STATE OF NEW YORK
COUNTY OF ONONDAGA SUPREME COURT

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In the Matter of the Application of
JOHN DOE,

Petitioner,

-against-

**MEMORANDUM OF LAW**

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

Index No. 2011-421

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

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## PRELIMINARY STATEMENT

This Memorandum is respectfully submitted to the Supreme Court of Onondaga County in opposition to petitioner's Article 78 petition seeking a writ of prohibition.

Petitioner's argument that the Commission lacks jurisdiction in this matter is unfounded. Constitutional and statutory provisions, prevailing case law and recent Commission decisions all make clear that the Commission has jurisdiction to make a finding of misconduct and impose sanctions upon petitioner for the conduct alleged in the Formal Written Complaint.

Petitioner's repeated and persistent imposition of fines that failed to comply with either maximum or minimum limits established by New York State law, in over 900 cases over 29 months, constitutes a serious adjudicative and administrative failure that is well within the Commission's power to investigate and adjudicate.

## PROCEDURAL HISTORY

Petitioner has been a Justice of the Salina Town Court since 1994, and an attorney admitted to the practice of law in New York since 1983.

On or about June 18, 2008, the Commission authorized investigation of a complaint alleging that petitioner imposed fines in traffic cases that failed to comply with the requirements of New York State law.

On or about June 11, 2009, petitioner provided testimony concerning the Commission's investigation.

Petitioner was served with a Formal Written Complaint dated May 20, 2010, containing four charges. The Complaint alleges that over a 29-month period, petitioner directly and through his failure to properly supervise his court clerks, imposed fines and surcharges in 791 traffic cases that exceeded the maximum amounts set by New York State law (Charges I and II). The fines imposed by petitioner's court in these cases exceeded the amount permitted by law by a total of $13,451.

The Complaint further alleges that in an additional 150 cases, petitioner directly and through his failure to properly supervise his court clerks, imposed fines and surcharges that were below the minimum amounts required by New York State law (Charges III and IV). The fines imposed by petitioner's court in these cases were below the statutory minimum by a total of $6,404.

Petitioner filed a verified Answer dated June 24, 2010, in which he denied knowledge or information sufficient to form a belief as to the truth of the majority of

factual allegations contained in the Complaint. Petitioner's Answer raised five affirmative defenses:

- the Complaint fails to state a cause of action;
- the Commission lacks subject matter jurisdiction and any existent administrative failures are the sole responsibility of the New York State Office of Court Administration;
- the Commission lacks subject matter jurisdiction and any actual illegal sentences imposed are the sole responsibility of the Appellate Courts of the State of New York;
- the Commission failed to allege any facts which constitute a violation of Judiciary Law § 44; and
- case law establishes that petitioner's alleged conduct is not actionable by the Commission.

## POINT I

### PETITIONER IS NOT ENTITLED TO A WRIT OF PROHIBITION BECAUSE HE CANNOT DEMONSTRATE A "CLEAR LEGAL RIGHT" TO RELIEF AND BECAUSE HE HAS AN ADEQUATE REMEDY BY WAY OF DIRECT REVIEW IN THE COURT OF APPEALS.

As the Court of Appeals held in Matter of Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597 (1980), prohibition is an extraordinary remedy that is available

> "only when there is a clear legal right" ... and only when the body or officer "acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction" ... .

Nicholson at 605-06 (citations omitted); see also Matter of Dondi v. Jones, 40 NY2d 8,

13 (1976); Matter of Van Wie v. Kirk, 244 AD2d 13, 24 (4th Dept 1998); Spargo v. New York Commission on Judicial Conduct, et al., 23 AD3d 808 (3rd Dept. 2005).

Prohibition does not lie in the circumstances here, where constitutional and statutory provisions, prevailing case law and recent Commission decisions all make clear that the Commission has jurisdiction to make a finding of misconduct and impose sanctions upon petitioner for the conduct alleged in the Formal Written Complaint.

Nor has petitioner made a credible showing that the Commission is so exceeding its jurisdiction "as to implicate the legality of the *entire* proceeding" against petitioner. Matter of Rush v. Mordue, 68 NY2d 348, 353 (1986) (emphasis added). As is set forth more fully below, pp.. 5-12, it is clearly within the jurisdiction of the Commission to investigate allegations of misconduct committed by judges of the Unified Court System. Because the Commission is acting within its lawful jurisdiction, prohibition will not lie. Matter of Roberts v. County Court of Wyoming County, 34 NY2d 246 (1974).

In addition, prohibition does not lie because petitioner has an adequate alternative remedy by way of direct review by the Court of Appeals. It is well-settled that

> Even when the petition presents a "substantial claim" of an absence of jurisdiction or an act in excess of jurisdiction, prohibition still may be deemed inappropriate after consideration of such factors as ... whether the excess of power can be adequately corrected on appeal or by other ordinary proceedings at law or in equity."

Nicholson at 605-06. Courts have routinely denied applications for a writ of prohibition where petitioners failed to demonstrate that their rights "could not be safeguarded through alternative remedies." Matter of Koziol v. Walsh-Hood, 72 AD3d 1634 (4th Dept 2010). *See also* Matter of Roberts v. County Court of Wyoming County, 34 NY2d 246,

248 (1974)("unseemliness" of granting writ of prohibition "aggravated by the availability of an appeal.").

Here, the Judiciary Law provides that any judge who is the subject of public discipline by the Commission is entitled to review as of right in the Court of Appeals. Judiciary Law § 44(7). Because petitioner's claim that the Commission is acting outside its jurisdiction may be raised on direct review in the Court of Appeals – in the same manner that similar claims were raised in Matter of Gilpatric, 12 NY3d 586 (2009) and Matter of Greenfield, 76 NY2d 293 (1990) – a writ of prohibition does not lie.

Petitioner has failed to establish a clear legal right to the relief requested and his claims may be adequately addressed on direct review. Accordingly, the petition should be dismissed.

## POINT II

### CONSTITUTIONAL AND STATUTORY PROVISIONS, PREVAILING CASE LAW AND RECENT COMMISSION DECISIONS ALL MAKE CLEAR THAT THE COMMISSION HAS JURISDICTION IN THIS CASE.

Petitioner's argument that the Commission lacks jurisdiction in this matter is unfounded. Constitutional and statutory provisions, prevailing case law and recent Commission decisions all make clear that the Commission has jurisdiction to make a finding of misconduct and impose sanctions upon petitioner for the conduct alleged in the Formal Written Complaint.

