report of her court's financial activity for the month of April 2005, and any remittance due, were not on file. By this letter, respondent was asked to check her records and confirm with the Justice Court Fund that she had filed her report or, if she had not filed her report, to send the report as soon as possible.

23. By letter dated July 11, 2005, an accountant of the Justice Court Fund advised respondent that the Justice Court Fund, as of that date, had not yet received her report of her court's financial activity for the months of April and May 2005, and any remittance due. Respondent was asked to contact the Justice Court Fund as soon as possible with the required documentation to avoid a loss of revenue to her municipality and suspension of her compensation.

24. On August 12, 2005, and again on August 17, 2005, the manager of the Justice Court Fund left telephone messages for respondent regarding her reports not being filed of her court's financial activity for the months of April and May 2005.

25. By letter dated August 19, 2005, the manager of the Justice Court Fund gave official notification to the supervisor of the Town of Wilmington that, as of that date, respondent had not filed a report of her court's financial activity, or remitted where due, for the months of April and May 2005. This official notice, upon receipt by the supervisor of the Town of Wilmington, required that respondent's judicial salary be stopped until further notice from the Justice Court Fund, pursuant to Section 27(1) of the Town Law.

26. Respondent's judicial salary was stopped in August 2005 as a result of her failure to file reports and remittances with the State Comptroller for the months of April and May 2005.

27. By letter dated August 24, 2005, the Commission advised respondent that it was conducting an initial review and inquiry of allegations that she had failed to file reports or remit funds to the State Comptroller for the months of April and May 2005.

28. By letter dated August 29, 2005, the manager of the Justice Court Fund gave official notification to the Supervisor of the Town of Wilmington that, as of that date, respondent was current in her monthly reporting requirements and that payment of her judicial salary should resume.

29. By a letter postmarked September 8, 2005, respondent acknowledged receipt of the Commission's letter of August 24, 2005, and stated that she had, in fact, faxed her report of her court's financial activity for the month of April 2005 to the State Comptroller on May 12, 2005, but that she was unable to provide a confirmation of that fax transmission. Respondent also stated that she had re-faxed the April 2005 report to the State Comptroller on June 16, 2005, along with her report of her court's financial activity for the month of May 2005.^[2] In support of these assertions, respondent provided the Commission, in her letter postmarked September 8, 2005, with purported copies of reports of her court's financial activity for the months of April and May 2005, each dated June 16, 2005 and signed by respondent. Respondent also provided therewith a copy of the August 29, 2005, letter from the manager of the Justice Court Fund to demonstrate that she was up-to-date on her report and remittance requirements for the months of April and May 2005.

30. Notwithstanding her statements in her letter postmarked September 8, 2005, on July 28, 2005, respondent certified that she had, on that date, transmitted electronically her report for the month of April 2005 to the State Comptroller and sent a check in the amount of \$805.00 to the chief fiscal officer of the Town of Wilmington. A copy of cancelled check number 105 shows that respondent did write a check to the Town of Wilmington in the amount of \$805.00 on July 28, 2005. The August 2005 statement of activity in respondent's court checking account shows that check number 105 in the amount of \$805.00 cleared the account on August 1, 2005.

31. In *People v. Daniel Smith*, respondent collected \$165.00 from the defendant and issued him a signed Receipt for Fine, number 005, dated March 10, 2005. Respondent did not report the \$165.00 collected from Mr. Smith in her March 2005 report of her court's financial activity, or in any subsequent report of her court's financial activity; nor did respondent remit the \$165.00 collected from Mr. Smith to the State Comptroller.

32. In *People v. Thomas Richardson*, respondent collected \$85.00 from the defendant and issued him a signed Receipt for Fine, number 043, dated August 25, 2005. Respondent did not report the \$85.00 collected from Mr. Richardson in her August 2005 report of her court's financial activity, or in any subsequent report of her court's financial activity; nor did respondent remit the \$85.00 collected from Mr. Richardson to the State Comptroller.

33. In *Rasmussen v. Neuman*, a small claims action, respondent collected a \$15.00 filing fee from the plaintiff and issued him a signed Receipt for Fine, number 042, dated September 9, 2005. Respondent also collected a \$15.00 filing fee from the defendant and issued him a signed Receipt for Fine, number 045, dated September 9, 2005. Respondent was required to include both payments of \$15.00 in her September 2005 report of her court's financial activity, and she reported only one payment in that amount in that report. Respondent did not remit the second payment of \$15.00 collected in *Rasmussen v. Neuman* to the State Comptroller.

34. In *People v. Allison Buckley*, respondent collected \$50.00 from the defendant and issued her a signed Receipt for Fine, number 046, dated October 20, 2005. Respondent did not report the \$50.00 collected from Ms. Buckley in her October 2005 report of her court's financial activity, or in any subsequent report of her court's financial activity; nor did respondent remit the \$50.00 collected from Ms. Buckley to the State Comptroller.

35. In *People v. Joseph Pafundi*, the defendant was issued five separate Simplified Traffic Informations, all of which were adjudicated on December 15, 2005. Four of the five Simplified Traffic Informations were dismissed, and the fifth, involving a seat belt violation, resulted in a fine of \$25.00 and a surcharge of \$35.00. Mr. Pafundi subsequently provided the court with a money order, dated January 4, 2006, in the amount of \$25.00. Respondent reported three of the four dismissed Simplified Traffic Informations in her December 2005 report of her court's financial activity, but did not report the disposition of the fourth dismissed Simplified Traffic Information or the collection of the \$25.00 payment in any report of her court's financial activity; nor did respondent remit the \$25.00 collected from Mr. Pafundi to the State Comptroller.

36. In her March 2006 report to the State Comptroller of her court's financial activity, respondent reported collecting \$25.00 from the defendant in *People v. Steven Fletcher*, who had been assessed a total of \$315.00 in fines and surcharges in connection with various vehicle and traffic offenses. In respondent's April 2006 report of her court's financial activity, she reported collecting another \$25.00 from Mr. Fletcher, and in her May 2006 report of her court's financial activity, she reported collecting a third payment of \$25.00. After making three payments of \$25.00 in March, April and May 2006, Mr. Fletcher owed respondent's court \$240.00.

37. On June 1, 2006, respondent collected a fourth payment of \$25.00 from Mr. Fletcher and, on that same day, issued him an unsigned computer generated receipt, number 114. This receipt indicated that Mr. Fletcher then owed the court \$215.00. On June 8, 2006, respondent collected another \$25.00 from Mr. Fletcher and issued him an unsigned computer generated receipt, number 120. Finally, on June 20, 2006, respondent collected a sixth payment of \$25.00 from Mr. Fletcher and provided him with an unsigned computer generated receipt, number 125.

38. Respondent did not report or remit any of the three payments of \$25.00 each, collected on June 1, 8 and 20, 2006, from Mr. Fletcher in her June 2006 report of her court's financial activity.

39. On July 20, 2006, respondent collected a seventh payment of \$25.00 from Mr. Fletcher and provided him with an unsigned computer generated receipt, number 148. Respondent reported this payment of \$25.00 from Mr. Fletcher in her July 2006 report of her court's financial activity. Respondent did not report any payments from Mr. Fletcher in her August 2006 report of her court's financial activity. On September 14, 2006, respondent collected an eighth payment of \$25.00 from Mr. Fletcher and provided him with an unsigned computer generated receipt, number 176. Respondent reported this payment of \$25.00 from Mr. Fletcher in her September 2006 report of her court's financial activity. As of this September 2006 report, Mr. Fletcher owed respondent's court \$115.00.

As to Charge III of the Formal Written Complaint:

40. From in or around January 2005 through in or around December 2005, respondent failed to maintain a complete and accurate cashbook and failed to itemize chronologically all receipts and disbursements of funds, as required by Section 200.23(a)(3) of the Recordkeeping Requirements for Town and Village Courts (22 NYCRR §200.23[a][3]). Respondent asserts that

she did not know that there existed a computer-generated cashbook until the Commission had requested a copy of it. She further asserts that she had to ask her co-judge where to find the computer-generated cashbook, that she did not know how it was generated, and that there was a lot about the computer and record-keeping that she needed to learn.

As to Charge IV of the Formal Written Complaint:

41. Mary J. Minogue is respondent's sister-in-law. She is married to the brother of respondent's husband.

42. On July 25, 2006, Mary J. Minogue was issued a ticket for a seat belt violation under Section 1229-c(3-a) of the Vehicle and Traffic Law, returnable in respondent's court. Ms. Minogue entered a guilty plea by mail with an explanation that though she always wears her seat belt, she had taken it off in this instance for five minutes to retrieve a spilled coffee cup from within her car. According to Section 1229-c(5) of the Vehicle and Traffic Law, the maximum civil fine for this violation is \$50.00. There is no mandatory minimum fine. There are no points assessed to the driver's license in connection with this violation.

43. In October 2006, the ticket was assigned to respondent in the ordinary course because at that time she was the town's only justice. Respondent adjudicated Ms. Minogue's guilty plea to the ticket and imposed only the mandatory State surcharge. Ms. Minogue did not appear in court. Respondent did not discuss the ticket with Ms. Minogue but accepted her written explanation of the incident.

44. Respondent acknowledges that she should have recused herself from handling the ticket but, at the time, she genuinely considered the matter to be of such minor import that she did not wish to transfer the ticket to another court and burden another judge with it.

45. While respondent has previously imposed fines of varying amounts in other seat belt violation cases, she has also imposed no fine in certain seat belt violation cases when, as here, she accepted the defendant's explanation. Respondent presided over nine other seat belt convictions in 2006. Of those nine, no fine was assessed in one case, involving a defendant whom respondent did not know, and a fine of either \$25.00 or \$50.00 was assessed in eight cases. The mandatory State surcharge was assessed in all cases.

Additional findings:

46. Respondent agrees to report and remit to the State Comptroller by January 21, 2008, the unreported \$165.00 collected from Mr. Smith, the unreported \$85.00 collected from Mr. Richardson, the unreported second payment of \$15.00 collected in *Rasmussen v. Neuman*, the unreported \$50.00 collected from Ms. Buckley, the unreported \$25.00 collected from Mr. Pafundi, and the unreported \$75.00 collected from Mr. Fletcher, all totaling \$415.00, and further agrees to provide the Commission with documentation that she has remitted these funds.

47. Respondent's failure to deposit court funds within 72 hours of receipt, her failure to report and remit to the State Comptroller a total of \$415.00 from six cases, and her failure to maintain a complete and accurate cashbook and to itemize chronologically all receipts and

disbursements of funds are the result of respondent's poor bookkeeping and recordkeeping practices. There is no evidence of conversion or the misuse of funds.

48. Respondent has agreed that the Commission may make future checks and audits of respondent's bookkeeping and recordkeeping practices and of her deposits, reports and remittances to the State Comptroller. Respondent understands that any future deficiencies in her financial practices could subject her to additional charges of judicial misconduct and could result in the Commission's determination that she be removed from office.

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(C)(1) and 100.3(E)(1)(d)(i) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established.

