STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

HOWARD M. AISON,

a Judge of the Amsterdam City Court,
Montgomery County.

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DETERMINATION

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 (Cheryl L. Randall, Of Counsel) for the Commission

Ackerman, Wachs and Finton, P.C. (by F. Stanton Ackerman) for the Respondent

The respondent, Howard M. Aison, a Judge of the Amsterdam City Court, Montgomery County, was served with a Formal Written Complaint dated November 13,

2007, containing three charges. The Formal Written Complaint alleged that respondent, while a part-time judge, arranged to have charges against his client filed in a court which did not have jurisdiction in order to circumvent the prohibition against practicing law in his own court (Charge I); failed to disqualify himself in a case notwithstanding that he had previously represented the complaining witness, and held the defendant in summary contempt without complying with proper procedures (Charge II); and represented defendants in three cases that had originated in his own court (Charge III). Respondent filed an amended Answer dated May 19, 2008.

By Order dated April 23, 2008, the Commission designated Philip C. Pinsky, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 9, 2008, in Albany. The referee filed a report dated December 16, 2008.

On January 9, 2009, the Administrator of the Commission, respondent's counsel and respondent entered into a Stipulation recommending that the Commission accept the proposed findings of fact and conclusions of law contained in the referee's report, determine that Charges I through III are sustained insofar as they are consistent with the referee's findings and conclusions, and determine that respondent be censured, waiving further submissions and oral argument.

On January 28, 2009, the Commission accepted the Stipulation and made the following determination.

1. Respondent has been a Judge of the Amsterdam City Court since 1997. He served as a part-time judge until April 1, 2007, when he became a full-time judge of the court.

2. Respondent is an attorney. He practiced law from 1973 to 1985, served as Montgomery County District Attorney from 1979 to 1985, and served as County Court judge from 1986 to 1995. He then resumed the practice of law as a sole practitioner and continued to practice law while serving as a part-time City Court judge.

As to Charge I of the Formal Written Complaint:

3. On or about January 25, 2000, respondent was retained as an attorney by Julie Taylor, who had learned that charges would be filed against her for allegedly defrauding the City of Amsterdam Housing Authority by receiving more than $9,000 in overpayments of housing subsidies. Respondent accepted a fee from Ms. Taylor.

4. Upon being retained by Ms. Taylor, respondent called the Chief Clerk of the Amsterdam City Court and was informed that there was no charge against Ms. Taylor in that court. Respondent then telephoned Montgomery County District Attorney Jed Conboy and set up a meeting at the District Attorney's office to discuss the Taylor matter. Mr. Conboy had been an assistant district attorney when respondent was District Attorney.

5. At their meeting, respondent told Mr. Conboy that he could not

represent Ms. Taylor in the Amsterdam City Court and suggested that the charge against her be filed in the Amsterdam Town Court. Respondent told Mr. Conboy that Ms. Taylor was willing to plead guilty to a misdemeanor and could pay the restitution immediately.

6. The Amsterdam Town Court did not have original jurisdiction over the Taylor matter since the crime arose in the City of Amsterdam.

7. On February 3, 2000, an Information was filed in the Amsterdam Town Court charging Ms. Taylor with Petit Larceny, a class A misdemeanor, with a return date of February 10, 2000. Respondent testified that the charge was filed in that court because Mr. Conboy had "said that it's okay."

8. Respondent represented Ms. Taylor in Amsterdam Town Court through the disposition of her case on February 10, 2000, when she was sentenced to a one-year conditional discharge and $9,236 in restitution.

9. On the same date, respondent sent a cashier's check to the Amsterdam Housing Authority in the amount of the restitution. In his cover letter respondent stated: "Both Julie and I deeply appreciate the consideration that both you, the Court and the District Attorney gave Julie regarding this matter."

10. Respondent was aware of the ethical prohibition barring him from practicing in his own court, and he was attempting to circumvent that prohibition when he arranged with Mr. Conboy to have the charge against Ms. Taylor filed in the Town Court.

11. Respondent has acknowledged that he should not have represented

Ms. Taylor in the matter and "should have known better" than to represent her.