Contrary to petitioner's argument, the Commission's adjudication of the charges set forth in the Formal Written Complaint does not usurp or impair the powers of the

appellate courts. The Court of Appeals has held in numerous cases over the past 25 years that legal error can be misconduct subject to the Commission's jurisdiction. Indeed, the Court has accepted the Commission's determination to discipline judges in cases where legal errors were "fundamental" and "repeated."

Finally, the Court of Appeals' decisions in Matter of Gilpatric, 12 NY3d 586 (2009), Matter of Greenfield, 76 NY2d 293 (1990) and Matter of Bauer, 3 NY3d 158 (2004) do not divest the Commission of jurisdiction in this case. To the contrary, each of these decisions, to the extent they are applicable, reaffirms that the Commission is well within its authority to adjudicate the charges of judicial misconduct set forth in the Formal Written Complaint.

### A. The Constitution, the Judiciary Law and the Rules Empower the Commission to Investigate Serious Adjudicative and Administrative Failures of Judges and to Impose Discipline in Appropriate Cases.

"The question of subject matter jurisdiction is a question of ... power: whether the [Commission] has the power, conferred by the Constitution or statute, to entertain the case before it." Fry v. Village of Tarrytown, 89 NY2d 714, 718 (1997). Thus, the question on this motion is not whether the petitioner has committed judicial misconduct – the question is whether the Commission has the power to determine, after hearing and upon a full record, whether misconduct has occurred.

Here, the New York State Constitution and the Judiciary Law empower the Commission to investigate and determine that a judge or justice of the Unified Court System be disciplined for "misconduct in office," "persistent failure to perform his duties" and "conduct ... prejudicial to the administration of justice." NY Const, Art VI,

§ 22 (a), Judiciary Law § 44(1). These constitutional and statutory provisions have been further defined in the Rules of the Chief Administrator of the Courts Governing Judicial Conduct (22 NYCRR § 100 *et seq.*) ("Rules"). Those Rules, *inter alia*, specifically require a judge to:

- "participate in establishing, maintaining and enforcing high standards of conduct" § 100.1;
- "respect and comply with the law" § 100.2(A);
- "be faithful to the law and maintain professional competence in it" § 100.3(B)(1);
- "maintain professional competence in judicial administration" § 100.3(C)(1); and
- "require staff, court officials and others subject to the judge's direction and control to observe the same standards of fidelity and diligence that apply to the judge" §100.3(C)(2).

The allegations that, in 579 cases, petitioner personally imposed fines that were above or below the amounts permitted by law (Charges I and III) clearly state a failure to "comply with the law," to "be faithful to the law," and "maintain professional competence in it." The allegations that, in 362 cases, petitioner permitted his clerks to impose fines that were above or below the amounts permitted by law (Charges II and IV) implicate those same provisions and additionally state a failure to "maintain professional competence in judicial administration" and to "require staff ... to observe the same standards of fidelity and diligence that apply to the judge." Because the allegations set forth in the Formal Written Complaint fall squarely within the constitutional, statutory

and regulatory powers conferred on the Commission, petitioner's application for a writ of prohibition should be denied.

**B. Legal Error and Judicial Misconduct Are Not Mutually Exclusive.**

Petitioner's argument that the Commission is attempting to "act as a super appellate court" with "free hand to prosecute any judge who is foolish enough to make a decision that is not favored by the Commission" (Petition ¶ 28) is entirely without merit. The fact that petitioner's failure to follow the law in hundreds of cases might have been addressed by individual litigants on appeal does divest the Commission of jurisdiction over that same conduct.

Indeed, the Court of Appeals has long held that legal error and judicial misconduct are "not necessarily mutually exclusive; a pattern of fundamental legal error may be 'serious misconduct'" subject to Commission sanction. Matter of Jung, 11 NY3d 365, 373 (2008) *citing* Matter of Reeves, 63 NY2d 105 (1984).

In Matter of Feinberg, 5 NY3d 206 (2005), the Court of Appeals accepted the Commission's removal of judge who failed to follow statutory provisions regarding the award of counsel fees in estate matters. The Court noted that judges have an obligation to "maintain professional competence in the law (22 NYCRR § 100.3 [B][1])," Id. at 214, and found that the judge's "consistent disregard for fundamental statutory requirements of office demonstrates an unacceptable incompetence in the law." Id. at 215. That language could easily be applied to petitioner's conduct here, where the Formal Written Complaint alleges that his court imposed fines that were above or below the amounts permitted by law in 941 cases.

The Feinberg Court specifically rejected the judge's argument that his conduct was mere "legal error," holding that "a judge's systematic failure to conform to legal requirements may form the basis for removal." Matter of Feinberg, 5 NY3d at 215 *citing* Matter of Bauer, 3 NY3d 158 (2004).

Petitioner has been a lawyer since 1983 and a judge since 1994. Through his education, training and experience, petitioner should have been well acquainted with sentences authorized by the Vehicle and Traffic Law (VTL). Imposing punishment for convictions in traffic cases is an integral part of petitioner's responsibilities, and he had a duty to know the sentences authorized by law. In this matter, petitioner is alleged to have repeatedly, in over 900 instances, over 29 months, imposed sentences that were not permitted by New York State law. As in Feinberg, petitioner had "an obligation to familiarize himself with contents of [the] legislation" governing practice in his court. Matter of Feinberg, 5 NY3d at 214 (2005). The Commission has full authority to determine whether his failure to comply with that legislation was misconduct.

### C. The Decisions in Matter of Gilpatric, Matter of Greenfield and Matter of Bauer Do Not Divest the Commission Of Jurisdiction Over This Matter.

Contrary to petitioner's claims, the decisions in Matter of Gilpatric, 12 NY3d 586 (2009), Matter of Greenfield, 76 NY2d 293 (1990), and Matter of Bauer, 3 NY3d 158 (2004) do not support the proposition that petitioner's alleged conduct is beyond the Commission's jurisdiction. (Petition ¶¶ 20-26, 45). To the contrary, these decisions compel the dismissal of petitioner's petition.

At the outset, petitioner's gratuitous and unsubstantiated allegations upon "information and belief," interpreting the cases cited should not be considered. The mere fact that petitioner feels it necessary to qualify his flawed and inaccurate interpretations of Court of Appeals' precedent as made "on information and belief" is the best evidence that he cannot show a clear legal right to a writ of prohibition.

Petitioner's reliance on Matter of Bauer (Petition ¶ 45) is particularly puzzling. While petitioner is free to cite language from the Bauer dissent, he is not free to ignore the fact that the majority opinion is the binding precedent in the case. That majority opinion quite clearly holds that the imposition of illegal sentences can be misconduct.