All funds received by a town or village justice must be properly documented, deposited "as soon as practicable" and no later than 72 hours after receipt, and remitted to the State Comptroller by the tenth day of the month following collection (Uniform Civil Rules for the Justice Courts §214.9[a]; Uniform Justice Ct Act §§2020 and 2021[1]; Town Law §27; Veh and Traf Law §1803). Depositing and reporting official monies promptly is essential to ensure public confidence in the integrity of the judiciary, and the failure to do so in a timely manner constitutes misconduct, even if there is no evidence of conversion. *See Matter of Hrycun*, 2002 Annual Report 109 (Comm on Judicial Conduct); *Matter of Ranke*, 1992 Annual Report 64 (Comm on Judicial Conduct); *Matter of Hamel*, 1991 Annual Report 61 (Comm on Judicial Conduct); *Matter of Jurhs*, 1984 Annual Report 109 (Comm on Judicial Conduct); *see also Bartlett v. Flynn*, 50 AD2d 401, 404 (4th Dept 1976).

In numerous cases in 2005 and 2006 respondent failed to deposit and report official monies in a timely manner as required by law. Some amounts were deposited months after they were received, or not at all; other amounts, totaling \$415.00, were not remitted to the State for several years, after her conduct had come under scrutiny by the Commission. Over the same period, respondent failed to maintain a complete and accurate cashbook recording her receipts and disbursements. Even after her salary was suspended in August 2005 as a result of her derelictions, respondent's practices were lax. Respondent has acknowledged these lapses of her bookkeeping and recordkeeping responsibilities.

It was also improper for respondent to preside over her sister-in-law's seat belt case, in which she accepted a guilty plea and imposed no fine. Judges are strictly prohibited from handling any matter in which a relative is a party (Rules, §100.3[E][1][d][i]), regardless of the nature of the case or the disposition. In this matter, the lenient disposition respondent accorded her relative compounds the appearance of impropriety (Rules, §100.2).

In considering the sanction, we note that there is no indication that any funds were used for inappropriate purposes, that all the mishandled funds have now been reported and remitted, and that respondent recognizes that she will be held strictly accountable for any future administrative lapses.

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

Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Mr. Jacob were not present.

Dated: February 21, 2008

^[1] Respondent's method of remitting to the State Comptroller is to write a check drawn on her court checking account to her town's budget officer who, in turn, sends the funds to the State Comptroller.

^[2] Though respondent described faxing her reports, in testimony during the Commission's investigation, she later clarified that she meant that she had filed her reports electronically over the internet and later faxed a confirmation letter.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to ROBERT C. MURPHY, a Judge of the Binghamton City Court, Broome County.

DECISION AND ORDER

BEFORE:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission
Aswad & Ingraham (by Charles O. Ingraham) for the Respondent

The matter having come before the Commission on May 7, 2008; and the Commission having before it the Formal Written Complaint dated June 15, 2007, respondent's Answer dated August 10, 2007, and the Stipulation dated April 22, 2008; and respondent having affirmed that he will neither seek nor accept reappointment as a judge of the Binghamton City Court upon the expiration of his current term of office on June 14, 2008, and having acknowledged that if he ever returns to judicial office, the Administrator would have the right to reinstate the charges against him and to seek his removal from judicial office; 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 matter closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Mr. Emery abstained.

Mr. Belluck did not participate.

Dated: May 20, 2008

STIPULATION

Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROBERT C. MURPHY**, a Judge of the Binghamton City Court, Broome County.

Subject to the approval of the Commission on Judicial Conduct (hereinafter "Commission"):

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission, and Honorable Robert C. Murphy (hereinafter "respondent"), who is represented in these proceedings by Charles O. Ingraham, Esq., as follows.

1. This Stipulation is presented to the Commission in connection with the Formal Written Complaint pending against respondent.
2. Respondent has been an appointed part-time Binghamton City Court Judge from June 14, 2002, to present. His current term ends on June 14, 2008. He is also an attorney in private practice.
3. Respondent was served with a Formal Written Complaint dated June 15, 2007, a copy of which is attached as Exhibit A. The Formal Written Complaint alleged, *inter alia*, that respondent permitted his law partners and associates to practice law in the Binghamton City Court.
4. Respondent submitted a verified Answer, dated August 10, 2007, in which he admitted, in part, and denied, in part, the allegations of the charges. The Answer is annexed as Exhibit B.
5. Respondent hereby affirms that he will neither seek nor accept reappointment as a judge of the Binghamton City Court upon the expiration of his current term of office on June 14, 2008.

6. Respondent hereby acknowledges that if he ever returns to judicial office, the Administrator would have the right to reinstate the charges against him, and to seek his removal from judicial office.

7. In view of the foregoing, all parties to this Stipulation respectfully request that the Commission close the pending matter based on this Stipulation.

8. 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: April 22, 2008

s/ **Honorable Robert C. Murphy**
Respondent

s/ **Charles O. Ingraham, Esq.**
Attorney for Respondent

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

EXHIBIT A: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.

EXHIBIT B: ANSWER: Available at www.scjc.state.ny.us.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to WILLIAM C. PELELLA, a Judge of the Binghamton Court, Broome County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair

Stephen R. Coffey, Esq., Vice Chair

Joseph W. Belluck, Esq.

Colleen C. DiPirro^[1]

Richard D. Emery, Esq.

Paul B. Harding, Esq.

Elizabeth B. Hubbard

Marvin E. Jacob, Esq.

Honorable Jill Konviser

Honorable Karen K. Peters

Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Charles Farcher, Of Counsel) for the Commission
Honorable William C. Pelella, *pro se*

The respondent, William C. Pelella, a Judge of the Binghamton City Court, Broome County, was served with a Formal Written Complaint dated June 15, 2007, containing one charge. The Formal Written Complaint alleged that respondent permitted his co-judge's law partners to appear before him in the Binghamton City Court. Respondent filed a Verified Answer dated August 9, 2007.

On April 2, 2008, 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 and providing for written and oral argument on the issue of sanctions. The Commission accepted the Agreed Statement on May 7, 2008. Each side submitted memoranda as to sanction.

On September 19, 2008, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been an elected, full-time Binghamton City Court Judge since January 1, 2005. He was admitted to the practice of law in New York in 1981.
2. Mary Anne Lehmann has been an elected, full-time Binghamton City Court Judge since 1997.
3. Robert C. Murphy was an appointed, part-time Binghamton City Court Judge from June 14, 2002, to June 14, 2008. During that time, he was in private practice as an attorney with a law office in Binghamton.
4. When respondent became a judge in 2005, he and Judge Lehmann were the only full-time judges of the Binghamton City Court, and Judge Murphy was the only part-time judge on the court.
5. From January 2004 to about June 1, 2006, Judge Murphy, Alan J. Pope and Kurt D. Schrader were law partners in, and James A. Sacco was of counsel to, the law firm of Pope, Schrader & Murphy LLP. During that time, Messrs. Pope, Schrader and Sacco were persons connected in law business with Judge Murphy. On or about June 1, 2006, Judge Murphy left the firm and became a sole practitioner.
6. From at least January 1, 2005, to about June 1, 2006, respondent knew Messrs. Pope, Schrader and Sacco professionally and knew that each was in the practice of law with Judge Murphy.
7. From in or about January 2005 to in or about March 2006, respondent permitted Messrs. Pope, Schrader and Sacco to appear before him in the Binghamton City Court in 14

criminal cases and five civil cases, as set forth more fully in the Agreed Statement of Facts, knowing that those attorneys were law partners or associates of Judge Murphy.

8. From March 15, 2005, to March 24, 2006, respondent assigned Mr. Schrader, while he was a law partner of Judge Murphy, to be counsel in nine criminal cases, as set forth more fully in the Agreed Statement of Facts.

9. At all times relevant to the matters herein, the process for assigning counsel in Binghamton City Court was as follows. Court staff would consult a list of attorneys who had declared themselves available for assignment and would telephone lawyers on that list in rotation until one was available to serve in the particular matter at hand. Respondent did not participate in this process, except to sign the assignment letter as to those cases on his docket where such assignment was necessary.

10. There is no indication that any of these assignments were made other than in the ordinary course, or that Mr. Schrader was given preferential treatment over other attorneys who were receiving court assignments, or that Mr. Schrader was reimbursed for his work in excess of reasonable and justifiable fees. Mr. Schrader's total compensation in these matters was \$1,907.50; he only sought compensation for his work in four of the nine cases.

11. In or about February 2006, Judge Elizabeth A. Burns, a part-time Judge of the Cortland City Court, was designated as an Acting City Court Judge of Binghamton to hear two cases in that court involving Judge Murphy's law firm. On March 22, 2006, Mr. Pope appeared before Judge Burns in the Binghamton City Court on behalf of the defendant in *RPI Construction v. A. Anthony Corporation*. Also on that date, Mr. Schrader appeared before Judge Burns on behalf of the plaintiff in *Pope, Schrader & Murphy LLP v. Lown*. Judge Burns adjourned both cases to review the issue of whether or not attorneys from Pope, Schrader & Murphy LLP could practice law in the Binghamton City Court in light of Judge Murphy's status as a part-time judge of that court.

12. On March 24, 2006, Judge Burns entered an Order disqualifying Pope, Schrader & Murphy LLP from representing the defendant in the *RPI* matter on the basis that Section 100.6 of the Rules Governing Judicial Conduct ("Rules") prohibits law partners and associates of a part-time judge from practicing law in that judge's court. Judge Burns directed the defendant either to appear *pro se* or to retain new counsel. On March 29, 2006, Judge Burns dismissed *Pope, Schrader & Murphy LLP v. Lown*, without prejudice.

13. As a result of Judge Burns' Order in the *RPI* matter, by letter dated March 30, 2006, respondent and Judge Lehmann advised the attorneys at Pope, Schrader & Murphy LLP that their firm was prohibited from practicing law in the Binghamton City Court, directed the firm to take steps to withdraw from any civil actions then pending in the Binghamton City Court and to inform criminal defendants that the Pope firm could no longer represent them, and gave notice to the firm that new counsel would be assigned to criminal defendants whose cases had been assigned to the firm.

14. By letter dated May 4, 2006, Judge Lehmann reported Judge Murphy's conduct to the Commission for, *inter alia*, allowing his partners and associates to practice law in the Binghamton City Court.

15. Notwithstanding that as early as January 1, 2005, respondent was aware that Messrs. Pope, Schrader and Sacco had appeared in the Binghamton City Court and respondent later concluded that in doing so, they had likely committed substantial violations of Section 471 of the Judiciary Law and the New York Lawyer's Code of Professional Responsibility, respondent did not take appropriate action to prohibit these attorneys from practicing in the court until March 30, 2006, and did not act to refer the information to an appropriate lawyers' disciplinary or grievance committee.

16. Notwithstanding that respondent received information indicating a substantial likelihood that Judge Murphy had committed a substantial violation of the Rules by not prohibiting his law partners and associates from practicing in the Binghamton City Court, contrary to the requirements of Section 471 of the Judiciary Law and Section 100.6(B)(3) of the Rules, respondent failed to take appropriate action, such as referring the information to the Commission. Respondent did confront Judge Murphy concerning the issue in or about April 2006 and understood that Judge Murphy was communicating with the Advisory Committee on Judicial Ethics. Respondent further understood that Judge Lehmann was submitting a complaint to the Commission.

17. From June 14, 2002, when Judge Murphy became a judge of the Binghamton City Court, until January 2005, when respondent became a judge of that court, respondent often appeared as an attorney in that court. He regularly observed attorneys Pope, Schrader and Sacco practicing before the other judges of that court. Respondent had respect for Messrs. Pope, Schrader and Sacco and the judges of the court. Respondent was aware that Mr. Pope was a member of the Commission on Judicial Conduct and had become its Vice Chair in 2004. In observing members of the Pope firm practice law in the Binghamton City Court, it did not occur to respondent that Mr. Pope, his partners or the other judges of court would be acting contrary to law or the Rules.