As to Charge II of the Formal Written Complaint:

12. On April 21, 2003, respondent met with and agreed to represent Melissa Weller in a Workers' Compensation matter. Ms. Weller signed a Notice of Appearance and Retainer, which respondent filed with the Workers' Compensation Board. When respondent met with her, Ms. Weller had no papers with her, and respondent asked her to bring them in. He never saw her again. There is no evidence that Ms. Weller ever pursued the case or that the Workers' Compensation Board took any action on the Weller case, other than assigning a case number. Respondent reasonably believed that his representation of Ms. Weller did not extend beyond April 2003.

13. On May 10, 2005, respondent accepted a guilty plea from Miguel Carmona to Harassment in the Second Degree and sentenced him to a conditional discharge and time served. Mr. Carmona is the father of Ms. Weller's children.

14. On July 12, 2005, respondent signed an order of protection against Mr. Carmona in favor of Ms. Weller, in connection with Mr. Carmona's conviction for Harassment. At that time, respondent had notice of the relationship between Mr. Carmona and Ms. Weller.

15. On April 4, 2006, respondent arraigned Mr. Carmona on charges of Criminal Contempt in the First Degree and Criminal Mischief in the Third Degree, both felonies, and Aggravated Harassment in the Second Degree, a misdemeanor, as well as an

alleged violation of the 2005 conditional discharge. The charges arose out of allegations that Mr. Carmona had left threatening messages on Ms. Weller's answering machine and had damaged the windshield of her vehicle. Respondent set bail and issued a temporary order of protection on the Criminal Contempt charge and released Mr. Carmona on his own recognizance on the other charges. Respondent knew that Mr. Carmona is the father of Ms. Weller's children by reason of her supporting deposition accompanying the felony complaint.

16. On April 25, 2006, Mr. Carmona pled guilty to a misdemeanor in satisfaction of all the charges and was promised a sentence of nine months plus a fine, consistent with the recommendation of the District Attorney. Sentencing was adjourned to June 20, 2006, and a presentence report was requested. Respondent issued a temporary order of protection directing Mr. Carmona to stay away from Ms. Weller. Bail was ordered in lieu of the previous release on recognizance.

17. On June 20, 2006, Mr. Carmona appeared before respondent for sentencing. During the proceeding, Mr. Carmona made offensive, threatening statements to respondent, and respondent held him in summary contempt and sentenced him to 30 days in jail and a $1,000 fine. Mr. Carmona then withdrew his plea to the misdemeanor and requested respondent's recusal due to a "conflict of interest" based on respondent's prior "dealings" with him and Ms. Weller "on a personal level." Respondent adjourned the matter to August 15, 2006.

18. There were no further proceedings in the case in City Court. On July 14, 2006, Mr. Carmona was indicted by a grand jury, and he later pled guilty to a felony.

19. Respondent did not disclose that Ms. Weller had been his client at any of the above court appearances in *Carmona*. Respondent testified that at the time of those proceedings, he did not recall that he had represented Ms. Weller and that if he had remembered doing so, he would have made such a disclosure.

As to Charge III of the Formal Written Complaint:

20. On November 22, 1998, in *People v. James A. Kenna*, the defendant was arraigned by respondent's co-judge in the Amsterdam City Court on a charge of Driving While Intoxicated (second offense), a felony.

21. On December 14, 1999, by letter to the clerk of the County Court, respondent requested a meeting with the County Court and the District Attorney's office concerning a waiver of indictment and the filing of a Superior Court information on the DWI felony against Mr. Kenna and another pending felony charge.

22. On or about April 26, 2000, the *Kenna* case was transferred from the Amsterdam City Court to County Court. Respondent represented the defendant, who pled guilty to the felony DWI on April 26, 2000, and was sentenced on November 16, 2000.

23. In *People v. Michael Waldynski*, the defendant was arrested on May 17, 1999, on a charge of Burglary in the First Degree, a felony, and was arraigned in the Amsterdam City Court by respondent's co-judge. On September 22, 1999, the case was

transferred to County Court. Respondent represented the defendant in County Court, where the defendant pled guilty to Burglary in the Second Degree on March 29, 2000, and was sentenced to a term of imprisonment on May 9, 2000.

24. In *People v. Ronald Holt*, the defendant was charged on March 26, 2000, in the Amsterdam City Court with Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, a felony, and Driving While Intoxicated. He was arraigned on that date by respondent's co-judge.

25. On that same date, respondent accepted a retainer for purposes of representing Mr. Holt.

26. On or about March 27, 2001, respondent's co-judge transferred the case to County Court, where it remained until July 30, 2001, when the County Court judge returned it to City Court. On August 7, 2001, respondent's co-judge again transferred the case to County Court, stating that "Mr. Aison said he will enter a plea in County Court."

