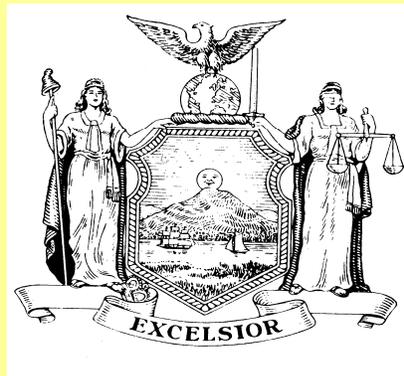


# ANNUAL REPORT

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2008

## NEW YORK STATE



## COMMISSION ON JUDICIAL CONDUCT

**NEW YORK STATE**  
**COMMISSION ON JUDICIAL CONDUCT**

\* \* \*

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JOSEPH W. BELLUCK, ESQ.  
(Appointed 4/1/08)

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RICHARD D. EMERY, ESQ.

PAUL B. HARDING, ESQ.

MARVIN E. JACOB, ESQ.

HON. JILL KONVISER

HON. KAREN K. PETERS

HON. TERRY JANE RUDERMAN

\* \* \*

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### SENIOR LAN ADMINSTRATOR

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### IT OFFICER

\*Herb Munoz

### SENIOR CLERK

Miguel Maisonet

---

\* Denotes staff who recently retired or left for other employment.



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MEMBERS

JEAN M. SAVANYU  
CLERK

May 12, 2008

To Governor David A. Paterson,  
Chief Judge Judith S. Kaye, and  
The Legislature of the State of New York:

Pursuant to Section 42, paragraph 4, of the Judiciary Law of the State of New York, the New York State Commission on Judicial Conduct respectfully submits this Annual Report of its activities, covering the period from January 1 through December 31, 2007.

Respectfully submitted,

Robert H. Tembeckjian, Administrator  
On Behalf of the Commission

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## INTRODUCTION TO THE 2008 ANNUAL REPORT

The New York State Commission on Judicial Conduct is the independent agency designated by the State Constitution to review complaints of misconduct against judges and justices of the State Unified Court System, and, where appropriate, render public disciplinary determinations of admonition, censure or removal from office. There are approximately 3,500 judges and justices in the system.

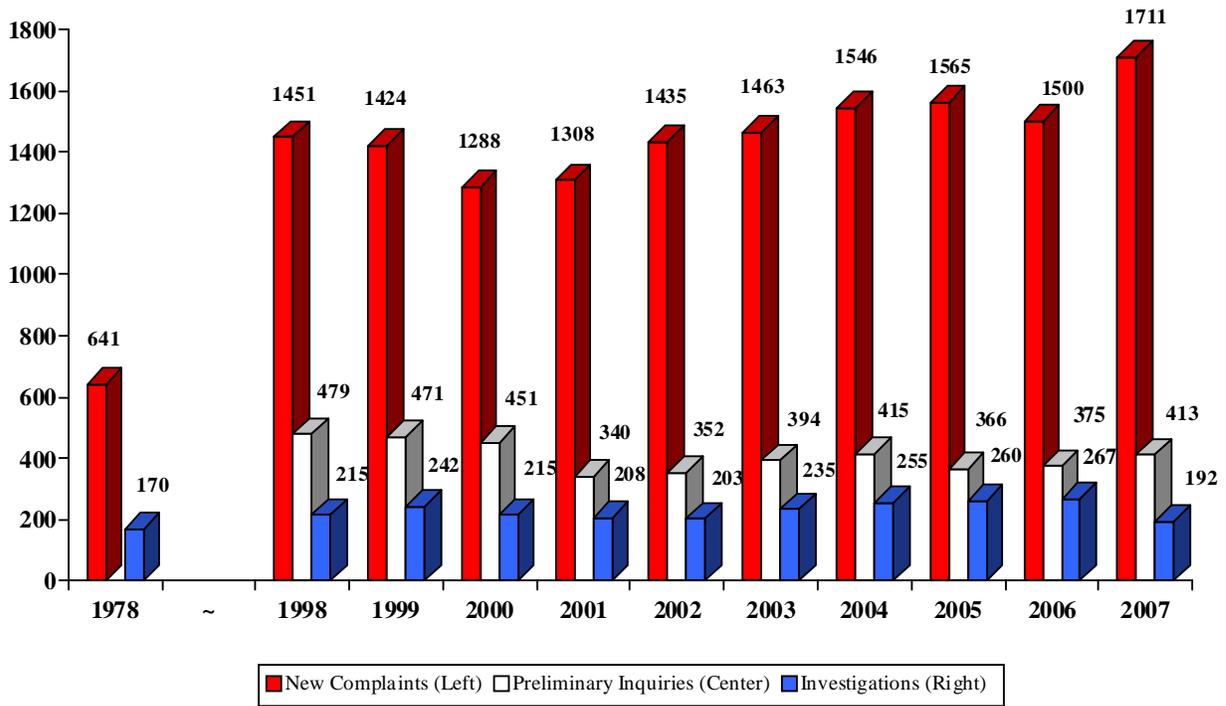
The Commission’s objective is to enforce high standards of conduct for judges, who must be free to act independently, on the merits and in good faith, but also must be held accountable should they commit misconduct. The text of the Rules Governing Judicial Conduct, promulgated by the Chief Administrator of the Courts on

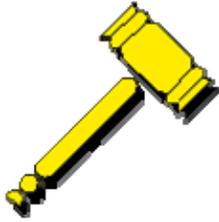
approval of the Court of Appeals, is annexed.

The number of complaints received by the Commission in the past 16 years has substantially increased compared to the first 17 years of the Commission’s existence. Since 1992, the Commission has averaged over 1440 new complaints per year, 400 preliminary inquiries and 200 investigations. Last year, 1711 new complaints were received and processed – the most ever – and 192 of those were investigated. Recently, for the first time in a generation, the Commission’s budget was significantly increased.

This report covers Commission activity in the year 2007.

**Complaints, Inquiries & Investigations in the Last Ten Years**





## Action Taken in 2007

Following are summaries of the Commission's actions in 2007, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

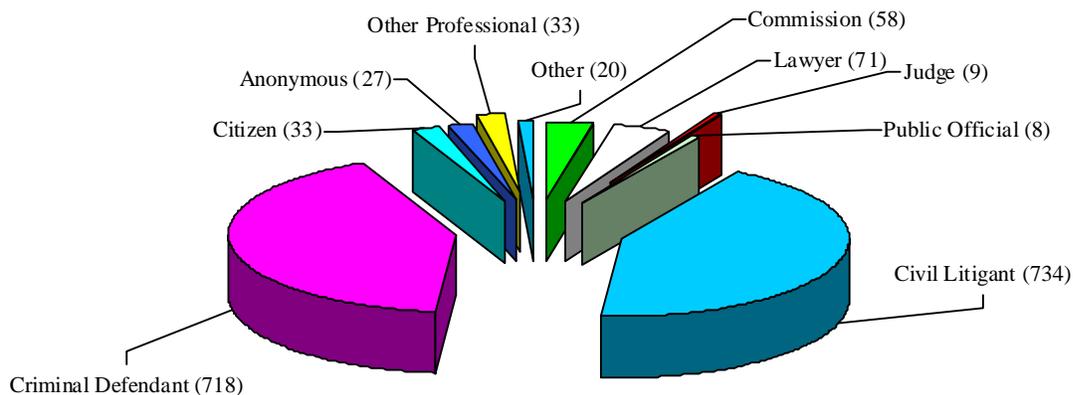
## Complaints Received

The Commission received 1711 new complaints in 2007 – the most ever in one year. Preliminary inquiries were conducted in 413 of these, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts. In 192 matters, the Commission authorized full-fledged investigations. Depending on the nature of the complaint, an investigation may entail interviewing witnesses, subpoenaing witnesses to testify and produce documents, assembling and analyzing various court, financial or other records, making court observations, and writing to or taking testimony from the judge.

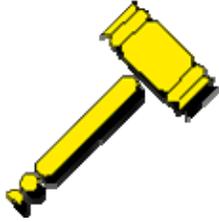
New complaints dismissed upon initial review are those that the Commission deems

to be clearly without merit, not alleging misconduct or outside its jurisdiction, including complaints against judges not within the state unified court system, such as federal judges, administrative law judges, Judicial Hearing Officers, referees and New York City Housing Court judges. Absent any underlying misconduct, such as demonstrated prejudice, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate complaints concerning disputed judicial rulings or decisions. The Commission is not an appellate court and cannot reverse or remand trial court decisions.

A breakdown of the sources of complaints received by the Commission in 2007 appears in the following chart.



Complaint Sources in 2007



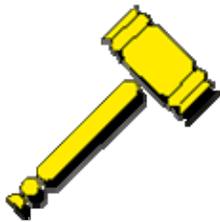
### **Preliminary Inquiries and Investigations**

The Commission's Operating Procedures and Rules authorize "preliminary analysis and clarification" and "preliminary fact-finding activities" by Commission staff upon receipt of new complaints, to aid the Commission in determining whether an investigation is warranted. In 2007, staff conducted 413 such preliminary inquiries, requiring such

steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

During 2007, the Commission commenced 192 new investigations. In addition, there were 228 investigations pending from the previous year. The Commission disposed of the combined total of 420 investigations as follows:

- 136 complaints were dismissed outright.
- 27 complaints involving 24 different judges were dismissed with letters of dismissal and caution.
- 11 complaints involving 8 different judges were closed upon the judges' resignation.
- 19 complaints involving 8 judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 53 complaints involving 30 different judges resulted in formal charges being authorized.
- 174 investigations were pending as of December 31, 2007.



### **Formal Written Complaints**

As of January 1, 2007, there were pending Formal Written Complaints in 47 matters, involving 32 different judges. In

2007, Formal Written Complaints were authorized in 53 additional matters, involving 30 different judges. Of the combined total of 100 matters involving 62 judges, the Commission acted as follows:

- 25 matters involving 24 different judges resulted in formal discipline (admonition, censure or removal from office).
- 10 matters involving 3 judges were closed upon the judge's departure from office, becoming public by stipulation.
- 1 matter involving 1 judge resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- 64 matters involving 34 different judges were pending as of December 31, 2007.

**Summary of All 2007 Dispositions**

The Commission’s investigations, hearings and dispositions in the past year involved

judges of various courts, as indicated in the following ten tables.

**TABLE 1: TOWN & VILLAGE JUSTICES – 2,250,\* ALL PART-TIME**

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	87	241	328
Complaints Investigated	19	84	103
Judges Cautioned After Investigation	2	13	15
Formal Written Complaints Authorized	1	15	16
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	1	18	19
Judges Vacating Office by Public Stipulation	0	1	1
Formal Complaints Dismissed or Closed	0	0	0

Note: Approximately 400 town and village justices are lawyers.

**TABLE 2: CITY COURT JUDGES – 385, ALL LAWYERS**

	<i>Part-Time</i>	<i>Full-Time</i>	<i>Total</i>
Complaints Received	58	186	244
Complaints Investigated	9	21	30
Judges Cautioned After Investigation	0	1	1
Formal Written Complaints Authorized	5	5	10
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	1	1	2
Judges Vacating Office by Public Stipulation	0	0	0
Formal Complaints Dismissed or Closed	0	0	0

Note: Approximately 100 City Court Judges serve part-time.

\*Refers to the approximate number of such judges in the state unified court system.

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**TABLE 3: COUNTY COURT JUDGES – 129 FULL-TIME, ALL LAWYERS\***

---

Complaints Received	214
Complaints Investigated	13
Judges Cautioned After Investigation	2
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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\* Includes 13 who also serve as Surrogates, 6 who also serve as Family Court Judges, and 38 who also serve as both Surrogates and Family Court judges.

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**TABLE 4: FAMILY COURT JUDGES – 127, FULL-TIME, ALL LAWYERS**

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Complaints Received	182
Complaints Investigated	13
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Judges Vacating Office by Public Stipulation	1
Formal Complaints Dismissed or Closed	0

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**TABLE 5: DISTRICT COURT JUDGES – 50, FULL-TIME, ALL LAWYERS**

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Complaints Received	17
Complaints Investigated	4
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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**TABLE 6: COURT OF CLAIMS JUDGES – 86, FULL-TIME, ALL LAWYERS**

---

Complaints Received	54
Complaints Investigated	3
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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**TABLE 7: SURROGATES – 82, FULL-TIME, ALL LAWYERS\***

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Complaints Received	42
Complaints Investigated	2
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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\* Some Surrogates also serve as County Court and Family Court judges. See Table 3 above.

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**TABLE 8: SUPREME COURT JUSTICES – 335, FULL-TIME, ALL LAWYERS\***

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Complaints Received	294
Complaints Investigated	24
Judges Cautioned After Investigation	4
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	1
Formal Complaints Dismissed or Closed	0

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\* Includes 14 who serve as Justice of the Appellate Term.

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**TABLE 9: COURT OF APPEALS JUDGES – 7 FULL-TIME, ALL LAWYERS;  
APPELLATE DIVISION JUSTICES – 67 FULL-TIME, ALL LAWYERS**

---

Complaints Received	29
Complaints Investigated	0
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Vacating Office by Public Stipulation	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

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**TABLE 10: NON-JUDGES AND  
OTHERS NOT WITHIN THE  
COMMISSION’S JURISDICTION\***

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Complaints Received	307
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\* The Commission reviews such complaints to determine whether to refer them to other agencies.

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**Note on Jurisdiction**

The Commission’s jurisdiction is limited to judges and justices of the state unified court system. The Commission does not have jurisdiction over non-judges, retired judges, judicial hearing officers (JHO’s), administrative law judges (*i.e.* adjudicating officers in government agencies or public

authorities such as the New York City Parking Violations Bureau), housing judges of the New York City Civil Court, or federal judges. Legislation that would have given the Commission jurisdiction over New York City housing judges was vetoed in the 1980s.



### **Formal Proceedings**

The Commission may not impose a public disciplinary sanction against a judge unless a Formal Written Complaint, containing detailed charges of misconduct, has been served upon the respondent-judge and the respondent has been afforded an opportunity for a formal hearing.

The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and

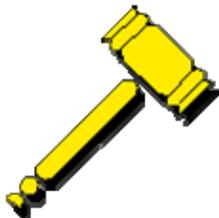
45) prohibits public disclosure by the Commission of the charges, hearings or related matters, absent a waiver by the judge, until the case has been concluded and a determination of admonition, censure, removal or retirement has been rendered.

Following are summaries of those matters that were completed and made public during 2007. The actual texts are appended to this Report.

### **Overview of 2007 Determinations**

The Commission rendered 24 formal disciplinary determinations in 2007: 5 removals, 10 censures and 9 admonitions. In addition, 3 matters were disposed of by stipulation made public by agreement of the parties. Nineteen of the 27 respondents were

non-lawyer-trained judges, and 8 were lawyers. Twenty of the respondents were part-time town or village justices, and 7 were judges of higher courts.



### **Determinations of Removal**

The Commission completed five formal proceedings in 2007 that resulted in determinations of removal. The cases are summarized below, and the texts are appended.

#### **Matter of Jerome C. Ellis**

The Commission determined on July 24, 2007, that Jerome C. Ellis, a Justice of the Leon Town Court, Cattaraugus County, should be removed from office for mishandling an eviction proceeding, presiding notwithstanding that he was biased, and using a religious and ethnic slur. Judge Ellis, who is not a lawyer, did not request review by the Court of Appeals.

#### **Matter of Dennis LaBombard**

The Commission determined on December 12, 2007, that Dennis LaBombard, a Justice of the Ellenburg Town Court, Clinton County, should be removed for *inter alia* presiding on a trespass case in which his two step-grandchildren were defendants, initiating an *ex parte* communication with the judge handling his relative's case, and asserting his judicial office after a car accident. Judge LaBombard, who is not a lawyer, requested review by the Court of Appeals, and the matter is pending.

**Matter of Jean Marshall**

The Commission determined on February 7, 2007, that Jean Marshall, a Justice of the Cuyler Town Court, Cortland County, should be removed for dismissing code violation charges in four cases based on out-of-court conversations and attempting to conceal her misconduct by altering her court calendar and testifying falsely about her actions. Judge Marshall, who is not a lawyer, requested review by the Court of Appeals, which accepted the Commission's determination and removed the judge on July 2, 2007.

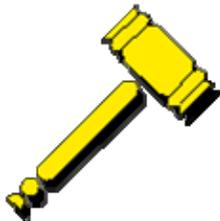
**Matter of Charles P. Myles, Jr.**

The Commission determined on November 1, 2007, that Charles P. Myles, Jr., a Justice

of the Esperance Town Court, Schoharie County, should be removed from office for being convicted of a felony and two misdemeanors. Judge Myles, who is not a lawyer, did not request review by the Court of Appeals.

**Matter of Robert M. Restaino**

The Commission determined on November 13, 2007, that Robert M. Restaino, a Judge of the Niagara Falls City Court, Niagara County, should be removed for committing 46 defendants into police custody in March 2005 after no one took responsibility for a ringing cell phone in the courtroom. Judge Restaino requested review by the Court of Appeals, and the matter is pending.



**Determinations of Censure**

The Commission completed ten formal proceedings in 2007 that resulted in public censure. The cases are summarized below, and the texts are appended.

**Matter of Donald W. Ballagh**

The Commission determined on November 7, 2007, that Donald W. Ballagh, a Justice of the Rose Town Court, Wayne County, should be censured for dismissing two charges and reducing a third without notice to or the consent of the District Attorney. Judge Ballagh, who is not a lawyer, did not request review by the Court of Appeals.

**Matter of Thomas P. Brooks, II**

The Commission determined on November 7, 2007, that Thomas P. Brooks, II, a Justice

of the Veteran Town Court and the Millport Village Court, Chemung County, should be censured for failing to adequately supervise his court staff, resulting in the negligent handling of court funds and for other administrative lapses. Judge Brooks, who is not a lawyer, did not request review by the Court of Appeals.

**Matter of William F. Burin**

The Commission determined on March 16, 2007, that William F. Burin, a Justice of the Lansing Town Court, Tompkins County, should be censured for failing to deposit court funds promptly and for failing to report and remit such funds to the State Comptroller within the time required by law. Judge Burin, who is not a lawyer, did not request review by the Court of Appeals.

**Matter of Edmund V. Caplicki, Jr.**

The Commission determined on September 26, 2007 that Edmund V. Caplicki, Jr., a Justice of the LaGrange Town Court, Dutchess County, should be censured for making inappropriate statements to and about a female attorney who appeared before him. Judge Caplicki, who is a lawyer, did not request review by the Court of Appeals.

**Matter of Anthony J. Cavotta**

The Commission determined on July 19, 2007, that Anthony J. Cavotta, a Justice of the Stillwater Town and Village Courts, Saratoga County, should be censured for failing to adequately supervise his court staff, resulting in the mishandling of court funds. Judge Cavotta, who is not a lawyer, did not request review by the Court of Appeals.

**Matter of Cathryn M. Doyle**

The Commission determined on February 26, 2007, that Cathryn M. Doyle, a Judge of the Surrogate's Court, Albany County, should be censured for giving testimony that showed a "lack of candor" during an investigation by the Commission. Judge Doyle did not request review by the Court of Appeals.

**Matter of Wesley R. Edwards**

The Commission determined on July 19, 2007, that Wesley R. Edwards, a Justice of the Stephentown Town Court, Rensselaer County, should be censured for mishandling several small claims cases, engaging in unauthorized out-of-court communications, and conveying the appearance of bias. Judge Edwards, who is not a lawyer, did not request review by the Court of Appeals.

**Matter of Duane R. Merrill**

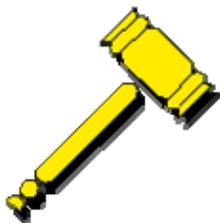
The Commission determined on May 14, 2007, that Duane R. Merrill, a Justice of the Hamden Town Court, Delaware County, should be censured for making biased statements, engaging in improper out-of-court contacts in two impending matters, and presiding over cases in which his former attorney appeared. Judge Merrill, who is not a lawyer, did not request review by the Court of Appeals.

**Matter of Noreen Valcich**

The Commission determined on August 21, 2007, that Noreen Valcich, a Justice of the Tannersville Village Court, Greene County, should be censured for mishandling a case in which she had a professional and social relationship with the defendant. Judge Valcich, who is not a lawyer, did not request review by the Court of Appeals.

**Matter of Edward J. Williams**

The Commission determined on November 13, 2007, that Edward J. Williams, a Justice of the Kinderhook Town and Valatie Village Courts, Columbia County, should be censured for engaging in an improper out-of-court communication regarding a pending case. Judge Williams, who is not a lawyer, did not request review by the Court of Appeals.



## **Determinations of Admonition**

The Commission completed nine proceedings in 2007 that resulted in a determination of public admonition. The cases are summarized as follows, and the texts are appended.

### **Matter of Doris T. Appel**

The Commission determined on May 14, 2007, that Doris T. Appel, a Justice of the Chatham Town Court, Columbia County, should be admonished for presiding over two traffic cases in which she was biased against the defendant's attorney, and thereafter improperly barring the attorney from appearing before her. Judge Appel, who is not a lawyer, did not request review by the Court of Appeals.

### **Matter of Stephen H. Brown**

The Commission determined on December 12, 2007, that Stephen H. Brown, a Justice of the Junius Town Court, Seneca County, should be admonished for sending a threatening letter to a litigant without lawful basis. Judge Brown, who is not a lawyer, did not request review by the Court of Appeals.

### **Matter of Alan L. Honorof**

The Commission determined on April 18, 2007, that Alan L. Honorof, a Judge of the Court of Claims and an Acting Justice of the Supreme Court, Nassau County, should be admonished for failing to make payments he owed under a confession of judgment relating to his former law practice and for asserting invalid claims in litigation related to the matter. Judge Honorof did not request review by the Court of Appeals.

### **Matter of Kevin J. Hurley**

The Commission determined on March 16, 2007, that Kevin J. Hurley, a Justice of the Carlton Town Court, Orleans County, should be admonished for contacting the State Police on behalf of a friend, identifying himself as a judge and otherwise using the prestige of his judicial office to advance his friend's private interests. Judge Hurley, who is not a lawyer, did not request review by the Court of Appeals.

### **Matter of John C. King, Sr.**

The Commission determined on February 14, 2007, that John C. King, Sr., a Justice of the North Hudson Town Court, Essex County, should be admonished for engaging in prohibited political activity while he was a candidate for Town Justice. Judge King, who is not a lawyer, did not request review by the Court of Appeals.

### **Matter of Marion T. McNulty**

The Commission determined on March 16, 2007, that Marion T. McNulty, a Justice of the Supreme Court, Suffolk County, should be admonished for improperly participating in fund-raising activities. Judge McNulty did not request review by the Court of Appeals.

### **Matter of Kathleen L. Robichaud**

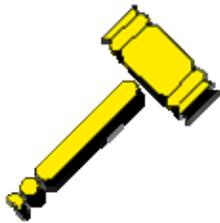
The Commission determined on August 1, 2007, that Kathleen L. Robichaud, a Judge of the Rensselaer City Court, Rensselaer County, should be admonished for delay in rendering decisions in 22 matters and failing to report the delays to court administrators as required. Judge Robichaud did not request review by the Court of Appeals.

### **Matter of Bruce S. Scolton**

The Commission determined on August 1, 2007, that Bruce S. Scolton, a Justice of the Harmony Town Court, Chautauqua County, should be admonished for delays in the disposition of six small claims cases. Judge Scolton, who is not a lawyer, did not request review by the Court of Appeals.

### **Matter of John R. Tauscher**

The Commission determined on February 5, 2007, that John R. Tauscher, a Justice of the Alabama Town Court, Genesee County, should be admonished for making public statements in which he implicitly threatened to reduce fines in future cases unless the Town Board approved a proposed salary increase for himself and his co-judge. Judge Tauscher, who is not a lawyer, did not request review by the Court of Appeals.



### **Other Public Dispositions**

The Commission completed three other proceedings in 2007 that resulted in a public disposition. The cases are summarized below, and the texts are appended.

and the District Attorney's Office on behalf of a friend and attempted to prompt criminal investigations against his friend's estranged husband and brother-in-law. The charges also alleged that the judge lent the prestige of his judicial office to his private family and business matters by using his judicial stationery for personal correspondence. The judge resigned from judicial office, stipulated that he could not successfully defend against the pending charges and affirmed that he would not seek or accept judicial office in the future.

### **Matter of Pauline K. Ashbaugh**

Pursuant to a stipulation, the Commission discontinued a proceeding on November 1, 2007, involving Pauline K. Ashbaugh, a non-lawyer Justice of the Cameron Town Court, Steuben County, after serving the judge with formal charges alleging *inter alia* that she lent the prestige of her judicial office to advance the private interests of her nephew. The judge resigned and affirmed that she would neither seek nor accept judicial office at any time in the future.

### **Matter of Marian R. Shelton**

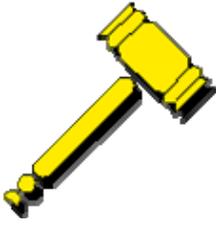
Pursuant to a stipulation, the Commission discontinued a proceeding on September 27, 2007, involving Marian R. Shelton, a Judge of the Family Court, Bronx County, after serving the judge with formal charges alleging *inter alia* that she acted improperly in holding a court employee's spouse in summary contempt without cause and without abiding by lawful procedures. It was stipulated that the woman was handcuffed and that the judge told her to "shut up," "shut your mouth" and "be quiet" and directed that she be placed in a holding cell.

### **Matter of Lawrence I. Horowitz**

Pursuant to a stipulation, the Commission discontinued a proceeding on July 12, 2007, involving Lawrence I. Horowitz, a Justice of the Supreme Court, Westchester County, after serving the judge with formal charges alleging that he intervened with local police

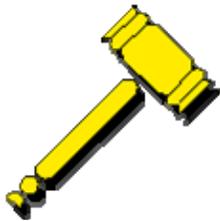
The judge purged the contempt after the woman had spent several minutes in the holding cell. The judge stipulated that she would neither seek nor accept reappointment as a Judge of the Family Court upon the

expiration of her term, and affirmed that she did not intend to seek or accept judicial office or a position as a Judicial Hearing Officer at any time in the future.



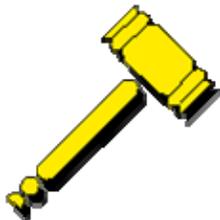
### **Dismissed or Closed Formal Written Complaints**

The Commission disposed of four Formal Written Complaints in 2007 without rendering public discipline. Two complaints were closed upon the resignation of the respondent-judge, pursuant to a stipulation in which the judge waived confidentiality and agreed not to seek judicial office in the future. One complaint was disposed of with a letter of caution, upon a finding by the Commission that judicial misconduct was established but that public discipline was not warranted. One complaint was closed upon the expiration of the respondent judge's term pursuant to a stipulation in which the judge waived confidentiality.



### **Matters Closed Upon Resignation**

Nine judges resigned in 2007 while complaints against them were pending at the Commission. Seven of them resigned while under investigation and two resigned while under formal charges by the Commission. The matters pertaining to these judges were closed. By statute, the Commission may continue an inquiry for a period of 120 days following a judge's resignation, but no sanction other than removal from office may be determined within such period. When rendered final by the Court of Appeals, the "removal" automatically bars the judge from holding judicial office in the future. Thus, no action may be taken if the Commission decides within that 120-day period that removal is not warranted.



### **Referrals to Other Agencies**

Pursuant to Judiciary Law Section 44(10), the Commission may refer matters to other agencies. In 2007, the Commission referred 31 matters to other agencies. (Some matters were referred to multiple agencies.) Twenty-four matters were referred to the Chief Administrative Judge or other officials at the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record keeping or other administrative issues. Six matters were referred to an attorney grievance committee. Two matters were referred to a District Attorney. Two matters were referred to the Attorney General. One matter was referred to the Inspector General. One matter was referred to the Internal Revenue Service.



## Letters of Dismissal and Caution

A *Letter of Dismissal and Caution* contains confidential suggestions and recommendations to a judge upon conclusion of an investigation, in lieu of commencing formal disciplinary proceedings. A *Letter of Caution* is a similar communication to a judge upon conclusion of a formal disciplinary proceeding and a finding that the judge's misconduct is established.

Cautionary letters are authorized by the Commission's rules, 22 NYCRR 7000.1(l) and (m). They serve as an educational tool and, when warranted, allow the Commission to address a judge's conduct without making the matter public.

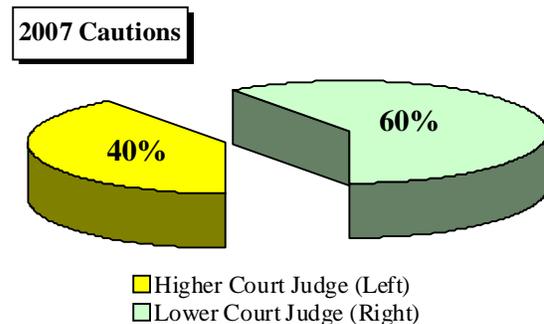
In 2007, the Commission issued 24 Letters of Dismissal and Caution and one Letter of Caution. Fifteen town or village justices were cautioned, including 2 who are lawyers. Ten judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct, as the examples below indicate.

**Improper Ex Parte Communications.** Four judges were cautioned for engaging in unauthorized *ex parte* communications. For example, one judge engaged in multiple conversations with one party concerning a pending proceeding. Another judge spoke out of court with a police officer regarding a case.

**Political Activity.** Seven judges were cautioned for improper political activity. The Rules Governing Judicial Conduct prohibit judges from attending political gatherings, endorsing other candidates or otherwise participating in political activities except for a certain specifically-defined

“window period” when they themselves are candidates for judicial office. The seven judges committed isolated and relatively minor violations of the applicable rules.

**Failure to Adhere to Statutory and Other Administrative Mandates.** Six judges were cautioned for failing to meet certain mandates of law, either out of ignorance or administrative oversight. For example, one was cautioned for imposing improper surcharges and for failing to administer an oath to witnesses. Another examined documents from a prospective party but did not schedule or hear the plaintiff's claim. One judge was cautioned for committing two defendants to jail without bail on misdemeanor charges.



**Charitable Fund Raising.** Except as to bar associations, law schools and court employee organizations, the Rules prohibit a judge from being a speaker or guest of honor at an organization's fund raising event. One judge was cautioned for lending the prestige of judicial office to the fund raising activities of a charitable organization.

**Audit and Control.** One judge was cautioned for collecting a judgment in installments and for not timely depositing or distributing the funds. One judge was

cautioned for not properly supervising a clerk.

**Delay.** Three judges were cautioned for significant delays in scheduling or disposing of cases, despite prompting by the parties.

**Miscellaneous.** Two judges asserted their judicial status in private matters. One judge did not follow through with a promise to officiate at a wedding.

**Follow Up on Caution Letters.** Should the conduct addressed by a cautionary letter continue or be repeated, the Commission may authorize an investigation on a new complaint, which may lead to formal charges and further disciplinary proceedings. In certain instances, the Commission will authorize a follow-up review of the judge's conduct, to assure that promised remedial action was indeed taken. In 1999, the Court of Appeals, in upholding the removal of judge who *inter alia* used the power and prestige of his office to promote a particular private defensive driver program, noted that the judge had persisted in his conduct notwithstanding a prior caution from the Commission that he desist from such conduct. *Matter of Assini v. Commission on Judicial Conduct*, 94 NY2d 26 (1999).



## **COMMISSION DETERMINATIONS REVIEWED BY THE COURT OF APPEALS**

Pursuant to statute, a respondent-judge has 30 days to request review of a Commission determination by the Court of Appeals, or the determination becomes final. In 2007, the Court decided the following Commission matter.

### **Matter of Jean Marshall**

The Commission determined on February 7, 2007, that Jean Marshall, a Justice of the Cuyler Town Court, Cortland County, should be removed from office for engaging in improper *ex parte* communications with the defendants in four building code violation cases, dismissing these cases before the adjourned appearance

dates without notice to or opportunity to be heard by the prosecutor, altering her calendar to conceal her misconduct and testifying falsely about the matter before the Commission. The Court of Appeals accepted the Commission's decision and removed the judge on July 2, 2007. 8 NY3d 741 (2007).



## **CHALLENGES TO THE COMMISSION'S PROCEDURES**

Two proceedings were brought against the Commission pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) by a New York City Family Court judge. The first was commenced in December 2006 and decided in February 2007, and the second was commenced in September 2007 and was settled in October 2007. Article 78 proceedings are public. The matters are summarized below.

### **Matter of Marian R. Shelton v. Commission on Judicial Conduct**

#### **First Article 78 Proceeding**

New York City Family Court Judge Marian R. Shelton commenced a CPLR Article 78 proceeding against the Commission in December 2006, seeking to prohibit the Commission from taking her testimony and otherwise proceeding with investigation of eight complaints alleging in substantial part that she was disrespectful, discourteous, disparaging and otherwise rude and intemperate toward litigants, lawyers, judges, court officers and others with whom she dealt in her official capacity.

Judge Shelton claimed *inter alia* that the Commission lacked jurisdiction to question her as to certain matters because it did not have specific complaints from the allegedly aggrieved individuals and because some categories of grievant (*e.g.*, court officers and fellow judges) were not specifically identified in the Rules Governing Judicial Conduct as people toward whom a judge is obliged to be courteous.

The Commission asserted in its defense that it was explicitly authorized by the Constitution to investigate complaints of habitual intemperance and that, under various court precedents, it did not need a

new complaint to question the judge about matters reasonably related to the existing complaints, which were already the subject of duly authorized investigation.

The matter was assigned to Supreme Court Justice Joan A. Madden in New York County, who granted Judge Shelton's request to seal the record and proceedings, pending decision. After hearing oral argument and receiving written submissions on the merits, Judge Madden denied the petition and dismissed the proceeding. \_\_\_ Misc3d \_\_\_, (Sup Ct NY Co February 8, 2007). Available on Lexis at 237 NYLJ 34 and Westlaw at 2/21/2007 NYLJ 22. Judge Madden also unsealed the record, except for the transcripts of Judge Shelton's previous testimony before the Commission; the parties had agreed previously to redact the names of Family Court litigants from all papers in the case.

Citing *Nicholson v. State Commission on Judicial Conduct*, 50 NY2d 597 (1980), Judge Madden ruled that a writ of prohibition would not lie where, as here, the Commission was operating within its constitutional mandate and where the petitioner could not demonstrate a "clear legal right" to the relief sought. Citing *State*

*Commission on Judicial Conduct v. Doe*, 61 NY2d 56 (1984), Judge Madden ruled that so long as the subject matter of the Commission's questions to Judge Shelton is reasonably related to the complaints under investigation, it is permissible for the Commission to pursue them, even without signed individual complaints for each such reasonably related matter.

On February 9, 2007, Judge Shelton filed a notice of appeal but did not perfect it. On March 6, 2007, her application for a stay of Judge Madden's decision, pending appeal, was denied by the Appellate Division, First Department.

### **Disciplinary Proceeding**

The Commission authorized a Formal Written Complaint against Judge Shelton and designated Robert H. Straus as referee to hear and report proposed findings of fact and conclusions of law. Judge Shelton waived confidentiality with regard to this proceeding.

### **Second Article 78 Proceeding**

On September 17, 2007, Judge Shelton commenced a new Article 78 proceeding in Supreme Court, New York County, seeking a stay and a judgment annulling the Commission's appointment of Mr. Straus as the referee in the pending disciplinary proceeding against her. The judge argued, *inter alia*, that the appointment of Mr. Straus as referee created an appearance of impropriety in that he had served as a Commission staff attorney more than 20 years earlier and had also served as Chief Counsel for the State of New York Grievance Committee for the Second and Eleventh Judicial Districts prior to his retirement from that position. On September 19, 2007, the Commission filed a cross-motion to dismiss the petition. On September 27, 2007, the disciplinary proceeding before the Commission was discontinued pursuant to the terms of a public Stipulation. (*See, Matter of Marian R. Shelton* on pages 213-16 of this report.) On October 11, 2007, the parties appeared before Justice Herman Cahn, and the following day the Article 78 proceeding was discontinued by stipulation.



## **OBSERVATIONS AND RECOMMENDATIONS**

The Commission traditionally devotes a section of its Annual Report to a discussion of various topics of special note or interest that have come to our attention in the course of various proceedings or other matters. We do this for public education purposes, to advise the judiciary so that potential misconduct may be avoided, and pursuant to our statutory authority to make administrative and legislative recommendations.

### **JUDICIAL COMPENSATION**

The New York State Unified Court System has over 3,500 judges and justices, ranging from part-time justices of town and village courts, to part-time or full-time city court judges, to full-time judges of higher courts such as District, Family, County, Surrogate and Supreme Courts. Town and village court justices are also referred to as magistrates, and judges of the higher courts are sometimes referred to as “statewide” judges, even though not all of them have statewide jurisdiction.

The salaries of the approximately 2,250 part-time town and villages justices are set by their local governing authorities, such as an elected town board. They range from less than \$8,000 a year to more than \$50,000, depending on the population, workload and financial resources of the local community. Generally, the salaries tend toward the lower end of the range.

The salaries of the more than 1,250 statewide judges and justices are set by the state Legislature, which also sets the salaries of its own members and the state’s Executive officers and commissioners, subject to approval or veto by the Governor, as with other legislation.

Much public attention has recently been drawn to the fact that the full-time judiciary, as well as Executive officers and commissioners and members of the Legislature, have not had a salary increase since 1999.

In 1999, the Legislature raised judicial salaries to approximate parity with federal judges, equating a state Supreme Court justice with a US District Court judge, and setting the salary at \$136,700. Judges of lower and higher courts were compensated proportionately, ranging from \$108,800 for city court judges in smaller cities, to \$156,000 for the Chief Judge of the State of New York.

Since 1999, the salaries of US District Court judges, which are set by Congress, have increased more than once, to their present level of \$165,200, which is roughly equivalent to the salary for a member of Congress (\$169,300). Federal judges, like full-time New York State judges and most full-time judges throughout the country, are not permitted to practice law or otherwise engage in other employment activities, with limited exceptions, such as teaching classes at a law school.

The Commission believes that an appropriate increase in the salaries of the statewide judiciary is well deserved and long overdue. It has long been the Commission's experience that the overwhelming majority of judges and justices in the State Unified Court System are capable, dedicated, talented and honorable men and women who uphold the high standards of conduct necessary to maintain an independent and fair-minded judiciary, and to promote the fair and proper administration of justice. Without such people of integrity, the delicate constitutional system of checks and balances that is the hallmark of American democracy would erode. Without fair compensation commensurate with the judiciary's important role, the strains on this delicate balance threaten to become acute.

The Commission urges the Legislature to enact and the Governor to sign an appropriate judicial compensation measure.<sup>1</sup>

The Commission makes this recommendation without comment on the merits of pending litigation addressing the judicial compensation issue.

The Commission is also aware of recent published reports suggesting that at least some judges are encouraging or engaging in acts of recusal from cases involving law firms which include members of the state Legislature, purportedly based upon frustration over the compensation issue. Notwithstanding the judiciary's understandable disappointment at the continuing compensation impasse, the Commission calls attention to the relevant opinions of the Advisory Committee on Judicial Ethics, which state and reiterate that, while recusal is discretionary, as long

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<sup>1</sup> Judiciary Law §42(4) authorizes the Commission to make recommendations to the Governor and the Legislature.

as a judge believes he or she can be impartial, recusal is not required in cases involving legislators, notwithstanding the salary lawsuit. The Advisory Committee concluded that, "even following commencement of a judicial compensation lawsuit by the Chief Judge and the Unified Court System, the relationship between a judge, who is not a named party to that lawsuit, and a legislator remains too remote a factor, in and of itself, to reasonably call into question a judge's impartiality when a legislator or a member of his/her law firm appears before a judge in an unrelated action." Joint Opinion 08-76, 08-84, 08-88 and 08-89. (Emphasis in original.) Indeed, the Advisory Committee held that if a judge believes he or she can be fair and impartial, opting for disqualification over the compensation issue would erode public confidence in the integrity, impartiality and independence of the judiciary. *Id.*

Opinions of the Advisory Committee are presumptively binding on the Commission.<sup>2</sup>

The Commission, which enforces the Rules Governing Judicial Conduct that all judges are obliged to observe, notes that among other things, the Rules require that a "judge shall perform the duties of judicial office impartially and fairly," and that "the judicial duties of a judge take precedence over all the judge's other activities." §§100.3, 100.3(A). A judge must be faithful to the law, must be patient, dignified and courteous and must not act with bias for or against any party. §§100.3(B)(1), (3), (4). A judge must observe high standards of conduct, act "at all times in a manner that promotes

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<sup>2</sup> Under Judiciary Law §212, the conduct of a judge who observes an Advisory Committee opinion "is presumed proper for the purposes of any subsequent investigation by the state commission on judicial conduct."

public confidence in the integrity and impartiality of the judiciary” and not use the prestige of judicial office to advance a private interest. §§100.1, 100.2(A), (C). A judge must “not make any public comment about a pending or impending proceeding...” §100.3(B)(8).<sup>3</sup> A judge must not “make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office,” and “with respect to cases, controversies or issues that are likely to come before the court, [a judge must not] make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” §100.3(B)(9)(a, b).

It would benefit neither the judiciary nor their justifiable interest in a fair compensation package for the Commission to be constrained to consider complaints against judges alleged to have violated these or other sections of the Rules in connection with the salary issue. The Commission urges all parties with a role to play in this matter to do so responsibly, professionally and with the utmost sensitivity to promoting public confidence in the independence, integrity, and impartiality of the judiciary, the courts and the administration of justice.

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<sup>3</sup> This paragraph of the Rules “does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.”

## FINANCIAL DISCLOSURE OBLIGATIONS

As noted on the official website of the Unified Court System, the Ethics in Government Act of 1987 was enacted “in order to promote public confidence in government, to prevent the use of public office to further private gain, and to preserve the integrity of governmental institutions. The Act accomplishes those goals by prohibiting certain activities, requiring financial disclosure by certain State employees, and providing for public inspection of financial statements.”

Pursuant to the Act, judges and justices of courts of record – that is, all courts except the town and village courts – and non-incumbent candidates seeking election to courts of record – are required to file annual financial disclosure statements, similar to that filed by other state officials and state government employees. Since 1990, the Ethics Commission for the Unified Court System (UCS Ethics) has been responsible for administering the distribution, collection, review and maintenance of annual financial disclosure statements. The powers, duties and procedures of the USC Ethics are set forth in 22 NYCRR Parts 40 and 7400.

Typically, when a judge is delinquent in submitting the annual statement and fails to respond to notices to cure, USC Ethics advises the Commission, which is likely to undertake an investigation. Where investigation reveals a valid excuse, the Commission will not impose discipline.

Too often, however, the explanations are not persuasive – *e.g.*, the judge was busy, or misplaced the disclosure form, or did not check the mail carefully enough for it, or was distracted by personal matters. In such cases, the Commission has typically issued a Letter of Dismissal and Caution, reminding the judge of the obligation not only to file but also to file promptly.

Fortunately, most judges take their financial disclosure obligations seriously, and the need for USC Ethics to make referrals to the Commission is relatively rare. Nevertheless, the Commission thinks it appropriate to remind the judiciary that a failure to file in a timely manner could subject a judge to public discipline.

## REFERENCE LETTERS BY JUDGES

The matter of whether, when and under what circumstances a judge may write a reference letter has for years been the subject of Advisory Opinions, continuing education and training lectures, and articles. The subject was addressed in a recent edition of *The Magistrate*, a publication of the New York State Magistrates Association, by **Gerald Stern**, who served as the Commission's first Administrator from 1974 to 2003. Mr. Stern is now Special Counsel to the New York State Judicial Institute and Senior Faculty in the Town and Village Justice Education Program. Mr. Stern's article, which is reprinted here with his permission and *The Magistrate's*, aptly portrays the concerns many judges encounter when asked to write such letters, and guides judges to the appropriate Rules, Advisory Opinions and disciplinary decisions.

### The Benefits of Judicial References

At one time or another, we all need good references. Judicial stationery is impressive, and it is understandable that a judge's status would result in requests from relatives, friends, associates and neighbors asking the judge to assist in obtaining admission to schools, finding jobs, buying coop apartments, obtaining licenses, and even getting out of trouble. Good references can work to the great advantage of an applicant or a person facing either discipline or punishment.

### The Tough Issue: May a Judge Be a Reference?

Judges may not lend the prestige of office to advance their own private interests or the private interests of others. Does that prohibit all judicial references? No. Whether references may be given depends on the circumstances -- an answer that creates confusion and makes it necessary to proceed with caution before agreeing to provide a reference.

There is compelling logic in some situations for judges to decline to provide references. Certainly, if the judge has no personal knowledge that would assist the decision maker(s) in making an informed decision, the judge should recognize that the request

really is to use the prestige of judicial office to advance someone's private interests. A typical situation is when a friend asks the judge to provide a reference for the friend's friend or relative, and the judge either does not know the person who needs the reference or has only casual knowledge of the person. That should be a "no-brainer." The judge should politely but firmly just say, "I am not permitted to use the prestige of office to assist or advance private interests."

More complicated are those situations in which judges have relevant information to offer. *Having* relevant information does not in itself warrant *expressing* it, especially when the party to whom it would be addressed has not asked for it. There are many situations when relevant information should not be provided because a judicial reference would have too much influence over the process, constituting the assertion of judicial influence.

How do we distinguish among these numerous situations in which references are sought? Sometimes by logic and realizing by instinct and common sense that a judge should not get involved. Beyond that, it may be helpful to know what the Advisory Committee on Judicial Ethics has determined to be appropriate. Because the facts in each situation are different, it is

often best to ask the Advisory Committee whether the circumstances permit a judge to provide a reference. The Advisory Committee considers the particular circumstances in each case, and cannot be expected to set forth black-letter or bright-line rules that cover all situations. It would be nice if that could be done, but impossible to achieve.

A prudent judge will be cautious, and, unless it is crystal clear that the judge either may or may not provide a reference letter, the judge should ask before doing so.

### **Advisory Opinions**

Here are some principles to remember. When a letter may be written, it must be based on the judge's personal knowledge and on the judge's honest appraisal of the applicant's abilities or character. Even when a letter may be prepared, the content of the letter must otherwise be appropriate. It is conceivable, for example, that a judge who has discretion to write a reference letter may employ language that is inappropriate (i.e. that asserts the influence of judicial office).

On occasion, a letter may be written without any solicitation by the source that would be considering the letter. As a general rule, however, references should be given only if the source asks for the judge's views.

### **Safe Letters**

Law schools and coop boards generally require applicants to submit letters of reference. They do not ask references for information. A judge with information to offer may do so even if the information is unsolicited by the law school or coop board. Op. 88-10; Op. 98-103. Whether a judge may write on behalf of applicants to schools

other than law schools has not been decided, and the safe course would be to seek an opinion before doing so.

### **Pending Investigations And Formal Proceedings**

The Rules Governing Judicial Conduct have been interpreted as permitting a judge to testify as a character witness, but only when the judge is subpoenaed to do so. The testimony would be based on the judge's opinion of the person's reputation, which would be based on what the judge has heard from others.

A judge should not interfere in ongoing court or disciplinary proceedings. Sending an unsolicited letter about a pending matter to a lawyer disciplinary proceeding, a department of probation, the Commission on Judicial Conduct, or a court of law would be regarded as interfering in the proceeding. But if the individual advises the forum that the judge has background information and the forum asks the judge for such information (including an opinion of the individual's character and good deeds), it would be permissible for the judge to express such information to the forum.

Similarly, a judge should decline to provide a reference or character letter for sentencing purposes unless the court or probation department solicits the information. Op. 89-73. A Supreme Court Justice who sent two "sentencing" letters to out-of-state judges on pending criminal cases was publicly disciplined. *Matter of Martin*, Commission Determination, June 6, 2002. Recommending that a defendant be sentenced to prison is also improper, and a judge who wrote such a letter to a County Court judge was publicly disciplined. *Matter of Howell*, Commission Determination, April 6, 2000.

A judge should not supplement a friend's gun-permit application with a judicial reference letter. Op. 95-33. See *Matter of Freeman*, Commission Determination, Nov. 8, 1991 (judge admonished for writing to County judge). If the judge were asked by the forum that has licensing power, the judge could provide personal knowledge of the applicant. So, the judge's response to such a request from the person seeking the license should be: "you may list me as a reference, but I am not permitted to give you a letter."

A judge may provide an unsolicited letter of reference to a character committee that is considering an applicant to the bar. Op. 88-166; Op.91-14. But the judge may not do so on behalf of a disbarred attorney who is seeking readmission to the bar. Op. 95-75.

### **Promoting Business**

A judge may not provide a reference that would be used to promote the sale of a book, but may write a book review for a journal or other publication. Op. 93-14. The difference is that promoting the book to create sales for the author and publisher is more of a business venture than a matter of scholarship.

A judge may not be a reference for a person seeking a bank loan. Op. 89-15. A judge may not submit an unsolicited letter of reference for a business seeking to provide or continue to provide services to a municipality. Op. 97-16. But a judge may write a letter expressing views on the performance of attorneys affiliated with an organization that is seeking public funding or a contract with a municipality; in this situation, the judge should not make a recommendation whether the funding should be provided or the organization's bid should be accepted. Op. 01-100, 101.

The Advisory Committee has permitted judges to write on behalf of friends who seek license application from New York State when the applications must be supported by letters of reference. For example, a judge may write a reference letter to the New York State Education Department for a friend who is seeking to practice acupuncture, and the judge may use judicial stationery as long as he or she adds the words, "Personal and Unofficial" on the letter. Op. 93-12. Care must be taken, however, to avoid asserting influence where a judge's friend is seeking a license from a municipal agency for which letters of reference are not required. The safest course is to seek an opinion from the Advisory Committee based on all the facts of the particular matter. One judge tried to help his friends in this regard. He asked a friend at the municipal agency that was considering the application of a license to look into the reasons why the license had not yet been granted. The judge was publicly disciplined. *Matter of Lonschein*, 50 N.Y.2d 569 (1980).

### **Employment Situations**

A judge who is asked to send an unsolicited letter of reference to a prospective employer may be faced with a difficult ethical issue. The Advisory Committee has authorized a judge to send an unsolicited letter to a District Attorney recommending the hiring of law student as an Assistant District Attorney when the District Attorney does not prosecute cases in the judge's court and where the judge knows both the District Attorney and the law student. Op. 93-95. Similarly, the Committee advised a judge that he or she may serve as a reference for an attorney who is seeking employment with a law firm that does not appear before the judge and is located outside of the jurisdiction of the judge's court. However, it is not clear from the opinion how the judge

intends to serve as a reference, whether it is in writing a letter or simply agreeing to respond if asked by the prospective employer. Op. 01-114. In that same opinion, the Advisory Committee noted that it had previously advised against writing a letter of reference to a District Attorney on behalf of a law student seeking employment when the District Attorney appeared regularly before the judge. But the judge could agree to serve as a reference if asked and could write a favorable “To Whom It May Concern” letter and give it to the law student.

A town justice may recommend the current chair of a political party for the civil service position of court clerk in the town court provided that the person resigns the political office. Op. 93-124.

A judge may recommend an attorney for a position on the Commercial Panel of the American Arbitration Association, and may nominate the lawyer as a member of the panel. Op. 93-129.

A judge may recommend an attorney for an 18-B (assigned counsel) panel as long as the recommendation is “personal and unofficial.” Op. 96-32. But a judge may not write to the Mayor’s Committee on the Judiciary in support of reappointment of another judge, but may respond to an inquiry by the Committee regarding such appointment. Op. 96-17.

The Committee authorized a judge to send a letter to the Governor concerning the fitness of a particular applicant for appointment as District Attorney. Op 95-28. The judge wanted to advise the Governor’s office that the applicant had been removed as a judge. The reasoning of the Advisory Committee was that the matter concerned the law, the legal system and the administration of

justice, and there seemed to be a basis to conclude that such interests would not be served if the applicant were appointed.

There are so many conditions and variables set forth in these employment situations that it would be best for a judge to ask for an opinion before writing a reference letter. To play it really safe, the judge who may be tempted to submit a reference letter for a friend should assume that the friend is competing with others for the job or public position, and an unsolicited letter from a judge may give undue advantage to the judge’s friend. The wiser course would be for the judge to decline to write an unsolicited letter but be available as an alternative to respond to inquiries from the prospective employer or appointing authority.

It may be that the individual who has asked for the letter may not be a serious contender for the position, or there might not even be such an available position. The judge who writes to a prospective employer may unknowingly be suggesting an appointment that had not been under serious consideration. Again, the safer course is to respond to the prospective employer instead of sending such a letter.

