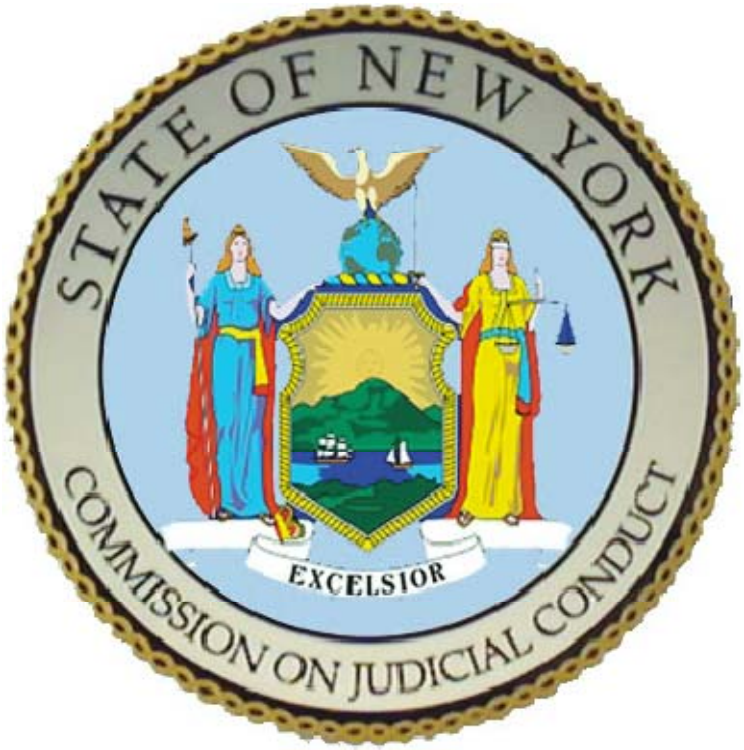
NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT



ANNUAL REPORT

2011

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

♦ ♦ ♦

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HON. JILL KONVISER (SERVED UNTIL 3-31-10)

NINA M. MOORE

HON. KAREN K. PETERS

HON. TERRY JANE RUDERMAN

♦ ♦ ♦

JEAN M. SAVANYU
Clerk of the Commission

CORNING TOWER
SUITE 2301
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12207
(518) 453-4600
(518) 486-1850 (Fax)

61 BROADWAY
SUITE 1200
NEW YORK, NEW YORK 10006
(PRINCIPAL OFFICE)
(646) 386-4800
(646) 458-0037 (Fax)

400 ANDREWS STREET
SUITE 700
ROCHESTER, NEW YORK 14604
(585) 784-4141
(585) 232-7834 (Fax)

WWW.CJC.NY.GOV

COMMISSION STAFF

Robert H. Tembeckjian
Administrator and Counsel

ADMINISTRATION
Edward Lindner, *Deputy Admin'r, Litigation*
Karen Kozac, *Chief Administrative Officer*
Melissa R. DiPalo, *Administrative Counsel*
Shouchou Luo, *Finance/Personnel Officer*
Beth S. Bar, *Public Information Officer*
Richard Keating, *Principal LAN Administrator*
Latasha Johnson, *Exec Sec'y to Administrator*
Wanita Swinton-Gonzalez, *Senior Admin Asst*
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Laura Vega, *Asst Admin Officer*
Miguel Maisonet, *Senior Clerk*
Stacy Warner, *Receptionist*

NEW YORK CITY OFFICE
Deputy Administrator (Vacant)
Jorge Dopico, *Deputy Administrator**
Jean Joyce, *Senior Attorney*
Roger J. Schwarz, *Senior Attorney*
Brenda Correa, *Staff Attorney*
Kathy Wu, *Staff Attorney**
Kelvin S. Davis, *Staff Attorney*
Alan W. Friedberg, *Special Counsel*
Margaret Corchado, *Senior Investigator**
Ethan Beckett, *Investigator*
Frank DeBiase, *Investigator*
Henry Tranes, *Investigator**
Lee R. Kiklier, *Senior Admin Asst*
Laura Archilla-Soto, *Asst Admin Officer*
Bridget MacRae, *Admin Asst**

ALBANY OFFICE
Cathleen S. Cenci, *Deputy Administrator*
Jill S. Polk, *Senior Attorney*
Thea Hoeth, *Senior Attorney*
Charles F. Farcher, *Staff Attorney*
Donald R. Payette, *Senior Investigator*
David Herr, *Senior Investigator*
Ryan Fitzpatrick, *Investigator*
Georgia A. Damino, *Asst Admin Officer**
Lisa Gray Savaria, *Asst Admin Officer*
Linda Dumas, *Asst Admin Officer*
Letitia Walsh, *Secretary*

ROCHESTER OFFICE
John J. Postel, *Deputy Administrator*
M. Kathleen Martin, *Senior Attorney*
David M. Duguay, *Senior Attorney*
Stephanie A. Fix, *Staff Attorney*
Rebecca Roberts, *Senior Investigator*
Betsy Sampson, *Investigator*
Vanessa Mangan, *Investigator*
Linda Pascarella, *Senior Admin Asst*
Mindy Providence, *Secretary**
Terry Scipioni, *Secretary*

*Denotes staff who left in 2010

ROBERT H. TEMBECKJIAN
ADMINISTRATOR & COUNSEL

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

61 BROADWAY
NEW YORK, NEW YORK 10006

646-386-4800 TELEPHONE
646-458-0037 FACSIMILE

www.cjc.ny.gov

March 1, 2011

To Governor Andrew M. Cuomo,
Chief Judge Jonathan Lippman, 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, 2010.

Respectfully submitted,

Robert H. Tembeckjian, Administrator
On behalf of the Commission

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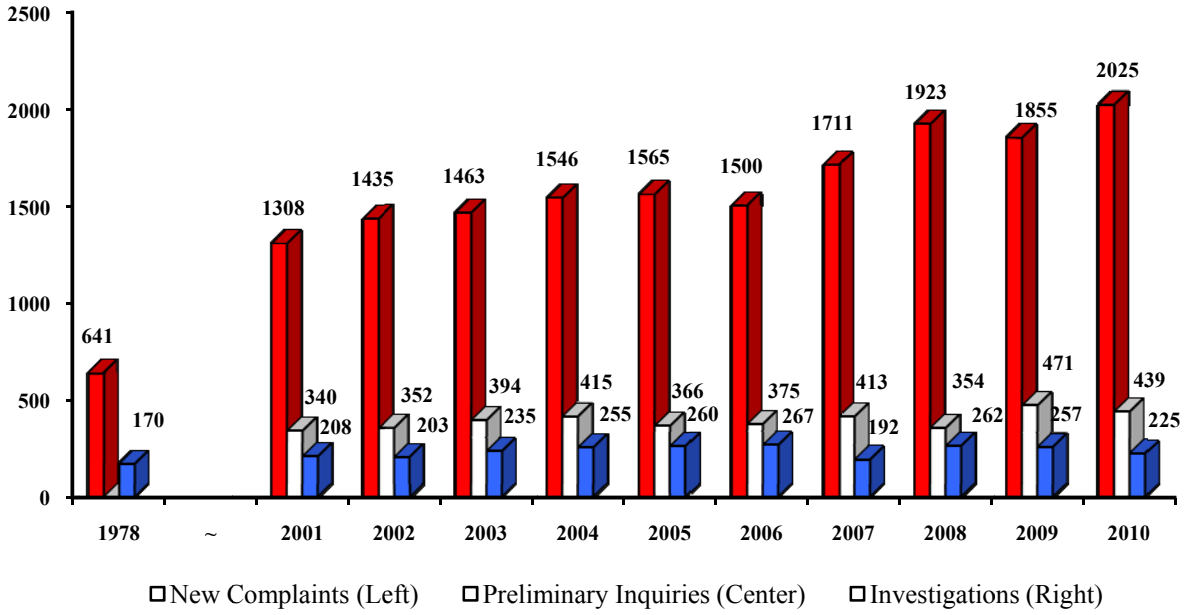
INTRODUCTION TO THE 2011 ANNUAL REPORT

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 annually by the Commission in the past 10 years has substantially increased compared to the first two decades of the Commission's existence. Since 2001, the Commission has averaged over 1,600 new complaints per year, 390 preliminary inquiries and 237 investigations. Last year, 2,025 new complaints were received, the highest number ever. Every complaint was reviewed by investigative and legal staff and an individual report was prepared for each complaint. All such complaints and reports were reviewed by the entire Commission, which then voted on which complaints merited opening full scale investigations. As to these new complaints, there were 439 preliminary reviews and inquiries and 225 investigations.

This report covers Commission activity in the year 2010.



COMPLAINTS, INQUIRIES & INVESTIGATIONS IN THE LAST TEN YEARS

ACTION TAKEN IN 2010

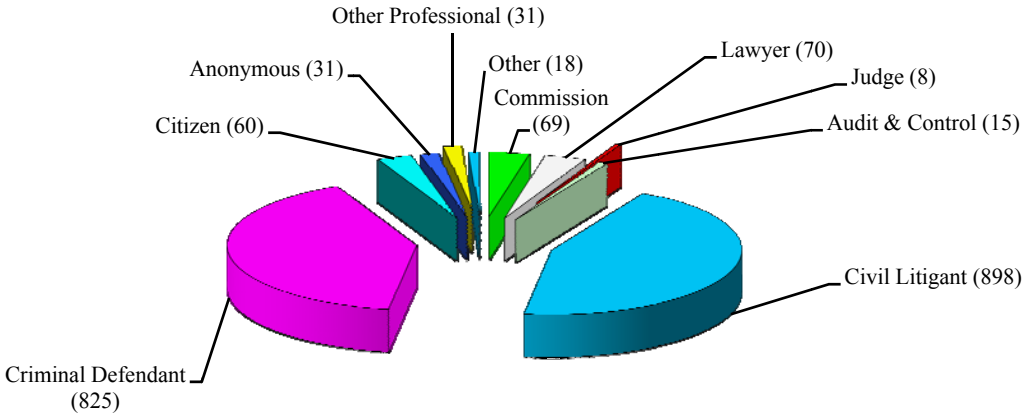
Following are summaries of the Commission's actions in 2010, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

COMPLAINTS RECEIVED

The Commission received 2,025 new complaints in 2010, the most ever in one year. All complaints are summarized and analyzed by staff and reviewed by the Commission, which votes whether to investigate.

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 non-judges, 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 2010 appears in the following chart.



COMPLAINT SOURCES IN 2010

PRELIMINARY INQUIRIES AND INVESTIGATIONS

The Commission's Operating Procedures and Rules authorize "preliminary analysis and clarification" and "preliminary fact-finding activities" by staff upon receipt of new complaints, to aid the Commission in determining whether an investigation is warranted. In 2010, staff conducted 439 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

In 225 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.

During 2010, in addition to the 225 new investigations, there were 205 investigations pending from the previous year. The Commission disposed of the combined total of 430 investigations as follows:

- 146 complaints were dismissed outright.
- 42 complaints involving 35 different judges were dismissed with letters of dismissal and caution.
- 13 complaints involving 11 different judges were closed upon the judge's resignation.
- Ten complaints involving four different 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.
- 24 complaints involving 15 different judges resulted in formal charges being authorized.
- 195 investigations were pending as of December 31, 2010.

FORMAL WRITTEN COMPLAINTS

As of January 1, 2010, there were pending Formal Written Complaints in 38 matters involving 22 different judges. In 2010, Formal Written Complaints were authorized in 24 additional matters involving 15 different judges. Of the combined total of 62 matters involving 37 judges, the Commission acted as follows:

- 21 matters involving 13 different judges resulted in formal discipline (admonition, censure or removal from office).
- Seven matters involving three different judges were closed upon the judge's resignation from office, two becoming public by stipulation.
- One matter involving one judge resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- Two matters involving two different judges were dismissed upon the judge's motion.
- 31 matters involving 18 different judges were pending as of December 31, 2010.

SUMMARY OF ALL 2010 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

	Lawyers	*Non-Lawyers*	*Total*
Complaints Received	122	226	348
Complaints Investigated	48	98	146
Judges Cautioned After Investigation	4	12	16
Formal Written Complaints Authorized	1	9	10
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	1	8	9
Judges Vacating Office by Public Stipulation	0	2	2
Formal Complaints Dismissed or Closed	1	0	1

NOTE: Approximately 400 town and village justices are lawyers.

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

TABLE 2: CITY COURT JUDGES – 385, ALL LAWYERS

	Part-Time	*Full-Time*	*Total*
Complaints Received	87	253	340
Complaints Investigated	12	9	21
Judges Cautioned After Investigation	4	2	6
Formal Written Complaints Authorized	1	0	1
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	0	0	0
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.

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

Complaints Received	252
Complaints Investigated	13
Judges Cautioned After Investigation	1
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

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

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

Complaints Received	194
Complaints Investigated	17
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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

Complaints Received	15
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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

Complaints Received	82
Complaints Investigated	2
Judges Cautioned After Investigation	1
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

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

Complaints Received	43
Complaints Investigated	4
Judges Cautioned After Investigation	2
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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

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

Complaints Received	307
Complaints Investigated	20
Judges Cautioned After Investigation	8
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	2

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

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

Complaints Received	67
Complaints Investigated	1
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

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

Complaints Received	377

* The Commission reviews such complaints to determine whether to refer them to other agencies.

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 2010. The actual texts are appended to this Report in Appendix F.

OVERVIEW OF 2010 DETERMINATIONS

The Commission rendered 13 formal disciplinary determinations in 2010: one removal, seven censures and five admonitions. In addition, two matters were disposed of by stipulation made public by agreement of the parties. Ten of the 15 respondents were non-lawyer trained judges and five were lawyers. Eleven of the respondents were town or village justices and four were judges of higher courts.

DETERMINATION OF REMOVAL

The Commission completed one formal proceeding in 2010 that resulted in a determination of removal. The case is summarized below and the full text can be found in Appendix F.

Matter of Gilbert L. Abramson

On October 26, 2010 the Commission determined that Gilbert L. Abramson, a Judge of the Family Court, Saratoga County, should be removed from office. The Commission determined that Judge Abramson repeatedly incarcerated Family Court litigants while denying them such fundamental rights as the right to be represented by counsel and the right to a hearing. In four separate cases, litigants were incarcerated for periods ranging from 21 days to 268 days after the judge failed to comply with the appropriate constitutional and statutory mandates. Judge Abramson committed these acts of misconduct despite having received a prior caution from the Commission for failing to advise litigants of the right to counsel. The judge also made "egregious and inexcusable" comments of a sexual nature on two separate occasions to a litigant in Saratoga County Family Treatment Court.

Judge Abramson, who resigned from judicial office a month before the determination was issued, subsequently filed a motion with the Court of Appeals asking the Court to vacate the determination and to effectuate a public stipulation signed by the judge, his attorney and the Commission's Administrator, but rejected by the Commission. On December 14, 2010, the Court of Appeals dismissed the judge's motion and issued an Order removing him from the bench.