27. On October 24, 2001, the defendant, represented by respondent, pled guilty in County Court to two misdemeanors, Driving While Intoxicated and Aggravated Unlicensed Operation of a Motor Vehicle in the Second Degree, and was sentenced to a one-year conditional discharge and revocation of his driver's license.

28. While the case against Mr. Holt was in the Amsterdam City Court, respondent rendered the following legal assistance to his client:

(A) Respondent composed a letter dated March 26, 2001, for Mr. Holt's signature, addressed to respondent's co-judge, which, in part, waived a preliminary hearing.

(B) Respondent composed an affidavit for Mr. Holt's signature and submission to the Court. Respondent sent a copy of the affidavit and the March 26, 2001 letter to the District Attorney under cover of a letter dated March 29, 2001, two days after the matter had been transferred to County Court.

(C) On or about August 7, 2001, respondent informed his co-judge that his client would enter a plea in County Court, which resulted in the co-judge determining to send the case to the County Court for disposition.

(D) On or about October 24, 2001, respondent caused a waiver of a preliminary hearing on behalf of his client to be filed in Amsterdam City Court. The record does not reflect why this document was prepared and filed in the City Court since the *Holt* case had been transferred on August 7, 2001, to the County Court, where the defendant entered a plea on October 24, 2001.

29. With respect to the March 26, 2001, letter drafted by respondent, which did not disclose that he was representing Mr. Holt, respondent testified at the hearing that he did not "want anybody in City Court to think that I am representing someone... I conceal all my clients from the City Court personnel. I don't want them to know who I represent."

30. At the hearing, respondent testified that he knew that as a part-time Amsterdam City Court judge he could not practice law in the City Court but felt it was permissible to prepare documents for his client to sign in the client's own name, "because the only purpose of the letter was to take it out of the City Court."

31. Respondent acknowledged at the hearing that he should not have represented Mr. Kenna, Mr. Waldynski or Mr. Holt since the cases had originated in his court.

Supplemental finding:

32. At the hearing, respondent was contrite, cooperative and forthright. He candidly recognized and acknowledged the impropriety of his behavior.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(A), 100.3(B)(1), 100.3(B)(6), 100.3(E)(1), 100.4(A)(3), 100.4(D)(1)(a) and 100.6(B)(2) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

A part-time judge may practice law subject to certain statutory and ethical restrictions designed to eliminate conflict and the appearance of any conflict between the exercise of judicial duties and the private practice of law. *See*, *Matter of Miller*, 2003 Annual Report 140 (Comm on Judicial Conduct). Every lawyer-judge must scrupulously observe the applicable rules in order to avoid conduct that may create an appearance of impropriety and impugn the integrity of judicial office. While serving as a part-time judge of the Amsterdam City Court, respondent violated these standards in his representation of clients in four matters between 1999 and 2001.

Section 16 of the Judiciary Law prohibits a judge from practicing law in the judge's court or "in an action, claim, matter, motion or proceeding originating in [the judge's] court." In *People v. Taylor*, respondent, with the assistance of the District Attorney, arranged to have a charge against his client filed in the Amsterdam Town Court, which did not have original jurisdiction, rather than in the Amsterdam City Court, where he knew himself to be barred, in order to circumvent the prohibition against practicing law in his own court. Since the crime arose in the City of Amsterdam, it is clear that the case would have been filed in the City Court but for respondent's intervention. Respondent's arrangement with the District Attorney – who had been respondent's assistant when respondent served as District Attorney – conveys the appearance of favoritism, which undermines the administration of justice and "created the impression that the courts were being manipulated to benefit respondent's private law

practice, to the possible inconvenience of the parties and to the burden of other courts that had to assume an additional caseload." *See*, *Matter of Feeney,* 1988 Annual Report 159, 161 (Comm on Judicial Conduct).

In choosing to represent Ms. Taylor, respondent, as the referee concluded, "put his private practice of law above his judicial obligations, for his own pecuniary gain" (Referee's report, p. 4). By doing so, respondent failed to ensure that his judicial duties took precedence over his private practice of law and failed to conduct his private practice of law in a manner compatible with his judicial office, contrary to Sections 100.3(A) and 100.4(A)(3) of the Rules.