In Bauer, the Commission removed a judge because, among other things,

> [i]n numerous cases he set exorbitant, punitive bail for defendants charged with misdemeanors and violations ... [and] imposed illegal sentences in four marijuana cases.

Matter of Bauer, 2005 Ann. Rep. 85 (Comm. on Jud. Conduct, March 30, 2004), 2004 WL 823744 (emphasis added).[1] The Court of Appeals quoted that language and found that "[t]he charges ... [were] fully borne out by the record." Matter of Bauer, 3 NY3d at 162. Thus, the majority opinion in Bauer holds that the imposition of illegal sentences and the discretionary imposition of excessive bail can be acts of judicial misconduct subject to the Commission's jurisdiction. As a result, petitioner's petition should be denied.

Petitioner's citations to Matter of Gilpatric, 12 NY3d 586 (2009) and Matter of Greenfield, 76 NY2d 293 (1990) are also unavailing.

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1. Commission determinations are available online at www.scjc.state.ny.us.

Matter of Gilpatric is wholly inapplicable to the conduct charged in this case. Gilpatric narrowly deals with one specific form of judicial misconduct that is not alleged in this case – "lengthy, inexcusable delays" in rendering decisions. Gilpatric, 12 NY3d at 590. The case does not address "administrative" failures generally; in fact, unlike this case, Rule 100.3(C) (Administrative Responsibilities) was not included in the Gilpatric charges.

Moreover, even if Gilpatric were somehow applicable, the holding in that case does not support petitioner's motion. Gilpatric squarely holds that "the Commission has jurisdiction to investigate complaints involving delay," Id. at 590, and directs the Commission to explore "the context" in which the conduct occurred. Id. Thus, to the extent the Gilpatric holding is at all relevant to this case, it supports the Commission's position that it has jurisdiction. If petitioner believes his conduct is analogous to the conduct sanctioned in Gilpatric, it logically follows that the Commission has jurisdiction and petitioner's application for a writ of prohibition must be denied.

Moreover, petitioner's description of his conduct as "mere administrative failures" (Petition ¶ 27) mischaracterizes the Formal Written Complaint. Charges I and III allege that petitioner himself imposed fines not authorized by law in 579 cases. The charges go to the illegality of the sentence imposed. It is axiomatic that the imposition of a sentence is a "uniquely judicial responsibility." People v. Sparber, 10 NY3d 457, 470 (2008). There is nothing "administrative" about imposing a sentence that is not authorized by law.

For these same reasons, petitioner's reliance on Matter of Greenfield (Petition ¶¶ 20-21) is similarly misplaced. Respondent notes that the Gilpatric Court explicitly held that the Greenfield analysis was no longer "workable." Gilpatric, 12 NY3d at 589.

Finally, petitioner's argument that a judge's "mere administrative failures" cannot be the subject of Commission discipline overlooks the Court of Appeals decision in Matter of Corning, 95 NY2d 450 (2000). In Corning, the Court accepted the Commission's removal of a judge who, among other things, "neglected the administrative requirement that he deposit funds promptly in his court account." Corning, 95 NY2d at 452. The Court held that the judge's conduct violated Rule 100.3(C)(1), which requires a judge to "diligently discharge ... administrative responsibilities" and "maintain professional competence in judicial administration." Petitioner is charged with violation of that same Rule in Charges II and IV of the Formal Written Complaint. The Commission clearly has jurisdiction to determine whether the charged misconduct occurred.

## POINT III

### THE FACT THAT THE FORMAL WRITTEN COMPLAINT IS WELL-GROUNDED IN COMMISSION PRECEDENT IS FURTHER EVIDENCE OF THE COMMISSION'S JURISDICTION.

The charges in the Formal Written Complaint are well-grounded in Commission precedent. The fact that the Commission has repeatedly publicly sanction judges for conduct identical to the conduct alleged in the Formal Written Complaint is further evidence that the Commission has jurisdiction.

**A. The Commission Has Previously Disciplined Judges For Imposing Illegal Sentences in Traffic Cases.**

The Commission has publicly disciplined numerous judges for imposing fines that exceeded the maximum amount authorized by law. *See* Matter of Banks, 2010 Ann. Rep. 100 (Comm. on Jud. Conduct, July 16, 2009), 2009 WL 2400327; Matter of Pisaturo, 2006 Ann. Rep. 228 (Comm. on Jud. Conduct, November 18, 2005), 2005 WL 5727956; Matter of Reid, 2003 Ann. Rep. 160 (Comm. on Jud Conduct, May 17, 2002), 2002 WL 1173488.

In Matter of Banks, the Commission concluded that the judge violated the Rules when he imposed fines in excess of the maximum amount authorized by law in 209 cases. The Commission found that:

> [w]hile it has been stipulated that respondent *acted unintentionally* in imposing fines in amounts that exceeded the legal maximum, his conduct was harmful to individual defendants and creates at least an appearance that he was imposing excessive amounts in order to increase the town's revenues.

Banks, 2010 Ann. Rep. at 102-103)(emphasis added). *See also* Matter of Reid, 2003 Ann. Rep. 160 (judge imposed excessive fines based on "mistaken" belief as to statutory authority).

Similarly, in Matter of Pisaturo, 2006 Ann. Rep. 228, the judge imposed fines in excess of the maximum amounts authorized by New York State law in over 700 traffic cases. The Commission found that although the judge there acted "mistakenly" (Pisaturo at 229), it is "the responsibility of every judge to 'respect and comply with the law,' to be

faithful to the law and to maintain professional competence in it (Sections 100.2[A] and 100.3[B][1] of the Rules Governing Judicial Conduct)" (Pisaturo at 230).

In this matter, petitioner certainly should have known, and was required by law to know, the maximum and minimum fines he was legally permitted to impose. His systematic failure to either know or abide by the law constituted an ongoing and persistent violation of his obligation under the Rules to administer his court properly and to respect and comply with the law and maintain judicial competence in it.

### B. The Commission Has Previously Disciplined Judges For Failing to Supervise Court Clerks Adequately.

The Commission has repeatedly and consistently disciplined judges for serious administrative failures, including the failure to exercise supervisory vigilance over court staff. As the Commission held in Matter of Ridgeway, 2010 Ann. Rep. 205 (Comm. on Jud Conduct, December 15, 2009), 2009 WL 5212135,

> a judge is required to exercise supervisory vigilance over court staff to ensure the proper performance of these responsibilities" which must be executed "in strict compliance with the statutory mandates...to ensure public confidence in the integrity of the judiciary.

