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

DETERMINATION

JOHN C. BIVONA,

a Justice of the Supreme Court, 10th Judicial
District, Suffolk County.

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THE COMMISSION:

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

APPEARANCES:

Robert H. Tembeckjian (Vickie Ma, Of Counsel) for the Commission

John L. Juliano for Respondent

The respondent, John Bivona, a Justice of the Supreme Court, 10th Judicial District, Suffolk County, was served with an amended Formal Written Complaint dated February 12, 2003, containing one charge. Respondent filed an amended answer dated

February 14, 2003.

On October 17, 2003, 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 October 23, 2003, the Commission approved the agreed statement and made the following determination.

1. Respondent has served as a Supreme Court Justice since January 1, 2001.

2. On October 31, 2001, Suffolk County Supreme Court Justice Denise F. Molia issued an Order which stayed the highly publicized civil matter of *Scott Conlon v. Lizzie Grubman and Allen J. Grubman* ("*Conlon*") pending the resolution of related criminal charges, except that the parties were permitted to proceed with non-party discovery.

3. On or about November 1, 2001, the law office of Cozen & O'Connor, counsel to Lizzie Grubman, served a non-party witness, William Maston, with a subpoena for a deposition scheduled for November 27, 2001. Notice of Mr. Maston's deposition was sent to the attorney for the plaintiff, Christopher Modelewski, on November 1, 2001.

4. At no time did Mr. Modelewski move to quash the subpoena or

otherwise object to the deposition before the assigned judge, Judge Molia. Indeed, he agreed to the rescheduling of Mr. Maston's deposition, which was ultimately scheduled for Monday, December 10, 2001, at the offices of Ohrenstein & Brown, counsel for co-defendant, Allen J. Grubman.

5. On Friday, December 7, 2001, at approximately 12:15 P.M., the office of Cozen & O'Connor served a non-party witness, Joseph Conlon III, the plaintiff's father, with a subpoena for a deposition scheduled for January 11, 2002. Mr. Modelewski did not seek any judicial intervention from the assigned judge, Judge Molia, but waited until the following evening, on Saturday, to seek relief from respondent at his home on grounds of purported abuse of discovery.

6. On the evening of December 8, 2001, a Saturday, respondent signed an *ex parte* Order to Show Cause in *Conlon* that was submitted by Mr. Modelewski. At the time, Mr. Modelewski was representing respondent in a real estate matter, *Auto Land Realty v. Caldwell Realty, Inc., Josephine Hall and John C. Bivona* ("*Auto Land*"). Mr. Modelewski and respondent had a close professional and social relationship. Respondent's Order effectively stayed the depositions of all non-party witnesses, one of whom, William Maston, was scheduled for the following Monday, December 10, 2001. Judge Molia's previous Order in *Conlon* had explicitly permitted the parties to proceed with non-party discovery.

7. While Mr. Modelewski was at respondent's home seeking respondent's signature on the Order to Show Cause, respondent and Mr. Modelewski

discussed the *Auto Land* matter.

8. If called as witnesses, the attorneys for the defendants would testify that as a result of respondent's Order, the depositions of non-party witnesses were delayed for several months and that the attorneys sustained substantial costs.

9. The practice in Suffolk County Supreme Court is for judges to be assigned on a rotating basis to handle off-hour (weekend) Special Term matters. On December 8, 2001, respondent was one of two Suffolk County Supreme Court Justices assigned to Special Term. However, when Mr. Modelewski went to respondent's home on December 8, 2001, Mr. Modelewski was unaware of respondent's assignment to Special Term matters.

10. Despite respondent's assignment to Special Term matters, because of his relationship with Mr. Modelewski, he should not have presided over an *ex parte* application that was submitted by Mr. Modelewski.

11. On the morning of December 10, 2001, Gail Ritzert (counsel for Allen Grubman), John McDonough (counsel for Lizzie Grubman), James LiCalzi and his client, William Maston, and a court reporter appeared at the offices of Ohrenstein & Brown for Mr. Maston's deposition. Mr. Modelewski appeared at the deposition with the Order signed by respondent enjoining the defendants from conducting any non-party discovery, including depositions of five named witnesses who had been previously served with subpoenas.

12. By Order dated December 19, 2001, Judge Molia determined that

respondent's Order was null and void and that Mr. Modelewski's application was not supported by an affidavit of emergency. The parties were further ordered to obtain permission from the Court before seeking any relief by way of Order to Show Cause.

13. Mr. Maston's deposition was rescheduled and conducted on February 1, 2002.

14. Respondent has had a close social and professional relationship with Mr. Modelewski and his law partner, Michael McCarthy, Esq., for more than ten years.

