

REPORT OF THE NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT
REGARDING COMPLAINTS AGAINST THE
HONORABLE LUIS A. GONZALEZ,
PRESIDING JUSTICE OF THE
APPELLATE DIVISION, FIRST DEPARTMENT



March 30, 2012

New York State Commission on Judicial Conduct
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Appendix A: Complaint dated March 29, 2011

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I. INTRODUCTION

This report is issued by the New York State Commission on Judicial Conduct pursuant to Judiciary Law Sections 42(4) and 44(10). It concerns the Commission's investigation of complaints conducted pursuant to Judiciary Law Section 44(2). The judge who is the subject of the complaints, Presiding Justice Luis A. Gonzalez of the Appellate Division, First Department, has waived confidentiality pursuant to Judiciary Law Section 45, which permits release of the complaints and the Commission's dispositive action.

The Commission issues this report (1) because the complaints against Judge Gonzalez have been highly publicized and the subject of widespread and often inaccurate speculation within the court and legal communities and (2) because the significant public policy implications of hiring practices at the Appellate Division, addressed in this report and referred for action to the Chief Judge, the Administrative Board of the Courts, and the Chief Administrative Judge, warrant public disclosure and comment.

A. Constitutional and Statutory Authorities Pertaining to the Commission

Article 6, Section 22(a) of the New York State Constitution authorizes the Commission to receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the Unified Court System.

Judiciary Law Section 44(2) authorizes the Commission, on its own motion, to initiate an investigation of a judge with respect to his/her conduct and to file as part of its record a written complaint signed by its Administrator, which shall serve as the basis of the investigation. (Such complaints are referred to as Administrator's Complaints.)

Judiciary Law Section 44(10) authorizes the Commission to refer matters to the attention of various officials, including the Chief Judge and judges with administrative responsibilities.

Judiciary Law Section 42(4) authorizes the Commission to make annual and other public reports which may include legislative and administrative recommendations, subject to statutory provisions regarding confidentiality.

Judiciary Law Section 45 authorizes a judge who is the subject of a complaint to waive confidentiality so the Commission's disposition of the matter may be made public.

B. The Appellate Division of Supreme Court; the Unified Court System

The New York State Supreme Court is this state's superior trial court. There are approximately 335 Supreme Court Justices serving throughout the state.

The Appellate Division of Supreme Court is the state's intermediate appellate court. There are approximately 56 Appellate Division Justices presently serving throughout the state. Appellate Division Justices are appointed by the Governor from among the ranks of elected Supreme Court Justices.

The state court system is administratively divided into four judicial departments. There is an Appellate Division situated in each of the four departments, led by a Presiding Justice appointed by the Governor. The First Judicial Department covers Manhattan and the Bronx, and the Appellate Division courthouse is located in Manhattan. The other Appellate Division courthouses are in Brooklyn, Albany and Rochester.

The Court of Appeals is New York State's highest court. There are seven Judges of the Court of Appeals, which is situated in Albany and led by the Chief Judge of the State of New York, who is appointed by the Governor with the consent of the Senate.

Policy for the court system is set by the Chief Judge and the Court of Appeals, in consultation with the four Presiding Justices of the Appellate Divisions, who along with the Chief Judge comprise the Administrative Board of the Courts. Court system policies are memorialized in the New York Codes, Rules and Regulations (NYCRR), among other places.

The New York State Unified Court System, comprised of approximately 3,500 judges and justices and approximately 16,000 employees, is administered by the Chief Administrator of the Courts, who is appointed by the Chief Judge and heads the Office of Court Administration (OCA). However, in many significant respects, the Court of Appeals and the Appellate Divisions are responsible for administering themselves. 22 NYCRR §§80.3, 80.4.

All judges and justices of the Unified Court System are bound to abide by the Rules Governing Judicial Conduct, as promulgated by the Chief Administrator on approval of the Court of Appeals. 22 NYCRR §100 *et seq.* The Commission on Judicial Conduct enforces those rules. 22 NYCRR §7000.9.

C. The Complaints Against Judge Gonzalez

The Honorable Luis A. Gonzalez is a Justice of the New York State Supreme Court, presently serving as Presiding Justice of the Appellate Division, First Department. He is a graduate of Eastern Mennonite University (BA 1968) and Columbia University

School of Law (JD 1975). He held various positions in government and private practice from 1975-85 and various judicial positions from 1985 to the present, including Administrative Judge in the Bronx, where he supervised both the criminal and civil branches of Supreme Court from 1999-2002. In 2002 he was appointed an Associate Justice of the Appellate Division, First Department, and in March 2009 he was appointed Presiding Justice.

In 2011, based upon information that had been brought to its attention, the Commission authorized three Administrator's Complaints against Presiding Justice Gonzalez, setting forth four allegations.

1. It was alleged that Judge Gonzalez falsely attested on mortgage documents that his Brooklyn home would be his primary residence, and that he improperly benefited from a "STAR" tax credit on his Brooklyn home, when his primary residence was an apartment in the Bronx. This allegation implicitly raised an issue as to whether Judge Gonzalez met the residency requirement for serving as Presiding Justice.
2. It was alleged that Judge Gonzalez improperly permitted the private practice of law by his executive assistant, Susan Hernandez.
3. It was alleged that Judge Gonzalez arranged or permitted a "no-show" job at the Appellate Division for Maria Baez, a former New York City Council member.
4. It was alleged that Judge Gonzalez engaged in nepotism and/or favoritism with regard to the hiring of his ex-wife as a court employee, and the hiring of others such as his secretary's brother, his executive assistant's nephew and his driver's son.

Information regarding the "no-show" job was originally communicated to the Commission's Administrator by another judge. Information regarding the other allegations was originally reported in the press. The complaints are appended.

The complaints have been exhaustively investigated. Approximately 60 witnesses were interviewed, many more than once, approximately half under oath. Hundreds of pages of documents were examined, including mortgage and other banking documents, residential rental leases, pertinent pages of the judge's income tax filings,¹ pertinent Appellate Division job descriptions and hiring records, and OCA employee time and leave records. Hiring protocols and procedures relating to the hiring of over 40

¹ Relevant income tax records were voluntarily provided by Judge Gonzalez to the Commission.