*Id.* at 209. *See also* Matter of Roller, 2009 Annual Report 165 (Comm. on Jud. Conduct, July 7, 2008), 2008 WL 4415141; Matter of Brooks, 2008 Annual Report 116 (Comm. on Jud. Conduct, November 7, 2007), 2007 WL 5541890; Matter of Cavotta, 2008 Annual Report 107 (Comm. on Jud. Conduct, July 19, 2007), 2007 WL 2505974; Matter of Burin, 2008 Annual Report 97 (Comm. on Jud. Conduct, March 16, 2007), 2007 WL 2505973; Matter of Jarosz, 2004 Annual Report 116 (Comm. on Jud. Conduct, May 28,

2003), 2003 WL 21371555; Matter of Restino, 2002 Annual Report 145 (Comm. on Jud. Conduct, November 19, 2001), 2001 WL 1801190.

## POINT IV

## PETITIONER MISAPPREHENDS THE COMMISSION'S MANDATE.

The Commission on Judicial Conduct was established by the state Constitution and empowered with the specific duties to "receive, initiate, investigate and hear complaints" of misconduct against judges of the state unified court system and, when appropriate, "determine that a judge or justice be admonished, censured or removed from office" (NY Const, Art VI, § 22 [a]). The Commission does not provide legal advice or issue advisory opinions, nor does it intervene in court administration.

As a result, petitioner's argument that Commission staff should have given "contact[ed] petitioner or his court to correct the obvious error" (Petition ¶¶ 33; 35) is without merit. Indeed, it undercuts his primary argument that the Commission lacks jurisdiction in this matter. Petitioner cannot logically argue that the Commission has authority to inquire and advise him about, but not inquire and adjudicate, the charges against him. In any event, as noted below, there are entities of the court system that he could have consulted for advice. It does not invalidate this Complaint that he failed to do so.

## POINT V

### PETITIONER IS NOT ENTITLED TO HAVE THE RECORD OF THIS PROCEEDING SEALED

There is a strong presumption in favor of public access to court proceedings as a matter of public policy. Matter of Westchester Rockland Newspapers v. Leggett, 48 NY2d 430, 437-438 (1979). Section 4 of the Judiciary Law states that the "sittings of every court within this state shall be public," with limited exceptions inapplicable here. The Uniform Rules for Trial Courts states: "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as the parties." 22 NYCRR § 216.1(a). "Confidentiality is clearly the exception, not the rule." In re Will of Hoffman, 284 AD2d 92, 93-94 (1st Dept. 2001).

Most significantly, for purposes of this Court's analysis, the Court of Appeals has specifically rejected the sealing of records where the Commission is subjected to an Article 78 proceeding, holding that the strict rules of confidentiality imposed on the Commission by Judiciary Law §§ 44 and 45 "appl[y] only to matters before the commission," not to matters before a court. Nicholson, 50 NY2d at 612-13.2. This Court

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2. In fact, the captions of the following cases reveal that most Article 78 proceedings involving the Commission have been public proceedings. *Compare* Spargo v. New York State Commission on Judicial

should follow the precedent set forth in Nicholson and unseal the record of this proceeding.

Petitioner has shown no reasonable basis for making an extraordinary exception to the Nicholson doctrine in this case. As Justice Madden held when denying a similar application from a judge seeking to seal her Article 78 petition for a writ of prohibition against the Commission, "[t]he investigation of a judge necessarily implicates the integrity of public confidence in the judiciary, and is a matter of legitimate public concern." Shelton v. New York State Commission on Judicial Conduct, Sup Ct, New York County, February 8, 2007, Index No. 118283/06 at 17 (unreported decision, attached hereto).

## POINT IV

## THE TEMPORARY RESTRAINING ORDER SHOULD BE VACATED

By Order of this Court dated February 7, 2011, respondent was temporarily restrained from taking further action against petitioner. Respondent contends that the temporary restraining order should be vacated and respectfully requests the Court deny

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Conduct, 23 AD3d 808 (3d Dept 2005); Saferstein v. New York State Commission on Judicial Conduct, 298 AD2d 589 (2d Dept 2002); Sassower v. Commission on Judicial Conduct, 289 AD2d 119 (1st Dept 2001); Mantell v. New York State Commission on Judicial Conduct, 277 AD2d 96 (1st Dept 2000); Montaneli v. New York State Commission on Judicial Conduct, 133 Misc 2d 526 (Sup Ct NY County 1986); Wilk v. New York State Commission on Judicial Conduct, 97 AD2d 716 (1st Dept 1983); Sims v. New York State Commission on Judicial Conduct, 94 AD2d 946 (4th Dept 1983); Richter v. State Commission on Judicial Conduct, 85 AD2d 790 (3d Dept 1981); Darrigo v. State Commission on Judicial Conduct, 74 AD2d 801 (1st Dept 1980); Raysor v. Stern, 68 AD2d 786 (4th Dept 1979); *Matter of Owen*, 413 NYS2d 815 (NY Ct Jud, May 4, 1978) *with* Doe v. Commission on Judicial Conduct, 246 AD2d 409 (1st Dept 1998); Doe v. State Commission On Judicial Conduct, 137 Misc 2d 268 (Sup Ct NY County 1987); Doe v. Commission on Judicial Conduct, 124 AD2d 1067 (4th Dept 1986); Anonymous Town Justice v. State Commission on Judicial Conduct, 96 Misc 2d 541(Sup Ct NY County 1978); Cunningham ex rel. Unnamed Town and Village Justices of Erie County v. Stern, 93 Misc 2d 516 (Sup Ct NY County 1978).

petitioner's request for a permanent order enjoining and restraining the respondent from taking action.

Petitioner has not shown "the likelihood of ultimate success on the merits, irreparable injury absent a grant of injunctive relief and a balancing of the equities" in his favor. Little India Stores, Inc., v. Singh, 101 AD2d 727, 728 (1st Dept 1984). Failure to establish *any* of the three prongs of this test warrants denial of the application. Doe v. Axelrod, 73 NY2d 748, 750-751 (1988); Clark v. Cuomo, 103 AD2d 244 (3rd Dept.1984), *aff'd* 63 NY2d 96 (1984). *See also* Aetna Insurance Comp. v. Capasso, 75 NY2d 860 (1990). This Court should vacate the restraining order so that the Commission may continue its lawful proceedings.

As set forth above, petitioner has failed to establish any likelihood of ultimate success on the merits of his petition. The failure to satisfy this prong of the test for injunctive relief should mandate a vacatur of the restraining order.

Petitioner has not shown that he will suffer irreparable injury absent a stay. Rather, petitioner has not made any allegation as to what, if any, irreparable injury he may suffer.