18. When respondent became a judge, Administrative Judge Judith F. O'Shea asked Judge Lehmann to serve as his "mentor judge," which *inter alia* meant that respondent observed Judge Lehmann preside over cases in her own courtroom. Respondent was aware that Judge Lehmann permitted members of the Pope law firm to appear before her, and he did not know that such appearances were prohibited. Until Judge Burns issued her Order in *RPI Construction v. A. Anthony Corporation* in March 2006, Judge Lehmann and respondent did not discuss the issue.

19. By early 2006, respondent began to feel uncomfortable about permitting the Pope law firm to practice in the Binghamton City Court. Respondent asked court staff to research the issue and was told there was no procedure in place for handling cases involving the Pope firm any differently than cases involving other law firms. Shortly thereafter, Judge Burns issued her March 2006 Order in *RPI Construction v. A. Anthony Corporation*.

20. Before Judge Burns issued her Order in the *RPI* matter, respondent was not aware of Section 471 of the Judiciary Law or Section 100.6(B)(3) of the Rules. Although he was the newest judge on the Binghamton City Court during the period at issue and was following a practice that predated his arrival to the court, respondent concedes that he was obliged to be aware of and to ensure compliance with the statutes and Rules, and that he failed to be so aware and compliant during the period at issue.

21. Judge Burns' action impressed upon respondent that it was improper for lawyers associated with the Pope law firm to appear in the Binghamton City Court. Respondent acted promptly thereafter to prohibit appearances in his court by lawyers of that firm.

22. Respondent has been candid and cooperative with the Commission throughout this proceeding.

23. There is no indication that respondent conferred any preferential treatment or special beneficial disposition, or unfavorable treatment, upon Judge Murphy's partners and associates, or any of their respective clients, in any of the cases in which those attorneys appeared before him, or that he acted in those cases in any manner other than impartially and in the ordinary course. Respondent nevertheless recognizes that public confidence in the judiciary requires both impartiality and the appearance of impartiality and that his conduct did not satisfy this standard.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1), 100.3(D)(1) and 100.3(D)(2) of the Rules and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

It is well-established that the law partners and associates of a part-time judge who is permitted to practice law are barred from practicing law in the judge's court (Jud. Law §471). This statutory prohibition is reflected in the ethical rules, which provide that such a part-time lawyer-judge "shall not permit his or her partners or associates," or those of a co-judge, to practice in the judge's court (Rules, §100.6[B][3]). Public confidence in the courts is diminished by the appearance of favoritism when a judge presides over a case in which a party is represented by the law partners of his or her judicial colleague.

For over a year, in 14 criminal cases and five civil matters, respondent allowed to appear before him in the Binghamton City Court the law partners and associate of his co-judge, Robert C. Murphy. In nine of the criminal cases, he actively facilitated these improper appearances by assigning Judge Murphy's partner to represent the defendants. By permitting these attorneys to appear before him though they were statutorily barred from doing so, respondent was complicit in persistent violations of the law. *See, Matter of Harris*, 56 NY2d 365 (1982); *Matter of Falsioni*, 1982 Annual Report 123 (Comm on Judicial Conduct).

The statutory prohibition (Jud. Law §471) is clear. It applies to all judges, making no distinction between appearances before part-time and full-time judges. Thus, although the Rule prohibiting a judge from sitting on a co-judge's partners' cases on its face applies only to part-time judges (§100.6[B][3]), the obligation to implement the statutory prohibition is not limited to part-time judges. *See*, Adv. Op. 05-124, 06-61.

It has been stipulated that respondent was unaware of these specific prohibitions regarding the appearances of his co-judge's partners and associates. Even without specific knowledge of the applicable law, it should have been readily apparent to respondent that such appearances not only would provide a direct financial benefit to his co-judge, but would create an unacceptable perception that parties represented by his co-judge's partners might receive special treatment. In this regard it is noteworthy that a visiting judge assigned to handle two cases involving Judge Murphy's firm immediately recognized the impropriety of such appearances, issuing an order disqualifying the firm from one case and dismissing the second case without prejudice. Moreover, as the Court of Appeals has stated, ignorance does not excuse violations of legal or ethical mandates since every judge is required to maintain professional competence in the law. *See*, *Matter of VonderHeide*, 72 NY2d 658, 660 (1988); *Matter of Kane*, 50 NY2d 360, 363 (1980); Rules, §100.3(B)(1). Further, since he was unaware of the applicable law, respondent did not bar the attorneys from appearing in the court or report the conduct of Judge Murphy and his partners to the appropriate disciplinary authorities (*see* Rules, §100.3[D][1], [2]), thereby permitting the improper practice to continue.

The record indicates that in early 2006 respondent was concerned about the appearances of his co-judge's firm, asked his staff to research the issue and was advised that Judge Murphy's firm was treated like any other attorneys. Given his concerns that the practice was or could be improper, it is clear that respondent should have done more, such as seeking an opinion from the Advisory Committee on Judicial Ethics, to determine whether he could preside over those attorneys' cases. As respondent concedes, he did not "question the system" sufficiently (Oral argument, p. 19).

In considering an appropriate sanction, we note several factors in mitigation.

First, it is clear from this record that there was a widespread practice of appearances by Judge Murphy's firm in the Binghamton City Court that predated respondent's tenure as a judge. Respondent knew that his predecessors, other judges of the court and attorneys whom he respected were involved in the practice, and he was guided by their precedent. While this does not excuse his own participation in the practice, it casts his behavior in a relatively less culpable light.

Second, there is no indication that respondent conferred any preferential treatment upon Judge Murphy's firm or their respective clients in the cases cited herein.

Third, respondent was on the bench for a relatively short period before the misconduct was identified.

Fourth, when the impropriety of the appearances by Judge Murphy's firm was brought to respondent's attention, he and his co-judge, Mary Anne Lehmann, took prompt action to bar the firm from appearing in the court in the future.

Fifth, the record demonstrates that respondent followed and respected the practices of his mentor judge, Mary Anne Lehmann, who engaged in this same misconduct for nearly four years.

Finally, throughout this proceeding respondent has been cooperative and contrite and has forthrightly acknowledged his misconduct. *See, e.g., Matter of LaBelle*, 79 NY2d 350, 363 (1992); *Matter of Allman*, 2006 Annual Report 83 (Comm on Judicial Conduct). In this regard, we note respondent's avowal that he has learned from this experience and his pledge to be guided by his duty to uphold the integrity of the judiciary.

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

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

Mr. Belluck and Mr. Harding dissent and vote that respondent be issued a confidential letter of caution.

Mr. Coffey, Ms. DiPirro and Judge Konviser were not present.

Dated: November 10, 2008

^[1] Ms. DiPirro resigned from the Commission on October 30, 2008. The vote in this matter was taken on September 19, 2008.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to SPERO PINES, a Judge of the Family Court, Broome County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair

Stephen R. Coffey, Esq., Vice Chair

Joseph W. Belluck, Esq.

Colleen C. DiPirro

Richard D. Emery, Esq.

Paul B. Harding, Esq.

Elizabeth B. Hubbard^[1]

Marvin E. Jacob, Esq.

Honorable Jill Konviser

Honorable Karen K. Peters
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 the Respondent

The respondent, Spero Pines, a Judge of the Family Court, Broome County, was served with a Formal Written Complaint dated August 21, 2007, containing three charges. The Formal Written Complaint alleged that respondent failed to be patient, dignified and courteous to litigants in three cases.

On April 29, 2008, 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 May 7, 2008, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent was admitted to the practice of law in 1977 and has been a Judge of the Broome County Family Court since January 1994. His current term of office expires on December 31, 2013.

As to Charge I of the Formal Written Complaint:

2. On February 23, 2006, respondent presided over an initial appearance on a petition by Margaret Albanese for custody of her son. Andrew Albanese, Sr., the father of the child, was also present. Mr. Albanese was serving a state prison sentence at the time and appeared before respondent in custody.

3. During the proceeding, when respondent asked whether any of the parties wished to be represented by an attorney, Mr. Albanese said he did. The following then ensued between respondent and Mr. Albanese:

[Respondent]: Mr. Albanese, you're in state prison. What could you possibly want an attorney for on the issue of custody? You're entitled to it, but I'm just kind of curious what in the world you would want an attorney and waste my time for?

Mr. A. Albanese: I don't want to waste your time. I want --

[Respondent]: Well, you're wasting my time, but I'll give you an attorney and we'll come back in for a hearing at a later date. I'm not going to waste any more time with this application. It'll be put down for a conference in as much as this dedicated father wishes to have an attorney. We'll do it on notice. Get him out of here.

4. In making the above-referenced remarks above, respondent's inflection and tone of voice toward Mr. Albanese were sarcastic.

5. Mr. Albanese was returned to prison immediately after the proceeding on February 23, 2006.

6. On June 19, 2006, respondent held a hearing in the matter. Mr. Albanese, who again appeared before respondent in custody, was represented by his assigned counsel, Norbert Higgins. During the proceeding, respondent called Mr. Albanese's testimony "inane" and told Albanese that he had "never heard more ridiculous testimony in twelve years on the bench." Respondent also called Mr. Albanese's interest in joint custody "patently ridiculous" and again reproached Mr. Albanese for his "absolute waste of everyone's time."²¹ Respondent thereafter issued a decision granting sole custody of the child to the mother, with mail visitation to Mr. Albanese.

7. In making the above-referenced remarks, respondent's inflection and tone of voice toward Mr. Albanese were sarcastic.

8. By Decision and Order dated October 18, 2007, the Appellate Division, Third Department, modified respondent's determination as to visitation, and remitted the matter to Family Court before a different judge, noting as follows:

As an initial matter, we have reviewed the entire record and do not find that [Mr. Albanese] was denied a fair trial by either Family Court's conduct or its remarks. With that said, we do not condone the frequent and unprovoked intemperate and denigrating remarks directed at [Mr. Albanese] by [respondent] which were clearly inappropriate and served only to undermine "public confidence in the integrity, fair-mindedness and impartiality of the judiciary." [Citations omitted.] Inasmuch as [Mr. Albanese] had an unquestioned, fundamental statutory right to be represented by counsel in these proceedings [citations omitted], he should not have been chastised by the court for exercising that right and "wasting [the court's] time" at the initial hearing.

As to Charge II of the Formal Written Complaint:

9. On February 1, 2006, respondent presided over an initial appearance on petitions by Juana Finnerty for custody of her three children. Also present was Marcos Henderson, the father of the children.

10. At the time of the February 1st proceeding, both Ms. Finnerty and Mr. Henderson were in the custody of the Broome County Jail. Mr. Henderson had been arrested in April 2005 on Grand Larceny charges, and Ms. Finnerty had recently been charged as an accessory in the same matter.

11. At the February 1st proceeding, after stating that he would assign counsel to represent Mr. Henderson and after establishing that both litigants were currently incarcerated, respondent made the following statements:

[Respondent]: Well, as far as I'm concerned, both of you are unfit and neither one of you are worthy of any kind of custody. How do you think you're going to have custody of your kids when you're both sitting in jail for God knows how long?