DETERMINATIONS OF CENSURE

The Commission completed seven formal proceedings in 2010 that resulted in public censure. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Carlos M. Calderon, III

On March 26, 2010, the Commission determined that Judge Carlos M. Calderon III, a Justice of the Milton Town Court, Saratoga County, should be censured for asserting his judicial status in asking prison officials to confiscate materials from an inmate. The materials were related to the judge's personal injury lawsuit against the inmate arising out of injuries the judge had suffered when he was a state trooper. The Commission found that the judge's misconduct was compounded by his "evasive and implausible" testimony at the Commission's hearing. Judge Calderon, who is not an attorney, did not request review by the Court of Appeals.

Matter of Walter V. Tripp

On April 20, 2010, the Commission determined that Walter V. Tripp, a Justice of the Mount Morris Town and Village Courts, Livingston County, should be censured for misconduct in two cases. The judge attempted to coerce a defendant in a traffic case into pleading guilty, among other things by threatening him with jail. In another case, Judge Tripp threatened to send a defendant's father to jail for purportedly being rude to the court clerk, who is the judge's wife, even though the judge had no first-hand knowledge of the alleged incident. He also threatened to arrest the defendant if the fine was not paid within seven days. Judge Tripp, who is not an attorney, did not request review by the Court of Appeals.

Matter of Brian M. Dugan

On October 6, 2010, the Commission determined that Brian M. Dugan, a Justice of the Scipio Town Court, Cayuga County, should be censured for failing to disqualify himself in an alleged criminal matter involving his business tenant and a long-time acquaintance. He also encouraged and helped negotiate a financial settlement between the parties. Judge Dugan, who is not an attorney, did not request review by the Court of Appeals.

Matter of Norman J. Peters

On October 6, 2010, the Commission determined that Norman J. Peters, a Justice of the Collins Town Court, Erie County, should be censured for threatening not to preside over court dates scheduled by his former co-justice, who had retired, unless he received additional pay. He also said he would direct his clerk to inform defendants who appeared that their cases were dismissed. The judge made this threat at a town board meeting that was open to the public. After the judge's threat, the town board authorized additional compensation for the judge. Judge Peters, who is not an attorney, did not request review by the Court of Appeals.

Matter of Donald P. Martineck

On October 12, 2010, the Commission determined that Donald P. Martineck, a Justice of the Somerset Town Court, Niagara County, should be censured for conduct resulting in his conviction for Driving While Intoxicated, a misdemeanor. The judge consumed 40 or more ounces of wine over a period of seven and a half hours and drove erratically before being stopped by a sheriff's deputy. In censuring the judge, the Commission noted that the sanction of

suspension from office was not available. Judge Martineck, who is not an attorney, did not request review by the Court of Appeals.

Matter of Jeffrey L. Menard
On October 13, 2010, the Commission determined that Jeffrey L. Menard, a Justice of the Mooers Town Court, Clinton County, should be censured for failing to disqualify himself in cases involving his nephews, his employers' sons and his co-justice. The judge testified in the Commission proceeding that he knew it was improper to preside over traffic cases involving his nephews but did not transfer at least one such case because the matter "wasn't worth the hassle" and he "got lazy." Judge Menard also disposed of several traffic tickets issued to two of his co-workers, who were also the sons of his employers at a farm equipment business, and handled four small claims actions in which his co-justice was the claimant. Judge Menard, who is not an attorney, did not request review by the Court of Appeals.

Matter of Gerard E. Maney
On December 20, 2010, the Commission determined that Gerard E. Maney, a Judge of the Family Court and an Acting Justice of the Supreme Court, Albany County, should be censured for conduct resulting in his conviction for DWAI (driving while his ability was impaired by alcohol), and for asserting his judicial office in connection with his arrest. The Commission stated that it would have suspended the judge without pay if it had the power to do so. The Commission found that after consuming alcohol at a private club, Judge Maney, who was driving his personal car which had judicial license plates, made an illegal U-turn in an attempt to avoid a sobriety checkpoint. During and after his arrest, Judge Maney made repeated references to his judicial status while asking the arresting officers for "professional courtesy" and "consideration." He also used mouthwash at the scene, initially refused to take a sobriety test and delayed taking a breathalyzer test. Judge Maney did not request review by the Court of Appeals.

DETERMINATIONS OF ADMONITION

The Commission completed five proceedings in 2010 that resulted in public admonition. The cases are summarized as follows and the full texts can be found in Appendix F.

Matter of Patrick J. McGrath
On February 5, 2010, the Commission determined that Patrick J. McGrath, a Justice of the Supreme Court, Rensselaer County, should be admonished for making improper "pledges or promises" to pistol permit holders and misrepresenting his jurisdiction over such permits during his 2008 campaign for Supreme Court. Judge McGrath did not request review by the Court of Appeals.

Matter of Raymond R. Barlaam
On March 15, 2010, the Commission determined that Raymond R. Barlaam, a Justice of the Ossining Village Court, Westchester County, should be admonished for maintaining a policy of scheduling trials in traffic cases based solely on when the issuing police officers would be available. This resulted in lengthy delays – sometimes for five years or more – in more than 500 cases. Judge Barlaam, who is an attorney, did not request review by the Court of Appeals.

Matter of James P. Gilpatric
On April 27, 2010, the Commission determined that James P. Gilpatric, a Justice of the Supreme Court, Ulster County, should be admonished for conduct that occurred when he was a Judge of the Kingston City Court. The Commission found that Judge Gilpatric failed to render decisions in a timely manner in 26 cases despite having been cautioned by the Commission about his delays, and despite the intervention of his administrative judge and numerous inquiries by litigants.

In 2009, the Commission had issued a determination of admonition in the same matter. Judge Gilpatric requested review of the determination by the Court of Appeals, which affirmed the Commission's jurisdiction to investigate judges for delays in issuing decisions and remitted the case to the Commission for further proceedings so that a fuller factual record could be developed. The Commission's Administrator and Judge Gilpatric then entered into an agreed statement of facts jointly recommending the sanction of admonition, which the Commission accepted.

Matter of David M. Trickler
On October 7, 2010, the Commission determined that David M. Trickler, a Justice of the Birdsall, Burns and Grove Town Courts, Allegany County, should be admonished for failing to disqualify himself in a timely manner in a harassment case in which he knew the defendant and the alleged victim, and in which he was a potential witness. Judge Trickler, who is not an attorney, did not request review by the Court of Appeals.

Matter of Nicole S. Post
On October 12, 2010, the Commission determined that Nicole S. Post, a Justice of the Maine Town Court, Broome County, should be admonished for improperly serving as both judge and court clerk of the Maine Town Court, participating in fund-raising activities on behalf of her and her son's sports teams, and failing to pay a $50 fine for seven months. Judge Post, who is not an attorney, did not request review by the Court of Appeals.

OTHER PUBLIC DISPOSITIONS

The Commission completed two other proceedings in 2010 that resulted in public dispositions. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Andrea L. McIntyre
On October 4, 2010, pursuant to a stipulation, the Commission discontinued a proceeding involving Andrea L. McIntyre, a Justice of the Theresa Village Court, Jefferson County, who resigned from office after being charged *inter alia* with failing to deposit approximately $11,080 in court funds within 72 hours of receipt, failing to sentence 105 defendants who were convicted of various vehicle and traffic charges, and failing to report 53 "scofflaws" to the Department of Motor Vehicles so that their licenses could be suspended. Judge McIntyre, who is not an attorney, affirmed that she would neither seek nor accept judicial office at any time in the future.

Matter of Norman A. Perkins
On December 9, 2010, pursuant to a stipulation, the Commission discontinued a proceeding involving Norman A. Perkins, a Justice of the Machias Town Court, Cattaraugus County, who

resigned from office after being charged *inter alia* with: (1) issuing eviction warrants even though the required Notices and/or Petitions had not been served and filed, (2) advising parties in six small claims actions that they were required to retain an attorney if they wished to appeal his decision, and (3) commending a litigant who had made a derogatory comment about Jewish people. Judge Perkins, who is not an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

OTHER DISMISSED OR CLOSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of four Formal Written Complaints in 2010 without rendering public discipline or dispositions. 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. Two complaints were dismissed upon motions by the respondent-judges. One Formal Written Complaint was closed upon the judge's resignation from office.

MATTERS CLOSED UPON RESIGNATION

Fourteen judges resigned in 2010 while complaints against them were pending at the Commission. Eleven resigned while under investigation. Three resigned while under formal charges by the Commission, two of whom did so pursuant to public stipulation. 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 2010, the Commission referred 41 matters to other agencies. Twenty-nine matters were referred to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record-keeping or other administrative issues. Five matters were referred to an attorney grievance committee. Two matters were referred to a District Attorney's office; four matters were referred to the State Comptroller; and one matter was referred to the Justice Department.

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 2010, the Commission issued 35 Letters of Dismissal and Caution and one Letter of Caution. Seventeen town or village justices were cautioned, including four who are lawyers. Nineteen judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct as indicated below.

Improper *Ex Parte* Communications. Three judges were cautioned for engaging in improper out-of-court communications with a party or taking judicial action without affording the right to be heard by law. For example, one judge dismissed a charge based on the defendant's *ex parte* explanation.

Political Activity. Five judges were cautioned for engaging in isolated instances of inappropriate political activity, such as making improper contributions to a political candidate or endorsing another candidate.

Demeanor. Seven judges were cautioned for being discourteous or making inappropriate comments to litigants, attorneys, witnesses, or the press. One judge, for instance, made disparaging comments regarding a defendant's level of education, and another used intemperate and otherwise offensive language in a conference with attorneys.

Audit and Control. Nine judges were cautioned for various administrative lapses, including failing to report cases and remit funds to the State Comptroller in a timely manner. One judge failed to adequately supervise court staff, which resulted in recordkeeping and internal control deficiencies.

Delay. Four judges were cautioned for delay in scheduling or disposing of cases.

Violation of Rights. Nine judges were cautioned for relatively isolated incidents of violating the rights of parties appearing before them. One judge initially denied a defendant's right to assigned counsel, and another increased fines without a legal basis.

Assertion of Influence. Several judges were cautioned for lending the prestige of judicial office to advance private interests. For example, one judge was cautioned for asserting the prestige of judicial office by improperly using an official parking permit.

Miscellaneous. One judge was cautioned for making inappropriate comments in court about judicial pay raises. Three judges were cautioned for failing to file financial disclosure statements with the Ethics Commission in a timely manner. Another judge conducted a trial without administering an oath to a witness.

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 a 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 DETERMINATION 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 2010, the Court decided the following Commission matter.

Matter of Gilbert L. Abramson
On October 26, 2010, the Commission determined that Gilbert L. Abramson, a Judge of the Family Court, Saratoga County should be removed for repeatedly incarcerating Family Court litigants while denying them such fundamental rights as the right to be represented by counsel and the right to a hearing, and for making highly inappropriate remarks of a sexual nature to a litigant.

Judge Abramson subsequently filed a motion with the Court of Appeals, asking the Court (1) to vacate the Commission's determination that he be removed from office, and (2) to accept in its place a proposed stipulation, which the Commission had rejected, in which the judge publicly accepted responsibility for his actions, resigned and agreed never to seek or accept judicial office in the future. In a decision dated December 14, 2010, the Court dismissed Judge Abramson's motion and issued an Order removing him from the bench. The Court stated that it did not have jurisdiction to entertain the motion since the proper procedure for challenging a Commission determination is to file a request for review with the Court within 30 days of receiving the determination. Judge Abramson did not file such a request for review.

CHALLENGES TO THE COMMISSION'S PROCEDURES

In re Morgenthau

On July 16, 2008, the Office of the New York District Attorney filed a motion in Supreme Court, New York County, seeking to quash a subpoena issued by a Commission Referee requiring District Attorney Robert M. Morgenthau to appear and give testimony in a Commission disciplinary proceeding.

The respondent-judge in the Commission proceeding, identified by the court as "W," sought to subpoena the District Attorney for the purpose of establishing that the DA was the source of the complaint being adjudicated in the disciplinary hearing, and that the DA had a political bias against him. The Commission's Administrator, whose requests for an offer of proof were denied by the Referee, opposed the subpoena on the ground that the DA was not the complainant, had not witnessed any of the alleged conduct set forth in the Formal Written Complaint, and could offer no relevant testimony. The Referee granted the respondent-judge's application for the subpoena, ruling that there was sufficient testimony during the hearing to "raise some question as to whether the District Attorney was involved in this in any fashion."

The District Attorney's motion to quash was returnable before Supreme Court Justice Nicholas Figueroa. The Administrator moved to intervene and again argued that the DA had no relevant information to offer. The Commission took no position on the motion.

On October 6, 2008, Justice Figueroa granted the DA's motion to quash, holding that: (1) the Referee's finding that that there was "a question" whether the DA was "involved in this in any fashion" was conjecture, (2) the DA was not a witness to any of the alleged misconduct and had no information relevant to the complaint, and (3) any purported bias on the DA's part was irrelevant.

The respondent-judge filed a Notice of Appeal dated November 6, 2008. The matter was submitted on September 29, 2009, without oral argument.

On May 4, 2010, the Appellate Division, First Department, unanimously affirmed Justice Figueroa's decision to quash the subpoena issued to the District Attorney. *In re Morgenthau,* 73 AD3d 415, 901 NYS2d 6 (1st Dept 2010). The Court noted that subpoenas issued by a Commission referee pursuant to Judiciary Law §43(2) must be "relevant and material to the subject of the hearing." When such a subpoena is challenged, it is incumbent on the proponent of the subpoena "to establish a factual basis that shows the relevancy to the subject matter of the investigation."

The Court found that the respondent-judge had failed to make that showing, holding that:

> Even were we to accept as true [Judge W's] contentions that the District Attorney had a political bias against him, and that he referred the complaints to the Commission himself, neither of these are relevant to the issue of [Judge W's] guilt or innocence of the misconduct charged.
> …

> Subpoenaing the District Attorney with the mere hope of developing relevant testimony once on the stand is precisely the kind of investigatory fishing expedition that the law forbids (*see Matter of New York State Comm. on Jud. Conduct v. Doe*, 61 NY2d at 60). (*Id.* at 10)

OBSERVATIONS AND RECOMMENDATIONS

PUBLIC DISCIPLINARY PROCEEDINGS

All Commission investigations and formal hearings are confidential by law. Commission activity is only made public at the end of the disciplinary process – when a determination of admonition, censure, removal or retirement from office is rendered and filed with the Chief Judge pursuant to statute – or, when the accused judge waives confidentiality.[1]

The subject of public disciplinary proceedings, for lawyers as well as judges, has been vigorously debated in recent years by bar associations and civic groups, and supported in newspaper editorials around the state. The Commission itself has long advocated that post-investigation formal proceedings should be made public, as they were in New York State until 1978, and as they are now in 35 other states.