Permitting further delay will undermine the strong public policy of resolving disciplinary complaints promptly and efficiently and curtail the Commission's role as the "instrument through which the State seeks to insure the integrity of its judiciary." New York State Commission on Judicial Conduct v. Doe, 61 NY2d 56 (1984). The equities here favor the Commission and the public in whose name it operates.

DATED: February 18, 2011
Syracuse, New York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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In the Matter of the Application of
MARIAN R. SHELTON,

INDEX NO. 118283/06

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules §7803(2)

-against-

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

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JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Marian R. Shelton, Judge of the Family Court of the State of New York, seeks a judgment pursuant to CPLR 7803(2) declaring that respondent New York State Commission on Judicial Conduct (the "Commission") is proceeding in excess of its jurisdiction in connection with its investigation of certain matters regarding Judge Shelton. Petitioner also seeks an order enjoining the Commission from continuing with its investigations. Specifically, petitioner challenges certain aspects of the investigation where she alleges the Commission has inquired about conduct in the absence of either a signed complaint or a complaint specific to such conduct, and that the subject matter of certain complaints involving internal court administration and operations, is outside the Commission's jurisdiction. Petitioner also challenges other aspects of the investigation into conduct relating to two matters on the grounds that they involve cases pending before her, and that certain complaints are from

organizations biased against her, and that in certain instances the Commission has not been neutral and impartial. Petitioner further seeks an order pursuant to section 216.1 of the Uniform Rules for the Trial Courts of the State of New York, sealing all documents in and related to this proceeding.

The complaints before the Commission, with one exception, involve allegations that in certain Family Court proceedings, petitioner was disrespectful, discourteous or made disparaging remarks to litigants, attorneys, judges, court officers or others who appeared before her. The complaints allege, *inter alia*, that petitioner made disparaging remarks about the credibility of PH, a litigant in a paternity proceeding[1]; the mental health of litigants RM, a party to a family offense petition and DS, a litigant in a custody case, and the law guardian in the PH proceeding; the appearance of DS; the morality of FB, a litigant in a paternity proceeding; and the accent of an attorney associated with the Legal Aid Society who petitioner allegedly ordered to leave her courtroom on baseless grounds. The remaining complaints involve similar conduct and allege that petitioner was rude and demeaning in her interaction with court officers, was discourteous in the courtroom to two fellow judges and held the spouse of a court clerk in contempt. The final complaint alleges that petitioner refused to preside in the intake part due to the reassignment of a court officer from her courtroom. In addition to the foregoing complaints, by letter dated October 31, 2006, the Commission informed petitioner that it intended to inquire about two additional matters reflected in the transcripts of Family Court proceedings involving two litigants, "S" and "R".

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[1]As these are Family Court proceedings, the names of the individuals involved have been redacted in the record and are reflected by initials.

Petitioner challenges the investigation as to the law guardian, the attorney, the court officers, the matter involving FB, and those based on the S and R transcripts, on the ground that no complaints were signed by the individual litigants, law guardian, attorney or individual court officers. Additionally, petitioner challenges the Commission's jurisdiction regarding the court officers, alleging that court officers are not encompassed within the purview of Canon 3 of the Code of Judicial Conduct and section 100.3(B)(3) of the Rules Governing Judicial Conduct, which require a judge to be "patient, dignified and courteous" to those she "deals with in an official capacity." Code of Judicial Conduct, Cannon 3(B)(3); 22 NYCRR §100.3(B)(3). Petitioner also challenges the complaints involving the court officers, her fellow judges and her failure to fulfill an assignment on the ground that these relate to matters of internal court administration which are not within the ambit of the Commission's jurisdiction. Regarding the FB complaint and the matter involving the S transcript, petitioner argues that they involves cases pending before her, which should not be considered by the Commission as it encroaches on the independence of the judiciary.

In opposing the petition, the Commission asserts that the investigation of petitioner is within the scope of its jurisdiction set forth in Article 6, Section 22(a) of the New York State Constitution and Article 2-A of the Judiciary Law. Specifically, the Commission argues that the complaints at issue in this proceeding allege similar acts of judicial misconduct consisting of judicial intemperance or the failure to perform official duties, which fall directly within the Commission's explicitly mandated constitutional authority to investigate. The Commission also argues that it is authorized to investigate the matters alleged in the complaints, and in the S and R

transcripts, since once an investigation is initiated by a complaint or an administrator's complaint, during the investigatory stage, its investigation, including questioning petitioner, need not be limited to the allegations in the complaints, but can include matters reasonably related to the subject matter of the complaints. The Commission further argues that petitioner has waived her right to make certain objections by testifying before the Commission, that the Commission is not prohibited from investigating matters pertaining to internal court administration, and that the Commission has exercised its investigatory authority in a neutral and impartial manner.

The relief petitioner seeks is in the nature of prohibition which is appropriate only "when there is a clear legal right" and only when the body or officer "acts or threatens to act without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized power." Matter of Nicholson v. State Commission on Judicial Conduct, 50 NY2d 597, 605-606 (1980). The Commission's jurisdiction is based on Article 6, Section 22(a) of the New York State Constitution which provides:

> The commission [the New York State Commission on Judicial Conduct] 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 for the administration of justice.

"The Judiciary Law implements the constitutional authorization and establishes the commission, granting it broad investigatory and enforcement powers." Matter of Nicholson v State Commission on Judicial Conduct, supra at 610. Judiciary Law §44(1) provides that 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 . . . including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance and conduct, on or off the bench, prejudicial for the administration of justice."

The Judiciary Law provides that the Commission may initiate an investigation of a judge's conduct based on the receipt of a written complaint, Judiciary Law §44(1),[2] or it may initiate an investigation on its own motion upon the filing an administrator's complaint, that is, a written complaint signed by the administrator, which serves as the basis for the investigation, Judiciary Law §44(2).[3] Thus, "[t]he Legislature . . . circumscribed the investigatory powers of the commission by requiring, as a prerequisite to initiating an investigation, that it either receive a complaint from a citizen (Judiciary Law, §44, subd. 1) or file a complaint on its own motion (Judiciary Law, §44, subd. 2)." Matter of Going, 97 NY2d 121, 124 (2001)(quoting Matter of New York State Commission on Judicial Conduct v. Doe, 61 NY2d 56, 60 [1984]).

The statutory framework provides that during an investigation, the Commission may require the judge to appear before it and requires the Commission to serve a copy of the complaint on the judge prior to such appearance; the judge may be represented by counsel and

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[2] Judiciary Law §44(1) also provides that "[u]pon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit."