A general “To Whom It May Concern” letter is sometimes authorized by the Committee, but such letters may be used for purposes not envisioned by the judge. In the course of the investigations into ticket fixing more than 25 years ago by the Commission on Judicial Conduct, the Commission learned that a general (all-purpose) letter issued by a judge to a friend was shown to a police officer who had stopped the friend for speeding. This was held to be an impermissible use of the prestige of judicial office. Before preparing one, the judge should take into account how such letters

could be misused. Once the judge signs such a letter, he or she has no control over who it will be shown to. While in limited instances the use of such letters has been approved, the potential risk of misuse should make judges extremely wary of using judicial prestige in this way.

### **The Advisory Committee**

The Advisory Committee's opinions may be obtained on the unified court system's web site, which may be found at [www.nycourts.gov](http://www.nycourts.gov). Click on "Judges" on the right and then locate "judicial ethics opinions" on left. Anyone may search by subject, or if a particular advisory opinion is being sought, type the number of the opinion in the box provided, using quotation marks. For example, to find Op. 95-28, type: "95-28."

In writing to the Advisory Committee, it is important to include the specific details of the situation that the judge wants help with.

One judge asked whether he or she could provide general character reference letters on behalf of relatives, friends and neighbors. The Committee advised the judge that without more details, the Committee could not render an opinion. Op. 06-56.

### **Conclusion**

Because there is much mischief that might be done with reference letters, it is best to proceed with caution. A prudent judge will either decline to be a reference or ask the Advisory Committee whether the particular circumstances justify the letter. Approval by the Advisory Committee means that the judge may send the letter without risking the possibility of discipline by the Commission on Judicial Conduct, provided the relevant facts were fully disclosed. Relying on advisory opinions to other judges, except in limited circumstances, may be risky since the pertinent facts may be significantly different.

## THE COMMISSION’S BUDGET

In 2007, for the first time in over a generation, the Commission’s budget was significantly increased, commensurate with its constitutional mandate and increasing caseload.

After public hearings chaired in the Senate by Judiciary Committee Chairman John A. DeFrancisco, and co-chaired in the Assembly by Judiciary Committee Chairwoman Helene D. Weinstein and Codes Committee Chairman Joseph R. Lentol and attended by Governmental Operations Committee Chair RoAnn M. Destito, and after Joint Budget Hearings chaired by Assembly Ways and Means Committee Chairman Herman D. Farrell, Jr., the Legislature, with the support of the four legislative leaders – Assembly Speaker Sheldon Silver, Senate president pro tem Joseph Bruno, Assembly Minority Leader James Tedisco and Senate Minority Leader Malcolm Smith, each of whom appoints one member of the Commission – proposed an

increase in the Commission’s budget from \$2.8 million to \$4.8 million. The Governor agreed, and the budget bill was signed.

In conjunction with the Division of Budget, the Commission developed and over the past fiscal year implemented a staffing and management plan to deploy these additional resources and tackle a backlog that was substantially larger than at any time since 1978, when a widespread practice of ticket-fixing, primarily in town and village courts, dramatically increased the Commission’s investigative docket. Phasing in staff throughout the past year, the Commission was able to reduce the time it takes to resolve complaints and investigations and to reduce the backlog by 14%, despite processing the largest number of new complaints in its history.

A comparative analysis of the Commission’s budget and staff over the years appears below in chart form.

<b>Selected Budget Figures, 1978 to Present</b>							
FISCAL YEAR	ANNUAL BUDGET*	COMPLAINTS RECEIVED*	NEW INVESTIG’NS	PENDING YEAR END	STAFF ATTORNEYS**	STAFF INVESTIG’RS	TOTAL STAFF
1978-79	\$1,644,000	641	170	324	21	18 f/t	63
1988-89	\$2,224,000	1109	200	141	9	12 f/t, 2 p/t	41
1992-93	\$1,666,700	1452	180	141	8	6 f/t, 1 p/t	26
1996-97	\$1,696,000	1490	192	172	8	2 f/t, 2 p/t	20
2005-06	\$2,609,000	1565	260	260	10	7f/t	28½
2006-07	\$2,800,000	1500	267	275	10	7f/t	28½
2007-08	\$4,795,000	1711	192	238	17	10f/t	51

\* Complaint figures are calendar year (Jan 1 – Dec 31); Budget figures are fiscal year (Apr 1 – Mar 31).

\*\* Number includes Clerk of the Commission, who does not investigate or litigate cases.



## **CONCLUSION**

Public confidence in the independence, integrity, impartiality and high standards of the judiciary, and in an independent disciplinary system that helps keep judges accountable for their conduct, is essential to the rule of law. The members of the New York State Commission on Judicial Conduct are confident that the Commission's work contributes to those ideals, to a heightened awareness of the appropriate standards of ethics incumbent on all judges, and to the fair and proper administration of justice.

Respectfully submitted,

**THOMAS A. KLONICK, CHAIR**  
**STEPHEN R. COFFEY, VICE CHAIR**  
**JOSEPH W. BELLUCK**  
**COLLEEN C. DIPIRRO**  
**RICHARD D. EMERY**  
**PAUL B. HARDING**  
**MARVIN E. JACOB**  
**JILL KONVISER**  
**KAREN K. PETERS**  
**TERRY JANE RUDERMAN**

## **APPENDIX**



**Biographies of Commission Members and Attorneys**  
**Roster of Referees Who Served in 2007**  
**The Commission's Powers, Duties & History**  
**Text of the Rules Governing Judicial Conduct**  
**Text of 2007 Determinations**  
**Statistical Analysis of Complaints**



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## Biographies of Commission Members

There are 11 members of the Commission on Judicial Conduct. Each serves a renewable four-year term. Four members are appointed by the Governor, three by the Chief Judge, and one each by the Speaker of the Assembly, the Minority Leader of the Assembly, the Temporary President of the Senate (Majority Leader) and the Minority Leader of the Senate.

Of the four members appointed by the Governor, one shall be a judge, one shall be a member of the New York State bar but not a judge, and two shall not be members of the bar, judges or retired judges. Of the three members appointed by the Chief Judge, one shall be a justice of the Appellate Division, one shall be a judge of a court other than the Court of

Appeals or Appellate Division, and one shall be a justice of a town or village court. None of the four members appointed by the legislative leaders shall be judges or retired judges.

The Commission elects a Chair and a Vice Chair from among its members for renewable two-year terms, and appoints an Administrator who shall be a member of the New York State bar who is not a judge or retired judge. The Administrator appoints and directs the agency staff. The Commission also has a Clerk who plays no role in the investigation or litigation of complaints but assists the Commission in its consideration of formal charges, preparation of determinations and related matters.

Member	Appointing Authority	Year First Appointed	Expiration of Present Term
Thomas A. Klonick	Chief Judge Judith S. Kaye	2005	3/31/2009
Stephen R. Coffey	Senator Joseph L. Bruno	1995	3/31/2011
Joseph W. Belluck	Governor David A. Paterson	2008	3/31/2012
Colleen C. DiPirro	Former Governor George E. Pataki	2004	3/31/2009
Richard D. Emery	Senator Malcolm A. Smith	2004	3/31/2012
Paul B. Harding	Assemblyman James Tedisco	2006	3/31/2009
Marvin E. Jacob	Assembly Speaker Sheldon Silver	2006	3/31/2010
Jill Konviser	Former Governor George E. Pataki	2006	3/31/2010
Karen P. Peters	Chief Judge Judith S. Kaye	2000	3/31/2010
Terry Jane Ruderman	Chief Judge Judith S. Kaye	1999	3/31/2012
Vacant	Governor David A. Paterson		3/31/2011

**Honorable Thomas A. Klonick**, *Chair of the Commission*, is a graduate of Lehigh University and the Detroit College of Law, where he was a member of the Law Review. He maintains a law practice in Fairport, New York, with a concentration in the areas of commercial and residential real estate, corporate and business law, criminal law and personal injury. He was a Monroe County Assistant Public Defender from 1980 to 1983. Since 1995 he has served as Town Justice for the Town of Perinton, New York, and has also served as an Acting Rochester City Court Judge, a Fairport Village Court Justice and as a Hearing Examiner for the City of Rochester. From 1985 to 1987 he served as a Town Justice for the Town of Macedon, New York. He has also been active in the Monroe County Bar Association as a member of the Ethics Committee. Judge Klonick is the former Chairman of the Prosecuting Committee for the Presbytery of Genesee Valley and is an Elder of the First Presbyterian Church, Pittsford, New York. He has also served as legal counsel to the New York State Council on Problem Gambling, and on the boards of St. John's Home and Main West Attorneys, a provider of legal services for the working poor. He is a member of the New York State Magistrates Association, the New York State Bar Association and the Monroe County Bar Association. Judge Klonick lectures in the Office of Court Administration's continuing Judicial Education Programs for Town and Village Justices.

**Stephen R. Coffey, Esq.**, *Vice Chair of the Commission*, is a graduate of Siena College and the Albany Law School at Union University. He is a partner in the law firm of O'Connell and Aronowitz in Albany. He was an Assistant District Attorney in Albany County from 1971-75, serving as Chief Felony Prosecutor in 1974-75. He has also been appointed as a Special Prosecutor in Fulton and Albany Counties. Mr. Coffey is a member of the New York State Bar Association, where he serves on the Criminal Justice Section Executive Committee and lectures on Criminal and Civil Trial Practice, the Albany County Bar Association, the New York State Trial Lawyers Association, the New York State Defenders Association, and the Association of Trial Lawyers of America.

**Joseph W. Belluck, Esq.**, graduated *magna cum laude* from the SUNY-Buffalo School of Law in 1994, where he served as Articles Editor of the Buffalo Law Review and where he was an adjunct lecturer on mass torts. He is a partner in the Manhattan law firm of Belluck & Fox, LLP, which focuses on asbestos, consumer, environmental and defective product litigation. Mr. Belluck previously served as counsel to the New York State Attorney General, representing the State of New York in its litigation against the tobacco industry, as a judicial law clerk for Justice Lloyd Doggett of the Texas Supreme Court, as staff attorney and consumer lobbyist for Public Citizen in Washington, D.C., and as Director of Attorney Services for Trial Lawyers Care, an organization dedicated to providing free legal assistance to victims of the September 11, 2001 terrorist attacks. Mr. Belluck has lectured frequently on product liability, tort law and tobacco control policy. He is an active member of several bar associations, and serves on the Boards of the New York State Trial Lawyers Association and the SLAPP Resource Center, an organization dedicated to protecting the right to free speech. He is a recipient of the New York State Bar Association's Legal Ethics Award.

**Colleen C. DiPirro** is President and CEO of the Amherst Chamber of Commerce, which has over 2,300 members. Prior to joining the Chamber, she worked for the Erie County Legislature and as a retail manager. She was the first President of the Western New York Chamber Alliance, an organization for Chamber Executives serving an eight county region. She was identified as one of the 100 most influential people in Western New York by Business First. In 1998, Ms. DiPirro became the first woman honored as the Executive of the Year by the Buffalo Sales and Marketing Executives. That same year Daeman College named her Citizen of the Year. She received the Governor's Award for Excellence in Business in 1999. She served on the Board of Directors of New York State Chamber of Commerce Executives in 1999. Ms. DiPirro serves as event and sponsorship coordinator and a member of the Advisory Board for the Buffalo Bills Alumni and was selected by Bills owner Ralph Wilson to serve on the Project 21 initiative. She served on a committee for Erie County Executive Joel Giambra's Transition Team. She has served on numerous not for profit and community boards of directors, including Western New York Autism Foundation, Hospice Playhouse Project, Executive Women International and the Williamsville Sweet Home Junior Football Association. Additionally, she served as the first Chairwoman of the University of Buffalo Leadership Development Program. Ms. DiPirro was appointed to serve on the Peace Bridge Authority by Governor Pataki in 2002. Ms. DiPirro is the widowed mother of two sons and the proud grandmother of one. She attended Alfred College where she majored in Marketing.

**Richard D. Emery, Esq.**, is a graduate of Brown University and Columbia Law School (*cum laude*), where he was a Harlan Fiske Stone Scholar. He is a partner in the law firm of Emery Celli Brinckerhoff and Abady in Manhattan. Mr. Emery serves on the New York State Commission on Public Integrity, the New York City Bar Association's Committee on Election Law and the Advisory Board of the National Police Accountability Project. He is also active in the Municipal Arts Society Legal Committee and serves on the New York County Lawyers Association Committee on Judicial Independence and on the Board of Children's Rights, the national children's rights advocacy organization. His honors include the Common Cause/NY, October 2000, "I Love an Ethical New York" Award for recognition of successful challenges to New York's unconstitutionally burdensome ballot access laws and overall work to promote a more open democracy; the New York Magazine, March 20, 1995, "The Best Lawyers In New York" Award for recognition of successful Civil Rights litigation; the Park River Democrats Public Service Award, June 1989; and the David S. Michaels Memorial Award, January 1987, for Courageous Effort in Promotion of Integrity in the Criminal Justice System from the Criminal Justice Section of the New York State Bar Association.

**Paul B. Harding, Esq.**, is a graduate of the State University of New York at Oswego and the Albany Law School at Union University. He is the Managing Partner in the law firm of Martin, Harding & Mazzotti, LLP in Albany, New York. He is on the Board of Directors of the New York State Trial Lawyers Association and the Marketing and Client Services Committee for the American Association for Justice. He is also a member of the New York State Bar Association and the Albany County Bar Association. He is currently on the Steering Committee for the Legal Project, which was established by the Capital District Women's Bar Association to provide a variety of free and low cost legal services to the working poor, victims of domestic violence and other underserved individuals in the Capital District of New York State.

**Marvin E. Jacob, Esq.**, is a graduate of Brooklyn College and New York Law School (*cum laude*). Mr. Jacob was a partner in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP, until his recent retirement. His practice included litigation in the bankruptcy courts and federal district and appellate courts. Mr. Jacob currently serves as a consultant and mediator in bankruptcy, litigation and SEC matters. Mr. Jacob was formerly Associate Regional Administrator, New York Regional Office, US Securities & Exchange Commission (1964-1979). He has served as adjunct professor of law at New York Law School and recently received a Distinguished Service Award for twenty-five years of service as a faculty member. Mr. Jacob is Chairman of the Board of Legal Assistance for the Jewish Poor, a member of the Advisory Board of Chinese American Planning Council, a member of and counsel to the Board of the Memorial Foundation For Jewish Culture, and Chairman of YouthBridge-NY. Mr. Jacob has published and lectured extensively on bankruptcy issues and has been recognized with many legal and community awards. He is the co-editor of *Reorganizing Failing Businesses*, recently published by the American Bar Association, and *Restructurings*, published by Euromoney Books. Mr. Jacob is listed in, among others, *The Best Lawyers in America* and *The Best Lawyers in New York*.

**Honorable Jill Konviser** is a graduate of the State University of New York at Binghamton and the Benjamin N. Cardozo School of Law. She was appointed to the Court of Claims by Governor George E. Pataki in 2005, has been designated an Acting Justice of the Supreme Court and currently hears criminal cases in New York City. She served as the Inspector General of the State of New York from December 2002 through March 2005. Prior to that, she served for five years as Senior Assistant Counsel to Governor Pataki, focusing on criminal justice issues. From 1995 until 1997, she was a manager with KPMG, and in 1997, she held the position of Deputy Inspector General of the Metropolitan Transportation Authority. She also served as a New York County Assistant District Attorney from 1990 to 1995, and was an Adjunct Professor at Fordham Law School and Cardozo Law School.

**Honorable Karen K. Peters** received her B.A. from George Washington University (*cum laude*) and her J.D. from New York University (*cum laude*; Order of the Coif). From 1973 to 1979 she was engaged in the private practice of law in Ulster County, served as an Assistant District Attorney in Dutchess County and was an Assistant Professor at the State University of New York at New Paltz, where she developed curricula and taught courses in the area of criminal law, gender discrimination and the law, and civil rights and civil liberties. In 1979 she was selected as the first counsel to the newly created New York State Division on Alcoholism and Alcohol Abuse and remained counsel until 1983. In 1983 she was the Director of the State Assembly Government Operations Committee. Elected to the bench in 1983, she remained Family Court Judge for the County of Ulster until 1992, when she became the first woman elected to the Supreme Court in the Third Department. Justice Peters was appointed to the Appellate Division, Third Department, by Governor Mario M. Cuomo on February 3, 1994. She was reappointed by Governor George E. Pataki in 1999 and 2004 and by Governor Eliot L. Spitzer in 2007. Justice Peters has served as Chairperson of the Gender Bias Committee of the Third Judicial District, and on numerous State Bar Committees, including the New York State Bar Association Special Committee on Alcoholism and Drug Abuse, and the New York State Bar Association Special Committee on Procedures for Judicial Discipline. Throughout her

career, Justice Peters has taught and lectured extensively in the areas of Family Law, Judicial Education and Administration, Criminal Law, Appellate Practice and Alcohol and the Law.

**Honorable Terry Jane Ruderman** graduated from Pace University School of Law, *cum laude*, holds a Ph. D. in History from the Graduate Center of the City University of New York and Masters Degrees from City College and Cornell University. In 1995, Judge Ruderman was appointed to the Court of Claims and is assigned to the White Plains district. At the time she was the Principal Law Clerk to a Justice of the Supreme Court. Previously, she served as an Assistant District Attorney and a Deputy County Attorney in Westchester County, and later she was in the private practice of law. Judge Ruderman is the Immediate Past President of the New York State Association of Women Judges, a member of the New York State Committee on Women in the Courts and Chair of the Gender Fairness Committee for the Ninth Judicial District. She has served as the Presiding Member of the New York State Bar Association Judicial Section, as a Delegate to the House of Delegates of the New York State Bar Association and on the Ninth Judicial District Task Force on Reducing Civil Litigation Cost and Delay. Judge Ruderman is also a board member and former Vice President of the Westchester Women's Bar Association, was President of the White Plains Bar Association and was a State Director of the Women's Bar Association of the State of New York. She also sits on the Cornell University President's Council of Cornell Women.

## Biographies of Commission Attorneys

**Robert H. Tembeckjian**, *Administrator and Counsel*, is a graduate of Syracuse University, the Fordham University School of Law and Harvard University's Kennedy School of Government, where he earned a Masters in Public Administration. He was a Fulbright Scholar to Armenia in 1994, teaching graduate courses and lecturing on constitutional law and ethics at the American University of Armenia and Yerevan State University. Mr. Tembeckjian served on the Advisory Committee to the American Bar Association Commission to Evaluate the Model Code of Judicial Conduct from 2003-07. He is on the Board of Directors of the Association of Judicial Disciplinary Counsel and the Editorial Board of the Justice System Journal. Mr. Tembeckjian has served on various ethics and professional responsibility committees of the New York State and New York City Bar Associations, and has published numerous articles in legal periodicals on judicial ethics and discipline.

**Cathleen S. Cenci**, *Deputy Administrator in Charge of the Commission's Albany office*, is a graduate of Potsdam College (*summa cum laude*) and the Albany Law School. In 1979, she completed the course superior at the Institute of Touraine in Tours, France. Ms. Cenci joined the Commission staff in 1985. She has been a judge of the Albany Law School moot court competitions and a member of Albany County Big Brothers/Big Sisters.

**John J. Postel**, *Deputy Administrator in Charge of the Commission's Rochester office*, is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission staff in 1980. Mr. Postel is a past president of the Governing Council of St. Thomas More R.C. Parish. He is a former officer of the Pittsford-Mendon Ponds Association and a former President of the Stonybrook Association. He served as the advisor to the Sutherland High School Mock Trial Team for eight years. He is the Vice President and a past Treasurer of the Pittsford Golden Lions Football Club, Inc. He is an assistant director and coach for Pittsford Community Lacrosse. He is an active member of the Pittsford Mustangs Soccer Club, Inc.

**Edward Lindner**, *Deputy Administrator for Litigation*, is a graduate of the University of Arizona and Cornell Law School, where he was a member of the Board of Editors of the Cornell International Law Journal. Prior to joining the Commission's staff, he was an Assistant Solicitor General in the Division of Appeals & Opinions for the New York State Attorney General. He has been a Board Member and volunteer for various community organizations, including Catholic Charities, The Children's Museum at Saratoga, the Saratoga Springs Public Library and the Saratoga Springs Preservation Foundation.

**Alan W. Friedberg** served as *Deputy Administrator in Charge of the Commission's New York office* until January 2008 and now serves as Chief Counsel to the Departmental Disciplinary Committee of the Appellate Division, First Department. He is a graduate of Brooklyn College, the Brooklyn Law School and the New York University Law School, where he earned an LL.M. in Criminal Justice. He previously served as a staff attorney in the Law Office of the New York City Board of Education, as an adjunct assistant professor of business law at Brooklyn College, and as a junior high school teacher in the New York City public school system.

**Jean Joyce**, *Senior Attorney*, is a graduate of Hamilton College (Russian Studies) and New York Law School (*cum laude*). Prior to joining the Commission staff, she clerked for Chief Judge Judith S. Kaye of the New York State Court of Appeals, and served as an Assistant District Attorney in the Bronx. She is a member of the New York City Bar Association.

**Cheryl L. Randall**, *Senior Attorney*, is a graduate of the State University of New York at Oneonta and the University of Connecticut Law School (*cum laude*). Prior to joining the Commission staff, she served as a Senior Attorney handling disciplinary cases for the State Education Department. She has also served as an attorney with the Office of the State Comptroller, the Public Employees Federation, the New York State School Boards Association and the law firm of Whiteman, Osterman & Hanna.

**M. Kathleen Martin**, *Senior Attorney*, is a graduate of Mount Holyoke College and Cornell Law School (*cum laude*). Prior to joining the Commission's staff, she was an attorney at the Eastman Kodak Company, where among other things she held positions as Legal Counsel to the Health Group, Director of Intellectual Property Transactions and Director of Corporate Management Strategy Deployment. She also served as Vice President and Senior Associate Counsel at Chase Manhattan Bank, and in private practice with the firm of Nixon, Hargrave, Devans & Doyle.

**Roger J. Schwarz**, *Senior Attorney*, is a graduate of Clark University (*Phi Beta Kappa*) and the State University of New York at Buffalo Law School (*honors*), where he served as editor of the *Law and Society Review* and received the Erie County Trial Lawyers' award for best performance in the law school's trial practice course. For the past 23 years, Mr. Schwarz practiced law in his own firm, with an emphasis on criminal law and criminal appeals, principally in the federal courts. Mr. Schwarz has also served as an associate attorney for the Criminal Defense Division of the Legal Aid Society in New York City, clerked for Supreme Court Justice David Levy (Bronx County) and was a member of the Commission's staff from 1975-77.

**Jill S. Polk**, *Senior Attorney*, is a graduate of the State University of New York at Buffalo and the Albany Law School. Prior to joining the Commission staff, she was Senior Assistant Public Defender in Schenectady County. Ms. Polk has also been in private practice, served as Senior Court Attorney to two judges, and was an attorney with the Legal Aid Society of Northeastern New York.

**David M. Duguay**, *Senior Attorney*, is a graduate of the State University College at Buffalo (*summa cum laude*) and the University at Buffalo Law School. Prior to joining the Commission's staff, he was Special Assistant Public Defender and Town Court Supervisor in the Monroe County Public Defender's Office. He served previously as a staff attorney with Legal Services, Inc., of Chambersburg, Pennsylvania.

**Melissa R. DiPalo**, *Staff Attorney*, is a graduate of the University of Richmond and Brooklyn Law School, where she was a Lisle Scholar and a Dean's Merit Scholar. Prior to joining the Commission's staff, she was an Assistant District Attorney in the Bronx.

**Stephanie A. Fix**, *Staff Attorney*, is a graduate of the State University of New York at Brockport and Quinnipiac College School of Law in Connecticut. Prior to joining the Commission staff she was in private practice focusing on civil litigation and professional liability in Manhattan and Rochester. She serves on the Executive Committee of the Monroe County Bar Association Board of Trustees, and the Bishop Kearney High School Board of Trustees. Ms. Fix received the President’s Award for Professionalism from the Monroe County Bar Association in 2004 for her participation with the ABA “Dialogue on Freedom” initiative. She is a member of the New York State Bar Association and Greater Rochester Association of Women Attorneys (GRAWA). Ms. Fix is an adjunct professor at St. John Fisher College.

**Brenda Correa**, *Staff Attorney*, is a graduate of the University of Massachusetts at Amherst and Pace University School of Law in New York (*cum laude*). Prior to joining the Commission staff, she served as an Assistant District Attorney in Manhattan and was in private practice in New York and New Jersey focusing on professional liability and toxic torts respectively. She is a member of the New York State Bar Association and the New York City Bar Association.

**Kathy Wu**, *Staff Attorney*, is a graduate of New York University and Queens Law School at the City University of New York. Prior to joining the Commission staff, she served as an Assistant District Attorney in Kings County, among other things prosecuting felony gun cases, and was in private practice at Paul Weiss Rifkind Wharton & Garrison, LLP.

**Kelvin S. Davis**, *Staff Attorney*, is a graduate of Yale University and the University of Virginia Law School. Prior to joining the Commission staff, he served as an Assistant Staff Judge Advocate in the United States Air Force and as Judicial Law Clerk to a Superior Court Judge in New Jersey.

**Kathryn J. Blake** served as a *Staff Attorney* until June 2007 and is now an attorney in the office of the New York State Attorney General. She is a graduate of Lafayette College and Cornell Law School, where she was a Note Editor for the *Cornell Journal of Law and Public Policy* and a member of the Moot Court Board. Prior to joining the Commission staff, she served as an Assistant Attorney General for the State of New York and was in private practice in New York, California and New Jersey.

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**Karen Kozac**, *Chief Administrative Officer*, is a graduate of the University of Pennsylvania and Brooklyn Law School. Prior to re-joining the Commission staff in June 2007, she was an administrator in the nonprofit sector. She previously served as a Staff Attorney at the Commission, as an Assistant District Attorney in New York County, and in private practice as a litigator.

**Beth S. Bar**, *Public Information Officer*, is a graduate of Brandeis University, the Newhouse School of Communications at Syracuse University and the Syracuse University Law School. Prior to joining the Commission staff in April 2008, she was a reporter for the New York Law Journal, the Journal News (Westchester) and the Observer-Dispatch (Utica).

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**Jean M. Savanyu**, *Clerk of the Commission*, is a graduate of Smith College and the Fordham University School of Law (*cum laude*). She joined the Commission's staff in 1977 and served as Senior Attorney until being appointed Clerk of the Commission in 2000. Ms. Savanyu teaches in the paralegal studies program at Hunter College and previously taught legal research and writing at Marymount Manhattan College. Prior to joining the Commission staff, she was a travel writer and editor.

**REFEREES WHO SERVED IN 2007**

<b>Referee</b>	<b>City</b>	<b>County</b>
Mark S. Arisohn, Esq.	New York	New York
William I. Aronwald, Esq.	White Plains	Westchester
William C. Banks, Esq.	Syracuse	Onondaga
Hon. Frank J. Barbaro	Watervliet	Albany
Jay C. Carlisle, Esq.	White Plains	Westchester
William T. Easton, Esq.	Rochester	Monroe
Robert L. Ellis, Esq.	Scarsdale	Westchester
Vincent D. Farrell, Esq.	Mineola	Nassau
Maryann Saccomando Freedman, Esq.	Buffalo	Erie
Douglas S. Gates, Esq.	Rochester	Monroe
Victor J. Hershdorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
H. Wayne Judge, Esq.	Glens Falls	Warren
Matthew J. Kelly, Esq.	Albany	Albany
Nancy Kramer, Esq.	New York	New York
Gerard LaRusso, Esq.	Rochester	Monroe
C. Bruce Lawrence, Esq.	Rochester	Monroe
Sherman F. Levey, Esq.	Rochester	Monroe
James C. Moore, Esq.	Rochester	Monroe
Gary Muldoon, Esq.	Rochester	Monroe
Hon. Edgar NeMoyer	Buffalo	Erie
Steven E. North, Esq.	New York	New York
Philip C. Pinsky, Esq.	Syracuse	Onondaga
John J. Poklemba, Esq.	Saratoga Springs	Saratoga
Hon. Eugene M. Salisbury	Buffalo	Erie
Hon. Felice K. Shea	New York	New York
Milton Sherman, Esq.	New York	New York
Shirley A. Siegel, Esq.	New York	New York
Hon. Richard D. Simons	Rome	Oneida
Robert J. Smith, Esq.	Binghamton	Broome
Robert Straus, Esq.	New York	Kings
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

**The Commission's Powers,  
Duties & History**



**2008 Annual Report**  
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**Commission on Judicial Conduct**





## **The Commission's Powers, Duties and History**

### **Creation of the New York State Commission on Judicial Conduct**

For decades prior to the creation of the Commission on Judicial Conduct, judges in New York State were subject to professional discipline by a patchwork of courts and procedures. The system, which relied on judges to discipline fellow judges, was ineffective. In the 100 years prior to the creation of the Commission, only 23 judges were disciplined by the patchwork system of *ad hoc* judicial disciplinary bodies. For example, an *ad hoc* Court on the Judiciary was convened only six times prior to 1974. There was no staff or even an office to receive and investigate complaints against judges.

Starting in 1974, the Legislature changed the judicial disciplinary system, creating a temporary commission with a full-time professional staff to investigate and prosecute cases of judicial misconduct. In 1976 and again in 1977, the electorate overwhelmingly endorsed and strengthened the new commission, making it permanent and expanding its powers by amending the State Constitution.

### **The Commission's Powers, Duties, Operations and History**

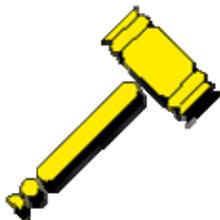
The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of judicial misconduct in New York State. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding their right to decide cases independently. The Commission does not act as an appellate court. It does not review judicial decisions or alleged errors of law, nor does it issue advisory opinions, give legal advice or represent litigants. When appropriate, it refers complaints to other agencies



By offering a forum for citizens with conduct-related complaints, and by disciplining those judges who transgress ethical constraints, the Commission seeks to insure compliance with established standards of ethical judicial behavior, thereby promoting public confidence in the integrity and honor of the judiciary.

All 50 states and the District of Columbia have adopted a commission system to meet these goals.

In New York, a temporary commission created by the Legislature in 1974 began operations in January 1975. It was made permanent in September 1976 by a constitutional amendment. A second constitutional amendment, effective on April 1, 1978, created the present Commission with expanded membership and jurisdiction. (For clarity, the Commission which operated from September 1976 through March 1978 will be referred to as the “former” Commission.)



### **Membership and Staff**

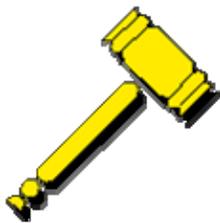
The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one by each of the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and at least two be lay persons. The Commission elects one of its members to be chairperson and appoints an Administrator and a Clerk. The Administrator is responsible for hiring staff and supervising staff activities subject to the Commission’s direction and policies.

The following individuals have served on the Commission since its inception. Asterisks denote those members who chaired the Commission.

Hon. Fritz W. Alexander, II (1979-85)  
Hon. Myriam J. Altman (1988-93)  
Helaine M. Barnett (1990-96)  
Herbert L. Bellamy, Sr. (1990-94)  
Joseph W. Belluck (2008-present)  
\*Henry T. Berger (1988-2004)  
\*John J. Bower (1982-90)  
Hon. Evelyn L. Braun (1994-95)  
David Bromberg (1975-88)  
Jeremy Ann Brown (1997-2001)  
Hon. Richard J. Cardamone (1978-81)  
Hon. Frances A. Ciardullo (2001-05)  
Hon. Carmen Beauchamp Ciparick (1985-93)  
E. Garrett Cleary (1981-96)  
Stephen R. Coffey (1995-present)  
Howard Coughlin (1974-76)  
Mary Ann Crotty (1994-98)  
Dolores DelBello (1976-94)  
Colleen C. DiPirro (2004-present)  
Richard D. Emery (2004-present)  
Hon. Herbert B. Evans (1978-79)  
\*Raoul Lionel Felder (2003-08)

\*William Fitzpatrick (1974-75)  
 \*Lawrence S. Goldman (1990-2006)  
 Hon. Louis M. Greenblott (1976-78)  
 Paul B. Harding (2006-present)  
 Christina Hernandez (1999-2006)  
 Hon. James D. Hopkins (1974-76)  
 William F. Howard (2006-07)  
 Marvin E. Jacob (2006-present)  
 Hon. Daniel W. Joy (1998-2000)  
 Michael M. Kirsch (1974-82)  
 \*Hon. Thomas A. Klonick (2005-present)  
 Hon. Jill Konviser (2006-present)  
 \*Victor A. Kovner (1975-90)  
 William B. Lawless (1974-75)  
 Hon. Daniel F. Luciano (1995-2006)  
 William V. Maggipinto (1974-81)  
 Hon. Frederick M. Marshall (1996-2002)  
 Hon. Ann T. Mikoll (1974-78)  
 Mary Holt Moore (2002-03)  
 Hon. Juanita Bing Newton (1994-99)  
 Hon. William J. Ostrowski (1982-89)  
 Hon. Karen K. Peters (2000-present)  
 \*Alan J. Pope (1997-2006)  
 \*Lillemor T. Robb (1974-88)  
 Hon. Isaac Rubin (1979-90)  
 Hon. Terry Jane Ruderman (1999-present)  
 \*Hon. Eugene W. Salisbury (1989-2001)  
 Barry C. Sample (1994-97)  
 Hon. Felice K. Shea (1978-88)  
 John J. Sheehy (1983-95)  
 Hon. Morton B. Silberman (1978)  
 Hon. William C. Thompson (1990-98)  
 Carroll L. Wainwright, Jr. (1974-83)

The Commission's principal office is in New York City. Offices are also maintained in Albany and Rochester.



### **The Commission's Authority**

The Commission has the authority to receive and review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations, file Formal Written Complaints and conduct formal hearings thereon, subpoena witnesses and documents, and make appropriate determinations as to dismissing complaints or disciplining judges

within the state unified court system. This authority is derived from Article 6, Section 22, of the Constitution of the State of New York, and Article 2-A of the Judiciary Law of the State of New York.

By provision of the State Constitution (Article 6, Section 22), the Commission:

shall 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...and may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.

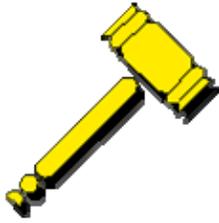
The types of complaints that may be investigated by the Commission include improper demeanor, conflicts of interest, violations of defendants' or litigants' rights, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench.

Standards of conduct are set forth primarily in the Rules Governing Judicial Conduct (originally promulgated by the Administrative Board of the Judicial Conference and subsequently adopted by the Chief Administrator of the Courts with the approval of the Court of Appeals) and the Code of Judicial Conduct (adopted by the New York State Bar Association).

If the Commission determines that disciplinary action is warranted, it may render a determination to impose one of four sanctions, subject to review by the Court of Appeals upon timely request by the respondent-judge. If review is not requested within 30 days of service of the determination upon the judge, the determination becomes final. The Commission may render determinations to:

- admonish a judge publicly;
- censure a judge publicly;
- remove a judge from office;
- retire a judge for disability.

In accordance with its rules, the Commission may also issue a confidential letter of dismissal and caution to a judge, despite a dismissal of the complaint, when it is determined that the circumstances so warrant. In some cases the Commission has issued such a letter after charges of misconduct have been sustained.



## Procedures

The Commission meets several times a year. At its meetings, the Commission reviews each new complaint of misconduct and makes an initial decision whether to investigate or dismiss the complaint. It also reviews staff reports on ongoing matters, makes final determinations on completed proceedings, considers motions and entertains oral arguments pertaining to cases in which judges have been served with formal charges, and conducts other Commission business.

No investigation may be commenced by staff without authorization by the Commission. The filing of formal charges also must be authorized by the Commission.

After the Commission authorizes an investigation, the Administrator assigns the complaint to a staff attorney, who works with investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge may be asked to respond in writing to the allegations. In some instances, the Commission requires the appearance of the judge to testify during the course of the investigation. The judge's testimony is under oath, and a Commission member or referee designated by the Commission must be present. Although such an "investigative appearance" is not a formal hearing, the judge is entitled to be represented by counsel. The judge may also submit evidentiary data and materials for the Commission's consideration.

If the Commission finds after an investigation that the circumstances so warrant, it will direct its Administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint institutes the formal disciplinary proceeding. After receiving the judge's answer, the Commission may, if it determines there are no disputed issues of fact, grant a motion for summary determination. It may also accept an agreed statement of facts submitted by the Administrator and the respondent-judge. Where there are factual disputes that make summary determination inappropriate or that are not resolved by an agreed statement of facts, the Commission will appoint a referee to conduct a formal hearing and report proposed findings of fact and conclusions of law. Referees are designated by the Commission from a panel of attorneys and former judges. Following the Commission's receipt of the referee's report, on a motion to confirm or disaffirm the report, both the administrator and the respondent may submit legal memoranda and present oral argument on issues of misconduct and sanction. The respondent-judge (in addition to his or her counsel) may appear and be heard at oral argument.

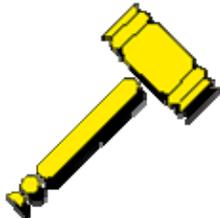
In deciding motions, considering proposed agreed statements of fact and making determinations with respect to misconduct and sanction, and in considering other matters pertaining to cases in which Formal Written Complaints have been served, the Commission deliberates in executive session, without the presence or assistance of its Administrator or

regular staff. The Clerk of the Commission assists the Commission in executive session, but does not participate in either an investigative or adversarial capacity in any cases pending before the Commission.

The Commission may dismiss a complaint at any stage during the investigation or adjudication.

When the Commission determines that a judge should be admonished, censured, removed or retired, its written determination is forwarded to the Chief Judge of the Court of Appeals, who in turn serves it upon the respondent-judge. Upon completion of service, the Commission's determination and the record of its proceedings become public. (Prior to this point, by operation of the strict provisions in Article 2-A of the Judiciary Law, all proceedings and records are confidential.) The respondent-judge has 30 days to request full review of the Commission's determination by the Court of Appeals. The Court may accept or reject the Commission's findings of fact or conclusions of law, make new or different findings of fact or conclusions of law, accept or reject the determined sanction, or make a different determination as to sanction. If no request for review is made within 30 days, the sanction determined by the Commission becomes effective.

### **Temporary State Commission on Judicial Conduct**

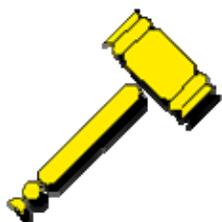


The Temporary State Commission on Judicial Conduct was established in late 1974 and commenced operations in January 1975. The temporary Commission had the authority to investigate allegations of misconduct against judges in the state unified court system, make confidential suggestions and recommendations in the nature of admonitions to judges when appropriate and, in more serious cases, recommend that formal disciplinary proceedings be commenced in the appropriate court. All disciplinary proceedings in the Court on the Judiciary and most in the Appellate Division were public.

The temporary Commission was composed of two judges, five lawyers and two lay persons. It functioned through August 31, 1976, when it was succeeded by a permanent commission created by amendment to the State Constitution.

The temporary Commission received 724 complaints, dismissed 441 upon initial review and commenced 283 investigations during its tenure. It admonished 19 judges and initiated formal disciplinary proceedings against eight judges, in either the Appellate Division or the Court on the Judiciary. One of these judges was removed from office and one was censured. The remaining six matters were pending when the temporary Commission was superseded by its successor Commission.

Five judges resigned while under investigation.



## **Former State Commission on Judicial Conduct**

The temporary Commission was succeeded on September 1, 1976, by the State Commission on Judicial Conduct, established by a constitutional amendment overwhelmingly approved by the New York State electorate and supplemented by legislative enactment (Article 2-A of the Judiciary Law). The former Commission's tenure lasted through March 31, 1978, when it was replaced by the present Commission.

The former Commission was empowered to investigate allegations of misconduct against judges, impose certain disciplinary sanctions and, when appropriate, initiate formal disciplinary proceedings in the Court on the Judiciary, which, by the same constitutional amendment, had been given jurisdiction over all 3,500 judges in the unified court system. The sanctions that could be imposed by the former Commission were private admonition, public censure, suspension without pay for up to six months, and retirement for physical or mental disability. Censure, suspension and retirement actions could not be imposed until the judge had been afforded an opportunity for a full adversary hearing. These Commission sanctions were also subject to a *de novo* hearing in the Court on the Judiciary at the request of the judge.

The former Commission, like the temporary Commission, was composed of two judges, five lawyers and two lay persons, and its jurisdiction extended to judges within the state unified court system. The former Commission was authorized to continue all matters left pending by the temporary Commission.

The former Commission considered 1,418 complaints, dismissed 629 upon initial review, authorized 789 investigations and continued 162 investigations left pending by the temporary Commission.

During its tenure, the former Commission took action that resulted in the following:

- 15 judges were publicly censured;
- 40 judges were privately admonished;
- 17 judges were issued confidential letters of suggestion and recommendation.

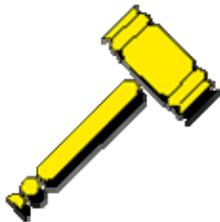
The former Commission also initiated formal disciplinary proceedings in the Court on the Judiciary against 45 judges and continued six proceedings left pending by the temporary Commission. Those proceedings resulted in the following:

- 1 removal;
- 2 suspensions;
- 3 censures;

- 10 cases closed upon resignation of the judge;
- 2 cases closed upon expiration of the judge's term;
- 1 proceeding closed without discipline and with instruction by the Court on the Judiciary that the matter be deemed confidential.

The remaining 32 proceedings were pending when the former Commission expired. They were continued by the present Commission.

In addition to the ten judges who resigned after proceedings had been commenced in the Court on the Judiciary, 28 other judges resigned while under investigation by the former Commission.

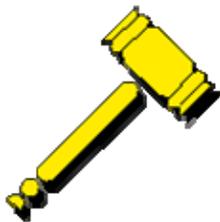


### **Continuation from 1978 to 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions**

Thirty-two formal disciplinary proceedings which had been initiated in the Court on the Judiciary by either the temporary or former Commission were pending when the former Commission was superseded on April 1, 1978, and were continued without interruption by the present Commission.

The last five of these 32 proceedings were concluded in 1980, with the following results, reported in greater detail in the Commission's previous annual reports:

- 4 judges were removed from office;
- 1 judge was suspended without pay for six months;
- 2 judges were suspended without pay for four months;
- 21 judges were censured;
- 1 judge was directed to reform his conduct consistent with the Court's opinion;
- 1 judge was barred from holding future judicial office after he resigned; and
- 2 judges died before the matters were concluded.



### **The 1978 Constitutional Amendment**

The present Commission was created by amendment to the State Constitution, effective April 1, 1978. The amendment created an 11-member Commission (superseding the nine-member former Commission), broadened the scope of the Commission's authority and streamlined the procedure for disciplining judges within the state unified court system. The Court on the

Judiciary was abolished, pending completion of those cases that had already been commenced before it. All formal disciplinary hearings under the new amendment are conducted by the Commission.

Subsequently, the State Legislature amended Article 2-A of the Judiciary Law, the Commission's governing statute, to implement the new provisions of the constitutional amendment.



### **Summary of Complaints Considered Since the Commission's Inception**

Since January 1975, when the temporary Commission commenced operations, 37,534 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 30,464 were dismissed upon initial review or after a preliminary review and inquiry, and 7,070 investigations were authorized. Of the 7,070 investigations authorized, the following dispositions have been made through December 31, 2007:

- 951 complaints involving 736 judges resulted in disciplinary action. (See details below and on the following page.)
- 1424 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1322, 77 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 566 complaints involving 401 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 453 complaints were closed upon vacancy of office by the judge other than by resignation.
- 3438 complaints were dismissed without action after investigation.
- 238 complaints are pending.

Of the 951 disciplinary matters against 736 judges as noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission. (It should be noted that several complaints against a single judge may be disposed of in a single action. This accounts for the apparent discrepancy between the number of complaints and the number of judges acted upon. Also, these figures take into account those decisions by the Court of Appeals that modified a Commission determination.)

- 156 judges were removed from office;
- 3 judges were suspended without pay for six months (under previous law);
- 2 judges were suspended without pay for four months (under previous law);
- 292 judges were censured publicly;
- 224 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission.

**Text of the Rules  
Governing Judicial Conduct**



**2008 Annual Report  
New York State  
Commission on Judicial Conduct**



# **RULES GOVERNING JUDICIAL CONDUCT**

**22 NYCRR § 100 *et seq.* (2006)**

## **Rules of the Chief Administrator of the Courts Governing Judicial Conduct**

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### **Preamble**

**Section 100.0 Terminology.**

**Section 100.1 A judge shall uphold the integrity and independence of the judiciary.**

**Section 100.2 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.**

**Section 100.3 A judge shall perform the duties of judicial office impartially and diligently.**

**Section 100.4 A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.**

**Section 100.5 A judge or candidate for elective judicial office shall refrain from inappropriate political activity.**

**Section 100.6 Application of the rules of judicial conduct.**

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### **Preamble**

The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The rules are to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The rules are designed to provide guidance to judges and candidates for elective judicial office and to provide a structure for regulating conduct through disciplinary agencies. They are not designed or intended as a basis for civil liability or criminal prosecution.

The text of the rules is intended to govern conduct of judges and candidates for elective judicial office and to be binding upon them. It is not intended, however, that every transgression will

result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The rules are not intended as an exhaustive guide for conduct. Judges and judicial candidates also should be governed in their judicial and personal conduct by general ethical standards. The rules are intended, however, to state basic standards which should govern their conduct and to provide guidance to assist them in establishing and maintaining high standards of judicial and personal conduct.

### **Section 100.0 Terminology.**

The following terms used in this Part are defined as follows:

(A) A "candidate" is a person seeking selection for or retention in public office by election. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions.

(B) "Court personnel" does not include the lawyers in a proceeding before a judge.

(C) The "degree of relationship" is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

(D) "Economic interest" denotes ownership of more than a de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge's spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities

(5) "de minimis" denotes an insignificant interest that could not raise reasonable questions as to a judge's impartiality.

(E) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

(F) "Knowingly", "knowledge", "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(G) "Law" denotes court rules as well as statutes, constitutional provisions and decisional law.

(H) "Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship.

(I) "Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(J) "Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(K) "Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports.

(L) A "part-time judge", including an acting part-time judge, is a judge who serves repeatedly on a part-time basis by election or under a continuing appointment.

(M) "Political organization" denotes a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

(N) "Public election" includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections.

(O) "Require". The rules prescribing that a judge "require" certain conduct of others, like all of the rules in this Part, are rules of reason. The use of the term "require" in that context means a

judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(P) "Rules"; citation. Unless otherwise made clear by the citation in the text, references to individual components of the rules are cited as follows:

"Part"-refers to Part 100.

"Section"-refers to a provision consisting of 100 followed by a decimal (100.1).

"Subdivision"-refers to a provision designated by a capital letter (A).

"Paragraph"-refers to a provision designated by an Arabic numeral (1)

"Subparagraph"-refers to a provision designated by a lower-case letter (a).

(Q) "Window Period" denotes a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating candidates for the elective judicial office for which a judge or non-judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported the judge's or non-judge's candidacy, and ending, if the judge or non-judge is a candidate in the general election for that office, six months after the general election, or if he or she is not a candidate in the general election, six months after the date of the primary election, convention, caucus or meeting.

(R) "Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

(S) An "independent" judiciary is one free of outside influences or control.

(T) "Integrity" denotes probity, fairness, honesty, uprightness and soundness of character. "Integrity" also includes a firm adherence to this Part or its standard of values.

(U) A "pending proceeding" is one that has begun but not yet reached its final disposition.

(V) An "impending proceeding" is one that is reasonably foreseeable but has not yet been commenced.

#### Historical Note

Sec. filed Feb. 1, 1996 eff. Jan. 1, 1996.

Amended (D) and (D)(5) on Sept. 9, 2004.

Added (R) - (V) on Feb. 14, 2006

**Section 100.1 A judge shall uphold the integrity and independence of the judiciary.**

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Part 100 are to be construed and applied to further that objective.

Historical Note

Sec. filed Aug. 1, 1972; renum. 111.1, new added by renum. and amd. 33.1, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

**Section 100.2 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.**

(A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

(D) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of age, race, creed, color, sex, sexual orientation, religion, national origin, disability or marital status. This provision does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

Historical Note

Sec. filed Aug. 1, 1972; renum. 111.2, new added by renum. and amd. 33.2, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

**Section 100.3 A judge shall perform the duties of judicial office impartially and diligently.**

(A) Judicial duties in general. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

(B) Adjudicative Responsibilities.

(1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

- (2) A judge shall require order and decorum in proceedings before the judge.
- (3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.
- (4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.
- (5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.
- (6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:
- (a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.
- (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.
- (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
- (d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.
- (e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(8) A judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This paragraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This paragraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

#### (C) Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) 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. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that

the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(D) Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action.

(3) Acts of a judge in the discharge of disciplinary responsibilities are part of a judge's judicial duties.

(E) Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the judge has a personal bias or prejudice concerning a party or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that (i) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;

(d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding;

(ii) is an officer, director or trustee of a party;

(iii) has an interest that could be substantially affected by the proceeding;

(e) The judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding or is likely to be a material witness in the proceeding.

(f) the judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits

the judge with respect to

- (i) an issue in the proceeding; or
- (ii) the parties or controversy in the proceeding.

(g) notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(F) Remittal of Disqualification. A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii) or subparagraph (1)(d)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Amended 100.3 (B)(9)-(11) & (E)(1)(f) - (g) Feb. 14, 2006

Amended 100.3(C)(3) and 100.3(E)(1)(d) & (e) Feb. 28, 2006

**Section 100.4 A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.**

(A) Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) detract from the dignity of judicial office; or
- (3) interfere with the proper performance of judicial duties and are not incompatible with judicial office.

(B) Avocational Activities. A judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Part.

(C) Governmental, Civic, or Charitable Activities.

(1) A full-time judge shall not appear at a public hearing before an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2)

(a) A full-time judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy in matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(b) A judge shall not accept appointment or employment as a peace officer or police officer as those terms are defined in section 1.20 of the Criminal Procedure Law.

(3) A judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Part.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that ordinarily would come before the judge, or

(ii) if the judge is a full-time judge, will be engaged regularly in adversary proceedings in any court.

(b) A judge as an officer, director, trustee or non-legal advisor, or a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities;

(ii) may not be a speaker or the guest of honor at an organization's fund-raising events, but the judge may attend such events. Nothing in this subparagraph shall prohibit a judge from being a speaker or guest of honor at a court employee organization, bar association or law school function or from accepting at another organization's fund-raising event an unadvertised award ancillary to such event;

(iii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice; and

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, but may be listed as an officer, director or trustee of such an organization. Use of an organization's regular letterhead for fund-raising or membership

solicitation does not violate this provision, provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation.

(D) Financial activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position;

(b) involve the judge with any business, organization or activity that ordinarily will come before the judge; or

(c) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge, subject to the requirements of this Part, may hold and manage investments of the judge and members of the judge's family, including real estate.

(3) A full-time judge shall not serve as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity, except that:

(a) the foregoing restriction shall not be applicable to a judge who assumed judicial office prior to July 1, 1965, and maintained such position or activity continuously since that date; and

(b) a judge, subject to the requirements of this Part, may manage and participate in a business entity engaged solely in investment of the financial resources of the judge or members of the judge's family; and

(c) any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from this paragraph during the period of such interim or temporary appointment.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except:

(a) a "gift" incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under section 100.3(E);

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 100.4(H).

(E) Fiduciary Activities.

(1) A full-time judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, designated by an instrument executed after January 1, 1974, except for the estate, trust or person of a member of the judge's family, or, with the approval of the Chief Administrator of the Courts, a person not a member of the judge's family with whom the judge has maintained a longstanding personal relationship of trust and confidence, and then only if such services will not interfere with the proper performance of judicial duties.

(2) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

(3) Any person who may be appointed to fill a full-time judicial vacancy on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from paragraphs (1) and (2) during the period of such interim or temporary appointment.

(F) Service as Arbitrator or Mediator. A full-time judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

(G) Practice of Law. A full-time judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to a member of the judge's family.

(H) Compensation, Reimbursement and Reporting.

(1) Compensation and reimbursement. A full-time judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Part, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(c) No full-time judge shall solicit or receive compensation for extra-judicial activities performed for or on behalf of: (1) New York State, its political subdivisions or any office or agency thereof; (2) school, college or university that is financially supported primarily by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for a lecture or for teaching a regular course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties; or (3) any private legal aid bureau or society designated to represent indigents in accordance with article 18-B of the County Law.