Ms. Finnerty: But I'm sitting there not guilty of this.

[Respondent]: Well, you're sitting there not guilty, nevertheless you're sitting there. What do you think, your kids are going to sit there with you?

Ms. Finnerty: No, they're not, but I'm coming out this week.

[Respondent]: Your petitions – your petitions are going to be dismissed, and I'm going to allow your mother to file an appropriate application regarding these proceedings. I'm denying your request for court assigned counsel. You're absolutely, totally wasting my time in this matter. You put yourself in situations, you put your children at risk. I'm going to notify the Department of Social Services, these kids are not safe with suitable relatives, and they will file the appropriate neglect proceedings against both of you. You're in no position – neither one of you are in any position to take care of these children. As far as I'm concerned, you're not in a position to take care of pets, much less children. Get 'em both out of here. You can file something, ma'am. I'll consider your application. And if you – if anybody gets a hold of Pedro Ithier [the paternal grandfather], tell him he better be in court next time, or I will issue a warrant for his arrest.

12. In making the above-referenced remarks above, respondent's inflection and tone of voice toward the parties were angry and scolding.

13. Thereafter, the parents and grandparents filed new petitions, and respondent held a hearing on March 1, 2006. The parties agreed on a custody and visitation plan, with the report and approval of the Broome County Department of Social Services, and which respondent approved.

As to Charge III of the Formal Written Complaint:

14. On March 11, 2004, in *Christina Davies v. John R. Davies*, Christina Davies filed a family offense petition against John Davies. Respondent granted her an order of protection, ordering Mr. Davies to stay away from the residence. While that petition was pending, on March 15, 2004, Mr. Davies filed a petition to be allowed back into the marital residence to retrieve medical supplies and his children's clothing.

15. On March 16, 2004, respondent dismissed Mr. Davies' petition on the basis that Mr. Davies had been able to retrieve his medical supplies prior to the court appearance.

16. After the parties left the courtroom on March 16th, respondent mocked Mr. Davies' application and twice referred to him as an "asshole" in the presence of court staff.

17. On March 31, 2004, in *Kristy L. Southee v. John R. Davies*, a custody modification proceeding regarding the parties' son, Mr. Davies returned to court before respondent for approval of a custody agreement.

18. Respondent initially read from the first *Davies* petition. When Mr. Davies attempted to speak to state that respondent had the incorrect petition before him, respondent rebuked him for interrupting, said he was reading from the correct file, told Mr. Davies to leave the courtroom "until you're able to conduct yourself properly in court," and declared a brief recess.

19. When the case was recalled a short time later, respondent signed a temporary order of custody in the *Southee* matter and, without elaborating, stated that he was disqualifying himself from all of Mr. Davies' cases, stating that "based on Mr. Davies' behavior, this court finds it very difficult to remain impartial and maintain objectivity." Mr. Davies thereafter said, "I'd like to apologize for earlier, Your Honor," and respondent replied, "I accept your apology, Mr. Davies."

20. Respondent's inflection and tone of voice were impatient and scolding.

Additional Findings:

21. In each of the above three matters, the parties had a long history in Family Court, involving allegations of abuse, neglect, drug or alcohol abuse and domestic violence.

22. Respondent acknowledges that he lost his patience with the litigants in the above cases and should not have treated them sarcastically or otherwise disrespectfully. He is remorseful and assures the Commission that such lapses will not recur. Respondent has been cooperative with the Commission throughout its investigative and adjudicative proceedings in this matter.

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

A judge is obliged to be the exemplar of dignity and decorum in the courtroom and to be "patient, dignified and courteous" to litigants (Rules, §100.3[B][3]). A judge must also act at all times in such a manner that "the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property" (*Matter of Sardino*, 58 NY2d 286, 290-91 [1983]; see, Rules, §100.2[A]). Respondent's conduct in Family Court, "where matters of the utmost sensitivity are often litigated by those who are unrepresented and unaware of their rights" (*Matter of Esworthy*, 77 NY2d 280, 283 [1991]), did not comport with these standards.

Respondent has acknowledged that in three cases he made rude, intemperate comments to and about litigants that conveyed the appearance of bias. His “angry,” “scolding” and “sarcastic” comments were demeaning and admittedly improper. By berating the litigants in two matters for “wasting” his time by seeking custody and by requesting counsel, he also undermined the parties’ exercise of their legal rights and showed a disregard for the fundamental right to counsel, which a judge is obligated to effectuate, not to discourage.

In one matter, shortly after the parties had left the courtroom, respondent mocked a litigant’s application and twice referred to the litigant as an “asshole” in the presence of court staff. Respondent’s acknowledged lack of objectivity towards the litigant ultimately required his recusal from the litigant’s cases.

A judge’s rudeness is not excused by the fact that a particular litigant may be difficult or have a history of imperfect behavior. Respect for the fairness and impartiality of the court is better fostered by a judge’s patience and courtesy than by anger, sarcasm and disrespect. *See, Matter of Going*, 1998 Annual Report 129 (Comm on Judicial Conduct)(judge twice told a Family Court litigant that he seemed “nuts”). “Breaches of judicial temperament “impair[] the public’s image of the dignity and impartiality of courts, which is essential to their fulfilling the court’s role in society.” *Matter of Mertens*, 56 AD2d 456, 470 (1st Dept 1977).

In considering an appropriate sanction, we note that respondent has served as a judge for 14 years and has an otherwise unblemished record. We also note that he is remorseful, has been cooperative throughout the proceedings, and has given assurance that such lapses will not recur.

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

Judge Klonick, Mr. Coffey, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Emery vote to reject the Agreed Statement on the basis that the stipulated facts in Charge III do not constitute misconduct, but otherwise concur that the appropriate disposition is admonition.

Ms. DiPirro was not present.

Dated: June 17, 2008

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

While I concur that there was misconduct with respect to the first two charges and the resulting sanction, I write separately because I would not find misconduct with respect to Charge III. From the record and Agreed Statement of Facts, it appears that after the litigants had left the courtroom, the judge in a private conversation with two court staff used the word “asshole” to refer to one of the parties in a case. While I would certainly agree that there is misconduct if a judge used that term towards a litigant or counsel during a proceeding or in some other formal setting, where words are spoken in what appears to be a private conversation between the judge

and his staff, finding misconduct feels to me to be too much of an infringement. This is especially so where the judge, as it appears from the facts here, subsequently disqualified himself from presiding over future proceedings involving the litigant.

Dated: June 17, 2008

^[1] Ms. Hubbard was appointed to the Commission on June 10, 2008. The vote in this matter was taken on May 7, 2008.

^[2] The transcript of the proceeding inadvertently inverts respondent's words.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to DAVID RAY, a Justice of the Brookfield Town Court, Madison County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair
Honorable Thomas A. Klonick, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Honorable David Ray, *pro se*

The respondent, David Ray, a Justice of the Brookfield Town Court, Madison County, was served with a Formal Written Complaint dated October 15, 2007, containing one charge. The Formal Written Complaint alleged that respondent convicted the defendants in a code violation case without a trial or guilty plea. Respondent filed an Answer dated November 5, 2007.

On January 22, 2008, 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 January 29, 2008, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Brookfield Town Court since January 1, 2004. He is not an attorney. He has been employed as a maintenance mechanic at Revere Inc., for the past ten years.

2. Prior to December 2004, Jacqueline McComber Harris took ownership of certain real property in Madison County, located at 2769 Vidler Road, West Edmonton, New York.

3. In December 2004, Christopher and Michele Bridge began residing as tenants at the Vidler Road property. At the time they moved in, there was a dilapidated garage and a large volume of used tires on the property, neither of which belonged to them.

4. On April 28, 2005, Ms. Harris, who still owned the Vidler Road property, entered into an access agreement with the New York State Department of Environmental Conservation concerning removal of the large volume of used tires from the property.

5. The Vidler Road property was also the subject of a local property code violation proceeding, and in May 2005, the code violation proceeding was concluded with Ms. Harris's payment of a \$500 fine to the town.

6. On July 19, 2005, Charles E. Sullivan, Jr., Director of the New York State Department of Environmental Conservation's Division of Environmental Enforcement, wrote to respondent providing him with a copy of the access agreement. The access agreement provided for the state to conclude its cleanup of the property before 2011.

7. On August 11, 2005, Madison County took possession of the Vidler Road property due to non-payment of delinquent taxes.

8. On January 3, 2006, Christopher and Michele Bridge were charged in the Brookfield Town Court with violating Local Law Number 1 (Section 3) of the Brookfield Town Code, as well as Sections 302, 303, and 305 of the New York State Property Maintenance Law, in connection with the dilapidated garage and the large pile of used tires that was still located on the Vidler Road property.

9. On January 10, 2006, Christopher and Michele Bridge were arraigned before respondent. Each defendant pleaded not guilty and declined counsel. Respondent told the defendants to keep the tires covered and adjourned the case until February 28, 2006.

10. On February 28, 2006, the defendants appeared before respondent and reached an agreement with Geoffrey B. Wordon, the Town of Brookfield Code Enforcement Officer, to destroy the dilapidated garage by March 15, 2006. The agreement made no mention of covering any tires.

11. On March 14, 2006, Christopher and Michele Bridge took ownership of the property from Madison County. A copy of the resolution of the Madison County legislature was provided to respondent during the pendency of the code violation action.

12. On April 25, 2006, Officer Wordon appeared in court for a proceeding in the matter. The Bridges did not appear. Officer Wordon told respondent, *ex parte*, that he had

driven past the Vidler Street property and observed that portions of the tires on the property were uncovered.

13. On May 7, 2006, respondent, based upon his *ex parte* communication with Officer Wordon, sent Christopher and Michele Bridge a letter stating that he was fining them \$100 for not keeping the tires covered. Respondent did so because he believed that the Bridges were intentionally violating his direction to keep the tires covered pending the conclusion of the case.

14. On May 23, 2006, Ms. Bridge appeared in court and paid the \$100 fine.

15. On June 30, 2006, Officer Wordon sent respondent a letter stating that he had visited the Vidler Street property and found that a portion of the tires were still uncovered.

16. On July 12, 2006, respondent sent Christopher and Michele Bridge a letter advising them that they had been convicted of the original charges, fining them an additional \$100, imposing a one-year conditional discharge and stating that payment was due to the court by August 11, 2006. Respondent also warned them that if their fine was not paid by the due date, their drivers' licenses would be suspended. Respondent did so notwithstanding that the Bridges had pleaded not guilty, and without affording them a trial or the opportunity to present a defense, cross-examine witnesses, testify on their own behalf or offer witnesses or other evidence.

17. The conditional discharge period concluded on July 12, 2007, without further action in the case. Respondent waived payment of the \$100 fine. No further action has been taken in the matter.

18. As to both the fine for not keeping the tires covered and the imposition of a conditional discharge, respondent recognizes that he did not act pursuant to law. Respondent was confused as to when responsibility for the Vidler Road property transferred from the prior owner, Ms. Harris, to the current owners, the Bridges. He understands that this confusion would likely have been avoided had he not acted peremptorily against the Bridges, and he now has an enhanced appreciation of the significance of both avoiding unauthorized *ex parte* communications and according litigants the right to be heard according to law.

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

Respondent's handling of a code violation case reveals a misunderstanding of basic legal procedures. Without a trial or guilty plea, he convicted the defendants and imposed two consecutive fines and a one-year conditional discharge based on unsubstantiated *ex parte* information from the code enforcement officer. Such conduct violates well-established ethical standards and warrants discipline.