It has been a fundamental premise of the American system of justice, since the founding of the republic, that the rights of citizens are protected, and governmental tyranny thwarted, by conducting the business of the courts in public; that secret or "star chamber" proceedings are great potential threats to liberty and individual rights. Moreover, judges are public officials, and the Commission is a public agency. Not only does the public have a right to know when formal charges have been preferred by a prosecuting authority against a public official, but the prosecuting entity is more likely to exercise its power wisely if it is subject to public scrutiny. It may well be that a judge as to whom charges are eventually dismissed may feel his or her reputation has been damaged by the trial having been public. Yet the historical presumption in favor of openness is so well established that criminal trials, where not only reputations but liberty is at stake, have been public since the adoption of the Constitution.

There are practical as well as philosophical considerations in making formal judicial disciplinary proceedings public. The process of evaluating a complaint, conducting a comprehensive investigation, conducting formal disciplinary proceedings and making a final determination subject to review by the Court of Appeals takes considerable time. The process is lengthy in significant part because the Commission painstakingly endeavors to render a determination that is fair and comports with due process. If the charges and hearing portion of a Commission matter were open, the public would have a better understanding of the entire disciplinary process. The very fact that charges had been served and a hearing scheduled would no longer be secret.

[1] The Commission has conducted over 700 formal disciplinary proceedings since 1978. Ten judges have waived confidentiality in the course of those proceedings. Two others waived confidentiality as to investigations.

As it is, maintaining confidentiality is often beyond the Commission's control. For example, in any formal disciplinary proceeding, subpoenas are issued and witnesses are interviewed and prepared to testify, by both the Commission staff and the respondent-judge. It is not unusual for word to spread around the courthouse, particularly as the hearing date approaches. Respondent-judges themselves often consult with judicial colleagues, staff and others, revealing the details of the charges against them and seeking advice. As more "insiders" learn of the proceedings, the chances for "leaks" to the press increase, often resulting in published misinformation and suspicious accusations as to the source of the "leaks." In such situations, both confidentiality and confidence in the integrity of the disciplinary system suffer.

It should be noted that even if Commission disciplinary proceedings were made public, the vast majority of Commission business would remain confidential. In 2010, for example, out of 2,025 new complaints received, 439 preliminary inquiries conducted and 225 investigations commenced, only 15 Formal Written Complaints were authorized. Those 15, as to which confidential investigations found reasonable cause to commence formal disciplinary proceedings, would have been the only new matters made public last year.

On several occasions in recent years, the Legislature has considered bills to open the Commission's proceedings to the public at the point when formal disciplinary charges are filed against a judge. Such legislation has had support in either the Assembly or the Senate at various times, although never in both houses during the same legislative session.

In 2009 and again in 2011, public-proceedings bills have been introduced. The Commission has been working with the Legislature, the Governor and the Chief Judge and urges that such a measure be enacted.

SUSPENSION FROM OFFICE

The power to suspend judges from office is another important subject on which the Commission has previously commented.

Interim Suspension of Judge Under Certain Circumstances

The State Constitution empowers the Court of Appeals to suspend a judge from office, with or without pay as it may determine, under certain circumstances:

- while there is pending a Commission determination that the judge be removed or retired,
- while the judge is charged in New York State with a felony, whether by indictment or information,
- while the judge is charged with a crime (in any jurisdiction) punishable as a felony in New York State, or
- while the judge is charged with any other crime which involves moral turpitude.

New York State Constitution, Art.6, §22(e–g)

There is no provision for the suspension of a judge who is charged with a misdemeanor that does not involve "moral turpitude." Yet there are any number of misdemeanor charges that may not be

defined as involving "moral turpitude" but that, when brought against a judge, would seriously undermine public confidence in the integrity of the judiciary. Misdemeanor level DWI or drug charges, for example, would seem on their face to fall in this category, particularly where the judge served on a criminal court and presided over cases involving charges similar to those filed against him or her.

Fortunately, it is rare for a judge to be charged with a crime, but it does occasionally happen. In 2008, a newly-elected Surrogate's Court Judge was indicted for allegedly violating campaign finance laws, and was suspended by the Court of Appeals pending trial.

There are non-felony and even non-criminal categories of behavior that seriously threaten the administration of justice and arguably should result in the interim suspension of a judge. Such criteria might well include significant evidence of mental illness affecting the judicial function, or conduct that compromises the essence of the judge's role, such as conversion of court funds or a demonstrated failure to cooperate with the Commission or other disciplinary authorities.

The courts already have discretion to suspend an attorney's law license on an interim basis under certain circumstances, even where no criminal charge has been filed against the respondent. All four Appellate Divisions have promulgated rules in this regard. Any attorney under investigation or formal disciplinary charges may be suspended pending resolution of the matter based upon one of the following criteria:

- the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Departmental Disciplinary Committee made in connection with any investigation, hearing, or disciplinary proceeding, or
- a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or
- other uncontested evidence of professional misconduct.

Rules of the Appellate Division, First Department, §603.4(e)(1)[2]

The American Bar Association's Model Rules for Judicial Disciplinary Enforcement suggest a broader definition of the type of conduct that should result in a judge's suspension from office. For example, rather than limit suspension to felony or "moral turpitude" cases, the Model Rules would authorize suspension by the state's highest court for:

- a "serious crime," which is defined as a "felony" or a lesser crime that "reflects adversely on the judge's honesty, trustworthiness or fitness as a judge in other respects,"

[2] See also, Rules of the Appellate Division, Second Department, §691.4(*l*)(1), Rules of the Appellate Division, Third Department, §806.4(f)(1), and Rules of the Appellate Division, Fourth Department, §1022.20(d)(3)(d).

- "any crime a necessary element of which … involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a 'serious crime'," and
- other misconduct for which there is "sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice."

It would require an amendment to the State Constitution to expand the criteria on which the Court of Appeals could suspend a judge from office. The Commission believes that the limited existing criteria should be expanded. We recommend that the Governor and Legislature consider so empowering the Court.

Suspension from Judicial Office as a Final Sanction

Under current law, the Commission's disciplinary determinations are limited to public admonition, public censure or removal from office for misconduct, and retirement for mental or physical disability.

Prior to 1978, when both the Constitution and the Judiciary Law were amended, the Commission, or the courts in cases brought by the Commission, had the authority to determine that a judge be suspended with or without pay for up to six months. Suspension authority was exercised five times from 1976 to 1978: three judges were suspended without pay for six months, and two were suspended without pay for four months.

Since 1978, neither the Commission nor the courts have had the authority to suspend a judge as a final discipline. While the legislative history of the 1978 amendments is not clear on the reason for eliminating suspension as a discipline, there was some discussion among political and judicial leaders at the time suggesting that, if a judge committed misconduct serious enough to warrant the already momentous discipline of suspension, public confidence in the integrity of that judge was probably irretrievably compromised, thus requiring removal. There was also concern about the effect on court administration and public finances, especially in less populous counties and in the town and village courts, where it would be difficult to arrange and pay for temporary replacements, and where case management would be uprooted both when the temporary judge arrived and left.

Nevertheless, at times the Commission has felt constrained by the lack of suspension power, noting in several cases in which censure was imposed as a sanction that it would have suspended the disciplined judge if it had authority to do so. Some misconduct is more severe than would be appropriately addressed by a censure, yet not egregious to the point of warranting removal from office. In several recent cases – *Matter of Gerard E. Maney* and *Matter of Donald P. Martineck* in 2010, *Matter of Cathryn M. Doyle* in 2007, *Matter of William A. Carter* in 2006, *Matter of Ira J. Raab* in 2003 – the Commission explicitly stated that it chose to censure the judge because it lacked the power to suspend.

As it has done previously, the Commission suggests that the Governor and Legislature consider the merits of a constitutional amendment, providing suspension without pay as an alternative sanction available to the Commission.

VEHICLE & TRAFFIC LAW SECTION 1806

Vehicle & Traffic Law Section 1806 was amended in 2009 to provide that when a defendant pleads not guilty by mail to a traffic infraction, the court must advise the defendant of an "appearance date." The law had previously required that the court advise of a trial date. However, many courts were using the "trial date" requirement to mandate a "conference" between the motorist-defendant and the prosecuting authority, and where no plea agreement was reached, setting a later date for trial. Apart from there being no authority to mandate such a "conference," there was a significant burden imposed on defendants who had to travel twice to court, sometimes at great distances, to dispose of a relatively simple traffic matter. There were financial consequences as well, such as unpaid time off from work and the additional cost of having a lawyer appear in court twice. Many defendants felt coerced into accepting unfavorable plea bargains in order to avoid a second trip to the court.

Use of the new "appearance date" requirement varies throughout the state, often depending on whether the local prosecuting authority will make someone available to negotiate a possible plea on the defendant-motorist's appearance date. For example, in many jurisdictions, the local police officer who issued the ticket is authorized to prosecute the case, but the policy of the State Police is not to permit Troopers to do the same. Some ticket-issuing officers will engage in plea negotiations with ticketed motorists, others will not. In many counties, the District Attorney does not have enough assistants to appear at all the town and village courts holding traffic sessions on the same evenings. It would continue to be an unfair burden on the defendant to require an appearance for such a conference if there is no one on the other side who is authorized to negotiate, or even to meet. Many defendant-motorists, who may not have realized they could call and ask the court for a trial date, still feel compelled to plead guilty after an unavailing "appearance date" conference, rather than return to court for trial on another occasion. In such situations, the judge may not assume the role of the prosecutor, even if the motivation is to alleviate the burden of additional court appearances by the defendant-motorist.

There is no prohibition on a judge setting a simultaneous appearance and trial date, so that in one visit to court, the defendant-motorist may either reach a plea agreement or go to trial.[3]

TRAFFIC DIVERSION PROGRAMS

The Commission has become aware that in some upstate counties, District Attorneys have instituted a "Traffic Diversion Program" that, with some variations, operates as follows. A motorist who is issued a traffic ticket, usually for speeding but apparently other moving violations, is offered the option by the District Attorney of disposing of the ticket by (1) paying a fee (say, $200) to the DA's Office and (2) attending, paying for and successfully completing a safe driving course, in exchange for which (3) the DA will either ask the court to dismiss the

[3] The City, Town and Village Courts Resource Center of the Unified Court System is available to provide assistance to judges who may need it. The Center is in Albany, reachable toll-free at 1-800-232-0630.

ticket or simply decline to prosecute. The Commission understands that in one county, the DA gives the court $5 per ticket and apparently keeps the balance of the $200 fee, and in another, the DA splits the $200 fee with the county and the town where the alleged speeding occurred.

The Commission finds this practice very troubling in several respects. For example, it appears as if some defendant-motorists are being offered the opportunity to buy their way out of points on their licenses or other appropriate consequences for unsafe driving. It effectively discriminates against those who cannot afford the $200 fee and the cost of the safe-driving course. It supplements the budget of a public agency (the DA's office) without any meaningful checks and balances and raises at least an appearance that the exercise of prosecutorial discretion may inappropriately be based on potential revenues to the office. It deprives the State of revenue from its portion of any fines and fees that would otherwise be shared with the locality.

Most significantly, such a traffic diversion program is unsupervised by a court, effectively leaving the prosecution in control of what should be an adjudicatory process. By the time the matter gets before a judge, it is a fait accompli. The judge will have had no input at the outset and, for example, has no option to object to a particular diversion because, say, the defendant-motorist has had multiple convictions and a higher fine or license suspension would be in order. If, after the fact, the judge declines to accept the plea bargain, the DA would simply decline to prosecute. This effectively gives the court a take-it-or-leave-it ultimatum, which in the Commission's view seriously undermines the authority of the court and the independence of the judiciary. It also keeps the ticket indefinitely pending over the defendant-motorist's head.

In light of its concerns, the Commission recommends that the State Comptroller, Attorney General and the District Attorneys Association of the State of New York examine and comment upon the propriety of such diversion programs.

RECORDING ARRAIGNMENTS

Town and village courts are not designated as courts "of record" by the New York State Constitution. In past annual reports, the Commission reported on problems caused by those courts not having to make a verbatim record of arraignments in criminal proceedings, such as the difficulty in verifying whether defendants were advised of such fundamental rights as the right to counsel and the right to assigned counsel if they could not afford to retain their own lawyers.

Fortunately, the court system took appropriate steps to rectify this situation. Section 200.23(b)(8) of the Uniform Rules for Trial Courts, concerning Recordkeeping Requirements for Town and Village Courts, was amended to require "a record of the arraignment proceedings, including the following entries: whether the charges were read to the defendant; the constitutional and statutory rights of which defendant was advised; whether counsel was assigned; the plea entered by the defendant; a summary of other actions taken by the court at arraignment, including the form of release and amount of bail set; and the date of the next scheduled appearance." Pursuant to Section 30.1 of the Rules of the Chief Judge, the Chief Administrative Judge issued Administrative Order 245-08, requiring the mechanical recording of all proceedings in town and village courts.

While the Commission still encounters some town and village justices who are not recording arraignments and/or not insuring that defendants are properly advised of their rights, the results of these rules amendments generally appear to be positive, at least insofar as the Commission has examined such recordings in the course of investigating complaints.

In contrast to the mandate for town and village courts, Section 200.24 of the Uniform Rules for Trial Courts, concerning Rules Applicable to Local Criminal Courts, provides that each city court "may, consistent with the provisions of Section 2019 of the Uniform City Court Act, maintain records of all criminal actions and proceedings in accordance with Section 200.23 of this part" (emphasis added).

The Commission recommends that the Office of Court Administration examine the applicable statutes and rules pertaining to the recording of court proceedings and, to the extent permitted by law, make them uniform.

THE COMMISSION'S BUDGET

In 2007, for the first time in more than a generation, the Commission's budget was significantly increased by the Legislature, commensurate with its constitutional mandate and ever increasing caseload. In the last five years, the Commission has received and processed a record number of new complaints: 7514 (1129 more than in any comparable period). It also authorized 2052 preliminary reviews and inquiries and 1203 full-scale investigations (more than in any comparable period).

This year, in light of the significant financial stress constraining all of state government, the Commission, like many agencies, agreed to its share of sacrifice, while continuing to live up to its constitutional mandate. For example, the number of staff will be capped at 49 rather than the allotted 55, and all raises were suspended for the entire fiscal year.

A virtually "flat" budget for FY 2011-12, *i.e.* a slight decrease from the $5.4 million appropriated last year, would result in economies, since escalating contractual obligations such as rent would actually increase annual costs. With prudent management, such funding would permit the Commission to meet its constitutional mandate to render discipline where appropriate, and dismiss unsubstantiated complaints, as fairly and promptly as possible. The Commission appreciates the continuing advice and support of the Governor and leaders of the Legislature in the budget process.

A comparative analysis of the Commission's budget and staff over the years appears below.