(2) Public Reports. A full-time judge shall report the date, place and nature of any activity for which the judge received compensation in excess of \$150, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

(I) Financial Disclosure. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this section and in section 100.3(F), or as required by Part 40 of the Rules of the Chief Judge (22 NYCRR Part 40), or as otherwise required by law.

#### Historical Note

Sec. filed Aug. 1, 1972; amd. filed Nov. 26, 1976; renum. 111.4, new added by renum. and amd. 33.4, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996; amds. filed: Feb. 27, 1996; Feb. 9, 1998 eff. Jan. 23, 1998. Amended (C)(3)(b)(ii).

**Section 100.5 A judge or candidate for elective judicial office shall refrain from inappropriate political activity.**

(A) Incumbent judges and others running for public election to judicial office.

(1) Neither a sitting judge nor a candidate for public election to judicial office shall directly or indirectly engage in any political activity except (i) as otherwise authorized by this section or by law, (ii) to vote and to identify himself or herself as a member of a political party, and (iii) on behalf of measures to improve the law, the legal system or the administration of justice.

Prohibited political activity shall include:

(a) acting as a leader or holding an office in a political organization;

(b) except as provided in Section 100.5(A)(3), being a member of a political organization other than enrollment and membership in a political party;

(c) engaging in any partisan political activity, provided that nothing in this section shall prohibit a judge or candidate from participating in his or her own campaign for elective judicial office or shall restrict a non-judge holder of public office in the exercise of the functions of that office;

(d) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization;

(e) publicly endorsing or publicly opposing (other than by running against) another candidate for public office;

(f) making speeches on behalf of a political organization or another candidate;

(g) attending political gatherings;

(h) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate; or

(i) purchasing tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

(2) A judge or non-judge who is a candidate for public election to judicial office may participate in his or her own campaign for judicial office as provided in this section and may contribute to his or her own campaign as permitted under the Election Law. During the Window Period as defined in Subdivision (Q) of section 100.0 of this Part, a judge or non-judge who is a candidate for public election to judicial office, except as prohibited by law, may:

(i) attend and speak to gatherings on his or her own behalf, provided that the candidate does not personally solicit contributions;

(ii) appear in newspaper, television and other media advertisements supporting his or her candidacy, and distribute pamphlets and other promotional campaign literature supporting his or her candidacy;

(iii) appear at gatherings, and in newspaper, television and other media advertisements with the candidates who make up the slate of which the judge or candidate is a part;

(iv) permit the candidate's name to be listed on election materials along with the names of other candidates for elective public office;

(v) purchase two tickets to, and attend, politically sponsored dinners and other functions, provided that the cost of the ticket to such dinner or other function shall not exceed the proportionate cost of the dinner or function. The cost of the ticket shall be deemed to constitute the proportionate cost of the dinner or function if the cost of the ticket is \$250 or less. A candidate may not pay more than \$250 for a ticket unless he or she obtains a statement from the sponsor of the dinner or function that the amount paid represents the proportionate cost of the dinner or function.

(3) A non-judge who is a candidate for public election to judicial office may also be a member of a political organization and continue to pay ordinary assessments and ordinary contributions to such organization.

(4) A judge or a non-judge who is a candidate for public election to judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under this Part;

(c) except to the extent permitted by Section 100.5(A)(5), shall not authorize or knowingly permit any person to do for the candidate what the candidate is prohibited from doing under this Part;

(d) shall not:

(i) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(ii) with respect to cases, controversies or issues that are likely to come before the court, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office;

(iii) knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent; but

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate subparagraphs 100.5(A)(4)(a) and (d).

(f) shall complete an education program, either in person or by videotape or by internet correspondence course, developed or approved by the Chief Administrator or his or her designee within 30 days after receiving the nomination or 90 days prior to receiving the nomination for judicial office. The date of nomination for candidates running in a primary election shall be the date upon which the candidate files a designating petition with the Board of Elections. This provision shall apply to all candidates for elective judicial office in the Unified Court System except for town and village justices.

(g) shall file with the Ethics Commission for the Unified Court System a financial disclosure statement containing the information and in the form, set forth in the Annual Statement of Financial Disclosure adopted by the Chief Judge of the State of New York. Such statement shall be filed within 20 days following the date on which the judge or non-judge becomes such a candidate; provided, however, that the Ethics Commission for the Unified Court System may grant an additional period of time within which to file such statement in accordance with rules promulgated pursuant to section 40.1(t)(3) of the Rules of the Chief Judge of the State of New York (22 NYCRR). Notwithstanding the foregoing compliance with this subparagraph shall not be necessary where a judge or non-judge already is or was required to file a financial disclosure statement for the preceding calendar year pursuant to Part 40 of the Rules of the Chief Judge. This requirement does not apply to candidates for election to town and village courts.

(5) A judge or candidate for public election to judicial office shall not personally solicit or accept campaign contributions, but may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions and support from the public, including lawyers, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees may solicit and accept such contributions and support only during the window period. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(6) A judge or a non-judge who is a candidate for public election to judicial office may not permit the use of campaign contributions or personal funds to pay for campaign-related goods or services for which fair value was not received.

(7) Independent Judicial Election Qualifications Commissions, created pursuant to Part 150 of the Rules of the Chief Administrator of the Courts, shall evaluate candidates for elected judicial office, other than justice of a town or village court.

(B) Judge as candidate for nonjudicial office. A judge shall resign from judicial office upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) Judge's staff. A judge shall prohibit members of the judge's staff who are the judge's personal appointees from engaging in the following political activity:

(1) holding an elective office in a political organization, except as a delegate to a judicial nominating convention or a member of a county committee other than the executive committee of a county committee;

(2) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding \$500 in the aggregate during any calendar year to all political campaigns for political office, and other partisan political activity including, but not limited to, the purchasing of tickets to political functions, except that this \$500 limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference also shall be made to appropriate sections of the Election Law;

(3) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fund-raising activity of a political candidate, political party, or partisan political club; or

(4) political conduct prohibited by section 25.39 of the Rules of the Chief Judge (22 NYCRR 25.39).

#### Historical Note

Sec. filed Aug. 1, 1972; renum. 111.5, new added by renum. and amd. 33.5, filed Feb. 2, 1982; amds. filed: Dec. 21, 1983; May 8, 1985; March 2, 1989; April 11, 1989; Oct. 30, 1989; Oct. 31, 1990; repealed, new filed; amd. filed March 25, 1996 eff. March 21, 1996. Amended (A)(2)(v).

Amended 100.5 (A)(2)(v), (A)(4)(a), (A)(4)(d)(i)-(ii), (A)(4)(f), (A)(6), (A)(7) Feb. 14, 2006; 100.5(A)(4)(g) Sept. 1, 2006.

### **Section 100.6 Application of the rules of judicial conduct.**

(A) General application. All judges in the unified court system and all other persons to whom by their terms these rules apply, e.g., candidates for elective judicial office, shall comply with these rules of judicial conduct, except as provided below. All other persons, including judicial hearing officers, who perform judicial functions within the judicial system shall comply with such rules in the performance of their judicial functions and otherwise shall so far as practical and appropriate use such rules as guides to their conduct.

(B) Part-time judge. A part-time judge:

(1) is not required to comply with section 100.4(C)(1), 100.4(C)(2)(a), 100.4(C)(3)(a)(ii), 100.4(E)(1), 100.4(F), 100.4(G), and 100.4(H);

(2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and

shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law;

(4) may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties.

(C) Administrative law judges. The provisions of this Part are not applicable to administrative law judges unless adopted by the rules of the employing agency.

(D) Time for compliance. A person to whom these rules become applicable shall comply immediately with all provisions of this Part, except that, with respect to section 100.4(D)(3) and 100.4(E), such person may make application to the Chief Administrator for additional time to comply, in no event to exceed one year, which the Chief Administrator may grant for good cause shown.

(E) Relationship to Code of Judicial Conduct. To the extent that any provision of the Code of Judicial Conduct as adopted by the New York State Bar Association is inconsistent with any of these rules, these rules shall prevail.

#### Historical Note

Sec. filed Aug. 1, 1972; repealed, new added by renum. 100.7, filed Nov. 26, 1976; renum. 111.6, new added by renum. and amd. 33.6, filed Feb. 2, 1982; repealed, new filed Feb. 1, 1996 eff. Jan. 1, 1996.

Amended 100.6(E) Feb. 14, 2006

**Text of the Commission's  
2007 Determinations**



**2008 Annual Report  
New York State  
Commission on Judicial Conduct**



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DORIS T. APPEL**, a Justice of the Chatham Town Court, Columbia County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission  
Roche, Corrigan, McCoy & Bush, PLLC (by Scott W. Bush) for the Respondent

The respondent, Doris T. Appel, a Justice of the Chatham Town Court, Columbia County, was served with a Formal Written Complaint dated September 15, 2006, containing one charge. The Formal Written Complaint alleged that respondent presided over two matters notwithstanding that she was biased against the defendants' attorney, and that thereafter she barred the attorney from appearing before her based on hearsay information. Respondent filed a Verified Answer dated October 6, 2006.

On March 27, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On May 10, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Chatham Town Court since 1984. She is not an attorney.
2. On November 30, 2005, respondent's court clerk told respondent about a conversation between a state trooper and the deputy town attorney, which the clerk had overheard. The conversation concerned a traffic stop for speeding on or about September 17, 2005, involving attorney Juliane Massarelli and another motorist, during which Ms. Massarelli provided the other driver with her business card. Respondent concluded from this hearsay information that Ms. Massarelli had acted unprofessionally. Respondent also concluded that Ms. Massarelli believed she should receive special treatment in the adjudication of her speeding ticket, which was heard by respondent's co-judge, because of her friendship with the deputy town attorney.

3. On the basis of the foregoing, respondent developed a personal bias against Ms. Massarelli.

4. On December 7, 2005, Ms. Massarelli appeared before respondent on behalf of two defendants charged with speeding in violation of the Vehicle and Traffic Law. About six weeks earlier, respondent had been presented with plea agreements in the cases, and Ms. Massarelli's appearance on December 7, 2005, without the defendants, was to supply respondent with proof of the completion by her clients of defensive driving courses and for respondent to assess fines.

5. On December 7, 2005, after finalizing the two Vehicle and Traffic Law charges, respondent informed Ms. Massarelli, in open court, that for personal reasons she did not explain, she would not permit Ms. Massarelli to appear before her in future cases. All of her future cases would be heard by respondent's co-judge Jason Shaw. Respondent refused Ms. Massarelli's request for an explanation at that time. Thereafter, Ms. Massarelli never reappeared before respondent, who never explained to her the reason for respondent's refusal to allow her to appear before her.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(3), 100.3(B)(4) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By presiding over the sentencing of two defendants represented by an attorney just before announcing that she was barring the attorney from appearing before her in the future, respondent violated Section 100.3(E) of the Rules, which requires disqualification in matters where the judge's impartiality might reasonably be questioned. As a judge, respondent is required to set aside her personal biases and to act impartially; she must not only be, but appear to be, impartial. If she could not do so because of a personal bias, she was required to disqualify herself. While the record gives no indication that respondent's handling of those two matters was influenced by her bias against the attorney, respondent should not have presided in the cases in view of her evident bias.

The record further establishes that respondent barred the attorney from appearing before her in any future matters based solely on unsubstantiated hearsay information about a purported overheard conversation. Without explanation, respondent effectively punished the attorney by announcing in open court that she was barring the attorney from appearing before her in any future case. Respondent's conduct was irresponsible, undignified and demeaning (Rules, §100.3[B][3]). *See, Matter of Hanofee*, 1990 Annual Report 109 (Comm. on Judicial Conduct) (judge refused to hear an attorney's cases for 88 days in an attempt to extract an apology for making remarks the judge deemed offensive). Moreover, by refusing to explain the reason for her precipitous action, respondent never gave the attorney an opportunity to refute the scurrilous information respondent had received.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: May 14, 2007



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **PAULINE K. ASHBAUGH**, a Justice of the Cameron Town Court, Steuben County.

**DECISION AND ORDER**

BEFORE:

Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Honorable Pauline K. Ashbaugh, *pro se*

The matter having come before the Commission on November 1, 2007; and the Commission having before it the Formal Written Complaint dated August 21, 2007, respondent's undated Answer received on September 12, 2007, and the Stipulation dated October 19, 2007; and respondent having resigned from judicial office by letter dated October 3, 2007, effective November 19, 2007, and having affirmed that she will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if accepted by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued and the case closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: November 5, 2007

**STIPULATION**

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **PAULINE K. ASHBAUGH**, a Justice of the Cameron Town Court, Steuben 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 on Judicial Conduct ("Commission"), and the Honorable Pauline K. Ashbaugh ("respondent"), as follows:

1. Respondent has served as a Justice of the Cameron Town Court since January 1992. Respondent is not an attorney. Respondent is 69 years old and her current term of office expires on December 31, 2007.

2. On August 24, 2007, respondent was served by the Commission with a Formal Written Complaint which alleged that respondent lent the prestige of her judicial office to advance the private interest of her nephew, Earl J. Sherwood, in connection with a dispute Mr. Sherwood was having with his girlfriend, Robin Brown, by contacting the Delaware County Sheriff's Department, identifying herself as a judge, providing a copy of an Order to Show Cause that had been issued by the Family Court in connection with an action between Mr. Sherwood and Ms. Brown, and requesting that the Sheriff's Department assist in locating Ms. Brown.

3. It was specifically alleged in the Formal Written Complaint that:

- a. Respondent and Shirley Sherwood are sisters. Earl J. Sherwood is Shirley Sherwood's son and respondent's nephew.
- b. Earl J. Sherwood and Robin Brown are domestic partners who co-habitate and have a child, Kaylie-Anna.
- c. On or about March 8, 2006, in connection with a domestic dispute between Mr. Sherwood and Ms. Brown at their residence, Ms. Brown left the residence with their child. Mr. Sherwood thereafter obtained an Order to Show Cause against Ms. Brown in Steuben County Family Court. The court appointed a law guardian for the child and directed both parties to continue residing in Steuben County.
- d. On or about March 9, 2006, Mr. Sherwood contacted the Delaware County Sheriff's Department and asked for their assistance in locating Ms. Brown, whom he believed to be residing in Oneonta with her stepmother, Pam Underwood. The Sheriff's Department asked Mr. Sherwood to provide the Order to Show Cause.
- e. On or about March 10, 2006, respondent's sister Shirley Sherwood advised respondent that her son Earl Sherwood and Ms. Brown had had a domestic dispute, that Ms. Brown had left their residence with Kaylie-Anna two days before, and that Mr. Sherwood had obtained an Order to Show Cause against Ms. Brown.
- f. On or about March 10, 2006, Shirley Sherwood and/or her son Earl Sherwood asked respondent to send a facsimile transmission of the Order to Show Cause to the Delaware County Sheriff's Department. Respondent agreed to do so.
- g. On March 10, 2006, respondent faxed the Order to Show Cause to the Delaware County Sheriff's Department and included a handwritten cover sheet on which she identified herself as a judge, provided the telephone number of her court and provided a brief description of Ms. Brown's vehicle and believed location.

h. On or about March 13, 2006, respondent spoke with a Delaware County Sheriff's Deputy who questioned her about the Order to Show Cause. Respondent identified herself as a town justice, explained the dispute between Mr. Sherwood and Ms. Brown and indicated that she had experience in such matters as a town justice. Respondent indicated that she had wanted the Sheriff's Department to attempt to locate Ms. Brown at her stepmother's home but that Mr. Sherwood had already done so.

4. The Formal Written Complaint alleged that 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 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; and failed to avoid impropriety and the appearance of impropriety in that she failed to respect and comply with the law and act 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, allowed family relationships to influence her judicial conduct and judgment, in violation of Section 100.2(B) of the Rules, and lent the prestige of judicial office to advance the private interests of others and conveyed the impression that others were in a special position to influence her, in violation of Section 100.2(C) of the Rules.

5. Respondent submitted an Answer in which she admitted sending the fax to the Delaware County Sheriff's Department and speaking to a member of the Sheriff's Department on behalf of her nephew in connection with his dispute with Ms. Brown.

6. Respondent tendered her resignation on October 13, 2007, effective on November 19, 2007, and submitted copies to the Cameron Town Clerk and the Office of Court Administration. A copy of respondent's resignation letter is attached.

7. Respondent affirms that she will neither seek nor accept judicial office in the future.

8. Pursuant to law, the Commission has 120 days from the date of a judge's resignation to complete the proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.

9. All parties to this Stipulation respectfully request that the Commission close the pending matter based upon this Stipulation.

10. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if accepted by the Commission.

Dated: October 19, 2007

s/ **Honorable Pauline K. Ashbaugh**  
Respondent

s/ **Robert H. Tembeckjian, Esq.**  
Administrator & Counsel to the Commission  
(**John J. Postel**, Of Counsel)



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DONALD W. BALLAGH**, a Justice of the Rose Town Court, Wayne County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Edward Fiandach for the Respondent

The respondent, Donald W. Ballagh, a Justice of the Rose Town Court, Wayne County, was served with a Formal Written Complaint dated June 12, 2007, containing one charge. The Formal Written Complaint alleged that respondent engaged in improper *ex parte* communications regarding a pending matter and dismissed and reduced charges without basis in law and without notice to the District Attorney. Respondent filed a Verified Answer dated July 11, 2007.

On September 26, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and that respondent be censured, and waiving further submissions and oral argument.

On November 1, 2007, the Commission accepted the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Rose Town Court since 1984. He is not an attorney.
2. On or about June 4, 2006, Sean Gardner, who was 21 years old, was charged with three misdemeanors in the Town of Rose: Driving While Intoxicated (DWI), Driving With A Blood Alcohol Content of .08 % or More (DWBAC), and Unlawfully Dealing With A Minor. The latter charge involved an allegation that the defendant provided an alcoholic beverage to a twenty year-old friend with whom he was driving.
3. Mr. Gardner was scheduled to appear before respondent on August 7, 2006, on the charge of Unlawfully Dealing With A Minor, and August 24, 2006 on the DWI and

DWBAC charges. Respondent and Mr. Gardner have no relationship or association with each other except as judge and defendant.

4. In or around June 2006, Mr. Gardner communicated with Staff Sergeant Kevin B. Sligh, a recruiter for the United States Army, and decided to enlist in the Army, with an induction date of on or about July 19, 2006. On or about July 5, 2006, Mr. Gardner learned from Sergeant Sligh that an alcohol-related conviction would significantly delay the time of his enlistment.

5. At some time between July 5, 2006, and July 17, 2006, Sergeant Sligh communicated with respondent by telephone, advised him that Mr. Gardner was scheduled to enlist on July 19, 2006, and asked that the pending matters against Mr. Gardner be accelerated.

6. Respondent thereupon rescheduled Mr. Gardner's return date to July 17, 2006, as to all three charges. Respondent did not notify the Wayne County District Attorney of the new schedule.

7. On or about July 17, 2006, Mr. Gardner appeared in court before respondent, discussed the charges pending against him and indicated that although he was scheduled to enlist in the military, an alcohol-related conviction would delay his enlistment date. The District Attorney's Office was not present.

8. Respondent thereupon left the courtroom, telephoned Sergeant Sligh and discussed with him the effect that a reduction to Driving While Ability Impaired would have upon Mr. Gardner's enlistment. Sergeant Sligh informed respondent that a conviction for any alcohol-related offense would delay enlistment for a year from the conviction date.

9. Respondent thereafter returned to the courtroom, dismissed the DWI charge, dismissed the Unlawfully Dealing With A Minor charge, reduced the misdemeanor DWBAC charge to a traffic infraction, *i.e.* Failure To Obey A Traffic Control Device, and imposed a \$205 fine and surcharge. Respondent did so without basis in law and without notice to or the consent of the Wayne County District Attorney, contrary to the requirements of Sections 170.30, 170.40, 170.45, and 210.45 of the Criminal Procedure Law.

10. Respondent was aware that notice to and the consent of the District Attorney's office was required before reducing the DWBAC charge and dismissing the other charges. Respondent advanced the date of the defendant's appearance and disposed of the charges without notice to or the consent of the District Attorney so that the charges would not delay the defendant's enlistment in the United States Army.

11. Although respondent was motivated by a desire to give a young defendant the chance to straighten out and improve his life by entering military service, he acknowledges that it was improper for him to excise the District Attorney from the proceedings and otherwise to circumvent the procedures he was sworn to uphold. Respondent commits not to repeat such conduct.

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)(1) and 100.3(B)(6) of the

Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

It was improper for respondent to dismiss two charges against a defendant and reduce a third charge based on *ex parte* discussions with the Army recruiter and without notice to or the consent of the District Attorney’s office. By granting a disposition that was contrary to the statutory procedures (Crim Proc Law §§170.30, 170.40, 170.45, 210.45), respondent failed to meet his ethical duty to “be faithful to the law” (Rules, §100.3[B][1]) and to “accord to every person who has a legal interest in a proceeding... the right to be heard according to law” (Rules, §100.3[B][6]).

Such conduct warrants public discipline. *See, Matter of Cook*, 2006 Annual Report 119 (Comm on Judicial Conduct); *Matter of Hooper*, 1999 Annual Report 105 (Comm on Judicial Conduct); *Matter of More*, 1996 Annual Report 99 (Comm on Judicial Conduct).

It has been stipulated that respondent was motivated by a desire to give the youthful defendant an opportunity to improve his life by entering military service. Such motivation is no excuse for disregarding the statutory requirements and depriving the District Attorney’s office of an opportunity to be heard with respect to the disposition. Indeed, by moving up the court date without notice, respondent ensured that the District Attorney would not be heard. We note that respondent commits not to repeat such conduct.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

Dated: November 7, 2007



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **THOMAS P. BROOKS, II**, a Justice of the Veteran Town Court and the Millport Village Court, Chemung County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Honorable Thomas P. Brooks, II, *pro se*

The respondent, Thomas P. Brooks, II, a Justice of the Veteran Town Court and the Millport Village Court, Chemung County, was served with a Formal Written Complaint dated January 24, 2007, containing three charges. The Formal Written Complaint alleged that respondent failed to administer properly the Veteran Town Court and failed to properly supervise his court staff with the result that court funds were not deposited as required, and failed to notify the Department of Motor Vehicles that 142 defendants in traffic cases had failed either to appear or to pay fines as required. Respondent filed an answer dated February 20, 2007.

On August 21, 2007, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On November 1, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Veteran Town Court since 2000 and a Justice of the Millport Village Court since 1997. He is not an attorney.
2. From 2000 to the present, six [sic] different clerks have been employed at various times by the Town of Veteran to assist respondent: Jane Briggs (through September 2000); Beverly Michalko (December 2000 through December 2002); Carol Zachery (May 2003 through July 2005); Rebecca Clark (September 2005 through December 2006); and Deborah Kelce Brooks (January 2007 to the present).

As to Charge I of the Formal Written Complaint:

3. From April 2001 through February 2006, respondent did not properly administer the Veteran Town Court and supervise his court clerk, with the result that \$1,395.00 in court funds received by the court in connection with eleven cases as set forth in Schedule A annexed to the Agreed Statement of Facts were not deposited into the court's bank account but were instead retained in the court files.

4. Upon learning from the Commission's staff in February 2006 that fines and fees received by the court in connection with eleven cases had been paper-clipped to the specific case files and not deposited into the court bank account, respondent took action to deposit those funds. All the funds have now been deposited, and there is no evidence of conversion or the misuse of funds.

As to Charge II of the Formal Written Complaint:

5. From May 2004 through April 2005, respondent did not properly administer the Veteran Town Court and supervise his court clerk, with the result that court funds were not deposited in the court's bank account within 72 hours of receipt as required by Section 214.9(a) of the Uniform Rules for the Justice Courts. In no month during that period did respondent's deposits into the court account equal the amount of court funds he had received during that month.

6. In or around May 2004, respondent received \$5,240.00 in court funds but deposited \$715.00 into his court account.

7. In or around June 2004, respondent received \$2,910.00 in court funds but deposited \$5,240.00 into his court account.

8. In or around July 2004, respondent received \$815.00 in court funds but deposited \$2,060.00 into his court account.

9. In or around August 2004, respondent received \$5,425.00 in court funds but deposited \$1,065.00 into his court account.

10. In or around September 2004, respondent received \$2,465.00 in court funds but deposited \$5,425.00 into his court account.

11. In or around October 2004, respondent received \$2,230.00 in court funds but deposited \$2,465.00 into his court account.

12. In or around November 2004, respondent received \$4,515.00 in court funds but deposited \$2,230.00 into his court account.

13. In or around December 2004, respondent received \$2,526.00 in court funds but deposited \$4,390.00 into his court account.

14. In or around January 2005, respondent received \$3,640.00 in court funds but deposited \$2,621.00 into his court account.

15. In or around February 2005, respondent received \$8,107.00 in court funds but deposited \$1,887.42 into his court account.

16. In or around March 2005, respondent received \$3,610.00 in court funds but deposited \$8,560.55 into his court account.

17. In or around April 2005, respondent received \$1,520.00 in court funds but deposited \$4,210.00 into his court account.

18. As a matter of practice between May 2004 and April 2005, court funds were deposited into the court account on a monthly basis rather than within 72 hours of receipt.

19. As a result of the Commission's investigation of the matters herein, respondent has taken steps to insure that all court funds are now deposited within 72 hours of receipt, as required by law.

20. Although respondent's deposits of court funds were not made in a timely or complete manner, all court funds have now been deposited, and there is no evidence of conversion or the misuse of funds.

As to Charge III of the Formal Written Complaint:

21. From January 2000 through February 2006, notwithstanding the requirements of Section 514(3) of the Vehicle and Traffic Law, respondent did not notify the Commissioner of Motor Vehicles to order the suspension of the driver's licenses of traffic defendants who failed to appear or pay a fine. Specifically, respondent failed to notify the Commissioner about the 142 defendants identified on Schedule B annexed to the Agreed Statement of Facts, notwithstanding that such defendants had been charged in the Veteran Town Court with violations of the Vehicle and Traffic Law and had failed either to appear in court or pay fines totaling \$7,750.00.

22. As a result of the Commission's investigation of the matters herein, respondent notified the Commissioner of Motor Vehicles to suspend the licenses of any and all defendants who have failed to appear or pay a fine, and to collect the \$7,750.00 in unpaid fines.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(C)(1) and 100.3(C)(2) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A town or village justice is personally responsible for monies received by the court (1983 Op. of the State Comptroller, No. 83-174). Such monies must be properly documented and

deposited within 72 hours of receipt (Uniform Justice Court Rules §214.9[a] [22 NYCRR §214.9(a)]). While these responsibilities may be delegated, a judge is required to exercise supervisory vigilance over court staff to ensure the proper performance of these important functions. *See Matter of Cavotta*, 2008 Annual Report \_\_\_ (Comm. on Judicial Conduct); *Matter of Jarosz*, 2004 Annual Report 116 (Comm. on Judicial Conduct).

Respondent has acknowledged that over a six-year period, he failed to perform his administrative and supervisory duties adequately, resulting in the careless handling of funds collected by the court. The record reveals a pattern of deposits that were untimely and incomplete. For example, in one month, respondent received \$5,240 in court funds but deposited only \$715 into his court account; the next month, \$2,910 was received and \$5,240 was deposited. In eleven cases, monies received by the court were simply placed in the case files, rather than deposited in the court bank account. In one case, a \$500 check was not deposited until nearly five years after it was received; several other checks and money orders were not deposited for several years.

Notwithstanding that all the funds respondent collected were eventually deposited, the administration of justice is compromised when public funds entrusted to a judge are handled in a careless manner. When such carelessness involves substantial amounts of money and continues for years, the damage to public confidence in the judge's court is considerable.

In addition, respondent neglected 142 motor vehicle cases pending in his court by failing to use the legal means available to him to compel defendants to answer the charges or to pay fines totaling \$7,750 he had imposed. Section 514(3) of the Vehicle and Traffic Law requires a judge to notify the Commissioner of Motor Vehicles of such dereliction so that the defendants' drivers' licenses can be suspended. By failing to do so, respondent permitted defendants to avoid legal process by simply ignoring the summonses they were issued or the fines levied against them. Such neglect deprived state and local authorities of thousands of dollars that should have been collected, and promotes disrespect for the administration of justice. *Matter of Ware*, 1991 Annual Report 79 (Comm. on Judicial Conduct).

In mitigation, it has been stipulated that there is no evidence of conversion or misuse of court funds and that respondent has taken steps to insure that funds are now deposited promptly, as required by law.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

Dated: November 7, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **STEPHEN H. BROWN**, a Justice of the Junius Town Court, Seneca County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Honorable Stephen H. Brown, *pro se*

The respondent, Stephen H. Brown, a Justice of the Junius Town Court, Seneca County, was served with a Formal Written Complaint dated August 21, 2007, containing one charge. The Formal Written Complaint alleged that in connection with a landlord-tenant dispute respondent engaged in an *ex parte* communication and sent an intimidating letter to the tenant without any lawful basis. Respondent filed an answer on October 20, 2007.

On November 19, 2007, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 6, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Junius Town Court since January 1, 2006. He is not an attorney. He was employed for 36 years as an independent contractor serving mainframe computers. He now runs a business repairing furniture and restoring antique furniture.

2. Respondent and Stephen Smith are volunteer firefighters in the Town of Junius. They are acquainted with each other through that activity but are not personal friends.

3. On October 26, 2006, respondent was scheduled to hear *Stephen Smith v. Kimberly Silbernagel*, a summary proceeding for eviction and nonpayment of rent over a trailer located in the Town of Junius.

4. Prior to the scheduled hearing, the defendant moved out of the trailer, and the parties spoke privately and settled the dispute. The defendant orally agreed to pay the plaintiff \$550 by December 1, 2006. Neither party was represented by counsel.

5. The parties advised respondent on October 26, 2006, that they had settled the matter and told him of Ms. Silbernagel's oral agreement to pay Mr. Smith \$550 by December 1, 2006. Therefore, no hearing was held. The oral settlement agreement between the parties was never memorialized, and respondent did not issue a decision, order or judgment in the matter. Neither party had counsel with them before respondent.

6. Prior to this proceeding, respondent had presided over only one other summary proceeding for eviction.

7. On the afternoon of December 1, 2006, Mr. Smith went to respondent's home in the Town of Junius and told him he had not received the \$550 from Ms. Silbernagel. Mr. Smith asked for respondent's assistance in obtaining payment. Respondent told Mr. Smith that he would contact Ms. Silbernagel.

8. On December 13, 2006, respondent composed and sent to Ms. Silbernagel a handwritten letter on court stationery, which is attached as Exhibit A to the Agreed Statement of Facts, stating *inter alia* that he knew where she lived and that if she did not contact him with a plan for paying Mr. Smith, respondent could take various actions against her, such as ordering the suspension of her operator's license, issuing a warrant for her arrest, garnishing her wages and sending her to jail.

9. Respondent composed the letter off-the-cuff, without assistance from Mr. Smith or anyone else. His purpose was to convince Ms. Silbernagel to live up to her oral representation in his court that she would pay Mr. Smith \$550, as agreed, in settlement of the lawsuit.

10. Respondent recognizes that it was improper for him to send a threatening letter to Ms. Silbernagel as a method of enforcing the oral agreement she had reached with Mr. Smith.

11. Respondent had been on the bench for ten months at the time of this episode. He did not realize then but recognizes now that Section 1812 of the Uniform Justice Court Act sets forth the procedures for a judgment creditor to enforce a small claims judgment in his court. Respondent also now recognizes that, in the absence of a judgment or other enforceable court order, or any other formal application for relief, there was no basis for him to intervene in this matter.

12. As of the date of this Agreed Statement of Facts, the dispute between Mr. Smith and Ms. Silbernagel has not been resolved. There have been no further proceedings or discussions between them, and there has been no judgment or other adjudication rendered. In the event there are further proceedings in connection with the dispute, respondent will disqualify himself from any involvement.

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(A), 100.3(B)(3), 100.3(B)(6) and

100.3(B)(7) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

Respondent abused his judicial power by sending a threatening letter in a landlord-tenant dispute in an attempt to enforce an oral settlement agreement. Respondent acted without a lawful basis based on the landlord’s *ex parte* request for assistance in obtaining payment.

A month after the parties in an eviction proceeding advised respondent that their dispute had been settled, the landlord contacted respondent, told him that the tenant had not paid the agreed-upon amount, and asked for assistance in collecting the payment. Based on the landlord’s request, respondent attempted to coerce the tenant into paying the debt by sending a letter on court stationery, stating that she “must” contact the court within a week “with a payment plan.” Respondent’s letter stated further that if the tenant failed to do so, “remember I know where you live” and “N.Y. state law allows the court many options. Suspensions of all licenses – Warrants – Wage Garnish – Jail.”

Respondent’s threat of incarceration for nonpayment of a civil debt was unenforceable. *See, Matter of Hamm*, 2003 Annual Report 123 (Comm on Judicial Conduct). Even if there had been a decision or judgment, respondent had no authority to arrest a litigant for non-payment of a civil debt, and it was improper even to imply that non-payment of the debt was a criminal matter. Nor did he have authority to impose any other sanctions in the absence of a judgment or decision. It is apparent that the sole purpose of making such statements was to intimidate the tenant into complying with the oral agreement. By his conduct, respondent violated his obligation to discharge his judicial duties in a fair and judicious manner and created the appearance that the landlord, who was a fellow volunteer firefighter in the town, was in a special position to influence respondent, contrary to Section 100.2(C) of the Rules.

In considering an appropriate sanction, we note that at the time of these events respondent had served as a judge for less than a year. In further mitigation, we note that respondent has stipulated that his conduct was improper and that he will disqualify himself from any further proceedings in connection with this matter.

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

Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder was not present.

Dated: December 12, 2007



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **WILLIAM F. BURIN**, a Justice of the Lansing Town Court, Tompkins County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Williamson, Clune & Stevens (by John Alden Stevens) for the Respondent

The respondent, William F. Burin, a Justice of the Lansing Town Court, Tompkins County, was served with a Formal Written Complaint dated September 18, 2006, containing two charges. Respondent filed a Verified Answer dated October 4, 2006.

On February 8, 2007, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On March 8, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Lansing Town Court, Tompkins County since January 1, 1994. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. From about January 2004 through in or about May 2005, respondent did not diligently discharge his administrative responsibilities and properly supervise his court clerks, with the result that approximately \$153,403.21 in court funds received during that period were not deposited within 72 hours of receipt, as required by Section 214.9(a) of the Uniform Civil Rules for the Justice Courts, and as indicated in the following paragraphs.

3. In January 2004, respondent received \$4,535.00 in court funds that were not deposited until March 11, 2004.

4. In February 2004, respondent received \$5,455.00 in court funds that were not deposited until March 11, 2004.

5. In March 2004, respondent received \$9,247.34 in court funds that were not deposited until May 7, 2004.
6. In April 2004, respondent received \$6,648.37 in court funds that were not deposited until June 10, 2004.
7. In May 2004, respondent received \$10,380.00 in court funds that were not deposited until June 25, 2004.
8. In June 2004, respondent received \$11,420.00 in court funds of which \$6,370.00 was deposited on July 28, 2004, and \$5,050.00 on July 29, 2004.
9. In July 2004, respondent received \$7,050.00 in court funds that were not deposited until August 25, 2004.
10. In August 2004, respondent received \$6,790.00 in court funds of which \$500.00 was deposited on August 12, 2004, \$1,000.00 on August 25, 2004, and \$5,290.00 on September 15, 2004.
11. In September 2004, respondent received \$10,420.00 in court funds of which \$10,315.00 were deposited on September 30, 2004, and \$105.00 on October 2, 2004.
12. In October 2004, respondent received \$6,650.00 in court funds that were not deposited until February 7, 2005.
13. In November 2004, respondent received \$15,110.00 in court funds that were not deposited until February 23, 2005.
14. In December 2004, respondent received \$12,110.00 in court funds that were not deposited until March 10, 2005.
15. In January 2005, respondent received \$10,900.00 in court funds that were not deposited until March 23, 2005.
16. In February 2005, respondent received \$4,165.00 in court funds that were not deposited until April 1, 2005.
17. In March 2005, respondent received \$8,830.00 in court funds that were not deposited until April 15, 2005.
18. In April 2005, respondent received \$11,055.00 in court funds of which \$6,070.00 was deposited on April 29, 2005, and \$4,985.00 on May 12, 2005.
19. In May 2005, respondent received \$12,637.50 in court funds of which \$9,552.50 were deposited on May 24, 2005, and \$3,085.00 on June 8, 2005.
20. From January 2004 through May 2005, respondent relied on his court clerk to properly handle all court funds. The court clerk received the funds, issued receipts, marshaled

funds for deposit, prepared bank deposit tickets and deposited the funds into the court bank account. Respondent did not handle court funds.

21. As a matter of practice, court funds were deposited on a monthly basis rather than within 72 hours of receipt, although on occasion, funds were held for periods of up to four months. Respondent never advised his court clerk that funds were required to be deposited within 72 hours of receipt.

22. Undeposited court funds were secured in a “bank bag” that was stored with the court records in the court office. During the period from January 2004 through May 2005, respondent had two different clerks: Patricia Kannus, who resigned in September 2004, and Penny Slougher, who began in October 2004. A prior court clerk, Joanne Payne, left her position on September 3, 2003. The position was not filled until the hiring of Ms. Kannus on October 20, 2003. Respondent was aware that court deposits were required to be made within 72 hours of receipt and that between October 2004 and May 2005, the statutory requirement was not being met. Respondent did not take any action to assist personally in the handling or depositing of funds to ensure compliance with the statutory requirement.

23. In January 2005, as a consequence of a letter issued by the Department of Audit and Control directing the Lansing Town Supervisor to stop payment of respondent’s salary, respondent attempted to secure assistance from the town board for his clerk. Respondent requested and obtained permission for his court clerk to receive “overtime” compensation for time beyond her normal work week. It was not until after being contacted by Commission staff in July 2005 that respondent required the clerk to deposit all court funds within 72 hours of receipt.

24. While deposits of respondent’s court funds were regularly made after the 72-hour period prescribed by law, all funds were accounted for and eventually deposited. No court funds were missing.

25. Respondent acknowledges that he was responsible for properly training and supervising his court clerk in the handling and depositing of court funds but that he did not perform these duties in an adequate manner.

As to Charge II of the Formal Written Complaint:

26. From January 2004 through April 2005, respondent did not diligently discharge his administrative responsibilities and properly supervise his court clerks, with the result that approximately \$99,078.37 in court funds received during that period were not reported and remitted to the State Comptroller within ten days of the month succeeding collection a total, as required by Sections 2020 and 2021 of the Uniform Justice Court Act, Section 1803 of the Vehicle and Traffic Law and Section 27(1) of the Town Law, as indicated in the following paragraphs. As a result, on February 24, 2005, the State Comptroller ordered that payment of respondent’s judicial salary be stopped.

27. Respondent's report and remittance to the State Comptroller for the month of January 2004, in the amount of \$4,535.00, was received on April 26, 2004, 76 days beyond the statutory required time.

28. Respondent's report and remittance to the State Comptroller for February 2004, in the amount of \$3,455.00, was received on May 26, 2004, 77 days beyond the statutory requirement.

29. Respondent's report and remittance to the State Comptroller for March 2004, in the amount of \$7,900.00, was received on June 25, 2004, 76 days beyond the statutory requirement.

30. Respondent's report and remittance to the State Comptroller for April 2004, in the amount of \$4,348.37, was received on July 6, 2004, 57 days beyond the statutory requirement.

31. Respondent's report and remittance to the State Comptroller for May 2004, in the amount of \$5,880.00, was received on July 28, 2004, 48 days beyond the statutory requirement.

32. Respondent's report and remittance to the State Comptroller for June 2004, in the amount of \$11,720.00, was received on August 27, 2004, 48 days beyond the statutory requirement.

33. Respondent's report and remittance to the State Comptroller for July 2004, in the amount of \$6,550.00, was received on September 9, 2004, 30 days beyond the statutory requirement.

34. Respondent's report and remittance to the State Comptroller for August 2004, in the amount of \$4,890.00, was received on October 4, 2004, 24 days beyond the statutory requirement.

35. Respondent's report and remittance to the State Comptroller for October 2004, in the amount of \$5,400.00, was received on February 9, 2005, 91 days beyond the statutory requirement.

36. Respondent's report and remittance to the State Comptroller for November 2004, in the amount of \$6,110.00, was received on March 1, 2005, 81 days beyond the statutory requirement.

37. Respondent's report and remittance to the State Comptroller for December 2004, in the amount of \$9,010.00, was received on March 14, 2005, 63 days beyond the statutory requirement.

38. Respondent's monthly report and remittance to the State Comptroller for January 2005, in the amount of \$7,480.00, was received on March 28, 2005, 46 days beyond the statutory requirement.

39. Respondent's report and remittance to the State Comptroller for February 2005, in the amount of \$4,165.00, was received on April 6, 2005, 27 days beyond the statutory requirement.

40. Respondent's report and remittance to the State Comptroller for March 2005, in the amount of \$9,080.00, was received on April 18, 2005, eight days beyond the statutory requirement.

41. The State Comptroller ordered payment of respondent's salary resumed on March 31, 2005.

42. Respondent's report and remittance to the State Comptroller for April 2005, in the amount of \$8,555.00, was received on May 18, 2005, eight days beyond the statutory requirement.

43. Respondent was aware that he was required by law to report and remit all court funds to the State Comptroller within ten days of the month succeeding collection. Respondent was also aware that as a matter of practice, his reports and remittances to the State Comptroller were submitted late. Respondent signed and reviewed each report before it was submitted to the State Comptroller.

44. Respondent relied on his court clerk to prepare and submit his monthly report. He took no action to ensure that reports were submitted as required by law until after the State Comptroller ordered that payment of his salary be stopped for late reporting and remitting. Respondent thereafter took steps to secure the approval of the town board of overtime hours for his clerk. Respondent did not take any action to assist personally in the reporting and remitting of funds to ensure compliance with the statutory requirement.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(C)(1) and 100.3(C)(2) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

A town or village justice is personally responsible for monies received by the court (1983 Opinion of the State Comptroller, No. 83-174). Such monies must be deposited within 72 hours of receipt and remitted to the State Comptroller by the tenth day of the month following collection (Uniform Civil Rules for the Justice Courts §214.9[a]; UJCA §2021[1]; Town Law §27; Vehicle and Traffic Law §1803). Although these responsibilities may be delegated, a judge is required to exercise supervisory vigilance to ensure the proper performance of these important functions. *See Matter of Jarosz*, 2004 Annual Report 116 (Comm. on Judicial Conduct) (inadequate supervision of court clerk, who made false entries to conceal receipt of monies, resulting in \$3,000 in missing funds) (censure); *Matter of Restino*, 2002 Annual Report 145 (Comm. on Judicial Conduct) (inadequate supervision of court clerk, who failed to maintain adequate records and to make timely deposits) (admonition).

As a consequence of respondent's inadequate supervision of his court staff over a period of 17 months, thousands of dollars in court monies were not deposited and remitted to the State in a timely manner. Typically, deposits were made monthly, rather than within 72 hours of receipt as required by law. Remittances to the State, which are required to be made monthly, were filed as much as three months late, thereby depriving State coffers of funds that should have been remitted earlier. Since respondent's court collected an average of over \$9,000 per month, the amounts involved were considerable.

Although respondent relied on his clerk to handle all court monies, he failed to provide adequate supervision or training to his staff to ensure that monies were deposited promptly and reported and remitted on a timely basis. Even after he became aware that the statutory requirements were not being followed, respondent did not assist personally in handling funds to ensure compliance with the mandated procedures, although he took steps to secure approval for overtime hours for his clerk. Only after being contacted by Commission staff did respondent finally require that deposits be made within 72 hours of receipt.

We note that undeposited funds were stored in a "bank bag" stored with court records in the court office. We remind respondent of the importance of ensuring that court funds are not only promptly deposited, but properly safeguarded prior to deposit.

In mitigation, we note that all funds were eventually deposited and have been properly accounted for. There is no indication that funds were missing or used for inappropriate purposes. We also note that respondent now recognizes his obligation as a judge to ensure compliance with the statutory procedures regarding the depositing, reporting and remitting of court funds.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Ms. DiPirro was not present.

Dated: March 16, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **EDMUND V. CAPLICKI, JR.**, a Justice of the LaGrange Town Court, Dutchess County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Melissa R. DiPalo, Of Counsel) for the Commission  
Sarah Diane McShea for the Respondent

The respondent, Edmund V. Caplicki, Jr., a Justice of the LaGrange Town Court, Dutchess County, was served with a Formal Written Complaint dated December 1, 2006, containing one charge. The Formal Written Complaint alleged that respondent made demeaning, derisive and otherwise inappropriate remarks about a female attorney.

On September 12, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and that respondent be censured, and waiving further submissions and oral argument.

On September 19, 2007, the Commission accepted the Agreed Statement of Facts and made the following determination.

1. Respondent was admitted to the practice of law in New York in 1970. He has been a Justice of the LaGrange Town Court since June 1974.

2. On June 25, 2005, at about 3:00 A.M., respondent arraigned Ronald Wood, who had been picked up on a bench warrant for failing to appear in court on a felony grand larceny charge. During the arraignment, respondent asked Mr. Wood whether he had an attorney and advised him that if he did not, an attorney would be appointed to represent him. Mr. Wood responded that he had an attorney, but could not remember his attorney's name or address or phone number. Mr. Wood stated that his attorney had represented him on other charges and had helped him "beat" those charges. Mr. Wood also stated that he liked his attorney and that she was "cute" and "had a nice butt." Respondent set bail, assigned the Dutchess County Public Defender's Office to represent Mr. Wood since he could not remember his attorney's name and scheduled his next court appearance for June 28, 2005. Respondent noted Mr. Wood's comments about his attorney on the arraignment sheet, believing that the attorney had a right to

know what her client had said about her. Mr. Wood was produced in court on June 28, 2005, but the Public Defender's Office was not present in court and his case was adjourned until July 5, 2005.

3. On July 5, 2005, respondent handled the calendar call at the LaGrange Town Court, substituting for a colleague who was on vacation that day. Respondent presided over *People v. Ronald Wood*, in which the defendant, Mr. Wood, was charged with Grand Larceny in the Fourth Degree. A senior assistant public defender appeared on behalf of Mr. Wood, who had been held in custody by the Dutchess County Sheriff's Office since his arraignment on June 25, 2005.

4. When Mr. Wood's case was called, respondent asked Mr. Wood if he had counsel. Mr. Wood identified the public defender who was present as his attorney. Respondent asked the defendant's attorney and the assistant district attorney to approach the bench. In a sidebar conference, respondent advised the defendant's attorney and the assistant district attorney that Mr. Wood had stated at his arraignment that he "liked his attorney," that she had gotten him off several other times on other charges, and that she was "cute" and had a "nice butt." Mr. Wood, who was nearby, confirmed that he had made the remarks.

5. Respondent raised the subject of the defendant's remarks about his attorney because he wanted to advise the attorney that her client had made comments about her. Respondent used the same words that Mr. Wood had used – "cute" and "nice butt" – and now realizes that he should not have repeated Mr. Wood's actual words.

6. In response to a plea offer by the assistant district attorney, Mr. Wood agreed to enter a guilty plea to a lesser offense of Petit Larceny. During the plea allocution in open court, respondent asked Mr. Wood whether he was satisfied with his attorney and if she was a "good attorney." Mr. Wood replied "yes" to both questions. Respondent also said that at arraignment, Mr. Wood had stated that his attorney was "cute" and had a "nice butt," and he asked whether Mr. Wood was still of that same opinion. (Although respondent does not recall repeating the actual remarks, he accepts the recollection of the defendant's attorney that he did so.) Mr. Wood again answered "yes."

7. Respondent asked Mr. Wood to provide his address and telephone number and advised him to contact his attorney when he was contacted by the Probation Department. The defendant's attorney also asked Mr. Wood to provide his telephone number, and respondent stated to her, "Oh, now you're getting his number." (While respondent does not recall making this comment, and the court clerk's contemporaneous notes indicate only that respondent requested Mr. Wood's telephone number, respondent accepts the recollection of the defendant's attorney.) Respondent's comment was intended as humor, and he acknowledges that it was inappropriate.

8. The same afternoon, the same attorney represented three other male defendants whose cases were heard by respondent. In connection with these cases, respondent asked each defendant if he agreed with Mr. Wood's remarks about the attorney. He did not repeat the remarks, but as the courtroom was relatively small, it was likely that Mr. Wood's remarks had been heard by the defendants and that respondent was aware of this when he asked the question

referring to Mr. Wood's prior remarks. Respondent's inappropriate remarks were a misguided attempt at humor. Although he did not intend to demean or embarrass the attorney, his conduct had that effect and was inappropriate.

9. The following day, July 6, 2005, the attorney appeared again before respondent. In colloquy before calling the cases on his calendar, in the presence of the attorney and two other attorneys, respondent told the attorney that he would call her case first because of how he had treated her the previous day. Respondent also laughed and recounted Mr. Wood's statements about the attorney being "cute" and having a "nice butt," and said, "Is that so bad?" (Respondent does not recall repeating Mr. Wood's words, but accepts the attorney's recollection that he did so.) Respondent's comment was intended as humor, and he acknowledges that it was inappropriate and offensive.

10. Respondent sincerely regrets his conduct and unequivocally states that he did not intend to offend or embarrass the attorney. He recognizes that his comments, which were intended to be humorous and not denigrating, were inappropriate and insensitive, and he apologizes for them. Prior to the incident on July 5, 2005, the attorney had appeared regularly in respondent's courtroom without incident, and they had enjoyed a collegial professional relationship. Respondent is known among local lawyers for his sense of humor, which is often self-effacing, but in this instance, he realizes he went too far at someone else's expense. There is no indication that this episode was part of a larger pattern of conduct demeaning to litigants, lawyers or others. Respondent strives to be respectful of all with whom he deals in his official capacity, but in this matter he made a serious misjudgment, which he recognizes and regrets.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(3) and 100.3(B)(4) of the Rules Governing Judicial Conduct ("Rules") and Sections 700.5(a) and 700.5(e) of the Rules of the Supreme Court, Appellate Division, Second Department ("Second Department Rules"), and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. 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.

A judge is obliged to be the exemplar of dignity and decorum in the courtroom and to treat those who appear in the court with courtesy and respect (Rules, §100.3[B][3]; Second Department Rules, §700.5[a], [e]). By gratuitously repeating and repeatedly joking about a defendant's inappropriate comments about his attorney's physical appearance, respondent clearly violated those standards.

When the defendant stated at the arraignment that his attorney was "cute" and "had a nice butt," it was entirely unnecessary for respondent to note those comments on the arraignment sheet and to repeat them in a sidebar conference ten days later when the case came before him, notwithstanding his rationale that he believed the defendant's attorney, a senior assistant public defender, had "a right to know" of the comments. It is no excuse that in using that language, respondent was simply reiterating the inappropriate statements that the defendant had made. Repeating those comments served no salutary purpose, demeaned the attorney and undermined

her professional status. Respondent's conduct was contrary to the standards of dignity, decorum and respect required of every judge.

Respondent compounded his misconduct on July 5<sup>th</sup> by reciting the defendant's comments in open court, by continuing to refer to the comments when other defendants appeared before him that day, and by reiterating them the following day even after he apparently realized that his conduct was improper. During the plea allocution, respondent reminded the defendant of his earlier comments, using the same language the defendant had used, and asked the defendant whether he still agreed with them. When the attorney asked the defendant for his telephone number (after respondent had directed the defendant to provide it), respondent joked, "Oh, now you're getting his number." Thereafter, in another misguided attempt at humor, respondent asked each of three other male defendants, all of whom were represented by the same attorney, whether each defendant agreed with Mr. Wood's remarks about the attorney. With each question that gratuitously alluded to those comments, respondent participated in the demeaning banter and subjected the attorney to further disrespect. The next day, apparently having recognized the impropriety of his behavior -- respondent told the attorney that he would call her cases first because of the way he had treated her the previous day -- he nevertheless repeated the defendant's statements for at least the third time and joked about them, stating, "Is that so bad?"

Such conduct is inexcusable and clearly lacks the courtesy and respect a judge is required to accord to attorneys. Respondent's persistence in his attempted humor at the attorney's expense is simply inexplicable and demonstrates a gross insensitivity to the injurious effects of such behavior. It was demeaning to the attorney and diminishes the dignity of the court. It embarrasses the judiciary as a whole.