[3] Judiciary Law §44(2) provides that the Commission "may on its own motion initiate an investigation of a judge, with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation."

may present evidentiary data and material relevant to the complaint. Judiciary Law §44(3). If during the investigation the Commission determines that a hearing is warranted, then it may direct that a formal written complaint be drawn, which must be signed and verified by the administrator, and contain allegations of judicial misconduct. Judiciary Law §44(4); Commission's Operating Rules & Procedures §7001.1(g). Here, the complaints in issue initiated the investigation and are to be distinguished from a formal written complaint. Complaints which initiate an investigation need not proffer facts that "would support formal charges." Matter of New York State Commission on Judicial Conduct v Doe, supra at 61.

As to petitioner's argument that the Commission is without jurisdiction in those matters where there are no signed complaints by individual court officers or by the attorney involved, the investigation was initiated based on complaints signed respectively by the President of the Court Officers Association, the union which represents the individual court officers, and the Attorneys-In-Charge of the Juvenile Rights Division of the Legal Aid Society, the attorney's employer. Both complaints are signed, written communications to the Commission which include allegations as to petitioner's "conduct, qualifications, fitness to perform or performance of [her] official duties." NY Const, art 6, §22(a); Judiciary Law §44(1). Neither the Judiciary Law nor the Commission's Operating Procedures require that a complaint, during the investigatory stage, be based on personal knowledge. Nor is there any requirement that a complaint is limited to the four corners of a single document or may not reference other documents.

The request from the Legal Aid Society includes a letter from the head of the Juvenile Rights Division seeking an investigation, referencing two letters including one written by the

attorney involved to the administrative judge of Bronx County Family Court which details petitioner's conduct. The request for an investigation by the president of the Court Officers Association includes certain memos and an incident report, and was supplemented by a letter from the Commission to petitioner giving a synopsis of six allegations involving court officers. Petitioner does not complain that she was unable to identify the matters in question or that she has been unable to prepare her testimony regarding these allegations. See Matter of Going, supra at 125. Moreover, both organizations are recognized within the court system, and members of those organizations are necessary and active participants in the daily operations of Family Court. Under these circumstances, when the documents are considered together, it cannot be said that an insufficient predicate exists for Commission's investigation into these matters.

To the extent petitioner argues that the organizations initiating the complaints are biased against her, refutes some allegations, asserts that the transcripts demonstrate that the Commission mischaracterizes some of the underlying interactions, provides explanations for others and argues that certain incidents are trivial in nature, at this investigatory stage, petitioner's arguments and explanations are insufficient grounds for enjoining the Commission from pursuing an investigation, but rather are evidentiary submissions and arguments properly presented to the Commission for consideration as to whether formal charges should be drawn pursuant to Judiciary Law §44(4).

As to petitioner's objection to the Commission's investigation of her exchange with the law guardian in the PH proceeding based on the lack of a complaint signed by the law guardian, this inquiry arose in connection with the complaint signed by PH, a litigant in that proceeding;

petitioner does not challenge the investigation of the PH complaint. The transcript reflects that the exchange between petitioner and the law guardian occurred within the context of the PH proceeding, and the issues involving the law guardian are intertwined with the investigation of petitioner's conduct in the PH matter.

In opposing the petition, the Commission relies in part on Matter of New York State Commission on Judicial Conduct v. Doe, supra, to argue that its authority to investigate allegations of judicial impropriety is it is not limited to the specific allegations in a complaint so long as the conduct is "reasonably related to the subject matter under investigation." Id at 61. While Matter of New York State Commission on Judicial Conduct v. Doe, does not deal directly with the scope of a investigation in relation to the complaint, the Court of Appeals addresses generally the scope of the Commission's investigatory powers. Id at 59-61. In that case, the Commission initially received an individual letter involving a judge's failure to repay a specified loan, and based on that letter and its own investigation, the Commission filed an administrator's complaint regarding another unpaid loan and the judge's participation in a specified profit-making business. The Commission then sought, through a subpoena, records and writings during the judge's ten-year tenure, relating to all loans, business activities, any past and current indebtedness, and all checking accounts, including cancelled checks. The question before the Court of Appeals was whether the Commission is empowered to issue a subpoena for documents of transactions not specifically identified in the individual or administrator's complaints. The Court held that the subpoena was valid to the extent it sought records regarding all loans and business activities during the judge's tenure as such information "directly relates" or "bear[s] a

reasonable relationship to the subject matters under investigation." Id at 62. However, with respect to the production of all writings, cancelled checks and other checking account documents relating to all past and current indebtedness, the Court held that the subpoena was "impermissibly overbroad," as it sought information "having no relation to the matters presently under investigation." Id.

Here, as in Matter of New York State Commission on Judicial Conduct v. Doe, the allegations regarding the law guardian involve the same subject matter as asserted by PH in the complaint, that is, discourtesy and disrespect to a participant in the proceeding, and involve the same proceeding as reflected in the same transcript. Furthermore, petitioner does not allege that she is unable to identify the matters in issue or is unable to prepare her testimony regarding these issues. See Matter of Going, supra at 125. Moreover, the principal purposes of a complaint have been satisfied, as is evident from petitioner's submissions, including her explanatory affidavit and an affidavit from the law guardian stating that petitioner was not discourteous, that she would not have made a complaint based on their exchange, that petitioner decides matters on the merits, that "we" could use more judges like petitioner, and that she hoped petitioner would continue on the bench. However, as noted above, at the investigatory stage these issues are proper for the Commission to consider in connection with its determination as to whether a formal complaint should be drawn. For the foregoing reasons, the absence of a specific complaint from the law guardian is not grounds for enjoining the Commission's investigation. See Matter of New York State Commission on Judicial Conduct v. Doe, supra.

The cases cited by petitioner, Matter of Going, supra and Matter of Richter v. State Commission on Judicial Conduct, 85 AD2d 790 (3rd Dept 1981), app denied 56 NY2d 508

(1982), do not support a contrary conclusion. While dicta in both cases suggest that the challenged conduct at issue in those cases may have required an additional complaint, the facts in those cases are readily distinguishable from those at bar. In Matter of Going, the conduct under investigation was in the nature of sexual harassment, and the challenged conduct involved an ex parte order reinstating a friend's driver's license; in Matter of Richter v. State Commission on Judicial Conduct, the challenge involved an investigation into an additional 48 matters unrelated to the initial matter under investigation.