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employees were reviewed. Judge Gonzalez appeared with counsel for two full days of investigative testimony.

In short, and as indicated more fully in this report, the Commission has reached the following conclusions.

- The first three allegations listed above are not established.
- As to the fourth allegation, the Commission found that the hiring practices at the Appellate Division, First Department, both before and during Judge Gonzalez's tenure, raise serious questions that require the detailed comments and recommendations for reform made in this report.

On the following pages, this report examines each of the four allegations and concludes with recommendations to the Chief Judge, the Administrative Board of the Courts and the Chief Administrative Judge.

II. THE RESIDENCY, MORTGAGE AND STAR TAX CREDIT ISSUES

A. The Complaint

Based upon a newspaper report, it was alleged that Judge Gonzalez falsely attested on mortgage documents that his Brooklyn home would be his primary residence, and that he improperly benefited from a “STAR” tax credit on his Brooklyn home, when his primary residence was an apartment in the Bronx. This allegation implicitly raises an issue as to whether Judge Gonzalez met the residency requirement for serving as Presiding Justice.

B. Background

Judge Gonzalez has been divorced from his wife (Vivian Gonzalez) for over a decade, although their relationship has remained cordial. They have two adult daughters.

Judge Gonzalez has owned a two-bedroom house with a basement apartment in Brooklyn for many years. At various times, he and/or one of his daughters have resided there. At other times, Judge Gonzalez has resided in an apartment in the Bronx, which has always been leased either in his name alone or jointly in his and his brother’s names.

Judge Gonzalez and Vivian Gonzalez never resided together in the Brooklyn house or the Bronx apartment.

C. Appellate Division Residency Requirements

While an Associate Justice of the Appellate Division may reside anywhere in New York State, the Constitution requires a Presiding Justice to reside in the department where his/her court is situated. NY Const Art 6, §4. The First Department is comprised of Manhattan and the Bronx. Therefore, the Presiding Justice of the Appellate Division, First Department, must reside in either Manhattan or the Bronx.

D. Chronology of Salient Events

In January 2000, Judge Gonzalez was living in a rental apartment in the Bronx. At various times between January 2000 and March 2009, he lived either in the Bronx rental apartment or the Brooklyn house.

Judge Gonzalez was appointed an Associate Justice of the Appellate Division in March 2002. There was no violation of law or other impropriety associated with his living in Brooklyn while serving as an Associate Justice of the Appellate Division.

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In November 2008, Judge Gonzalez was living in the Brooklyn house, as was one of his daughters and her child. The judge had given up the lease on his Bronx apartment. The Brooklyn house was his primary residence.

In November 2008, Judge Gonzalez applied for a mortgage with Union Federal Mortgage Corporation (UFMC) on the Brooklyn house. On the mortgage application, he accurately reported the house as his primary residence. Judge Gonzalez was awarded a mortgage on February 6, 2009, by UFMC, backed by the Federal Housing Administration.

At the time he was awarded the mortgage, Judge Gonzalez was entitled to the New York State School Tax Credit (STAR), which applies only to a taxpayer's primary residence. However, he did not separately fill out the STAR forms as part of the mortgage application or at the closing. As was the prevailing practice in New York City at the time, and as confirmed by witness interviews and our review of the mortgage documents and other documents presented at the closing, applicability of the STAR credit was assumed and correctly applied by UFMC, which was servicing both the mortgage and the tax payments. Judge Gonzalez credibly testified that his attention was not called to the STAR credit at the closing, and that subsequently he made monthly payments on the combined mortgage and tax obligations, as billed by UFMC, without realizing that he was benefitting from the STAR credit.

In January 2009, Governor David A. Paterson nominated Jonathan Lippman to be Chief Judge of the Court of Appeals. At the time, Judge Lippman was Presiding Justice of the Appellate Division, First Department, having served in that position since May 2007.

Judge Lippman was confirmed by the Senate and took office as Chief Judge on February 11, 2009, creating a vacancy for Presiding Justice of the Appellate Division, First Department. Judge Gonzalez applied for the position and on March 1, 2009, in order to meet the constitutional residency requirement for Presiding Justice, Judge Gonzalez moved to the Bronx building in which he had previously resided, albeit in a different apartment unit. He signed a lease, changed his driver's license and voter registration to reflect his new primary address, and notified his bank, the Office of Court Administration and others. On March 25, 2009, he was appointed Presiding Justice by Governor Paterson.

For 2008 and 2009, Judge Gonzalez filed his income tax returns in a timely manner, accurately reporting the Brooklyn house as his residence in 2008 and the Bronx apartment as his residence in 2009. He first learned about the STAR credit issue when a reporter for the New York Post asked him about it in March 2011. At that point, the judge's attorney communicated with the relevant tax authorities, and Judge Gonzalez refunded the \$560 that the New York City Finance Department said he had been credited

for STAR. Other than the STAR benefit, there was no other tax benefit to Judge Gonzalez for living in Brooklyn as opposed to the Bronx, since for tax purposes, the five counties making up New York City are regarded as one.

E. Analysis

Judge Gonzalez was in compliance with the applicable residency requirements at all times material to this matter.

There were no misrepresentations on the mortgage documents.

The confusion over the STAR benefit is *de minimis* and, given the prevailing practice in New York City at the time, not attributable to the judge, who repaid the credited amount on learning about it.

F. Disposition

This complaint is dismissed.

III. ALLEGED PRIVATE PRACTICE OF LAW BY JUDGE'S EXECUTIVE ASSISTANT

A. The Complaint

Based upon a newspaper report, it was alleged that Judge Gonzalez improperly permitted the private practice of law by his executive assistant, Susan Hernandez.

B. Background

Susan Hernandez began working at the Appellate Division in May 2010, first as an attorney assigned to the Departmental Disciplinary Committee (DDC), then as Judge Gonzalez's executive assistant. A newspaper article indicated that she was practicing law at Roura & Melamed in Manhattan while simultaneously employed by the court.

