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

DIANE A. LEBEDEFF,

a Judge of the Civil Court of the City of
New York and an Acting Justice of the
Supreme Court, New York 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
Mary Holt Moore[1]
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian for the Commission

Gair, Gair, Conason, Steigman & Macauf (By Ben B. Rubinowitz)
for Respondent

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[1] Ms. Moore resigned from the Commission on September 22, 2003. The vote in this matter was taken on September 18, 2003.

The respondent, Diane A. Lebedeff, a judge of the Civil Court of the City of New York and an acting justice of the Supreme Court, Queens County, was served with a Formal Written Complaint dated October 8, 2002, containing one charge. Respondent filed an answer dated November 12, 2002.

On September 8, 2003, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts, agreeing that the Commission make its determination based upon the agreed facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On September 18, 2003, the Commission approved the Agreed Statement of Facts and made the following determination.

1. Respondent has been a judge of the Civil Court since January 1983 and an acting justice of the Supreme Court since 1988. She has handled all aspects of cases involving guardianships for Allegedly Incapacitated Persons ("AIPs"), having been assigned approximately 200 such cases a year for several years. By the end of 1998 and for the next two years, respondent was assigned 60% of the guardianship cases in Manhattan, which amounted to approximately 200 such cases per year.

2. Alice Krause is an accountant who specialized in preparing personal income tax returns. Operating out of her apartment in Manhattan, she prepared approximately 800 tax returns annually, until terminating her practice after suffering a stroke in March 2002.

3. Ms. Krause first met respondent around 1978, when they served

together on a Community Board in Manhattan. They became friends, and Ms. Krause has been respondent's annual federal and state tax preparer since approximately 1980.

4. On three occasions, respondent appointed Alice Krause as a fiduciary or guardian of the personal needs of an AIP, and on two occasions respondent approved compensation to Ms. Krause for her services in such matters. In making such appointments, respondent specifically advised the parties in those litigations that Ms. Krause was her personal accountant, and there were no objections to Ms. Krause's service.

5. Alice Krause was one of more than 600 people appointed in more than 400 guardianship cases pending before respondent.

6. From 1980 to 1996, as a general practice, Ms. Krause prepared and contemporaneously billed respondent for her annual tax preparation services, and respondent paid such bills in a timely manner. Ms. Krause's billing practices were not always consistent and her bills were not always accurate. In at least one year during this period, respondent paid Ms. Krause more than the amount for which she should have been billed, and in the following year, respondent's bill from Ms. Krause was reduced accordingly.

7. On December 17, 1993, respondent made her first fiduciary appointment of Alice Krause, as Guardian of the Person and Property of Miriam Seborer.

8. On June 28, 1996, respondent made her second fiduciary appointment of Alice Krause, as Trustee of the Helen Marks Supplemental Needs Trust.

9. On March 28, 1997, respondent approved a fee of approximately $16,500 to Ms. Krause in the *Seborer* case.

10. On October 15, 1997, Ms. Krause prepared respondent's 1996 federal and state income tax returns, but respondent was not billed for such services until July 2001 and did not pay until after July 2001.

11. On November 7, 1997, respondent approved a fee of approximately $5,393 to Ms. Krause in the *Marks* case.

12. On December 2, 1997, Ms. Krause prepared respondent's 1995 federal and state income tax returns, but respondent was not billed for such services until July 2001 and did not pay until after July 2001.

13. On April 27, 1999, Ms. Krause prepared respondent's 1997 federal and state income tax returns, but respondent was not billed for such services until July 2001 and did not pay until after July 2001.

14. On December 14, 1999, respondent made her third fiduciary appointment of Ms. Krause, as Trustee for Michael Sanchez, an AIP. Although Ms. Krause had not yet submitted a request for payment as of January 2003, she has indicated that she intends to do so.

15. On February 2, 2001, Ms. Krause prepared respondent's 1998 federal and state income tax returns, but respondent was not billed for such services until July 2001 and did not pay until after July 2001.

16. Ms. Krause's standard charge for tax preparation services was $300

a year per client.

17. Ms. Krause averred that during the subject time period she had every intention of billing respondent for her tax preparation services and did not realize until quite some time had passed that, as a result of a glitch in her computer program, a couple of bills had not been generated or sent to several of her clients, including but not limited to respondent.