In the *Kenna*, *Waldynski* and *Holt* cases, respondent violated Section 16 of the Judiciary Law by representing the defendants in County Court notwithstanding that the cases had originated in the Amsterdam City Court. In each of the cases, the defendants were arraigned in the City Court by respondent's co-judge, who transferred the cases to County Court since the defendants were charged with a felony. Although respondent never presided over those cases in the City Court, the statutory prohibition precluded him from representing the defendants after the cases were transferred. *See*, *Matter of Miller*, *supra*; *Matter of Feeney*, *supra*; *Matter of Bruhn*, 1988 Annual Report 133 (Comm on Judicial Conduct); *see also* Adv Op. 88-50, 99-34.

In one of the cases, *People v. Holt*, respondent also provided legal assistance to his client in the brief period while the case was still pending in the

Amsterdam City Court, in contravention of clear statutory and ethical prohibitions. A judge may not act as an attorney in a case pending in the judge's court (Jud Law §16; Rules, §100.6[B][2]). While respondent did not physically appear in the City Court in connection with the *Holt* case and, indeed, acknowledged that he was attempting to conceal from City Court personnel that he was representing the defendant, his actions violated the ethical prohibitions and constituted an impermissible intermingling of his roles as a lawyer and judge. In this regard, we agree with the referee that the defendant's letter (drafted by respondent) to the City Court judge waiving a preliminary hearing was "hardly a ministerial act, since it requires an informed tactical judgment by an attorney" (Referee's report, p. 15).

In addition, it was improper for respondent to preside over *People v. Carmona* in 2005 and 2006 without disclosing that the complaining witness was a former client of his law practice. A judge's disqualification is required in any matter where 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 a judge's former law client is required if the representation occurred within the past two years; thereafter, at the very least, disclosure is required for a significant period (Adv. Op. 97-85, 94-71, 92-14, 92-01). *See also, Matter of Bruhn, supra; Matter of Feeney, supra; see also, Matter of Filipowicz*, 54 AD2d 348 (2d Dept 1976).

Since respondent had briefly represented Ms. Weller more than two years before the *Carmona* matter first came before him, his disqualification was not mandatory provided that he believed that he could be impartial. Nevertheless, disclosing the relationship was required under the ethical guidelines. As we have previously stated, "There can be no substitute for making full disclosure on the record 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" (*Matter of Merrill*, 2008 Annual Report 181 [Comm on Judicial Conduct]). By failing to disclose his prior attorney-client relationship with the complaining witness, respondent did not act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Rules, §100.2[A]).

As the referee found, it is no excuse that respondent did not recall his brief representation of Ms. Weller. Judges who practice law should maintain appropriate records and implement appropriate controls in order to ensure that their conduct complies with the ethical restrictions.

In its totality, respondent's conduct showed insensitivity and inattention to his ethical responsibilities and, in particular, to the special ethical obligations of judges who are permitted to practice law. In mitigation, we note that respondent was candid, cooperative and contrite at the hearing and that he has acknowledged his misconduct.

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

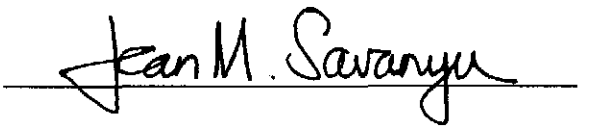
Judge Klonick, Mr. Coffey, Mr. Harding, Ms. Hubbard, Judge Konviser and Judge Ruderman concur.

Mr. Belluck, Mr. Emery, Mr. Jacob and Judge Peters dissent and vote to reject the stipulation on the basis that the disposition is too lenient and that respondent should be removed.

CERTIFICATION

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

Dated: March 26, 2009



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

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

HOWARD M. AISON,

a Judge of the Amsterdam City Court,
Montgomery County.

DISSENTING OPINION
BY MR. EMERY, IN WHICH
MR. BELLUCK, MR. JACOB
AND JUDGE PETERS JOIN

It is out of character for this Commission not to remove a part-time judge who manipulates his clients, co-judges, brethren County judges and the District Attorney's office in a series of cases that comprise a pattern of rule breaking for the purpose of securing financial benefit for that judge's private practice of law. The Commission's decision in this case would be an aberrant precedent were it not for the long delay in sanctioning these events and the fact that Judge Aison is now a full-time judge who can no longer engage in such practices. Notwithstanding these mitigating facts, I must dissent and vote for removal because this sort of mitigation, in my view, is irrelevant to sanction in the face of Judge Aison's calculated disregard of the prohibitions that apply to judges who practice law and his overt and covert manipulations of the court system he is sworn to uphold.