For the same reasons discussed above, this court finds that the Commission should not be enjoined from inquiring into the conduct reflected in the S and R transcripts. In a letter dated October 31, 2006, the Commission informed petitioner that inquiry would be made as to these matters. Initially, the Commission sent petitioner a letter dated April 3, 2006, informing her that "[t]he Commission on Judicial Conduct is investigating complaints alleging that you were rude and made inappropriate comments to litigants and others who appear before you." Referencing the RM and PH matters, and one incident involving an individual court officer, the letter requested that petitioner respond in writing to certain questions. Apparently, in June 2006, after receiving other complaints, the Commission requested petitioner to appear and give testimony. Significantly, with the exception of the complaint regarding petitioner's refusal as to one assignment, the conduct under investigation involves allegations of discourtesy and disrespect towards litigants, attorneys, court officers, fellow judges and others, giving rise to issues of judicial intemperance. It is evident from the face of the S and R transcripts that the conduct to be investigated is of the same nature as the conduct already under investigation, i.e. disparaging

remarks to litigants and attorneys, involving the use of similar words and comments relating to their mental health and appearance. The Commission has already initiated an investigation of this specific type of conduct, and as petitioner has been given notice of the intent to inquire into such matters, it cannot be said that the Commission is exceeding or is without jurisdiction to investigate the conduct in the S and R transcripts. See Matter of New York State Commission on Judicial Conduct v. Doe, supra. Furthermore, as in the matter involving the law guardian, petitioner does no allege that she is unable to identify the conduct or prepare her testimony. See Matter of Going, supra at 125. Thus, the principle purpose of a complaint has been satisfied.

As to the matter involving FB, petitioner correctly points out, that the letter FB sent to the Commission asks for petitioner to be removed from presiding over her case. In a follow-up letter, FB's attorney urges the Commission to consider her client's allegations, and states that she intends to make a motion for petitioner to recuse herself. Both letters contain allegations that in a paternity action, petitioner was rude and disrespectful to FB, and questioned FB's morality. Under these circumstances, the two letters are sufficient to serve as complaints from FB and her attorney.

Petitioner also objects to the FB complaint and the matters in the S transcript, on the ground that they involve proceedings presently pending before her. Petitioner argues that the Commission's investigation should be enjoined as it impacts on the independence of the judiciary, by encouraging complaints in pending matters in an improper attempt to influence the court or seek recusal. This argument is rejected. The determination of a judge's ability to be fair and impartial in light of a complaint filed with the Commission, lies in the individual judge's

discretion as to whether recusal is warranted. See Schwartz v. Schwartz & Schlacter, 188 AD2d 285 (1st Dept 1992). Petitioner's further argument based on Cannon 3(B)(8), which prohibits a judge from publically commenting on matters pending before her, is likewise rejected, as the judiciary law expressly provides that the Commission's investigation at this stage is confidential. See Judiciary Law §44(4).

As to the complaints from court officers and the administrator's complaints involving petitioner's conduct toward fellow judges and her refusal to preside in the intake part, petitioner contends that the Commission is without jurisdiction to investigate allegations of discourtesy to courts officers and fellow judges, or to investigate matters relating to internal court operations and administration. To support this contention, petitioner relies on Canon 3(B)(3) of the Code of Judicial Conduct and section 100.3(B)(3) of the Rules Governing Judicial Conduct, which require that

> [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. [emphasis added]

Petitioner argues that the "others" to whom the judge must be courteous, are limited to those who come before a judge in an "official capacity," and that court officers and fellow judges do not fall into such category. Petitioner further argues that her interpretation is reinforced by the inclusion of "staff" and "court officials" in the second part of the rule. Specifically, petitioner asserts that "[t]he inclusion of such groups among those 'subject to the judge's direction and control,' as contrasted to those who appear before her in an 'official capacity,' further underscores that Canon 3(B)(3) does not proscribe judicial courtesy toward court officer and fellow judges."

Petitioner's interpretation is rejected, as Cannon 3(B)(3) requires a judge to be courteous to everyone she deals with in an official capacity, and it cannot be reasonably disputed that in the courtroom, in connection with the operation of a court part, a judge deals with both court officers and fellows judges "in an official capacity." Here, the specific conduct in the complaints involved interactions between petitioner and individual court officers and fellow judges, which occurred in petitioner's courtroom while court was in session, and related to the operation of the courtroom, and the performance of petitioner's duties and responsibilities as a judge. Such interactions while petitioner was presiding court, are distinguishable from personal interactions between a judge and court officers or fellow judges which take place while court is not in session. Under these circumstances, for the purpose of an investigation, it cannot be said that this aspect of the investigation should be enjoined on the ground that petitioner was not dealing with the court officers and fellow judges in "an official capacity."[4]

Finally, petitioner agues that the Commission is without jurisdiction as to the matters involving the court officers, fellow judges, and her refusal as to one assignment, as such matters concern internal court operations and administration. This argument without merit. Even if other avenues are available to resolve issues that arise between judges and court officers or fellow judges, that fact alone does not preclude the Commission's investigation. Moreover, petitioner's

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[4]To support her interpretation, petitioner further cites to revisions to the American Bar Association's Model Code of Judicial Conduct, proposed by the Joint Commission to Evaluate the Model Code of Judicial Conduct. The proposed revision in the Model Code's counterpart to New York Cannon 3(B)(3) at issue here, adds specific references to "staff" and "court officials" as those to whom a judge must be courteous. Such proposed revision is not inconsistent with the conclusion reached above.

alleged failure to perform the intake assignment falls squarely within the ambit of the Commission's jurisdiction to "investigate and hear complaints with respect [a judge's] performance of [her] official duties." NY Const, art 6, §22(a). Contrary to petitioner's assertion, Matter of Lenney, 71 NY2d 459 (1988) is inapplicable, as in that case the "matters of internal court administration" to which the Court of Appeals referred, involved calendar control and issues of substantive law. While petitioner correctly points out that the persistent failure to perform judicial duties is the constitutional standard by which the Commission evaluates a judge's conduct, and that the allegations appear to involve an isolated incident, as noted above, this challenge and petitioner's other challenges as to the underlying merits of the complaints, and her assertion that her testimony and other evidence refutes the allegations of discourtesy and disrespect, should be presented to the Commission for consideration in determining whether formal charges are appropriate. In reaching the foregoing conclusions, it must be emphasized that the issue before this court is whether the Commission's investigation should be enjoined, not whether any allegation provides a sufficient basis for a formal complaint.