SELECTED BUDGET FIGURES: 1978 TO PRESENT

Fiscal Year	Annual Budget[1]	New Complaints[1]	New Investig'ns	Pending Year End	Public Disciplines	Staff Attorneys[2]	Investig'rs ft/pt	Total Staff
1978	1.6m	641	170	324	24	21	18	63
1988	2.2m	1109	200	141	14	9	12/2	41
1992	1.7m	1452	180	141	18	8	6/1	26
1996	1.7m	1490	192	172	15	8	2/2	20
2000	1.9m	1288	215	177	13	9	6/1	27
2006	2.8m	1500	267	275	14	10	7	28½
2007	4.8m	1711	192	238	27	17	10	51
2008	5.3m	1923	262	208	21	19	10	49
2009	5.3m	1855	257	243	24	18	10	48
2010	5.4m	2025	225	226	15	18	10	48
2011	5.4m[3]	~	~	~	~	17	9	49

[1] Complaint figures are calendar year (Jan 1 – Dec 31); Budget figures are fiscal year (Apr 1 – Mar 31). Budget figures are rounded off.
[2] Number includes Clerk of the Commission, who does not investigate or litigate cases.
[3] Proposed.

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,

HON. THOMAS A. KLONICK, *CHAIR*
STEPHEN R. COFFEY, ESQ., *VICE CHAIR*
HON. ROLANDO T. ACOSTA
JOSEPH W. BELLUCK, ESQ.
JOEL COHEN, ESQ.
RICHARD D. EMERY, ESQ.
PAUL B. HARDING, ESQ.
ELIZABETH B. HUBBARD
NINA M. MOORE
HON. KAREN K. PETERS
HON. TERRY JANE RUDERMAN

APPENDIX A: 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 App'ted	Expiration of Present Term
Thomas A. Klonick	Chief Judge Jonathan Lippman	2005	3/31/2013
Stephen R. Coffey	(Former) Senate President Pro Tem Joseph L. Bruno	1995	3/31/2011
Rolando T. Acosta	Chief Judge Jonathan Lippman	2010	3/31/2014
Joseph W. Belluck	(Former) Governor David A. Paterson	2008	3/31/2012
Joel Cohen	Assembly Speaker Sheldon Silver	2010	3/31/2014
Richard D. Emery	(Former) Senate Minority Leader Malcolm A. Smith	2004	3/31/2012
Paul B. Harding	(Former) Assembly Minority Leader James Tedisco	2006	3/31/2013
Elizabeth B. Hubbard	(Former) Governor David A. Paterson	2008	3/31/2011
Nina M. Moore	(Former) Governor David A. Paterson	2009	3/31/2013
Hon. Karen K. Peters	(Former) Governor David A. Paterson	2000	3/31/2014
Terry Jane Ruderman	(Former) Chief Judge Judith S. Kaye	1999	3/31/2012

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.

Honorable Rolando T. Acosta is a graduate of Columbia College and the Columbia University School of Law. He served as a Judge of the New York City Civil Court from 1997 to 2002, as an Acting Justice of the Supreme Court from 2001 to 2002, and as an elected Justice of the Supreme Court from 2003 to present. He presently serves as an Associate Justice of the Appellate Division, First Department, having been appointed in January 2008. Prior to his judicial career, Judge Acosta served in various capacities with the Legal Aid Society, including Director of Government Practice and Attorney in Charge of the civil branch of the Brooklyn office. He also served as Deputy Commissioner and First Deputy Commissioner of the New York City Commission on Human Rights.

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.

Joel Cohen, Esq., is a graduate of Brooklyn College and New York University Law School, where he earned a J.D. and an LL.M. He is a partner in Stroock & Stroock & Lavan LLP in Manhattan, which he joined in 1985. Mr. Cohen previously served as a prosecutor for ten years, first with the New York State Special Prosecutor's Office and then as Assistant Attorney-in-Charge with the US Justice Department's Organized Crime & Racketeering Section in the Eastern District of New York. He is a member of the Federal Bar Council and is an Adjunct Professor of Law teaching Professional Responsibility at Fordham Law School, having previously done so at Brooklyn Law School. Mr. Cohen is the author of three books dealing with religion -- *Moses: A Memoir* (Paulist Press 2003), *Moses and Jesus: A Conversation* (Dorrance Publishing 2006) and *David and Bathsheba: Through Nathan's Eyes* (Paulist Press 2007) -- and has authored over 150 articles in legal periodicals, primarily the New York Law Journal and the National Law Journal.

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 City Bar Association's Committee on Election Law, the Advisory Board of the National Police Accountability Project, and the New York State Commission on Public Integrity. He is also active in the Association of Trial Lawyers of America and the Municipal Arts Society Legal Committee, 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.

Elizabeth B. Hubbard is a graduate of Smith College (B.A. *summa cum laude*) and the Johns Hopkins School of Advanced International Studies, where she earned a masters degree. She served as Executive Director of the Committee for Modern Courts and is presently a member of

the Modern Courts Board of Directors. She served previously as President and Judicial Director of the New York State League of Women Voters, President of the League of Women Voters of Huntington, Founding Chairperson of the Huntington Township Chamber Foundation, a recent President of the Huntington Township Housing Coalition, and a member of her Village Planning Board. Ms. Hubbard has also served as a member of the Dominick Commission to reform the State court system, two gubernatorial judicial screening panels, the State Bar Association's Committee on Courts and the Community and the American Judicature Society. Ms. Hubbard also worked on improving prison conditions when she served as Chair of the Correctional and Osborne Associations.

Nina M. Moore received her B.A. from Knox College (*Magna Cum Laude, Phi Beta Kappa*) and her M.A. and Ph.D. in political science from the University of Chicago. She is an Associate Professor of Political Science at Colgate University, where she has been on the faculty since 1998 and has chaired the Research Council and the Faculty Development Council. She previously held teaching positions at DePaul University, the University of Minnesota and Loyola University of Chicago. Professor Moore is the author of *Governing Race: Politics, Policy and the Politics of Race* (Praeger 2000) and various articles and papers on the Supreme Court, Congress and public policy matters. She is on the editorial board of the *Ralph Bunche Journal of Public Affairs.*

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. She was appointed by Chief Judge Jonathan Lippman in 2009 to the New York State Justice Task Force to examine the causes of wrongful convictions and make appropriate recommendations to safeguard against such convictions. 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 *cum laude* from Pace University School of Law, 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 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 President of the New York Association of Women Judges, 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.

RECENT MEMBERS

Honorable Jill Konviser served on the Commission from 2006 to 2010. She 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.

APPENDIX B: 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.

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.

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.

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.

Melissa R. DiPalo, *Administrative Counsel*, 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.

Jean Joyce, *Senior Attorney*, graduated *cum laude* from New York Law School, where she was Executive Notes and Comments Editor of the *Law Review,* and received a B.A. in Russian Studies from Hamilton College. She was previously the Senior Principal Law Clerk to Chief Judge Judith S. Kaye of the New York State Court of Appeals, and served as an Assistant

District Attorney in the Bronx County District Attorney's Office. She also served as a Law Assistant to the Honorable Robert P. Patterson, Jr., Chair of the Attorney Grievance Committee for the United States District Court, Southern District of New York. Ms. Joyce is currently a member of the New York City Bar Association's Professional Responsibility Committee and from 2003-2006 was a member of the Association's Criminal Advocacy Committee. She is also a member of the Historical Society of the Courts of the State of New York, the Association of Judicial Disciplinary Counsel and the Brooklyn Bar Association. Ms. Joyce has been a CLE panelist on criminal procedure and capital punishment issues and is the author of *Francis Miles Finch*, in *The Judges of the Court of Appeals: A Biographical History*, edited by the Honorable Albert M. Rosenblatt.

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 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.

Thea Hoeth, *Senior Attorney,* is a graduate of St. Lawrence University *(cum laude)* and the Albany Law School. Prior to joining the Commission staff, she managed various not-for-profit organizations and most recently served as executive director of *To Life!*, a regional breast cancer education and support organization. Ms. Hoeth served previously in a number of senior state government positions, including executive director of the NYS Ethics Commission (1991 – 94) and the cabinet-level post of executive director of the New York State Office of Business

Permits and Regulatory Assistance. She was also in private practice, has lectured and written on topics related to public sector ethics and was an adjunct professor of legal ethics for The Sage Colleges.

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.

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.

Charles F. Farcher, *Staff Attorney*, is a graduate of the College of St. Rose and the Albany Law School. Prior to joining the Commission staff, he served as an Appellate Court Attorney with the Appellate Division of Supreme Court, Third Department.

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Alan W. Friedberg, *Special Counsel*, 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 Chief Counsel to the Departmental Disciplinary Committee of the Appellate Division, First Department, as Deputy Administrator in Charge of the Commission's New York City Office, as a Senior Attorney at the Commission, as a staff attorney in the Law Office of the New York City Board of Education, as an adjunct professor of business law at Brooklyn College, and as a junior high school teacher in the New York City public school system.

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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 S.I. Newhouse School of Publications Communications at Syracuse University and the Syracuse University College of Law. Prior to joining the Commission staff in April 2008, she was a reporter for the New York Law Journal and the Journal News (Westchester).

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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 legal 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.

APPENDIX C: REFEREES WHO SERVED IN 2010

Referee	City	County
Roger Bennet Adler, Esq.	New York	New York
Hon. Frank J. Barbaro	Watervliet	Albany
Peter Bienstock, Esq.	New York	New York
William T. Easton, Esq.	Rochester	Monroe
Robert L. Ellis, Esq.	Scarsdale	Westchester
Vincent D. Farrell, Esq.	Mineola	Nassau
Paul Feigenbaum, Esq.	Albany	Albany
Edward B. Flink, Esq.	Latham	Albany
David Garber, Esq.	Syracuse	Onondaga
Douglas S. Gates, Esq.	Rochester	Monroe
Ronald Goldstock, Esq.	Larchmont	Westchester
Victor J. Hershdorfer, Esq.	Syracuse	Onondaga
Hon. Janet A. Johnson	White Plains	Westchester
H. Wayne Judge, Esq.	Glens Falls	Warren
Matthew J. Kelly, Esq.	Albany	Albany
Nancy Kramer, Esq.	New York	New York
Sherman F. Levey, Esq.	Rochester	Monroe
Roger J. Maldonado, Esq.	New York	New York
Gregory S. Mills, Esq.	Clifton Park	Saratoga
James C. Moore, Esq.	Rochester	Monroe
Gary Muldoon, Esq.	Rochester	Monroe
Edward J. Nowak, Esq.	Penfield	Monroe
Philip C. Pinsky, Esq.	Syracuse	Onondaga
Hon. Felice K. Shea	New York	New York
Shirley A. Siegel, Esq.	New York	New York
Robert H. Straus, Esq.	New York	Kings
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany

APPENDIX D: 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

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

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

Hon. Rolando T. Acosta (2010-present)
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)
Joel Cohen (2010-present)
Howard Coughlin (1974-76)
Mary Ann Crotty (1994-98)
Dolores DelBello (1976-94)
Colleen C. DiPirro (2004-08)
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)
Elizabeth B. Hubbard (2008-present)
Marvin E. Jacob (2006-09)
Hon. Daniel W. Joy (1998-2000)
Michael M. Kirsch (1974-82)
*Hon. Thomas A. Klonick (2005-present)
Hon. Jill Konviser (2006-10)
*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)
Nina M. Moore (2009-present)
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 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, 43,337 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 35,523 were dismissed upon initial review or after a preliminary review and inquiry, and 7,814 investigations were authorized. Of the 7,814 investigations authorized, the following dispositions have been made through December 31, 2010:

- 1,028 complaints involving 787 judges resulted in disciplinary action. (See details below and on the following page.)
- 1,564 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1,442, 86 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 642 complaints involving 454 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 496 complaints were closed upon vacancy of office by the judge other than by resignation.
- 3,858 complaints were dismissed without action after investigation.
- 226 complaints are pending.

Of the 1,028 disciplinary matters against 787 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.) These figures take into account the 91 decisions by the Court of Appeals, 16 of which modified a Commission determination.

- 159 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);
- 320 judges were censured publicly;
- 243 judges were admonished publicly;
- 59 judges were admonished confidentially by the temporary or former Commission; and
- 1 matter was dismissed by the Court of Appeals upon the judge's request for review.

Court of Appeals Reviews

Since 1978, the Court of Appeals, on request of the respondent-judge, has reviewed 91 determinations filed by the present Commission. Of these 91 matters:

- The Court accepted the Commission's sanctions in 75 cases (66 of which were removals, 6 were censures and 3 were admonitions);
- The Court increased the sanction from censure to removal in 2 cases;
- The Court reduced the sanction in 13 cases:
    - 9 removals were modified to censures;
    - 1 removal was modified to admonition;
    - 2 censures were modified to admonitions; and
    - 1 censure was rejected and the charges were dismissed.
- The Court remitted 1 matter to the Commission for further proceedings.

APPENDIX E: RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR § 100 *et seq.*

Rules of the Chief Administrator of the Courts Governing Judicial Conduct

Preamble

The rules governing judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statues, 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.

Historical Note
Sec. filed Aug.1, 1972; amd. Filed Nov. 26, 1976; renum. 111.3, new added by renum. and amd. 33.3, filed Feb. 2, 1982; amds. filed: Nov. 15, 1984; July 14, 1986; June 21, 1988; July 13, 1989; Oct. 27, 1989; replaced, new filed Feb. 1, 1996 eff. Jan. 1, 1996.
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.

(5) Nothing in this rule shall further limit the practice of law by the partners or associates of a part-time judge in any court to which such part-time judge is temporarily assigned to serve pursuant to section 106(2) of the Uniform Justice Court Act or Section 107 of the Uniform City Court Act in front of another judge serving in that court before whom the partners or associates are permitted to appear absent such temporary assignment.

(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

Added 100.6(B)(5) March 24, 2010

APPENDIX F:

TEXT OF 2010 DETERMINATIONS RENDERED BY THE COMMISSION

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to GILBERT L. ABRAMSON, a Judge of the Family Court, Saratoga County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Jill S. Polk and Thea Hoeth, Of Counsel) for the Commission
Robert P. Roche for the Respondent

The respondent, Gilbert L. Abramson, a Judge of the Family Court, Saratoga County, was served with the first Formal Written Complaint dated June 17, 2008, containing seven charges. The first Formal Written Complaint alleged that in six matters respondent violated the due process rights of defendants appearing before him by failing, *inter alia*, to advise them of the right to counsel and to afford an opportunity to be heard, notwithstanding that he had been issued a Letter of Dismissal and Caution for failing to advise litigants of the right to counsel. Respondent filed an Answer dated December 3, 2008.

By Order dated November 28, 2008, the Commission designated Paul A. Feigenbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 9, 2009, in Albany; the hearing exhibits included a stipulation of facts as to Charges I through VII (Ex. 1). The referee filed a report on July 21, 2009.