As far back as 1983, the Commission held that remarks which serve to demean female attorneys because of their gender have no place in the courts of this state. *See, Matter of Jordan*, 1984 Annual Report 104 (Supreme Court Justice was admonished for addressing a female attorney as "little girl" and for repeating the comment after she objected); *Matter of Doolittle*, 1986 Annual Report 87 (District Court Judge was admonished for repeatedly commenting about the appearance and physical attributes of female attorneys appearing before him); *Matter of Blangiardo*, 1988 Annual Report 129 (Acting Supreme Court Justice was admonished for stating, after swatting at a female lawyer's hand, "I like to hit girls because they are soft").

In considering the sanction, we note that testimonials submitted on respondent's behalf by female attorneys indicate that at other times he has been a respectful, able, dignified professional. Thus, the breach of judicial decorum depicted here, while serious, appears to be an aberration. We also note that respondent recognizes that his comments were inappropriate. We note further that respondent was censured for ticket-fixing in 1978 and has an otherwise unblemished record in more than three decades on the bench.

By reason of the foregoing, the Commission determines that the appropriate disposition is censure. Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: September 26, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ANTHONY J. CAVOTTA**, a Justice of the Stillwater Town and Village Courts, Saratoga County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission  
Tabner, Ryan and Keniry, LLP (by William J. Keniry) for the Respondent

The respondent, Anthony J. Cavotta, a Justice of the Stillwater Town and Village Courts, Saratoga County, was served with a Formal Written Complaint dated March 5, 2007, containing one charge. The Formal Written Complaint alleged that respondent failed to supervise his court clerks and failed to discharge his administrative responsibilities diligently, resulting in numerous record-keeping and other administrative deficiencies. Respondent filed a Verified Answer dated March 30, 2007.

On July 6, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On July 12, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent was a Justice of the Stillwater Village Court from 1977 until March 2007, when the position was abolished. He has been a Justice of the Stillwater Town Court since 1983, and his current term of office expires on December 31, 2007. Respondent is not an attorney.
2. From in or about January 1999 to in or about May 2005, notwithstanding that he was aware of reports by the State Comptroller in 1997 and 2000 that identified deficiencies in the Town of Stillwater Justice Court's financial records and procedures, respondent failed to adequately supervise his court clerks and failed to discharge his administrative duties diligently.
3. In August 2004, respondent and his then co-justice reported to the State Police their discovery that \$315 in court funds collected in December 2003 had not been deposited.

After an inconclusive investigation by the State Police, respondent and his co-justice each contributed \$157.50 to cover the shortage, which respondent attributes to malfeasance by a former court clerk.

4. There is no evidence that respondent misappropriated any court funds or destroyed any court records.

5. Respondent has cooperated with the State Police, Stillwater town officials and the Office of Court Administration in an attempt to identify the sources of the missing funds and to reconstruct the missing court records, and has implemented a number of new procedures, as recommended by the State Comptroller in the report appended to the Agreed Statement, so as to prevent future deficiencies such as those identified in the report.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(C)(1) and 100.3(C)(2) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. 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.

A town or village justice is personally responsible for monies received by the court (1983 Op. of the State Comptroller, No. 83-174). Such monies must be properly documented, deposited within 72 hours of receipt, and remitted monthly to the State Comptroller (UJCA §2021[1]; Town Law §27; Vehicle and Traffic Law §1803; Uniform Justice Court Rules §214.9[a]). While these responsibilities may be delegated, a judge is required to exercise supervisory vigilance to ensure the proper performance of these important functions. *See Matter of Jarosz*, 2004 Annual Report 116 (Comm. on Judicial Conduct); *Matter of Restino*, 2002 Annual Report 145 (Comm. on Judicial Conduct).

Respondent has acknowledged that over a six-year period, he failed to adequately supervise his court clerks and failed to discharge his administrative duties diligently, as required by the ethical standards (Rules, §100.3[C][1] and [2]). As a consequence of respondent’s inadequate supervision, \$315 in court monies, received in December 2003, had not been deposited by August 2004 and could not be properly traced due to missing court records. Ultimately, respondent and his co-justice each contributed their personal funds to cover the shortage.

Significantly, respondent was on notice of deficiencies in the court’s records and procedures as a result of reports by the State Comptroller in 1997 and 2000. Such reports should have prompted respondent to be particularly diligent in supervising court staff to ensure that the court’s financial records were properly maintained and that court funds were properly safeguarded. Respondent has acknowledged that he failed to do so.

In considering an appropriate sanction, we note that there is no indication that respondent misappropriated court funds or destroyed court records. We also note, in mitigation, that respondent has cooperated with Town and State officials in an attempt to identify the sources of the missing funds and to reconstruct the missing records, and that he has implemented a number

of new procedures, as recommended by the State Comptroller, so as to prevent future deficiencies.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

Dated: July 19, 2007



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **CATHRYN M. DOYLE**, a Judge of the Surrogate's Court, Albany County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission  
Cade & Saunders (by William J. Cade and John D. Rodgers) for the Respondent

The respondent, Cathryn M. Doyle, a Judge of the Surrogate's Court, Albany County, was served with a Formal Written Complaint dated February 18, 2005, containing two charges. Respondent filed a verified answer dated March 14, 2005.

On April 5, 2005, respondent filed a motion to dismiss the Formal Written Complaint. Commission counsel filed papers dated April 11, 2005, in opposition to the motion, and respondent filed a reply affirmation dated April 20, 2005. By order dated April 22, 2005, the Commission denied the motion to dismiss.

By order dated April 22, 2005, the Commission designated C. Bruce Lawrence, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 15 and 16 and October 20, 2005, in Albany (hereinafter "hearing before the referee"). The referee filed a report dated February 27, 2006.

The parties submitted memoranda with respect to the referee's report. Counsel to the Commission recommended that respondent be removed from office, and counsel to respondent recommended that the charges be dismissed. On December 7, 2006, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been the Surrogate of Albany County since January 1, 2000. Prior to that, she had served as the Chief Clerk of that court for 20 years.

As to Charge I of the Formal Written Complaint:

2. The charge is not sustained and therefore is dismissed.

As to Charge II of the Formal Written Complaint:

3. On February 11, 2004, and June 22, 2004, respondent gave testimony under oath (hereinafter “investigative testimony”) during the Commission’s investigation of a complaint concerning her alleged activities in connection with the Thomas J. Spargo Legal Expense Trust (hereinafter “*Spargo* trust”), a fund established to raise monies for the benefit of her friend, Supreme Court Justice Thomas J. Spargo. Respondent’s investigative testimony concerning her knowledge of, and involvement in, the *Spargo* trust was inconsistent, misleading and evasive.

#### Background

4. In 2003 the *Spargo* trust was established for the purpose of paying legal expenses Judge Spargo was incurring in connection with federal litigation he had brought challenging the Commission’s proceedings against him. The trust documents were prepared by Richard P. Wallace, a Troy attorney. Judge Spargo’s mother, Olive Spargo, was the grantor of the trust; Brian Sanvidge and George Cushing were co-trustees.

5. In 2002 and 2003, there were numerous conversations in respondent’s presence about the *Spargo* litigation and, specifically, a fund to raise money for Judge Spargo’s benefit. Respondent had conversations on that subject with the key participants in the *Spargo* trust – Mr. Wallace, Olive Spargo, Mr. Sanvidge and Mr. Cushing – and with Mr. Cushing’s wife, Susan Keating.

6. Respondent spoke with Olive Spargo, with whom she had a close relationship, about contributing money to help Judge Spargo. Olive Spargo told respondent that she wanted to give money to Judge Spargo and wanted to raise money for that purpose from among her friends. Respondent heard many people say that they wanted to help Judge Spargo so she expected they would contribute money to help him.

7. Mr. Sanvidge, a long-time friend of respondent and a close friend of Judge Spargo, told respondent that he was looking into setting up a fund for Judge Spargo’s benefit and had gotten the names of several attorneys, one of whom was Richard Wallace, whom he intended to contact about setting up such a fund.

8. Sometime after that conversation with Mr. Sanvidge, respondent encountered Mr. Wallace at a bar association event. Respondent asked Mr. Wallace, an attorney who had appeared before her, if he had ever heard of a “Clinton trust,” and said that she had heard that “people are going to set one up.” Mr. Wallace responded that he knew what a “Clinton trust” was, that it was a basic trust that anyone could do, and that he could do one. Thereafter, Mr. Sanvidge contacted Mr. Wallace about setting up the *Spargo* trust, and Mr. Wallace agreed to prepare the trust documents.

9. George Cushing and his wife, Susan Keating, are long-time friends of respondent with whom she talks frequently. Olive Spargo told respondent that Mr. Cushing “was going to handle the fund” for Judge Spargo. Mr. Cushing spoke to respondent about the *Spargo* trust and told her that he wanted to be the “manager” or “trustee” of the fund. Respondent had conversations with Mr. Cushing and Ms. Keating about the trust duties and whether Mr. Cushing would serve as a trustee. Respondent told Mr. Cushing that there would be donors from outside the Capital district.

10. Respondent received the unsigned signature cards for the *Spargo* trust bank account in an envelope at her chambers, and she delivered the envelope containing the cards to Mr. Cushing at her home. After signing the cards, Mr. Cushing left the cards in respondent's kitchen. The signed cards were eventually returned by mail to Mr. Sanvidge.

11. Mr. Sanvidge asked respondent to obtain the *Spargo* trust tax I.D. number from Mr. Wallace's office. Respondent telephoned Mr. Wallace's office, got the number, and passed it on to Mr. Sanvidge.

#### Respondent's Investigative Testimony

12. On February 11, 2004, and June 22, 2004, when questioned under oath by Commission staff about her activities in connection with the *Spargo* trust, respondent testified that while she knew that a fund was being set up for Judge Spargo's benefit, she did not know that it was a trust. She testified further that she did not know anything about "the specifics" of the *Spargo* trust, did not know how the trust was set up, did not know how funds for the trust would be raised, and did not know who may have contributed. Respondent acknowledged that there were numerous conversations about the subject in her presence; she testified that it was a "general topic of conversation" and stated, "Everybody was talking about it."

13. When asked if she had spoken to Mr. Sanvidge directly about the trust, respondent testified that she "didn't have any direct conversations about the trust with anyone." Respondent testified that she had told Mr. Sanvidge that she "had nothing to do with" the trust, and she "didn't want to know anything about it."

14. Respondent testified that she did not solicit Mr. Cushing to be a trustee of the *Spargo* trust and did not know whether he was a trustee. She testified that Mr. Cushing "could very well be" a trustee of the fund and "may have" had a role in the trust but she did not know that "for a fact"; nor did she know "if he ever actually did anything." She testified that she did not recall any specific conversations with Mr. Cushing on the subject although, since they spoke frequently, she was certain Mr. Cushing "would have" talked to her about the possibility of his being a trustee. Respondent also testified that Mr. Cushing was "active" in talking about a trust and she "may have" told him that a trust was being created and "would have" told him "that they were using trustees...as a general point of conversation." In one conversation with Mr. Cushing, she probably told him there were donors "waiting in the wings," or words to that effect, but she does not recall.

15. Respondent testified that she had had no discussions with Mr. Wallace concerning the topic of a trust and did not know of any involvement he had in the *Spargo* trust.

16. Respondent testified that someone, whom she could not identify, left an envelope containing the unsigned signature cards for the *Spargo* trust in her chambers; that the envelope was marked for delivery to George Cushing; and that she gave the envelope to Mr. Cushing at her home without knowing the contents. Respondent testified that she does not know what happened to the cards after Mr. Cushing signed them at her home.

### Respondent's Letter to the Commission

17. Following her investigative testimony, the Commission sent a letter to respondent dated October 21, 2004, describing the testimony of various witnesses as to certain matters and asking if she wished to “amend, change, recant or withdraw” her prior testimony. In her written response dated November 19, 2004 (hereinafter “letter to the Commission”), respondent stated that while she did not wish “to amend, change, recant or withdraw” her prior testimony, she wished to “clarify and correct any mis-impression I have given you” by commenting further as to certain matters.

18. In her letter to the Commission, respondent stated that she had an “informal and casual” conversation with Mr. Wallace in which she asked him if he had ever heard of a “Clinton trust.” Respondent acknowledged that this conversation occurred after Mr. Sanvidge had told her that he was looking into a setting up a fund for Judge Spargo’s benefit and had gotten the names of several attorneys he intended to contact, one of whom was Mr. Wallace. Respondent’s question to Mr. Wallace was “rather academic” since she “did not know if Mr. Sanvidge was even going to pursue the issue.” Respondent also stated that she had obtained the *Spargo* trust tax I.D. number from Mr. Wallace’s office and passed it on to Mr. Sanvidge after Mr. Sanvidge had asked her to verify the number. In other respects, respondent’s letter to the Commission was generally consistent with her investigative testimony.

19. In her letter to the Commission, respondent stated *inter alia* that: (i) although she had “general knowledge,” which came from hearing “sound bites” of conversations with mutual friends, that there was a legal defense fund created for Judge Spargo, she had “no particular recollection of any details”; (ii) when she had testified that she had no “direct conversations about the trust with anyone,” she meant that she had no formal role, but she was present during numerous conversations on the subject and “may have been an idle observer of whatever process was used to create the final entity”; (iii) “to the best of [her] knowledge” she did not ask Mr. Cushing to serve as trustee, and it is her understanding that he had been asked to serve as “manager/trustee” of the *Spargo* trust by Mr. Sanvidge; (iv) she does not recall speaking to Mr. Cushing about trustee duties; (v) she told Mr. Cushing that there would be contributions to the *Spargo* fund from outside the Capital district since Judge Spargo’s mother had told her that she and several friends were going to contribute to “help” Judge Spargo; and (vi) she does not know what happened to the signature cards after she gave them to Mr. Cushing; she either mailed them, gave them to someone or left them with Mr. Cushing.

### Respondent's Hearing Testimony

20. At the hearing before the referee, respondent gave testimony that was generally consistent with her investigative testimony as modified by her November 19<sup>th</sup> letter to the Commission.

21. At the hearing, when questioned about her conversation with Mr. Wallace on the subject of a “Clinton trust,” respondent stated under oath that she did not know that President Clinton had been impeached and tried in the Senate.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2(A) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge II of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established. Charge I is not sustained and therefore is dismissed.

Pursuant to its statutory authority (Jud. Law §44, subd. 3), the Commission sought respondent's testimony during an investigation of her alleged involvement in the Spargo Legal Expense Trust, a fund established to raise monies for the benefit of respondent's friend and fellow judge. Accompanied by counsel, respondent appeared on two occasions at the Commission's office and, under oath, testified extensively concerning her actions. We conclude that while the underlying allegations concerning her involvement in the *Spargo* trust have not been sustained, respondent's sworn investigative testimony concerning those matters violated her duty to be forthright and cooperative.

The record establishes that during the investigation respondent repeatedly minimized and distorted her knowledge of, and involvement in, the *Spargo* trust by making statements that were, on their face, inconsistent, evasive and obfuscatory. For example, respondent testified that she did not know that the *Spargo* fund was a trust, although she "assume[d]" it was, and that she did not know anything about "the specifics" of the *Spargo* trust. We reject her defense that such testimony was technically accurate since she never actually saw the trust documents. A judge's duty to testify forthrightly is not satisfied by responses that are misleading and obstructionist.

Respondent conceded that there were numerous conversations about the general subject in her presence, although, in another overly technical response, she denied having "direct conversations" about the *Spargo* trust. While she may have attempted to distance herself from the trust's activities, it is crystal clear from her own testimony that she knew numerous details about the trust's origins and operations and that she had conversations related to the trust with all the key participants: attorney Richard Wallace, who prepared the trust documents; Olive Spargo, the grantor; and Brian Sanvidge and George Cushing, the co-trustees.

Throughout her investigative testimony, respondent engaged in similar equivocation and obfuscation. She testified that she did not solicit Mr. Cushing to be a trustee of the fund and did not know he was a trustee, although "he could very well be"; according to respondent, she did not know "for a fact" that Cushing had any role in the trust, although he "may have." Respondent insisted that she did not have a specific recollection of discussing the subject with Mr. Cushing, although she was sure he "would have" discussed the subject with her. Yet, in her investigative testimony, she conceded that she made a delivery to him which he identified as signature cards for the trust bank account; and at the hearing before the referee, she acknowledged that Mr. Cushing had told her he wanted to be the "manager" or "trustee" of the fund, that Judge Spargo's mother had told her that Mr. Cushing "was going to handle the fund," and that she had discussed Cushing's duties as a potential trustee with Cushing's wife. In this light, her investigative testimony that Mr. Cushing "may have" had a role in the trust but she did not know that "for a fact" was evasive and deceptive.

In her investigative testimony, respondent also told an elaborate tale of receiving the *Spargo* trust signature cards in an envelope in her chambers and delivering the envelope to Mr. Cushing at her home, although she insisted that she had no idea who gave her the envelope, did not know its contents until she made the delivery, and did not recall what happened to the cards after Mr. Cushing signed them and left them in her kitchen. This account strains credulity. It seems far more likely that, in explaining her actions that were established through the testimony of others, respondent found it convenient not to know what was happening or to remember significant details.

As to another key incident, respondent was obliged to “clarify and correct” her investigative testimony after being confronted with contradictory testimony. After testifying that she had had no discussions with attorney Richard Wallace about the trust, respondent was advised of Mr. Wallace’s testimony to the contrary and was given an opportunity to amend her testimony. In her subsequent letter to the Commission, respondent acknowledged that she had asked Mr. Wallace about a “Clinton trust,” though she maintained that the conversation was so casual that it was insignificant to her at the time. Yet she conceded that that conversation occurred after Mr. Sanvidge had told her that he was looking into setting up a fund for Judge Spargo’s benefit and had gotten the names of several attorneys he intended to contact, one of whom was Mr. Wallace; moreover, following this conversation Mr. Sanvidge did indeed contact Mr. Wallace, who prepared the trust documents. In her investigative letter, respondent also acknowledged that, at Mr. Sanvidge’s request, she obtained the *Spargo* trust tax I.D. number from Mr. Wallace’s office and passed it on to Mr. Sanvidge.

Based on the record in its totality, we cannot conclude that respondent’s involvement in the *Spargo* trust was, in itself, improper. We agree with the referee that respondent’s discussions with respect to the trust among her circle of friends and acquaintances and her limited involvement in the trust activities did not constitute a misuse of the prestige of her judicial office or compromise the integrity of the judiciary, as alleged in Charge I. Nevertheless, the conclusion is inescapable that respondent’s tortured efforts to minimize her role in the *Spargo* trust<sup>[1]</sup> and her purported lapses of memory as to pertinent matters violated her duty to be forthright, candid and cooperative. Respondent’s own testimony established that she was in the middle of many ongoing discussions about the *Spargo* trust, and even as she insisted that she knew few details about it, her testimony revealed that she knew quite a lot. Since many of those involved in the matter were her close friends, and since even respondent concedes that there were numerous conversations about the subject in her presence, it strains credulity that her knowledge of the subject and her participation in these events were as negligible as she has asserted.

In considering respondent’s testimony, we recognize that the referee, who heard the witnesses’ testimony at the hearing, concluded that respondent did not “knowingly and materially [give] testimony that was false, misleading and evasive” (Report, p. 12). Significantly, however, the referee not only characterized respondent’s investigative responses as “overly technical” but cited her “initial lack of candor” in her investigative testimony (Report, pp. 12, 13). While we accord due weight to the referee’s findings, we disagree with his conclusion that a judge’s lack of candor in disciplinary proceedings “based upon a structured defense of deniability” does not constitute misconduct (*Id.* at 12). In our view, a judge’s obligation to testify truthfully and forthrightly in a Commission proceeding is not satisfied by responses that are “overly technical,” incomplete or otherwise misleading.

In considering an appropriate sanction, we are mindful of *Matter of Kiley*, 74 NY2d 364 (1989), in which the Court of Appeals, reducing the sanction from removal to censure, held that the Commission had unfairly attributed lack of candor to the judge for his explanation of why he had spoken about a friend's case to the prosecutor and the presiding judge. Stating that the Court "do[es] not condone 'lack of candor' as an aggravating factor if it unfairly deprives an investigated judge of the opportunity to advance a legitimate defense," the Court warned that "the use of a judge's 'lack of candor' as an aggravating circumstance should be approached cautiously to minimize the risk that the investigative process itself will be used to generate more serious sanctions" (*Id.* at 370, 371). Accordingly, while "a judge's dishonesty or evasiveness before Commission investigators is not to be condoned," "inadvertent factual misstatements, testimonial inconsistencies or even poor judgment in responding to searching, unanticipated questions" should not form the basis for a lack of candor finding as an aggravating circumstance (*Id.* at 371).

Here, as the referee observed, many of the allegations involve conversations and incidents that may be subject to differing recollections. As the Court of Appeals has stated, "testimonial inconsistencies" and "discrepancies" do not necessarily establish that a judge's testimony was deliberately false. *Matter of Kiley, supra*, 74 NY2d at 371, 369; *see also, Matter of Skinner*, 91 NY2d 142, 144 (1997) (testimonial "discrepancies...[do] not necessarily reflect dishonesty or evasiveness"). We give respondent the benefit of the doubt as to "minor discrepancies in factual testimony, which may result from an honest difference in recollection" (*Matter of Kiley, supra*, 74 NY2d at 369). Nevertheless, based on the many inconsistencies and the shifting and evasive responses in respondent's testimony, we find a lack of candor that reaches a level of corrosiveness to the investigative and adjudicative processes that cannot be condoned.

Constrained by the Court's reasoning in *Kiley*, we cannot conclude, however, that respondent should be removed from office. We note that no other allegations of misconduct by respondent, apart from the issues related to her testimony, were established in this proceeding. Clearly, respondent's misguided effort to minimize her rather limited involvement in the *Spargo* trust was far more serious than the acts she may have wished to conceal. Significantly, in no case has a judge been removed solely for testimony that lacked candor, absent any underlying misconduct. Indeed, in cases involving false testimony where judges have been removed, the underlying misconduct has been extremely serious. *See, e.g., Matter of Collazo*, 91 NY2d 251, 255 (1998); *Matter of Mogil*, 88 NY2d 749, 754-55 (1996); *Matter of Intemann*, 73 NY2d 580, 582 (1989); *Matter of Gelfand*, 70 NY2d 211, 218 (1987).

We have also considered that, in her investigative letter to the Commission following her testimony, respondent corrected and clarified her prior testimony in certain pertinent respects, especially with respect to her conversation with Mr. Wallace. As the referee suggested, respondent's letter "broadened her answers" and laid out additional facts "to be sure that she had not misled the Commission," which mitigated her initial lack of candor (Report, pp. 12, 13). *See, Matter of Redmond*, 1998 Annual Report 151 (Comm. on Judicial Conduct) (judge's "attempt[ ] to mislead" the Commission in his investigative testimony was mitigated by his subsequent letter providing correct information). We believe that respondent's truthful admissions, even if belated, are a mitigating factor on the issue of sanctions.

Further, we note that respondent is a respected judge who has had a lengthy career in public service and an unblemished record in seven years on the bench.

Weighing these factors against the standards set forth by the decisions of the Court of Appeals, we do not see a sufficient basis to remove an otherwise qualified, capable judge. *See, Matter of Kiley, supra; Matter of Hart*, 7 NY3d 1, 10-11 (2006) (accepting the sanction of censure, the Court cited “several instances of conflicting testimony,” among other “troubling” factors); *see also, Matter of Skinner*, 91 NY2d 142, 144 (1997) (sanction reduced from removal to censure notwithstanding “discrepancies” in the judge’s testimony and a finding by the Commission that the testimony was “disingenuous and evasive”); *Matter of Edwards*, 67 NY2d 153 (1986) (reducing the sanction from removal to censure, the Court rejected the Commission’s conclusion that the judge’s testimony showed “lack of candor”).

We have previously urged the legislature to consider a constitutional amendment providing suspension from office without pay as an alternative sanction available to the Commission (Commission Annual Reports, 2006, 2002, 2000, 1997). Were suspension available to us, we would impose it in this case to reflect the severity of respondent’s misconduct. Absent that alternative, we have concluded that respondent should be censured.

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

Mr. Felder, Judge Klonick, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser and Judge Ruderman concur.

Mr. Coffey and Judge Peters did not participate.

Dated: February 26, 2007

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<sup>[1]</sup> Perhaps epitomizing respondent’s strained attempts to distance herself from the *Spargo* trust was her belabored insistence at the hearing, on the subject of a “Clinton trust,” that she did not know that President Clinton had been impeached and tried in the Senate since she did not pay attention to such matters (Tr. 463-65).

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **WESLEY R. EDWARDS**, a Justice of the Stephentown Town Court, Rensselaer County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the Commission  
Dreyer Boyajian LLP (by Craig M. Crist) for the Respondent

The respondent, Wesley R. Edwards, a Justice of the Stephentown Town Court, Rensselaer County, was served with a Formal Written Complaint dated December 1, 2006, containing two charges. The Formal Written Complaint alleged that respondent mishandled several small claims proceedings, engaged in improper ex parte communications and conveyed the appearance of bias. Respondent filed a Verified Answer dated January 22, 2007.

On June 7, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On July 12, 2007, the Commission accepted the Agreed Statement and made the following determination

1. Respondent has been a Justice of the Stephentown Town Court, Rensselaer County, since January 1964. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On June 8, 2005, respondent held a hearing in the small claims matter of *Laura Kerber v. Joseph Hodgens*, in which the claimant sought \$3,000 in damages for allegedly incomplete and defective construction work performed at her home by the defendant. Ms. Kerber resided in the City of Albany, and Mr. Hodgens resided in Stephentown.

3. At the hearing on June 8, 2005, respondent failed to offer Ms. Kerber the opportunity to cross-examine the opposing party. At the conclusion of the hearing, over Ms. Kerber's objection, respondent directed her to allow the defendant to return to her home the following day to complete the construction work.

4. Pursuant to Section 1801 of the Uniform Justice Court Act, respondent had no jurisdiction to order any relief other than a money judgment. Respondent now recognizes he was without authority to order equitable relief in a small claims proceeding, and he acknowledges his obligation under the Rules Governing Judicial Conduct ("Rules") to be faithful to the law and maintain professional competence in it.

5. On June 9, 2005, respondent spoke *ex parte* with Mr. Hodgins, who told respondent he had completed all required work at Ms. Kerber's residence. Respondent did not inform Ms. Kerber that he had spoken with Mr. Hodgins or afford her an opportunity to respond to Mr. Hodgins' assertions.

6. On June 15, 2005, Ms. Kerber sent respondent a letter, a copy of which is annexed as Exhibit A to the Agreed Statement of Facts, in which she stated that despite respondent's direction, Mr. Hodgins had failed to complete the required work at her home on June 9, 2005, and in which she asked respondent what she needed to do to settle the case.

7. On June 23, 2005, respondent telephoned Mr. Hodgins, engaged in another *ex parte* conversation with him and requested that he complete the work at Ms. Kerber's house. Respondent never responded to Ms. Kerber's letter.

8. Respondent recognizes that it was improper for him to engage in such *ex parte* communications, notwithstanding that his intention was to facilitate a resolution of the dispute. Respondent also recognizes that he should have been mindful of the Court of Appeals decision in *Matter of Wesley Edwards*, 67 NY2d 153 (1986), in which he was censured for *inter alia* initiating *ex parte* communications with another judge in connection with a speeding ticket issued to his son.

As to Charge II of the Formal Written Complaint:

9. On November 9, 2004, Brittany Marbot and Casey Marbot each filed a small claim in the Nassau Village Court against Tony Scott for damages to their automobiles. Brittany Marbot's claim was for \$1,000, and Casey Marbot's claim was for \$3,000. After the Nassau Village Justices recused themselves, the cases were transferred by the County Court to the Stephentown Town Court.

10. On April 9, 2005, respondent sent written notices to the claimants and Mr. Scott that both cases were scheduled for small claims hearings on May 11, 2005.

11. On or about May 11, 2005, after listening to the testimony of only Brittany Marbot, respondent summarily dismissed both claims against Mr. Scott, stating that the matter was

criminal, not civil. Respondent now recognizes that, in doing so, he thereby failed to accord the claimants a full and fair opportunity to be heard, as required by the Rules.

12. Thereafter, Brittany Marbot and Casey Marbot attempted to file criminal charges against Mr. Scott with the State Police, but the police declined to process charges and advised them that the matter was civil, not criminal in nature.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(4) and 100.3(B)(6) of the Rules and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent's handling of three small claims matters was fraught with errors and violated well-established statutory and ethical mandates. In *Kerber v. Hodgens*, in which the claimant had sought damages for construction work that was allegedly defective and incomplete, respondent initially failed to provide the claimant an opportunity to cross-examine the defendant. Then, over the claimant's objection, respondent ordered the defendant to complete the work, notwithstanding that respondent had no jurisdiction to order any relief other than a money judgment (Uniform Justice Court Act §1801). Respondent compounded his misconduct by engaging in *ex parte* communications with the defendant on two occasions regarding the status of the court-ordered labors. Although it has been stipulated that respondent's intention was to facilitate a resolution of the dispute, his actions went beyond his proper role as a judge. Respondent's mishandling of the case violated his obligation to be faithful to the law and maintain professional competence in it, to refrain from unauthorized *ex parte* communications and to afford the parties a full opportunity to be heard as required by law (Rules, §§100.2[A], 100.3[B][1], 100.3[B][6]).

In two other small claims filed by individuals for alleged damage to their automobiles, respondent summarily dismissed both claims after listening to the testimony of only one of the claimants, stating that the matters were criminal, not civil. In doing so, respondent again failed to accord the claimants a full and fair opportunity to be heard, as required (Rules, §100.3[B][6]).

Town and village justices wield enormous power in civil and criminal cases, and it is reasonable to expect them to know and follow basic statutory procedures. As the Court of Appeals has held, ignorance and lack of competence do not excuse ethical violations, and every judge has an obligation to learn and abide by the Rules Governing Judicial Conduct. *Matter of VonderHeide*, 72 NY2d 658, 660 (1988); see also, *Matter of Curcio*, 1984 Annual Report 80 (Comm. on Judicial Conduct); *Matter of Muskopf*, 2000 Annual Report 133 (Comm. on Judicial Conduct); *Matter of Nichols*, 2002 Annual Report 133 (Comm. on Judicial Conduct). With more than four decades of experience as a judge, respondent should be familiar with small claims procedures and with the jurisdictional limits of his court. Moreover, having been previously censured by the Court of Appeals for engaging in *ex parte* communications with another judge (*Matter of Edwards*, 67 NY2d 153 [1986]), respondent should have been particularly mindful of his duty to refrain from unauthorized *ex parte* contacts.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge  
Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

Dated: July 19, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JEROME C. ELLIS**, a Justice of the Leon Town Court, Cattaraugus County.

**THE COMMISSION:**

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

**APPEARANCES:**

Robert H. Tembeckjian (John J. Postel and Stephanie A. Fix, Of Counsel) for the Commission  
Weyand and Weyand, LLP (by Fredric F. Weyand) for the Respondent

The respondent, Jerome C. Ellis, a Justice of the Leon Town Court, Cattaraugus County, was served with a Formal Written Complaint dated September 19, 2006, containing one charge. The Formal Written Complaint alleged that in connection with an eviction proceeding, respondent: (i) presided notwithstanding that he was biased; (ii) failed to follow the law; and (iii) made a derogatory comment about Jewish people. Respondent filed an Answer dated November 14, 2006.

By order dated November 28, 2006, the Commission designated James C. Moore, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 29, 2007, in Rochester; on February 20, 2007, in Little Valley; and on March 12, 2007, in Rochester. The referee filed a report dated May 15, 2007.

Commission counsel filed a brief with respect to the referee's report and recommended the sanction of removal. Respondent filed no papers with the Commission. On July 11, 2007, the Commission heard oral argument by Commission counsel; respondent did not appear. Thereafter, the Commission considered the record of the proceeding and made the following findings of fact.

1. Since 1990, respondent has been and continues to be a Justice in the Town of Leon, Cattaraugus County. He is the only Justice for the Town. Respondent has attended the required training sessions for town justices. He is not an attorney.

2. Periodically, respondent is assisted in performing his duties as Town Justice by his brother's former wife, Diane Ellis.

3. In 2004, Diane Ellis' daughter, Rhoda Ellis, was living with Terry Snyder, and they had two children together. This fact was known to respondent.

4. Pursuant to an installment land contract executed in 2003, Allen and Lori A. Haskins agreed to purchase certain real property from Terry Snyder and Douglas Corkwell for the sum of \$12,000; the agreement provided that Mr. and Ms. Haskins would make an initial payment of \$500 towards the purchase price and, thereafter, monthly payments of \$350, together with insurance, sewer, water rents, taxes and assessments.

5. In June 2004, after learning that taxes on the property had not been paid for the fiscal year 2002, Mr. and Ms. Haskins stopped making payments under the contract.

6. In August 2004, Mr. Snyder approached respondent in court complaining about the Haskins and indicating that he wanted them removed from the property. On August 2, 2004, based upon information provided to him by Mr. Snyder, respondent prepared a Notice to Objectionable Tenant, directed to Laurie (sic) and Allen Haskins, which stated that the landlord had elected to terminate their tenancy as of September 22, 2004. Respondent signed the form as "Judge Ellis" on the line marked "Landlord." Respondent was not the landlord of the subject property. Respondent gave the notice to Mr. Snyder.

7. At the time of completing and signing the Notice to Objectionable Tenant, respondent was aware of the terms of the installment land contract, and respondent knew that Mr. and Ms. Haskins were not parties to a lease with Mr. Snyder and Mr. Corkwell.

8. Prior to August 2004, Mr. and Ms. Haskins had appeared as defendants in cases before respondent, and respondent had heard negative comments about the Haskins, which caused him to have a negative opinion about them.

9. On October 24, 2004, based upon information provided by Terry Snyder, respondent completed and signed a Justice Court Summons directing Lori Haskins to appear in the Leon Town Court on October 27, 2004, and stating that upon her failure to appear on that date, a judgment would be taken against her in the sum of \$3,100 by reason of "failure to pay rent and taxes." No summons was issued to Allen Haskins.

10. The summons issued by respondent requiring Ms. Haskins' appearance in three days provided less than the 22 days' notice required for a small claims hearing (*see* 22 NYCRR §214.10[d]).

11. On October 27, 2004, the parties appeared without counsel before respondent in the Leon Town Court. Respondent's niece, Rhoda Ellis, was also present. Mr. and Ms. Haskins requested an adjournment so that they could consult with an attorney, and respondent granted the adjournment.

12. On October 27, 2004, immediately after the court appearance, Douglas Corkwell told respondent that Mr. and Ms. Haskins had been lying. Respondent then prepared a warrant

directed to the County Sheriff instructing that Lori and Allen Haskins be removed from the property that was the subject of the installment land contract.

13. The warrant prepared by respondent stated inaccurately that a petition and notice of petition had been served on the Haskins and that a judgment had been entered. The warrant was filed in the County Sheriff's office on October 28, 2004.

14. On November 1, 2004, Deputy Stevens delivered a 72-hour notice to Lori and Allen Haskins instructing them to vacate the subject premises by November 4, 2004. Thereafter, the Haskins' attorney, Amy Jacobson, contacted respondent, who adjourned the matter to November 10, 2004.

15. On November 10, 2004, Mr. and Ms. Haskins, Terry Snyder, Rhoda Ellis and the parties' attorneys appeared before respondent.

16. As a result of negotiations conducted on that date, the parties agreed to settle the matter with the understanding that Mr. and Ms. Haskins would vacate the property within 60 days. Mr. Snyder executed a general release to Mr. and Ms. Haskins, and Mr. and Ms. Haskins executed a general release to Mr. Snyder.

17. After the terms of the settlement were placed upon the record, respondent turned off the recording equipment.

18. In a belligerent manner, respondent then stated in words or substance to Mr. and Ms. Haskins that they should "stop jewing other landlords."

19. Respondent testified in the Commission proceeding that the term "jewling" is "a slang word to me for swindling or cheating people out of money or not paying your bill, just out and out stealing."

20. Respondent also testified that his comment was based in part on negative information he had heard about the Haskins outside of court.

21. On January 12, 2005, respondent completed and signed a small claims notice to Lori and Allen Haskins to appear in the Town Court of Leon in response to a claim by Terry Snyder for \$2,500 for alleged damage to the "tenant house." No hearing with respect to the claim was ever held.

22. In his testimony before the referee at the Commission hearing and in his letter to the Commission dated March 26, 2007, respondent acknowledged the inappropriateness of his actions and apologized for them. He also testified, "[B]ut as far as kicking the Haskins out of town, I am not sorry."

23. Respondent testified that prior to the *Haskins* matter, he had no experience as a Town Justice in handling cases involving defaults under installment land contracts or in connection with landlord/tenant eviction proceedings.

24. Respondent knew that, as a Town Justice, he was required to avoid the appearance of impropriety by avoiding handling cases in which he had a family interest. Respondent was also aware of the impropriety of engaging in *ex parte* communications with respect to a matter pending before him.

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(B), 100.3(B)(1), 100.3(B)(3), 100.3(B)(4), 100.3(B)(6), 100.3(E)(1) and 100.3(E)(1)(a)(i) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

Respondent abused his judicial authority in a property dispute, presided over the matter notwithstanding his bias against the defendants, used his judicial power to benefit his relative’s interests, and berated the defendants using a repugnant religious and ethnic slur. Such a record amply demonstrates that respondent lacks the requisite fitness to serve as a judge.

From the outset, respondent’s handling of the dispute involving an installment land contract was a travesty. With no due process, based on the sellers’ *ex parte* representations that the purchasers, Allen and Lori Haskins, had failed to make the required payments, respondent issued a notice to the Haskins terminating their tenancy. The notice issued by respondent not only referred to the terms of a non-existent “lease,” but, inexplicably, was signed by respondent on the line marked “Landlord,” thereby indicating to the Haskins that “the Landlord [who] elects to terminate your tenancy” was none other than the judge himself. By issuing such a notice, respondent abused the authority of his judicial office and aligned himself with the sellers’ private interests.

Some two months later, based on additional information provided by the seller, respondent issued a summons to Ms. Haskins for \$3,100 in money damages for “failure to pay rent and taxes.” The summons required her appearance in three days to avoid default, which was significantly less than the 22 days’ notice required for a small claims hearing (*see* 22 NYCRR §214.10[d]). Finally, after another *ex parte* discussion with the seller, respondent issued a warrant of eviction one day after he had adjourned the case for a week so the Haskins could get an attorney. The warrant, directed to the County Sheriff, stated inaccurately that a petition and notice of petition had been served on the Haskins and that a judgment had been entered. Only the intervention of the Haskins’ attorney prevented them from being summarily evicted from the property where they resided.

Respondent’s mishandling of the entire matter violated the law and compromised his impartiality and integrity. *See, e.g., Matter of Holmes*, 1998 Annual Report 139 (Comm. on Jud. Conduct) (judge issued a warrant of eviction based on an *ex parte* request, with no due process); *Matter of Little*, 1988 Annual Report 191 (Comm. on Jud. Conduct) (in a summary proceeding to recover possession of real property for nonpayment of rent, judge signed a warrant of eviction notwithstanding that no hearing had taken place and no judgment had been entered as required by law).

It is no excuse that respondent, who has served as a judge since 1990, maintains that he had never previously handled a case involving an eviction or installment land contract and that he was unfamiliar with the appropriate procedures. Every judge, lawyer or non-lawyer, is required to maintain professional competence in the law (Rules, §100.3[B][1]; *see, Matter of VonderHeide*, 72 NY2d 658 [1988]; *Matter of Feinberg*, 5 NY3d 206 [2005]). Moreover, assistance in such circumstances is available to local justices from the Justice Court Resource Center, under the auspices of the Office of Court Administration; indeed, in his testimony respondent acknowledged that as part of his judicial training he had received information about where to call for assistance (Tr. 147-49). As the Court of Appeals has stated, “[i]gnorance and lack of competence do not excuse violations of ethical standards” (*Matter of VonderHeide, supra*, 72 NY2d at 660).

Respondent’s handling of the *Haskins* matter was tainted both by his acknowledged animosity towards the defendants and by his connection with one of the sellers, Terry Snyder, the live-in boyfriend of respondent’s niece and the father of her two children. Respondent’s niece, whose mother works as respondent’s part-time court assistant, was present in court with her boyfriend during the proceedings on October 27<sup>th</sup> and November 10<sup>th</sup>.

A judge’s disqualification is required in a proceeding in which the judge’s impartiality might reasonably be questioned (Rules, §100.3[E][1]). *See, Matter of Ross*, 1990 Annual Report 153 (Comm. on Jud. Conduct); *see also, Matter of Merkel*, 1989 Annual Report 111 (Comm. on Jud. Conduct) (town justice issued a warrant in a Bad Check case in which her court clerk was the complaining witness, then granted an adjournment in contemplation of dismissal without disclosing the relationship). In *Merkel*, the Commission found that even if the judge’s disqualification was not mandated by the ethical standards, the judge “should have at least disclosed the relationship and given the parties the opportunity to be heard on the issue before proceeding.” The Commission stated:

A reasonable person might question whether the judge could handle fairly a matter involving someone with whom she has such frequent contact and a presumed relationship of trust. Judicial discretion was required in making determinations regarding the warrant, bail and disposition, and it was imperative that they be made in a manner that appears impartial.

Here, respondent’s actions throughout the *Haskins* matter conveyed the appearance that he was using his judicial power to benefit his relative’s personal and financial interests.

Ethnic or religious slurs, offensive to decorum and decency under ordinary circumstances, are particularly intolerable when used by a judge in court. *See, Matter of Mulroy*, 94 NY2d 652 (2000); *Matter of Agresta*, 64 NY2d 327 (1985); *Matter of Bloodgood*, 1982 Annual Report 69 (Comm. on Jud. Conduct). Respondent’s use of the term “jewling” – which he defined as synonymous with “swindling or cheating” – seriously compromises public confidence in the administration of justice in his court and adversely affects his impartiality and the appearance of impartiality. Significantly, respondent turned off his court tape recorder before berating the Haskins, which suggests that he was well aware that his language would be offensive. Moreover, the fact that respondent directed the term toward the Haskins, based in part

on unsubstantiated information he had heard about their behavior, underscores his bias against them, which required his recusal, and suggests that he fails to understand basic concepts of fairness, impartiality and due process.

The purpose of discipline is to safeguard the bench and the public from unfit incumbents (*see, Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [III] [Ct. on the Judiciary]). Whether respondent's conduct was the result of incompetence or a deliberate intent to benefit his relative's interests, the record in its totality demonstrates conclusively that he is unfit to serve as a judge and that his continued retention on the bench is inconsistent with the fair and proper administration of justice in his court.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

Dated: July 24, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ALAN L. HONOROF**, a Judge of the Court of Claims and an Acting Justice of the Supreme Court, Nassau County.

**THE COMMISSION:**

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

**APPEARANCES:**

Robert H. Tembeckjian (Jean Joyce, Of Counsel) for the Commission  
William S. Petrillo for the Respondent

The respondent, Alan L. Honorof, a Judge of the Court of Claims and an Acting Justice of the Supreme Court, Nassau County, was served with a Formal Written Complaint dated December 6, 2006, containing one charge.

On March 6, 2007, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and that respondent be admonished, and waiving further submissions and oral argument.

On March 8, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Court of Claims since 1996. He was designated an Acting Justice of the Supreme Court in 1996 and has since served in that position continuously. Respondent is an attorney.
2. On January 10, 2006, respondent appeared at the Commission's New York City office and gave sworn testimony before a referee concerning the matters herein.
3. In 1996, prior to being appointed to the Court of Claims, respondent was a practicing attorney and represented Peter Beck and Dominic Sergi, defendants in a corporate dissolution proceeding involving their corporation, ASF Glass ("ASF").
4. In 1998, Mr. Beck and Mr. Sergi commenced an action against respondent, the basis of which was that respondent advised Mr. Beck and Mr. Sergi to purchase shares from a shareholder in ASF under the Business Corporation Law without advising them that the election

to purchase the shares was irrevocable, or of their potential personal liability if they elected to purchase the shares in their personal capacities.

5. In or about April 2000, the parties reached an agreement and respondent signed a stipulation of settlement (hereinafter “settlement”) and confession of judgment, agreeing to pay a total of \$55,000. Specifically, respondent agreed to pay a lump sum of \$25,000 followed by 60 monthly installments of \$500.

6. The settlement further provided that the confession of judgment was to be held in escrow by counsel for Mr. Beck and Mr. Sergi pending full and satisfactory performance by respondent and thereafter was to be returned to respondent, provided that, should respondent default, Mr. Beck and Mr. Sergi would be entitled to cause the confession of judgment to be released from escrow and entered in the County Clerk’s Office and to pursue all legal remedies to enforce and collect the judgment.

7. The settlement further provided that the parties acknowledged that they had been advised by competent legal counsel in connection with the execution of the settlement, and that they entered into the settlement freely, voluntarily and without coercion.

8. The settlement further provided that any modifications to the settlement were to be in writing, signed by the party to be charged, and that any oral representation or modification would have no force and effect.

9. In accord with the terms of the settlement, respondent paid \$25,000 on the debt and commenced paying monthly installments.

10. In or about May 2001, respondent sought to negotiate a discounted buyout of the settlement, using his and ASF’s mutual accountant, Fred Moss, as mediator. Thereafter, respondent learned that Mr. Beck had become the sole assignee of respondent’s obligation under the settlement.

11. In November 2001, respondent made a \$3,500 payment in satisfaction of seven months of monthly payments owed under the settlement. Respondent directed former ASF counsel to hold said sum in escrow to be disbursed by the sole holder of the note, Mr. Beck. Thereafter, respondent ceased making the payments required by the settlement.

12. In March 2003, Lawrence Kenney, Esq., as attorney for Mr. Beck, informed respondent by demand letter that:

[t]he last payment which you made pursuant to the terms of the Agreement was \$3,500 on November 20, 2001. . . . No payments have been received since that date. The current unpaid balance of the debt is \$21,000. You are seriously in arrears.

In order to avoid our taking action on your default, please forward a check to the undersigned immediately for \$8,000 drawn to the order of Peter Beck. This wo[u]ld cover the payments due from

December 9, 2001 to March 9, 2003. All future payments must be kept current and forwarded to the undersigned.

13. In July 2003, Mr. Kenney informed counsel for respondent, Bee, Eiseman & Ready, by letter that, “your client, Alan L. Honorof, and Alan L. Honorof, P.C., are in default under the Settlement Agreement.”

14. Shortly thereafter, respondent telephoned Mr. Kenney and stated that Bee, Eiseman & Ready no longer represented him and that Andrew P. Cooper, Esq., was his new attorney. Respondent offered to make a \$500 installment payment. Mr. Kenney told respondent to defer this particular \$500 installment until Mr. Kenney had an opportunity to speak about the matter with Mr. Cooper.

15. By letter dated January 21, 2004, Mr. Cooper memorialized a telephone conversation with Mr. Kenney in which it was offered that respondent would pay \$2,500 immediately and then make \$500 monthly payments until the balance was paid.

16. By letter dated February 6, 2004, Mr. Kenney proposed a tentative arrangement whereby respondent would pay \$2,500 immediately, then make \$500 monthly payments until the end of the original term of the settlement, of May 31, 2005, and then make one lump sum payment of \$10,500.

17. As noted by Mr. Kenney’s letter to respondent dated April 19, 2004, respondent never executed the arrangement. Negotiations broke down over the addition of the lump-sum payment and ceased after April 2004.

18. In or about July 2004, Mr. Beck filed a summons and complaint demanding judgment in accord with the terms of the settlement.

19. In or about September 2004, acting on advice of counsel, respondent verified an answer denying the allegations and stating that the settlement and confession of judgment arising from the suit were procured by “fraud and duress.”

20. Respondent testified that the basis for his “fraud” defense was a statement by Mr. Sergi, made some time after the summer of 2003, that he and Mr. Beck had filed their original action against respondent because “the manner in which [respondent] answered the original complaint [in the corporate dissolution proceeding] rendered us liable to personal judgments in the funding of the agreement with the departing shareholder . . . and if [respondent] had answered in a different way, and protected us from individual liability, it was our intention to close the corporation, bankrupt it and leave [the shareholder] out in the cold, so we didn’t have to pay him anymore.”

21. Respondent testified that, based on Mr. Sergi’s statement, he:

...realized that [Mr. Beck and Mr. Sergi] didn’t have an intention of following through on their own obligations, and that they were using me to defeat somebody else’s lawful position and that’s not a position that I would have allowed. This new knowledge, which I

didn't have when I signed the original stipulation, now left me with a very sour taste in my mouth and I no longer felt obliged. That's what I meant when we used the term "fraud." I didn't think the agreement was fair to me, based on that.

22. Respondent testified that with respect to his defense of "duress," "the only coercion was defrauding me while I was representing that company into believing that what I was doing was legally above board, that whatever action on behalf of that client was a legal, valid position to take in an effort to settle that case." Respondent acknowledged that no one "forced" him to do anything.

23. Respondent acknowledges that, though he believed, based in part on conversations with his attorney and Mr. Beck, that there was a period during which payments were suspended, he was incorrect in that belief.

24. Respondent acknowledges that his asserted defenses of fraud and duress were invalid and that, as a judge and officer of the court, he was especially obliged not to verify such assertions, despite the advice of counsel, unless he was reasonably certain, after due diligence, that such assertions were accurate.

25. Respondent acknowledges that he owes the remaining debt under the settlement and has made the following arrangements with respect to repayment: Respondent will pay \$22,000 by May 15, 2007 in full satisfaction of the debt owed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.2(A) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

By failing to abide by a confession of judgment and by asserting invalid claims in a verified pleading, respondent engaged in conduct that tends to undermine public confidence in the judiciary as a whole.

The record establishes that respondent failed to make payments he owed under a confession of judgment<sup>[1]</sup> and settlement of a claim related to his former law practice. The settlement required respondent to make monthly payments of \$500, which would have paid off the debt by May 2005. Respondent stopped making payments while attempting, unsuccessfully, to renegotiate the payment terms, and he made no payments after November 2001. As a result of his non-payment, the creditor was forced to commence litigation to collect the \$21,000 respondent still owed. In connection with the litigation, respondent verified an answer containing defenses that he now acknowledges were invalid.

A judge, who is sworn to uphold the law and seek the truth, has a duty to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity of the judiciary (Rules, §100.2). As the Court of Appeals has stated:

Judges personify the justice system upon which the public relies to resolve all manner of controversy, civil and criminal. A society that empowers judges to decide the fate of human beings and the disposition of property has the right to insist upon the highest level of judicial honesty and integrity. A judge's conduct that departs from this high standard erodes the public confidence in our justice system so vital to its effective functioning. *Matter of Mazzei*, 81 NY2d 568, 571-72 (1993).

As a judge and officer of the court, respondent was especially obliged to be candid in the litigation process and not to verify assertions in a pleading unless he was reasonably certain, after due diligence, that such assertions were accurate.

Judges are held to stricter standards than “the morals of the market place” and are required to observe “[s]tandards of conduct on a plane much higher than for those of society as whole...so that the integrity and independence of the judiciary will be preserved.” *Matter of Spector*, 47 NY2d 462, 468 (1979), quoting *Meinhard v Salmon*, 249 NY 458, 464; *Matter of Kuehnel*, 49 NY2d 465, 469 (1980). See also, *Matter of Esposito*, 2004 Annual Report 100 (Comm. on Judicial Conduct) (judge filed an answer in litigation that was “deceptive” in significant respects). Respondent has acknowledged that his conduct violated the high ethical standards required of judges, both on and off the bench.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Emery dissents and votes to reject the Agreed Statement of Facts and to dismiss the charge.

Ms. DiPirro was not present

Dated: April 18, 2007

## **DISSENTING OPINION BY MR. EMERY**

### **INTRODUCTION**

I respectfully dissent and vote to dismiss the charges and reject the stipulation as to misconduct and discipline. The Agreed Statement of Facts does not state a case that constitutes misconduct. There are no facts that demonstrate that Judge Honorof used the prestige of judicial office to avoid his financial obligations or that his dilatory behavior in repaying a personal debt compromised the integrity of the judiciary.

Most importantly, I wholeheartedly agree that it would be misconduct for a judge to pose a frivolous defense to avoid paying a debt; however, the record before us does not support a

finding that respondent, at the time he raised the defenses, knew that his defenses were “invalid” or frivolous. As presented, the Agreed Statement simply states that he failed to make payments pursuant to a settlement and confession of judgment and that he asserted “invalid” defenses in connection with the ensuing litigation. Respondent’s intent and knowledge at the time he asserted his defenses are critical, and as to this important issue the record is incomplete. The judge’s explanation of his legal position at the time supports the view that he only recognized retrospectively that his defenses were invalid. As discussed below, for this reason, he deserves the benefit of the doubt.