Roura & Melamed was founded by Ms. Hernandez's husband, Walter Roura. Ms. Hernandez worked at the firm while attending law school. Prior to working at the Appellate Division, Ms. Hernandez had a solo legal practice, sharing space at Roura & Melamed from 1998 to 2009.

The newspaper report was apparently based on a phone call to the firm in April 2011 by a journalist, who reportedly asked the receptionist whether Ms. Hernandez would be available for a consultation and was supposedly told yes. There is no indication that an appointment was actually made or that anyone visited or met with Ms. Hernandez at the firm since she started work at the Appellate Division.

C. Court Rules

Court system rules prohibit a lawyer employed full-time by the courts from engaging in the private practice of law, with very limited exceptions (such as handling wills or estate matters for relatives), and then only with permission of the Chief Administrative Judge or the appropriate Presiding Justice of the Appellate Division.

D. Review of Records; Witness Interviews

Ms. Hernandez denied engaging in any private practice of law since going to work at the Appellate Division in May 2010. She does not maintain an outside office. Inasmuch as she has not practiced law outside her job at the Appellate Division, she never asked Judge Gonzalez for permission to practice law, and he never granted such permission.

Independently, Judge Gonzalez testified that he was unaware of any instance in which Ms. Hernandez engaged in outside law practice.

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Judge Gonzalez, Ms. Hernandez and the current Clerk of the Court, Susanna Rojas all attested to the long hours Hernandez devotes to her courthouse job.

Ms. Hernandez's financial disclosure report for 2010 shows no outside legal practice, either solo or with Roura & Melamed or any other firm. (The report shows that she received deferred payments from clients for past legal work.) Her OCA time and leave records show no indication of unusual time off. Review of electronic court records in the five counties of New York City shows no pending cases in which she is recorded as counsel.

The Roura law firm website makes no mention of Ms. Hernandez. A description of the firm and photos of the principals in a June 2011 New York Magazine article do not mention or show Ms. Hernandez.

Ten months after Ms. Hernandez started working at the Appellate Division, OCA's online registry of lawyers still listed her professional address as that of the building in which her former office was located. At the same time, however, it accurately listed her court system email address. The partially inaccurate entry for Ms. Hernandez on the OCA online registry of lawyers does not constitute evidence that she is engaged in the unauthorized practice of law.

E. Analysis

There is no credible information from which to conclude that Judge Gonzalez authorized Ms. Hernandez to engage in the private practice of law, or that she did so engage in the private practice of law, while employed at the Appellate Division.

F. Disposition

This complaint is dismissed.

IV. ALLEGED NO-SHOW JOB

A. The Complaint

Based upon information provided to the Commission by an Associate Justice of the Appellate Division, it was alleged that Judge Gonzalez arranged or permitted a “no-show” job at the Appellate Division for Maria Baez, a former New York City Council member.

B. Background

Maria Baez served by election on the New York City Council from January 2002 through December 2009. She lost the Democratic primary in September 2009 and left office when her term expired on December 31, 2009.

Ms. Baez went to work at the Appellate Division as a Principal Court Analyst, at a salary of \$64,834, in June 2010. Three months later, Ms. Baez transferred to a job with the court system’s Department of Public Safety in White Plains.

On September 2, 2011, an Associate Justice of the Appellate Division telephoned the Commission’s Administrator and advised of having been informed by employees of the court that Judge Gonzalez had arranged for and/or permitted a “no-show” job for Ms. Baez.

C. Witness Interviews

Ms. Baez was hired on the recommendation of, and reported to, Elba Castro, who had been executive assistant to Judge Gonzalez and then became Deputy Clerk of the Court.

Ms. Baez was hired to help study and evaluate the court examiners program, in connection with a possible reorganization, and to work on other administrative assignments. (Court examiners are appointed pursuant to Article 81 of the Mental Hygiene Law to report *inter alia* on whether guardians or other appointees have properly fulfilled their obligations.) Witnesses attested to Ms. Baez’s having worked at the Appellate Division for approximately three months.

In September 2010, at her request, for family and health-related reasons, Ms. Baez was transferred by OCA to a position in White Plains. This was corroborated by Ms. Castro and independently confirmed by two senior officials at OCA. Ms. Baez remains on the job in White Plains.

D. Review of Employee Records

Ms. Baez’s hiring and transfer documents, and her time and leave records, all corroborate the foregoing and show that she has “clocked in” regularly, whether assigned to the Appellate Division in Manhattan or with OCA in White Plains. While she has taken some accrued annual leave and sick leave to which she is entitled, she is not in arrears and has a positive balance on her time and leave records.

At the time of the complaint in this matter, OCA’s electronic court-system email directory listed Ms. Baez as located at the Appellate Division, even though she had been working in White Plains for nearly a year. This may account for the erroneous impression that she was a “no-show” at the Appellate Division.

E. Analysis

Maria Baez did not have a “no-show” job at the Appellate Division or anywhere else in the court system.

F. Disposition

This complaint is dismissed.

V. **ALLEGED FAVORITISM AND NEPOTISM IN HIRING**

A. **The Complaint**

Based upon newspaper reports, it was alleged that Judge Gonzalez engaged in nepotism and/or favoritism with regard to the hiring of his ex-wife as a court employee, and the hiring of others such as his secretary's brother, his executive assistant's nephew and his driver's son.

B. **Applicable Rules**

Every Justice of the Supreme Court may appoint and at pleasure remove two personal appointees: one law clerk and one secretary. 22 NYCRR §5.1. A Presiding Justice of an Appellate Division has additional staff, which in Judge Gonzalez's case included an executive assistant, a second secretary and a driver.²

While the Chief Administrator has broad responsibility for the process of hiring employees throughout the court system, the Appellate Divisions control the hiring of their own employees. 22 NYCRR §80.3(a)(2). Except with regard to a judge's personal appointees, the Appellate Divisions typically delegate hiring and other administrative responsibilities to the Presiding Justice and/or the Clerk of the Court. 22 NYCRR §80.3(a)(3). The Chief Administrator's powers and duties with respect to the Appellate Divisions are specifically limited. 22 NYCRR §80.3(b). Indeed, as the highest courts in and policy-makers for their respective judicial departments, the Appellate Divisions have historically operated with a significant measure of autonomy.