Respondent was served with the Second Formal Written Complaint dated July 7, 2009, containing three charges (numbered as Charges VIII through X). The Second Formal Written Complaint alleged that respondent made offensive remarks of a sexual nature to and about a litigant and failed to advise another litigant of the right to counsel notwithstanding having been issued the above-mentioned Letter of Dismissal and Caution. Respondent filed an Answer dated July 20, 2009.

On August 14, 2009, the Administrator moved for summary determination with respect to the Second Formal Written Complaint. Respondent opposed the motion in papers filed on September 21, 2009, and the Administrator filed a reply on September 22, 2009. By Decision and Order dated September 24, 2009, the Commission denied the motion for summary determination and, on the same date, designated Philip C. Pinsky, Esq., as referee to hear and report proposed findings of fact and conclusions of law with respect to the Second Formal Written Complaint. A hearing was held in Albany on December 2, 7 and 8, 2009, and January 12 and 13 and March 2, 2010. The referee filed a report dated June 28, 2010.

The parties submitted briefs with respect to the referee's reports and the issue of sanctions. Commission counsel recommended the sanction of removal, and respondent's counsel opposed the recommendation. Oral argument was waived. On September 29, 2010, the Commission considered the record of the proceedings and made the following findings of fact.

1. Respondent has been a Judge of the Family Court, Saratoga County, since 2000. His current term expires on December 31, 2010. Prior to serving as a judge, respondent served as chief counsel to the New York State Senate Committee on Children and Families and as deputy county attorney for Saratoga County dealing with Family Court matters.

As to Charge I of the Formal Written Complaint:

2. On February 11, 2003, the Saratoga County Support Collection Unit, on behalf of Laurie Beaulac, filed a petition for violation of a child support order by Daniel Eddy. Mr. Eddy was never personally served with that petition. On the request of the Support Magistrate, respondent issued a warrant for Mr. Eddy's arrest on April 9, 2003. No evidentiary hearing on the petition was held by the Support Magistrate.

3. On February 3, 2005, Mr. Eddy voluntarily appeared before respondent in response to the April 9, 2003 warrant and on his own petition for modification of support, which was filed on November 22, 2004. The modification petition requested relief from the support order due to Mr. Eddy's physical and mental limitations, and the petition was signed and submitted by his power of attorney due to those same physical and mental limitations. Respondent knew that Mr. Eddy was under the care of a doctor due to a stroke, was in rehabilitation therapy, was unable to read or write and in general had physical limitations. At this appearance, respondent also proceeded on a petition for violation of a support order filed by the Support Collection Unit on behalf of Colleen Van Patten.

4. At the February 3, 2005 court appearance, Mr. Eddy's attorney questioned whether Mr. Eddy had been properly served with the petitions, and he advised respondent that no evidentiary hearing had been held with respect to the violation petition in *Beaulac* and that Eddy had not had an opportunity to show that he was incapable of paying due to his limitations.

5. Without reviewing the affidavits of service, granting an evidentiary hearing on either of the violation petitions or the modification petition, or granting a hearing on Mr. Eddy's ability to pay, respondent imposed two consecutive sentences of 180 days for the alleged violations with respect to the *Beaulac* and *Van Patten* matters and committed Mr. Eddy to the county jail.

6. By letter dated February 4, 2005, Mr. Eddy's attorney again requested that respondent review the issue of proper service and grant Mr. Eddy a hearing based upon his physical and mental deficiencies. On February 24, 2005, after Mr. Eddy had served 21 days in the county jail, respondent restored the matter to the court calendar. Upon review of the affidavit of service, respondent determined that Mr. Eddy had not been personally served, and released him from jail. Respondent remanded the violation petitions and the modification petition back to the Support Magistrate.

7. Specifically with respect to whether a hearing should have been held on Mr. Eddy's capacity to pay in the *Beaulac* and *Van Patten* matters, respondent acknowledges that he should have granted Mr. Eddy a hearing in both proceedings and that he should have reviewed the affidavit of service prior to sentencing.

As to Charge II of the Formal Written Complaint:

8. On September 9, 2004, respondent presided over *Jennifer McGrath v. Carmen LaFalce,* which concerned confirmation of the Support Magistrate's determination finding Mr. LaFalce in willful violation of the support order. Respondent confirmed the findings of the Support Magistrate and committed Mr. LaFalce to a term not to exceed six months' incarceration, until such time as Mr. LaFalce paid arrears of $15,391.32 and paid his current weekly support obligation. The sentence was suspended on the condition that on or before December 9, 2004, Mr. LaFalce pay the set arrears and his current weekly support obligation to the petitioner or Support Collection Unit.

9. On December 9, 2004, the matter came on to be heard by respondent regarding Mr. LaFalce's compliance with the September 9, 2004 court order. Initially, respondent signed a corrective order to reflect a 90-day suspended sentence in place of the six-month suspended sentence. Respondent then found that Mr. LaFalce had paid $18,200 to purge the condition in the suspended sentence, the increase being additional support that had accumulated since the last court appearance. Based upon discussions with Mr. LaFalce's attorney regarding the suspended sentence and future findings of willfulness, respondent issued a new 90-day order of commitment, suspended unless Mr. LaFalce failed to pay his weekly support and there was a finding that this failure to pay was willful.

10. At the December 9, 2004 proceeding, respondent stated that in order for Mr. LaFalce to be committed under the order "there will have to be a finding of willfulness and the willfulness, if a sentence is imposed, it will have to be confirmed by me. So, there's due process that applies."

11. On April 4, 2005, respondent presided over *McGrath v. LaFalce*, which concerned an affidavit filed by the Support Collection Unit alleging Mr. LaFalce's failure to pay support and requesting the vacatur of the suspended sentence issued on December 9, 2004. At this court appearance, respondent sentenced Mr. LaFalce to 90 days in jail. Respondent did not comply with the terms of his December 9, 2004 order and his assurances of due process; no finding of willfulness was made, and no hearing was held. Mr. LaFalce paid the purge amount and was released that day.

12. Respondent further failed to grant Mr. LaFalce a hearing with respect to his ability to pay, even though he was advised by Mr. LaFalce's attorney that Mr. LaFalce was "without means to pay the current order of support."

13. Respondent knew on April 4, 2005, that on June 28, 2004, Mr. LaFalce had filed a petition to modify support, based upon his inability to pay, that had not yet been heard.

14. At the hearing before the referee, respondent testified that he signed the commitment order in order "to persuade" Mr. LaFalce to pay support and that respondent had done the same thing a year earlier and "it worked."

As to Charge III of the Formal Written Complaint:

15. On April 11, 2002, Saratoga County Family Court Judge Courtney Hall issued an order of commitment against Henry Allen, sentencing him to 270 days in jail for failure to pay two separate support orders. Judge Hall suspended the sentence so long as Mr. Allen complied with the support orders.

16. On April 28, 2005, respondent presided over *Saratoga County Support Collection v. Henry Allen*, which concerned a request to vacate the suspended sentence set by Judge Hall.

17. During this appearance, Mr. Allen stated that he "would like to get an adjournment to get a lawyer."

18. Respondent denied the request, telling Mr. Allen, "No, you've already been sentenced." Respondent did not advise Mr. Allen of the right to an attorney or give Mr. Allen time to confer with an attorney, as he had requested.

19. Respondent sentenced Mr. Allen to jail for 270 days in the absence of counsel and without a hearing. Mr. Allen served 268 days in jail based upon respondent's ruling.

20. Respondent acknowledges that Mr. Allen had the right to an attorney and the right to an adjournment to consult with an attorney prior to sentencing.

As to Charge IV of the Formal Written Complaint:

21. On April 5, 2005, the Support Collection Unit, on behalf of Traci Brown, filed a petition for violation of a child support order against Anthony Brown. Mr. Brown appeared before the Support Magistrate on May 3, 2005, and the matter was scheduled for further proceedings on July 7, 2005. Mr. Brown failed to appear on that date, and the Support Magistrate made a finding on default of a willful violation of the support order. The matter was referred to respondent for confirmation and sentencing on August 18, 2005.

22. The Support Magistrate did not sign the order of default and willful violation until August 15, 2005, the same day the summons regarding the confirmation was mailed to Mr. Brown. Mr. Brown's 35-day statutory right to file objections to the findings of the Support Magistrate did not expire until September 19, 2005.

23. On August 18, 2005, respondent presided over *Saratoga County Support Collection v. Anthony Brown*. Mr. Brown initially was not present in court. Respondent confirmed the findings of the Support Magistrate, imposed a sentence of incarceration of 180 days and issued a warrant for Mr. Brown's arrest. Twenty minutes later, Mr. Brown appeared, and respondent recalled the matter.

24. Respondent failed to advise Mr. Brown of his right to counsel prior to restating the imposition of the 180-day sentence of incarceration, failed to grant a hearing and failed to adjourn the matter until after Mr. Brown's right to file objections had run. At the conclusion of the proceeding, respondent stated:

> "THE COURT: So, you should be used to jail. You've been there before.
>
> MR. BROWN: I'm not used to jail, your honor.
>
> THE COURT: Well, get used to it. Be current on your payment or sit in jail. I don't have a high tolerance for it."

25. Mr. Brown spent 177 days in jail based upon respondent's commitment order.

26. Respondent acknowledges that Mr. Brown had the right to counsel, the right to a hearing and the right to file objections. At the hearing, respondent testified as to his handling of this matter, "I absolutely fell down. I failed in my responsibility."

As to Charge V of the Formal Written Complaint:

27. On May 26, 2005, the Support Magistrate found John Grizzard to be in willful violation of a child support order, and the matter was referred to respondent for confirmation and sentencing.

28. On July 7, 2005, respondent confirmed the findings of the Support Magistrate, sentenced Mr. Grizzard to 30 days' incarceration and suspended the order of commitment on the condition that Mr. Grizzard pay his support. Respondent did not advise Mr. Grizzard of his right to counsel or assigned counsel prior to confirming the findings and imposing sentence.

29. Respondent acknowledges that prior to the imposition of the suspended sentence, Mr. Grizzard should have been advised of his right to counsel and to assigned counsel if qualified.

30. On November 10, 2005, the Support Collection Unit filed an affidavit alleging that Mr. Grizzard had failed to pay his support and requested that the suspended sentence be vacated.

31. The matter came on to be heard before respondent on December 5, 2005. At this court appearance, respondent vacated the suspended sentence and entered an order of commitment requiring Mr. Grizzard to serve the 30 days' incarceration. Prior to vacating the suspended sentence and committing Mr. Grizzard to jail, respondent did not advise him of his right to counsel and to assigned counsel if qualified. Mr. Grizzard paid the purge amount and was released that day.

32. Respondent acknowledges that prior to commitment, Mr. Grizzard should have been advised of his right to counsel and to assigned counsel if qualified.

33. At the hearing, respondent acknowledged that he failed to advise Mr. Grizzard of his rights, but testified the case had "a happy outcome" since Mr. Grizzard paid the purge amount and was released.

As to Charge VI of the Formal Written Complaint:

34. On November 28, 2005, the Support Magistrate found Peter Mahaney to be in willful violation of a child support order. The Support Magistrate did not sign the order to that effect until December 5, 2005.

32. Mr. Mahaney was not present at the November 28 support hearing. He had called to ask for an adjournment, which the Support Magistrate denied. The matter was referred to respondent for confirmation and sentencing on December 9, 2005.

33. The summons for sentencing was mailed to Mr. Mahaney on December 1, 2005, which was four days before the Support Magistrate signed the order of disposition. The 35-day statutory requirement for filing of objections had not run by the summons return date of December 9, 2005.

34. On December 9, 2005, Mr. Mahaney called the court and advised that he would be late. After waiting for one hour and 20 minutes for his arrival, respondent had the matter called, confirmed the findings of the Support Magistrate and sentenced Mr. Mahaney to 180 days' incarceration.

35. Mr. Mahaney appeared five minutes later, and respondent recalled the matter. Respondent failed to advise Mr. Mahaney of his right to counsel prior to imposing the 180-day sentence of incarceration, failed to grant a hearing, failed to determine if Mr. Mahaney had received the order and failed to adjourn the matter until after Mr. Mahaney's right to file objections had run.

36. Respondent acknowledges that Mr. Mahaney had the right to counsel, the right to a hearing and the right to file objections and that respondent should have determined if Mr. Mahaney had received the order prior to imposing a sentence.

37. Mr. Mahaney evinced his desire to have counsel appointed when he stated that he never received an application for a Public Defender. In response, respondent told Mr. Mahaney, after imposing the 180-day sentence, "We'll give you a PD application to take with you to get you out." Mr. Mahaney served 180 days in jail.

38. At the hearing, respondent testified that he did not notice the date the order was signed and that he should have adjourned the proceedings and appointed an attorney to represent Mr. Mahaney, who seemed "clueless" about the proceedings.

As to Charge VII of the Formal Written Complaint:

39. On February 9, 2005, the Commission issued respondent a Letter of Dismissal and Caution for, *inter alia*, failing to "advise[] [a litigant] of his right to counsel, as required by Section 262 of the Family Court Act," and failing to advise another litigant "of her right to assigned counsel, as required by statute" and to "make appropriate inquiries as to her ability to afford counsel." The Commission's letter stated in part: "[This letter] is a confidential disposition of the current complaint but may be used in a future disciplinary proceeding based on a failure to adhere to the terms of the letter."

40. Notwithstanding his receipt of the Letter of Dismissal and Caution, and within a few months after receiving the letter, respondent failed to advise litigants of their right to counsel in the *Allen, Brown, Grizzard* and *Mahaney* matters.

As to Charge VIII of the Second Formal Written Complaint:

41. In 2008 respondent was the presiding judge of the Saratoga County Family Treatment Court (hereinafter "Treatment Court"). The operation of the Treatment Court is governed by a Policy and Procedure Manual, which respondent helped draft. Participants in Treatment Court proceedings are parties charged with abuse or neglect, where substance abuse is a critical factor. If accepted for Treatment Court, a party receives treatment and support services,

is monitored by the court and appears on a regular basis. The Treatment Court team, which includes Resource Coordinator Rebecca Dixon, Assistant County Attorney Karen D'Andrea, case managers and administrative staff, meets after each weekly session and then meets with the judge to inform him of their conclusions about the cases. The charges against participants who successfully complete the program are resolved akin to an adjournment in contemplation of dismissal.

42. Although Treatment Court is a less structured environment than the regular part of Family Court and has certain procedures that are different from those in the regular part of Family Court, including that the participants have direct conversation with the judge without benefit of counsel and are not under oath, its proceedings are court proceedings. Resource Coordinator Rebecca Dixon testified:

> "The judge is always in the role of judge, so he is always presiding over the – It's a formal court proceeding. Although it may look and sound different from other court proceedings, it is a formal court proceeding. So, in that sense, he is not a discussion leader. He is the judge."

Ms. Dixon testified that the judge's direct conversations with Treatment Court participants are "generally considered one of the key differences and one of the key components to success in treatment courts, because there is an investment directly from the judge and the participants usually respond to that." During Treatment Court proceedings, respondent always wore his robes and sat on the bench.