## DISCUSSION

Respondent allegedly tried to avoid paying a debt arising out of a settlement, negotiated while he was an attorney in private practice, that required him to pay installments after he became a judge. He has stipulated in the record before us that he signed a confession of judgment in connection with this settlement and that, in defense of a lawsuit filed by his creditors years after the settlement, he asserted claims that were “invalid.” To explain the “invalid” claims, the judge asserts, according to the Agreed Statement, that information he learned after the settlement caused him to believe that his former clients -- his creditors -- had attempted to use his representation for fraudulent purposes. Thus, in the judge’s mind, the ensuing lawsuit against him to enforce the settlement had a potential vulnerability to a charge of wrongdoing by the plaintiffs that had not come to light at the time of the original settlement. On the basis of this record, as more fully set forth in the Agreed Statement, the judge has accepted the sanction of admonition for purportedly engaging in “conduct that tends to undermine public confidence in the judiciary.”

I dissent notwithstanding the judge’s acquiescence to the charges. It is unprecedented for this Commission to find misconduct, and to act as debt collector for private litigants against a judge, when the judge’s alleged misbehavior is limited to failing to pay a private debt and defending a collection lawsuit. All prior cases in which judges in debt have been found to have engaged in misconduct have significant aggravating and independent bases for discipline. *See, Matter of Mason*, 100 NY2d 56 (2003) (after giving his rent-stabilized apartment to his relative and depositing the rent he collected into his attorney escrow account, judge used funds from the account for personal purposes, did not remit the rent payments to the landlord, and failed to cooperate in the investigation); *Matter of George*, 2003 Annual Report 115 (Comm. on Judicial Conduct) (after converting a client’s funds, judge was held in contempt for failing to pay a judgment, disregarded an information subpoena, repaid the funds only after being warned he could be incarcerated, and testified falsely about the matter). In *George*, the Commission dismissed outright a charge that the judge had 20 judgments entered against him for unpaid debts, seven of which were unsatisfied at the time of the hearing. As stated by the referee in that case: “[T]he failure to pay debts is essentially private conduct,...[and it is an] undeniable fact that people of the highest moral and ethical standards in the course of their lives may encounter financial difficulty, even to the point of having judgments entered against them” (Report of A. Vincent Buzard, pp. 5-6).

Here, of course, no judgment has been entered. Although respondent’s creditors could have collected the debt simply by filing the confession of judgment in a timely manner and executing on it,<sup>[2]</sup> it appears that they chose not to do so, but rather to commence the litigation

that is pending and file a complaint with the Commission. Certainly, a finding of judicial misconduct should not hinge on the strategic choice of a judge's creditor.

The closer question in this case is whether it is aggravating conduct and, therefore, misconduct for respondent to defend a personal lawsuit with verified defenses that he now admits are "invalid." If it were clear that the judge, as a litigant, knew *at the time* he filed them that the defenses were invalid, I would agree that even though he was not in any way using his judicial office in defending the private litigation, such conduct, which would be sanctionable for an attorney, would warrant a finding of judicial impropriety because it would in fact "tend to undermine public confidence in the judiciary."

In this case, however, I have to give the benefit of the doubt to the judge. According to the Agreed Statement, after the settlement, he claims he learned that his former clients had attempted to use his representation fraudulently. While it is legally questionable whether the new information supports defenses of fraud and duress, because he claims that the newly discovered information caused him and his attorney to assert the defenses, it cannot be determined from the record as circumscribed by the Agreed Statement whether the judge was acting in bad faith at the time he asserted these defenses. This point is reinforced by the failure of the Agreed Statement to resolve the critical open question of when the judge knew his defenses were "invalid." Although the charges assert that he "falsely alleged" those defenses, all we know now on this record is that the defenses proffered were subsequently conceded to be "invalid." As a basis for a finding of misconduct, the stipulated language is inconclusive and oblique. In any event, claims made in good faith in the course of personal litigation that are subsequently conceded to be "invalid" cannot support a finding of misconduct.

Once again, the Commission has been asked to determine an appropriate sanction based on an incomplete record. *See, Matter of Clark*, 2007 Annual Report \_\_\_ (Emery Dissent); *Matter of Carter*, 2007 Annual Report \_\_\_ (Emery Concurrence). When an agreed statement is viewed as an appropriate vehicle to discipline a judge, it should answer all relevant questions so that we can determine whether there has been misconduct and what sanction if any should be rendered. One of the great virtues of hearings is that the judge's intent and knowledge, both at the time of the alleged incidents and when the judge is facing discipline, are fully explored. Here, as in *Clark* and *Carter*, the stipulated facts leave gaps that make it difficult to render an appropriate sanction. While the parties to the agreement may be satisfied, the Commission members inherit the product of negotiation instead of a referee's findings and a fully developed record, including the testimony of the judge and others. In imposing disciplinary sanctions on judges, we ought not to be uncertain of the judge's intent, knowledge and good faith at the time the judge engaged in the prohibited conduct.

The judge's acquiescence to the misconduct charges and public discipline does not, in my view, override the serious problems presented by the agreed-upon result. In light of the obvious overwhelming financial pressure on the judge, not only to pay off the debt, but to pay counsel to defend the Commission charges and the pending litigation, it is hard to conceive of a judge – unless the judge has independent wealth and need not rely on the plainly inadequate judicial salary the State provides<sup>31</sup> – resisting any sanction short of removal under these circumstances.

But my primary concern is an institutional one -- that the Commission is being manipulated. It would seem that the judge's creditors are using the Commission as a parallel track to litigation in order to exert pressure on a judge who appears to be in financial distress. We are apparently playing along with this stratagem, including extracting a promise from the judge that he will be subject to further discipline if he fails to pay by May 15 (Agreed Statement, par. 26). This unseemly pressure applied by us, even with the best of intent, is outside the proper function of this Commission. In my view, this flawed result not only creates an unsound precedent that may be used to charge misconduct whenever a judge fails to pay a debt, or even is merely dilatory in debt repayment, but also ensnares the Commission in the muck and mire of the debt-collection process. Because I believe that we should recognize that the appropriate limits of our jurisdiction do not include disciplining a judge who is defending, even if aggressively, against private debt collection in a civil matter, I am constrained to dissent.

Dated: April 18, 2007

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<sup>[1]</sup> A confession of judgment can be filed within three years with the county clerk, who is authorized to enter a judgment for the amount confessed (CPLR §3218).

<sup>[2]</sup> Under CPLR §3218, a confession of judgment can be filed within three years with the county clerk, who is authorized to enter a judgment for the amount confessed.

<sup>[3]</sup> It is ironic that this case should come before the Commission at a time when judges have been denied raises, not to mention cost of living increases, for eight years, resulting in salaries that do not even remotely reflect their contributions and that fail to provide adequate economic security befitting their status and accomplishment in the legal profession.

## **DECISION AND ORDER**

In the Matter of the Proceeding of the Judiciary Law in Relation to **LAWRENCE I. HOROWITZ**, a Justice of the Supreme Court, Westchester County.

### THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

### APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg and Brenda Correa, Of Counsel) for the Commission  
Jones Garneau LLP (by Deborah A. Scalise) for the Respondent

The matter having come before the Commission on July 12, 2007; and the Commission having before it the Formal Written Complaint dated March 20, 2006; the Verified Answer dated December 4, 2006; and the Stipulation dated June 21, 2007; and the Commission having designated Milton Sherman, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and a hearing having been held on February 14, February 15 and March 7, 2007; and respondent having resigned from judicial office by letter dated June 20, 2007, effective June 22, 2007, and having affirmed that he will neither seek nor accept judicial office or Judicial Hearing Officer status at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will be made public if accepted by the Commission; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued and the case closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Mr. Felder and Ms. DiPirro were not present. Judge Ruderman did not participate.

Dated: July 16, 2007

## **STIPULATION**

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **LAWRENCE I. HOROWITZ**, Supreme Court Justice, Westchester 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, Lawrence I. Horowitz (“respondent”), and his attorney Deborah A. Scalise, Esq., that:

1. This Stipulation is presented to the Commission in connection with both a formal proceeding and an investigation pending against respondent.

2. Respondent was admitted to the practice of law in New York in 1987 and has been a Justice of the Supreme Court since 2004.

3. On March 20, 2006, respondent was served with a Formal Written Complaint, containing two charges.

A. Charge I alleges *inter alia* that in February 2005, respondent communicated with the Yorktown Police Department, the Mount Pleasant Police Department and the Westchester County District Attorney’s Office, both on behalf of Michelle Nolan, his close personal friend, who had been stopped for speeding and was arrested for driving a car that had been reported stolen, and in an attempt to prompt an investigation against Ms. Nolan’s estranged husband and his brother.

B. Charge II alleges that respondent lent the prestige of judicial office to his private business, family and other matters, in that from January 2004 through April 2005 he used his judicial stationery for personal correspondence unrelated to his official duties, including a bill-paying dispute with a telephone company.

C. The Formal Written Complaint is annexed hereto as Exhibit 1.

4. Respondent submitted an Answer dated December 5, 2006, admitting certain facts, denying certain other facts, and denying knowledge or information sufficient to form a belief as to whether his conduct violated the Rules. The Answer is annexed hereto as Exhibit 2.

5. A hearing was held before a referee, Milton Sherman, Esq., on February 14, February 15 and March 7, 2007. The parties submitted post-hearing memoranda to the referee on May 15 and May 18, 2007. The referee’s report is pending.

6. In 2007, respondent was advised by the Commission that it was investigating additional allegations against him. The 2007 investigation was unrelated to the charges in the Formal Written Complaint.

7. Respondent cannot successfully defend the Formal Written Complaint presently pending against him and therefore has resigned from judicial office. A copy of his letter of resignation, dated June 20, 2007, is annexed hereto as Exhibit 3.

8. Respondent hereby affirms that he will neither seek nor accept judicial office or Judicial Hearing Officer status at any time in the future.

9. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from the date of a judge's resignation to complete the proceedings and, if the Commission determines that the judge should be removed from office, to file a determination with the Court of Appeals. Pursuant to law, removal from office disqualifies a judge from holding judicial office in the future.

10. In view of respondent's resignation and affirmation that he will neither seek nor accept judicial office in the future, all parties to this Stipulation respectfully request that the Commission close the pending matter based upon this Stipulation.

11. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the limited extent that this Stipulation will be made public if accepted by the Commission.

June 21, 2007

s/ **Lawrence I. Horowitz**  
Respondent

s/ **Deborah A. Scalise**  
Jones Garneau, LLP

s/ **Robert H. Tembeckjian**  
Administrator & Counsel to the Commission  
(**Brenda Correa, Alan Friedberg**, Of Counsel)

**[CLICK HERE TO VIEW ALL THREE EXHIBITS.](#) TO VIEW THEM INDIVIDUALLY, CLICK BELOW.**

**[EXHIBIT 1: THE FORMAL CHARGES LODGED AGAINST THE JUDGE](#)**

**[EXHIBIT 2: THE JUDGE'S ANSWER](#)**

**[EXHIBIT 3: THE JUDGE'S LETTER OF RESIGNATION](#)**



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **KEVIN T. HURLEY**, a Justice of the Carlton Town Court, Orleans County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Barth Sullivan Behr (by Philip B. Abramowitz) for the Respondent

The respondent, Kevin T. Hurley, a Justice of the Carlton Town Court, Orleans County, was served with a Formal Written Complaint dated September 19, 2006, containing two charges. Respondent filed a Verified Answer dated October 13, 2006.

On February 16, 2007, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On March 8, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Carlton Town Court, Orleans County since January 1, 1998. He is not an attorney.

2. In 2005, at all times relevant to the charges herein, respondent was dating Darlene Cooper; respondent knew that Ms. Cooper had an Order of Protection against her ex-husband, Tracy Cooper; and respondent was acquainted with Ms. Cooper's daughter, Krystal Cooper.

As to Charge I of the Formal Written Complaint:

3. On or about May 27, 2005, at about 3:00 PM, Darlene Cooper was approached on the street in the Village of Albion, New York, by her ex-husband, Tracy Cooper, who expressed an interest in reconciling with her. Ms. Cooper promptly terminated the conversation.

4. At about 6:23 PM that same day, Ms. Cooper received a call on her cell phone from a telephone number she recognized as belonging to Mr. Cooper. She did not answer the call.

5. Later that night, respondent visited Ms. Cooper at her home in Albion, New York, where she informed him of her encounter with Mr. Cooper and the call to her cell phone. Ms. Cooper said she was upset and had been crying. Ms. Cooper told respondent that she believed that her ex-husband had violated the Order of Protection, and she asked respondent if he had any contacts at the State Police station in Albion.

6. Respondent asked Ms. Cooper if she had called the local sheriff's department. When she said no and added that her ex-husband was friendly with many local law enforcement officers, respondent said he would call the State Police in Albion on her behalf. He thereupon telephoned the State Police from Ms. Cooper's home and spoke with Sergeant David Martek, to whom respondent identified himself as "Kevin Hurley, Carlton Town Justice."

7. Respondent advised Sergeant Martek that there was an Order of Protection against Mr. Cooper in favor of Ms. Cooper, and that Ms. Cooper had said she had been approached on the street and later called by Mr. Cooper. Respondent suggested that the Orleans County Sheriff's Department would not adequately pursue the matter.

8. Sergeant Martek advised respondent that Ms. Cooper could come to the police station to file a complaint if she wished to pursue the matter. Sergeant Martek took no other action in the matter.

9. On June 1, 2005, Ms. Cooper went to the State Police station in Albion, met with State Trooper Todd Conley and filed a complaint against Mr. Cooper. Respondent was not present and Ms. Cooper did not refer to him during her meeting with Trooper Conley. Sergeant Martek was not present and had not advised Trooper Conley about his conversation with respondent five days earlier.

10. Based on Ms. Cooper's complaint, and without reference to or reliance on any request by respondent for action, Trooper Conley arrested Mr. Cooper on June 1, 2005, and he was charged in the Albion Village Court with Criminal Contempt, 2<sup>nd</sup> Degree.

11. In January 2006, Mr. Cooper pleaded guilty to Harassment.

As to Charge II of the Formal Written Complaint:

12. On or about June 2, 2005, Krystal Cooper was arrested in the Town of Carlton and charged with Aggravated Harassment, based on a complaint filed against her by her mother, Darlene Cooper, for allegedly making harassing telephone calls.

13. Shortly after the arrest, the local police took Krystal Cooper for arraignment to the Carlton Town Court.

14. Respondent was the only judge present in court when the police arrived with Krystal Cooper. Respondent advised the police that because he had a conflict in the matter, he

could not conduct the arraignment and was disqualified from the case. After disqualifying himself, respondent issued an order assigning the Orleans County Public Defender to represent Krystal Cooper.

15. Krystal Cooper was thereafter taken by the police to the Gaines Town Court, where she was arraigned and a Temporary Order of Protection was issued directing her not to have any contact with Darlene Cooper. Notwithstanding that the arraignment took place in Gaines, the case was still within the jurisdiction of the Carlton Town Court.

16. On June 6, 2005, Krystal Cooper appeared for further proceedings in the Carlton Town Court. Both respondent and his co-judge, Carlton Town Court Justice George L. Miller, were sitting at the bench, presiding separately over individual cases. Judge Miller adjourned Krystal Cooper's case at the request of Assistant District Attorney Joseph Cardone.

17. Prior to adjourning the case, Judge Miller reissued the Temporary Order of Protection against Krystal Cooper. As Judge Miller began to read the order to Krystal Cooper, respondent, who was still sitting at the bench, interrupted and stated, "I want that order of protection on the record." A transcript of the proceeding indicates that Judge Miller took no action in response to Judge Hurley's statement.

18. On September 14, 2005, Judge Miller granted Krystal Cooper an Adjournment in Contemplation of Dismissal on the basis of a motion by Mr. Cardone.

19. Other than as described in paragraphs 14 and 17 above, respondent took no part in Krystal Cooper's case.

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(B), 100.2(C), 100.3(B)(4) and 100.4(A)(3) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The ethical standards specifically prohibit a judge from lending the prestige of judicial office to advance the private interests of the judge or others (Rules, §100.2[C]). Respondent violated this well-established provision in two separate matters involving a woman whom he was dating.

In the first matter, it was improper for respondent to contact the State Police on behalf of his friend, Darlene Cooper, and to identify himself as a town justice when he reported an alleged violation of an order of protection. As soon as Ms. Cooper asked respondent if he "had any contacts" at the police station, respondent should have recognized the potential peril of using his judicial status in any way to obtain an advantage for his friend. Instead, by telephoning the police, identifying himself as a town justice and relating details of the dispute as conveyed to him by Ms. Cooper, respondent, who is not an attorney, acted as his friend's advocate while lending the prestige of his judicial office to advance her private interests. Respondent's gratuitous reference to his judicial status could be interpreted as an implicit request for special

treatment, which could have been avoided had Ms. Cooper placed the call on her own behalf. Moreover, because Ms. Cooper had told him that her former husband was friendly with many local law enforcement officers, respondent also suggested to the police that the Sheriff's Department would not adequately pursue the matter. In its totality, respondent's call was an assertion of special influence and a misuse of his judicial prestige. *See, Matter of Straite*, 1988 Annual Report 226 (Comm. on Judicial Conduct) (judge used his judicial position to influence police to investigate a complaint made by the judge's son); *Matter of Stevens*, 1999 Annual Report 153 (Comm. on Judicial Conduct) (judge interfered in a police dispute involving his son and demanded that his son's antagonist be arrested).

We note that when the police told respondent that Ms. Cooper could come to the police station if she wished to file a complaint, respondent did not pursue the matter, and he did not accompany Ms. Cooper when she later went to the police station.

A few days later, respondent became involved in a second matter, involving Ms. Cooper's daughter, in which Ms. Cooper herself was the criminal complainant. After properly disqualifying himself from the case, respondent assigned counsel to Ms. Cooper's daughter. Shortly thereafter, when the case came before respondent's co-judge, who reissued a Temporary Order of Protection, respondent interjected himself into the case by commenting in open court, "I want that order of protection on the record." Because of his relationship with Ms. Cooper, respondent should have refrained from any participation in the case.

Cumulatively, respondent's conduct suggests that he failed to recognize the importance of avoiding any participation in matters involving an individual with whom he has a close relationship. *See, Matter of Lomnicki*, 1991 Annual Report 68 (Comm. on Judicial Conduct) (judge sat on the bench with another judge and participated in a case even though he had disqualified himself from the matter).

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

Mr. Felder, Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Peters and Judge Ruderman concur.

Judge Konviser dissents and votes to reject the Agreed Statement of Facts on the basis that Charge I should not be sustained as there was no suggestion of a malevolent or venal motive on the part of the Judge; rather, he was simply assisting a close personal friend whom he honestly (and correctly) believed was the victim of a crime. Judge Konviser concurs that the appropriate disposition is admonition based on the conduct in Charge II.

Ms. DiPirro was not present.

Dated: March 16, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN C. KING, SR.**, a Justice of the North Hudson Town Court, Essex County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission  
John C. King, Sr., *pro se*

The respondent, John C. King, Sr., a Justice of the North Hudson Town Court, Essex County, was served with a Formal Written Complaint dated September 19, 2006, containing one charge. Respondent filed an answer dated November 15, 2006.

On December 12, 2006, the administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On January 25, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the North Hudson Town Court, Essex County, since January 1, 2006, having successfully run for election in November 2005. He is not an attorney.
2. In 2005, while running as a candidate for North Hudson Town Justice, respondent engaged in various prohibited partisan political activities, as follows.
3. Throughout 2005, respondent was Chairman of the North Hudson Republican Party.
4. In or around June 2005, respondent became a candidate for North Hudson Town Justice, in that he began collecting signatures on a nominating petition in support of his candidacy.

5. Notwithstanding that he became a judicial candidate in or around June 2005, respondent did not resign the position as Chairman of the North Hudson Republican Party until January 1, 2006.

6. Respondent was a member of Friends of Richard B. Meyer, a campaign committee formed in 2005 to promote the candidacy of Richard B. Meyer for the position of Essex County Family, County and Surrogate's Court Judge. Respondent's name was listed on the letterhead of the Meyer campaign committee in August 2005.

7. In or around July 2005, respondent circulated a nominating petition for Richard B. Meyer's candidacy for the position of Essex County Family, County and Surrogate's Court Judge.

8. On or about September 18, 2005, respondent attended and participated in a meeting of the Republican Committee of the Town of North Hudson, at which Deborah Duntley was nominated as a Republican candidate for a second position as North Hudson Town Justice, which had recently become vacant. Respondent signed the certificate of nomination as Chairman of the Republican Committee. Ms. Duntley had previously been nominated to run against respondent as a candidate of the Wisdom Party. After Ms. Duntley was nominated as a Republican for the second judicial position available in North Hudson, respondent asked her to withdraw as the Wisdom Party candidate opposing him for the other available judicial position. Ms. Duntley did so.

9. In the fall of 2005, respondent displayed on his property the campaign signs of candidates Richard B. Meyer (a candidate for Essex County Family, County and Surrogate's Judge), Julie Garcia (a candidate for Essex County District Attorney) and Henry Hommes (a candidate for Essex County Sheriff).

10. Respondent did not engage in any prohibited political activity after he became a judge, and asserts that he was unaware during his campaign of the limitations on political activity by judicial candidates but recognizes that he was nevertheless obliged to know and abide by the Rules. Respondent assures the Commission that he will abide by all ethical requirements in the future.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(1)(a), 100.5(A)(1)(c), 100.5(A)(1)(d), 100.5(A)(1)(e) and 100.5(A)(1)(g) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Judicial candidates are strictly prohibited from engaging in partisan political activity, except for certain, limited activity in connection with the candidate's own campaign for office. The ethical mandates explicitly prohibit a judge or judicial candidate from holding office in a political organization (Section 100.5[A][1][a] of the Rules), engaging in partisan political activity on behalf of other candidates (Sections 100.5[A][1][c] and [d]), endorsing other candidates (Section 100.5[A][1][e]) and attending political gatherings (Section 100.5[A][1][g]).

While a judicial candidate, respondent engaged in partisan political conduct that clearly violated these standards.

Although a non-judge candidate for judicial office is permitted to belong to a political organization (Section 100.5[A][3] of the Rules), such a person cannot be a “leader” or hold office in a political organization (Section 100.5[A][1][a]). By continuing to serve as chairman of the local Republican Party until taking office as a judge, respondent violated that mandate. As the Party chairman, he continued to play an active, visible role in local political affairs. Notably, he attended a political meeting at which a candidate for the other available judgeship was nominated, and he signed the certificate of nomination.

Respondent also participated in the political campaign of another candidate and publicly endorsed other candidates, which is expressly prohibited (Section 100.5[A][1][c]-[e]). He played an active role in supporting a candidate for another judicial position, serving as a member of the candidate’s committee, circulating a nominating petition for the candidate, and being listed on the candidate’s letterhead. In addition, he displayed signs on his property supporting not only the judicial candidate but local candidates for District Attorney and Sheriff. Such endorsements are clearly barred. *See, e.g., Matter of Campbell*, 2005 Annual Report 103 (Comm. on Judicial Conduct); *Matter of Farrell*, 2005 Annual Report 159 (Comm. on Judicial Conduct); *Matter of Crnkovich*, 2003 Annual Report 99 (Comm. on Judicial Conduct); *Matter of Cacciatore*, 1999 Annual Report 85 (Comm. on Judicial Conduct); *Matter of Decker*, 1995 Annual Report 111 (Comm. on Judicial Conduct). A judge may not even make anonymous telephone calls from a telephone bank on behalf of a candidate for public office. *Matter of Raab v. Comm. on Judicial Conduct*, 100 NY2d 305 (2003). When respondent openly supported the candidates for District Attorney and Sheriff, he not only put the prestige of the court behind the endorsement but conveyed the impression that he had political alliances with individuals who would likely appear before him in future cases.

The ethical restrictions on political activity by judges and judicial candidates address “the State’s compelling interest in preventing political bias or corruption, or the appearance of political bias or corruption, in its judiciary” (*Matter of Raab, supra*, 100 NY2d at 316). As the Court of Appeals has held, such limitations are not only constitutionally sound, but fair and necessary to “preserv[e] the impartiality and independence of our State judiciary and maintain[] public confidence in New York State’s court system” (*Id.* at 312).

It is no excuse that, as respondent claims, he was unaware of the relevant limitations on political activity by judicial candidates. Every judge and judicial candidate is obliged to know and abide by the applicable ethical rules.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur. Mr. Emery files a concurring opinion.

Dated: February 14, 2007

## CONCURRING OPINION BY MR. EMERY

Respondent, John C. King, Sr., is accused of engaging in campaign activity in his quest for judicial office that compromised his obligation to “‘preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State’s court system’” (Determination at p. 6, quoting *Matter of Raab*, 100 NY2d 305, 312 [2003]). This accusation grows out of King’s undisputed failure to resign his post as Chairman of the North Hudson Republican Party and, in that capacity, his active support of other local Republican candidates in 2005, during a period when he was running for judicial office. Notably, at the time he ran he was not a judge.

On their face, the Rules Governing Judicial Conduct, in particular Section 100.5(A)(1)(a), preclude a candidate – judge or non-judge – from holding office or being a “leader” in a political organization, and Sections 100.5(A)(1)(c)-(e) and (g) proscribe endorsing and supporting other candidates as well as attending political gatherings. Despite these selective restrictions on a judicial candidate’s political activities, the Rules do NOT forbid a non-judge candidate from being a member, as opposed to a “leader,” of a political organization or from paying dues to a political organization (Section 100.5[A][3]). Nor do the Rules restrict any judicial candidate from active campaigning as a party endorsed candidate, advertising and campaigning as a member of a slate of party candidates, being endorsed by a political party, buying two tickets to and attending a political fund-raising event, receiving non-anonymous campaign contributions from political parties and party leaders, contributing to his/her campaign, reimbursing a party to pay for expenses in the judicial campaign, or standing on street corners soliciting votes. Most significantly, the rules do not prohibit receiving non-anonymous campaign contributions from the very lawyers and their clients whose cases the judge is, or will be, deciding. In other words, the Rules allow, as they must, blatant and aggressive politicking by judges and non-judges running for a judicial office, even though, without any rhyme or reason, they purport to cherry pick certain political activities as violations.

Juxtaposing sanctions for otherwise normal, accepted and necessary campaign practices – endorsing, campaigning for and supporting fellow candidates as well as contributing to and supporting party activities – with the campaign activities that the Rules allow – running on a party slate, accepting party endorsements, receiving party and party leader contributions, attending certain fund-raising events, reimbursing the party for campaign expenses and accepting non-anonymous campaign contributions from lawyers and clients who appear before the candidate judge – renders it hard to fathom any unifying rationale for the Rules that we enforce today. At a minimum, as in this case, these byzantine rules are a trap for the unwary. More importantly, it is hard to see how the Rules viewed as a regimen of regulation serve their purported interest to “‘preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State’s court system.’” *Matter of Raab, supra*, 100 NY2d at 312. And most importantly, this hodgepodge scheme of political regulation tramples the First Amendment rights of judicial candidates and voters.

I have written several times before on the constitutional ramifications of this contradictory and, ultimately, futile scheme of political regulation. See *Matter of Farrell*, 2005 Annual Report 159; *Matter of Campbell*, 2005 Annual Report 133; and *Matter of Spargo*, 2007

Annual Report \_\_\_\_ (Emery Concurrences). In those cases I concluded that the Rules suffer from the fatal constitutional flaws of over- and underinclusiveness, and cannot withstand the strict scrutiny that the Supreme Court in *Republican Party of Minnesota v. White*, 536 US 765 (2002), requires. I need not belabor that analysis here, and I refer anyone interested to those opinions.

My point today is a somewhat different one. The confluence of two current events makes this a propitious time for the Commission to exercise its discretion and refrain from enforcing this unconstitutional scheme of political regulation. First, apart from what I believe is our obligation not to impose punishment under unconstitutional and blatantly unfair rules, the Commission is facing a potentially crippling crisis of resources that our staff has ably documented in its current budgetary request to the Legislature (“Judicial Ethics and the New York State Budget: How Acutely Inadequate Funding Seriously Challenges the Commission’s Effort to Fulfill Its Critically Important Constitutional Mandate,” Nov. 21, 2006). Second, after the Second Circuit’s affirmance of District Judge John Gleeson’s decision in *Lopez Torres v. NY State Bd of Elections*, 462 F3d 161 (2d Cir 2006), which invalidated the party convention system for selecting judicial nominees and substituted, at least for the immediate future, primary elections to select judicial candidates, the pervasive presence of hotly contested judicial campaigns will imminently and exponentially expand. Starting this June, when petitioning begins, campaign politics and judicial elections will converge in ways, and with an intensity, the likes of which this state has never seen.

As a practical matter, the Commission simply does not have the resources to begin to cope with what will inevitably be a tidal wave of complaints nor with the First Amendment defenses these campaign tactics will generate. There is no conceivable way that we will be able to determine with any sense of confidence which candidates violated this absurd scheme of political regulation, let alone determine which candidates did so knowingly and intentionally. And if we do find some violations, we are likely to be embroiled in difficult constitutional litigation in federal court. Therefore, it behooves us to concentrate our paltry resources on the far more important strains of judicial impropriety such as abuse of litigants and lawyers, misappropriation of funds, and abuse of the judicial office for personal advantage, to name a few of the routine serious complaints with which we are inundated.

This is the worst time for the Commission to pretend that we have the ability, let alone the capacity, to enforce contradictory rules in the quagmire of election politics. Rather, this is the time for us to fix on higher priorities and refrain from providing Band-Aids for a self-inflicted wound that our State Constitution has impaled us with by requiring judicial elections. See *Matter of Spargo, supra* (Emery Concurrence). Finally, we should frankly and openly admit that under this absurd scheme of political regulation mandated by the Court of Appeals in *Matter of Raab*, we cannot fulfill our mission because enforcement of these conflicting rules will never “preserv[e] the impartiality and independence of our State judiciary and maintain[ ] public confidence in New York State’s court system.” Rather, such “enforcement” will undermine it.

Nonetheless, because respondent agrees that he violated the Rules, and the Rules were upheld as constitutional in *Raab*, I am constrained to concur in the result that the majority reaches in this case. Until some enterprising litigant challenges the *Raab* result in a federal court

or the Court of Appeals overrules the decision, *Raab* remains binding on me and this Commission.

Dated: February 14, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DENNIS LABOMBARD**, a Justice of the Ellenburg Town Court, Clinton County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn J. Blake, Of Counsel) for the Commission  
Peter A. Dumas for the Respondent

The respondent, Dennis LaBombard, a Justice of the Ellenburg Town Court, Clinton County, was served with a Formal Written Complaint dated September 22, 2006, containing seven charges. The Formal Written Complaint alleged that respondent: (i) presided over two cases in which his step-grandchildren were the defendants, (ii) contacted the judge presiding in a case in which his step-grandson was the defendant and lent the prestige of his judicial office to advance his step-grandson's interests, (iii) released a defendant based on the *ex parte* request of a former co-worker, (iv) asserted his judicial office to advance his private interests after a car accident, (v) improperly delegated his judicial duties, (vi) condoned a display in the court office that mocked two state troopers, and (vii) failed to supervise his court clerk who obtained and filed a false statement as a complaint against respondent's election opponent. Respondent filed a Verified Answer dated November 2, 2006, an amendment to his answer dated November 21, 2006, and a letter dated January 31, 2007, further amending his answer.

By Order dated November 9, 2006, the Commission designated Philip C. Pinsky, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 6 and 7 and April 10, 2007, in Albany. The referee filed a report dated August 17, 2007.

Commission Counsel filed a brief with respect to the referee's report and recommended the sanction of removal. Respondent did not file a brief with the Commission. On November 1, 2007, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. On August 9, 2004, Trooper Thomas C. Willette verified two Informations and issued appearance tickets to Devin LaClair: one for Criminal Mischief in the Fourth Degree (Penal Law §145.00), a Class A misdemeanor, and the other for Criminal Trespass in the Third Degree (Penal Law §140.10), a Class B misdemeanor. The two Informations, relying on facts contained in the supporting deposition of Richard A. Cole, alleged that a trespass and property damage had occurred on Mr. Cole's property on August 4, 2004, in the Town of Clinton. The appearance tickets directed the defendant to appear in the Ellenburg Town Court on August 19, 2004.

2. Devin LaClair is a relative of former Clinton Town Justice Daniel LaClair, who at that time was the only Town Justice in the Town of Clinton.

3. Trooper Willette decided, without consulting respondent or Judge LaClair, to make the appearance tickets returnable in Ellenburg rather than in Clinton because he knew that Devin LaClair was related to Judge LaClair and, a year earlier, a speeding ticket he had issued to Mr. LaClair in the Town of Clinton had been sent to the Town of Ellenburg due to that relationship.

4. Trooper Willette notified Judge LaClair that he had arrested Devin LaClair and that he was going to send the matter to Ellenburg unless Judge LaClair objected. Judge LaClair told the trooper to "Go ahead and send it to Ellenburg." Judge LaClair then telephoned respondent concerning the *LaClair* case and told him that he was "sending over the case" because of a conflict of interest involving his relative.

5. After notifying the district attorney's office that the *LaClair* arraignment was going to take place in Ellenburg due to the conflict, Trooper Willette sent respondent a note stating as follows:

I am sure you are familiar with the name on this paperwork. I didnt send him to T/Clinton because of the conflict of interest. I attempted to contact Ed Narrow with negative results. I did talk to Nancy at DA's office who said it was fine. Any questions call me.

6. After speaking with assistant district attorney Edward F. Narrow, Trooper Willette sent a note to Mr. Narrow stating: "I issued these at Ellenburg for known reasons. I have about eight more arrests with this incident. Any questions call me. I'm on vacation until 08/23."

7. On August 17, 2004, Mr. Narrow sent respondent a plea offer for *People v. Devin LaClair* and asked respondent to provide it to the defendant or his counsel at the arraignment. The plea offer was to reduce the original misdemeanor charges to a Trespass violation (Penal Law §140.05). The plea offer included a "recommended sentence" of "15 days in jail conditionally discharged upon the defendant completing 75 hours community service." Subsequently, the 75 hours was changed by the district attorney to 25 hours. On August 19, 2004, the *LaClair* case was adjourned to September 2, 2004.

8. Trooper Willette advised respondent that he would be filing criminal charges against several other individuals, including Kristin Drown and Patrick Drown, in connection with the

alleged incident on Mr. Cole's property. Kristin and Patrick Drown are the stepchildren of respondent's daughter. Respondent did not inform the trooper that the Drowns were related to him, and he agreed to have those cases filed in his court.

9. Trooper Willette verified Informations against four individuals, including Kristin Drown and Patrick Drown, charging them with Criminal Trespass in the Third Degree (Penal Law §140.10), a Class B misdemeanor, arising out of the events on Mr. Cole's property, and on August 23, 2004, the four defendants were issued appearance tickets returnable in the Ellenburg Town Court on September 2, 2004.

10. On September 2, 2004, respondent presided over the cases of the five defendants, including Devin LaClair, Kristin Drown and Patrick Drown. The defendants were present at the proceeding with their parents, including respondent's son-in-law and daughter, the father and stepmother of Kristin and Patrick Drown. Assistant district attorney Edward Narrow was also present. Respondent did not disclose to Mr. Narrow that he was related to Kristin and Patrick Drown, and Mr. Narrow did not know of the relationship.

11. None of the defendants was represented by counsel. All five defendants received youthful offender status.

12. With respect to Devin LaClair, respondent accepted the defendant's plea to the Trespass violation that had been offered by the district attorney's office. With respect to the remaining defendants, including Kristin and Patrick Drown, respondent granted an adjournment in contemplation of dismissal with the consent of the prosecutor. After the pleas were accepted but before the proceedings were concluded, Mr. Narrow left the court.

13. After Devin LaClair had pled guilty to Trespass as set forth in the plea offer, and after Mr. Narrow had departed, respondent sentenced Mr. LaClair to a weekend in jail and did not impose any community service. The sentence respondent imposed did not comport with the plea offer.

14. As to the other four defendants, including his step-grandchildren Kristin and Patrick Drown, respondent did not impose community service as a condition of the adjournment in contemplation of dismissal. Mr. Narrow had consented to the disposition in each of those cases conditioned upon each of those defendants performing 25 hours of community service, as authorized by the Criminal Procedure Law (§170.55[6]). Respondent did not advise Mr. Narrow that he would not be imposing a community service requirement on the five defendants.

15. A month or two later, Mr. Narrow learned that community service had not been imposed on the five defendants. He did not move to vacate the sentences imposed.

As to Charge II of the Formal Written Complaint:

16. On November 1, 2004, Patrick Drown was charged in the Clinton Town Court with Criminal Mischief in the Third Degree (Penal Law §145.05), a Class E felony, based on allegations that he had damaged a motor vehicle. Mr. Drown was also charged with Making a

Punishable False Written Statement (Penal Law §210.45), a Class A misdemeanor. Patrick Drown is the stepson of respondent's daughter.

17. The matter was transferred to the Mooers Town Court. On November 5, 2004, Mooers Town Justice Orville Nedeau arraigned Mr. Drown.

18. The next day, respondent telephoned Judge Nedeau and introduced himself as either "Judge LaBombard" or "Dennis LaBombard." Respondent knew that Judge Nedeau knew him to be a judge. The telephone conversation lasted about ten minutes.

19. In the conversation, respondent said that Patrick Drown was his step-grandson, inquired as to the date of the next court appearance, and told Judge Nedeau that Mr. Drown was a "good kid." Respondent also made some statements about "the other people involved" in the events underlying the Criminal Mischief charge. Respondent's statements gave Judge Nedeau the impression that other individuals "maybe weren't telling the right information," "had been in trouble" and were more culpable than respondent's relative.

20. On December 9, 2004, Patrick Drown appeared with his attorney in the Mooers Town Court before Judge Nedeau. Respondent attended the proceeding with his daughter, Mr. Drown's stepmother, and sat in the back of the courtroom. He did not speak with Judge Nedeau.

21. On March 3, 2005, with the consent of the district attorney's office, Patrick Drown pled guilty before Judge Nedeau to the reduced charge of Criminal Mischief in the Fourth Degree (Penal Law §145.00), a Class A misdemeanor, and was sentenced to make restitution and perform community service. Judge Nedeau testified at the Commission hearing that respondent's call had no influence on his handling of the case.

As to Charge III of the Formal Written Complaint:

22. On October 17, 2004, State Trooper Richard Moore, who was off duty, approached Ryan Guay's truck after he had observed Mr. Guay and his brother "spotlighting" fields, an illegal method of deer hunting. After seeing rifles in the truck and speaking with the defendant, Trooper Moore called the station. Before the patrols arrived, the defendant allegedly threatened Trooper Moore with a piece of wood. Trooper Christopher Gonyo arrived at the scene and arrested Mr. Guay. The defendant was charged with Criminal Possession of a Weapon in the Third Degree (Penal Law §265.02), a Class D felony; Menacing in the Third Degree (Penal Law §120.15), a Class B misdemeanor; and violations of the Environmental Conservation Law. The defendant was taken to the State Police Barracks in Ellenburg for arraignment, and respondent was contacted to conduct the arraignment.

23. At the arraignment on October 17, 2004, respondent set bail of \$5,000 cash or \$10,000 bond as recommended by the district attorney's office.

24. The defendant's mother, Helen Guay, was present at the arraignment but did not speak to respondent. Respondent knew Ms. Guay since they had worked in the same department

of Wyeth Laboratories for several years. (At the time of these events, respondent was no longer working there.) Respondent knew that the defendant, Ryan Guay, was Ms. Guay's son.

25. After respondent set bail, the defendant told respondent that he would lose his job if he did not go to work the next day. Respondent replied that he would "make some phone calls" in the morning and "see what we can do about it, if I can release you and let you get to your job." Trooper Gonyo heard respondent make a comment about contacting the district attorney's office the next day "to make some sort of arrangement on the bail."

26. The defendant was unable to post bail and was transported to the Clinton County Jail.

27. The next morning Helen Guay telephoned respondent and said she was concerned that her son would lose his job. Respondent told her that he would confer with the district attorney's office to see what could be done to get the defendant out of jail so that he could get to work.

28. After speaking with Ms. Guay, respondent released Mr. Guay on his own recognizance based on the *ex parte* requests of the defendant and his mother. Respondent maintains that assistant district attorney Edward Narrow consented to the defendant's release; Mr. Narrow denies speaking to respondent about the matter or consenting to the defendant's release.

29. Respondent testified at the hearing that if the charge had not been a felony and had been before him for a disposition, he would have disqualified himself because of his work-related relationship with the defendant's mother.

With respect to Charge IV of the Formal Written Complaint:

30. On September 23, 2004, a car being driven by Valencia Baldwin in the Village of Chateaugay stopped for a red light and then waited to make a right turn in order to allow a bicycle to cross the road. As Ms. Baldwin waited for the bicycle to cross, her car was hit from behind by a car driven by respondent.

31. After both cars pulled over to the curb, respondent told Ms. Baldwin that she was wrong in having stopped her car and that he was a judge and knew what he was talking about. He repeatedly told Ms. Baldwin in that conversation that he is a judge. Ms. Baldwin noticed that respondent's car had a "SMA" (State Magistrates Association) license plate, which she knew designated a town justice.

32. Ms. Baldwin went into a nearby barber shop to use a telephone to call the police. While she was on the phone, respondent, who also had entered the shop, continued to state several times that he is a judge. Several individuals overheard respondent's statements.

33. After giving Ms. Baldwin contact information, respondent left the scene, saying that he had to get to a doctor's appointment. Since there was no property damage and no physical injury, respondent was not required to remain at the scene until the police arrived.

As to Charge V of the Formal Written Complaint:

34. The charge is not sustained and therefore is dismissed.

As to Charge VI of the Formal Written Complaint:

35. The charge is not sustained and therefore is dismissed.

As to Charge VII of the Formal Written Complaint:

36. The charge is not sustained and therefore is dismissed.

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)(1), 100.3(B)(6), 100.3(E)(1) and 100.3(E)(1)(d)(i) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I, paragraph 5, subdivision (B) and Charges II through IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charge I, paragraph 5, subdivisions (A) and (C), and Charges V, VI and VII are not sustained and therefore are dismissed.

Respondent engaged in a series of willful, egregious misdeeds, both on and off the bench, in which he abused the power and prestige of his judicial office for his own personal advantage and for the benefit of others. The record establishes that he presided over the cases of his relatives and a former co-worker's son, changed his bail decision after an *ex parte* call from the defendant's mother, initiated an *ex parte* communication with the judge handling his relative's case, and asserted his judicial office after a car accident. Such "a pattern of injudicious behavior and inappropriate actions...cannot be viewed as acceptable conduct by one holding judicial office." *Matter of VonderHeide*, 72 NY2d 658, 660 (1988).

It is a fundamental precept of judicial ethics that a judge may not preside over a case in which a relative is a party (Rules, §100.3[E][1][d][i]). As the Court of Appeals has stated:

The handling by a judge of a case to which a family member is a party creates an appearance of impropriety as well as a very obvious potential for abuse, and threatens to undermine the public's confidence in the impartiality of the judiciary. Any involvement by a judge in such cases or any similar suggestion of favoritism to family members has been and will continue to be viewed by this court as serious misconduct.

*Matter of Wait*, 67 NY2d 15, 18 (1986). See also, *Matter of Thwaites*, 2003 Annual Report 171 (Comm on Judicial Conduct); *Matter of Pulver*, 1983 Annual Report 157 (Comm on Judicial Conduct).

Notwithstanding this well-established ethical prohibition, respondent presided over the cases of two step-grandchildren, granting the defendants an adjournment in contemplation of dismissal. Not even the presence in the courtroom of his daughter and son-in-law, the defendants' stepmother and father, prompted him to recognize the manifest impropriety of handling his relatives' cases. In addition, the fact that respondent eliminated the community service requirement effectively delivered a more favorable disposition to his family members than that agreed to by the district attorney and circumvented the procedural requirements applicable to them.

We reject respondent's argument that his misconduct is mitigated in any way by the rationale that he intended to treat his relatives the same as, or even more harshly than, any other defendants. While handling a relative's case would be improper regardless of the disposition imposed, the result here is plainly a favorable one, which compounds the impropriety. We also reject as a mitigating factor respondent's claim that he did not impose community service for any defendants at that time because it was unavailable nearby. If respondent was unwilling to impose the community service condition required by the district attorney, he was obliged to so inform that office so that it would have an opportunity to reconsider its consent to the dispositions. Instead, he acted without notice to the district attorney under circumstances suggesting a deliberate effort to circumvent the procedural requirements for the benefit of his relatives as well as their co-defendants.

It was also improper for respondent to preside at a felony arraignment in which the defendant was his former co-worker's son. If, as respondent has acknowledged, his work-related relationship with the defendant's mother required his disqualification had the case been before him for a disposition, he should not have handled the arraignment. See, *Matter of Valcich*, 2008 Annual Report \_\_\_ (Comm on Judicial Conduct). Respondent seriously exacerbated his misconduct and conveyed the appearance of favoritism by releasing the defendant the next day after receiving an *ex parte* telephone call from the defendant's mother, who told respondent that she was concerned that her son would lose his job. Regardless of whether he consulted with the district attorney before releasing the defendant, respondent's conduct was improper. By considering an *ex parte* request with respect to the defendant's bail and acceding to the implicit plea for special consideration, respondent violated well-established ethical rules and allowed his personal relationships to influence his actions as a judge. Such conduct impairs public confidence in the integrity and impartiality of the judiciary. See, e.g., *Matter of Gassman*, 1987 Annual Report 89 (Comm on Judicial Conduct) (after setting bail for three defendants, judge released them on recognizance after an *ex parte* contact by another judge).

Even more seriously, on two occasions respondent abused the prestige of judicial office by engaging in off-the-bench conduct that invoked his judicial status, both implicitly and explicitly, for his and his family's benefit. Especially improper was his telephone call to the judge handling a criminal case in which respondent's step-grandson had been charged. Notwithstanding respondent's claim that his intent was simply to inquire about the next court

date, he should have recognized the importance of avoiding any involvement in the matter -- and specifically any contact with the judge handling the case, who knew respondent as a fellow judge -- in order to avoid any perception of using his judicial status to gain an advantage for his relative's interests. Presumably, a phone call inquiring about the court date could have been made by the defendant's parents or attorney. Respondent's call went well beyond a simple inquiry and could have had only one purpose: to influence the judge to give special consideration to respondent's relative.

After initiating contact with the judge handling the case, respondent advised the judge that the defendant was his relative and was "a good kid." Such conduct is improper, even in the absence of any specific request for favorable treatment, since it appears to be an implicit request for special consideration. *Matter of Edwards*, 67 NY2d 153 (1986). Such conduct "is wrong, and has always been wrong" and undermines public confidence in the fair and impartial administration of justice. *Matter of Byrne*, 47 NY2d (b), (c) (Ct on the Judiciary 1979). Judges are prohibited from using the prestige of judicial office to advance private interests (Rules, §100.2[C]), and doing so on behalf of a friend or relative facing criminal charges is improper. See, e.g., *Matter of Kiley*, 74 NY2d 364 (1989); *Matter of Edwards*, *supra*; *Matter of Horowitz*, 2006 Annual Report 183 (Comm on Judicial Conduct); *Matter of Sharlow*, 2006 Annual Report 232 (Comm on Judicial Conduct); *Matter of Kolbert*, 2003 Annual Report 128 (Comm on Judicial Conduct); *Matter of LoRusso*, 1988 Annual Report 195 (Comm on Judicial Conduct).

Respondent's conduct was especially pernicious since he used his judicial influence not only to vouch for his relative, but to denigrate other individuals involved in the underlying incident. During his ten-minute conversation with the judge who was handling the case, respondent made additional statements that conveyed to the judge the clear impression that the other individuals were more culpable than respondent's relative. This was a reprehensible abuse of his judicial clout. See, *Matter of Kaplan*, 1997 Annual Report 96 (Comm on Judicial Conduct); see also, *Matter of Howell*, 2001 Annual Report 115 (Comm on Judicial Conduct); *Matter of Stevens*, 1999 Annual Report 153 (Comm on Judicial Conduct).

Finally, during the same period, respondent abused the prestige of judicial office when he repeatedly identified himself as a judge after a minor traffic accident. The record establishes that he asserted his judicial status in the context of blaming the other motorist, and not simply, as respondent has claimed, to assure the other motorist that she would be able to reach him. Injecting his judicial status into the dispute was unnecessary and unseemly. Respondent's repeated references to the fact that he is a judge were a blatant misuse of his judicial prestige, demonstrating that he was using his judicial status for his personal advantage. See, *Matter of Werner*, 2003 Annual Report 198 (Comm on Judicial Conduct) (judge identified himself as a judge when his car was stopped by police); see also, *Matter of D'Amanda*, 1990 Annual Report 91 (Comm on Judicial Conduct) (judge used judicial prestige to avoid receiving three traffic tickets).

As the Court of Appeals has stated, removal is "a drastic sanction which should only be employed in the most egregious circumstances" (*Matter of Cohen*, 74 NY2d 272, 278 [1989]) and "where necessary to safeguard the Bench from unfit incumbents" (*Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [III] [Ct on the Judiciary

1979]). The totality of respondent's willful misdeeds, both on and off the bench, shows a blatant disregard for the high ethical standards required of judges and renders him unfit to remain in office.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur except as follows.

Mr. Harding and Mr. Jacob dissent only as to the finding of misconduct as to Charge I, paragraph 6 of the Formal Written Complaint concerning respondent's elimination of the community service requirement.

Mr. Felder and Ms. DiPirro were not present.

Dated: December 12, 2007



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JEAN MARSHALL**, a Justice of the Cuyler Town Court, Cortland County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser<sup>[1]</sup>  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Lawrence J. Knickerbocker for the Respondent

The respondent, Jean Marshall, a Justice of the Cuyler Town Court, Cortland County, was served with a Formal Written Complaint dated June 21, 2005, containing two charges. Respondent filed an answer dated August 10, 2005.

By Order dated September 13, 2005, 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 January 18, 2006, in Syracuse. The referee filed a report dated June 19, 2006.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and counsel for respondent recommended a letter of caution. On October 30, 2006, 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 Cuyler Town Court since 1999. She is not an attorney. Respondent regularly holds court on Monday night.

As to Charge I of the Formal Written Complaint:

2. In *Town of Cuyler v. Ken and Lisa Covney*, Douglas Staley, the code enforcement officer for the Town of Cuyler, issued an Order to Remedy dated May 23, 2003, alleging that the Covneys had erected a barn without a permit and giving them 30 days to comply with the town code. Thereafter, Mr. Staley filed an Accusatory Instrument dated August 18, 2003.

3. Respondent sent Ken Covney a notice to appear in the Cuyler Town Court on November 17, 2003. On that date, Victoria Monty, Esq., the town attorney, appeared in court on behalf of the Town of Cuyler. Mr. Covney did not appear. Respondent adjourned the case to December 29, 2003.

4. On December 8, 2003, Gina Blasdell, Esq., the Covneys' attorney, sent a letter to respondent and Ms. Monty requesting an adjournment of the December 29, 2003, appearance date to mid-January. Respondent never responded to Ms. Blasdell's request for an adjournment.

5. In *Town of Cuyler v. Donald A. Marshall*, Mr. Staley filed an Order to Remedy dated July 25, 2003, alleging that Mr. Marshall had in excess of 30 unlicensed/unregistered vehicles on his property and giving him 30 days to comply with the town code. Thereafter, Mr. Staley filed an Accusatory Instrument dated September 25, 2003.

6. Respondent sent Mr. Marshall a notice to appear in the Cuyler Town Court on November 17, 2003. Mr. Marshall appeared on that date, and Ms. Monty appeared on behalf of the Town of Cuyler. Mr. Marshall admitted that he was in violation of the town code but said he was working toward compliance and asked for more time. Respondent adjourned the case to December 29, 2003.

7. In *Town of Cuyler v. Robert Gosselin*, Mr. Staley issued an Order to Remedy on August 11, 2003, alleging that Mr. Gosselin had unlicensed/unregistered vehicles on his property and giving him 30 days to comply with the town code. Thereafter, Mr. Staley filed an Accusatory Instrument dated September 25, 2003.

8. Respondent sent Mr. Gosselin a notice to appear in the Cuyler Town Court on November 17, 2003. Mr. Gosselin appeared on that date, and Ms. Monty appeared on behalf of the Town of Cuyler. Mr. Gosselin admitted that he was in violation of the town code but said he was working toward compliance. Respondent adjourned the case to December 29, 2003.