The record indicates that after the defendants had pleaded not guilty to charges involving uncovered tires on property where they resided, respondent adjourned the case and ordered the defendants to cover the tires. At the next scheduled court date, the defendants did not appear, and the code enforcement officer told respondent that the tires were still uncovered. Respondent sent the defendants a letter stating that he was adjourning the case for a month and imposing a \$100 fine “for not covering the tires like I asked.” Two months later, after the defendants had paid the fine, the code enforcement officer told respondent *ex parte* that the tires were still uncovered, whereupon respondent sent the defendants another letter imposing *another* \$100 fine and a one-year conditional discharge. Respondent has acknowledged that he never afforded the unrepresented defendants the right to be heard and to present a defense, including the fact that at the time the original charges were filed, the defendants did not even own the property at issue.

It is the responsibility of every judge, lawyer or non-lawyer, to maintain professional competence in the law (Rules, §100.3[B][1]) and to ensure that every defendant is afforded basic procedural due process. *Matter of Hise*, 2003 Annual Report 125 (Comm on Judicial Conduct) (judge convicted and sentenced a defendant charged with a zoning violation, without a trial or guilty plea). A judge is also required to accord to all interested parties a full right to be heard under the law (Rules, §100.3[B][6]). *See, e.g., Matter of Marshall*, 8 NY3d 741 (2007); *Matter of More*, 1996 Annual Report 99 (Comm on Judicial Conduct) (judge dismissed charges in three traffic cases without notice to the prosecutor and disposed of three other cases based on *ex parte* communications). Depriving defendants of well-established rights is not just legal error, but can be judicial misconduct. *See Matter of Reeves*, 63 NY2d 105, 109-10 (1984).

Respondent, who had served as a judge for two years at the time he handled this case, has acknowledged that his actions were inconsistent with the required procedures and that his confusion about the ownership of the property would likely have been avoided had he not acted so peremptorily against the defendants. Further, it has been stipulated that respondent now has an enhanced appreciation of the significance of both avoiding unauthorized *ex parte* communications and according litigants the right to be heard according to law.

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

Judge Klonick, Mr. Coffey, Mr. Harding, Judge Konviser, Judge Peters and Judge Ruderman concur.

Ms. DiPirro and Mr. Emery dissent and vote to reject the Agreed Statement of Facts on the basis that the disposition is too lenient.

Mr. Felder and Mr. Jacob were not present.

Dated: February 26, 2008

DISSENTING OPINION BY MR. EMERY, IN WHICH MS. DIPIRRO JOINS

In my view entering into an Agreed Statement with Commission Staff should not be a “Get Out of Jail Free” card in a game of judicial misconduct. The sanction of admonition that Justice David Ray receives for fundamental breaches of due process – convicting citizens without any trial and fining citizens based only on *ex parte* conversations with a law enforcement official – is so inconsistent with our precedent and what the public expects of us that it betrays an expedient approach to judicial discipline not consistent with our constitutional obligations.

While it may on occasion be appropriate to negotiate Agreed Statements that accurately reflect the facts and allow for resolutions of allegations of judicial misconduct, the sanctions imposed pursuant to such resolutions should not be outliers in our jurisprudence. Clearly a judge should get credit for recognizing his/her misconduct and admitting to it in an Agreed Statement. But when the misconduct is so fundamental that it betrays a basic ignorance and insensitivity to a judge’s most fundamental responsibility – to hear both sides before imposing punishment – even *post hoc* recognition of wrongdoing should not compromise the sanction decision to the point of wrist-slapping.

I have complained previously about the expedient use of Agreed Statements. *See, Matter of Honorof*, 2008 Annual Report ___ (Emery Dissent); *Matter of Clark*, 2007 Annual Report 93 (Emery Dissent); *Matter of Carter*, 2007 Annual Report 79 (Emery Concurrence). I have also argued that *ex parte* evidence is corrosive of due process. *See, Matter of Marshall*, 2008 Annual Report ___ (Emery Opinion Concurring in Part and Dissenting in Part) (judge’s “high-handed *ex parte* activity” showed “disregard for fundamental due process rights” which, standing alone, warrants removal); *Matter of Williams*, 2008 Annual Report ___ (Emery Dissent) (judge’s *ex parte* conversation with a trooper, which appeared to influence his decision, was “inexcusable” and warrants removal, particularly after prior discipline for similar misconduct). In this case, however, the level of result-oriented resolution reaches unprecedented levels. Here a judge twice illegally imposed fines based on a verbal report of a local code enforcement officer on residents of land who had pleaded not guilty to the charges and were never afforded a trial or opportunity to present a defense. It appears he fined them twice for the same code violations and then entered a conviction with no notice whatsoever. This conduct, reminiscent of Politburo justice, has no place even in rural New York, where it seems we give more leeway than we should.

The fact that many justice courts suffer from the absence of lawyers presiding is no excuse for us to allow town justices to escape responsibility for fundamental violations of well-established individual rights. Many non-lawyer town justices do fine work, scrupulously protecting the rights of the litigants who appear before them. In this case, the judge had presided for more than two years and certainly should have understood his obligation to be fair. Apparently he did not, and his betrayal of the trust invested in him requires more response from us than an admonition conveys.

I have no doubt that if this judge had contested the charges he would have been removed. It cannot be that his willingness to enter into an Agreed Statement warrants such a severe reduction in sanction that admonition is appropriate. It may be that if we were convinced that he had learned from this process and was sincerely apologetic to the victims of his excess, a censure

would be justified. But this record, comprised only of the Agreed Statement, does not support a result less severe than removal.

There is another troubling aspect to this case. Sadly, the qualifications for judicial office in town and village courts are so minimal that persons who should not be judges are. There is no educational or vocational prerequisite for service as a town or village justice. The result is that, among the many judges who serve, there are some who clearly would be unqualified if there were reasonable, minimum standards. Respondent's "Answer" in this case betrays such a poor facility with basic writing skills that it is glaringly reflective of the problem of having no minimum standards for judicial office. Current judicial training programs are, regrettably, not a solution to this problem since demonstrably unqualified judges regularly complete them successfully. We should all be deeply concerned with the easy escape route we have provided in this case to a judge who submitted such a troubling, but revealing Answer. Here, the Agreed Statement deprives us of any information describing respondent's educational background or life experience. If the case had proceeded to a hearing at least we would know more than we know now about the respondent. On this record, it is clear to me that he should not continue to serve as a judge.

Therefore, I dissent and would reject the Agreed Statement and the negotiated sanction of admonition.

Dated: February 26, 2008



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to MARIE ROLLER, a Justice of the Veteran Town Court and Acting Justice of the Millport Village Court, Chemung County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard^[1]
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Honorable Marie Roller, *pro se*

The respondent, Marie Roller, a Justice of the Veteran Town Court and Acting Justice of the Millport Village Court, Chemung County, was served with a Formal Written Complaint dated January 24, 2007, containing three charges. The Formal Written Complaint alleged that respondent failed to make timely deposits of court monies (Charges I and II) and failed to notify the Department of Motor Vehicles regarding defendants who did not answer charges or pay fines as required (Charge III). Respondent filed an Answer dated February 15, 2007.

By Order dated July 3, 2007, the Commission designated William T. Easton, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 14, 2007, in Syracuse. Schedules A and B of the Formal Written Complaint were amended at the hearing. The referee filed a report dated March 20, 2008.

The parties submitted briefs with respect to the referee's report. Oral argument was waived. On May 8, 2008, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent is a Justice of the Veteran Town Court and has served in that capacity since January 1, 2000. Since 2003, she has also served as an Acting Justice of the Millport Village Court.

2. Respondent's co-justice of the Veteran Town Court is Thomas P. Brooks, II, who assumed his position at the same time as respondent.

3. During her tenure as Veteran Town Justice, respondent was assisted by three court clerks: Jane Briggs (from January 2000 to August 2000), Beverly Michalko (from November 2000 to December 2002), and Carol Zachary (from May 2003 to May 2005).

4. Before taking office as a town justice, respondent attended a training course sponsored by the Office of Court Administration, and since that time she has regularly attended and successfully completed Office of Court Administration training programs.

As to Charge I of the Formal Written Complaint:

5. In April 2005, during a scheduled examination of Veteran Town Court records pursuant to a Commission investigation, Commission investigator Rebecca Roberts discovered \$430 in undeposited court funds in a file cabinet in respondent's office at the court. These funds included: (a) a \$25 money order from John Howells that was noted as received by the court on July 9, 2001; (b) a \$20 money order from David Clowers that was noted as received by the court on August 14, 2002; (c) \$110 in cash that was noted as being paid by Kimberly Marshall to the court in September 2002; (d) a \$75 money order from Alice Seymour that was noted as received by the court on May 27, 2004; and (e) a \$200 money order from Elizabeth Mousaw that was noted as received by the court on October 12, 2004.

6. These payments were not deposited into the court bank account until at least February 2006.

7. The cases of *Howells*, *Clowers* and *Marshall* were resolved in respondent's court. The cases of *Seymour* and *Mousaw* pre-dated respondent's tenure as Veteran Town Justice, but those payments were received by the court when respondent was a judge and thus were under her control and supervision.

8. The undeposited payments in *Howells*, *Clowers* and *Marshall* represented partial payments of fines and surcharges.

9. Respondent was aware from the time she assumed her position as Veteran Town Justice that Section 214.9(a) of the Uniform Civil Rules for the Justice Courts requires judges to deposit court funds within 72 hours of receipt, exclusive of Sundays and holidays.

10. Although respondent was confused during this period whether the court could accept partial payments, respondent was aware that partial payments, if received, were not exempt from the rules governing deposit of court funds.

11. Three of the five undeposited payments (*Howells*, *Clowers* and *Marshall*) were received during the tenure of Court Clerk Beverly Michalko, and two (*Seymour* and *Mousaw*) were received during the tenure of Court Clerk Carol Zachary.

As to Charge II of the Formal Written Complaint:

12. From May 2004 until April 2005, respondent deposited court funds into the Veteran Town Court account on a monthly basis rather than within 72 hours of receipt.

13. Respondent held court sessions at least twice per month during this period, and the court also received payment of fines and surcharges between court sessions, including payments by mail.

14. Because respondent was depositing funds on a monthly basis and not within 72 hours of receipt, respondent's practice resulted in the accumulation of substantial amounts of undeposited funds.

15. Respondent's practice also resulted in a substantial discrepancy between the payments received in every month and the funds deposited, as follows:

(a) In May 2004, respondent received \$6,140 in payments, but deposited \$1,050 into her court account.

(b) In June 2004, respondent received \$2,410 in payments, but deposited \$6,140 into her court account.

(c) In July 2004, respondent received \$2,430 in payments but deposited \$2,410 into her court account.

(d) In August 2004, respondent received \$3,980 in payments but deposited \$2,325 into her court account.

(e) In September 2004, respondent received \$4,440 in payments but deposited \$3,980 into her court account.

(f) In October 2004, respondent received \$4,645 in payments but deposited \$4,440 into her court account.

(g) In November 2004, respondent received \$3,567 in payments but deposited \$4,745 into her court account.

(h) In December 2004, respondent received \$12,505 in payments but deposited \$3,567 into her court account.

(i) In January 2005, respondent received \$2,655 in payments but made no deposits into her court account.