As cited below, certain relatives of a judge may not be appointed to positions in the judge's court, and all judges are obliged to avoid nepotism and favoritism in the making of appointments.

22 NYCRR Part 8 – Rules of the Chief Judge

8.1 Prohibited Appointments

No person shall be appointed to a position in any State-paid court of the Unified Court System if he or she is a relative within the fourth degree of relationship, or the spouse of such relative, of any judge or the spouse of such judge of the same court within the county in which the appointment is to be made. The Appellate Divisions and Appellate Terms of the Supreme Court shall not be considered the same court as the Supreme Court for purposes of this Part.

² Judge Gonzalez reassigned his driver and his second secretary to the court's general employment pool in late 2010 and early 2011, respectively.

8.2 Application

This Part shall not apply to appointments to positions in the competitive class nor to persons who have held permanent appointments in positions in the Unified Court System prior to the effective date of this Part or prior to the relative becoming a judge.

22 NYCRR Part 100 – Rules Governing Judicial Conduct

100.3(C)(3) [Appointments]

A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered. A judge shall not appoint or vote for the appointment of any person as a member of the judge's staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the fourth degree of relationship of either the judge or the judge's spouse or the spouse of such a person. A judge shall refrain from recommending a relative within the fourth degree of relationship of either the judge or the judge's spouse or the spouse of such person for appointment or employment to another judge serving in the same court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the appointment of relatives of judges....

C. Scope of the Commission's Investigation

The Commission does not have general powers of inquiry into the operations of the court system. Its jurisdiction is limited to investigations of specific complaints of judicial misconduct against judges and justices of the Unified Court System. NY Const Art 6, §22; Jud L §§44(1), (2). The Commission does not have jurisdiction over non-judges. Accordingly, the Commission's investigation in this matter was limited to the complaints against Judge Gonzalez, as described above.³

Note: Unless otherwise noted, all further references to the Appellate Division are to the First Department.

³ In the course of its investigation, the Commission was informed about hiring practices at the Appellate Division, First Department, predating Judge Gonzalez's tenure on the court, and to a lesser extent about certain hiring practices at the other three Appellate Divisions. It must be noted, however, that except for the current complaints against Judge Gonzalez, the Commission never received a complaint about the hiring practices, past or present, of any Presiding Justice of any Appellate Division. As a result, while information about the hiring practices of others is referenced in this report to provide proper context, those practices were not the subject of the Commission's investigation.

The Commission interviewed 52 present and former staff of the Appellate Division, including the present and three former Clerks of the Court, with experience going back approximately 30 years.

During the Commission's investigation, Judge Gonzalez and others raised an issue about the possible motivations of individuals who seemed to have spoken anonymously to the press, leading to the newspaper reports that prompted this investigation. The Commission does not have information sufficient to form a conclusion about the motivations of those who may have instigated the press reports that compelled it to investigate. The Commission's inquiry focused not on the identity or motives of the unidentified complainants but on the facts pertaining to the alleged conduct. This has always been the Commission's protocol. A well-motivated individual may make an unsubstantiated complaint, and a maliciously motivated individual may make a substantiated claim of misconduct. Even where a known or unknown complainant's motives may be less than altruistic, the Commission's attention has always been on the accused judge's conduct, and its decisions have always been based on whether the conduct at issue was proven and, if so, warranted discipline.

D. Investigative Findings

1. Background

The Appellate Division has 20 judges and approximately 300 employees, including attorneys, administrative staff and other support staff.⁴

The Clerk of the Court is the highest-ranking non-judicial officer of the Appellate Division. Among other things, the Clerk is responsible for the day-to-day administration of the court staff. The Clerk is the only employee of the court to be selected by the entire bench. Other high-ranking employees of the court, such as the Chief Counsel to the Departmental Disciplinary Committee (DDC) and the Director of the Mental Hygiene Legal Services (MHLS), have traditionally been appointed by the Presiding Justice, in consultation with the full bench or a committee of its judges.

2. Filling Administrative (i.e. Non-Attorney) Positions

Traditionally, there have been different protocols for filling attorney versus non-attorney jobs at the Appellate Division.

Vacancies for attorney positions typically have been advertised or posted both inside and outside the Appellate Division.

⁴ At the time of this report, three of the 20 judicial positions were vacant.

On the other hand, with exceptions and variations under some Presiding Justices, vacancies for administrative jobs typically have been “posted” only in internal rooms at the courthouse that are not accessible to the public. Such jobs generally have not been advertised in newspapers or in OCA publications, on the OCA website or in other internet employment listings, or in other government employment listings. Typically, the only way to learn about job openings at the court was to work there or have some connection to someone who did. For decades, hiring at the Appellate Division has generally favored those with acquaintances, friends, relatives or other connections at the court.⁵

This is in contrast to the way other administrative jobs are typically advertised by the court system, where employment announcements are posted on the OCA website and sometimes listed on other employment websites, in newspapers or in other publications.

Prior to 2009, the hiring/interviewing/vetting process at the Appellate Division was coordinated by the Clerk of the Court, usually assisted by a Deputy Clerk, the head of the court unit to which the new employee would be assigned, and sometimes others. Some Presiding Justices had these “hiring panels” or the Clerk of the Court summarize the candidates’ qualifications in a memorandum, with a recommendation as to the first choice. While the Presiding Justice usually made the final decision, typically choosing the recommended individual, on occasion for administrative vacancies the hiring decision was delegated to the Clerk of the Court. Some Presiding Justices would ask a committee of judges to review the recommendations of the hiring panels as to certain positions.