In opposing the petition, the Commission also argues that since petitioner has already appeared before the Commission pursuant to Judiciary Law §44(3) and testified as to four of the complaints, the petition should be dismissed as to those complaints on mootness grounds. This argument is without merit. Contrary to the Commission's assertion, neither Matter of Richter v. State Commission on Judicial Conduct, supra, nor Matter of Sims v. New York State Commission on Judicial Conduct, 94 AD2d 946 (4th Dept 1993), supports a different result as in both those cases the judge involved voluntarily gave testimony before the Commission without

preserving any objection. In the instant case, as clearly indicated in the transcript, petitioner specifically objected to testifying about the challenged aspects of the investigation, and counsel to the Commission acknowledged such objection.

Petitioner asserts that the Commission has acted in a manner inconsistent with its role as a neutral investigator of judicial conduct by mischaracterizing the facts and the colloquies in issue. To support this assertion, petitioner for the most part relies on the context of the conduct under investigation and proffers explanatory evidence. However, the record as a whole does not reflect that the Commission has acted in a manner that is biased against or prejudicial to petitioner, so as to provide grounds for enjoining the investigation. Notwithstanding this conclusion, it is noted that the Commission should exercise its authority with impartiality in all aspects of its investigation, including ensuring neutrality and accuracy in any characterization of the conduct under investigation.

Finally, the Court turns to petitioner's request for an order, pursuant to section 216.1 of the Uniform Rules for New York State Trial Courts, sealing the court record, including "all documents in and related to this proceeding." In support of this application, petitioner's attorney submits an affidavit that sealing is warranted in view of the "sensitive nature of the issues involved." Specifically, petitioner asserts that this proceeding challenges the investigation of a judge which is confidential pursuant to Judiciary Law §44(4); the petition describes sensitive and personal matters litigated in Family Court which are unique to the litigants and not of general public interest; the petition raises security issues relating to Bronx Family Court, which for safety reason should remain confidential; and absent a sealing order, petitioner's ability to perform her duties, and her reputation, may be needlessly and adversely affected.

At the outset, it should be noted that this court previously issued orders dated December 11, 2006, December 13, 2006 and December 18, 2006, directing that the record be temporarily sealed until the determination of this proceeding or further order of this court, and directing the redaction of the names of all litigants in the Family Court proceedings at issue, and the redaction of any information regarding security at Bronx Family Court. In accordance with the court's order, the parties have filed redacted papers which shall be the official record of this proceeding. Thus, the privacy and security issues raised in petitioner's original order to show case have been resolved, and need not be addressed in determining whether sufficient grounds exist for permanently sealing the record in this proceeding.

As a broad constitutional proposition, the public as well as the press are entitled to have access to court proceedings. Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter Ltd., 274 AD2d 1, 6 (1st Dept 2000). Moreover, New York statutory and common law "have long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly and fairly." Matter of Conservatorship of Brownstone, 191 AD2d 167, 168 (1st Dept 1993). Consequently, judicial proceedings are presumptively open to the public and the press, unless compelling reasons for closure are presented. Anonymous v. Anonymous, 263 AD2d 341, 341-342 (1st Dept 2000); Herald Co, Inc. v Weisenberg, 89 AD2d 224, 226 (4th Dept 1982), aff'd 59 NY2d 378 (1983); Merrick v. Merrick, 154 Misc2d 559, 562 (Sup Ct, NY Co 1992), aff'd 190 AD2d 516 (1st Dept 1993).

With respect to the sealing of court records, section 216.1(a) of the Uniform Rules for New York State Trial Courts directs that "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in

whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard." 22 NYCRR § 216.1(a); Liapakis v. Sullivan, 290 AD2d 393 (1st Dept 2002); In re Will of Hoffmann, 284 AD2d 92, 93 (1st Dept 2001); Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter Ltd., supra at 8; Doe v. Bellmore-Merrick Central High School District, 1 Misc3d 697, (Sup Ct, Nassau Co 2003); Coopersmith v. Gold, 156 Misc2d 594 (Sup Ct, Rockland Co 1992).

Although "good cause" is a standard that is "difficult to define in absolute terms, a sealing order should rest on a sound basis or legitimate need to take judicial action," Danco Laboratories Ltd. v. Chemical Works of Gedeon Richter, Ltd., supra at 8 (quoting Coopersmith v. Gold, supra), presupposing that "compelling circumstances must be shown by the party seeking to have the records sealed." Coopersmith v. Gold, supra at 606. "Confidentiality is clearly the exception, not the rule," In re Will of Hoffman, supra at 94, and the presumption of openness of court records remains in the absence of compelling circumstances for secrecy, Coopersmith v. Gold, supra at 606.

Here, petitioner fails to make an adequate showing of "good cause" to warrant a sealing order as to the entire record in this proceeding. The investigation of a judge necessarily implicates the integrity of and public confidence in the judiciary, and is a matter of legitimate public concern. The Court of Appeals has made clear that while the legislature has established strict rules of confidentiality in connection with complaints, correspondence and

proceedings before the Commission on Judicial Conduct, "a blanket rule requiring the sealing of all court records involving proceedings by the commission is unjustified in the absence of legislative mandate." Matter of Nicholson v. State Commission on Judicial Conduct, supra at 613. The Court of Appeals, went on to explain, however, that "[p]ublic access to court records need not and should not signal access to the commission's internal proceedings."

This court concludes that under the circumstances herein, good cause exists for a limited sealing order sealing the transcripts of the investigatory proceedings before the Commission on September 27, 2006 and September 28, 2006, which the Commission submitted as exhibits 18 and 19 to its answer. Judiciary Law §44(4) explicitly provides for confidentiality of such investigatory proceedings, and access to the entire transcripts of those proceedings is not necessary to the issues raised herein.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the redacted papers shall be the official record of this proceeding and the Clerk is directed to file the redacted papers as the official record of this proceeding; and it is further

ORDERED that petitioner's motion for a sealing order is granted only to the extent that the transcripts of the investigatory proceedings before respondent Commission on Judicial Conduct on September 27, 2006 and September 28, 2006, which were submitted as exhibits 18 and 19 to the Commission's answer, shall be sealed, and in all other respects petitioner's motion for a sealing order is denied; and it is further

ORDERED that the Clerk is directed to seal the transcripts of the investigatory proceedings before respondent Commission on Judicial Conduct on September 27, 2006 and September 28, 2006, which were submitted as exhibits 18 and 19 to the Commission's answer; and it is further

ORDERED that the court's prior order temporarily sealing the entire record in this proceeding, shall remain in effect until February 14, 2007, and the Clerk is directed to temporarily seal the entire record until February 14, 2007.

This constitutes the decision, order and judgment of the court.

DATED: February 8, 2007

ENTER:

J.S.C.