(j) In February 2005, respondent received \$4,950 in payments but deposited \$15,160 into her court account.

(k) In March 2005, respondent received \$9,000 in payments but deposited \$4,930 into her court account.

(l) In April 2005, respondent received \$4,055 in payments but deposited \$12,920 into her court account.

16. Respondent personally deposited funds into the court account during this period. Respondent's court clerk during this period, Carol Zachary, prepared deposit slips for respondent but never made deposits.

17. Although respondent was aware during this time that Section 214.9(a) of the Uniform Civil Rules for the Justice Courts requires court funds to be deposited within 72 hours of receipt, respondent never informed her court clerk of this requirement; nor did respondent direct her clerk to prepare deposit slips to enable respondent to deposit these funds in compliance with the Rules.

18. Respondent's professional relationship with her clerk, Carol Zachary, became acrimonious during Ms. Zachary's tenure.

As to Charge III of the Formal Written Complaint:

19. From April 2001 through February 2006, respondent failed to notify the Department of Motor Vehicles (DMV) regarding 110 defendants who had either failed to answer their charges within 60 days of the return date or failed to pay the fines respondent had imposed, as indicated on Schedule B to the Formal Written Complaint as amended at the hearing.

20. Of these cases, 49 defendants had failed to appear in court or answer the charges against them, and 61 defendants had failed to pay fines and/or surcharges imposed by respondent. As a result of respondent's failure to notify DMV, these defendants did not have

their licenses suspended or have points assessed against their licenses, and \$7,430 of imposed fines and/or surcharges was not collected.

21. The above cases were returnable before respondent during the time when Beverly Michalko and Carol Zachary served as court clerk, as well as during several months when respondent had no court clerk.

22. Respondent was aware of her obligation to notify DMV regarding such defendants. Respondent neither notified DMV herself nor instructed her court clerk to do so.

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(C)(1) and 100.3(C)(2) 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. Charges I through III of the Formal Written Complaint as amended are sustained, and respondent's misconduct is established.

A town or village justice is personally responsible for monies received by the court (1983 Op. of the State Comptroller, No. 83-174). Such monies must be deposited within 72 hours of receipt (Uniform Civil Rules for the Justice Courts §214.9[a] [22 NYCRR §214.9(a)]). While this responsibility may be delegated, a judge is required to exercise supervisory vigilance over court staff to ensure the proper performance of this important function. *See Matter of Cavotta*, 2008 Annual Report 107 (Comm on Judicial Conduct); *Matter of Jarosz*, 2004 Annual Report 116 (Comm on Judicial Conduct). *See also, Matter of Brooks*, 2008 Annual Report 89 (Comm on Judicial Conduct).

Respondent failed to perform her administrative and supervisory duties adequately, resulting in the careless handling of funds collected by the court. The record reveals a pattern of deposits that were untimely and incomplete. For example, in one month respondent received \$12,505 in payments but deposited \$3,567 into the court account; the next month she received \$2,655 but made no deposits; and the following month, \$4,950 was received and \$15,160 was deposited. In five cases, monies received by the court totaling \$430, including \$110 in cash, were simply placed in a file cabinet, where they remained for months or years. These monies, some of which represented partial payments of fines and surcharges, remained undeposited until they were discovered during a Commission investigation.

The administration of justice is compromised when public funds entrusted to a judge are handled in a careless manner. When such carelessness involves substantial amounts of money and continues for years, the damage to public confidence in the judge's court is considerable.

In addition, respondent neglected 110 motor vehicle cases pending in her court by failing to use the legal means available to compel defendants to answer the charges or to pay fines totaling \$7,430 she had imposed. Section 514(3) of the Vehicle and Traffic Law requires a judge to notify the Commissioner of Motor Vehicles of such derelictions so that the defendants' drivers' licenses can be suspended. By failing to do so, respondent permitted defendants to avoid legal process by ignoring the summonses they were issued or the fines levied against them. Respondent's neglect is unacceptable since it promotes disrespect for the administration

of justice, deprived state and local authorities of thousands of dollars that should have been collected, and enabled defendants whose licenses should have been suspended to continue to drive for months or years. *See, Matter of Ware*, 1991 Annual Report 79 (Comm on Judicial Conduct).

Respondent's problems with her court clerk over some of this period do not excuse these administrative lapses. Indeed, those circumstances should have prompted respondent to take particular care to insure that her administrative duties were being properly performed.

In mitigation, there is no evidence that court funds were misused, and respondent has taken steps to insure that funds are now deposited promptly, as required by law.

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

Judge Klonick, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Coffey concur as to Charge III and the sanction of censure, but dissent as to Charges I and II and vote to dismiss the charges on the basis that the administrative problems have been remedied and there is no indication that monies were missing.

Ms. DiPirro was not present.

Dated: July 7, 2008

^[1] Ms. Hubbard was appointed to the Commission on June 10, 2008. The vote in this matter was taken on May 8, 2008.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to JOAN E. SHKANE, a Judge of the Family Court, Oneida County

THE COMMISSION:

Honorable Thomas A. Klonick, Chair

Stephen R. Coffey, Esq., Vice Chair

Joseph W. Belluck, Esq.

Richard D. Emery, Esq.

Paul B. Harding, Esq.

Elizabeth B. Hubbard

Marvin E. Jacob, Esq.

Honorable Jill Konviser

Honorable Karen K. Peters

Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
Honorable Joan E. Shkane, *pro se*

The respondent, Joan E. Shkane, a Judge of the Family Court, Oneida County, was served with a Formal Written Complaint dated August 7, 2008, containing one charge. The Formal Written Complaint alleged that respondent improperly threatened to hold an agency and two police investigators in contempt after the investigators took a litigant from the courtroom's waiting area into custody.

On December 4, 2008, 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 December 11, 2008, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent was admitted to the practice of law in New York in 1978 and has been a Judge of the Oneida County Family Court since January 1, 2007. Her current term of office expires on December 31, 2016.

2. The Oneida County Family Court is located in the Oneida County Office Building in Rome, New York.

3. On the afternoon of September 6, 2007, in the Oneida County Office Building, in advance of a hearing, respondent directed her law clerk and attorneys representing a child, the child's father, and the county department of social services to engage in a pre-hearing conference in a child neglect case. They did so in a conference room while respondent attended to other matters in her chambers. The child's father (hereinafter, "Mr. H") was in the building's shared waiting area outside the view of respondent. He was not in police custody nor was he under arrest.

4. While the conference was in progress, two officers of the Oneida County Child Advocacy Center ("CAC"), Investigator John Dellerba and Rome Police Investigator Edward D'Alessandro, entered the waiting area looking for Mr. H, whom they wished to arrest on charges of Endangering the Welfare of a Child and Sexual Abuse in the Third Degree. They asked if he would accompany them to the Rome Police Station. Mr. H agreed, indicating that he did not believe that his appearance in court was required. The officers informed two deputies in the waiting area that they would be taking Mr. H to the Police Department on charges. Without restraining him, the officers drove Mr. H to the police station.

5. Later on the afternoon of September 6, 2007, when respondent learned from her law clerk that Mr. H had left the building with law enforcement officials, she telephoned CAC Director Kevin Revere and confirmed that the two CAC officers had escorted Mr. H from the office building to arrest him. Respondent then demanded of Mr. Revere that Mr. H be

immediately returned to the court and that the incident never be repeated. She angrily threatened to hold the CAC in criminal contempt of court for the two officers' actions.

6. As a result of respondent's call to Mr. Revere, Officer Dellerba issued appearance tickets to Mr. H and drove him back to the County Office Building. When respondent was informed that Mr. H had returned, she again telephoned Mr. Revere and angrily demanded that Officers Dellerba and D'Alessandro appear at her court in one-half hour or face an arrest warrant for contempt of court.

7. Officer Dellerba arrived first. When he entered the courtroom, respondent went on the record and directed him to tell Officer D'Alessandro to be in the courtroom that afternoon or she would issue a warrant for his arrest. She told Officer Dellerba that he was potentially in contempt of court for interfering with the judicial process, which was punishable by 30 days in jail and a \$1,000 fine. Officer Dellerba apologized and left the courtroom.

8. Both Officers Dellerba and D'Alessandro were in the courtroom within an hour. Respondent lectured them at length in an angry, impatient and discourteous manner, repeatedly sought admissions of wrongdoing from them and repeatedly threatened them with contempt, notwithstanding that Officer Dellerba apologized several times.

9. At no point was there any accusatory instrument or any matter before respondent to which the CAC, Officer Dellerba or Officer D'Alessandro was a party or witness.

10. Respondent acknowledges that she lost her patience and self control, that she should have accepted the officers' early apologies and that she improperly threatened the officers and the CAC with contempt. She recognizes that under these circumstances, neither the officers nor the CAC was properly subject to criminal or civil contempt and that she should not have intimidated that they were.

11. Respondent commits (A) to familiarize herself more fully with the legal and procedural mandates regarding contempt by attending at the earliest opportunity a judicial education and training program addressing the subject of contempt and reporting to the Commission that she has done so, and (B) to adhere more faithfully to those mandates and the Rules Governing Judicial Conduct ("Rules") in the future.

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)(2) and 100.3(B)(3) of the Rules and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Every judge is required to be an exemplar of dignity in the courtroom and to be courteous towards those with whom the judge deals in an official capacity (Rules, §100.3[B][3]). Respondent violated these standards by her abusive treatment of two police officers who had lawfully taken into custody a litigant who had been in the waiting area outside the courtroom. At

the time, the litigant's attorney was participating in a pre-hearing conference in the judge's chambers.

The record indicates that when respondent learned that officers assigned to the Child Advocacy Center had taken the litigant, she telephoned the CAC, demanded that the litigant be returned to the court immediately, and threatened to hold the agency in criminal contempt for the officers' actions. She also demanded that the officers return to the court, under threat of contempt, and when they did so, she subjected the officers to an angry, lengthy harangue. Accusing them of interfering with a court proceeding, respondent repeatedly threatened to hold a contempt hearing and stated that the officers faced 30 days in jail and a \$1,000 fine. Even after the officers had apologized several times, respondent continued to lecture them in an angry, discourteous manner and threatened them with contempt and a jail sentence unless they apologized. Finally the judge accepted their apologies, and no contempt proceeding was held.

Respondent has stipulated that she "lost her patience and self-control," that neither the officers nor the CAC was properly subject to criminal or civil contempt and that she should not have intimated that they were. Under the circumstances, *the threat of contempt or jail against the officers was excessive and inappropriate, notwithstanding that respondent did not act on her threat. See, Matter of Waltemade, 37 NY2d (nn), (iii) (Ct on the Judiciary 1975) (judge engaged in misconduct by angrily and inappropriately threatening lawyers and witnesses with "sanctions" and contempt, even though his threats were never followed by a contempt citation or any other disciplinary action); Matter of Hart, 2009 Annual Report ___ (Comm on Judicial Conduct) (judge threatened an attorney with contempt or jail if he did not proceed in a case, notwithstanding that the attorney had been sent by his firm to request an adjournment and had advised the judge that he was unprepared to try the case).* It was an abuse of discretion for respondent to force the officers to return to court so that she could bully, threaten and chastise them.

In mitigation, we note that respondent now recognizes that her conduct was improper and that she should have accepted the officers' early apologies. We also note that she has committed to familiarize herself more fully with the legal and procedural mandates regarding contempt by attending an appropriate training program and to adhere to the ethical mandates in the future.