43. On September 28, 2006, a neglect proceeding was commenced in Warren County against Wendy ___ (hereinafter "Wendy"). The neglect petition alleged that Wendy and her child's father had used their child as a "look out" while stealing merchandise from a store; the petition also alleged that Wendy had a history of substance abuse. A short time later, the matter was transferred to Saratoga County Family Court.

44. The Warren County Family Court issued an Order dated January 29, 2007, releasing the child to the custody of her mother, with supervision by the Saratoga County Department of Social Services, upon specified terms and conditions which required, *inter alia*, that Wendy undergo an assessment with the Saratoga County Treatment Court, participate in the Treatment Court program if accepted, and attend the program until successfully discharged or terminated from the program. After an assessment, Wendy entered the Treatment Court program. Wendy was required, *inter alia*, to appear in court on a weekly basis.

45. At an appearance in Treatment Court before respondent on April 14, 2008, Wendy wore a T-shirt with an innocuous caricature of a smiling turtle; beneath the caricature was the caption "cranky but adorable so I'm worth it." The following statements were made on the record during the proceeding:

"JUDGE ABRAMSON: Let me talk to my friend Wendy, who has to have her meniscus done.

WENDY: Yeah.

JUDGE ABRAMSON: Yeah.

KAREN D'ANDREA: Look at her shirt.

WENDY: It says, 'Cranky but adorable so I'm worth it.'

JUDGE ABRAMSON: It's a shirt with a penis on it. I don't understand. It's a turtle, right?

WENDY: Yep.

JUDGE ABRAMSON: So you're walking – you're hobbling. That's what it looks like. It's very phallic, and it's a penis with a smile on it. I've embarrassed (unintelligible). She's blushing. I didn't know I could do that. (unintelligible). So you got to get your meniscus done. You're hobbling like crazy. You go side to side.

WENDY: Well, no – yeah.

JUDGE ABRAMSON: That's the meniscus. So you go for the MRI and your doctor. She's (unintelligible). She's got the giggles.

FEMALE VOICE: Now I look at turtles in a whole different way. Oh god. It's going to change them forever.

WENDY: Naw, I ain'ts going to wear this shirt again.

JUDGE ABRAMSON: Did you ever see a sad turtle? They're happy to be like – because that turtle, that's a turtle on Viagra. It's erect; it's smiling. And you never see a sad Mrs. Turtle, because they're fully satisfied. They always (intelligible). So I had the meniscus surgery done. It was a day. There are three little incisions. They go in and they're done and you're home. And I went to work the next day. But as Becky (unintelligible) points out (sic), 'You sit on your judicial ass all day. So you could sit and do your job.' She didn't really say that. But you work, you're standing on your feet. But it will be a couple of days.

> That's a small potato surgery. But she's going to puke she's laughing so hard. This is like the highlight of my day. (Unintelligible). So you'll get this surgery done, because it's a small procedure. It's not laparoscopic, but they use a little machine and it's done and then you go home. She's got the giggles. I'm bringing down the house.
>
> FEMALE VOICE: Everybody's --
>
> JUDGE ABRAMSON: -- It feels good. You can't look at your shirt without feeling aroused."

46. At the hearing before the referee, respondent conceded that when he said, "That's a turtle on Viagra," he was "implying that it's a turtle that has an erection" and that when he said "you never see a sad Mrs. Turtle, because they're fully satisfied," he was talking about "sexual satisfaction." He also agreed that he was "talking about a turtle on Viagra satisfying [his] wife, Mrs. Turtle, sexually."

47. At the hearing before the referee, in response to a suggestion by respondent's attorney that the conversation about the shirt may have "relaxed" Wendy, Ms. Dixon, the Treatment Court Resource Coordinator, testified:

> "I am not Wendy, so I can't speak to what calms her down or doesn't calm her down. I would maintain that that is still not an appropriate topic and if that was calming to her or not, it probably speaks to why it shouldn't be said in court."

She also testified:

> "The judge is not a therapist and that is not the judge's role. What we have found is that the fact that the judge is speaking directly to people and is concerned about their well-being may have a therapeutic value for that person, but the judge's role is not that of a therapist."

48. On the Monday following the April 14 proceeding, Ms. Dixon told respondent that "the shirt thing was not a good idea." Respondent understood Ms. Dixon's suggestion to mean that he should not talk about the T-shirt again, and he "definitely" agreed with that suggestion. On the same day, the Treatment Court team held its usual weekly meeting, and after discussing respondent's comments about the shirt, they caused their conclusion to be communicated to him. Respondent agreed that he would not comment about the shirt again, and he said he would apologize to Wendy. There is no evidence that he did so.

49. On May 16, 2008, a violation petition was filed by the Child Protective Services, alleging that Wendy, *inter alia*, had failed a drug screen, had failed to appear at

Treatment Court, and had allowed a drug dealer into her home in an effort to purchase crack cocaine. A public defender was assigned to her, and when they appeared on July 17, 2008, Wendy admitted to having been under the influence of cocaine while caring for her child. Respondent signed an Order of Supervision, whose terms and conditions included a requirement that Wendy continue to submit to the jurisdiction of the Treatment Court and comply with its terms and conditions until successfully discharged.

50. On September 22, 2008, Wendy wore the same T-shirt to Treatment Court that she had worn on April 14th. Respondent again commented inappropriately about the shirt, describing the image as "phallic" and "pornographic." The following statements were made on the record during the proceeding:

> "JUDGE ABRAMSON: So Wendy, another great shirt. You get the best shirts, and you went to a place where the shirts are like $4.99 a shirt.
>
> FEMALE VOICE: $8.95.
>
> JUDGE ABRAMSON: $8.95. Well, that's a nice shirt.
>
> WENDY: Thank you.
>
> JUDGE ABRAMSON: All of Wendy's shirts are phallic. Look at the turtle. Look at the turtle.
>
> MS. DIXON: Leave the turtle alone, your honor.
>
> JUDGE ABRAMSON: It's a turtle. It's a pornographic turtle. You know what the turtle looks like? The guy who does the enzyte commercial? You know, smiling Bob – you know, for male enhancement, the same goofy smile? I'm just embarrassing the crap out of Wendy. It's my personal (unintelligible) of the week. She's hiding the turtle. So, Wendy, you missed some (unintelligible) test, you thought that if you went for -- to treatment the next day, you take the test --
>
> WENDY: – Saturday morning.
>
> JUDGE ABRAMSON: You got to take it.
>
> WENDY: Yeah.
>
> JUDGE ABRAMSON: You got to do it on the day.
>
> WENDY: I've been calling Becky, like, every day like I

was supposed to. I was bugging her actually, but then Thursday and Friday, I just -- I rode -- I went to my class and then after my class -- Well, after work Friday, I totally bugged out and --

JUDGE ABRAMSON: – Been three years, straightforward thing.

WENDY: Yes, I got a big old note by the phone.

JUDGE ABRAMSON: You have a nice turtle, it really is. You saw the nice turtle.

WENDY: Yeah, I'm not wearing that shirt.

JUDGE ABRAMSON: I tease you every shirt you wear.

WENDY: Yeah, I know, right.

UNKNOWN: I'd think you'd learn already.

JUDGE ABRAMSON: Yeah, yeah, yeah.

WENDY: Yeah, it takes me awhile."

51. Respondent testified that he commented on the shirt at the September 22, 2008, proceeding because the fact that Wendy wore the shirt again and drew attention to the shirt by pointing to it indicated that "she was welcoming of the attention, and I thought that was appropriate." He also testified that his role in Treatment Court was "to take away the barriers of being afraid of the judge," and he stated:

"People in treatment court should not be afraid to say how they are feeling, how they are doing, that they've had a problem, the problem with the wife, the girlfriend, the boyfriend, the in-laws, not to be afraid. Put it on the table for us to work on it. That's my job, to remove those impediments. The other impediments they deal with in staffing. My job is to say, 'No one is going to hurt you here. Tell us how we can help,' so they don't have to be afraid and they can be honest. That's really my job.

* * *

We are in another part and there are no adversaries here. We are here to help you, not punish you, and whatever you need to do to be okay, it's okay, and really take the fear element off the table. And it is. When someone asks is this therapy, but– no, but it is therapeutic. It's exactly therapeutic. It's a safe place to overcome the obstacles that are in your way."

52. Respondent testified further that Wendy was "wound very tight" and "stressed" about her impending knee surgery so he "wanted to take her mind off the subject, hence the shirt was an easy target." He testified that he thought he was being funny and that his humor was appropriate to the situation, but "it didn't work":

> "I try to make light of the moment of the shirt that I know she was very fond of – she was showing it off – and to make fun of the context in which the shirt looked like a penis, and it was the Enzyte ad about smiling Bob, that everybody loved.
>
> I was trying to get her to giggle and relax and take her mind off her presenting issues. And she laughed. That was successful. But it didn't accomplish what I wanted to do and get her in a better place to deal with her medical issues. That's what I was shooting for.
>
> THE REFEREE: Shooting for what?
>
> THE WITNESS: Getting her to decompress and take her mind off her pending surgery. She was very – not a good patient medically. And - But we went right back to it, and I think I added more stress to her than not."

53. In an affidavit to the Commission, respondent stated that while he "did note [Wendy's] blush of embarrassment for which I, the outsider, take self-assigned blame....[i]t was not my purpose to produce the blush, but to poke good-natured fun at the notorious male 'enhancement' ad it seems the whole real world has seen."

54. At the hearing before the referee, respondent acknowledged that his comments about Wendy's shirt would have been "absolutely inappropriate" in the regular part of the Family Court, but testified, "I am a different judge when I'm doing Family Court than I am a treatment court judge."

55. He also testified that, in hindsight, he recognized that his remarks were not appropriate.

As to Charge IX of the Second Formal Written Complaint:

56. On August 15, 2008, Nancy Hammond filed a petition in Family Court seeking an order of protection against Edward Trzeciak, alleging that he was coming to her home and calling her. After hearing Ms. Hammond's *ex parte* request and taking her testimony, respondent issued a temporary order of protection and adjourned the matter to September 29, 2008.

57. At the outset of the proceeding on September 29, 2008, Mr. Trzeciak did not appear in the courtroom, and respondent proceeded in his absence to grant Ms. Hammond an order of protection by default. She then left the courtroom to wait for the order.

58. Unknown to respondent at that time, Mr. Trzeciak had been in the waiting room of the court and had not heard his name called. When he asked a court officer what was going on, the officer brought him to the courtroom. Ms. Hammond re-entered the courtroom, and respondent said he would "re-do" the proceeding.

59. At no time during the recorded proceeding at which both parties were present did respondent advise Mr. Trzeciak of his right to the assistance of counsel, to have an adjournment to confer with counsel, or to have counsel assigned if he were financially unable to obtain counsel. Respondent claims that before the proceeding went back on the record, he advised Mr. Trzeciak of these rights and that Mr. Trzeciak said that he did not want an attorney and wanted to proceed. The evidence as to such a conversation is inconvincing. It is clear that respondent did not conduct any inquiry to confirm that Mr. Trzeciak's purported waiver of counsel was knowing, intelligent and voluntary, an inquiry that respondent knew was required by law.

60. During the Commission's investigation as to whether he had advised Mr. Trzeciak of the right to counsel, respondent stated, "I felt it injudicious and most unwise to read him the option in Miranda-like fashion…when he consented to the order to stay away." At the hearing, respondent testified that he had perceived Mr. Trzeciak's comments on the record to have constituted his consent to the order of protection and that respondent had concluded, incorrectly, that such "consent" obviated the need to afford Mr. Trzeciak the right to counsel.

61. Respondent granted Ms. Hammond a three-year order of protection. Two months later, upon the advice of his court attorney that by law the maximum time period for an order under the circumstances is two years, respondent issued an amended order of protection for two years.

As to Charge X of the Second Formal Written Complaint:

62. On February 9, 2005, the Commission issued respondent a Letter of Dismissal and Caution for failing to advise a litigant of the right to counsel, as required by Section 262 of the Family Court Act, and failing to advise another litigant of the right to assigned counsel and to make appropriate inquiries as to her ability to afford counsel.

63. Notwithstanding his receipt of the Letter of Dismissal and Caution, respondent, as set forth in Charge IX, did not advise Mr. Trzeciak of the right to counsel as required by law or make any inquiry to determine whether he had knowingly, intelligently and voluntarily waived the right to counsel.

Additional findings:

64. As to Charges I through VII, respondent acknowledged by stipulation that he failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, failed to avoid impropriety and the appearance of impropriety in that he failed to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, failed to perform his judicial duties impartially and diligently in that he failed to be faithful to the law and maintain professional competence in it, and failed to accord the right to be heard according to law.

65. Respondent testified that notwithstanding his receipt of the Letter of Dismissal and Caution in February 2005, it was not clear until the decision of the Appellate Division, Third Department, in *People ex rel. Foote v. Lorey*, 28 AD3d 917 (3d Dept 2006), *app dism'd*, 7 NY3d 863 (2006), *app den'd*, 8 NY3d 803 (2007), which was issued in April 2006, that the right to counsel attaches at all stages of a Family Court proceeding.

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)(2), 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. Charges I through VII of the first Formal Written Complaint and Charges VIII through X of the Second Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Respondent repeatedly denied litigants in Family Court proceedings fundamental constitutional and statutory rights, including the right to be represented by counsel and the right to a hearing, while depriving them of liberty. Such a systematic disregard of basic legal requirements constitutes serious misconduct (*Matter of Jung*, 11 NY3d 365 [2008]; *see also, Matter of Bauer*, 3 NY3d 158 [2004]), which is aggravated by respondent's failure to heed an earlier Commission warning about his failure to accord the right to counsel. Compounding this record of impropriety, respondent made inappropriate comments of a sexual nature while presiding over a Treatment Court proceeding and continued to make such remarks at a subsequent proceeding even after their impropriety was brought to his attention. This record of egregious misbehavior "cannot be viewed as acceptable conduct by one holding judicial office." *Matter of VonderHeide*, 72 NY2d 658, 660 (1988).

I. Denial of Fundamental Rights

It is well-established that the right to be heard is fundamental to our system of justice and "necessarily attaches to family offense proceedings," where parents "have an equally fundamental interest in the liberty, care and control of their children" (*Matter of Jung*, *supra*, 11 NY3d at 373; *see also* Fam Ct Act §454[1], [3] [providing for incarceration "after hearing" on a willful violation of an order of support]). The right to counsel is "[i]ntegral to this fundamental

interest" and "coextensive with the right to be heard in a meaningful manner," as the Court of Appeals has held:

> "'[A]n indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges,…is entitled to the assistance of counsel' (*Ella B.*, 30 NY2d at 356 [codified in 1975 and extended to provide litigants with the right to counsel in custody, family offense and contempt proceedings (*see* Family Court Act §§261, 262[a] [v], [a][vii])])…Waiver of this right must be 'unequivocal, voluntary and intelligent'; a court is obligated to make a 'searching inquiry' to ensure that it is (*see People v Smith*, 92 NY2d 516, 520 [1998])."