Sometimes the Clerk would advise administrative judges or court personnel outside the building that there were administrative vacancies to fill. For the most part, however, because the jobs were typically posted only inside the Appellate Division courthouse itself, the only applicants were those who had direct or indirect access to the court, such as through an acquaintance, friend, relative or other contact.

Once the Presiding Justice made the hiring selection, the Clerk of the Court would sign the appointment papers and submit them to OCA for processing. But for exceptional circumstances, such as a lack of funding for a particular position, OCA had no standing to thwart an appointment. The employee would not be authorized to begin work, however, until OCA processed the paperwork. Typically, a file would be kept by the Clerk of the Court containing the job announcement, the successful candidate’s resume, the Clerk’s recommendation memo and, for a time, the resumes of others who were considered for the position.

⁵ We do not say that every Presiding Justice in the First Department adhered to this closed-circuit practice, or knew about it, or even had an opportunity to make administrative appointments. Some Presiding Justices had limited tenures and/or relatively few vacancies to fill. Others delegated this responsibility. At least one advertised vacancies externally and publicly, not just in the courthouse.

Judge Gonzalez changed the protocol upon becoming Presiding Justice. He moved the hiring process into his chambers. His executive assistant, rather than the Clerk of the Court, coordinated all the hiring, and the Presiding Justice himself, rather than the Clerk, signed the appointment documents when a new employee was hired. There were no hiring committees as there had been under some of his predecessors.

Judge Gonzalez testified that he changed the procedure in order to emulate the way he handled hiring when he had been Administrative Judge in the Bronx, prior to his appointment as an Associate Justice of the Appellate Division in 2002. He also testified that he wanted the hiring process to be administered by people he trusted and with whom he had a close working relationship. He said it is not his style to “micromanage” once he delegates responsibility. He also testified that he did not interfere with the traditional prerogatives of the DDC Chief Counsel to make a hiring recommendation or veto an appointment, and the MHLS Director to make his/her own hiring decisions.

Judge Gonzalez is not the only Presiding Justice of an Appellate Division to have put his executive assistant, rather than the Clerk of the Court, in charge of the hiring process, and there is nothing inherently inappropriate in doing so. However, while all Presiding Justices, as leaders of their courts, bear general responsibility for the hiring process, accountability becomes more personal and direct as the process gets closer to him or her. Except as otherwise noted in this report, Judge Gonzalez delegated responsibility for filling the vacant administrative positions to his executive assistants.

Judge Gonzalez told his first executive assistant (Elba Castro), and then her successor (Susan Hernandez), to follow the traditional job “posting” protocols of the court, which he knew meant advertising administrative job openings internally, in non-public rooms of the courthouse. He also told them to hire people who would reflect well on the court. He did not tell them anything about retaining the files for vacant positions, and there are few such records available.⁶ Nor did he ask them to draft memoranda evaluating the candidates.

An early retirement incentive in 2010, made available throughout state government as a means of reducing payroll and saving costs, resulted in 46 vacancies at the Appellate Division. This was possibly the largest departure of court employees at any one time in the history of the court; 15% of the Appellate Division’s staff retired.⁷ Excluding the personal appointees of individual judges, court officers and lawyer positions (which traditionally are advertised outside as well as within the courthouse), 25 vacancies in administrative positions were created by the exodus. All 25 were “non-

⁶ In the course of its investigation, the Commission requested documents pertaining to those who applied but were not hired for the vacancies at issue in this report. The response from the court was that such documents did not exist or could not be found.

⁷ Statewide, approximately 10% of the court system’s 17,000-member workforce departed.

competitive” positions, meaning *inter alia* there was no qualifying examination or predetermined list from which to hire.

Other events in 2010 with significant budgetary implications – including a looming cut in funding for the court system overall, and a concern that a system-wide hiring freeze would go into effect – resulted in a concerted effort to fill the open positions at the Appellate Division promptly. Of the 46 vacancies resulting from the retirement incentive, 44 were filled, including all 25 administrative positions. As to the 25, the process was overseen by Judge Gonzalez’s executive assistant, Susan Hernandez.

Virtually all 25 replacements got their jobs through word-of-mouth, because they had acquaintances, friends, relatives or other contacts at the Appellate Division through which they learned of vacancies that were not otherwise advertised. As Ms. Hernandez testified, she "got resumes from people who came by, walking by chambers and just knew there was a job available and handed the secretary a resume to give me."

Six of the 25 had direct family ties to people working in Judge Gonzalez’s chambers:

- Vivian Gonzalez, ex-wife to Judge Gonzalez
- A nephew of Judge Gonzalez’s current executive assistant Susan Hernandez
- A nephew of Judge Gonzalez’s first executive assistant Elba Castro
- A brother of Judge Gonzalez’s secretary
- A son and a cousin of Judge Gonzalez’s driver

Both Judge Gonzalez and Ms. Hernandez testified that, in anticipation of a system-wide hiring freeze that might be announced in early 2011, they accelerated the pace of hiring as the end of 2010 approached, notwithstanding that a senior official at OCA had previously advised Ms. Hernandez not to fill all of the vacancies, in order to conserve the court’s financial resources.⁸

Three of the 25 hires require particular comment.

⁸ When employees leave state government service, their employing agencies are responsible for certain financial commitments, such as paying them for certain unused annual leave. The budgetary impact of such “cash-outs” could *inter alia* limit the funds immediately available for future hires. In the First Department, some new employees were paid before the retirement payouts to departing employees were completed. The resulting deficit of about \$400,000 was made up by transferring surplus funds from the Appellate Division, Second Department.

The Hiring of Susan Hernandez's Nephew. In the summer of 2010, Susan Hernandez asked Judge Gonzalez if it would be appropriate to consider her nephew for a job at the Appellate Division. Judge Gonzalez replied that as long as he is qualified, the answer is yes. Ms. Hernandez then told her nephew ("M") to submit a resume. Thereafter, "M" was first interviewed by his aunt, Ms. Hernandez, and then by Judge Gonzalez, who wanted to interview "M" himself because of the familial relationship between "M" and Ms. Hernandez. Judge Gonzalez said he made the decision to hire "M" for an administrative position because he discerned the young man was good with computers, even though he did not meet the educational or experiential requirements noted in the formal job description, *e.g.* he was not a college graduate and had never worked in the court system.⁹ Judge Gonzalez testified that he regarded the requirements as "guidelines." "M" was hired as a Senior Appellate Court Clerk at a salary of \$58,298. There were no other candidates interviewed or considered for the job.