The Commission has accurately and fully set forth the pattern of Judge

Aison's misconduct. Two of the cases at issue particularly and starkly make the point. In *Holt*, Judge Aison forthrightly admits that despite knowing that he could not practice in his own court, he agreed to represent a defendant whose case was before that court. Rationalizing that he could represent the defendant if his role was sufficiently disguised, the judge attempted to conceal the representation by preparing documents for his client's signature for submission to Judge Aison's City Court co-judge under the guise of *pro se* written submissions. He later abandoned his subterfuge, informing his co-judge that his client would enter a plea in County Court, thereby causing his co-judge to transfer the case to County Court. *See* Finding 28(C). At that point, Judge Aison arranged a guilty plea and acceptable disposition for his client with the District Attorney's office. The judge himself had led that office as District Attorney some years earlier.

Of course, his client paid Judge Aison a fee for these services. And Judge Aison has proffered no explanation for these manipulations other than his intent to earn a living. He was simply oblivious to the fact that this conduct was, on its face, deceptive and in clear violation of the Judiciary Law which he is sworn to uphold.

That he was the former District Attorney takes on an even more prominent role in the second troubling case. Knowing that he could not represent the defendant in *People v. Taylor*, a case which involved a potential felony with preliminary jurisdiction in the City Court, Judge Aison convinced his former assistant district attorney – by that time the County District Attorney – to file the charge as a misdemeanor in the Amsterdam Town Court, where no original jurisdiction existed but where Judge Aison was permitted

to practice. This cozy relationship avoided the uncomfortable possibility that Judge Aison might be disqualified and deprived of a fee. Perhaps the District Attorney was consoled by the favorable plea disposition that was reached. Perhaps, as well, the judge's client was pleased by the favorable disposition.

This corrosion of the judicial, defense and prosecutorial functions for pragmatic and personal benefit is simply too much to tolerate. Recently, we publicly disciplined two full-time City Court judges for condoning similarly pragmatic manipulations of their colleague, a part-time judge whose law firm practiced before the court where he sat. *Matter of Lehmann*, 2009 Annual Report ___; *Matter of Pelella*, 2009 Annual Report ___ (Comm on Judicial Conduct). The colleague, who – like Judge Aison – flouted the restrictions on the practice of law by part-time judges for his own and his firm's financial benefit, avoided discipline only by agreeing to vacate office when his term expired and not to hold judicial office in the future (*Matter of Murphy*, 2009 Annual Report ___).

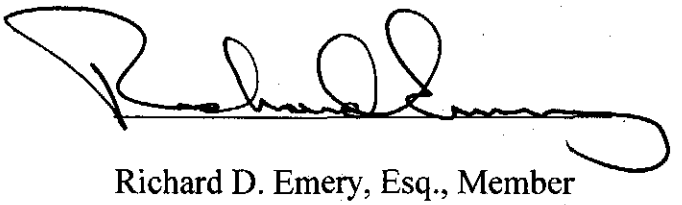
I understand the Commission's consideration of Judge Aison's expressions of contrition. However, his distortion and compromise of fundamental legal precepts that inhere in his misconduct are simply too severe to warrant a sanction less than removal. *Lehmann* and *Pelella* clearly require as much.

The fact that most of these events occurred some time ago should not mitigate removal. When a judge uses deceit and subterfuge by practicing law in his own court – and the facts are established by incontrovertible proof – the lapse of time in

prosecuting the case should not be relevant to sanction. This is precisely why there is no statute of limitations for judicial misconduct. Nor should it inure to Judge Aison's benefit in evaluating the Commission's response to his earlier misconduct that he is now a full-time judge.

It is contrary to logic and precedent to leave a judge on the bench who has so egregiously violated the trust of judicial office by manipulating the very system in which he is a judge for his personal benefit and the benefit of a private client. *See*, *Matter of Gibbons*, 98 NY2d 448 (2002) (judge notified an attorney, whose firm was the judge's former employer and referred cases to the judge, that he had just signed a search warrant for the premises of the attorney's client). Respondent should be removed.

Dated: March 26, 2009



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Commission on Judicial Conduct