9. In *Town of Cuyler v. Tab and Bonita Beckwith*, Mr. Staley issued an Order to Remedy dated August 11, 2003, alleging that Mr. Beckwith had erected a structure without a proper permit and had unlicensed/unregistered vehicles and vehicle parts on his property. The Order to Remedy gave Mr. Beckwith 30 days to comply with the town code. Thereafter, Mr. Staley filed an Accusatory Instrument dated September 25, 2003.

10. Respondent sent Mr. Beckwith a notice to appear in the Cuyler Town Court on November 17, 2003. Mr. Beckwith appeared on that date, and Ms. Monty appeared on behalf of the Town of Cuyler. Mr. Beckwith admitted that he was in violation of the town code and told the court that he was in the process of removing one unregistered vehicle and would apply for a building permit. Respondent adjourned the case to December 29, 2003.

11. On December 29, 2003, Mr. Marshall, Mr. Gosselin and Mr. Beckwith each telephoned respondent concerning their cases, which were scheduled for that night. Respondent spoke with each of them and agreed to adjourn their cases.

12. During those telephone conversations, respondent had an *ex parte* discussion with each of the three defendants concerning the merits of their cases.

13. That night, Ms. Monty and Mr. Staley appeared before respondent in connection with the *Covney, Marshall, Gosselin* and *Beckwith* cases. Respondent told Ms. Monty and Mr.

Staley that their appearance was a “wasted trip” since she had adjourned the cases after the defendants had contacted her and indicated they could not appear.

14. Prior to their appearance, neither Ms. Monty nor Mr. Staley had received any notice that the cases had been adjourned.

15. Ms. Monty pressed respondent for an adjourned date. Respondent looked at her court calendar and selected January 26, 2004. Ms. Monty observed respondent write something down when she set that date, and Mr. Staley observed respondent write in her court calendar.

16. On January 13, 2004, respondent issued a “Letter Decision and Order” dismissing the *Covney, Marshall, Gosselin* and *Beckwith* cases.

17. Although respondent testified at the hearing that she dismissed the cases because Mr. Staley had not gotten back to her after re-inspecting the properties as she had directed on December 29<sup>th</sup>, the decision provides no indication that the cases were dismissed for that reason. The decision states that “after thinking about” the four cases respondent was dismissing the cases based on “precedent.” The decision also states: “Another problem I have with these so called violations is the fact that it seems to be pick and choose. When everybody is treated the same in this town, I may reconsider.”

18. Prior to issuing her decision, respondent had an *ex parte* discussion with a town board member concerning the merits of the *Covney* case. As noted above, respondent also had an *ex parte* discussion with the defendants in *Marshall, Gosselin* and *Beckwith* concerning the merits of their respective cases.

19. Respondent dismissed the four cases because of her personal belief, based on her *ex parte* discussions, that the defendants’ properties were in compliance with the town code.

20. Prior to issuing her decision, respondent provided no notice to the prosecution that she had received *ex parte* information and no opportunity to respond to the *ex parte* statements.

21. Neither the Covneys nor their attorney ever made an actual appearance in court or entered a plea. The only record of an appearance in that case was the attorney’s written request for an adjournment.

22. Respondent dismissed the charges in the four cases without having received a motion, oral or written, from the defendants.

23. Respondent dismissed the charges in the four cases without providing an opportunity to Mr. Staley to testify concerning the allegations and without providing Ms. Monty an opportunity to offer proof or to address the charges in court.

24. After receiving respondent’s decision, Ms. Monty sent respondent a letter dated January 22, 2004, stating that the Town had not been provided with an opportunity to be heard

and asking that the cases be restored to the calendar. Respondent did not respond, and the cases were not restored to the calendar. No appeal was taken as to respondent's decision.

As to Charge II of the Formal Written Complaint:

25. On October 12, 2004, respondent testified under oath during the Commission investigation concerning her actions in the *Covney*, *Marshall*, *Gosselin* and *Beckwith* cases. Respondent testified falsely that on December 29, 2003, she did not adjourn the four cases to January 26, 2004, or any other date certain.

26. After respondent testified on October 12, 2004, a Commission investigator went to respondent's home and reviewed respondent's 2003 court calendar (Comm. Ex. 22), which respondent provided to the Commission.

27. On respondent's calendar, the entry for December 29, 2003, contains respondent's handwritten entries, "Donald Marshall", "Tab Beckwith", "Ken Coveney" and "Robert Gosselin", listed in a column. On that page, after setting an adjourned date at Ms. Monty's request, respondent had originally written next to each defendant's name an arrow and the numbers "1/26", to indicate that she had adjourned the cases to January 26, 2004. Respondent also wrote next to the names: "letters if Doug doesn't call."

28. Sometime after testifying before the Commission that she had not adjourned the four cases to January 26, 2004 or any other date certain, respondent used multiple "white-out" strips on the calendar page to obliterate her original entries next to the four names and to conceal her previously written adjourned dates. Over the obliteration, respondent wrote: "Doug is v'ing on these properties to see if everything is cleaned up and getting back to me Coveney? Call Gina".

29. Respondent's usual practice to indicate an adjourned date in her calendar was to write an arrow next to the defendant's name followed by the date to which the case had been adjourned. Respondent uniformly wrote adjourned dates in a numeric fashion indicating the month and the day, *e.g.*, "1/26."

30. In no other instance in her 2003 calendar did respondent use "white-out" to alter or to reflect a change in an entry. There are numerous other obliterations in the calendar, all of which respondent made by scribbled cross-outs.

31. Respondent made the white-out obliteration in her calendar on the page for December 29, 2003, in an attempt to conceal from the Commission that she had adjourned the cases to January 26, 2004.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.3(B)(6) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary

Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

The record establishes that after dismissing four code violation cases on the basis of unsubstantiated *ex parte* communications, without providing notice to the prosecution or an opportunity to be heard, respondent seriously exacerbated her misconduct by testifying falsely about her actions and by altering her court calendar in order to conform her records to her false testimony. Her conduct violated well-established ethical standards and demonstrates convincingly that she is unfit to serve as a judge.

A judge is required to accord to all interested parties a full right to be heard under the law (Rules, Section 100.3[B][6]). Respondent has acknowledged violating that standard by having *ex parte* conversations concerning the merits of each of the four cases -- three discussions with defendants and one discussion with another individual -- and then dismissing the cases based on the unsubstantiated information she had received. Such conduct violates fundamental legal principles and, standing alone, warrants public discipline. *See, Matter of Gori*, 2002 Annual Report 101 (Comm. on Judicial Conduct) (after engaging in *ex parte* communications, judge held a hearing after telling the other party he did not have to appear); *Matter of Kressly*, 2005 Annual Report 173 (Comm. on Judicial Conduct) (judge held a trial in a code violation case without providing notice to the prosecuting authorities); *Matter of More*, 1996 Annual Report 99 (Comm. on Judicial Conduct) (judge dismissed charges in three traffic cases without notice to the prosecutor and disposed of three other cases based on *ex parte* communications).

Even if the *ex parte* communications were, as respondent testified, brief and unsolicited, respondent was obligated to give the prosecuting authorities notice of the unauthorized information she had received and an opportunity to rebut the information in court. It is clear from the record that she failed to do so. Instead, after telling the prosecutors that she had adjourned the cases to January 26<sup>th</sup>, she relied on the *ex parte* information in dismissing the cases prior to the adjourned date, without any sworn testimony or motions and, in the case of one defendant, without any plea or court appearance. The mishandling of these cases by respondent, who has been a judge since 1999, reveals a fundamental misunderstanding of basic legal procedures.

Thereafter, respondent seriously exacerbated her misconduct by testifying falsely during the Commission investigation that she had not adjourned the cases to January 26<sup>th</sup> and by altering her court calendar in order to conceal the adjournments. These actions, designed to obstruct the Commission's investigation into her misconduct, are especially subject to condemnation. *See, Matter of Jones*, 47 NY2d (mmm) (Ct on the Judiciary 1979); *Matter of Kadur*, 2004 Annual Report 119 (Comm. on Judicial Conduct). "Such deception is antithetical to the role of a judge, who is sworn to uphold the law and seek the truth." *Matter of Kadur, supra; Matter of Myers*, 67 NY2d 550, 554 (1986).

We are mindful that the referee, after evaluating the evidence and weighing the witnesses' credibility, concluded that the charge of false testimony was not proved (Referee's report, pp. 6-7, 19). While the findings of the trier of fact normally are accorded due deference, they are "proposed" findings which the Commission is empowered to accept or reject (22

NYCRR §§7000.6[f][1][iii], 7000.6[1]). Based on our own careful examination of the entire record, we reject the referee's conclusion that the charge of false testimony was unproved. In doing so, we note that the referee's views are somewhat unclear. In particular, his analysis and his conclusion exonerating respondent appear to be inconsistent in significant respects with his enumerated findings of fact, which include a finding that respondent testified falsely as to the adjournments (Referee's report, p. 18, Finding 75).

As respondent has acknowledged, she originally wrote "1/26" on her court calendar page for December 29, 2003, next to the names of the four cases. The format of this entry is consistent with respondent's usual method for noting adjournments on her calendar (*see, e.g.*, her notations on the calendar page for November 17<sup>th</sup>, noting the adjournments of the four cases to December 29<sup>th</sup>). This notation, supported by the testimony of both the town attorney and the code enforcement officer, convincingly establishes that respondent adjourned the four cases to that date. This is clearly contrary to her testimony during the investigation, in which she repeatedly denied adjourning the cases to January 26<sup>th</sup> or any other date certain (Comm. Ex. 23). Respondent's false testimony was material to the Commission's investigation of her conduct since it was an effort to conceal that she had disposed of the four cases prior to the next scheduled court date.

We are unpersuaded by the argument that respondent's investigative testimony was truthful because, in her mind, the adjournment was "tentative," rather than an actual adjournment. Even if this strained rationale were accepted, her testimony would be highly misleading and therefore improper. Words must be understood according to their plain meanings, and when respondent was asked under oath if she had adjourned the cases and, in response, denied that she had done so, there was no reason to conclude that those words had any qualified or contrary meaning.

We are also unconvinced by respondent's explanation that she did not dismiss the cases prematurely but dismissed them because Mr. Staley, the code enforcement officer, never reported back to her on whether the violations had been corrected, as she claims she directed him to do. Significantly, the decision itself (Comm. Ex. 20), which discusses several reasons for the dismissal, gives no indication that the cases were dismissed for that reason. Providing a possible motivation for respondent's actions, the decision indicates that a key factor in the dismissal was respondent's belief that the Town was selectively targeting certain defendants, a view respondent reiterated in her Answer and during the oral argument (Oral argument, p. 35).

We further conclude that in a clumsy effort to conceal that she had, in fact, adjourned the cases to January 26<sup>th</sup>, respondent used "white-out" to obliterate the original entry on her court calendar and then wrote a notation over it. Respondent's explanation that this was a routine alteration, intended only to update the status of the cases, is most unconvincing. Even the referee, who found respondent's explanation to be "plausible," conceded that the alteration "appears like a covering up of wrongdoing" and that "it is possible" respondent behaved as alleged (Referee's report, p. 6). In our view, there is abundant evidence that this was not a routine alteration and that respondent's purpose in altering her calendar was to obstruct the investigation.

Significantly, although there are dozens of scribbled cross-outs throughout respondent's 2003 calendar, this was the only occasion where "white-out" was used to make a change. In order to obliterate all traces of the original entry, respondent had to apply multiple "white-out" strips to the calendar page. The laborious effort required to change this single entry stands in sharp contrast to the many loosely-scribbled cross-outs throughout the rest of the calendar. Moreover, if respondent simply wanted to update the status of the cases, as she testified, there was ample room on the page to record additional information (two-thirds of the page is blank), and it was obviously unnecessary to obliterate what she had already written and then write over it. The circumstantial evidence, and respondent's inability to provide a credible explanation for her actions, establish convincingly that her conduct was a deliberate effort to conceal from the Commission that she had lied about adjourning the cases. This deception and dishonesty are exponentially worse than the original misconduct she attempted to conceal.

Respondent's actions are clearly inconsistent with the standards of integrity and propriety required of all members of the judiciary. A judge who engages in such deceitful behavior cannot be entrusted to administer oaths or to sit in judgment on others whose credibility she must assess. Such conduct "impedes the efficacy of the disciplinary process and is destructive of a judge's usefulness on the bench" (*Matter of Kadur, supra*, 2004 Annual Report at 123).

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

Mr. Felder, Judge Klonick, Mr. Emery, Mr. Harding, Judge Peters and Judge Ruderman concur as to the sanction. Mr. Coffey and Mr. Jacob dissent as to sanction and vote that respondent be censured.

As to Charge I, Mr. Felder, Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Peters and Judge Ruderman concur.

As to Charge II, Mr. Felder, Judge Klonick, Mr. Harding, Judge Peters and Judge Ruderman concur. Mr. Coffey, Mr. Emery and Mr. Jacob dissent and vote to dismiss the charge.

Ms. DiPirro was not present.

Dated: February 7, 2007

#### **CONCURRING OPINION BY MR. FELDER**

I concur that the record convincingly establishes respondent's egregious misbehavior, as alleged in Charges I and II. Indeed, although the prescribed standard of proof in Commission cases is a preponderance of the evidence (22 NYCRR §7000.6[i]), in my view the proof in this case far exceeds that standard.

The most compelling evidence against respondent, as I see it, comes from her own words. Both at the hearing before the referee and at the oral argument before the Commission, respondent's statements were evasive, riddled with inconsistencies, and singularly unpersuasive.

In attempting to explain her actions, she repeatedly showed a troubling misapprehension of the relevant issues, and her explanations only raised more questions about whether she understands the proper role of a judge.

For example, at the oral argument, respondent acknowledged that prior to these proceedings it had been her practice to grant adjournments upon the request of an attorney without notifying the other side (Oral argument, p. 40). When I asked her whether she still followed that practice, her responses revealed that, notwithstanding these proceedings, she has learned little about appropriate legal procedures:

MR. FELDER: Since all of this happened with what we're concerned here with today, do you still follow that same practice?

RESPONDENT: I do with attorneys and public defenders, DAs, but not with citizens, defendants.

MR. FELDER: But if –

RESPONDENT: If a defendant calls me I tell them they have to come to court.

MR. FELDER: Yes, but if a DA, if you grant the DA an adjournment, how does the defendant know then, if you're doing it *ex parte*?

RESPONDENT: They wouldn't know until they came to court.

JUDGE PETERS: If you grant the DA an adjournment, do you send a letter to the defendant or do you make the defendant show up anyway?

RESPONDENT: I make the defendant show up anyway.

JUDGE PETERS: Why not just send him a letter and say, "The DA asked for an adjournment, I granted it"? Why inconvenience them?

RESPONDENT: Well, since all this has started, and it's been going on three years now, I've been a lot more careful with talking to defendants on the phone.

JUDGE PETERS: Well, you can send them a letter, can't you?

RESPONDENT: Yes, I could send them one.

JUDGE PETERS: And then they don't have to drive all the way to court?

RESPONDENT: Right, but if it's an attorney, you would assume that the attorney would notify the client.

MR. FELDER: Well, if the attorney requested on behalf of the defendant, do you notify the prosecutor?

RESPONDENT: No, not until he shows up in court.

MR. FELDER: He has to show also?

RESPONDENT: Yes.

(Oral argument, pp. 40-42)

Respondent's words reveal, even at this late date, a shaky grasp of the rules pertaining to *ex parte* communications. She clearly fails to understand that before granting any application for an adjournment, she generally should hear from the other side. Section 100.3(B)(6)(a) of the Rules provides that, with respect to *ex parte* communications as to scheduling, a judge should, "insofar as practical and appropriate, make[ ] provision for prompt notification of other parties or their lawyers of the substance of the *ex parte* communication and allow[ ] an opportunity to respond."

Also telling was respondent's statement in her Decision dismissing the code violation cases (Comm. Ex. 20) indicating that one factor in the dismissal was her belief that the Town was selectively targeting certain defendants. Respondent reiterated that view both in her Answer ("[I]t has been only poor people who have received summonses") and at the oral argument (Oral argument, pp. 35-36). Asked why that view was relevant, respondent provided no clear response (*Id.*). The words in respondent's Decision speak for themselves: "Another problem I have with these so called violations is the fact that it seems to be pick and choose. When everybody is treated the same in this town, I may reconsider" (Comm. Ex. 20). Motivated by her personal disagreement with the enforcement of the law, she simply chose to dismiss the charges.

Respondent could offer no persuasive explanation for why the arrows and notations on her calendar for December 29<sup>th</sup> – in the identical format she used throughout the calendar to indicate adjournments – did not, as she insisted, actually signify an adjournment. Nor could she provide any convincing explanation for her use of white-out, on that page alone, to make a substantial alteration, or for why she did not simply write the new entry she wished to make below those dates, on the bottom on that page, two-thirds of which was blank. Cumulatively, respondent's hollow explanations convey a powerful statement about her lack of credibility.

In concluding that respondent was not credible, I am constrained to disregard the referee's report, which I find unreliable and inexplicable in this regard. While appearing to exonerate respondent from the charge of false testimony, he makes a factual finding that she testified falsely as to the adjournments (Referee's report, Finding 75). He finds that the charge of false testimony (in which she denied adjourning the cases) was not proved (Referee's report, pp. 6, 19), yet also finds that she did set adjourned dates (Referee's report, Findings 8, 21, 35, 49). In light of these inconsistencies, I have examined the entire record of this case with particular care.

Additionally, I note that Chief Judge Judith S. Kaye has focused on the local justice courts and has proposed certain reforms, including more training and supervision and other measures to improve the functioning of these courts. Respondent's conduct underscores the need

for greater training and other reforms. As Judge Kaye has stated: “These courts must provide the same high standard of justice the public expects and deserves from any court in New York” (“Sweeping Reforms of New York’s Local Justice Courts Unveiled,” Press Release, New York State Unified Court System, 11/21/06).

I concur with the majority that respondent’s actions are inconsistent with the high standards of integrity and propriety required of all members of the judiciary.

Dated: February 7, 2007

## **OPINION BY MR. EMERY CONCURRING AS TO SANCTION AND DISSENTING AS TO CHARGE II**

This case presents a difficult question: whether to remove a judge for high-handed *ex parte* activity alone, even though in my view she has not been found responsible for covering up her activities when the Commission investigated her. As I explain below, I conclude that respondent’s undisputed actions with respect to Charge I are an adequate basis for her removal notwithstanding that I find her not to have violated her obligations as alleged in Charge II.

My vote for removal is driven in part by Judge Marshall’s demonstration in her testimony that she fails to grasp at a fundamental level the unique role of a judge. Her testimony and her conduct clarified for me that her removal from office is warranted, notwithstanding that I vote to dismiss the more serious of the two charges. Although it is sometimes obvious that a judge has engaged in misconduct, we are often handicapped by an incomplete record for the purpose of rendering an appropriate sanction, and in this regard the judge’s testimony is especially critical. It has consistently been my view that plenary hearings are essential to the Commission’s proper dispensation of its obligation to determine an appropriate sanction, especially where removal is at issue. *See Matter of Carter* and *Matter of Clark*, 2007 Annual Report at \_\_\_\_\_. Here, like my fellow Commissioner Jacob, I defer to the specific finding of the referee: the Commission did not prove by a preponderance of evidence that Judge Marshall altered her calendar to corroborate a lie to Commission investigators. *See Referee’s Report* at pp. 6-7, 19. In addition, my independent review of the record confirms this conclusion, and I, therefore, fully subscribe to the portions of Commissioner Jacob’s opinion which expertly parse the evidence and demonstrate the logic and force of the referee’s central finding on the only disputed facts in this case.

In addition, I believe it is important to expand on one procedural wrinkle in this case that concerns me. Our effort in this case has been made significantly more difficult because of the apparent inconsistencies in the referee’s report. There appears to be a glaring contradiction between the referee’s careful exposition of his conclusion that the proof was inadequate to support the charge that the judge obliterated adjourned dates in her calendar to support a lie to Commission investigators (Referee’s report, pp. 6-7, 19 [Conclusion 80]) and the referee’s finding that the judge did give false testimony about whether she adjourned the four cases at issue (*Id.* at p. 18 [Finding 75]). Neither side sought reconsideration to clarify this contradiction; rather, each chose to selectively argue to the Commission that its view was supported by the referee.

Although I can understand that attorneys may choose not to seek clarification for strategic or other reasons, as Commission members we require a complete, clear record on which to base our determination. The Court of Appeals would likewise be greatly hampered in its review of a determination if the record contains glaring inconsistencies or is otherwise deficient. Thus, I see a critical need for establishing a procedure that either we or Commission staff, on notice to the respondent, should seek clarification from the referee before we engage in the complex task of considering the arguments and the referee's report, and before we write opinions based on a record that is unclear, as in this case.

Nonetheless, I agree with Commission counsel and my fellow commissioners that Judge Marshall should be removed. The undisputed findings in this case, wholly aside from whether she covered up any misdeeds, betray a jurist with such a fundamental misunderstanding of what it means to be a judge that she should not remain on the bench. Unlike other judges whom we have disciplined for engaging in *ex parte* communications central to the merits of the cases before them, Judge Marshall did so repeatedly and unabashedly, even righteously proclaiming that her behavior was justified because "It has been only poor people who have received summonses" (Judge's Answer) and "When everybody is treated the same in this town, I may reconsider" (Judge's Letter Decision and Order [Comm. Ex. 20]). Her Joan of Arc indignation and her reckless actions may serve her well with some unknown constituency, but they have no place in the mind and actions of a judge who must be fair to individual litigants. To make matters worse, she high-handedly dismissed cases based on the uncorroborated information that she received *ex parte* and she never informed the prosecutors to give them a chance to protest. And, as Chairperson Felder demonstrates in his concurring opinion, we can have no confidence that she has learned any lessons, let alone the ones that this case should have taught her.

It is unimaginable that we would even consider a sanction less serious than removal if Judge Marshall were sitting in Supreme Court when she engaged in these undisputed infractions and displayed the unvarnished bias that her statements reveal. *See, Matter of Blackburne*, 7 NY3d 213 (2006). It is true, however, that some of our cases have resulted in discipline less serious than removal for similar infractions.<sup>[2]</sup> But none of these cases combine the disregard for fundamental due process rights with the raw display of self-justifying prejudice that animates these violations. Even if some of our other sanctions in similar cases seem lenient by comparison, we need to consider each case on its own merits, especially with respect to our obligation to predict future compliance. The fact that Judge Marshall is not a lawyer does not excuse her and certainly does nothing for those whose rights she tramples. Although she is not a Supreme Court Justice, the public deserves no less protection from her and we should certainly not tolerate standards that excuse her abuse of power.

Because Judge Marshall's undisputed misconduct is far beyond tolerable levels of judicial lawlessness and because I believe that she has not learned that her role as a judge requires her to set aside her prejudices, I concur in the decision to remove her.

Dated: February 7, 2007

## OPINION BY MR. JACOB, IN WHICH MR. COFFEY JOINS, DISSENTING AS TO CHARGE II AND AS TO SANCTION

While I concur that respondent should be disciplined for her *ex parte* communications as established in Charge I, I respectfully dissent from the finding of misconduct as to Charge II and vote to dismiss the charge. In my view, there is no basis to overrule the referee's conclusion that Commission counsel failed to prove by a preponderance of the evidence that respondent "lied under oath and then altered court records to conceal the truth" (Referee's report, p. 6).

Charge II alleges that respondent engaged in misconduct by testifying falsely during the investigation that she had adjourned the *Covney*, *Marshall*, *Gosselin* and *Beckwith* cases and by altering her court calendar to obliterate the adjourned dates. As the majority opinion makes clear, false testimony by a judge is extremely serious, and respondent's removal from office hinges on whether she lied under oath about her conduct. Respondent denied that she testified falsely and insists that she did not adjourn the cases to a "date certain" and did not alter her calendar for the purpose of concealing the adjournments. The referee found that the charge was unproved and that respondent's explanation for the alteration was "plausible" and was not "contradicted by the evidence" (Referee's report, pp. 6-7).

As the trier of facts designated by the Commission, the referee was empowered to evaluate the quality and weight of the evidence presented and, especially, to weigh the credibility of the witnesses. In doing so, he considered not only respondent's testimony, but the testimony of all the witnesses as it bears upon the charges. The credibility findings of a trier of fact are normally accorded considerable weight and should not be disturbed if they are substantiated by the record.<sup>[3]</sup> Certainly, the referee was in the best position to make crucial findings as to respondent's credibility. There is no indication that he misapprehended the facts or overlooked important evidence. Accordingly, there is simply no basis for the Commission to overturn such findings, especially in a matter as serious as this where, as Commission counsel has conceded, the remaining misconduct does not warrant the sanction of removal.

I recognize that the Commission may accept or reject a referee's "proposed" findings of fact and conclusions of law (*see* 22 NYCRR §§7000.6[f][iii], 7000.6[l]). However, it would be highly unusual for the Commission to substitute its own judgment for that of its referee on the key issue of a judge's credibility. In nearly every case which has turned on such credibility determinations, the Commission has accepted the referee's findings, and the Court of Appeals has repeatedly cited such findings in reviewing Commission determinations (*see, e.g., Matter of Going*, 97 NY2d 121, 124 [2001]; *Matter of Collazo*, 91 NY2d 251, 253 [1998]; *Matter of Mogil*, 88 NY2d 749, 753 [1996]; *Matter of Gelfand*, 70 NY2d 211, 214-15 [1987]).

I am constrained to disagree with the majority's observation that the referee's views on this critical issue are unclear. In three pages of detailed analysis (Referee's report, pp. 4-7), the referee's views are set forth unambiguously, and he concludes, in unequivocal language: "I do not believe that it has been established by a preponderance of the evidence that Judge Marshall testified falsely" (Referee's report, p. 6). Those views are later incorporated and restated in his enumerated conclusion as to Charge II, a single sentence declaring unequivocally that the charge was not proved by a preponderance of the evidence (Referee's report, p. 19).<sup>[4]</sup> These findings as

to respondent's credibility go to the heart of Charge II. From any reading of the report in its entirety, there is no doubt whatever that the referee concluded that the charge was unproved.

In my view, Commission counsel places undue reliance on a single finding by the referee that the judge gave false testimony when she testified that she had not adjourned the cases (Referee's report, p. 18, Finding 75). That aberrational finding is completely inconsistent not only with the entire thrust of the referee's detailed analysis but with (i) his explicit statement in his analysis that the allegation of false testimony concerning the adjourned dates was not proved (p. 6)<sup>151</sup> and (ii) his specific, enumerated conclusion of law as to Charge II (p. 19). Since neither side chose to clarify the apparent inconsistency, choosing instead to emphasize the findings in its favor, the question cannot be resolved with certainty, but I believe the only reasonable conclusion from a fair reading of the entire record is that the finding is an aberration. It appears likely that the inclusion of Finding 75 may have been an editing error, since the referee adopted verbatim proposed findings of fact 1 through 79 contained in Commission counsel's post-hearing brief, omitting only the last proposed finding and changing the proposed conclusions. Most significantly, the referee *did not adopt* proposed finding of fact 80, requested by Commission counsel, that respondent obliterated the entry in her calendar for the purpose of concealing her adjournment and conforming her records to her investigative testimony.<sup>161</sup> Without that proposed finding, which the referee rejected, Charge II is eviscerated.

On the key issues regarding the alleged adjournments and alteration of the court calendar, the referee provided a penetrating analysis of respondent's testimony. He found that respondent's account of her actions was "plausible" and "not 'contradicted by the evidence'" (Referee's report, p. 6), and I see no reason to overrule that conclusion. As to the purported adjournments, I note, in particular, that neither Ms. Monty nor Mr. Staley produced any contemporaneous notes regarding their court appearance on December 29<sup>th</sup>. The only written records concerning that appearance – respondent's entries on her calendar – are inconclusive, as the referee noted. Essentially, the evidence consists of conflicting recollections by the witnesses as to exactly what respondent had said at a proceeding that occurred more than two years earlier. From this purported battle of recollections, the record appears to support respondent. Significantly, respondent testified that she told Mr. Staley to re-inspect the properties and get back to her in a couple of weeks (Tr. 251, 257-58); Mr. Staley does not recall whether that statement was made (Tr. 134); and Ms. Monty was never asked about it. Accordingly, on this key issue Judge Marshall's testimony stands uncontroverted, which leaves no basis for concluding that her testimony was false.

Further, I am constrained to reject the suggestion that respondent's testimony regarding the adjournments has been inconsistent. Both in her investigative testimony and at the hearing, respondent consistently denied adjourning the cases to January 26<sup>th</sup> or any other date (Comm. Ex. 23, pp. 37, 44, 48, 62-63; Tr. 252, 302, 307-08). At the hearing, Commission counsel conceded as much (Tr. 306). Although respondent stated at the hearing that her calendar entry "1/26" referred to a "tentative" adjournment (Tr. 307), I do not find that statement to be inconsistent with her other testimony; nor does it establish that her testimony was false. Lying under oath is a very serious charge which should not be based on testimony that can be read as being literally true.

In my view, the altered entry in respondent's calendar – which the majority regards as the linchpin of respondent's misconduct – actually demonstrates most graphically the weakness of Commission counsel's argument. It is readily apparent, even on a photocopy, that the entry was altered by the use of white-out. This eviscerates Commission counsel's theory that respondent intentionally used white-out, rather than her usual scribbled cross-outs, to obliterate the adjourned dates on her calendar because she was attempting to conceal that the entry had been altered, believing that she would only have to provide a photocopy of the page to the Commission. Moreover, although Commission counsel characterizes the use of white-out as an "obliteration," it is nothing of the sort. The writing beneath the white-out is visible, literally, to the naked eye. It can scarcely be doubted that – as respondent noted at the oral argument (pp. 34, 39) – had she actually intended to "obliterate" and conceal the original entry, it could have been done far more effectively. Commission counsel's argument – that respondent was calculating enough to use white-out for the alteration, but foolish enough to do so in a sloppy manner – is most unconvincing. Counsel's explanation citing "a record of ham-handed attempts" by judges to cover up misconduct (Oral argument, p. 55) does not address the underlying weakness of his entire theory, which the referee rejected.

Essentially, this case consists of several brief, unsolicited *ex parte* communications by respondent: three defendants telephoned her shortly before their scheduled appearance and blurted out that the violations had been remedied, and there was an *ex parte* discussion with a town official. It is undisputed that respondent did not initiate these discussions and that the communications were very brief. It is also undisputed that respondent was told that the violations had been corrected, and that Mr. Staley never got back to respondent, after December 29<sup>th</sup>, to advise her to the contrary.

Simply stated, Commission counsel presented an elaborate theory of what might have happened subsequently, in the course of the Commission's investigation, but failed to prove those allegations at a hearing before a referee. A judge should not be removed based on theories and conjecture, especially when the Commission's own referee has concluded that the most serious allegations were unproved. I cannot substitute my judgment for that of the Commission referee where I am constrained to agree that respondent's testimony concerning the purported adjournments was plausible, nor can I plausibly make the inferences that the majority makes regarding the "obliteration" on her calendar.

At the oral argument, respondent expressed contrition for her *ex parte* contacts and pledged against recurrences of such conduct (Oral argument, pp. 34, 43). Contrary to the majority's conclusion that respondent's testimony was strained and evasive, I found respondent to be responsive, candid, contrite and, most important perhaps, emphatic in her denials as to any false testimony. While Mr. Felder appears to criticize respondent for distinguishing between *ex parte* requests for adjournments from lawyers and requests from litigants, such conduct goes beyond the charges in this proceeding, and, in any event, staff has conceded that respondent's *ex parte* conduct does not warrant removal. I believe we are dealing here with a systemic problem, as evidenced by Ms. Monty's *ex parte* letter to respondent following the dismissals, and it would be inequitable to visit the consequences of this system solely upon respondent, as appears to be suggested by Mr. Felder.

Under our rules, Commission counsel bears the burden of proof by a preponderance of the evidence (22 NYCRR §7000.6[i][1]). Giving due deference to the referee's findings, I find that that burden has not been met in this case. Accordingly, I vote to dismiss Charge II. Since Commission counsel concedes that Charge I, standing alone, would not warrant the sanction of removal, I respectfully dissent from the determined sanction and vote to censure respondent.

Dated: February 7, 2007

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<sup>[1]</sup> Judge Konviser was appointed to the Commission on November 6, 2006. The vote in this matter was taken on October 30, 2006.

<sup>[2]</sup> See, e.g., *Matter of Kressly*, 2005 Annual Report 173 (judge held a trial and dismissed the charge in a code violation case without notice to the prosecution) (admonition); *Matter of Cook*, 2006 Annual Report 119 (judge reduced or dismissed charges in over 40 cases without notice to the prosecutor, some of which were based on *ex parte* communications and one of which was based on a request for special consideration) (censure); *Matter of Gori*, 2002 Annual Report 101 (judge solicited *ex parte* information concerning the merits of a small claims case, held a hearing in the defendant's absence after telling him he did not have to appear, and dismissed the claim prior to the deadline for submission of additional information) (admonition); *Matter of Hooper*, 1999 Annual Report 105 (judge reduced charges in two traffic cases, one pending before another judge, based on *ex parte* requests of defendants, without notice to the prosecution) (admonition); *Matter of More*, 1996 Annual Report 99 (judge dismissed charges in three traffic cases without notice to the prosecution and disposed of three other cases after initiating *ex parte* discussions with, respectively, a prosecutor, a social worker and a witness) (admonition); *Matter of LaMountain*, 1989 Annual Report 99 (judge ruled in favor of the plaintiff after an *ex parte* meeting with the plaintiff, before the case was commenced, in which he reviewed the claim and helped the party marshal his proof; after the case, he told the defendant he could not appeal until the judgment was paid, wrote a letter referring to extra-judicial complaints against the defendant, and admitted his hostility in a conversation with the defendant's secretary) (admonition); *Matter of Wilkins*, 1986 Annual Report 173 (judge dismissed a civil claim after a "preliminary hearing," in the absence of the plaintiff's attorney and after advising the defendant's attorney *ex parte* that he would entertain a motion to dismiss) (censure); *Matter of Loper*, 1985 Annual Report 172 (judge refused to hear a plaintiff's claim after initiating and engaging in an *ex parte* discussion with the prospective defendant) (censure); *Matter of Racicot*, 1982 Annual Report 99 (judge, *inter alia*, engaged in numerous *ex parte* discussions concerning disputed evidentiary matters with the neighbors and co-workers of a defendant prior to the defendant's guilty plea) (censure). See also *Matter of VonderHeide*, 72 NY2d 658 (1988) (judge removed for routinely initiating *ex parte* discussions to solicit information concerning pending cases, abuse of authority and intemperate behavior).

<sup>[3]</sup> See, e.g., *Poster v Poster*, 4 AD3d 145 (1<sup>st</sup> Dept 2004) ("It is the function of a referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility. Generally, courts will not disturb the findings of a referee so long as the determination is substantiated by the record. The recommendations of a special referee are

entitled to great weight because, as the trier of fact, he has an opportunity to see and hear the witnesses and to observe their demeanor... To the extent that the referee clearly defined the issues, resolved matters of credibility and made findings that were substantially supported by the record, the court properly credited those findings; to the extent that the referee's findings were not substantiated by the record, they were properly rejected"); *Slater v Links at North Hills*, 262 AD2d 299 (2d Dept 1999) ("The determination of a Referee appointed to hear and report is entitled to great weight, particularly where conflicting testimony and matters of credibility are at issue, since the Referee, as the trier of fact, had the opportunity to see and hear the witnesses and to observe them on the stand. The findings of such a Referee will not be disturbed if supported by the evidence in the record" [citations omitted]).

<sup>[4]</sup> "The Commission did not prove by a preponderance of the evidence that respondent failed to avoid impropriety and the appearance of impropriety in that she failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of the Rules; nor were any other violations based on the allegations in Charge II proved" (Referee's report, p. 19).

<sup>[5]</sup> The referee states: "The Commission argues that Judge Marshall testified falsely about the adjourned dates at an earlier Commission hearing. I do not believe that it has been established by a preponderance of the evidence that Judge Marshall testified falsely" (Referee's report, p. 6).

<sup>[6]</sup> See "Post-Hearing Memorandum by Counsel to the Commission," p. A-17.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MARION T. McNULTY**, a Justice of the Supreme Court, Suffolk County.

**THE COMMISSION:**

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

**APPEARANCES:**

Robert H. Tembeckjian (Jean Joyce, Of Counsel) for the Commission  
Jones Garneau, LLP (by Deborah A. Scalise) for the Respondent

The respondent, Marion T. McNulty, a Justice of the Supreme Court, Suffolk County, was served with a Formal Written Complaint dated December 5, 2006, containing one charge.

On February 27, 2007, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On March 8, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent was admitted to the practice of law in New York in 1976. In 1987, she was elected a Judge of the Family Court to a ten-year term commencing January 1988. In 1996, she was appointed an Acting Justice of the Supreme Court. In 1997, respondent was reelected as a Judge of the Family Court to a second ten-year term, commencing January 1998. In 2004, she was appointed Supervising Judge of the Matrimonial Parts in Suffolk County. In 2005, respondent was elected as a Justice of the Supreme Court, for a 14-year term commencing January 2006.

2. In or about 1987, respondent joined the private organization Decision Women in Commerce and Professions ("DWCP").

3. DWCP meets monthly for networking and fund-raising purposes. The organization raises and donates funds primarily to local not-for-profit organizations benefiting women and families. Organizations receiving donations from DWCP must submit

documentation to DWCP's Donations Committee, of which respondent has never been a member. DWCP's administrative costs are funded from members' dues and dinner costs.

4. In or about 2003, 2005 and 2006, respondent participated in fund-raising activities of DWCP.

5. In or about 2003, respondent created a flyer for a DWCP fund-raiser and personally handed out copies of the flyer to court employees and attorneys who had expressed an interest in attending DWCP events.

6. In early 2005, respondent prepared and mailed a flyer to acquaintances, providing information about an April 2005 DWCP event, referring to her "many friends" who had attended past fund-raisers and stating in part that "[a]s always, there will be the stupendous basket auction of themed baskets, table prizes, huge raffle, good friends, great food and Judge McNulty will have a drawing of her own for a ticket from the checks forwarded to her by April 11<sup>th</sup>, a mere week before the party." A copy of the flyer is attached as Exhibit A to the Agreed Statement of Facts.

7. In early 2006, respondent prepared a flyer to accompany a DWCP invitation to an April 2006 fund-raiser, copies of which are attached as Exhibits B and C to the Agreed Statement of Facts. Respondent prepared the flyer, printed out 30 or more copies of it, placed copies of the flyer into envelopes along with copies of the DWCP invitation, and addressed, stamped and mailed the envelopes at her own expense to between 24 and 27 friends and attorneys. With respect to the April 2006 fund-raiser:

A. Respondent sent flyers to some attorneys who had previously appeared before her in court, and discussed the fund-raiser with some attorneys in the courthouse hallway;

B. Respondent distributed flyers to interested court personnel and posted a large, glossy version of DWCP's invitation on the door to her chambers in the private hallway of the courthouse. Respondent's secretary posted one of respondent's flyers in the Family Court employees' entranceway; and

C. Respondent's flyer stated that "Judge McNulty will have a drawing of her own for a free ticket from the checks forwarded to her by April 17<sup>th</sup>." The flyer indicated that interested persons should give respondent a check for the fund-raiser before April 17, and that respondent would randomly pick one check and pay for that person's ticket, returning the winner's check to him or her. Some individuals personally handed respondent checks, and some mailed them to respondent's house. Respondent's secretary compiled a list of names, given to her by respondent, of individuals who had given respondent checks for the fund-raiser.

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) and 100.4(C)(3)(b)(i) and (iv) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

While judges may engage in civic and charitable activities, the prestige of judicial office may not be used in fund-raising. A judge may not “personally participate in the solicitation of funds or other fund-raising activities” or “use or permit the use of the prestige of judicial office for fund-raising” (Rules, §100.4[C][3][b][i] and [iv] ). Over a four-year period, respondent violated these well-established ethical rules by personally participating in fund-raising activities on behalf of a civic organization.

Respondent’s activities included preparing flyers to fund-raising events, handing out copies of the flyer to court employees and attorneys, encouraging attendance at fund-raisers by referring in flyers to her “many friends” who had attended in the past, and conducting drawings from among the checks forwarded to her. The prize for respondent’s drawing was a free ticket, which respondent had paid for, to the fund-raising event.

Compounding respondent’s misconduct in this regard is that her activities included substantial activity in the courthouse and direct solicitations of attorneys who had appeared before her. She spoke to attorneys and court employees, collected checks in the courthouse, and posted flyers in the courthouse. Her secretary compiled a list of names for respondent of individuals who had given checks to respondent for the 2006 fund-raiser. Respondent should have recognized that her highly visible participation in the fund-raising activities as well as her direct approaches to court employees and attorneys who appeared before her could have a considerable coercive effect.

Although there is nothing in the record before us that discloses whether respondent knew that such conduct is improper, we have to assume that all judges know that participating in fund-raising is strictly prohibited. The rules are clear; the Advisory Committee on Judicial Ethics has warned judges for decades not to engage in fund-raising activities; and the Commission has addressed the subject in its annual reports. If respondent had any doubt whether she could engage in such activities, she could have requested a confidential opinion from the Advisory Committee.

In *Matter of Kaplan*, 1984 Annual Report 112 (Comm. on Judicial Conduct), the Commission publicly admonished a judge for assisting his wife’s fund-raising efforts. The judge’s wife had asked attorneys to contribute by purchasing journal ads and the judge in his court chambers gave the attorneys the advertising contracts for their signatures. The Commission stated at that time:

A judge may not “solicit funds for any educational, religious, charitable, fraternal or civic organization or use or permit the use of the prestige of the office for that purpose....”

The Commission said further:

Although the funds were solicited by his wife, respondent, by distributing and collecting the advertising contracts, used the prestige of his office to assist her fund-raising activities. That he did so in his chambers to lawyers exacerbates his violation of the rule. Lawyers with matters pending before respondent or who

regularly appeared in his court could not help feeling pressured to cooperate in his wife's efforts in order to maintain good relations with respondent.

Respondent's fund-raising and direct solicitations in the courthouse were considerably more open and extensive than Judge Kaplan's efforts to assist his wife in fund-raising. With two decades of experience as a judge, respondent should have known that her conduct in 2003, 2005 and 2006 violated clear rules against fund-raising and soliciting contributions.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Ms. DiPirro was not present.

Dated: March 16, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **DUANE R. MERRILL**, a Justice of the Hamden Town Court, Delaware County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn J. Blake, Of Counsel) for the Commission  
Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC (by Kevin M. Young) for the Respondent

The respondent, Duane R. Merrill, a Justice of the Hamden Town Court, Delaware County, was served with a Formal Written Complaint dated January 12, 2006, containing four charges. The charges alleged that in two matters respondent engaged in prohibited *ex parte* communications and made biased statements about the parties, notwithstanding that he had previously been admonished for similar conduct, and that in seven cases when his personal attorney appeared before him respondent failed either to disqualify himself or to disclose the relationship. Respondent filed a Verified Answer dated February 24, 2006.

On May 25, 2006, respondent filed a motion for summary determination. Commission counsel opposed the motion in papers dated June 12, 2006. On January 10, 2007, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts and providing for written and oral argument on the issue of sanctions. The Commission accepted the Agreed Statement on January 29, 2007, determined that the motion for summary determination was moot, and scheduled briefs and oral argument on the issue of sanctions.

Each side submitted memoranda as to sanction. Commission counsel recommended removal, and respondent's counsel recommended a sanction no greater than censure. On March 8, 2007, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been a Justice of the Hamden Town Court, Delaware County, since 1989. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On or about September 1, 2004, Wayne Sparling and William Sprague engaged in an argument at Mr. Sprague's premises regarding \$2,919 Mr. Sprague had charged Mr. Sparling for auto-body repair work he had done on two cars owned by Mr. Sparling. Mr. Sprague refused to release one of the vehicles to Mr. Sparling until the outstanding balance was paid in full. During the dispute, Mr. Sprague telephoned Frederick Neroni, his attorney, and Mr. Sparling allegedly shoved Mr. Sprague and ripped the telephone from the wall. Sheriff's Deputy Jon Bowie was called to the scene and issued Mr. Sparling an appearance ticket charging him with Assault in the Third Degree and returnable in the Hamden Town Court. Mr. Sprague required medical attention for his injuries.

3. Respondent and Mr. Sparling own farms that are adjacent to each other. The sheriff's office informed Mr. Sparling to contact respondent in relation to getting access to his vehicle. On or about September 1, 2004, shortly after the foregoing incident, Mr. Sparling visited respondent at his hayfield and told him about the incident, stating that a dispute over the payment he owed to Mr. Sprague for car repairs ended in a fight, and mentioning that Mr. Sprague had been on the phone with Mr. Neroni at the time of the altercation. Respondent told Mr. Sparling, who was very agitated and upset, that he did not want to discuss the matter. After Mr. Sparling persisted, respondent replied that he would speak with Mr. Neroni.

4. That afternoon, respondent telephoned Mr. Neroni and discussed an interim resolution in which Mr. Sprague would accept \$800 in payment and release the car to Mr. Sparling, and Mr. Sprague could pursue the remainder of his claim in small claims court. Respondent recognizes in retrospect that he should not have contacted Mr. Neroni, and that by doing so he created the impression that he was using his judicial position on behalf of Mr. Sparling in order to bring about a prompt resolution of the matter.

5. Respondent next telephoned the sheriff's office so that they would be aware of the proposed agreement, and so that an officer would convey the information to the parties. He told Deputy Bowie, who had responded to the scene of the altercation earlier that day, that he had spoken to both Mr. Sparling and Mr. Neroni (Mr. Sprague's attorney), that he had recommended that Mr. Sprague accept \$800 and release Mr. Sparling's car, and that he suggested Mr. Sprague could go to small claims court to attempt to recover the remainder of the disputed amount. Respondent expressed concern that the two parties would have a second altercation when Mr. Sparling paid the \$800 and picked up his car.

6. During his conversation with Deputy Bowie, respondent *inter alia* called both Sprague and Sparling "hot heads" and said they "don't have brains enough to pour piss out of a boot with instructions on the heel and a hole in the toe." Respondent states that his purpose in making these remarks was to ensure that Deputy Bowie was aware of the potential for a second altercation.

7. Later, on the afternoon of September 1, 2004, Mr. Sprague spoke to a sheriff's deputy, who informed him that respondent had called the sheriff's office and had recommended that Mr. Sprague should accept \$800 for the repairs and release the vehicle to Mr. Sparling, and that he could pursue his claim for damages in small claims court. Mr. Sprague agreed to release

the vehicle in exchange for \$800 because he believed that he could be arrested if he did not do so. He later commenced a civil proceeding in another court to recover the unpaid balance due for the automotive repairs, as well as for damage to his property and reimbursement of his medical bills.

8. Prior to September 1, 2004, respondent had disqualified himself from presiding over at least two other matters in which Mr. Sparling had appeared. On or about September 6, 2004, Mr. Sparling appeared before respondent for arraignment on the Assault charge, waived counsel and was released on his own recognizance by respondent. Respondent offered to disqualify himself from the matter, as he had previously in matters involving Mr. Sparling, and because he had knowledge of the civil dispute between the parties. However, both the defendant and the Assistant District Attorney declined the offer.

9. Mr. Sparling again appeared before respondent on or about October 11, 2004. Respondent dismissed the Assault charge in the interest of justice at the request of Mr. Sparling and upon the consent of the Assistant District Attorney, who indicated that he did not have a viable case due to conflicting accounts of the incident from the parties. Respondent did not set forth on the record or in an order the basis for the dismissal in the interest of justice, as required by Section 170.40 of the Criminal Procedure Law.

As to Charge II of the Formal Written Complaint:

10. On or about April 1, 2005, Ronald Panzica was arrested and charged with Assault in the Third Degree and Trespass for allegedly injuring his neighbor, Raymond Iris, during an argument over their property boundaries. The arresting officer issued an appearance ticket requiring the defendant to appear on April 11, 2005.

11. On or about April 2, 2005, Mr. Iris telephoned respondent at his residence and asked respondent to issue a protective order against his neighbor, Ronald Panzica. Respondent told Mr. Iris that he could not issue a protective order because he had not yet received any paperwork from the sheriff. Mr. Iris was very persistent, frustrated and frequently interrupted respondent in his attempt to explain the process. Respondent had no prior contact or relationship with either Mr. Iris or Mr. Panzica.

12. After his conversation with Mr. Iris, respondent telephoned the sheriff's department and spoke to Karen Parsons, a dispatcher. Respondent indicated that he had just received a telephone call from Mr. Iris about an incident the previous evening and asked when he would receive the paperwork. Ms. Parsons said that the matter was returnable April 11, 2005, and respondent asked if he could nevertheless have the paperwork by April 4, 2005.

13. On or about April 4, 2005, respondent telephoned Mr. Iris and told him to appear in court that evening regarding the order of protection. Respondent then telephoned the sheriff's department and spoke to Ms. Parsons. Respondent said that he had not yet received the paperwork for *People v. Ronald Panzica*, that Mr. Iris was scheduled to appear that evening to request an order of protection and that he needed the paperwork as soon as possible. Ms. Parsons indicated that Mr. Iris had just contacted the sheriff's office and complained about the sheriff's handling of his case, and she expressed her disdain for Mr. Iris. In response to Ms.

Parsons' comments, respondent commented that he needed the paperwork so he would "have something more to base my refusal to give him an order of protection on." Respondent now recognizes that he should not have made such a statement, which created the impression that he had predetermined he would not issue the order of protection.

14. When Mr. Iris appeared in court on April 4, 2005, respondent told him that he could not grant the order of protection because he still had not received the paperwork from the sheriff. When Mr. Iris attempted to describe the altercation, respondent told Mr. Iris that he had seen many disputes between neighbors and usually both were at fault.

15. While Mr. Iris was still in court on April 4, 2005, respondent again telephoned the sheriff's department and spoke to a deputy, who informed him that the papers were in the mail. Respondent told the deputy that he had not yet received the paperwork and that "one of the parties is here and starting to get irritated with me and everybody else."

16. When respondent completed his calendar on the evening of April 4, 2005, he again telephoned the sheriff's department and spoke to another dispatcher, Joanne Mills. Respondent told her he had been frustrated when he telephoned earlier that night, and he said he wanted assurance from the sheriff's department that a deputy had told the defendant "that his ass will be in jail the next time" he went near Mr. Iris, even without an order of protection.

17. On or about April 5, 2005, respondent telephoned Mr. Iris and informed him that he had issued a temporary protective order. Several days after respondent issued the order of protection, respondent received a telephone call from District Attorney Richard Northrup, informing him that the temporary order of protection was defective because the form was not properly completed due to an incorrect name inserted into the order. DA Northrup informed respondent that the temporary order of protection would not be enforced by his office.

18. On or about April 11, 2005, Mr. Panzica was scheduled to be arraigned at 6:30 P.M. Mr. Panzica and his attorney, Terence P. O'Leary, arrived at approximately 6:15 P.M., prior to the arrival of the Assistant District Attorney.

19. Respondent conducted the arraignment at approximately 6:15 P.M., prior to the arrival of the Assistant District Attorney. At the arraignment, respondent did not offer to disqualify himself from the matter and failed to disclose that Mr. O'Leary had previously represented respondent.

20. Prior to the arrival of the Assistant District Attorney, respondent informed Mr. Iris that he had rescinded the temporary order of protection because it was defective and that he would not issue another order. Instead, respondent "orally" ordered Mr. Iris and Mr. Panzica to stay away from each other. Respondent acknowledges that he should have waited until Assistant District Attorney Francis Wood appeared before conducting the arraignment, that he should have disclosed on the record that Mr. O'Leary had previously represented him and that he should have inquired as to whether Mr. Wood objected to respondent's presiding over the matter.

21. When ADA Wood arrived at 6:30 P.M., Mr. Panzica was leaving the courthouse. Respondent notified ADA Wood about the arraignment, and ADA Wood advised that he was

recusing himself from the matter because he realized, in passing Mr. Panzica, that they both attended the same church.

22. At the next court appearance, on or about May 16, 2005, respondent requested that the *Panzica* case be transferred to another Town Court because he had “too much contact” with Mr. Iris and because the defendant’s attorney, Mr. O’Leary, had represented respondent. By order dated May 27, 2005, Delaware County Court Judge Carl F. Becker transferred the *Panzica* case to another Town Court for all further proceedings.