The Hiring of the Judge's Ex-Wife, Vivian Gonzalez. Both Judge Gonzalez and Susan Hernandez testified that Ms. Hernandez first raised the idea of hiring Vivian Gonzalez in November 2010 to fill a vacancy at the DDC, ostensibly because Ms. Gonzalez had a human resources background, even though the DDC's human resource services are handled by staff at the court's main office.¹⁰ Judge Gonzalez, who knew his ex-wife was looking for a job, passed along her resume to Ms. Hernandez and played no further role, except to do some research to satisfy himself that it would not constitute nepotism to hire his ex-wife, and to sign the hiring papers after Ms. Hernandez made Vivian Gonzalez a job offer. Judge Gonzalez testified that he told Ms. Hernandez not to mention to anyone that Vivian Gonzalez was his ex-wife, ostensibly to avoid the appearance of favoritism.

DDC Chief Counsel Jorge Dopico testified that he first met Vivian Gonzalez when Ms. Hernandez sent her to him for an interview.¹¹ While Mr. Dopico and Ms. Hernandez have differing recollections as to when they discussed that Vivian Gonzalez was the judge's ex-wife, and as to whether Mr. Dopico raised a concern about the ethical implications of such a hire, neither of them raised the ethics issue with Judge Gonzalez. Ms. Hernandez approved the hire, Mr. Dopico did not object, and Judge Gonzalez signed Vivian Gonzalez's appointment papers on December 7, 2010, the same day she was interviewed by Mr. Dopico. Her title was Associate Appellate Court Clerk, and her salary was \$64,834. She worked as a paralegal, not as a human resources specialist, at a higher grade than her supervisor and at a higher salary than most paralegals at the DDC.

⁹ All job titles in the court system, including those at issue in this report, have a formal written description, which includes the qualifications necessary for the positions.

¹⁰ This is not to say there would be no purpose in having a human resources liaison at the DDC.

¹¹ Mr. Dopico was a Deputy Administrator at the Commission from December 2009 to November 2010.

There was no financial benefit to Judge Gonzalez associated with the hiring of his ex-wife. For example, (i) he does not pay spousal support, so there would be no adjustment to his payment due to her changed financial circumstances, (ii) they have no common debts or financial obligations, such as support to their children, who are adults, (iii) they do not own property together and (iv) she has no financial obligations to him.

The Hiring of Elba Castro's Nephew. Elba Castro, who preceded Susan Hernandez as Judge Gonzalez's executive assistant, encouraged her nephew "R" to apply for a position as a Senior Appellate Court Clerk at the Appellate Term in May 2010, at a salary of \$58,298. (The Appellate Term operates within the Appellate Division.) After "R" was interviewed for the job, Ms. Castro advised officials at the Appellate Term that he was her nephew, ostensibly to be above-board and avoid any conflict of interest. She did not advise Judge Gonzalez about the relationship until he signed "R's" appointment papers on June 17, 2010, or that she had so informed Appellate Term officials. "R" did not meet the qualifications listed for this job, *i.e.* he was not a college graduate (at the time he was taking courses online for a bachelor's degree) and did not have equivalent experience, such as prior work for the court system.

3. Budget Cuts and Layoffs

In April 2011, after the Legislature imposed a \$170 million cut in the budget requested by the Chief Judge on behalf of the judiciary, the court system *inter alia* laid off approximately 500 employees. As part of an overall reduction in force, the Chief Administrative Judge asked the Appellate Division, First Department, to reduce its workforce by 10.

The Clerk of the Court, Susanna Rojas, oversaw the layoffs.¹² Neither Judge Gonzalez nor Ms. Hernandez participated. Ms. Rojas, working with the heads of various departments within the Appellate Division, and OCA, identified 10 job titles which would be subject to layoffs. Those with least seniority within the selected titles were laid off. Among those laid off were (a) Vivian Gonzalez, Judge Gonzalez's ex-wife, (b) the son of Judge Gonzalez's driver and (c) the cousin of Judge Gonzalez's driver.

4. Judge Gonzalez's Perspective

Judge Gonzalez noted that the in-house method of filling administrative vacancies long predated his arrival at the Appellate Division. He presented information from two former Presiding Justices, both no longer on the bench, who also limited administrative job postings to non-public rooms in the courthouse. He submitted a list of approximately 50 individuals, all hired before his tenure and some as long as three decades ago, whose

¹² Ms. Rojas is a lawyer who came up through the professional ranks of the Appellate Division and is not the subject of any nepotism or favoritism claim.

relationships with judges and other employees of the court suggest nepotism or favoritism. He said he does not believe the First Department is unique in its practices.

Judge Gonzalez said that all of the staff hired in his tenure were qualified for their positions, that those who did not meet the listed requirements had other qualifications, and that since each was subject to a six-month probationary period, there would be an opportunity to release an employee who did not perform according to expectations.

Nevertheless, as a result of his experience with the Commission, Judge Gonzalez advised the Commission of a proposed change for the First Department, to the effect that all jobs would be advertised on the OCA website and possibly through other employment resources, so the pool of available applicants would be broadened. Judge Gonzalez also advised the Commission that he raised this issue with the Administrative Board of the Courts in December 2011.

Note: In reviewing the data and information provided by Judge Gonzalez regarding the hiring practices of some of his predecessors, and otherwise in the course of gathering information during this investigation, the Commission was advised of certain apparent violations of 22 NYCRR §8.1, which prohibits the hiring by a court of individuals, or the spouses of such individuals, if they are within four degrees of relationship to a judge of the same court, or the judge's spouse.¹³ There do not now appear to be any employees at the Appellate Division in the prohibited category.

