

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

BRIAN D. MERCY,

**AGREED
STATEMENT OF FACTS**

A Justice of the Glenville Town Court and an
Acting Justice of the Scotia Village Court,
Schenectady County.

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
Honorable Brian D. Mercy ("respondent"), who is represented in this proceeding by
Robert P. Roche, Esq., that further proceedings are waived and that the Commission
shall make its determination upon the following facts, which shall constitute the entire
record in lieu of a hearing.

1. Respondent was admitted to the practice of law in New York in 2001. He has been a Justice of the Glenville Town Court, Schenectady County, since January 1, 2011, and an Acting Justice of the Scotia Village Court, Schenectady County, since December 4, 2007. Each of these positions is part time. Respondent's term in the Glenville Town Court expires on December 31, 2014, and his current term in the Scotia Village Court expires on December 5, 2012.

2. Respondent was served with a Formal Written Complaint dated

March 12, 2012, and filed an Answer dated March 26, 2012.

As to Charge I

3. At all times relevant to the matters herein, Stephen F. Swinton, Jr., and Paul S. Zonderman were part-time town court justices of the Niskayuna Town Court, Schenectady County, and attorneys engaged in the private practice of law in Schenectady County. Judges Swinton and Zonderman were admitted to the practice of law in New York in 2004 and 1977, respectively.

4. At all times relevant to the matters herein, in addition to serving as a part-time town or village court justice in Schenectady County, respondent was engaged in the private practice of law in Schenectady County.

5. From in or about 2002 until in or about December 2008, respondent was an associate at the Law Offices of Kouray & Kouray, which maintains an office in Schenectady, New York. In or about December 2008, respondent formed the Law Office of Brian D. Mercy, PLLC., which maintains an office at 514 State Street, Schenectady, New York.

6. Megan M. Mercy is an attorney who was admitted to the practice of law in New York in 2005. Megan M. Mercy is respondent's wife and an associate at Brian D. Mercy, PLLC.

7. As set forth below, from in or about April 2008 to in or about April 2009, respondent represented private legal clients in seven cases in the Niskayuna Town Court, Schenectady County, before Judges Swinton and Zonderman, notwithstanding that Judges Swinton and Zonderman, like respondent, are part-time town court justices in

Schenectady County who are also permitted to practice law, and notwithstanding a promulgated rule that prohibits a part-time judge from practicing law in a court in the county in which his/her court is located, before judges who are permitted to practice law.

8. Respondent acknowledges that his representation of clients in cases in the Niskayuna Town Court, before Judges Swinton and Zonderman, violated Section 100.6(B)(2) of the Rules Governing Judicial Conduct (“Rules”).

People v Sharran Sukhoo

9. On April 4, 2008, Sharran Sukhoo was charged by the Niskayuna Police Department with Speeding, in violation of Section 1180(d) of the Vehicle and Traffic Law (“VTL”). The traffic ticket was returnable in the Niskayuna Town Court on May 7, 2008.

10. On April 23, 2008, respondent wrote a letter to the Niskayuna Town Court advising that he represented Mr. Sukhoo on the violation, entering a not-guilty plea on Mr. Sukhoo’s behalf and communicating that he intended to negotiate the disposition with the prosecutor by mail.

11. On April 23, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, advising that he represented Mr. Sukhoo, enclosing a copy of an auto repair order which, according to respondent, indicated that Mr. Sukhoo’s speedometer had been malfunctioning at the time of the infraction, and requesting that the People consent to a guilty plea to the reduced charge of violating Section 1110-a of the VTL, which requires motorists to obey traffic control devices.

12. On May 7, 2008, a Memorandum of Negotiated Plea was prepared and signed by the Assistant District Attorney and Judge Zonderman, in which the People and the court agreed to accept a guilty plea to the reduced charge of violating Section 1110-a of the VTL in exchange for a \$100 fine and \$55 surcharge. The Memorandum was not signed by respondent or Mr. Sukhoo.

13. By letter dated August 21, 2008, Judge Swinton advised respondent that, in light of the failure to agree upon a disposition of the case, a trial on the original charge had been scheduled for September 29, 2008.