As to Charge III of the Formal Written Complaint:

23. Respondent engaged in the conduct set forth in Charges I and II herein, notwithstanding having been admonished by the Commission in a determination dated March 17, 1998, for *inter alia* engaging in improper *ex parte* communications with both parties in a landlord/tenant dispute, acting as an advocate for one of the parties in that dispute, using the prestige of his judicial office to advance that party’s position, telling the tenants they would be evicted if legal proceedings were commenced, and thereafter presiding over the matter when eviction proceedings were commenced. Respondent was represented in that proceeding by Terence P. O’Leary.

As to Charge IV of the Formal Written Complaint:

24. From in or about October 1997 through in or about January 1998, attorney Terence P. O’Leary represented respondent in proceedings before the Commission, which resulted in a determination of admonition dated March 17, 1998.

25. Respondent retained Terence P. O’Leary to represent him in this proceeding before the Commission. Mr. O’Leary represented respondent from on or about May 25, 2005, until Mr. O’Leary withdrew as counsel in January 2006.

26. From in or about June 1997 through in or about May 2005, attorney Terence P. O’Leary represented individuals before respondent in the six cases set forth in Exhibit E to the Agreed Statement of Facts and in *People v. Panzica*, as set forth in Charge II. Respondent either failed to disqualify himself and/or failed to disclose to the parties that Mr. O’Leary was representing him or had previously represented him.

27. Respondent acknowledges and agrees that he will disqualify himself from any case in which Mr. O’Leary appears for a period of two years following Mr. O’Leary’s representation of respondent, and that upon the expiration of the two-year period he will notify all parties in any matter in which Mr. O’Leary appears of the relationship and provide an opportunity to request respondent’s recusal.

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)(1), 100.3(B)(6)<sup>(1)</sup>, 100.3(E)(1) and 100.3(F) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and

Section 44, subdivision 1, of the Judiciary Law. Charges I through IV of the Formal Written Complaint are sustained, and respondent's misconduct is established.

In two impending matters involving individuals who were scheduled to appear in his court, respondent engaged in prohibited *ex parte* communications and made statements that compromised his impartiality, notwithstanding that he had previously been disciplined for similar misconduct.

In the *Sparling* matter, respondent's efforts to resolve a dispute involving his neighbor overstepped the boundaries of his judicial authority. After his neighbor, Mr. Sparling, had been issued an appearance ticket on a charge of Assault in connection with a dispute over payment for car repairs, respondent made a series of *ex parte* calls to the alleged victim's attorney and to the sheriff's office, proposing an interim settlement that would enable his neighbor to retrieve his car. In speaking to the deputy, ostensibly to warn him of the possibility of a second altercation between the parties, respondent made disparaging comments about the individuals involved. Such conduct compromised respondent's impartiality and conveyed the appearance that he had prejudged the matter and that he was acting as an advocate for his neighbor (Rules, §§100.1 and 100.2[A]). It is the proper role of a judge to preside in court proceedings, not to mediate disputes out of court. *Matter of Glover*, 2006 Annual Report 165 (Comm. on Judicial Conduct).

We note that respondent had previously disqualified himself in matters in which his neighbor Mr. Sparling had appeared, that he properly offered to disqualify himself when the Sparling-Sprague case came before him, and that he presided with the consent of both sides. Nevertheless, even if he anticipated that his recusal would likely be required because of his relationship with Mr. Sparling, respondent's conduct was improper. With two decades of experience as a judge, respondent should have recognized that out-of-court misconduct is not cured by an offer to recuse and that he should avoid any involvement in impending matters that might compromise his impartiality as a judge. Moreover, respondent's deprecating comments cannot be excused by any suggestion that he was simply attempting to warn the deputy that the individuals might be involved in a future altercation. If respondent believed that such a warning was necessary, the warning could have been conveyed by more appropriate language.

Several months later, in the *Panzica* matter, respondent again conveyed the appearance of bias in a series of *ex parte* communications. After the complaining witness in a pending Assault case contacted respondent to request an order of protection, respondent made a series of calls to the sheriff's office in order to obtain the necessary paperwork as soon as possible. While these calls may have had a proper, even commendable, purpose, respondent's comments during these conversations were inappropriate and conveyed the appearance that he had prejudged the merits of the case. Respondent also conveyed the appearance of prejudgment by telling the alleged victim, who had requested the protective order, that in disputes between neighbors "usually both were at fault." Notably, respondent, who had no prior relationship with either party, eventually issued the requested order, notwithstanding his earlier comments suggesting that he would not do so. Thus, despite conveying the appearance of prejudgment, the record suggests that respondent made a decision that was based on the merits.

When the parties appeared before him at the arraignment a few days later, the defendant was represented by an attorney, Terence O’Leary, who had represented respondent several years earlier. Compounding the appearance of partiality, respondent refused to re-issue the order of protection and he arraigned and released the defendant fifteen minutes before the scheduled arrival of the assistant district attorney, thereby depriving the prosecution of the right to be heard. At the next court appearance in the case, respondent properly disqualified himself because of Mr. O’Leary’s involvement and because of his contacts with the alleged victim. Notwithstanding his disqualification, respondent’s handling of the case showed insensitivity to the appearance of bias conveyed by his conduct.

A judge’s disqualification is required in any matter where the judge’s impartiality “might reasonably be questioned” (Rules, §100.3[E][1]). Under guidelines provided in numerous opinions of the Advisory Committee on Judicial Ethics, disqualification in matters involving the judge’s personal attorney is required if the representation occurred within the past two years; thereafter, at the very least, disclosure is required for a significant period (Adv. Op. 92-54, 93-09, 97-135, 99-67). *See also, Matter of Ross*, 1990 Annual Report 153 (Comm. on Judicial Conduct); *Matter of Phillips*, 1990 Annual Report 145 (Comm. on Judicial Conduct). Respondent violated these standards by failing to disqualify himself from a case handled by Mr. O’Leary, who was representing respondent at the time, and thereafter by failing to disclose the relationship when the attorney appeared before him in subsequent matters.

In 1997, while Mr. O’Leary was representing respondent in a proceeding before the Commission, respondent dismissed a charge against a defendant represented by Mr. O’Leary. Significantly, however, the disposition had been negotiated before Mr. O’Leary began to represent respondent. Thereafter, starting in 2002, Mr. O’Leary appeared before respondent in six matters, including *Panzica*, before briefly representing him again in this proceeding. In those cases – four criminal cases and two civil cases – respondent failed to disclose his prior relationship with Mr. O’Leary. Although the attorney-client relationship had ended more than four years earlier, disclosure was required under the ethical guidelines. It is no excuse that in a small community, the district attorney and others may have been aware of the relationship. There can be no substitute for making full disclosure on the record in order to ensure that the parties are fully aware of the pertinent facts and have an opportunity to consider whether to seek the judge’s recusal.

In considering an appropriate sanction, we note that respondent was admonished in 1998 for engaging in *ex parte* conduct in connection with a landlord-tenant dispute. *Matter of Merrill*, 1999 Annual Report 127 (Comm. on Judicial Conduct). Failure to heed a prior disciplinary sanction is a significant aggravating factor that militates in favor of a strict sanction. *Matter of Rater*, 69 NY2d 208, 209 (1987). We note, however, that whereas in the earlier matter respondent did not offer to disqualify himself when the case came before him, in *Sparling* he offered to recuse at the arraignment and presided with the consent of the parties, and in *Panzica* he eventually disqualified himself because of Mr. O’Leary’s involvement and because of his contacts with the alleged victim. These actions suggest that respondent has learned from his earlier experience to be more sensitive about the need for recusal when his impartiality can reasonably be questioned. We note further that respondent has been cooperative and has acknowledged his misconduct, that there was no charge of favoritism in any of the cases Mr.

O'Leary handled before him, and that respondent has agreed to make appropriate disclosure in the future if Mr. O'Leary appears in his court. In view of these factors, we have concluded that censure is appropriate.

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

Mr. Felder, Judge Klonick, Mr. Emery, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Harding dissent as to the sanction and vote that respondent be admonished.

Ms. DiPirro was not present.

Dated: May 14, 2007

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<sup>[1]</sup> The Formal Written Complaint is deemed amended to include this provision, which was cited in the Agreed Statement of Facts.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **CHARLES P. MYLES, JR.**, a Justice of the Esperance Town Court, Schoharie County.

#### THE COMMISSION

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

#### APPEARANCES

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission  
Gaspar M. Castillo, Jr., for the Respondent

The respondent, Charles P. Myles, Jr., a Justice of the Esperance Town Court, Schoharie County, was served with a Formal Written Complaint dated July 19, 2007, containing one charge. The Formal Written Complaint alleged that respondent tampered with the utility company meter measuring electricity to his home, resulting in his conviction of a felony and three misdemeanors. Respondent filed a verified answer dated August 1, 2007, admitting that he was convicted but denying the underlying criminal conduct and asserting that his conviction is not final because it is on appeal.

By motion dated August 31, 2007, the administrator of the Commission moved for summary determination, pursuant to Section 7000.6(c) of the Commission's operating procedures and rules (22 NYCRR §7000.6[c]), based on respondent's conviction of the criminal charges. Respondent did not file a response to the motion. By Decision and Order dated September 21, 2007, the Commission granted the motion and determined that the charge was sustained and that respondent's misconduct was established.

The Commission scheduled oral argument on the issue of sanctions for November 1, 2007. Oral argument was not requested and thereby was waived. Counsel to the Commission filed a memorandum recommending that respondent be removed from office. Respondent filed no papers on the issue of sanctions.

On November 1, 2007, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent took office as a Justice of the Esperance Town Court in January 2004. He is not an attorney.

2. On or about November 23, 2005, respondent tampered with the utility meter measuring the amount of electricity respondent was using at his home.

3. On or about November 16, 2006, as a result of his tampering with the utility company meter at his home, respondent was convicted by a jury of Falsifying Business Records, 1<sup>st</sup> Degree, a class E felony, and Petit Larceny, Theft of Services and Criminal Tampering, 2<sup>nd</sup> Degree, which are class A misdemeanors. On or about January 31, 2007, respondent was sentenced by the Schoharie County Court to a term of probation for five years.

4. Respondent resigned as Esperance Town Justice effective November 18, 2006. The Office of Court Administration was informed of respondent's resignation on July 6, 2007.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2(A) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's conduct, as established in the criminal matter resulting in his conviction of a felony and three class A misdemeanors, demonstrates his lack of fitness for judicial office. Such behavior is unacceptable in who holds a position of public trust and irreparably damages respondent's ability to serve as a judge. *See Matter of Bailey*, 67 NY2d 61 (1986) (judge convicted of a misdemeanor in connection with a scheme to illegally hunt deer); *Matter of Westcott*, 2001 Annual Report 123 (Comm on Judicial Conduct) (judge convicted of Endangering the Welfare of a Mentally Retarded Person); *see also*, Town Law §31(5) and Village Law §3-301(5) (providing that a person convicted of a felony is "permanently ineligible" to serve as a town or village justice). Accordingly, the sanction of removal, which bars respondent from holding judicial office in the future, is appropriate notwithstanding that he has resigned.

We note that, in this proceeding, respondent failed to respond to the motion for summary determination or to file any papers on the issue of sanctions. Such conduct may be construed as "an indifference to the attendant consequences" of the proceeding. *Matter of Nixon*, 53 AD2d 178, 180 (1<sup>st</sup> Dept 1976).

This determination is rendered pursuant to Judiciary Law §47 in view of respondent's resignation from the bench.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

Dated: November 1, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **ROBERT M. RESTAINO**, a Judge of the Niagara Falls City Court, Niagara County.

**THE COMMISSION:**

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

**APPEARANCES:**

Robert H. Tembeckjian (John J. Postel, Stephanie A. Fix and Edward Lindner, Of Counsel) for the Commission  
Joel Daniels and Mark Uba for the Respondent

The respondent, Robert M. Restaino, a Judge of the Niagara Falls City Court, Niagara County, was served with a Formal Written Complaint dated June 20, 2006, containing one charge. The Formal Written Complaint alleged that while presiding in a Domestic Violence Part, respondent threatened to commit to jail and did revoke the recognizance release of 46 defendants when no one took responsibility for a ringing cell phone. Respondent filed an Answer dated August 9, 2006.

By Order dated August 29, 2006, the Commission designated Honorable Edgar C. NeMoyer as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 1, 2 and 15, 2006, in Buffalo. The referee filed a report dated March 30, 2007.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and counsel for respondent recommended censure. On September 19, 2007, 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 Niagara Falls City Court Judge since 1996. He initially served in a part-time capacity and became a full-time judge in January 2002.

2. Respondent presided in the Domestic Violence Part on a weekly basis from 1999 through March 11, 2005. The Domestic Violence Part handles cases of defendants who, after arraignment on charges involving violence against family members, have been screened to determine whether they are eligible for a court-supervised, 26-week program of counseling and education. If accepted into the program, defendants are required to refrain from using drugs or alcohol, to undergo counseling and testing, and to report to court on a weekly basis so their

progress can be monitored. As a matter of practice, defendants in the Domestic Violence Part are released each week on their own recognizance unless they violate a condition of participation, in which case they face the possibility of sanctions, including the revocation of their release and the imposition of bail. When defendants appear in the Part, they are generally required to remain in the courtroom until the completion of all the proceedings that day, even after their own cases have been concluded.

3. Shortly after 9:00 AM on March 11, 2005, respondent took the bench in the Domestic Violence Part. About 70 cases were scheduled, and approximately 70 people were in the courtroom. In addition to defendants, also present were defense attorneys and prosecutors, court administrative personnel, court security officers, and representatives from counseling programs. The courtroom was open to defendants and others entering and leaving.

4. For about 45 minutes, respondent handled in a routine manner eleven cases involving defendants who were participants in the Domestic Violence Program. In accordance with the customary procedures, respondent questioned the defendants, released them on their own recognizance and directed them to remain in court until the proceedings were concluded. At approximately 10:00 AM, a device that appeared to be a cell phone rang in the back of the courtroom. Addressing the defendants in the courtroom, respondent stated:

Now, whoever owns the instrument that is ringing, bring it to me now or everybody could take a week in jail and please don't tell me I'm the only one that heard that. Mr. Martinez, did you hear that ringing?...

Everyone is going to jail; every single person is going to jail in this courtroom unless I get that instrument now. If anybody believes I'm kidding, ask some of the folks that have been here for a while. You are all going.

5. When no one took responsibility for the ringing phone, respondent directed that everyone remain in the courtroom and then took a five-minute recess while court security attempted to locate the phone. An officer stood at the doorway to prevent anyone from leaving the courtroom. Prior to that time, there had been traffic in and out of the courtroom.

6. Notwithstanding the recess, respondent did not withdraw his threat to send all of the defendants to jail if the owner of the phone was not discovered.

7. When respondent returned to the bench, he was told that the phone had not been located. Respondent then asked Reginald Jones, the defendant who had been standing before him when the phone had sounded, if he knew whose phone it was. Mr. Jones replied, "No. I was up here." Although respondent knew that Mr. Jones did not have the phone that had been ringing, he revoked Mr. Jones' recognizance release, set bail at \$1,500 and committed him into custody.

8. Respondent proceeded to call the remaining cases on the calendar and then to recall the cases of the eleven defendants who had been released on their own recognizance earlier that

morning. Respondent questioned each defendant as to his or her knowledge of the phone. After each defendant denied having the phone or knowing whose it was, respondent revoked the defendant's recognizance release and reinstated bail; he set additional bail for two defendants who were previously released on bail. In total, he committed 46 defendants into custody. In five of the cases, he revoked the defendant's release and committed the defendant with little or no discussion.

9. Three of the defendants committed into custody were making their first appearance in the Domestic Violence Part that day. The remaining defendants had regularly appeared in the Part as required; 15 defendants had previously appeared on at least a dozen occasions as required in connection with the program; one defendant had appeared 25 times and was one or two weeks away from completing the program. Only one of the defendants committed into custody had an attorney who was present.

10. In questioning the defendants, respondent repeatedly admonished the "selfish" person who refused to take responsibility for the phone, and chastised the defendants who claimed not to know whose phone it was. At one point he said, "[T]his hurts me more than any of you imagine because someone in this courtroom has no consideration for you, no consideration for me and just doesn't care." He stated:

As I have indicated, this troubles me more than any of you people can understand. Because what I am really, really having a hard time with, that someone in this courtroom who is so self-absorbed, so concerned only for their own well-being, they kind of figure they're going to be able to establish the bail and it won't matter so screw all of the rest of you people. Some of you people may not be in the economic situation this selfish person is in and you have to start realizing amongst your own selves someone out there who is the typical reason we have this Part; they put their interests above everybody else's. They don't care what happens to anybody.

A short time later he stated:

This person, whoever he or she may be, doesn't have a whole lot of concern. Let's see how much concern they have when they are sitting in the back there with all the rest of you. Ultimately when you go back there to be booked, you got to surrender what you got on you. One way or another we're going to get our hands on something. See, the sadness in all of this is that this individual is prepared to put everybody through a reassessment of bail rather than dealing with it.

11. During the questioning, many defendants told respondent that the noise had come from the back corner and that if they knew who had the phone, they would say so. Several defendants pleaded with the phone's owner to come forward.

12. During the questioning, numerous defendants commented on the unfairness of respondent's actions in committing all the defendants into custody. When one defendant said, "This is not fair to the rest of us," respondent replied, "I know it isn't," before committing the defendant. Another defendant told respondent, "I know this ain't right," and respondent replied, "You're right, it ain't right. Ain't right at all." To another defendant, respondent commented, "That's really a shame and it isn't fair at all. Somebody completely doesn't care." One defendant said, "I don't see everybody going to jail for this, I really don't." Another defendant said, "It's a shame, everybody being penalized." One defendant told respondent, "I think the more people you send to jail, [the] less likely [the] culprit is to come forward."

13. As he was committing the defendants, respondent alternated between verbalizing sympathy and outright sarcasm. When one defendant said, "I'm sorry I had to be here today," respondent said, "I'm sorry too." After several defendants said that the noise had appeared to come from the back corner, respondent said, "Life gets dizzy in that back corner"; he commented to one defendant, "There's a whole lot of phones back there but nobody's phone was ringing." At another point he said, "[I]t seems to me I'm supposed to be dealing with grown-ups..."; then he compared the defendants' responses to a scene from "a mob movie":

The other thing which is amazing here with this group, this is better than watching a mob movie. Everybody that comes to this microphone, and I got to tell you something, you're all pretty good, when you come up to this microphone, and if you saw somebody got shot or killed, you would say, "I didn't see nothing, I heard shots." And if a body dropped right in front of you, you would say that, "I didn't see a thing."

14. In committing the defendants, respondent ignored the special circumstances cited by several defendants who asked not to be taken into custody. Three defendants told respondent that their jobs would be at risk if they were incarcerated; one said, "You know I just got a job and I love the job. I don't have \$1000. I really don't." One defendant said he was scheduled to be in school; one defendant said that he had a doctor's appointment that day and might need surgery; another said that his mother was having surgery that day. One defendant, who had previously appeared four times as required, told respondent, "My little girl is coming home at 3:00. Can I be sanctioned next week so I can get my girl?" Respondent committed each of these defendants into custody.

15. At the hearing before the referee, respondent acknowledged that, while he was committing the defendants into custody, he knew that he had no legal basis for doing so; he explained that he simply focused on attempting to locate the phone's owner and was frustrated by his inability to do so. Although a sign in the court warns that cell phones and pagers must be turned off, bringing a cell phone into the courtroom or having a cell phone ring in the court was not a violation of the Domestic Violence Program requirements.

16. Respondent questioned only defendants about the ringing phone. He did not question any of the prosecutors, defense attorneys, court personnel, program representatives or others who were present in the courtroom.

17. In addition to the 46 defendants who were committed into custody, respondent handled several other cases in a routine manner that morning after the phone had sounded. He allowed four defendants to leave, two after dismissing the charges against them and asking them about the phone, one after his attorney told respondent that the defendant had “wandered in at the wrong time,” and another because he had been outside of the courtroom.

18. Throughout all the proceedings that morning, respondent did not raise his voice; he appeared calm and in control.

19. In reinstating bail for the defendants and setting additional bail for two defendants, respondent did not consider any of the factors required by Section 510.30 of the Criminal Procedure Law to be considered before setting bail.

20. At the conclusion of the proceedings, shortly before noon, respondent left the bench and made a scheduled trip to tour a juvenile detention facility in Erie County.

21. After being committed into custody, the 46 defendants were taken by police to the booking area in the City Jail, where they were searched and their property was confiscated. They were then placed in crowded “holding” cells or jail cells. Thereafter, 17 defendants were released from custody after it was determined that the court still held bail that had previously been posted on their behalf, and 15 defendants were released after posting the bail set by respondent. The remaining 14 defendants could not post bail and were committed to the custody of the Niagara County Sheriff.

22. The 14 defendants who could not post bail were shackled; their wrists were handcuffed to a lock box attached to a waist chain; and they were transported by bus to the County Jail in Lockport, a ride that took about 30 minutes. The defendants arrived at the jail between 3:00 and 3:30 and were searched again and placed in cells.

23. While touring the juvenile detention facility, respondent received a call on his pager from his clerk, and when he returned the call, the clerk told him that the press was inquiring about his actions earlier that day. Respondent told the clerk that he would return to court and that the clerk should have the paperwork and a court reporter ready so that he could order the defendants’ release. Respondent testified at the hearing that prior to receiving the call from his clerk, he reflected on his conduct and decided to contact his clerk to arrange for the defendants’ release.

24. Respondent returned to court around 3:00 PM. About an hour later, in a proceeding held in his chambers, he ordered the release of the 14 defendants who had been sent to the County Jail.

25. The 14 defendants were released at the County Jail in Lockport between 5:00 and 5:30 PM. They were not provided with transportation back to Niagara Falls.

26. After March 11, 2005, respondent did not preside in the Domestic Violence Part.

27. In his Answer and at the hearing in this matter, respondent acknowledged that his conduct was improper and inexcusable.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(3) and 100.3(B)(6) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

In an egregious and unprecedented abuse of judicial power, respondent committed 46 defendants into police custody in a bizarre, unsuccessful effort to discover the owner of a ringing cell phone in the courtroom. In doing so, he inexplicably persisted in his conduct over some two hours, questioning the defendants individually about the phone before committing them into custody, and ignoring the pleas of numerous defendants who protested that his conduct was unfair and pleaded that he reconsider. Respondent’s conduct, which resulted in the unjustified detention of the defendants for several hours and the incarceration of 14 defendants in the County Jail, caused irreparable damage to public confidence in the fair and proper administration of justice in his court.

The salient facts are undisputed. When the cell phone rang while respondent was presiding in a Domestic Violence Part, he immediately directed the owner to come forward or else “everybody could take a week in jail...Everyone is going to jail; every single person is going to jail in this courtroom unless I get that instrument now.” It is shocking that respondent’s immediate response to what was, at worst, a breach of courtroom etiquette by an unknown individual was a threat to incarcerate all the defendants present *en masse*. Even as a threat, such a reaction was disproportionate and improper. It is even more shocking that, over the next two hours, he methodically proceeded to carry out his threat without realizing that his extreme response was far more disruptive than a ringing phone.

When no one took responsibility for the phone, respondent directed that no one be allowed to leave the courtroom while court security conducted a search and respondent himself took a brief recess. Barring anyone from leaving the courtroom while the search was conducted was, in itself, an excessive response to the ringing phone since it affected scores of people who had done nothing wrong. Despite the opportunity during the recess to reconsider his actions, respondent did not withdraw the threat. Returning to court, he began to question the defendants individually, starting with the defendant who had been standing before him when the phone rang. Although it was clear that that individual was not the owner of the phone – as respondent now concedes – respondent committed him into custody, revoking his recognizance release and setting \$1,500 bail. He then proceeded to call the remaining cases on the calendar and to recall the cases of eleven defendants who had been released earlier that morning. After questioning each defendant about the phone, he revoked his or her recognizance release and reinstated bail or set additional bail, committing a total of 46 defendants into custody. After being placed in crowded holding cells which could scarcely accommodate the large numbers of individuals who were being committed, 32 defendants were released on bail, and the remaining 14 defendants who could not post bail were transported by bus, in handcuffs and shackles, to the County Jail in Lockport, where they were held for several hours until respondent came to his senses and ordered their release later that day.

In summarily committing the defendants into custody, respondent acted without any semblance of a lawful basis, disregarding the statutory criteria for bail or contempt of court. In doing so, he violated the trust of the defendants and of the public at large, who place their confidence in the administration of justice by the courts. Respondent also did a grave injustice to the Domestic Violence Part, its principles and its worthy aims. Except for three defendants who were appearing for the first time in the Part that day, all the defendants whom respondent committed had previously been released on recognizance or bail in connection with the terms of the Domestic Violence Program, having agreed to undergo counseling and other conditions for six months and to report to court on a weekly basis so their progress could be monitored. Notably, all the defendants had previously appeared in court regularly as required, many for a dozen or more times. It was their understanding that as long as they fulfilled the requirements of the program, they would not be incarcerated. In fact, although two defendants who appeared before respondent that morning prior to the ringing phone had violated a condition of their release, respondent, who had discretion to incarcerate them for those lapses, did not do so. For all these defendants, including the majority who had not violated a single condition of their release, respondent's peremptory decision to hold them in custody because of a ringing cell phone can only have been perceived as a shocking injustice.

The record reveals that over the two hours in which respondent was ordering the defendants' detention, he had many opportunities to grasp the enormity of what he was doing. He inexplicably disregarded the comments of numerous defendants regarding the unfairness of his actions. When one defendant commented, "I know this ain't right," respondent replied, "You're right, it ain't right. Ain't right at all." When another said, "This is not fair to the rest of us," he replied, "I know it isn't," before committing the defendant. Another defendant perceptively observed, "I think the more people you send to jail, [the] less likely [the] culprit is to come forward." It is difficult to understand why these and other similar remarks did not cause respondent to reflect, reconsider and recognize the impropriety of his conduct. Instead, he continued to interrogate, chastise and commit the defendants while repeatedly blaming the "selfish" individual who failed to take responsibility for the phone; he even compared the defendants' proclamations of ignorance concerning the phone's owner to a scene from "a mob movie."

It is sad and ironic that even as respondent was scolding the defendants for their behavior, in a court where trust and personal accountability were of paramount importance, respondent's own irresponsible behavior provided a poor example of such attributes. His conduct was injurious not only to the defendants themselves, but to the public as a whole, who expect every judge to act in a manner that reflects respect for the law the judge is duty-bound to administer. It is also ironic that in repeatedly berating the "selfish" and "self-absorbed" individual who "put their interests above everybody else's" and "[doesn't] care what happens to anybody," respondent failed to recognize that he was describing himself.

In committing the defendants, respondent ignored the special circumstances cited by several defendants who asked not to be taken into custody. Three defendants told respondent that their jobs would be at risk if they were incarcerated; another told the judge that he had to pick up his child that afternoon and asked if he could be sanctioned the following week instead. Oddly, in the midst of his wholesale incarceration of dozens of defendants, respondent handled

several matters routinely and, somewhat arbitrarily, allowed four individuals to leave after interrogating them about the phone. One defendant was permitted to leave after his attorney vouched for him (of the 46 defendants committed by respondent, only one had an attorney who was present). The totality of the circumstances – including the fact that there had been considerable traffic in and out of the court when the phone had rung and that only defendants (and not attorneys, counselors or court personnel who were present) were subjected to respondent’s inquisition and punishment – compounded the appearance that respondent’s actions were arbitrary and unjust.

Not until hours later that afternoon did respondent arrange for the release of the incarcerated defendants. Although he has testified that he reached an independent realization that he had acted improperly, it is undisputed that he took no steps to arrange for the defendants’ release until he learned that the press was inquiring into his actions. By the time the 14 defendants were eventually released from the County Jail, they had been in custody for six or seven hours. Under these circumstances, we cannot give respondent credit for timely remorse or sensitivity to his ethical responsibilities. Indeed, while respondent now expresses remorse for his actions, we note that, except for a subsequent chance encounter with one individual who was incarcerated on March 11<sup>th</sup>, he has never apologized to the individuals who were deprived so unjustly of their liberty. In any event, as the Court of Appeals has stated with respect to contrition, in some instances “no amount of it will override inexcusable conduct.” *Matter of Bauer*, 3 NY3d 158, 165 (2004).

Simply stated, we find no mitigating circumstances in the record before us. Respondent characterizes his behavior as aberrational and attributes it, at least in part, to certain stresses in his personal life. Such an explanation cannot excuse his behavior. Presiding in a busy court presents every judge with significant challenges on a daily basis, and every judge is obliged to set aside his or her personal problems upon entering the courtroom and to be an exemplar of dignity, courtesy and patience (Rules, §100.3[B][3]). No doubt many if not most of the defendants in respondent’s court were experiencing significant stresses in their own lives, but the message consistently imparted by the Domestic Violence Part, and indeed by every court, is the importance of self-control and personal accountability. Surely that message applies as well to the presiding judge.

We reject the dissent’s argument that respondent’s conduct was part of “a single *res gestae*” or a single episode of poor judgment. Rather, it was a painfully prolonged series of acts over several hours that transcended poor judgment.

We conclude that respondent’s behavior was such a gross deviation from the proper role of a judge that it warrants the sanction of removal, notwithstanding his previously unblemished record on the bench and the testimony as to his character and reputation. *See, Matter of Shilling*, 51 NY2d 397, 399 (1980); *Matter of Blackburne*, 7 NY3d 213 (2006). “Judicial misconduct cases are, by their very nature, *sui generis*” (*Matter of Blackburne, supra*, 7 NY3d at 220-21). In causing 46 individuals to be deprived of their liberty out of pique and frustration, respondent abandoned his role as a reasonable, fair jurist and instead became a petty tyrant, abusing his judicial power and placing himself above the law he was sworn to administer. It is tragic that in a crowded courtroom, only the individual wearing judicial robes, symbolizing his exalted status

and the power it conferred, seems to have been oblivious to the enormous injustice caused by his rash and reckless behavior. Although “removal is not normally to be imposed for poor judgment, even extremely poor judgment” (*Matter of Sims*, 61 NY2d 349, 356 [1984]), respondent’s actions “exceeded all measure of acceptable judicial conduct,” bringing the judiciary into disrepute and irreparably damaging public confidence in his ability to serve as a judge (*Matter of Blackburne*, *supra*, 7 NY3d at 221). Such a “breach of the public trust” warrants the sanction of removal (*Matter of McGee*, 59 NY2d 870, 871 [1983]; *see also*, *Matter of Gibbons*, 98 NY2d 448, 450 [2002]).

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

Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder dissents only as to the sanction and votes that respondent be censured.

Dated: November 13, 2007

#### **CONCURRING OPINION BY MR. EMERY**

Commissioner Felder’s dissent argues that this case is not controlled by the Court of Appeals’ decision in *Matter of Blackburne*. Though I dissented from the Commission’s decision to remove Justice Blackburne, which was affirmed by the Court of Appeals, it is plain to me that the *Blackburne* precedent squarely controls this case. In fact the “aberrant” behavior of Judge Restaino was more egregious than that of Justice Blackburne.

Justice Blackburne, in an aberrant and arrogant fit of pique, asserting that a police officer had misrepresented facts to her, prevented the arrest of a defendant in her drug treatment court after being warned by a court officer and an assistant district attorney that she should allow the arrest to go forward. Judge Restaino, in an aberrant fit of pique, over the course of several hours, wrongfully jailed 46 defendants for up to seven hours because no one of them would admit that his or her cell phone rang in court. Several of these defendants warned Judge Restaino as he was remanding them that what he was doing was unfair and seriously harmful to them.

To my mind the cases are indistinguishable except perhaps with respect to the persistent and sustained nature of Judge Restaino’s misconduct and the much shorter duration of Justice Blackburne’s. Both judges presided in a specialty court and testified that trust and responsibility were a key component in the success of those programs. In both cases they perverted justice and their role as judges in a very similar way, in a thoroughly misguided belief that the integrity of their respective courts required them to thwart normal procedure. Justice Blackburne erred on the side of liberty; Judge Restaino, on the side of captivity.

In both cases the judges realized their errors shortly after they completed their misconduct – Judge Restaino when he learned the press was interested, Justice Blackburne when she learned that people in the courthouse were discussing her actions. In both cases a parade of

distinguished character witnesses convincingly testified about each judge's impressive career of public service and blemishless record and underscored that the conduct was aberrant. Both judges expressed remorse. It seems clear in both cases that the conduct was unlikely to be repeated.

Commissioner Felder's legerdemain in characterizing the cases as warranting a distinction in favor of Judge Restaino is breathtaking, especially in light of his vote to remove Justice Blackburne. In my view he must either admit his mistake in *Blackburne* and argue that it should be overturned, or vote to remove Judge Restaino. Instead, he chooses to mischaracterize the precedential effect of *Blackburne* in order to reach his desired result. Because I am bound by the *Blackburne* decision, with which I do not agree, I concur with the majority.

Dated: November 13, 2007

### **OPINION BY MR. FELDER, DISSENTING AS TO SANCTION**

In the four years that I have served as a member, Vice Chair and, ultimately, as now, its Chairman, this has been the most difficult decision for me to make.

The record establishes that respondent, after a long period of personal stress, while presiding in a domestic violence part,<sup>[1]</sup> simply "snapped" when he heard a cell phone go off in his courtroom and engaged in what can only be described as two hours of inexplicable madness. The record also establishes that his conduct over those two hours was a total aberration from his character and demeanor as a judge for eleven years (and previously as public defender for ten years) and that he has received the support and praise of his judicial colleagues, court personnel and community leaders.

Judge Violante describes respondent as being "dedicated," and testified that when he appointed him, he believed that respondent's "dedication...for this assignment was second to none and I sat in that part for three years, so I'm including myself in that vein of assigned judges" (Tr. 457). Judge Violante further indicated that respondent was vice president of the New York State City Court Judges organization and that he "handled himself as a distinguished member of our group and a distinguished member of the bench" (Tr. 462). He went on to say regarding respondent, "on his social, his personal and his professional character, it's been nothing but impeccable from what I can comment upon and that would be my only response" (Tr. 466). Angelo Morinello, respondent's co-judge, knew respondent both when he was practicing before the court, and "pretty much on a daily basis" when he was City Court judge (Tr. 479). He said that respondent's reputation was "excellent" – one "that exceeds that of most judges" (Tr. 480, 481).

Putting aside the question of competency and dedication, what respondent did here is beyond reprehensible. He abused the most serious power that a judge possesses: taking away a person's liberty. Previously, I have stated that "Tyrants come in more varieties than Baskin-Robbins has flavors" (*Matter of Mills*, 2005 Annual Report 185), and if I believed that this respondent was indeed a tyrant, I certainly would not hesitate to vote for his removal.

Although the majority insists that the improper incarceration of defendants for several hours required respondent's removal, the fact is that in numerous cases, for various reasons, the Commission has censured or even admonished judges who improperly held defendants in custody for far lengthier periods. In *Matter of Mills*, for example, the Commission, on the recommendation of Commission counsel, censured a City Court judge who abused his power by holding one individual (a college student who had interrupted the judge during a post-acquittal lecture) in solitary confinement for four days, and another individual (a courtroom spectator) in handcuffs for several hours for having used an expletive in the courthouse parking lot. In *Mills*, I voted for the judge's removal since the record amply demonstrated the judge's arrogance and dishonesty in attempting to justify his actions. (In contrast, in this case respondent appears to be sincerely remorseful and quite humble.) In *Matter of Teresi*, 2002 Annual Report 163, pursuant to a stipulation, the Commission censured a Supreme Court Justice for numerous acts of misconduct, including abusing his contempt power by sentencing a *pro se* litigant to six months in jail for refusing to sign a corrective deed (the litigant was incarcerated for 45 days until he was released by another court). I note these cases not to minimize the conduct of those judges, but merely to place in perspective the severity and consequences of respondent's actions. Admittedly, this case involves more than one person whose rights were violated egregiously, but the judge's conduct here, in my view, was a single *res gestae* – two hours of viral lunacy out of a person's entire professional life.

Although *Matter of Blackburne*, 7 NY3d 213 (2006) establishes that a judge can be removed for a single incident of notoriously poor judgment, the conduct in that case arose from a calculated determination to undermine the criminal justice process by thwarting a lawful arrest. In contrast, the respondent here was attempting to have an individual (as well as the individual's peers who may have witnessed the breach) take responsibility for a breach of courtroom decorum. In *Blackburne*, the judge acted purely out of personal pique, based on incomplete information, and, further, she persisted in the face of contrary advice from experienced court personnel. Perhaps most significantly, in *Blackburne* there was a serious question as to the sincerity and timeliness of the judge's contrition. In contrast, in this case the referee, a distinguished former judge who heard the testimony, concluded that the respondent, who testified at great length, appeared to be sincerely remorseful. The referee also commented on the impressive testimony of a psychologist and a psychiatrist who gave persuasive testimony as to the unlikelihood of a recurrence.

In *Matter of Carter*, 2007 Annual Report 79, the Commission censured a judge who left the bench and attempted to assault a defendant but was unsuccessful only because he was physically restrained by court officers; a few months later, the judge suggested to a police officer that the officer "thump the s---" out of a defendant. If Judge Carter is deemed fit to remain on the bench and was given an opportunity to continue to serve as a judge, I believe that Judge Restaino deserves the same opportunity.

Having heard from respondent, I believe along with the referee that he is sincerely filled with remorse. The record also reveals that respondent promptly sought counseling in an effort to understand what may have prompted such aberrational misbehavior and to do whatever is humanly possible to insure that such a serious lapse would not be repeated. The judge is continuing to receive regular counseling, and his therapist has stated that, insofar as we can ever

be certain about the future, such an aberrational act will likely not recur. In this regard, I cannot conclude that he is unfit to continue to serve or is a menace to the public, as the majority suggests.

At the oral argument, my colleagues expressed dismay that respondent did not apologize to each individual defendant (except in a chance encounter with one defendant) either in person or by letter. I can understand that when respondent consulted a lawyer, the lawyer's reaction might well have been, "Put nothing in writing and admit nothing," since this might be construed as an admission against interest. Most people follow – for better or worse – their lawyer's advice. I believe it is most unfair and unprecedented to use the lack of a personal apology as the linchpin for determining that the judge should be removed.

I would have preferred to vote for a more serious penalty than censure, but a lesser one than removal; however, none is available. This speaks for the value of the Commission having the ability to vote to suspend a judge without pay, as a penalty that would be in severity between censure and removal. In my view this case would have easily fallen into such a category. Further, in the only other public case involving a disturbance created by an electronic device, we were far less draconian in our remedy. In *Matter of Feinman*, 2000 Annual Report 105, the Commission admonished a judge who held a defendant in custody for 90 minutes after the defendant's pager rang in his court. There may well be value in having some uniformity in the rules as to how such disturbances should be handled (and, indeed, as to whether cell phones should even be permitted in the courtroom), and had such rules existed, the situation in respondent's courtroom on March 11<sup>th</sup> would likely not have escalated to the degree that it did. However, this should be addressed by a different forum.

The reality here is that even a public censure would undoubtedly have a deleterious effect on the judge's career. In any event, I believe this is a case where it should be up to the public, who elected respondent to serve in his community, to decide when he is up for re-election whether he should remain on the bench.

When, in my view, the Commission votes for removal of a judge, it should not be as part of a game of "gotcha." The reason should be (1) if a judge is unchecked, he or she would be a danger to the community, and (2) unless restrained by our determination, the judge would repeat his or her misconduct. Viewing this judge, for the reasons stated above, I do not believe such to be the case. A third rationale for removal may be "to send a message" to the judiciary. I believe, short of Western Union, that message has been sent by this proceeding. Certainly, if our purpose is to show we are "tough guys" and will wield the bludgeon of removal if a judge loses control in the courtroom, then that is not a proper purpose, either by its intention or result.

I am constrained to comment on Commission counsel's attempt to belittle respondent's explanation that he "snapped" because of personal stresses in his life. Although Commission counsel argues that such an explanation is not believable because no single triggering event in his personal life had occurred that morning and that prolonged stress cannot explain a temporary loss of reason, I believe that simple human experience has shown that that is simply untrue.

I can understand the Commission's judgment, having been confronted with respondent's atrocious actions. The facts are so hypnotically awful that one's judgment can comfortably and perhaps even logically be closed to a more searching analysis. In this case it was the majority's decision to toss respondent into that judicial dustbin of removed and disgraced judges. I admit that initially, after reading all the material concerning respondent, I agreed with that view. I then listened to respondent with an open mind and particular attention. The repulsive nature of his actions on March 11, 2005 (and I believe that respondent himself would accept that characterization), juxtaposed against his otherwise impeccable judicial career, was particularly puzzling.

Having listened to the judge, and having considered the matter carefully, I cannot find it within myself to destroy this individual's professional life over this regrettable episode. The record shows without contradiction that he is a decent, humble, dedicated individual who is well-liked and respected. After growing up in public housing, he built an exemplary career in public service. Significantly, one individual who was incarcerated by respondent on March 11<sup>th</sup> testified on the judge's behalf at the hearing and stated, quite movingly, that the judge had been a positive influence in his life. He expressed gratitude for the judge's encouragement in his staying with the Domestic Violence Program and earning a diploma, stating that "[without] the judge's helpfulness to really keep me focused in what I need to get done, I would have to say...I probably wouldn't have that diploma now" (Tr. 554). Indeed, he also testified that a year and a half after the incident, when he appeared before respondent in traffic court, he bought a photograph of himself with his diploma and in his cap and gown to show to the judge to thank him for his encouragement, at which time the judge led the court in applauding him. To be sure, it is likely that most defendants who were held in custody that day by respondent may not regard him so fondly, but I believe this individual's testimony is quite revealing as to the kind of judge respondent has been, and can continue to be, if permitted to serve.

Although the ultimate cause of respondent's bizarre behavior that day may never be known with certainty, it is uncontroverted that the conduct was a profound aberration in an otherwise unblemished career. On a human level, I simply do not believe that such an episode should outweigh a lengthy, distinguished career of public service.

Dated: November 13, 2007

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<sup>[1]</sup> Chief Judge Mark Violante of the Niagara Falls City Court, who set up the Domestic Violence Part in 1997, describes it as "a standard criminal part ... ." "[In] some cases, as conditions while the case is continuing to be pending, a condition of their bail is that they were involved or are involved in some anger management programs or batterer's programs" (Tr. 453).

Judge Richard Kloch, the Supervising Judge for the Criminal Courts for the Eighth Judicial District, described the caseload in the court as "crushing" (Tr. 542).

In addition to his responsibilities as a Niagara Falls City Court judge, the testimony indicated that respondent has served as an acting County Court judge, Family Court judge and Buffalo City Court judge as needed and that he has an impeccable reputation as a dedicated, fair, hard-working jurist with great integrity.



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **KATHLEEN L. ROBICHAUD**, a Judge of the Rensselaer City Court, Rensselaer County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission  
Larry J. Rosen for the Respondent

The respondent, Kathleen L. Robichaud, a Judge of the Rensselaer City Court, Rensselaer County, was served with a Formal Written Complaint dated March 5, 2007, containing two charges. The Formal Written Complaint alleged that respondent delayed rendering judgments in ten cases, delayed rendering decisions on motions in 12 cases, and failed to report the delayed cases as required on her reports to her administrative judge. Respondent filed a Verified Answer dated March 23, 2007.

On June 15, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On July 12, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent was admitted to the practice of law in New York in 1990. She has been a Judge of the Rensselaer City Court since 1996, serving quarter-time. She also maintains a private law practice in Rensselaer.

As to Charge I of the Formal Written Complaint:

2. In the nine small claims and one civil claim set forth on Schedule A annexed to the Agreed Statement of Facts, respondent failed to render judgments within 30 days of the hearings, as required by Section 1304 of the Uniform City Court Act. Respondent delayed in issuing her decisions for up to 23 months.

3. In the 11 commercial claims and one civil claim set forth on Schedule B annexed to the Agreed Statement of Facts, respondent failed to render decisions on submitted motions within 60 days, as required by Section 1001 of the Uniform City Court Act and Section 4213(c) of the Civil Practice Law and Rules. Respondent failed to issue decisions for up to 20 months after final submission.

As to Charge II of the Formal Written Complaint:

4. From in or about April 2005 to in or about April 2006, respondent signed and submitted five quarterly reports to her administrative judge, as required by Section 4.1 of the Rules of the Chief Judge, in which she represented that she had no matters pending decision longer than 60 days after final submission, notwithstanding that respondent had numerous such matters pending decision, as set forth in Charge I, *supra*.

5. There is no evidence to indicate that respondent's delays in the cases at issue were deliberate or the result of anything other than poor management. Respondent appears to have lost track of the cases, did not realize they were pending, and therefore did not realize that her quarterly reports were inaccurate.

6. As a result of the Commission's inquiry, respondent has instituted better calendar controls and administrative oversight to ensure that in the future her decisions will be timely and her reports to her administrative judge will be accurate. The court has added administrative staff; the chief clerk now compiles a monthly report as to all civil matters pending decision; and the Office of Court Administration has provided a part-time law clerk to assist respondent.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(7) and 100.3(C)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent's delays in issuing decisions in 22 matters, coupled with her failure to report the delayed cases as required to court administrators, constitute a dereliction of her responsibilities as a judge.

The ethical standards require every judge to dispose of court matters "promptly, efficiently and fairly," and further provide that "the judicial duties of a judge take precedence over all the judge's other activities" (Rules, §§100.3[B][7], 100.3[A]). Here, over a 26-month period, respondent failed to render timely decisions in 22 matters, including small claims, civil claims and commercial claims. In ten matters (nine small claims and one civil claim), respondent failed to render judgments within 30 days, as required by law (Uniform City Court Act §1304), and in 12 civil matters she failed to issue decisions on motions within the required 60 days (CPLR §4213[c]). The delays ranged from two months up to two years; in eleven matters the delays were over one year.

Respondent compounded her misconduct by failing to list the undecided matters on five consecutive quarterly reports filed with her administrative judge. *See Matter of Washington*, 100 NY2d 873 (2003); *cf.*, *Matter of Greenfield*, 76 NY2d 293 (1990). On those reports, which are required to be filed on a quarterly basis by Section 4.1 of the Rules of the Chief Judge, respondent represented that she had no matters pending decision longer than 60 days after submission, when in fact there were numerous such matters pending decision. Filing reports that are inaccurate or incomplete is extremely serious, since it prevents court administrators from “assess[ing] the reasons for the delay and tak[ing] appropriate action.” *Matter of Greenfield*, *supra*, 76 NY2d at 299.

It has been stipulated that, due to poor management, respondent was unaware of the delayed matters and did not intentionally omit them from her reports. Such negligence is inexcusable and constitutes a serious neglect of her administrative responsibilities (Rules, §100.3[C][1]).

We view such delays as serious misconduct because of the adverse consequences on individual litigants, who are deprived of the opportunity to have their claims heard in a timely manner, and on public confidence in the administration of justice. Our decision in this case and in *Matter of Scolton* (decision issued today) should not be interpreted to suggest that delays can never rise to a level warranting removal. We will not hesitate to impose sanctions in such cases to ensure that the public is protected from the deleterious effects of unwarranted delays.

In considering an appropriate sanction, we note that respondent, who has served as a judge since 1996, has acknowledged her misconduct and has instituted numerous administrative improvements to ensure that in the future her decisions will be timely and her quarterly reports will be accurate.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

Dated: August 1, 2007



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **BRUCE S. SCOLTON**, a Justice of the Harmony Town Court, Chautauqua County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Honorable Bruce S. Scolton, *pro se*

The respondent, Bruce S. Scolton, a Justice of the Harmony Town Court, Chautauqua County, was served with a Formal Written Complaint dated January 24, 2007, containing one charge. The Formal Written Complaint alleged that respondent failed to dispose of six small claims cases in a timely manner. Respondent filed a Verified Answer dated February 13, 2007.

On June 21, 2007, the Administrator of the Commission and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On July 12, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Harmony Town Court since May 10, 1990. He is an attorney who was admitted to the practice of law in New York in 1977.

2. In *John R. and Patricia C. Gavin v. Randall L. Present*, a small claims action in which the claimants sought \$493.23 in damages, respondent delayed holding a hearing from on or about March 23, 2004, until November 3, 2004, and thereafter delayed issuing a decision until October 10, 2006, notwithstanding that Mr. Gavin twice requested a decision from respondent, orally at the courthouse on August 30, 2004, and by letter dated September 30, 2004.

3. In *Sebastian A. Reale v. Raymond Nelson, d/b/a Ray Nelson Service, et al.*, a small claims action in which the claimant sought \$3,015.00 in damages, respondent delayed holding a hearing from on or about September 23, 2003, until on or about January 13, 2004, and thereafter did not render a decision until October 10, 2006, notwithstanding that he received a letter from the defendant's attorney, dated May 20, 2004, requesting a decision.

4. In *Richard Anderson v. Frank Roth*, a small claims action in which the claimant sought \$350.00 in damages, respondent delayed holding a hearing in the case from May 10, 2004, to March 8, 2005.

5. In *Julie Sealy v. Jamie Burnett*, a small claims action in which the claimant sought \$1,023.95 in damages, respondent delayed holding a hearing in the matter from September 13, 2004, to March 8, 2005.

6. In *Lynne Carlson v. Art Millace*, a small claims action in which the claimant sought \$3,000.00 in damages, respondent delayed holding a hearing in the matter from September 13, 2004, to March 8, 2005.

7. In *Amy Dullong v. John Vistrand*, a small claims action in which the claimant sought \$2,200.00 in damages, respondent took no action in the matter after the filing of the claim on June 21, 2004. Respondent never sent notice of the action to the defendant, never scheduled a hearing and never held a hearing. After receiving letters dated June 21, 2006, and August 18, 2006, from the Commission regarding the matter, respondent contacted the claimant, who indicated she no longer wished to pursue the matter.

8. Respondent acknowledges that he failed to dispose of the business of his court promptly, efficiently and fairly with respect to these six small claims cases, with the result that no action was taken in one of the cases, hearings were delayed from four to ten months in five of the cases, and decisions were delayed from 23 to 33 months in two of the cases. Respondent has no excuse for his inaction and delay.

9. Both as an attorney and a judge, respondent is aware of the prejudice to the parties that may result when proceedings are delayed without good cause. Respondent commits himself to insuring that such delays do not recur.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(7) and 100.3(C)(1) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

Over a three-year period, respondent was responsible for significant delays in six small claims matters that were filed in his court. Respondent has acknowledged that he has no excuse for his inaction and delays.

The ethical standards require every judge to dispose of court matters “promptly, efficiently and fairly,” and further provide that “the judicial duties of a judge take precedence over all the judge’s other activities” (Rules, §§100.3[B][7], 100.3[A]). In five cases, respondent delayed from four to ten months in scheduling a hearing, and in a sixth case respondent never scheduled a hearing for more than two years, at which point the claimant, not surprisingly,

declined to pursue the matter further. The delays respondent permitted amounted to an inexcusable neglect of his duties as a judge (Rules, §100.3[C][1]).

In addition, in two of the cases respondent delayed inexcusably in rendering a timely decision. In *Gavin v. Present*, respondent issued a decision 23 months after holding a hearing, and in *Reale v. Nelson*, he issued a decision 33 months after the hearing. Significantly, both decisions were rendered shortly after respondent had been contacted by the Commission, which was investigating the alleged delays.

The “informal and simplified” procedures for small claims are intended to provide litigants with an efficient and just resolution to their legal disputes (Uniform Justice Court Act §1804). This goal is thwarted when cases are delayed inexcusably for extended periods.

Respondent’s excessive delays in scheduling small claims hearings, coupled with his delays in issuing decisions, constitute neglect of his administrative and adjudicative responsibilities, which warrants discipline. *See, Matter of Leonard*, 1986 Annual Report 137 (Comm. on Jud. Conduct) (town justice was censured for delays in 14 small claims matters); *see also, e.g., Matter of Vincent*, 70 NY2d 208, 209 (1987) (judge failed to make timely deposits and remittals of court funds to the State Comptroller and “failed to dispose of his small caseload in a timely manner”); *Matter of Ware*, 1991 Annual Report 79 (Comm. on Jud. Conduct) (judge failed to take any action to dispose of 228 motor vehicle cases in which defendants failed to appear or answer the charges).

We view such delays as serious misconduct because of the adverse consequences on individual litigants, who are deprived of the opportunity to have their claims heard in a timely manner, and on public confidence in the administration of justice. Our decision in this case and in *Matter of Robichaud* (decision issued today) should not be interpreted to suggest that delays can never rise to a level warranting removal. We will not hesitate to impose sanctions in such cases to ensure that the public is protected from the deleterious effects of unwarranted delays.