(*Id*.; *see also*, *Matter of Bauer*, *supra*, 3 NY3d at 164 ["The right to counsel, in practical respects, remains absolutely fundamental to the protection of a defendant's other substantive rights"]). In Family Court, "where matters of the utmost sensitivity are often litigated by those who are unrepresented and unaware of their rights," the failure to afford these fundamental rights is especially "intolerable" and "necessarily has the effect of leaving litigants with the impression that our judicial system is unfair and unjust" (*Matter of Esworthy*, 77 NY2d 280, 283 [1991] [among other misconduct, judge "neglected to inform litigants appearing before him of their constitutional and statutory rights, including their right to counsel" (*Id.* at 282)]).

Respondent has stipulated that he failed to afford these fundamental rights in six cases in which he summarily ordered the incarceration of parties for non-payment of support. As the record shows, these derelictions had grave consequences for litigants. As a consequence of respondent's disregard of fundamental rights, six litigants were sentenced to significant terms of incarceration, and the record indicates that three of those litigants served six months or more in jail on the unlawful sentence he imposed.

In *Eddy*, involving a litigant who was impaired by a stroke, unable to read or write, and who had filed a modification petition based on his impairment, respondent failed to hold a hearing and confirmed the support magistrate's findings which were based on the litigant's default, notwithstanding that the default judgment was invalid since Mr. Eddy had not been personally served (Fam Ct Act §453[c]). Although Mr. Eddy's attorney repeatedly questioned whether his client had been properly served, respondent imposed two consecutive 180-day sentences without reviewing the affidavit of service, stating cavalierly that he would look for it later. After Mr. Eddy's attorney sent respondent a letter the next day asking him again to review the issue, respondent finally determined that the litigant had never been properly served and – 21 days after he was sent to jail – ordered his release.

In four of these cases, respondent also failed to advise the parties of the right to counsel and/or to effectuate that right before depriving them of their liberty. In *Mahaney*, for example, respondent confirmed the support magistrate's findings, which were based on the litigant's default, and imposed a 180-day sentence on the unrepresented litigant without advising him of the right to counsel or conducting any inquiry to determine whether he had

"unequivocal[ly], voluntar[ily] and intelligent[ly]" waived that right (*People v. Smith*, 92 NY2d 516, 520 [1998]). When Mr. Mahaney told respondent that he had never gotten an application for the public defender – a comment that should have raised a red flag as to whether he had been afforded his rights – respondent ignored that statement and imposed the sentence, callously stating, "We'll give you a PD application to take with you to get you out." In fact, Mr. Mahaney's time to file objections to the support magistrate's findings had not yet expired (*see* Fam Ct Act §439[e]), but without the benefit of counsel, he did not assert his statutory rights. (Under similar circumstances involving another unrepresented litigant [*Brown*] who did not receive the statutorily-mandated time to file objections, respondent committed the litigant to jail for 180 days.[1]) Mr. Mahaney served the entire sentence – 180 days in jail – as a result of respondent's unlawful commitment order.

In *Allen* and *Grizzard*, respondent also failed to advise the parties of the right to counsel before sentencing them and failed to conduct any inquiry to determine whether they had knowingly waived their rights. In *Allen*, a support proceeding in which respondent vacated the suspension of a 270-day sentence, respondent pointedly denied the litigant's request for an adjournment to obtain counsel, telling him that he had already been sentenced (Mr. Allen served 268 days of the sentence).

Significantly, these four cases occurred only a few months after respondent had received a Letter of Dismissal and Caution from the Commission with respect to his failure to afford the right to counsel in two earlier matters. A judge's disregard of a cautionary warning that his or her conduct was improper is a significant aggravating factor in disciplinary proceedings. *See*, *Matter of Assini*, 94 NY2d 26, 30-31 (1999); *Matter of Robert*, 89 NY2d 745, 747 (1997).

While such transgressions may be characterized as legal error, it is well-established that legal error and judicial misconduct "are not necessarily mutually exclusive" (*Matter of Feinberg*, 5 NY3d 206, 215 [2005]; *see also*, *Matter of Reeves*, 63 NY2d 105, 109-10 [1984]); as the Court of Appeals has held, "a pattern of fundamental legal error may be 'serious misconduct'" (*Matter of Jung*, *supra*, 11 NY3d at 373; *see also*, *Matter of Sardino,* 58 NY2d 286, 289 [1983]; *Matter of McGee,* 59 NY2d 870, 871 [1983]). In this case, as in the cases cited above, legal error and misconduct overlap. In repeatedly depriving litigants of fundamental constitutional and statutory rights, respondent also violated ethical standards requiring every judge to "be faithful to the law and maintain professional competence in it" and to afford the right to be heard according to law (Rules, §§100.3[B][1], 100.3[B][6]).

The misconduct depicted here is essentially undisputed; indeed, by stipulation, respondent admitted the underlying facts and misconduct as to Charges I through VII.[2]

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[1] After imposing the sentence, respondent told Mr. Brown, "[Y]ou should be used to jail. You've been there before." When Mr. Brown replied, "I'm not used to jail, your honor," respondent told him curtly, "Well, get used to it. Be current on your payment or sit in jail" (Ex. 1 [Stipulated Facts], Ex. R, p. 6). Mr. Brown served 177 days of the sentence.

[2] *See* Ex. 1. Although respondent, in his hearing testimony, "attempted to disavow" the contents

Although respondent stated in his Answer to the first Formal Written Complaint that after receiving the Commission's Letter of Dismissal and Caution he "dramatically changed his methodology on the bench with special attention to the rights to counsel to all stages of the proceedings" (Answer, par. 4), at the hearing he insisted that the law in that regard was not clear until the decision of the Appellate Division, Third Department, in *People ex rel. Foote v. Lorey*, 28 AD3d 917 (3d Dept 2006), *app dism'd*, 7 NY3d 863 (2006), *app den'd*, 8 NY3d 803 (2007). We find that argument unconvincing. While *Foote* emphasized that the right to counsel is "an absolute and fundamental right" and that "Family Court is obligated to conduct an 'in depth inquiry to ascertain that the [party's] decision to proceed [without counsel] was knowingly, intelligently and voluntarily made'" (*Id*. at 918), those fundamental principles of constitutional and statutory law were well-established, as that opinion itself makes clear. That those principles were clear prior to *Foote* is shown by the fact that the Family Court judge whose conduct was criticized in that case was later removed by the Court of Appeals for depriving that litigant, and others, of rights that were "fundamental to our system of justice" (*Matter of Jung*, *supra*, 11 NY3d at 372). As an experienced judge with previous professional experience dealing with Family Court matters, it is inconceivable that respondent would be unfamiliar with those important principles of law and with the relevant provisions of the Family Court Act which he was called upon to implement on a daily basis. Moreover, just months before his conduct in the cases presented in this record, the Commission's cautionary letter reminded respondent of his obligations with respect to affording the right to counsel and cited the relevant law. Respondent clearly should have known that he was violating core rights at the heart of the proceedings.

Significantly, more than two years after *Foote* and three months after being served with the first Formal Written Complaint in this proceeding, respondent failed to advise another litigant of the right to counsel on the record before issuing an order of protection against him.[3] Notwithstanding respondent's "unconvincing" testimony (Referee's Report, p. 19) that he advised Mr. Trzeciak of his rights off the record and notwithstanding the dubious proposition that respondent construed Mr. Trzeciak's statement that he did not oppose the order of protection to constitute a waiver of the right to counsel, it is undisputed that respondent "did not conduct any inquiry, no less an in-depth inquiry," to confirm that this purported waiver of counsel "was knowing, intelligent and voluntary," as he knew the law required (Referee's Report, p. 19; *Matter of Foote*, *supra*, 28 AD3d at 918 [quoting *Lee v. Stark*, 1 AD3d 815, 816 [3d Dept 2003]). There is no indication on the record that Mr. Trzeciak knew that he had a right to counsel or that he explicitly and intelligently waived that right.

During the investigation and at the hearing, respondent rationalized his failure to advise Mr. Trzeciak of the right to counsel by stating that he "felt it injudicious and most unwise to read him the option in Miranda-like fashion" since Mr. Trzeciak consented to the order and

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of the stipulation in certain respects, as the referee noted (Rep. 12), the underlying facts are conclusively established by the documentary evidence.

[3] This was a proceeding that followed the issuance of an *ex parte* temporary order of protection (Ex. 16). With respect to the proceeding on September 29, 2008, respondent told the Commission that had Mr. Trzeciak not "consented" to the order of protection, he "gets the mantra under FCA Section 832" (Ex. 23, p. 3).

both parties "wanted to be away from each other as quickly as possible" (Ex. 23, p. 3; Tr. 773). Respondent's continued insensitivity to the importance of affording the fundamental right to counsel – despite the Commission's cautionary letter, despite the fact that he was then the subject of pending disciplinary charges involving similar improprieties, and despite his insistence that after the *Foote* decision he has scrupulously followed the law – "strongly suggests that, if he is allowed to continue on the bench, we may expect more of the same" (*Matter of Bauer*, *supra*, 3 NY3d at 165).

II. Comments in Treatment Court Proceedings

Respondent's comments on two separate occasions while presiding over Treatment Court proceedings were egregious and inexcusable. His gratuitous remarks, which were prompted by an innocuous caricature on a litigant's T-shirt, were ribald and replete with sexual innuendo. (It should be underscored that the image on the shirt was benign and non-sexual.) Even when respondent noticed that the litigant was blushing with embarrassment and giggling nervously at his comments, he continued in the same vein, joking and commenting with evident satisfaction, "I'm bringing down the house." Even more inexcusably, respondent made similar comments some five months later when the litigant wore the same T-shirt to court, notwithstanding that the Resource Director of the Treatment Court team had advised him in the interim that his earlier remarks were inappropriate and respondent had assured her that it "wouldn't happen again."

"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" (*Matter of Caplicki*, 2008 Annual Report 103 [Comm on Judicial Conduct]; Rules, §100.3[B][3]). By repeatedly making gratuitous, joking comments of a sexual nature during court proceedings, respondent clearly violated those standards.

It is no defense that respondent may have been attempting to relax a litigant who was anxious about her impending surgery or that he was attempting to put her at ease in the court proceedings generally, as he claims. "[B]reaches of judicial temperament are of the utmost gravity…[and] impair[ ] the public's image of the dignity and impartiality of courts, which is essential to...fulfilling the court's role in society" (*Matter of Mertens*, 56 AD2d 456 [1st Dept 1977]). In *Matter of Trost*, 1980 Annual Report 153 (Comm on Judicial Conduct), the Commission rejected a similar justification by a Family Court judge for his inappropriate statements (*e.g.*, telling two litigants that they were "wasting everybody's time" and "ought to get shotguns and…kill each other"). In that case, the Commission noted, the judge had asserted that it "is effective at times [for a judge] to meet people at their own level and to use language and convey ideas that they would not understand if presented in any other fashion." As the Commission stated in *Trost*:

> Although respondent describes the setting of his court as "informal" (Hr. 28), his conduct fails to comport with reasonable standards of decorum and taste, appropriate even to an informal

setting. He appears to have used the informality of his court to justify the denigration of those who appear in that court.

Similarly, we reject respondent's claim here that the relative informality in some respects of Treatment Court proceedings justified his joking use of sexually charged language in an attempt "to take away the barriers of being afraid of the judge" and to "remove those impediments" so that the participants can be honest. Although "we are mindful of the unique dynamics of Treatment Court proceedings, its laudable goals and record of success" (*Matter of Blackburne*, 2006 Annual Report 103, *sanction accepted*, 7 NY3d 213 [2006]), nothing in the special nature of such a court or its governing procedures or policies can excuse the language depicted in this record, which clearly "fails to comport with reasonable standards of decorum and taste." Respondent conceded that his remarks would have been inappropriate in the regular part of Family Court, and we agree with the referee's conclusion, following his scholarly analysis of Treatment Court proceedings, that there is simply "no basis for affording the presiding judge in Family Treatment Court more latitude in that respect" (Referee's Report, p. 23). *See also*, *Matter of Restaino*, 2008 Annual Report 191, *sanction accepted*, 10 NY3d 577 (2008) (judge's attempt to reinforce standards of "trust and personal accountability" in a Domestic Violence Part did not excuse his incarceration of participants when no one took responsibility for a ringing cell phone in the court); *Matter of Blackburne*, *supra*, 2006 Annual Report at 108 (notwithstanding "the special nature" of Treatment Court proceedings, "we fail to see how public confidence in the court is advanced when a judge actively helps a defendant to avoid arrest by sneaking him out the back door. Respondent's behavior in this case far exceeded the norm of acceptable conduct by any judge in any court").

Despite their relative informality, Treatment Court proceedings are formal court proceedings in every critical respect. The litigant who was the principal target of respondent's comments had been ordered by him to continue her participation in Treatment Court, which was a mandatory and critical part of the judicial process in her case, and he had presided over a violation petition against her while she was a participant in the Treatment Court. His comments towards her represent a significant and unacceptable departure from the proper role of a judge who had been, and would continue to be, the final arbiter of her case.

III. Conclusion

The record in its totality demonstrates respondent's profound disregard for the rule of law and his continuing insensitivity to the overriding importance of protecting the rights of litigants despite the Commission's cautionary warning and despite his assurances that he "dramatically changed" his practices after that warning. Even after being served with formal charges involving similar improprieties, respondent failed to accord the right to counsel in the *Trzeciak* matter, and, at a time when he should have been especially sensitive to his ethical obligations in view of the pending disciplinary proceedings, he made the grossly inappropriate comments in Treatment Court that are set forth in this record.

As the Court of Appeals stated in *Matter of Jung*, *supra*, 11 NY3d at 374, a case that bears notable similarities to the instant matter:

> "Although judicial disciplinary proceedings are not punishment (*Matter of Esworthy*, 77 NY2d 280 [1991]), the severe sanction of removal is warranted where a jurist has exhibited a 'pattern of injudicious behavior … which cannot be viewed as acceptable conduct by one holding judicial office' (*Matter of VonderHeide*, 72 NY2d 658, 660 [1988]) or an abuse of 'the power of his office in a manner that … has irredeemably damaged public confidence in the integrity of his court' (*Matter of McGee*, 59 NY2d 870, 871 [1983])."

Recognizing that removal from office is an "extreme sanction" that "should be imposed only in the event of truly egregious circumstances" (*Matter of Cunningham*, 57 NY2d 270, 275 [1982]), we conclude that the appropriate disposition is removal, a sanction that renders respondent ineligible to hold judicial office in the future (NY Const Art 6 §22[h]).

The disposition in this case is rendered pursuant to Judiciary Law Section 47 in view of respondent's resignation from the bench.

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Emery, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Harding were not present.