E. Practices at Other Appellate Divisions

Judge Gonzalez suggested that there were similarities in hiring protocols between the First Department and the other three departments. While this inquiry was focused on the specific complaints against Judge Gonzalez, the Commission received anecdotal information during its investigation suggesting that there were both similarities and significant differences between the First and the other departments as to filling administrative vacancies. For example, at least one Appellate Division adopted a detailed written hiring protocol several years ago that requires job openings to be announced to the general public via the OCA website, and committees to interview and recommend candidates. And although the OCA website is not uniformly used among the four Appellate Divisions to advertise administrative jobs, at least two of the four departments have "employment opportunities" pages on their individual websites.

The Commission believes that a more uniform and transparent approach among the four Appellate Divisions would be appropriate and makes such a recommendation at the conclusion of this report.

¹³ Relatives within four degrees of relationship would include a first cousin, grandniece, grand-aunt, great-great grandparent and great-great grandchild.

F. Analysis

It seems clear that, with some exceptions, hiring for non-lawyer positions at the Appellate Division, First Department, has been a closed process for decades. A system in which the vast majority of administrative jobs are “posted” only in internal, non-public rooms of the courthouse, is inherently exclusive, in that it requires an acquaintance, friend, relative or some other connection to the court, in order to know about and apply for an open position. Such a practice undermines the judicial obligation to make appointments based on merit, avoiding favoritism and nepotism. It excludes from consideration a vast pool of qualified individuals who have no present connection to the court. It diminishes public confidence in the fairness and impartiality of the courts, even if every person hired for every job was in fact qualified for it.

We do not say that every Presiding Justice in the First Department adhered to this closed-circuit practice, or knew about it, or even had an opportunity to make administrative appointments. Some Presiding Justices had limited tenures and/or relatively few vacancies to fill. Others delegated this responsibility. At least one advertised vacancies externally and publicly, not just in the courthouse.

Judge Gonzalez candidly acknowledged being aware of the closed hiring practices followed by many of his predecessors. By bringing the process into his chambers, however, and ceding much of the hiring responsibility to his executive assistants, he made himself more vulnerable for errors committed under his watch, particularly while dealing with pressures arising from the unprecedented departure of 15% of the court’s staff as a result of the retirement incentive program.

Not every vacant position needs to be filled by a competitive process. Certain jobs, such as those involving specialized skills or experience, or the promotion of deserving employees, may appropriately be filled by a “directed” rather than open search process. That there was no competitive process or meaningful vacancy announcement for any of the 25 administrative jobs at issue here, however, only underscores the sense that the jobs were filled on the basis of nepotism or favoritism. This is especially evident in the hiring of Judge Gonzalez’s ex-wife, and the hiring of relatives of his chambers staff.

To his credit, Judge Gonzalez has acknowledged shortcomings in the present protocols at the Appellate Division, First Department, and is open to making meaningful change.

G. Disposition

The Commission dismisses this complaint with the public comments in this report and also refers this matter to the Chief Judge, the Administrative Board of the Courts and the Chief Administrative Judge, pursuant to Judiciary Law §44(10). The Commission recommends that they collectively examine the hiring practices of the Appellate Divisions, capitalize on existing strengths, devise uniform and more comprehensive guidelines for judges and court employees in order to promote merit and avoid even the appearance of nepotism and favoritism, and adopt more uniform hiring and employment protocols that would include, for example:

1. the public advertising of all job openings – on the OCA website, other employment websites and other appropriate forums – with specific and limited criteria for appropriate exceptions to such a rule;
2. the vetting of applicants for each vacancy by panels of senior Appellate Division staff and, where appropriate, judges;
3. the recusal of any employee from the hiring process when a relative (or relative's spouse) within four degrees of relationship to the employee or employee's spouse is applying for a position; and
4. the assignment of personnel in such a manner as to insure that supervisors and their subordinates are not within four degrees of relationship to each other or each other's spouses.

The Commission believes that such a system-wide reform of the hiring process would ultimately enhance public confidence in the courts and advance such laudable goals as a qualified, diverse and transparently selected workforce.

Appendix A:

Complaint dated March 29, 2011

ADMINISTRATOR'S COMPLAINT

In the Matter of: Luis A. Gonzalez
Presiding Justice
Appellate Division, First Department
New York County

Complaint # 2011/N-0250

Statutory Authorization

This complaint is filed at the direction of the State Commission on Judicial Conduct in compliance with Section 44, subdivision 2, of the Judiciary Law and is intended to serve as the basis for an investigation. In accordance with Section 44, subdivision 3, in the event that the above-named judge is required to appear before the Commission or any of its members or staff, this complaint will be served at the time the judge is notified in writing of the required appearance.

This complaint is not an accusatory instrument. It provides a basis to commence an investigation. Thus, a judge under investigation may be required to reply to other allegations in addition to those set forth below.

Complaint

According to the attached article in the New York Post, it is alleged that Judge Gonzalez took out a mortgage on a Brooklyn house and falsely attested in the mortgage documents that the home would be his primary residence; that he improperly claimed STAR property tax benefits on the Brooklyn home for tax years 2009 through 2011, notwithstanding that the STAR rebate is only available for owner-occupied primary residences, whereas the judge actually lives in a rent-stabilized apartment in the Bronx which he explicitly or implicitly declared to be his primary residence; and that he engaged in nepotism and/or favoritism with regard to the hiring of his ex-wife as a court clerk, and the hiring of others, such as his secretary's brother, his executive assistant's nephew and his former driver's son.



New York, New York

Date Signed: March 29, 2011

Robert H. Tembeckjian, Administrator

Authorized on March 28, 2011

Judge out of order

By ISABEL VINCENT and MELISSA KLEIN

Last Updated: 3:58 PM, March 27, 2011

Posted: 12:19 AM, March 27, 2011

A Manhattan judge in charge of one of the most prestigious state courts in the country lied on mortgage documents, received property-tax breaks he didn't deserve and made questionable hires that included his ex-wife.

Justice Luis Gonzalez, the presiding judge of New York's Appellate Division First Department, simultaneously took advantage of both rent-stabilization rules and home-ownership tax breaks by claiming places in two boroughs as his home, The Post has learned.

In 2009, he took out a \$510,276 loan on a Brooklyn house, attesting on the mortgage document that the property would be his primary residence. He then got a STAR tax break in 2009, 2010 and 2011 -- a perk that amounted to \$4,440 and is supposed to go only for a primary residence.

But Gonzalez really resided in a rent-stabilized Grand Concourse apartment in The Bronx, a living situation that is also supposed to be a primary residence.

Gonzalez confessed his duplicity to The Post, saying he designated the Brooklyn abode as his main home to get the mortgage.

"To be honest with you, I did not think there was anything improper about it," he said. "It sounds super silly, super stupid."

Asked whether the deception was a crime, he said, "If it is, you're talking to someone who is in deep trouble."

Jonathan New, a mortgage-fraud expert and former Manhattan federal prosecutor, said it's a federal crime -- fraud -- to lie on a credit application to a federally insured institution or for a federally insured loan. It is punishable by up to 30 years' prison and a maximum \$1 million fine.

Documents on file with the city show that Gonzalez got the February 2009 loan through now-defunct Union Federal Mortgage Corp. and that the loan was insured by the Federal Housing Administration. Such government-insured loans are available only for a primary residence.

Gonzalez has taken out four mortgages on the Williamsburg home since 2004 and paid off three. On the first, for \$280,000, he also said he would live in the house, on South Sixth Street.

The judge says he lived in the modest two-bedroom house sometime between 2006 or 2007 and 2009, a period in which he borrowed \$467,000 in two loans.

He said he moved back to The Bronx in January 2009 and was unaware the Brooklyn home had a tax break.

Gonzalez, 65, was promoted from an Appellate Division judge to presiding justice in March 2009 by Gov. David Paterson, becoming the first Latino to hold to the position. As presiding judge, he was required to live in The Bronx or Manhattan. He earns \$147,600.

Critics say Gonzalez has allowed nepotism to run rampant in the court. Vivian Gonzalez, whom the judge divorced 10 years ago but remains friendly with, was hired in December as a \$65,000-a-year court clerk.

Gonzalez said there was "no prohibition" against hiring his ex.

He said he signed off on recent hirings of court workers' relatives, including his secretary's brother, his executive assistant's nephew and the son of a court officer who used to be his driver. None had state court experience, state payroll records show. But Gonzalez said all were qualified.

Additional reporting by Candice Giove

melissa.klein@nypost.com

Appendix B:

Complaint dated April 18, 2011

ADMINISTRATOR'S COMPLAINT

In the Matter of: Luis A. Gonzalez
Presiding Justice
Appellate Division, First Department

Complaint # 2011/N-0320

Statutory Authorization

This complaint is filed at the direction of the State Commission on Judicial Conduct in compliance with Section 44, subdivision 2, of the Judiciary Law and is intended to serve as the basis for an investigation. In accordance with Section 44, subdivision 3, in the event that the above-named judge is required to appear before the Commission or any of its members or staff, this complaint will be served at the time the judge is notified in writing of the required appearance.

This complaint is not an accusatory instrument. It provides a basis to commence an investigation. Thus, a judge under investigation may be required to reply to other allegations in addition to those set forth below.

Complaint

According to the attached article from the New York Post, it is alleged that Susan Hernandez-Roura, who serves as Judge Gonzalez's executive assistant, is engaged in the private practice of law, contrary to promulgated court system rules that prohibit full-time employees of the court system from practicing law, with limited exceptions.

New York, New York

Date Signed: April 18, 2011



Robert H. Tembeckjian, Administrator

Authorized on April 18, 2011

Judge in 'double' trouble

By MELISSA KLEIN

April 17, 2011

There may be another ethical breach in Judge Luis Gonzalez's court.

The presiding justice of the Appellate Division's First Department, already under investigation by a state oversight panel, has employed an executive assistant who may be doing double duty.

Gonzalez hired Susan Hernandez-Roura in May 2010 as a lawyer earning \$99,599, later promoting her to his top assistant at a salary of \$126,000.

Hernandez-Roura practiced law downtown before joining the court, and a Post reporter who recently called the firm was told she was available for a consultation.

State rules say a lawyer employed full-time by the court system cannot, with few exceptions, practice law.

The Post has revealed that Gonzalez claimed a Brooklyn home as a primary residence on mortgage documents, while insisting he lived in the Bronx.

Appendix C:

Complaint dated September 6, 2011

ADMINISTRATOR'S COMPLAINT

In the Matter of: Luis A. Gonzalez
Presiding Justice
Appellate Division, First Department
New York County

Complaint # 2011/N-0690

Statutory Authorization

This complaint is filed at the direction of the State Commission on Judicial Conduct in compliance with Section 44, subdivision 2, of the Judiciary Law and is intended to serve as the basis for an investigation. In accordance with Section 44, subdivision 3, in the event that the above-named judge is required to appear before the Commission or any of its members or staff, this complaint will be served at the time the judge is notified in writing of the required appearance.

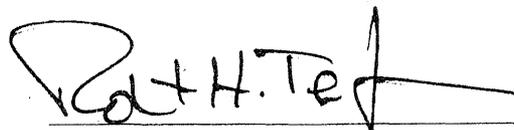
This complaint is not an accusatory instrument. It provides a basis to commence an investigation. Thus, a judge under investigation may be required to reply to other allegations in addition to those set forth below.

Complaint

It is alleged that Judge Gonzalez arranged for and/or permitted a "no-show" job at the Appellate Division as a Principal Court Analyst for former New York City Councilwoman Maria Baez sometime after Ms. Baez was defeated for re-election and left office at the end of her term on December 31, 2009. This information was made known to the Commission in a telephone call on September 2, 2011, from an Associate Justice of the Appellate Division, who advised the Commission's Administrator [of having] been so informed by employees of the court.

New York, New York

Date Signed: September 6, 2011



Robert H. Tembeckjian, Administrator

Authorized on September 6, 2011