15. Mr. Modelewski represented respondent in the *Auto Land* civil action, which was commenced in November 2000. A Stipulation of Settlement in *Auto Land* was signed and so ordered by Suffolk County Supreme Court Justice Alan D. Oshrin on November 15, 2001. A Stipulation of Discontinuance was filed on December 10, 2001, the same day that a condition of the Stipulation of Settlement was satisfied. The Stipulation of Discontinuance in *Auto Land* was filed on December 10, 2001, two days after respondent granted Mr. Modelewski's request for an Order to Show Cause in *Conlon*.

16. Respondent did not pay Mr. Modelewski any legal fees relative to *Auto Land* until after the Commission sought respondent's written response as part of its investigation in this matter.

17. Respondent paid Mr. Modelewski $1,000 by check dated May 11, 2002, for his legal services in connection with *Auto Land*.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(B)(1) and 100.3(E)(1) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it consistent with the above findings and conclusions, and respondent's misconduct is established.

Well-established ethical standards require a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned (Rules Governing Judicial Conduct §100.3[E][1]).

Respondent did not comply with these standards when he signed an *ex parte* Order to Show Cause in *Scott Conlon v. Lizzie Grubman and Allen J. Grubman* that was presented to him by the plaintiff's attorney, Christopher Modelewski, who was then representing respondent in a civil case, *Auto Land Realty v. Caldwell Realty, Inc., Josephine Hall and John C. Bivona* ("*Auto Land*"). Respondent's impartiality could reasonably be questioned in the *Conlon* matter in view of his existing attorney-client relationship with Mr. Modelewski as well as his long-time close social and professional relationship with Mr. Modelewski and his law partner.

Notwithstanding that the *Auto Land* matter was in the process of being completed, respondent should have recognized that his existing attorney-client relationship with Mr. Modelewski required his disqualification. The conflict was starkly apparent when respondent and the attorney discussed the *Auto Land* matter while the attorney was at respondent's home seeking his signature on an Order on behalf of another

client. Numerous opinions of the Advisory Committee on Judicial Ethics have held that a judge may not permit his or her personal attorney to appear before the judge for two years after the representation was concluded, and then only if the judge believes he or she can be impartial and if the judge discloses the relationship (*e.g.*, Adv Op 92-54, 96-102, 97-30).

The *ex parte* nature of the application by Mr. Modelewski, who came to respondent's home with the requested Order on a Saturday night, effectively precluded any opportunity for respondent to make disclosure or for the opposing attorneys to consent or object to his participation in the matter. Under the circumstances, it was especially improper for respondent to sign the order presented by Mr. Modelewski, which stayed the imminent deposition of a non-party witness for which Mr. Modelewski had had more than a month's notice.

This was not a situation where respondent's obligation not to preside over his friend's matters might be outweighed by an emergency that prompted him to decide the matter. There was no valid reason under these circumstances for respondent to prevent the scheduled depositions from taking place. Mr. Modelewski had sufficient time during the preceding weeks to seek a stay of the deposition from the judge assigned to the case. Even if respondent had been advised by Mr. Modelewski that he only realized the need to make the application on Saturday, when the courts were closed, respondent should have required Mr. Modelewski to present his papers to Judge Molia on Monday morning. Respondent should have realized that Judge Molia would be in a far better

position to determine the merits of the application. Thereafter, Judge Molia vacated respondent's Order and authorized discovery to continue, so that the practical effect of respondent's intervention was to create a delay of several weeks for the depositions to be held.

In 1987, the Commission admonished a Nassau County Court judge who had considered a bail application by a defendant in a Monroe County criminal proceeding who had been arrested in Queens County. *Matter of Winick*, 1988 Ann Rep 239 (1987). The judge had been asked to conduct the proceeding while he was at his Country Club by his friend who was a member of the same club. He agreed to consider the application as a favor to his friend, and did so at his home after considering the opposing views expressed by telephone by a Nassau County assistant district attorney. The Commission concluded that because the matter "conveyed an appearance of favoritism," the judge's conduct warranted a public disciplinary sanction, "not to punish [the judge] but to maintain public confidence in the judiciary" (*Id.* at 243).

Respondent's actions conveyed the appearance that he was not impartial, which is precisely why he should have been expected to disqualify himself from Mr. Modelewski's case.

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

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

Mr. Goldman dissents and votes to reject the agreed statement of facts on the basis that the disposition is too lenient.

Judge Luciano did not participate.

Mr. Coffey was not present.

CERTIFICATION

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

Dated: December 29, 2003

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct