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

KENNETH W. GIBBONS,

a Justice of the Glenville Town Court,
Schenectady County.

DETERMINATION

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THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, 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:

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

Roche, Corrigan, McCoy and Bush (by Robert P. Roche) for Respondent

The respondent, Kenneth W. Gibbons, a justice of the Glenville Town Court, Schenectady County, was served with a Formal Written Complaint dated October 31, 2000, containing one charge. Respondent filed an Answer dated November 15, 2000.

By Order dated January 2, 2001, the Commission designated William C. Banks, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 10, 2001, and the referee filed his report with the Commission dated September 6, 2001.

The parties submitted briefs with respect to the referee's report. On December 20, 2001, 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 Glenville Town Court, Schenectady County since 1995.

2. Respondent is an attorney who was admitted to practice in 1993. He is a sole practitioner with an office at his home in Glenville. From 1996 to September 1997, respondent was employed as an associate in the law firm of Kingsley and Towne, one of the principals of which was James Towne, Jr. Although respondent was asked to leave the firm, the parting was amicable, and since that time, respondent has referred at least one case to Mr. Towne and Mr. Towne has referred clients to respondent.

3. Alphonse Rullo, the proprietor of Capitaland, a car dealership in Glenville, has been a client of Mr. Towne for many years. Respondent was aware that Capitaland was Mr. Towne's client. While respondent was employed at Kingsley and Towne, he did some work on a matter involving Capitaland and on the estate of Mr.

Rullo's mother.

4. In June 2000, after Mr. Towne told respondent that he was having difficulty getting a building permit for Capitaland, respondent placed a call to the town building department to expedite the issuance of a building permit for Capitaland's renovations.

5. On July 25, 2000, at 5:50 PM, respondent signed a search warrant for the premises of Capitaland on the application of the Department of Environmental Conservation (DEC). The warrant application, which was sworn to before respondent by the presenting officer, alleged that Capitaland permitted an unauthorized hauler to transport and dispose of hazardous substances, particularly ethylene glycol, an antifreeze, from Capitaland's underground storage tanks. The search warrant authorized the DEC and the attorney general's office to sample the liquids found in the tanks, to dye-test the drains and to seize documentary evidence pertaining to the transportation or disposal of ethylene glycol and other liquid wastes of Capitaland.

6. After signing the search warrant and completing court business, respondent left the court and, shortly thereafter, telephoned Mr. Towne's law office from his car, using his cell phone. Respondent left a message on Mr. Towne's voice mail, asking him to call respondent either on his cell phone, if Mr. Towne was still in the office, or at respondent's home.

7. When respondent arrived home, he placed a second telephone call to

Mr. Towne's home and left a message on his answering machine, asking Mr. Towne to "give me a call sometime this evening."

8. Mr. Towne, who was on a fishing trip in Maine at the time, was notified by his wife that respondent had called and left a message for Mr. Towne to call him that evening. At approximately 7:50 PM that evening, Mr. Towne returned respondent's calls. Respondent did not know that Mr. Towne was out of the area.

9. In their brief telephone conversation, respondent told Mr. Towne that there was a problem with Capitaland regarding ethylene glycol, that respondent had just signed a search warrant for the Capitaland premises at the request of the DEC, and that Mr. Towne should have a meeting with his client right away in order to solve the ethylene glycol problem.

10. Respondent knew that the search warrant would be executed shortly.

11. Following his conversation with respondent, Mr. Towne immediately reported the conversation to attorneys and sought advice as to his obligations with respect to the matter. Mr. Towne did not notify his client of the impending search.

12. The search warrant signed by respondent was executed on the morning of July 27, 2000. Samples taken from the underground tanks were found not to be hazardous, and Capitaland was not charged as a result of the search.

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)(6) and 100.3(B)(10) of the Rules Governing Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By notifying an attorney that he had just signed a search warrant for premises of the attorney's client, respondent engaged in egregious misconduct that was inconsistent with the fair and proper administration of justice.

The record establishes that within minutes of signing the warrant, respondent attempted to contact the attorney, left two urgent telephone messages for the attorney to return the calls and, in the ensuing conversation, imparted the highly confidential information that he had just signed a search warrant against the attorney's client at the request of the DEC and that the client had an ethylene glycol problem. Respondent's extraordinary, *ex parte* communication jeopardized the integrity of the DEC's search since, as the DEC officer testified, potential problems could have been concealed on short notice. His unauthorized disclosure of the search warrant was contrary to the ethical rules (Sections 100.3[B][6] and 100.3[B][10] of the Rules Governing Judicial Conduct) and was also a potential violation of the Penal Law (*see* Penal Law §195.05 [Obstructing Governmental Administration]; Penal Law §205.50 [Hindering Criminal Prosecution]; Penal Law §195.00 [Official Misconduct]). Moreover, by advising the attorney of the

search warrant, respondent placed the attorney in an ethical quandary and seriously compromised the attorney's ability to represent his client.

Respondent's misconduct is not mitigated by his claim that he had no intent to disclose the search warrant when he placed the calls and that he contacted the attorney only because, having recently done a favor for the attorney and his client, he was angry that the client now had "a problem with ethylene glycol." That very "problem" was the subject of the search warrant, and having placed two urgent telephone calls to discuss the subject, respondent cannot minimize his responsibility by claiming that disclosure of the search warrant just "slipped out," as he testified at the hearing. He is fully responsible for his actions and his words. Moreover, even respondent's version of the incident depicts a judge who lacks judicial temperament and an understanding of his judicial role: he assumed the client's guilt upon reading the search warrant application; he disclosed highly confidential information because he was angry and "lost control"; and he wanted to tell the attorney to meet with his client immediately to "solve the problem" which was the subject of the warrant. Even without a specific reference to the search warrant, that message would have been a serious breach of his ethical duties.

Respondent's misconduct cannot be viewed as a momentary lapse of judgment. Between his first call to the attorney and the actual conversation, respondent had approximately two hours to consider what he wanted to say and to recognize that he should say nothing whatsoever pertaining to the subject. His persistence in attempting to

contact the attorney, and the opportunity he had for reflection, suggest a determined, deliberate decision to convey the message that was conveyed.

Respondent's misconduct was inexcusable and cannot be attributed to inexperience or ignorance. As a judge since 1995 and an attorney, respondent had no doubt that the search warrant was confidential and that disclosing it to the attorney was absolutely prohibited.

The effectiveness of the judicial system is dependent upon the public's trust in the integrity of the judiciary. Respondent's unauthorized disclosure of confidential information acquired in his judicial capacity was a perversion of the judicial process, and the fact that the attorney did not act upon the information should not inure to respondent's benefit. Such conduct seriously distorted his role as a judge and irredeemably damages public confidence in the integrity of his court. While the extreme sanction of removal "is not normally to be imposed for poor judgment, even extremely poor judgment," in this case respondent's misconduct "transcends poor judgment" and is "truly egregious." Matter of Sims v. Comm on Jud Conduct, 61 NY2d 349, 356 (1984); Matter of Steinberg v. Comm on Jud Conduct, 51 NY2d 74, 81 (1980); Matter of Mazzei v. Comm on Jud Conduct, 59 NY2d 870, 871 (1983). His misconduct constitutes a serious breach of the public trust which demonstrates that he is unfit for judicial service.

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

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

Mr. Coffey was not present.

CERTIFICATION

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

Dated: February 6, 2002

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