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

Judge Klonick, Mr. Coffey, Mr. Harding, Ms. Hubbard, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Belluck dissents and votes to reject the Agreed Statement on the basis that the proposed disposition is too lenient.

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

Dated: December 29, 2008



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to JOHN L. TAFT, a Justice of the Southport Town Court, Chemung County.

DECISION AND ORDER

BEFORE:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Davidson & O'Mara, P.C. (by Bryan J. Maggs) for the Respondent

The matter having come before the Commission on May 8, 2008; and the Commission having before it the Formal Written Complaint dated January 2, 2008, respondent's Answer dated January 25, 2008, and the Stipulation dated April 15, 2008; and respondent having submitted a letter dated April 11, 2008, to the Southport Town Clerk and the Office of Court Administration stating that he will leave office as of May 31, 2008; and respondent having affirmed that he will neither seek nor accept judicial office in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if approved by the Commission; now, therefore, it is

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

SO ORDERED.

Dated: May 9, 2008

STIPULATION

Subject to the approval of the Commission on Judicial Conduct ("Commission"):

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission on Judicial Conduct ("Commission"), the Honorable John L. Taft ("respondent"), and his attorney, Bryan J. Maggs, Esq., as follows.

1. Respondent has served as a Justice of the Southport Town Court since 1986. He is not an attorney. His current term of office expires on December 31, 2009.

2. On January 8, 2008, respondent was served by the Commission with a Formal Written Complaint which alleged that in or about December 2003 respondent: failed to disqualify himself in *People v. Mark D. Gibson*, in which the defendant had been charged with Speeding, notwithstanding that the defendant had been a physician for respondent and other members of his family; initiated an *ex parte* telephone conversation with the defendant prior to his return date; *sua sponte* granted an Adjournment in Contemplation of Dismissal (“ACD”); and thereby violated various provisions of the Rules Governing Judicial Conduct. A copy of the Formal Written Complaint is appended hereto as Exhibit A.

3. Respondent submitted an Answer in which he admitted the specifically alleged facts of the Formal Written Complaint, but denied that his actions constituted a violation of any of the Rules Governing Judicial Conduct. A copy of the Answer is appended hereto as Exhibit B.

4. Had this matter proceeded to a hearing, respondent intended to assert as part of his defense that, following his *ex parte* discussion with the defendant, he initiated a telephone discussion with Chemung County Assistant District Attorney Anna Guardino, during which he described the charge and proposed disposition and obtained Ms. Guardino’s consent to the disposition.

5. On April 11, 2008, respondent submitted a letter of resignation from judicial office to the Southport Town Clerk and the Office of Court Administration, indicating that he would leave office effective June 1, 2008. A copy of respondent’s letter is appended hereto as Exhibit C.

6. Pursuant to Section 47 of the Judiciary Law, the Commission’s jurisdiction over a judge continues for 120 days after resignation from office.

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

8. All the parties to this Stipulation respectfully request that the Commission close the pending matter based upon this Stipulation without adjudication of the charges or defenses thereto.

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.

April 15, 2008

s/ **Honorable John L. Taft**
Respondent

s/ **Bryan J. Maggs, Esq.**
Attorney for Respondent

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

EXHIBIT A: FORMAL WRITTEN COMPLAINT: Available at www.scjc.state.ny.us.

EXHIBIT B: ANSWER: Available at www.scjc.state.ny.us.

EXHIBIT C: LETTER OF RESIGNATION: Available at www.scjc.state.ny.us.



**In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law
in Relation to ELLEN YACKNIN, a Judge of the Rochester City Court, Monroe County.**

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Colleen C. DiPirro^[1]
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Marvin E. Jacob, Esq.
Honorable Jill Konviser
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Trevett Cristo Salzer & Andolina P.C. (by James C. Gocker) for the Respondent

The respondent, Ellen Yacknin, a Judge of the Rochester City Court, Monroe County, was served with a Formal Written Complaint dated March 5, 2007, containing two charges. The Formal Written Complaint alleged that respondent, while a candidate for Supreme Court, personally solicited the support of two attorneys who were in the courthouse and about to appear before her, and that respondent issued and/or authorized campaign literature containing a misrepresentation. Respondent filed a Verified Answer dated April 17, 2007.

By Order dated April 27, 2007, the Commission designated Steven Wechsler, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 29, September 12 and October 31, 2007, in Rochester. The referee filed a report dated July 18, 2008.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of censure, and counsel to respondent recommended a confidential letter of caution.

On October 24, 2008, the Commission heard oral argument^[2] and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has served as a Judge of the Rochester City Court since 2003.

As to Charge I of the Formal Written Complaint:

2. In 2005 respondent was a candidate for nomination for Supreme Court Justice.
3. In the course of her campaign respondent communicated with between 100 and 130 attorneys asking for their support in the campaign.
4. Eftihia Bourtis is an attorney in private practice who appears in Rochester City Court on occasion.
5. On July 13, 2005, respondent placed a telephone call to Ms. Bourtis at her office with the intent of seeking Ms. Bourtis' support for her campaign. Ms. Bourtis was on vacation, and respondent left a message that she had called. At the time respondent made this call, Ms. Bourtis did not have any cases pending before respondent. Ms. Bourtis received respondent's message on July 25, 2005.
6. The next day, July 26, 2005, Ms. Bourtis was present in respondent's courtroom for the purpose of appearing in *People v. Hall*, in which she represented the defendant. After respondent took the bench but before *People v. Hall* was called, respondent asked Ms. Bourtis to approach the bench, and Ms. Bourtis did so.
7. At the bench, respondent and Ms. Bourtis had a brief conversation. Ms. Bourtis alluded to respondent's telephone message, explaining that she had just returned from vacation. Respondent then stated to Ms. Bourtis that she was running for Supreme Court and asked Ms. Bourtis for support in the campaign and whether she could use Ms. Bourtis' name in connection with the campaign. Ms. Bourtis felt that she had to say yes, and she did say yes. After this conversation, the *Hall* case was called, and Ms. Bourtis' client rejected the plea offered by the District Attorney's office. Respondent adjourned the case, which was later dismissed for failure to prosecute.
8. Respondent testified that immediately after her conversation with Ms. Bourtis at the bench, respondent "felt terrible" and realized that it was inappropriate to have such a conversation under these circumstances.
9. At no time did respondent ask an attorney or any other person for a monetary contribution to support her campaign.

As to Charge II of the Formal Written Complaint:

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

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

By soliciting support for her candidacy for Supreme Court from an attorney in her court, moments before the attorney was scheduled to appear before her with a client, respondent engaged in conduct that compromised her impartiality and independence and promoted her political interests in the courtroom. Such behavior is inconsistent with the high ethical standards required of judges.

Respondent has acknowledged that she discussed her candidacy at the bench with attorney Eftihia Bourtis, whom she had telephoned earlier to ask for support. (Respondent had left a message since the attorney was on vacation.) Although respondent disputes that she called the attorney to the bench, respondent acknowledges that at the bench she stated that she had called about the campaign and she asked if Ms. Bourtis would support her. Ms. Bourtis, who testified that the request made her “uncomfortable,” agreed to support respondent and to allow the campaign to use her name. As Ms. Bourtis testified, under the circumstances “I felt that I had to say yes.”

While judges and judicial candidates are permitted to engage in significant political activity on behalf of their own campaigns for judicial office (Rules, §100.5), the ethical standards require a candidate to “act in a manner consistent with the impartiality, integrity and independence of the judiciary” (Rules, §100.5[A][4][a]; *see also* §100.2[A]). By asking for political support from an attorney standing before her in court, respondent severely damaged any possibility that she could handle the attorney’s case without an appearance of bias. Regardless of the attorney’s response, respondent’s impartiality was compromised. (Indeed, if the attorney had immediately requested the judge’s recusal, respondent would have had little choice but to grant the request.) Moreover, respondent should have recognized that her request would present the attorney with a serious professional conflict. Respondent, by her actions, impaired her impartiality and the judiciary’s independence.

A judge’s campaign activities must be strictly separated from the performance of judicial duties in order to avoid any appearance of using judicial authority to advance the judge’s private interests. The Court of Appeals has stated that even off the bench, a judge “remain[s] cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others” (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]; *see also, Matter of Lonschein*, 50 NY2d 569, 571 [1980]). In her courtroom, wearing her robes, respondent was clothed not just figuratively but literally with the trappings of judicial status,

which made her request for political support from the attorney particularly coercive. (*See, Matter of Kaplan*, 1984 Annual Report 112 [Comm on Judicial Conduct]; *Matter of McNulty*, 2008 Annual Report 177 [Comm on Judicial Conduct] [judge’s charitable activities in the courthouse, including solicitation of attorneys who appeared before her, “could have a considerable coercive effect,” since the attorneys could not help feeling pressured to cooperate].)

The political benefit or desirability of obtaining endorsements is contemplated by the Rules in the designation of committees of responsible persons who seek such public support on behalf of a judicial candidate. While prohibiting the candidate from “personally solicit[ing]” contributions, the Rules provide that a candidate may establish a committee to “solicit and accept reasonable campaign contributions **and support** from the public, including lawyers...” (Rules, §100.5[A][5]) (emphasis added). An attorney who did not wish to support a judge-candidate would be far less pressured to decline such a request made by a campaign committee than one coming from the candidate herself – especially when the attorney has a case before the judge who is making the request.

We disagree with our colleague’s view that New York’s political activity restrictions are an unconstitutional abridgment of a judicial candidate’s First Amendment rights and that purported inconsistencies in the rules somehow mitigate respondent’s misconduct. As the Court of Appeals has held, New York’s restrictions on political activity by judges 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” (*Matter of Raab*, 100 NY2d 305, 312 [2003]). The alleged anomalies in the rules, cited in the dissenting opinion, do not invalidate the entire body of the rules; nor are they relevant to respondent’s conduct in this case, which, as Mr. Emery acknowledges, was clearly wrong. The impropriety of soliciting any favor or benefit from an attorney in the courtroom while presiding over the attorney’s case is well-established, apart from the specific restrictions on political activity.

In considering the sanction, we note that although respondent has testified that she immediately regretted her conversation with Ms. Bourtis and realized that it was inappropriate, she has acknowledged making a similar request for support of an attorney in the courthouse lobby a few weeks later. Respondent should have been more sensitive to her obligation to avoid engaging in political activity in the courthouse.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Harding, Ms. Hubbard, Judge Konviser, Judge Ruderman and Judge Peters concur. Mr. Coffey files a concurring opinion, in which Mr. Belluck joins.

Mr. Emery dissents in a separate opinion as to the sanction and votes that respondent be issued a letter of caution.

Ms. DiPirro and Mr. Jacob were not present.

Dated: December 29, 2008

CONCURRING OPINION BY MR. COFFEY, IN WHICH MR. BELLUCK JOINS

I do not agree with the entire thrust of Mr. Emery's dissent. Nonetheless, I do concur in his overall critical observation of the quite incomprehensible application of New York's rules pertaining to judicial political activity.

Dated: December 29, 2008

DISSENTING OPINION BY MR. EMERY

Judge Ellen Yacknin's solicitation of political support from Eftihia Bourtis for her candidacy for Supreme Court by calling Ms. Bourtis up to the bench in her courtroom, on a day when Ms. Bourtis appeared as counsel for a criminal defendant, presents a snapshot of the degradation which New York's elective system for selection of judges inflicts on judicial candidates. Because I believe that the ambiguous and unrealistic rules that we impose upon judges facing election do not fairly and effectively address this and other compromising political scenarios, I must dissent as to the imposition of a public reprimand and vote to privately caution Judge Yacknin.

I have written extensively in the past about the defects in the judicial conduct rules that govern judges when they run for office under our system. *Matter of Campbell*, 2005 Annual Report 133 (Concurring Opinion); *Matter of Farrell*, 2005 Annual Report 159 (Concurring Opinion); *Matter of Spargo*, 2007 Annual Report 107 (Opinion Concurring in Part and Dissenting in Part); *Matter of King*, 2008 Annual Report 145 (Concurring Opinion). Regrettably, the Court of Appeals has upheld the rules which restrict judicial candidates from supporting other candidates and actively participating in party politics. *Matter of Watson*, 100 NY2d 290 (2003); *Matter of Raab*, 100 NY2d 305 (2003). It has done so notwithstanding the clear holding of *Republican Party of Minnesota v. White*, 536 US 765 (2002), which I believe is a clarion call that protects judges from campaign conduct rules which are either under-inclusive (do not prohibit plainly improper conduct) or over-inclusive (prohibit clearly protected conduct). Thus, in my view, because New York's rules for judicial candidates prohibit conduct that is clearly protected political activity (engaging in unfettered party politics) and condone conduct that clearly should be prohibited (judges accepting contributions from lawyers who are appearing in their courts), this entire regulatory scheme violates the First Amendment.

In the past, when these issues came before the Commission I disagreed with the Commission decisions but concurred in the result because I am bound by the Court of Appeals' rulings. I understand and sympathize with the Court's pragmatic impulse to muddle through this mire, attempting to maintain the integrity and stature of the judiciary by separating it from unseemly political party activity and, at the same time, allowing judges to participate in the politics that are an inescapable part of our state constitutionally mandated elective selection system. But the result of this conundrum is that the Court of Appeals has upheld an entirely

unworkable and untenable system of judicial candidate regulation in which the conduct rules are unrealistic, unclear and contradictory.

Judge Yacknin was operating within this Kafkaesque maze. The rules she was supposed to follow prohibited her from “personally solicit[ing] or accept[ing] campaign contributions” (§100.5[A][5]), but did not bar her from personally seeking the “support” (whatever that means) of attorneys who were appearing before her. Moreover, she was allowed to form a committee that asked lawyers for contributions to her campaign (§100.5[A][5]). She was allowed to ask lawyers to serve on her campaign committee (Adv. Op. 92-19). And she was allowed to attend and speak at the fund-raisers that her committee arranged (§100.5[A][2][i]; Adv. Op. 03-122a, 97-41). Although judicial candidates are *advised* that judges must be shielded from knowledge of the identity of their contributors (Adv. Op. 02-06; *Judicial Campaign Ethics Handbook*, p. 8), by attending their own fund-raising events, candidates can quickly glean who is contributing. And, most importantly, a judge is specifically permitted to preside over cases in which a lawyer appears who openly supported the judge’s candidacy (*e.g.* Adv. Op. 90-182, 90-196, 03-64, 03-77), even if the judge knows that the lawyer contributed to the judge’s campaign (Adv. Op. 04-106).

This is the unseemly scheme of judicial campaigning which infects the integrity of our system of judicial election in every election cycle, in every part of the State. It plainly should be prohibited. But it is not. The Court of Appeals has approved it.

In this case, the Commission establishes for the first time that a judge may not solicit campaign support from the bench. As obvious as this proposition may sound, there is no specific rule against it. No cases or judicial advisory opinions address this unseemly activity. (The closest precedent is Advisory Opinions urging caution in the use in campaign literature of photographs taken in the courthouse “because the courthouse may not be used for political purposes” [*Campaign Ethics Handbook*, p. 10].)

The ethical rules that the Commission concludes address this violation state, in relevant part, that a judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” (§100.2[A]) and that a judicial candidate “shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary” (§100.5[A][4][a]). Ironically, these rules, on their face, seem to more directly prohibit the election activities that the same rules are specifically interpreted to approve – asking currently appearing lawyers to serve on the judge’s campaign committee and knowing the identity of currently appearing lawyer/contributors. Neither the rules nor their extant interpretations, however, specifically address Judge Yacknin’s offense -- solicitation of general support from the bench. Thus, it is hard for me to square the juxtaposition of these campaign activities and find that only Judge Yacknin’s conduct is sanctionable when the other far more corrosive activity has, in a sad bow to political reality, been immunized from normal ethical misconduct analysis.

Common understanding should dictate that it is improper to solicit support from the bench (just as it should be clear that judges should not have contributors appear before them). But judges are allowed to solicit “support” virtually anywhere from lawyers who have cases

pending before the court. In this case, Judge Yacknin acknowledged during the investigation that she personally contacted 100-130 attorneys to solicit their support, and the Commission staff made no argument that such conduct was anything other than business as usual. As clear as it is that solicitation from the bench is improper, especially when a client is sitting in the courtroom, I fail to see a meaningful distinction between such solicitation and repeated and insistent calls for campaign support from judges to individual lawyers who regularly appear before the judge. In either case coercion, and the whiff of bribery, are palpable. In light of this overall scheme that allows lawyers to finance judicial campaigns, it seems otherworldly to punish Judge Yacknin for her particular transgression.

The entire system of regulating judicial campaigns is riddled with hypocrisy. It reduces judges to supplicants of the lawyers and clients who should hold them in high esteem. Expressing ad hoc outrage when one judge happens to come to our attention for her obtuse behavior feels like fiddling while Rome burns. We really deserve better and the independence of our judiciary demands much more.

I refuse to make Judge Yacknin a posterperson for judicial campaign misconduct even though, as she forthrightly acknowledges, she clearly should not have done what she did. Therefore, I dissent and recommend that she be given a private caution.

Dated: December 29, 2008

^[1] Ms. DiPirro resigned from the Commission on October 30, 2008. The vote in this matter was taken on October 24, 2008.

^[2] Respondent was present and was advised that she could address the Commission for 10 minutes if she wished to do so. Respondent did not ask to speak. By letter dated October 27, 2008, counsel to respondent requested that the argument be reopened so that respondent could address the Commission. The Commission denied the request by letter dated November 6, 2008.

COMPLAINTS PENDING AS OF DECEMBER 31, 2007

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>								
<i>NON-JUDGES</i>								
<i>DEMEANOR</i>		9	24	5	5	7	5	55
<i>DELAYS</i>		4	4	2	2	1	1	14
<i>CONFLICT OF INTEREST</i>		9	5	0	5	0	6	25
<i>BIAS</i>		2	4	1	0	0	1	8
<i>CORRUPTION</i>		4	3	0	0	1	0	8
<i>INTOXICATION</i>		0	1	0	0	0	0	1
<i>DISABILITY/QUALIFICATIONS</i>		0	1	0	1	0	0	2
<i>POLITICAL ACTIVITY</i>		5	7	7	1	2	3	25
<i>FINANCES/RECORDS/TRAINING</i>		4	5	3	4	1	1	18
<i>TICKET-FIXING</i>		2	4	1	1	0	1	9
<i>ASSERTION OF INFLUENCE</i>		5	7	4	2	1	0	19
<i>VIOLATION OF RIGHTS</i>		9	22	6	3	6	6	52
<i>MISCELLANEOUS</i>		0	2	0	1	0	0	2
TOTALS		53	89	29	24	19	24	238

*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 2008

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	978							978
<i>NON-JUDGES</i>	396							396
<i>DEMEANOR</i>	114	30	27	1	1	1	0	174
<i>DELAYS</i>	55	14	6	1	1	0	0	77
<i>CONFLICT OF INTEREST</i>	16	18	10	1	1	1	0	47
<i>BIAS</i>	23	7	6	0	0	0	0	36
<i>CORRUPTION</i>	19	8	0	1	1	0	0	29
<i>INTOXICATION</i>	1	1	0	0	2	0	0	4
<i>DISABILITY/QUALIFICATIONS</i>	0	0	0	0	1	0	0	1
<i>POLITICAL ACTIVITY</i>	15	15	2	2	0	0	0	34
<i>FINANCES/RECORDS/TRAINING</i>	9	16	8	1	1	0	0	35
<i>TICKET-FIXING</i>	3	1	1	0	1	0	0	6
<i>ASSERTION OF INFLUENCE</i>	14	6	4	1	2	0	0	27
<i>VIOLATION OF RIGHTS</i>	10	37	16	2	0	0	0	65
<i>MISCELLANEOUS</i>	8	2	4	0	0	0	0	14
TOTALS	1661	155	84	10	11	2	0	1923

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ALL COMPLAINTS CONSIDERED IN 2008: 1923 NEW & 238 PENDING FROM 2007

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	978							978
<i>NON-JUDGES</i>	396							396
<i>DEMEANOR</i>	114	39	51	6	6	8	5	229
<i>DELAYS</i>	55	18	10	3	3	1	1	91
<i>CONFLICT OF INTEREST</i>	16	27	15	1	6	1	6	72
<i>BIAS</i>	23	9	10	1	0	0	1	44
<i>CORRUPTION</i>	19	12	3	1	1	1	0	37
<i>INTOXICATION</i>	1	1	1	0	2	0	0	5
<i>DISABILITY/QUALIFICATIONS</i>	0	0	1	0	2	0	0	3
<i>POLITICAL ACTIVITY</i>	15	20	9	9	1	2	3	59
<i>FINANCES/RECORDS/TRAINING</i>	9	20	13	4	5	1	1	53
<i>TICKET-FIXING</i>	3	3	5	1	2	0	1	15
<i>ASSERTION OF INFLUENCE</i>	14	11	11	5	4	1	0	46
<i>VIOLATION OF RIGHTS</i>	10	46	38	8	3	6	6	117
<i>MISCELLANEOUS</i>	8	2	6	0	0	0	0	16
TOTALS	1661	208	173	39	35	21	24	2161

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ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	15,657							15,657
<i>NON-JUDGES</i>	5042							5042
<i>DEMEANOR</i>	3183	39	1134	308	115	113	239	5131
<i>DELAYS</i>	1296	18	157	75	30	16	22	1614
<i>CONFLICT OF INTEREST</i>	628	27	441	147	54	23	122	1442
<i>BIAS</i>	1822	9	257	55	27	18	31	2219
<i>CORRUPTION</i>	438	12	105	14	7	21	34	661
<i>INTOXICATION</i>	54	1	36	7	11	3	25	137
<i>DISABILITY/QUALIFICATIONS</i>	55	0	32	2	18	14	6	127
<i>POLITICAL ACTIVITY</i>	306	20	259	174	14	23	43	839
<i>FINANCES/RECORDS/TRAINING</i>	259	20	273	179	123	84	97	1035
<i>TICKET-FIXING</i>	26	3	85	159	42	62	164	541
<i>ASSERTION OF INFLUENCE</i>	192	11	142	70	20	9	55	499
<i>VIOLATION OF RIGHTS</i>	2412	46	443	193	81	48	80	3303
<i>MISCELLANEOUS</i>	755	2	247	80	29	40	57	1210
TOTALS	32,125	208	3611	1463	601	474	975	39,457

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