14. On September 29, 2008, after Mr. Sukhoo failed to appear for his trial, Judge Swinton convicted Mr. Sukhoo *in absentia* of violating Section 1180(d) of the VTL and sentenced him to pay a \$165 fine and \$55 surcharge.

15. On October 3, 2008, respondent called the Niskayuna Town Court and advised that Mr. Sukhoo was not responding to respondent's calls and letters. Respondent indicated that he would forward the fine notice to Mr. Sukhoo but did not expect a response from him. Mr. Sukhoo paid the fine and surcharge to the court on February 5, 2009.

People v Alyssa Singh

16. On April 7, 2008, Alyssa N. Singh was charged by the Niskayuna Police Department with Failure to Yield Right of Way at a Stop Sign, in violation of VTL §1142(a). The ticket was returnable in the Niskayuna Town Court on May 7, 2008.

17. On April 30, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, advising that he represented Ms. Singh and requesting a supporting deposition.

18. On July 15, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, enclosing a copy of the supporting deposition and requesting that the People consent to an adjournment in contemplation of dismissal because the supporting deposition showed "the officer has no first hand knowledge of the alleged infraction."

19. On August 25, 2008, a Memorandum of Negotiated Plea was prepared and signed by the Assistant District Attorney and Judge Zonderman, in which the People and the court agreed to accept a guilty plea to the reduced charge of violating VTL §1201(a), No Parking, in exchange for a fine of \$150.

20. In or about August 2008 or September 2008, respondent and Ms. Singh signed the Memorandum of Negotiated Plea.

21. On September 9, 2008, respondent's colleague, Steven Kouray, wrote the Niskayuna Town Court a letter, enclosing an escrow check in the amount of \$150, representing Ms. Singh's fine, and the fully executed Memorandum of Negotiated Plea, signed by respondent and Ms. Singh.

People v David Pierpont

22. On August 8, 2008, David J. Pierpont was charged by the Niskayuna Police Department with Failure to Yield Right of Way at a Stop Sign, in violation of VTL

§1142(a). The ticket was returnable in the Niskayuna Town Court on September 10, 2008.

23. On August 18, 2008, respondent wrote the Niskayuna Town Court a letter advising that he represented Mr. Pierpont on the charge and entering a not-guilty plea on his behalf. Respondent also communicated that he intended to negotiate a disposition with the Assistant District Attorney through the mail.

24. On August 18, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, advising that he represented Mr. Pierpont and requesting a supporting deposition.

25. On November 3, 2008, Judge Zonderman dismissed the charge against Mr. Pierpont. A handwritten note on the court's copy of the ticket states, "Dismiss – no supp dep." Underneath that note, in apparently different handwriting, appears the notation, "Looks like we never requested one," and is initialed, "PZ."

People v Katrina L. Dryer

26. On August 24, 2008, Katrina L. Dryer was charged by the Niskayuna Police Department with Disobeyed Traffic-Control Device, in violation of VTL §1110(a). The ticket was returnable in Niskayuna Town Court on September 17, 2008.

27. On September 5, 2008, respondent wrote a letter to the Niskayuna Town Court advising that he represented Ms. Dryer, entering a not-guilty plea on her behalf and communicating that he intended to negotiate a disposition with the Assistant District Attorney.

28. On September 5, 2008, respondent wrote a letter to the Niskayuna Town Court, to the attention of the Assistant District Attorney, advising that he represented Ms. Dryer and requesting the Assistant District Attorney's consent to a guilty plea to the reduced charge of violating VTL §1201(a), No Parking.

29. On September 28, 2008, a Memorandum of Negotiated Plea was prepared and signed by the Assistant District Attorney and Judge Swinton, in which the People and the court agreed to accept a guilty plea to the reduced charge of violating VTL §1201(a), No Parking, in exchange for a fine of \$150.

30. In or about September 2008 or October 2008, respondent and Ms. Dryer signed the Memorandum of Negotiated Plea.

31. On October 14, 2008, respondent wrote a letter to the Niskayuna Town Court, enclosing the fully executed Memorandum of Negotiated Plea, signed by Ms. Dryer and respondent, and a Plea by Mail Fine Notice with Ms. Dryer's credit card information filled-in for payment of her fine.