18. On July 17, 2001, after Ms. Krause was questioned about her relationship with respondent by the court system's Special Inspector General for Fiduciary Appointments, Ms. Krause (through her lawyer) sent respondent invoices of $300 each for the 1995, 1996, 1997 and 1998 tax returns. Respondent at first expressed her surprise to Ms. Krause that the bills had not previously been paid, and she thereafter paid Ms. Krause $1,200.

19. Notwithstanding that Ms. Krause's tax preparation and billing practices were at times delayed and inconsistent, respondent should have known that for a four-year period in which she was awarding fiduciary appointments and fees to Ms. Krause, respondent herself was not being billed for and was not paying for the tax preparation services Ms. Krause was providing to her.

20. Respondent concedes that she created an appearance of impropriety by not paying for income tax preparations by Ms. Krause in the same four-year time period that respondent was making fiduciary appointments and approving fiduciary fees to Ms. Krause. Respondent acknowledges that the timing and nature of the relationship

and transactions between respondent and Ms. Krause required respondent to insure that she was receiving bills from Ms. Krause and paying her on a timely basis for the personal services Ms. Krause was rendering to her.

21. Commission Counsel does not allege or offer evidence to support a claim that there was a *quid pro quo* or similar understanding between respondent and Ms. Krause concerning the facts herein.

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

By failing to pay her accountant for tax preparation services over the same period that she was appointing the accountant as a fiduciary and approving more than $21,000 in compensation for her, respondent engaged in misconduct that created an appearance of impropriety.

Respondent appointed her accountant and long-time friend, Alice Krause, as a fiduciary in 1993 and 1996, and in March 1997, she approved an initial fee of $16,500 for Ms. Krause. Thereafter, Ms. Krause, who had prepared respondent's income tax returns since 1980 and had, as a general practice, contemporaneously billed her for such services, prepared respondent's income tax returns for the years 1995 to 1998 but

did not bill respondent for those services until July 2001, after the court system's Special Inspector General had questioned Ms. Krause about her relationship with respondent. Respondent then paid Ms. Krause a total of $1,200 for her work on the 1995-1998 returns.

The timing of respondent's receipt of that $1,200 benefit – during a period when she was conferring a benefit on Ms. Krause by appointing her and approving her compensation – creates the appearance of a *quid pro quo*. It has been stipulated that no *quid pro quo* has been alleged or proved. Nonetheless, the appearance of such a serious breach of judicial ethics diminishes public confidence in the integrity of the judiciary and requires disciplinary action. As the Court of Appeals stated in *Matter of Spector*, 47 NY2d 462, 465, 466 (1979), in admonishing a judge for the "appearances of impropriety" stemming from his appointments:

> [In addition], and this is peculiar to the judiciary, even if it cannot be said that there is proof of the fact of disguised nepotism, ***an appearance of such impropriety is no less to be condemned than is the impropriety itself.*** [Emphasis added.]

In *Spector*, the judge had awarded appointments to the sons of two other judges who were contemporaneously appointing his son. The Court noted that while there was no finding of a *quid pro quo*, the "circumstantial appearance of impropriety" permitting such an inference required public discipline (*Id.* at 468, 469). The Court stated:

> Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct which is all too often popularly attributed to the judiciary. To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a

> very subjective and often faulty public perception would be to fail to comprehend the principle. The community, and surely the judges themselves, are entitled to insist on a more demanding standard. As Chief Judge Cardozo wrote in *Meinhard v Salmon* (249 NY 458, 464): "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." And there is no higher order of fiduciary responsibility than that assumed by a judge.
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> 47 NY2d at 468-69

When appointing Ms. Krause as a fiduciary, respondent had a duty to avoid even the appearance of receiving any financial benefits from her appointee. Since she continued to use Ms. Krause's services as an accountant while appointing her and approving her fees, respondent should have been particularly careful to ensure that she paid for those services, and her failure to do so cannot be excused by inattention or oversight. Her dereliction of her ethical responsibilities created an appearance of impropriety permitting an inference that she accepted free tax preparation services from her appointee over a four-year period which ended only with the Special Inspector General's inquiry into the matter. This departure from the high standards of conduct required of every judge, both on and off the bench, jeopardizes the public's respect for the judiciary as a whole, which is essential to the administration of justice.

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

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

Mr. Goldman did not participate.

Judge Luciano and Ms. Moore were not present.

CERTIFICATION

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

Dated: November 5, 2003

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