In admonishing respondent, who has served as a judge since 1990, we note that he has acknowledged his misconduct and that his neglect of his judicial duties, as depicted in the record before us, is limited to the six matters described herein.

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

Judge Klonick, Mr. Coffey, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Felder and Ms. DiPirro were not present.

Dated: August 1, 2007



In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MARIAN R. SHELTON**, a Judge of the New York City Family Court, Bronx County.

**DECISION AND ORDER**

**BEFORE:**

Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

**APPEARANCES:**

Robert H. Tembeckjian (Alan W. Friedberg, Of Counsel) for the Commission  
Ingram Yuzek Gainen Carroll & Bertolotti, LLP (by Dean G. Yuzek) for the Respondent

The matter having come before the Commission on September 26, 2007; and the Commission having before it the Formal Written Complaint dated June 1, 2007, respondent's Verified Answer dated June 25, 2007, and the Stipulation dated September 26, 2007; and the Commission having designated Robert H. Straus, Esq., as referee to hear and report proposed findings of fact and conclusions of law; and no hearing having been held to date; and respondent having stipulated that she does not contest the Commission's position that her conduct as set forth in the Stipulation violated the specified ethical rules; and respondent having affirmed that she will neither seek nor accept reappointment as a judge of the New York City Family Court upon the expiration of her current term on December 31, 2007, and that she does not intend to seek or accept judicial office or a position as a Judicial Hearing Officer at any time in the future; and the parties having stipulated as to the terms under which the Stipulation may be vacated and the pending proceeding be activated; and respondent having waived confidentiality as provided by Judiciary Law §45; now, therefore, it is

DETERMINED, on the Commission's own motion, that the pending proceeding be discontinued pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: September 27, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **MARIAN R. SHELTON**, a Judge of the New York City Family Court, Bronx County.

### **STIPULATION**

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 the Honorable Marian R. Shelton (“Respondent”), who is represented in this proceeding by Ingram Yuzek Gainen Carroll & Bertolotti, LLP (Dean G. Yuzek, Of Counsel), as follows:

1. This Stipulation is presented to the Commission in connection with a Formal Written Complaint pending against Respondent.
2. Respondent was admitted to the practice of law in New York in 1985. She was appointed a Judge of the New York City Family Court, Bronx County, in July 1998, for a term that expires on December 31, 2007.
3. Respondent was served with a Formal Written Complaint dated June 1, 2007, containing 13 charges. The Formal Written Complaint is annexed hereto as Exhibit 1.
4. Respondent submitted a Verified Answer dated June 25, 2007, in which she denied the material allegations of the Formal Written Complaint and asserted nine affirmative defenses. The Answer is annexed hereto as Exhibit 2.
5. On July 5, 2007, Respondent moved to dismiss certain charges in the Formal Written Complaint. The Administrator opposed the motion. On July 16, 2007, the Commission denied the motion without prejudice.
6. On July 18, 2007, the Commission designated Robert H. Straus, Esq. as Referee to hear and report proposed findings of fact and conclusions of law with regard to the Formal Written Complaint.
7. On August 9, 2007, Respondent waived confidentiality with respect to this proceeding. A copy of the waiver is annexed hereto as Exhibit 3.
8. On July 26, 2007, Respondent moved for the Referee to disqualify himself from this proceeding. The Administrator opposed the motion. On August 13, 2007, the Referee denied the motion.
9. On August 23, 2007, Respondent appealed the Referee’s decision and moved for the Commission to disqualify the Referee. The Administrator opposed the motion. On September 12, 2007, the Commission denied the motion.
10. Respondent admits the following facts regarding Charge I of the Formal Written Complaint:

- A. Michelle Nusser is the wife of Ben Nusser, who is the Intake Clerk in Respondent's court.
- B. On or about December 10, 2004, Ms. Nusser entered the spectator section of Respondent's courtroom at approximately 6:30 PM.
- C. At approximately 6:45 PM, after the last litigant had left and Respondent was at the bench signing various papers, Ms. Nusser stood up and motioned to her husband, whereupon Respondent directed her to leave the courtroom.
- D. Ms. Nusser turned to leave, and while departing said the word "asshole," referencing the Judge.
- E. Respondent thereafter ordered a court officer to return Ms. Nusser to the courtroom. When Ms. Nusser was brought back into the courtroom, Respondent stated that Ms. Nusser was in summary contempt, as a result of which she was handcuffed, told her to "shut up," "shut your mouth" and "be quiet" and directed that she be placed in a holding cell and returned to court on Monday morning.
- F. After spending several minutes in a holding cell and indicating she would apologize if given the opportunity, Ms. Nusser was brought back to court, where Respondent told her "You will never enter my courtroom again for any reason." Ms. Nusser apologized and Respondent purged the contempt.

11. Subject to the acceptance by the Commission of this Stipulation, Respondent does not contest the Commission's position that her foregoing conduct in connection with Charge I violated Section 100.3(B)(3) of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct ("Rules") and Section 604.2 of the Rules of the Appellate Division, First Department, and acknowledges the Commission's position that violations of Sections 100.1, 100.2(A) and 100.3(B)(1) of the Rules and of Section 604.1(e)(1) and (e)(5) of the Rules of the Appellate Division, First Department, and Section 755 of the Judiciary Law flow therefrom.

12. Respondent hereby affirms that she will neither seek nor accept reappointment as a Judge of the New York City Family Court, Bronx County, upon the expiration of her current term on December 31, 2007.

13. Respondent hereby affirms that she does not intend to seek or accept judicial office or a position as a Judicial Hearing Officer in the Courts of the State of New York at any time in the future.

14. In view of the foregoing, Respondent and the Administrator respectfully request that the Commission discontinue this proceeding subject to Respondent's understanding that if she returns to judicial office in the Courts of the State of New York or violates paragraph 17 hereof prior to December 31, 2007, the Formal Written Complaint, and the hearing and other

judicial disciplinary proceedings related thereto, can be activated and proceed, and her admission as set forth in paragraph 10 regarding Charge I will remain in effect.

15. Respondent understands that this Stipulation, and the Commission's decision accepting or rejecting it, are public documents, in view of her aforementioned waiver of confidentiality.

16. Respondent affirms that she enters into this Stipulation voluntarily, without coercion, and without any claim that the Commission or its representatives have violated, abridged or prejudiced her rights regarding her entry into this Stipulation.

17. Respondent and the Commission agree that, subsequent to this Stipulation, neither she, the members of the Commission, nor their respective attorneys or other agents will make any statements that dispute or appear to dispute any of the terms of this Stipulation, including her admission as set forth in paragraph 10 regarding Charge I. Respondent understands that, should she, her attorneys or other agents make any such statements, the Administrator may summarily request and the Commission may direct this Stipulation be vacated and an immediate hearing be held before the Referee as to the Formal Written Complaint.

Dated: September 26, 2007

s/ **Honorable Marian R. Shelton**  
Respondent

s/ **Dean G. Yuzek, Esq.**  
Ingram Yuzek Gainen Carroll & Bertolotti, LLP  
Attorney for Respondent

s/ **Robert H Tembeckjian, Esq.**  
Administrator & Counsel to the Commission

The Original Stipulation

Exhibit 1: The Formal Written Complaint

Exhibit 2: The Answer

Exhibit 3: The Judge's Waiver of Confidentiality

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **JOHN R. TAUSCHER**, a Justice of the Alabama Town Court, Genesee County.

**THE COMMISSION:**

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

**APPEARANCES:**

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission  
Michael M. Mohun for the Respondent

The respondent, John R. Tauscher, a Justice of the Alabama Town Court, Genesee County, was served with a Formal Written Complaint dated September 19, 2006, containing one charge. Respondent filed a Verified Answer dated October 19, 2006.

On January 11, 2007, the administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On January 25, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Alabama Town Court since 1995. He is not an attorney.
2. In or around September 2005, respondent submitted a proposed court budget for 2006 to the Alabama Town Board, requesting a \$200 salary increase for himself and for his co-justice, and a \$1,000 salary increase for the court clerk. The Town Board approved a salary increase for the court clerk in the amount of \$200 but rejected respondent's request for a raise for himself and his co-justice.
3. On November 7, 2005, respondent appeared at a public hearing called by the Town Board on the 2006 budget. Respondent asked the Town Board to reconsider his request for increases in the salaries of both town justices and the court clerk. During his presentation, respondent made the following statement:

We're never to consider ourselves a revenue source but there is a revenue line on the, this side of the ledger and it is somewhat understated from what the state report that I have from this year through September. The revenue generated by our town court has been \$44,165.00. There are still three months to report. The amount that the town was allowed to keep so far is \$16,505.00. I'm, I guess I'm confused as to why if there is a difference in the amount that a department asks for and what is put into the line item of the proposed budget that that department supervisor or in general would be not asked to explain what they want and why they want it. But, that's your decision as to whether you want to ask anybody in the court system why they want what they want. I would ask that you reconsider the salaries of the judges and the court clerk to be what we had asked them to be. I can also tell you that there is revenue available from the court that would more than offset that in one transfer of bail monies that are to be forfeited. Forfeited bail monies are deposited directly into the general fund of the town. At this moment, I am sitting on \$2,800.00 of bail monies that should be forfeited because the people have not done what they were supposed to do. That more than offsets what we're asking for by \$1,000.00 or better. The other thing that I can tell you there was a town justice in Bergen who didn't get a raise when he thought that he should and the town board never asked him to explain anything but they lost \$20,000.00 in revenue because they didn't cooperate or didn't even consider asking him why he wanted an increase. They just said, no, you're not getting one. As I said earlier at the opening that judges have a lot of leeway when they're sitting up there in terms of what they can do and what they won't. Whether or not that happens, I can't make a promise. I just tell you that that option is available to the judges.

4. On November 14, 2005, respondent again appeared before the Town Board at a public meeting in connection with its consideration of the 2006 budget. While explaining the court's policies as to imposing fines, respondent made the following statements:

[A]s I said before, the judge has the discretionary ability to adjust the fine structure. But that revenue line is directly related to that expense line.

\* \* \*

There's another option too. The only thing that the court is required to do is to collect the surcharge. If the fine structure is \$0 to \$150.00 with a \$55.00 surcharge, all we are required to do is collect the surcharge. But the fine can be zero, it can be \$150.00, somewhere in between or none.

\* \* \*

I will once again state my opinion. I need not say anymore other than the justices do have direct input on the distribution code lines A and B. I am looking at the September Report for this year. We brought in \$1,310.00 into the town. Lines A and B was \$1,185.00 and we have a direct impact on that line.

\* \* \*

As I said to Brian, the fine structure runs from zero to something and no one can tell us what to fine.

5. Respondent then engaged in the following colloquy with a Town Board member:

Town Board Member: Are you saying you're going to hold back fining so that the town doesn't make as much money. You have that liberty, option?

Respondent: I have that right. I have that liberty and as long as I treat everybody the same, I can't tell Larry<sup>[1]</sup> what to do, okay, because he runs his side of the court differently than mine. That's why his amount was \$550.00 and mine was \$2,400.

6. Respondent had no further contact with the Town Board after November 14, 2005, concerning his budget proposal or salary increase requests.

7. The Town Board adhered to its original decision and approved a \$200 salary increase for the court clerk but did not approve any salary increase for respondent or his co-judge.

8. A review of respondent's court records indicates a consistent pattern of imposing fines both before and after his budget request and public statements to the Town Board. Notwithstanding his statements to the Town Board, respondent continued to impose fines, consistent with his standard practice, based upon the merits of the individual cases before him.

9. A review of respondent's court records indicates that the \$2,800 in bail to which respondent referred in his statement to the Town Board was properly refunded to the appropriate recipients.

10. Respondent acknowledges that it was inappropriate for him to make statements that even appeared to suggest he would increase the amount of fines to finance pay raises the Town Board might approve for himself, his co-judge and court clerk, or decrease the amount of fines to punish the Town Board for refusing such raises.

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) and 100.3(C)(1) of the Rules Governing Judicial Conduct<sup>[2]</sup> ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. 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.

On two occasions respondent made public statements to the Town Board in which he explicitly linked his discretionary ability to set fines, and thereby increase or decrease town revenues, with a proposed salary increase for himself, his co-justice and court clerk. The clear import of respondent's statements was that he could exercise his discretion in setting fines and

forfeiting bails to help fund the requested increase, and, conversely, that he could reduce fines in future cases if the Board refused to raise his salary. Although he was careful to describe such actions as simply his “options” as a judge, his words, on their face, were implicitly threatening.

Such statements undermine confidence in the judicial role, which is to exercise discretion, without bias or prejudice, based on the merits of each case. *See Matter of Tracy*, 2002 Annual Report 167 (Comm. on Judicial Conduct). Regardless of whether he intended to act on his warning, it was unseemly even to imply that a judge might reduce fines in future cases out of pique unless his salary was increased. Equally important, defendants and the public should never have to wonder if a high fine was imposed, even in part, to increase local revenues and fund the judge’s salary. By making such statements, respondent seriously undermined public confidence not only in the integrity and impartiality of his court, but in the judiciary as a whole.

It has been stipulated that a review of respondent’s court records reveals a consistent pattern of imposing fines before and after he made the comments cited herein. Accordingly, since there is no indication that respondent ever took any action on his implied threats, we conclude that his ability to serve as a judge has not been irretrievably damaged. We find that respondent’s ill-considered statements justly deserve a strong public rebuke.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Dated: February 5, 2007

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<sup>[1]</sup> Refers to respondent’s co-judge, Lawrence L. Klotzbach.

<sup>[2]</sup> It was stipulated that respondent’s conduct also violated Section 100.3(B)(9)(a) of the Rules, prohibiting a judge from “[making] pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office.” This amendment to the Rules was effective Feb. 14, 2006. We find that respondent’s misconduct, which occurred prior to that date, is covered by the other provisions cited.

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **NOREEN VALCICH**, a Justice of the Tannersville Village Court, Greene County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Kathryn J. Blake, Of Counsel) for the Commission  
Kevin H. Harren for the Respondent

The respondent, Noreen Valcich, a Justice of the Tannersville Village Court, Greene County, was served with a Formal Written Complaint dated December 6, 2006, containing one charge. The Formal Written Complaint alleged that respondent presided over a case notwithstanding that respondent had a professional and social relationship with the defendant and had discussed the underlying facts *ex parte* with her; that respondent granted an adjournment in contemplation of dismissal without notice to the District Attorney as required by law; and that respondent extended an order of protection after discussing the matter *ex parte* with the complaining witness. Respondent filed an answer on January 31, 2007.

On May 31, 2007, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On July 12, 2007, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Tannersville Village Court, Greene County, since 1991. She is not an attorney.
2. As set forth more fully herein, from on or about September 29, 2004, to on or about March 23, 2005, respondent: (i) presided over *People v. Marlene Rice*, notwithstanding that she had a professional and social relationship with the defendant, and notwithstanding that the defendant had discussed with her *ex parte* some of the underlying facts of the case, (ii) failed to disclose to the prosecution her relationship with the defendant, and (iii) engaged in an improper *ex parte* communication with the complaining witness and extended an order of protection in favor of the complaining witness without notice to the District Attorney.

3. Respondent had worked for a time as a school bus driver for a local school district. She and her husband also run a local bed-and-breakfast.

4. Marlene Rice worked at a local convenience store, where her supervisor was the store manager, Patience Ragan.

5. Prior to August 2004, Ms. Rice had been a guest one time for a few days at the bed-and-breakfast run out of respondent's home by respondent and respondent's husband.

6. In or around August 2004, Ms. Rice's employment at the convenience store was ended, and respondent participated in training Ms. Rice as a school bus driver.

7. In and around August and early September 2004, Ms. Rice visited respondent's home socially on several occasions and respondent visited Ms. Rice's home on two occasions. During these visits, Ms. Rice spoke to respondent about conflicts she had with her boss, Ms. Ragan.

8. On or about September 29, 2004, respondent arraigned Ms. Rice on a Harassment charge resulting from a complaint filed by Ms. Ragan. No representative of the District Attorney's office was present. Ms. Rice was without counsel. Respondent issued an order of protection against the defendant for the benefit of Ms. Ragan and Ms. Ragan's daughter, which was to remain in effect until March 31, 2005.

9. Thereafter, respondent failed to disclose to the District Attorney that she had a social and professional relationship with the defendant.

10. On or about October 20, 2004, the defendant again appeared before respondent without counsel. No representative of the District Attorney's office was present. Respondent granted to the defendant an adjournment in contemplation of dismissal without having obtained the unequivocal consent of the District Attorney (*see* Crim Proc Law §170.55[1]).

11. On or about March 23, 2005, respondent had an *ex parte* conversation with Ms. Ragan, who requested an extension of the order of protection previously granted for her benefit. Ms. Ragan told respondent that she suspected Ms. Rice had placed anonymous phone calls to the school Ms. Ragan's daughter attended. Respondent, on the basis of this information only, thereafter issued another order of protection dated March 23, 2005, effective for six months, without complying with Section 530.13 of the Criminal Procedure Law, which solely provides for the *ex parte* extension of a temporary order of protection simultaneous with the issuance of a warrant for the defendant's arrest.

12. By Letter of Dismissal and Caution dated April 7, 2000, respondent was cautioned by the Commission for delay in determining a motion and returning bail. By Letter of Dismissal and Caution dated December 19, 2000, respondent was cautioned by the Commission for conveying the appearance that she was not impartial when she reinstated a matter adjourned in contemplation of dismissal without consulting the district attorney.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(4), 100.3(B)(6), 100.3(E)(1) and 100.3(F) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings, and respondent’s misconduct is established.

A judge’s disqualification is required in matters in which the judge’s disqualification “might reasonably be questioned” (Rules, §100.3[E][1]), and judges must assiduously avoid even the appearance of impropriety (Rules, §100.2[A]). Since respondent had a social relationship with Marlene Rice, including mutual visits to each other’s homes in August and September 2004, and had recently participated in training Ms. Rice as a school bus driver, a reasonable person might question whether respondent could be impartial in a Harassment case in which Ms. Rice was the defendant. This is especially so since Ms. Rice had previously discussed with respondent her conflicts with her boss, who was the complaining witness in the case. *See Matter of Robert*, 89 NY2d 745 (1997); *Matter of Ross*, 1990 Annual Report 153 (Comm. on Judicial Conduct).

We recognize that in small communities, judges may know many, if not most, of the people in their community and may, in exigent circumstances, be required to preside over arraignments in matters in which they might otherwise consider disqualification. On the facts presented, respondent should not have presided over the arraignment. Even if respondent believed she could be impartial, respondent should have disclosed the relationship, which would have afforded the District Attorney an opportunity to be heard on the issue of respondent’s participation in the matter (Rules, §100.3[F]). *See, Matter of Merkel*, 1989 Annual Report 111 (although the judge’s disqualification was not required in a case involving her court clerk, disclosure was required; judge was admonished). Instead, after conducting the arraignment and issuing an order of protection, respondent continued to preside in the case, without disclosure, and granted the defendant an adjournment in contemplation of dismissal (“ACD”). Respondent compounded the appearance of impropriety by imposing the ACD without obtaining the “unequivocal” consent of the District Attorney. *See, Matter of Conti*, 70 NY2d 416 (1987). By law, such a disposition requires “the consent of both the people and the defendant” (Crim Proc Law §170.55[1]).

The record further establishes that five months later, respondent extended the order of protection in the matter, based on an *ex parte* conversation with the complaining witness. Pursuant to law (Crim Proc Law §530.13), an order of protection cannot be extended without the issuance of a warrant, in compliance with well-established statutory procedures and safeguards.

In determining that censure is appropriate, we note that respondent has previously been cautioned twice for ethical transgressions.

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

Judge Klonick, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur.

Mr. Coffey and Mr. Emery dissent and vote to reject the Agreed Statement of Facts. Mr. Emery files a dissenting opinion.

Mr. Felder and Ms. DiPirro were not present.

Dated: August 21, 2007

### **DISSENTING OPINION BY MR. EMERY**

Justice Valcich is a three time offender whom the Commission is giving another chance to harm the citizens who appear before her. Before we make this rash choice in favor of clemency for a recidivist ethical violator, I believe we should know what the relevant facts are.

Instead, once again, the Commission forges ahead to make what I consider to be a precipitous decision on the basis of an inadequate Agreed Statement, granting censure instead of what might well be removal if all the facts were known. On this record, however, we cannot be sure of the appropriateness of either sanction.

There are three defects in the Agreed Statement which constitutes the entire record in this case: first, it fails to disclose the facts of, or even the allegations that led to, the underlying harassment charge that Justice Valcich resolved by granting a friend an adjournment in contemplation of dismissal (“ACD”); second, the Agreed Statement confuses rather than clarifies the facts by stating that Justice Valcich granted the ACD “without having obtained the *unequivocal consent* of the District Attorney” (par. 10), instead of “consent” as required by the applicable statute; and third, it is unclear from the Agreed Statement whether Judge Valcich was ignorant of the requirement that a prosecutor consent to an ACD or whether, because of her bias, she intentionally disregarded it.

Deciding this case without a description of the allegations that led to the harassment charge effectively precludes assessment of the severity of the judge’s deviation from proper judicial conduct. In my view, we are required to make this assessment to fulfill our responsibility to fix on an appropriate sanction. For instance, if the judge’s friend were accused of threatening to murder the complainant’s children and the judge granted her an ACD without the consent of the District Attorney, then she should be removed. Such misconduct would be inexcusable favoritism. If, on the other hand, the harassment charge alleged several hang-up telephone calls, and the grant of the ACD were deficient because the District Attorney was not informed, censure might be called for. The point is that the nature of the harassment alleged is probative of the judge’s state of mind when she used her official judicial powers to favor a friend. It may have been a gross, crass favor, in the nature of a corrupt act. Or, it may have been a misjudgment that in fact rendered substantial justice. Thus, the specific nature of the harassment charge is critical to reaching an informed decision as to sanction. But the Agreed Statement omits this information.

Second, I have no clue as to what it means to say that the “unequivocal consent” of the District Attorney was not obtained. Either the prosecutor consented consistent with the requirement of the statute (CPL §170.55), or s/he did not. “Equivocal consent” is an oxymoron and “unequivocal consent” is redundant in this context. Such phrases convey no meaning. They only confuse and obfuscate. Therefore, substituting “unequivocal consent” for “consent” that is required by statute has no place in an Agreed Statement that, in my view, is fully the equivalent of a plea agreement. The staff of the Commission should insist on a clear statement and not mince words. Our responsibility is to inform the judiciary, bar and public, not perplex them for the sake of streamlining the process.

The phrase “unequivocal consent” that was negotiated in this Agreed Statement begs the question of whether the prosecutor consented. There is no statutory burden on the judge to obtain “unequivocal consent.” And this Commission may not impose undefined and unauthorized additional burdens on judges granting ACDs. If the judge did not obtain the requisite “consent” of the prosecutor, she should admit it; if she disputes whether the DA consented, the issue is important enough to require a hearing.

And, if in fact the DA consented in accordance with law, the judge should be cleared of the charge of favoritism and sanctioned for the less serious offenses of not disclosing her relationship with the accused and two instances of *ex parte* communications. If no prosecutorial consent was obtained and the harassment was serious, she should be removed.

Finally, if the judge did not get the DA’s consent, we need to know whether she was aware of the statutory requirement (which is fundamental) and, if so, what her explanation is for why she disregarded the law in this case. If she engaged in this misconduct knowingly using her judicial authority to benefit a friend, she should be removed. *See, Matter of LaClair*, 2006 Annual Report 199 (Emery Dissent).

This case again demonstrates what I consider to be the facile manipulation of the Commission in the process of reaching agreed statements. *See, Matter of Carter*, 2007 Annual Report \_\_\_ (Emery Concurrence); *Matter of Clark*, 2007 Annual Report \_\_\_ (Emery Dissent); *Matter of Honorof*, 2008 Annual Report \_\_\_ (Emery Dissent). When an agreed statement is presented as a basis for imposing discipline, it should answer all relevant questions so that we can determine whether there has been misconduct and what sanction, if any, should be imposed. It is our core responsibility to determine whether a judge is fit to remain on the bench (*Matter of Reeves*, 63 NY2d 105, 111 [1984]), and we should not have to make a decision, especially on this ultimate issue, on a record with significant factual gaps, confusing characterizations of events, and critical unresolved issues.

My hope is that with the additional resources that the Legislature has provided to the Commission, staff will be more rigorous, requiring that judges who wish to enter into agreed dispositions forthrightly explain their state of mind and fully and completely describe their misconduct. This may be painful, but it surely is less wrenching than a hearing and factual findings when a judge knows s/he has engaged in misconduct. On the basis of a record that truly reveals what animated the misconduct, let alone what it was, the Commission will have much less difficulty fulfilling our responsibility to render an appropriate sanction.

In this case, the record does not meet the requisite standard of disclosure and completeness and therefore I dissent.

Dated: August 21, 2007

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to **EDWARD J. WILLIAMS**, a Justice of the Kinderhook Town and Valatie Village Courts, Columbia County.

THE COMMISSION:

Raoul Lionel Felder, Esq., Chair  
Honorable Thomas A. Klonick, Vice Chair  
Stephen R. Coffey, Esq.  
Colleen C. DiPirro  
Richard D. Emery, Esq.  
Paul B. Harding, Esq.  
Marvin E. Jacob, Esq.  
Honorable Jill Konviser  
Honorable Karen K. Peters  
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Kathryn J. Blake, Of Counsel) for the Commission  
Gerstanzang, O'Hern, Hickey & Gerstenzang (by Thomas J. O'Hern) for the Respondent

The respondent, Edward J. Williams, a Justice of the Kinderhook Town and Valatie Village Courts, Columbia County, was served with a Formal Written Complaint dated April 19, 2006, containing four charges. The Formal Written Complaint alleged that respondent engaged in misconduct in connection with three cases notwithstanding that he had previously been disciplined by the Commission. Respondent filed a Verified Answer dated May 31, 2006.

By Order dated June 9, 2006, the Commission designated Robert J. Smith, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on September 18 and 20 and October 20, 2006, in Albany. The referee filed a report on March 20, 2007.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal. Respondent's counsel did not recommend a sanction. On September 20, 2007, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has held judicial office in the Village of Valatie since 1982 and in the Town of Kinderhook since 1984.
2. Respondent presided over *People v. Daniel Wloch*, in which Mr. Wloch was charged with one count of Harassment, Second Degree, filed in the Valatie Village Court. The charge resulted from a dispute between Mr. Wloch and his neighbor, Cynthia Engle, regarding her dog's barking.

3. On or about May 21, 2004, New York State Trooper Eric Leonard served Mr. Wloch with a criminal summons, which required him to appear in the Valatie Village Court before respondent on June 3, 2004.

4. Mr. Wloch appeared in the Valatie Village Court on that date, without counsel, and pleaded not guilty to the charge. Respondent asked Mr. Wloch if he wished to be represented by an attorney, and Mr. Wloch replied that he would represent himself. The complaining witness, Ms. Engle, asked for an order of protection for herself and her daughter, claiming that she was afraid of Mr. Wloch and that he was stalking them. Respondent issued an Order of Protection, which required Mr. Wloch to stay 50 feet away from Ms. Engle and her daughter. On or about June 4, 2004, a State trooper served Mr. Wloch with the Order of Protection, which remained in effect until July 1, 2004.

5. Mr. Wloch hired Andrew Jacobs, Esq., to represent him at the trial, which was held on or about September 6, 2004.

6. At the trial, Mr. Wloch and Ms. Engle testified with respect to the alleged harassment. Mr. Wloch testified that he had spoken to a State trooper about the Harassment charge and that the trooper had said, "Don't worry about it. It would only be a \$100 fine" and had stated further that it would be "like a speeding ticket." It is unclear whether in his testimony Mr. Wloch identified the trooper with whom he spoke; he had spoken to at least two other State troopers in addition to the one who served him with a summons. Mr. Wloch's testimony regarding that conversation was irrelevant to the alleged harassment. After the trial, respondent reserved decision and adjourned the matter to October 7, 2004.

7. Sometime between the trial and the adjourned date, respondent saw Trooper Leonard at the County Fair. Respondent told Trooper Leonard that Mr. Wloch had testified that the trooper had told him that if he pleaded guilty, it would only be a \$100 fine and "that would be the end of it." Trooper Leonard told respondent that he had had no such conversation with Mr. Wloch.

8. On or about October 6, 2004, Mr. Jacobs telephoned the court to request an adjournment and spoke to respondent, who agreed to the adjournment. During the conversation, respondent told Mr. Jacobs that he had reached a decision and asked Mr. Jacobs if he wanted to know what the decision was. Mr. Jacobs responded in the affirmative. Respondent stated that he was going to find Mr. Wloch guilty. Respondent also stated that he had spoken to Trooper Leonard and that the trooper either did not recall the conversation or did not believe it took place as Mr. Wloch had testified.

9. Mr. Jacobs was concerned about respondent having spoken with a trooper who had not been called as a witness at the trial, but he did not request respondent's recusal.

10. On or about November 4, 2004, Mr. Wloch appeared before respondent and was found guilty of Harassment, Second Degree. Respondent sentenced him to a conditional discharge with a \$100 surcharge. After the verdict, respondent stated in court that he had spoken to the trooper about the alleged conversation with Mr. Wloch and that the trooper either did not

recall the conversation or recalled it differently from Mr. Wloch's testimony about it. According to Mr. Wloch and Mr. Jacobs, respondent said that he had been going to find Mr. Wloch not guilty but "because of that" conversation, he was finding Mr. Wloch guilty.

11. Mr. Wloch filed a Notice of Appeal but did not pursue the appeal.

As to Charge II of the Formal Written Complaint:

12. The charge is not sustained and therefore is dismissed.

As to Charge III of the Formal Written Complaint:

13. The charge is not sustained and therefore is dismissed.

As To Charge IV of the Formal Written Complaint:

14. Respondent engaged in an improper *ex parte* communication as set forth in the above findings notwithstanding that in 2002 he was censured for making an improper *ex parte* request of another judge for favorable treatment in a friend's case. In 1993 respondent was issued a Letter of Dismissal and Caution for discourtesy to an attorney, and in 2001 respondent was admonished for engaging in improper political activity, publicly criticizing a prosecutor, excluding an attorney from his court, and signing a judgment in a summary proceeding without following the required procedures.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(4) and 100.3(B)(6) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and IV of the Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established. Charges II and III are not sustained and therefore are dismissed.

Respondent engaged in a prohibited *ex parte* communication in a pending matter notwithstanding his previous discipline for *ex parte* activity and other misconduct. Such conduct compromised his impartiality and is inimical to the role of a judge.

It is undisputed that after respondent had reserved decision in a Harassment case, he spoke to the arresting officer concerning a matter affecting the defendant's credibility. The defendant, Daniel Wloch, had testified at the trial that a trooper had told him that the pending charge was "like a speeding ticket" and would result in a \$100 fine. Despite respondent's testimony that his purpose in speaking to the trooper was not to obtain *ex parte* information but to advise the trooper not to tell defendants about the potential outcome of a charge, it was improper for respondent to have that conversation while the case was pending; if he believed it was necessary to impart that advice, he should have done so after the case was concluded. Moreover, although Mr. Wloch's testimony about his conversation with the trooper was irrelevant to the pending charge, the trooper's response to respondent's communication – either

that he did not recall the conversation or that it did not take place as Mr. Wloch had testified – clearly affected respondent’s determination as to the defendant’s credibility. Indeed, both Mr. Wloch and his attorney testified that respondent, in disclosing his conversation with the trooper, explicitly linked the conversation with his determination of the defendant’s guilt. At the very least, respondent’s conversation with the trooper created the appearance that he had obtained, and relied upon, out-of-court unsworn information in making his decision in the case, thereby depriving the defendant of the fundamental right to confront and respond to the evidence against him. Such *ex parte* communications are contrary to well-established ethical standards (Rules Governing Judicial Conduct, §100.3[B][6]).

Respondent’s insistence that the out-of-court conversation did not influence his decision as to the defendant’s credibility is unconvincing. It is difficult to imagine how it would not influence his decision, since respondent has acknowledged that he concluded from the trooper’s statements that the defendant had lied under oath. The uncontroverted testimony that he told Mr. Wloch, after finding him guilty, of his conversation with the trooper supports the conclusion that it influenced his decision, since it is unclear why he would have referred to that conversation except to bolster his conclusion that the defendant was not credible. The patent unfairness of his reliance on the trooper’s statements is underscored by the fact that respondent may have spoken to the wrong trooper, since it is unclear whether Mr. Wloch had identified the trooper in his testimony. Most importantly, the *ex parte* conversation was improper regardless of whether respondent relied on it to convict the defendant.

We reject respondent’s argument that his “disclosure” of the *ex parte* communication on two occasions in any way minimizes the effects of his misconduct. Although respondent appropriately recognized that he was obliged to disclose the communication, it was plainly inadequate to make this disclosure by telephone while informing the defendant’s attorney that he had already decided to find the defendant guilty. Such a disclosure should have been made in court, prior to announcing his verdict, in the context of seeking the defendant’s views as to whether respondent should be disqualified because of his improper conduct. It seems clear that respondent had no intention of disqualifying himself, and the fact that the attorney did not seek his recusal in no way inures to respondent’s benefit. (Respondent’s out-of-court disclosure of his verdict raises further concern as to his understanding of the importance of avoiding *ex parte*, substantive communications in a pending matter.) Respondent’s subsequent in-court “disclosure” of the conversation, after he had rendered his verdict, obviously had nothing to do with protecting the fairness of the proceedings, but rather appears to have been a self-serving attempt to bolster his verdict by announcing why the defendant was unworthy of belief. Clearly such disclosure does not cure the adverse effects of the improper *ex parte* communication that he initiated.

We conclude, however, that respondent’s misconduct, although serious, does not rise to the level of “truly egregious” misbehavior requiring the sanction of removal. As the Court of Appeals has stated, “Removal is an extreme sanction and should be imposed only in the event of truly egregious circumstances...” *Matter of Cunningham*, 57 NY2d 270, 275 (1982); *see also*, *e.g.*, *Matter of Going*, 97 NY2d 121, 127 (2001). The evidence is uncontroverted that respondent did not seek out the trooper to investigate the defendant’s credibility, but spoke to him in a chance encounter out of court for the purpose of advising him not to tell defendants the

potential outcome of a charge. Thus, this case can be distinguished from cases involving judges who have been disciplined for repeatedly conducting *ex parte* investigations out of court. *E.g.*, *Matter of VonderHeide*, 72 NY2d 658 (1988) (judge routinely made telephone calls outside of court in order to determine the facts in pending matters, and engaged in significant additional misconduct) (removal); *see also*, *Matter of Racicot*, 1982 Annual Report 99 (judge contacted a defendant's employer, co-workers, neighbors and others to obtain information about disputed evidentiary issues) (censure); *Matter of More*, 1996 Annual Report 99 (judge initiated *ex parte* communications in several cases to discuss the pending matters) (admonition). Moreover, respondent's disclosure of the conversation to the defendant's attorney indicates that he recognized the impropriety of his *ex parte* communication and may have been an attempt to "cure" his misconduct. But for that disclosure, the episode would likely not have come to light. We also note that respondent has acknowledged the impropriety of his conduct and has pledged to avoid such misconduct in the future.<sup>[1]</sup>

This is the fourth time in a 25-year judicial career that respondent has faced disciplinary proceedings. The Court of Appeals has held that prior discipline is an aggravating factor militating in favor of a strict sanction, especially where the prior discipline was based on similar misconduct. *Matter of Rater*, 69 NY2d 208, 209-10 (1987). In 2002 respondent was censured for making an improper *ex parte* request to another judge to rescind an order of protection issued against respondent's friend (*Matter of Williams*, 2003 Annual Report 200 [Comm on Judicial Conduct]). In addition, in 1993 respondent was issued a Letter of Dismissal and Caution for discourtesy to an attorney, and in 2001 he was admonished for improper political activity and other misbehavior. In view of this disciplinary history, this decision places respondent on notice that any future ethical lapses will be viewed with appropriate severity.

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

Mr. Felder, Judge Klonick, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Harding, Mr. Jacob, Judge Konviser, Judge Peters and Judge Ruderman concur except as follows.

Judge Klonick, Judge Peters and Judge Ruderman dissent only as to Charge III and vote to sustain the charge.

Mr. Emery dissents only as to the sanction and votes that respondent be removed from office.

Dated: November 13, 2007

#### **CONCURRING OPINION BY MR. FELDER**

I concur in the majority's sanction, but arrive there at a less traveled route – one that should certainly, in my opinion, be visited more often in our Commission's journeys.

Given the respondent's position that he sought a censure – when, in my mind, the appropriate sanction in this case hovered between censure and something less – censure it is. In

explanation of the foregoing conclusion, the fact is that only one of three substantive charges was sustained, and even censure could arguably be too severe in view of the fact that single sustained charge basically involved an off-hand comment at a local fair. As the majority notes, it is undisputed that the respondent did not seek out the trooper to investigate the defendant's credibility, but spoke to him in a chance encounter for the understandable purpose of advising him not to tell defendants the potential outcome of a charge. I certainly disagree with the dissenter who would impose an even stronger punishment.

I am taken aback that missing from the Commission's rationale (and certainly that of the dissenter) is a significant consideration: life has already penalized this judge far more than our ability to do so.

The respondent has been a judge for 25 years, having been elected by his community multiple times. For his duties as a Town Court Justice, he receives \$5,400 a year, and additionally, receives \$4,200 a year for serving as a Village Justice.

For the last 39 years, the respondent has been a quadriplegic. A large portion of his life has effectively been taken away. He cannot dress himself, get out of bed without help, attend to his grooming, embrace a loved one, pick up a child, arrive at court, make his own notes when hearing cases, etc. For this individual, each day is surely filled with physical challenges – often insurmountable, sometimes humiliating – which most of us can scarcely imagine. Respondent was consigned to ride in the freight elevator of the building to arrive and leave the Commission hearing. Under the facts as presented, it troubles me that a serious effort was made by the Commission in its prosecutorial role (and endorsed by the dissenter) to take away another large portion of the respondent's life, his judicial position, based on what now appears to be no more than a single inappropriate *ex parte* comment.

It is difficult for me to accept that – in my view – in our rulings and prosecutions we do not fully allow the panoply of the human condition (other than those often rehearsed easy-to-fake emotions of remorse or contrition) to play a more prominent role in our considerations and actions as a Commission. We cannot claim to be a civilized and caring society, and yet, in our actions, not enfold into our judgments, where pertinent, the terrible burdens that others must bear in order to traverse the landscape of life.

The respondent did not seek special treatment from the Commission because of his personal hardships. No doubt he would be the first to say that he should receive no special consideration or accommodation from us, nor, indeed, has he received such treatment. But it is our obligation to be mindful that in rendering our judgments, we are dealing with far more than abstract legal concepts. We are affecting the lives of human beings and, in this case, an individual whose life gives testimony to his personal courage.

In all the papers, including the referee's Report presented to us, there is but one passing mention of respondent's condition which appears in the Memorandum of Law by his attorney. Aside from this, it is totally lacking in our analysis. Surely it, and respondent's accomplishments in the face of it, deserve recognition. If missing from our considerations is the spark of empathy that sets us apart from all others of God's creatures, our decisions are as nothing.

Respondent has acknowledged that he should not have spoken to the trooper out of court about the defendant, and his misconduct is appropriately subject to discipline. It should be noted, however, that any suggestion that he repeatedly engaged in the same misconduct and repeatedly ignored our prior disciplinary warnings is simply not supported by the record. The judge was privately cautioned in 1993 and was admonished in 2001. The following year he was censured for misconduct that predated his previous discipline. This record does not establish that he has disregarded our disciplinary warnings, especially since his misconduct in this case, in my view, is significantly different from the misconduct for which he was previously disciplined. In the earlier case, he asked another judge to rescind an order of protection after both the complaining witness and the defendant (a couple who were respondent's friends) asked him to do so. Although both matters involve a form of *ex parte* activity, in my view it is inaccurate, or certainly very misleading, to characterize it as "the same" misconduct. I also note that in this case, it appears that respondent was genuinely attempting to do the right thing when he disclosed his conversation to the defendant's attorney, which suggests that he has learned from his previous discipline. Indeed, had he not disclosed the conversation, it is likely it would never have come to light since the trooper did not even recall the conversation when questioned about it at the hearing.

I vote to censure, and present my rationale – for better or worse – as it may be received by my colleagues, in the hope that the thoughts engendered will impact on their future deliberations and considerations.

Dated: November 13, 2007

## **OPINION BY MR. EMERY DISSENTING AS TO SANCTION**

### ***INTRODUCTION***

The problem with the majority's decision to censure Judge Williams rather than remove him is that he has engaged in serious misconduct sanctioned by this Commission on three prior occasions, covering a wide variety of misbehavior including, just two years earlier, improper *ex parte* communications – the same transgression as in this case. On this, the latest occasion of his breach of judicial ethics, Judge Williams engaged in an *ex parte* conversation with a state trooper that, even though he contends otherwise, appears to have directly influenced his decision in a case that resulted in the conviction of a defendant who may well have been innocent.

In its attempt to excuse this misconduct, the majority decision oddly minimizes the seriousness of the abuse by crediting the judge for recognizing his misconduct and reporting it to defense counsel ("respondent's disclosure of the conversation to the defendant's attorney indicates that he recognized the impropriety of his *ex parte* communication") (Determination, p. 9). But the majority, virtually in the same breath, states that it "reject[s] respondent's argument that his 'disclosure' of the *ex parte* communication on two occasions in any way minimizes the effects of his misconduct" because the judge did not recuse and, instead, relied on the trooper's *ex parte* information to convict the defendant (Determination, pp. 7-8).

In fact, as the majority recognizes, it is difficult to imagine how this particular *ex parte* conversation, flatly contradicting the defendant's sworn testimony at trial, would not affect the judge's decision. As such, our unanimous conclusion that Judge Williams knew that he was engaging in judicial misconduct and that, at the very least, it appeared to affect his decision hardly mitigates his malfeasance; rather, it aggravates it dramatically.

Finally, in my view, and apparently in the majority's view (Determination, p. 7), Judge Williams plainly lied to the hearing officer and to the Commission when he addressed us in claiming that the *ex parte* conversation did not make a difference in reaching his guilty verdict. Because of these three aspects of this case, Judge Williams should be removed.

### ***DISCUSSION***

The sequence of events is accurately and specifically set forth in the majority's decision. The notable point is that Judge Williams' resolution of the underlying Harassment charge against Mr. Wloch turned on a credibility determination between him and his neighbor, the complaining witness. Obviously, this was not something the judge could decide without thinking about it carefully; after the trial he reserved decision rather than simply ruling. In the interim he "ran into" a State trooper who he believed was involved in Mr. Wloch's arrest and questioned him about what the judge plainly thought was a pertinent aspect of the case. The judge asked the trooper whether he had told Mr. Wloch, at the time of his arrest, that the charge "would only be a \$100 fine" and would be "like a speeding ticket," something Mr. Wloch had testified to at trial. The trooper responded to the judge's *ex parte* question by denying that any such conversation had taken place, thereby contradicting Mr. Wloch's sworn testimony and in essence calling his credibility starkly into question. Although the judge claims that his intent in speaking to the trooper was not to test Mr. Wloch's credibility but simply to advise the trooper not to make such statements to defendants, he must have realized that the trooper's response would either support or undermine the credibility of the defendant.

Any judge, let alone this one disciplined once before for an improper *ex parte* communication, knows that gathering *ex parte* evidence which pertains to a litigant's credibility deprives the accused of his right to cross-examine the person asserting contradictory evidence. In this case it was especially important not only because the whole case hinged on the credibility contest between the accused and the complaining witness, but also because the judge may have questioned the wrong trooper, thereby eliciting incorrect information. Moreover, there is evidence in this case that the judge stated to defense counsel and the defendant after the verdict that he would have dismissed the charges against Mr. Wloch but for his *ex parte* conversation with the trooper.

Whether this last point is true or not, the judge's insistence that he would have found Mr. Wloch guilty even if he had not talked to the trooper rings false. When I asked him at the oral argument how he could claim that his conversation with the trooper made no difference in a case that turned strictly on the credibility of the defendant especially in the circumstances here, where he had reserved decision at the time he heard the evidence, he had no rational answer. He simply insisted that the conversation "had nothing to do with" his decision "because the people had proved beyond a reasonable doubt in my mind that Mr. Wloch committed a crime of

Harassment” (Oral argument, p. 51). Yet he conceded that he had reserved his decision because “I like to think...over what was said at trial” (p. 52).

Nonetheless, apparently, some of my fellow commissioners have been swayed in the judge’s favor at least partly by the failure of defense counsel to seek recusal of the judge. There is no dispute that the judge related to defense counsel – in a separate uncharged *ex parte* telephone conversation before the verdict was announced – his version of the conversation with the trooper. How the fact that defense counsel did not seek the judge’s recusal after this conversation mitigates the judge’s misconduct in any way eludes me. Defense counsel may not have served his client effectively by not making a motion for recusal, perhaps because he feared the wrath of a judge he practiced before regularly. But nothing about his failure to act mitigates the judge’s prejudicial resort to *ex parte* evidence and his own failure to recuse, especially after being disciplined for similar misconduct just two years earlier. As the majority concedes, the judge’s “disclosure” was plainly not to alert defense counsel to seek the judge’s disqualification since, in the same conversation, the judge told the attorney that he intended to find the defendant guilty. Thus, the fact that the judge “appropriately recognized that he was obliged to disclose the communication” (Determination, p. 8) is meaningless. This point, recognized by the majority, brings into sharp focus that this judge does not learn. The failure of a defense attorney to teach him is no excuse.

The judicial robes are not a right; they are perhaps the ultimate privilege that the voters and the state bestow on an exalted class of men and women whose judgment and integrity should be beyond reproach. This is not baseball where, even if it were, three strikes would send you back to the dugout. The behavior of this judge in this case is inexcusable, and it is grossly exacerbated in the context of his persistent prior discipline. Put simply, he does not understand his responsibilities and the limits on his authority. In colloquial terms, he “doesn’t get it” and he never will. As a repeat offender who has demonstrated that he is unable or unwilling to recognize and avoid misconduct, he is a danger to the public who trusts us “to safeguard the Bench from unfit incumbent[ ] [judges]” (*Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [111] [Ct. on the Judiciary 1975]). Regrettably, we have not warranted that trust in this case.<sup>[2]</sup>

Dated: November 13, 2007

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<sup>[1]</sup> We are compelled to note that, in reaching its conclusions, the concurrence inappropriately relies on matters not in the record regarding Judge Williams’ personal life.

<sup>[2]</sup> I agree with the majority’s footnote pointing out that Mr. Felder’s concurrence, which attempts to mitigate Judge Williams’ misconduct because of his disability, has no basis in the record before us (Determination, p. 9). The problem with Mr. Felder’s sympathetic exposition on the daily life of Judge Williams is that, apparently, Judge Williams either does not view his life in the same way as Mr. Felder or, more to the point, does not consider his disability an appropriate basis for mitigation in his case. I assume that if he did, his able counsel would have offered evidence to support such a claim.

We are required to limit our review of mitigation evidence to those factors that are probative of a judge's proclivity to repeat misconduct. Nothing that I can think of about Judge Williams' disability informs us on that point. If he is to be credited in this case, it should be for not playing that card. Regrettably, Mr. Felder has inappropriately chosen to play that card for him.

# **Statistical Analysis of Complaints**



**2008 Annual Report**  
**New York State**  
**Commission on Judicial Conduct**



**COMPLAINTS PENDING AS OF DECEMBER 31, 2006**

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>								
<i>NON-JUDGES</i>								
<i>DEMEANOR</i>		21	34	2	1	11	7	76
<i>DELAYS</i>		3	6	2	0	1	3	15
<i>CONFLICT OF INTEREST</i>		12	9	2	1	0	0	24
<i>BIAS</i>		5	4	0	0	0	4	13
<i>CORRUPTION</i>		6	1	2	0	1	1	11
<i>INTOXICATION</i>		0	2	0	0	0	0	2
<i>DISABILITY/QUALIFICATIONS</i>		0	0	0	0	0	0	0
<i>POLITICAL ACTIVITY</i>		10	4	6	1	2	1	24
<i>FINANCES/RECORDS/TRAINING</i>		5	6	1	1	0	3	16
<i>TICKET-FIXING</i>		4	4	0	0	1	0	9
<i>ASSERTION OF INFLUENCE</i>		9	6	2	3	0	1	21
<i>VIOLATION OF RIGHTS</i>		23	23	6	0	4	5	61
<i>MISCELLANEOUS</i>		0	2	0	1	0	0	3
<b>TOTALS</b>		98	101	23	8	20	25	275

\*Matters are “closed” upon vacancy of office for reasons other than resignation. “Action” includes determinations of admonition, censure and removal from office by the Commission since its inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by the temporary and former commissions on judicial conduct operating from 1975 to 1978.

## NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 2007

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	941							941
<i>NON-JUDGES</i>	307							307
<i>DEMEANOR</i>	113	34	8	0	1	3	0	159
<i>DELAYS</i>	35	11	7	0	0	0	0	53
<i>CONFLICT OF INTEREST</i>	26	13	3	0	1	0	0	43
<i>BIAS</i>	15	3	2	0	0	0	0	20
<i>CORRUPTION</i>	19	2	0	0	1	0	0	22
<i>INTOXICATION</i>	2	1	0	0	0	0	0	3
<i>DISABILITY/QUALIFICATIONS</i>	2	2	0	0	1	3	0	8
<i>POLITICAL ACTIVITY</i>	11	15	1	0	0	0	0	27
<i>FINANCES/RECORDS/TRAINING</i>	10	13	0	1	0	0	0	24
<i>TICKET-FIXING</i>	0	5	2	0	0	0	0	7
<i>ASSERTION OF INFLUENCE</i>	15	10	2	0	0	1	0	28
<i>VIOLATION OF RIGHTS</i>	10	29	6	4	0	1	0	50
<i>MISCELLANEOUS</i>	13	2	4	0	0	0	0	19
<b>TOTALS</b>	1519	140	35	5	4	8	0	1711

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**ALL COMPLAINTS CONSIDERED IN 2007: 1711 NEW & 275 PENDING FROM 2006**

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	941							941
<i>NON-JUDGES</i>	307							307
<i>DEMEANOR</i>	113	55	42	2	2	14	7	235
<i>DELAYS</i>	35	14	13	2	0	1	3	68
<i>CONFLICT OF INTEREST</i>	26	25	12	2	2	0	0	67
<i>BIAS</i>	15	8	6	0	0	0	4	33
<i>CORRUPTION</i>	19	8	1	2	1	1	1	33
<i>INTOXICATION</i>	2	1	2	0	0	0	0	5
<i>DISABILITY/QUALIFICATIONS</i>	2	2	0	0	0	3	0	7
<i>POLITICAL ACTIVITY</i>	11	25	5	6	2	2	1	52
<i>FINANCES/RECORDS/TRAINING</i>	10	18	6	2	1	0	3	40
<i>TICKET-FIXING</i>	0	9	6	0	0	1	0	16
<i>ASSERTION OF INFLUENCE</i>	15	19	8	2	3	1	1	49
<i>VIOLATION OF RIGHTS</i>	10	52	29	10	0	5	5	111
<i>MISCELLANEOUS</i>	13	2	6	0	1	0	0	22
<b>TOTALS</b>	1519	238	136	28	12	28	25	1986

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## ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	14,679							14,679
<i>NON-JUDGES</i>	4646							4646
<i>DEMEANOR</i>	3069	55	1083	302	109	105	234	4957
<i>DELAYS</i>	1241	14	147	72	27	15	21	1537
<i>CONFLICT OF INTEREST</i>	612	25	426	146	48	22	116	1395
<i>BIAS</i>	1799	8	247	54	27	18	30	2183
<i>CORRUPTION</i>	419	8	102	13	36	20	34	632
<i>INTOXICATION</i>	53	1	35	7	9	3	25	133
<i>DISABILITY/QUALIFICATIONS</i>	55	2	31	2	16	14	6	126
<i>POLITICAL ACTIVITY</i>	291	25	250	165	13	21	40	805
<i>FINANCES/RECORDS/TRAINING</i>	250	18	260	175	118	83	96	1000
<i>TICKET-FIXING</i>	23	9	80	158	40	62	163	535
<i>ASSERTION OF INFLUENCE</i>	178	19	131	65	16	8	55	472
<i>VIOLATION OF RIGHTS</i>	2402	52	405	185	78	42	74	3238
<i>MISCELLANEOUS</i>	747	2	241	80	29	40	57	1196
<b>TOTALS</b>	30,464	238	3438	1424	566	453	951	37,534

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