People v Robert Pierpont

32. On January 15, 2009, Robert A. Pierpont was charged by the Niskayuna Police Department with Aggravated Unlicensed Operation in the Third Degree, in violation of VTL §511(1)(a), and Disobeyed Traffic-Control Device, in violation of VTL §1110(a). The tickets were returnable in the Niskayuna Town Court on February 18, 2009.

33. On January 23, 2009, Mr. Pierpont signed a sworn affirmation in which he stated, *inter alia*, "I authorize my attorney, BRIAN D. MERCY,

PLLC./MEGAN M. MERCY, ESQ. to enter a plea of guilty on my behalf.” Respondent notarized the affirmation.

34. On February 18, 2009, Mr. Pierpont appeared in Niskayuna Town Court and pleaded guilty to Facilitating Aggravated Unlicensed Operation, in violation of VTL §511-a(1). Judge Swinton accepted Mr. Pierpont’s plea, convicted him of said charge in full satisfaction of all charges and sentenced him to pay a fine of \$200 and a surcharge of \$85.

35. On February 25, 2009, respondent sent a letter to the Niskayuna Town Court, addressed to “Your Honor,” stating that “[o]n February 18, 2009, Mr. Pierpont appeared before you and entered a plea of guilty to facilitating aggravated unlicensed operation of a motor vehicle. The court has imposed a fine in the amount of \$285.” Respondent enclosed a “Brian D. Mercy, PLLC. attorney escrow check” in the amount of \$285.

People v Phoolmattie Dehal

36. In or about January 2009, Phoolmattie Dehal was charged with Grand Larceny in the Third Degree, in violation of Penal Law §155.35, Petit Larceny, in violation of Penal Law §155.25, and two counts of Falsifying Business Records in the First Degree, in violation of Penal Law §175.10.

37. On January 22, 2009, respondent called the court and asked if the hearing would go forward as scheduled. He stated that his wife or Steven Kouray would represent Ms. Dehal.

38. On March 30, 2009, respondent sent a letter on his law firm letterhead by facsimile to the Niskayuna Town Court, addressed to "Your Honor." He wrote, "Ms. Dehal is scheduled to appear before you on 4/1/09. I have spoken with ADA Laurie Hammond-Cummings and she has consented to an adjournment of one month while we determine a restitution figure." Respondent went on to request an adjournment until April 29, 2009. As a result, Judge Swinton adjourned the matter to April 29, 2009.

39. On April 29, 2009, Ms. Dehal appeared in Niskayuna Town Court and pleaded guilty to Petit Larceny in full satisfaction of all charges. Judge Swinton sentenced Ms. Dehal to a conditional discharge upon the conditions that she pay restitution in the amount of \$10,920 and complete 70 hours of community service.

40. Respondent signed a check dated April 28, 2009, drawn on his IOLA Account and made payable to Niskayuna Consumer's Co-Operative, Inc., in the amount of \$10,920. A handwritten note on the check states, "Dehal - Rest."

People v John Thomas

41. In or about January 2009, John Thomas was charged with Outside Storage of Junk in violation of Section 220-16A(2)(f) of the Code of the Town of Niskayuna.

42. By criminal summons dated January 23, 2009, Judge Swinton directed Mr. Thomas to appear in the Niskayuna Town Court for an arraignment on February 4, 2009.

43. On February 4, 2009, Megan M. Mercy, respondent's wife, appeared with Mr. Thomas at his arraignment before Judge Swinton at the Niskayuna Town Court.

At the arraignment, Ms. Mercy gave the court respondent's business card with "Megan Mercy, esq." handwritten across the top. After Mr. Thomas entered a not-guilty plea, the matter was adjourned until March 4, 2009.

44. Megan Mercy appeared in the Niskayuna Town Court with Mr. Thomas again on March 4, 2009 and March 18, 2009. On March 18, 2009, Judge Swinton adjourned the matter until April 1, 2009, with a trial date of April 8, 2009.

45. On April 1, 2009, the town attorney appeared in the Niskayuna Town Court on the *Thomas* matter. Neither Mr. Thomas nor Ms. Mercy appeared in the court on that date. Judge Swinton scheduled a trial for April 8, 2009, at 9:00 AM.

46. On April 7, 2009, respondent telephoned the Niskayuna Town Court and requested that the trial scheduled for the following day be adjourned. Through a court clerk, Judge Swinton advised respondent that his request was denied, but that the trial would be moved from 9:00 AM to 12:00 PM.

47. On April 8, 2009 at 8:40 AM, respondent sent Judge Swinton a letter by fax advising that neither Ms. Mercy nor James E. Walsh, Esq., who had been scheduled to represent Mr. Thomas for trial, could appear on that date. Respondent went on to request that Judge Swinton reconsider his refusal to grant an adjournment.

48. On April 8, 2009 at about 12:00 PM, Mr. Thomas appeared in the Niskayuna Town Court without an attorney. Judge Swinton adjourned the matter to May 13, 2009.

49. On April 8, 2009 at 3:41 PM, respondent sent a letter to Judge Swinton by fax requesting a transcript of that day's proceeding in the *Thomas* case.

50. On April 29, 2009, Judge Swinton sent a letter to respondent advising that, "pursuant to Section 100.6(B)(2) of the Rules Governing Judicial Conduct, this court will not act upon or otherwise respond to your letters of 08 April 2009." Thereafter, Mr. Thomas retained other counsel, and respondent made no further communications to the Niskayuna Town Court regarding the *Thomas* matter.

51. By reason of the foregoing, respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety in that he failed to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and practiced law in a court in the county in which his court is located, before judges who are permitted to practice law, in violation of Section 100.6(B)(2) of the Rules.

Additional Factors

52. Respondent did not physically appear in the Niskayuna Town Court before Judges Swinton and Zonderman for any representation on the matters identified herein.

53. Respondent has not represented clients in the Niskayuna Town Court since in or about April 2009.

54. Respondent has been cooperative with the Commission throughout its inquiry.

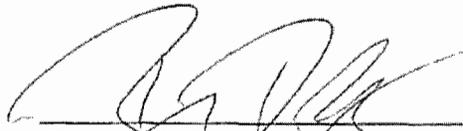
55. Respondent now appreciates that, as an attorney-judge, he has a responsibility to learn about and carefully adhere to the applicable restrictions on the practice of law. Respondent regrets his failure to abide by the Rules in this instance and pledges to accord himself with the Rules.

IT IS FURTHER STIPULATED AND AGREED that respondent withdraws from his Answer any denials or defenses inconsistent with this Agreed Statement of Facts.

IT IS FURTHER STIPULATED AND AGREED that the parties to this Agreed Statement of Facts respectfully recommend to the Commission that the appropriate sanction is public Admonition based upon the judicial misconduct set forth above.

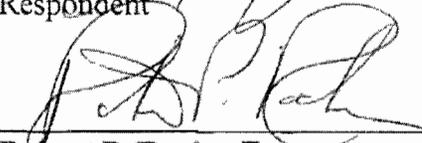
IT IS FURTHER STIPULATED AND AGREED that if the Commission accepts this Agreed Statement of Facts, the parties waive oral argument and waive further submissions to the Commission as to the issues of misconduct and sanction, and that the Commission shall thereupon impose a public Admonition without further submission of the parties, based solely upon this Agreed Statement. If the Commission rejects this Agreed Statement of Facts, the matter shall proceed to a hearing and the statements made herein shall not be used by the Commission, the respondent or the Administrator and Counsel to the Commission.

Dated: 6/4/12



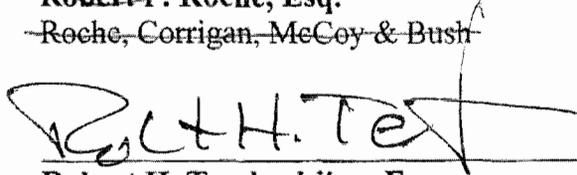
Honorable Brian D. Mercy
Respondent

Dated:



Robert P. Roche, Esq.
~~Roche, Corrigan, McCoy & Bush~~

Dated: 6/7/2012



Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(S. Peter Pedrotty, Esq. Of Counsel)