Dated: October 26, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to RAYMOND R. BARLAAM, a Justice of the Ossining Village Court, Westchester County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Robert H. Tembeckjian and Brenda Correa, Of Counsel) for the Commission
Honorable Raymond R. Barlaam, *pro se*

The respondent, Raymond R. Barlaam, a Justice of the Ossining Village Court, Westchester County, was served with a Formal Written Complaint dated July 15, 2009, containing one charge. The charge alleged that respondent failed to schedule or re-schedule trials in a timely manner in more than 500 traffic cases, resulting in lengthy delays. Respondent filed a verified Answer dated September 18, 2009.

On February 24, 2010, 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 March 4, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a part-time Justice of the Ossining Village Court, Westchester County, since 1983. Respondent was admitted in 1975 to the practice of law in the State of New York.

2. From 2003 to 2008, as an Ossining Village Court Justice, respondent maintained a policy of scheduling trials based solely on the availability of the individual issuing police officers for the expediency of the Ossining Police Department and for the financial benefit of the Village of Ossining. As a result, respondent failed to efficiently and promptly schedule and reschedule trials in more than 500 traffic matters, and these matters languished without resolution in his court for as long as five years and five months.

3. The court scheduled weekly Vehicle and Traffic trials on Thursday afternoons between the hours of 1:00 P.M. to 4:30 P.M.

4. From 2003 to 2008, all matters in respondent's court were catalogued in a case-tracking system based upon the individual issuing officer's name, and they were assigned trial dates based upon each officer's availability for court, as determined by whether the officer had been assigned to a day shift.

5. Pursuant to respondent's policy and practice, his court clerk obtained the schedule of each officer in advance of a court appearance to determine whether the officer was on duty for the day shift. The clerk would then schedule or reschedule the court appearance to coincide with the officer's availability during a day shift. The purpose of the court's scheduling practice was to enable the police department to reduce overtime costs.

6. As a result of respondent's policy, over 500 traffic cases were not adjudicated for as long as five years and five months because the issuing officers were either not assigned to work the day shift or were unavailable due to injuries or illness. In the case of one officer, his cases were not heard because he was activated for military service and was therefore not available for trial.

7. The following officers were unavailable for the following periods due to injury or illness: Officer Sylvester (November 2006 to September 2007), Officer Demilia (June 2007 to October 2007), Officer Ryzy (July 2007 to February 2008) and Officer Carpenter (December 2007 to January 2008). The following officer was unavailable for the following period due to his being activated for military duty: Officer Kastunis (October 2003 to March 2005).

8. The cases for which these officers were responsible are noted in the schedules annexed to the Agreed Statement of Facts.

9. Without comment on whether the delays due to injury, illness and military leave were appropriate as a matter of law, the Administrator did not consider the time periods and cases referred in paragraphs 7 and 8 above as delays to be held against respondent for purposes of this public discipline.

10. Respondent acknowledges that his blanket policy of scheduling cases solely on the basis of the officers' schedules created a bias and/or the appearance of bias in favor of the police department and was detrimental to the litigants, who were forced to wait years for their day in court.

Factors in Mitigation

11. There is no indication that any individual defendant's driver's license was suspended due to respondent's blanket practice of scheduling or postponing trials based upon the shift to which the police department assigned the issuing officer.

12. As a result of the Commission's inquiry, respondent has discontinued his blanket scheduling policy and practice. He now calendars matters in a timely fashion, without necessarily accommodating the police officers' schedules, and he considers requests for adjournment on a case by case basis.

13. As a result of the Commission's inquiry, respondent has disposed of virtually all of the approximately 500 cases at issue, by conducting trials, accepting guilty pleas or entertaining motions to dismiss by the prosecutor.

14. Respondent now recognizes that his previous blanket scheduling policy was no excuse for the numerous, lengthy delays that resulted and that were *inter alia* inconsistent

with his obligations to be and appear impartial and to dispose of judicial matters promptly, efficiently and fairly.

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), 100.3(B)(7) 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, and respondent's misconduct is established.

The ethical standards require every judge to dispose of court matters "promptly, efficiently and fairly" (Rules, §100.3[B][7]). As a result of respondent's policy of scheduling trials based solely on the availability of the issuing police officer, more than 500 traffic matters languished without resolution in respondent's court for as long as five years and five months. The inordinate delays resulting from this practice, in which hundreds of litigants were deprived of a timely adjudication of their cases, were detrimental to the proper administration of justice in respondent's court. *See*, *Matter of Scolton*, 2008 Annual Report 209 (judge, *inter alia*, delayed scheduling a hearing in six small claims cases).

Most of the delays in this record ranged from two to three years. While some of the delays were attributable in part to the officers' unavailability due to injuries, illness or military service, we note that those absences accounted for a relatively insignificant part of the delays. It appears that, for the most part, delays were caused because cases were not scheduled unless the officer was on duty on the afternoon when respondent normally scheduled traffic trials. The resulting delays were excessive and unwarranted.

Respondent has acknowledged that his procedures, which were intended to reduce police overtime costs, "created a bias and/or the appearance of bias in favor of the police department" (Agreed Statement, par. 10). Such financial considerations do not justify a practice in which many litigants were forced to wait years for their day in court. Excessive delays could also be detrimental to justice in other respects. Such delays might adversely affect the prosecution of cases, since police officers could not reasonably be expected to recall a traffic stop from years earlier. Some defendants, whose licenses were subject to revocation upon conviction if they were repeat offenders, may have been permitted to remain on the roads while the adjudication of their cases was delayed. As a result, public confidence in the fair and prompt administration of justice is eroded.

In mitigation, we note that respondent recognizes that his scheduling policy was no excuse for the resulting delays and that his practice was inconsistent with his obligation to be and appear impartial and to dispose of judicial matters promptly, efficiently and fairly. Respondent now calendars all matters in a timely fashion and he has disposed of virtually all of the delayed matters.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore and Judge Ruderman concur.

Judge Peters was not present.

Dated: March 15, 2010

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to CARLOS M. CALDERON III, a Justice of the Milton Town Court, Saratoga County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Robert H. Tembeckjian and Charles F. Farcher, Of Counsel) for the Commission
Gerstenzang, O'Hern, Hickey, Sills & Gerstenzang (by Thomas J. O'Hern) for the Respondent

The respondent, Carlos M. Calderon III, a Justice of the Milton Town Court, Saratoga County, was served with a Formal Written Complaint dated October 8, 2008, containing one charge. The charge alleged that respondent referred to his status as a judge in communications with prison officials asking them to confiscate documents from an inmate in furtherance of respondent's personal interests. Respondent filed a verified Answer dated November 7, 2008.

By Order dated January 15, 2009, the Commission designated Michael Whiteman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 10 and May 11, 2009, in Albany. The referee filed a report dated October 16, 2009.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended that the judge be censured, and the judge's attorney recommended that the judge be admonished. Oral argument was waived. Thereafter, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Milton Town Court, Saratoga County, since January 2006. He is not an attorney. Prior to assuming the bench, respondent was a New York State Trooper.

2. On February 24, 2005, as a State Trooper, respondent was involved in a high-speed pursuit of Octavio Rivera, who had stolen a motor vehicle. The chase ended with a collision between respondent's police cruiser and the stolen car.

3. Mr. Rivera was charged with numerous crimes including Robbery, Driving While Intoxicated and Assault. At the trial, respondent testified against Mr. Rivera and was cross-examined by Mr. Rivera, who acted as his own attorney. Mr. Rivera was convicted, sentenced to 15 years' imprisonment and remanded to Sing Sing Correctional Facility.

4. Prior to the sentencing, respondent received a letter from the Saratoga County Probation Department asking him to submit a Victim Impact Statement as part of its Pre-Sentence Investigation of Mr. Rivera and enclosing a form for that purpose. The cover letter stated that the Victim Impact Statement would be attached to the Pre-Sentence Report and would be "submitted to the Court, the Prosecutor, the Defendant's attorney and the Defendant if he/she has no attorney."

5. On November 30, 2005, respondent completed the Victim Impact Statement. Respondent described the accident and his physical injuries, indicated that he had not suffered any emotional injury and said that he had "forgiven and [was] moving on." Respondent gave his home address on the form.

6. Respondent retired from the State Police in part because of injuries he suffered in the collision with Mr. Rivera.

7. On April 18, 2007, respondent commenced a personal injury action against Mr. Rivera in Saratoga County, alleging that he suffered physical injury and "mental anguish" as a result of the collision. Respondent was represented in his civil suit by an attorney.

8. Mr. Rivera sent to respondent a Notice to Admit pursuant to CPLR 3123, dated May 21, 2007, seeking an admission that the Victim Impact Statement, a copy of which was attached, and respondent's signature on that document were genuine.

9. The Notice to Admit bore the caption and index number of respondent's lawsuit and was clearly related to respondent's personal injury action against Mr. Rivera.

10. The envelope bearing Mr. Rivera's Notice to Admit was addressed to

"Hon. Carlos Calderon" and was mailed to respondent's home address. The Notice to Admit indicated on its face that copies were being sent to respondent, respondent's attorney and the County Clerk of Saratoga County.

11. Respondent's declaration in the Victim Impact Statement that he suffered no "emotional injury" as a result of Rivera's crime was a potential defense to respondent's claim in the civil suit that he suffered "mental anguish."

12. Respondent's attorney instructed him to disregard Mr. Rivera's Notice to Admit.

13. After receiving Mr. Rivera's correspondence, respondent telephoned Sing Sing Correctional Facility and spoke with Lieutenant Harry Kerrigan. Respondent told Lieutenant Kerrigan that he had received a letter at his personal residence from an inmate and that the letter was addressed to him as "Honorable Carlos Calderon." The title "Honorable" was a reference to respondent's judicial office.

14. Respondent asked that documents in Rivera's possession containing respondent's home address be confiscated and that his name be removed from Rivera's mailing list. Lieutenant Kerrigan advised him that the request should be made in writing.

15. On or about May 27, 2007, respondent mailed copies of the Notice to Admit and the Victim Impact Statement that he had received from Mr. Rivera to Lieutenant Kerrigan, with a cover letter. This correspondence was sent in an envelope bearing respondent's judicial title, Milton Town Justice, and a return address associated with the Milton Town Court.

16. Respondent's letter to Lieutenant Kerrigan referred to himself as "Hon. Carlos M. Calderon III" in the return address as well as the signature line.

17. In the first paragraph of the letter, respondent stated that he was a New York State Trooper for 23 years and that "I have since become a Town Judge in Saratoga County."

18. Respondent's letter to Lieutenant Kerrigan stated that Mr. Rivera had a copy of the Victim Impact Statement in his possession, requested that documents containing respondent's home address be confiscated and destroyed, and requested further that Lieutenant Kerrigan advise "the inmate correspondence program" at Sing Sing that respondent wished no further contact with Mr. Rivera. Respondent's letter asserted that he had spoken with Saratoga County District Attorney James Murphy as well as members of the Saratoga County Department of Probation and that all agreed that Mr. Rivera improperly possessed the Victim Impact Statement.

19. Respondent's communications to Lieutenant Kerrigan lacked candor in that respondent did not refer to his pending civil suit against Mr. Rivera or to the fact that a letter

he had received from the Saratoga County Department of Probation had informed him that Mr. Rivera would have access to the Victim Impact Statement if he had no attorney.

20. Respondent asserted his judicial office in his communications with prison officials in an attempt to advance his own personal interests.

21. As a result of respondent's repeated references to his judicial office, Sing Sing officials were made aware of respondent's judicial status.

22. Respondent's letter, postmarked May 29, 2007, arrived at Sing Sing Correctional Facility. As a result of respondent's request, Mr. Rivera's legal documents, including his copy of respondent's Victim Impact Statement, were confiscated.

23. Respondent subsequently received a letter from William Lee, Deputy Superintendent of Sing Sing Correctional Facility, dated June 14, 2007, stating that various documents had been secured pursuant to respondent's request. Deputy Lee's letter noted the pending lawsuit against Mr. Rivera and requested that respondent submit "a response as to the appropriateness of Mr. Rivera's possession of these documents." Respondent did not reply to Deputy Lee's letter.

24. Mr. Rivera's documents were returned to him on September 6, 2007, more than three months after respondent's original request to have them confiscated.

25. In his testimony at the hearing, respondent failed to recognize the impropriety of his actions. In his brief to the Commission, respondent acknowledged, through his attorney, that it was improper to use his judicial title in his communications with prison officials.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.2(C) 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 communications with corrections officials, respondent asserted his judicial status to advance his private interests. Asking the officials to confiscate documents from an inmate, which contained information that was detrimental to respondent's interests in his personal injury lawsuit against the inmate, respondent gratuitously referred to his judicial office in an unmistakable effort to add clout to his requests. Such conduct is contrary to well-established standards prohibiting a judge from lending the prestige of judicial office to advance the private interests of the judge or others (Rules, §100.2[C]). *See*, *e.g.*, *Matter of Nesbitt*, 2003 Annual Report 152; *Matter of Cipolla*, 2003 Annual Report 84 (Comm on Judicial Conduct).

Communicating with prison officials, initially by telephone and then in a follow-up letter, respondent advised the officials that the inmate was improperly in possession of a confidential victim impact statement containing respondent's home address, and he asked the officials to confiscate and destroy any documents in the inmate's possession that contained respondent's personal information. Respondent also asked that the inmate be prohibited from contacting him in the future. In making the requests, respondent made several references to his judicial office, referring to himself as "Honorable," sending the letter in a Town Court envelope, and, in his letter, explicitly identifying himself as a town justice. As the referee concluded, "respondent's repeated references to his judicial status were gratuitous and can only be seen as an effort to influence the disposition of his personal requests" (Rep. 5). Even if respondent believed that the inmate was not authorized to possess the statement and even if respondent's sole purpose in making the request was to protect his privacy and personal safety, as he claims, his actions showed extremely poor judgment and insensitivity to his ethical obligations.

Significantly, respondent's communications with prison officials did not mention his pending lawsuit against the inmate. Nor did respondent mention that the Department of Probation had informed him that the victim impact statement would be available to the unrepresented defendant. (This information was contained in a form letter respondent had received 18 months earlier.) In these respects, respondent's communications were misleading and lacked candor. Such conduct, while invoking his judicial status in a matter that impinged on his personal interests, violated his ethical obligation to observe high standards of conduct, both on and off the bench (Rules, §100.2[A]).

While respondent's original transgression in making use of his judicial position to secure private advantage may have been impulsive and thoughtless, his misconduct was exacerbated by his subsequent lack of forthrightness when questioned about his actions. Like the referee, who saw and heard the testimony at the hearing, we find that respondent's testimony in significant respects was evasive and implausible. For example, he insisted under oath that he called prison officials, rather than asking his attorney to do so, because his request involved a "personal matter" (Tr. 42). He asserted that he referred to himself as "Honorable" only because that was how the inmate had addressed correspondence to him, then implied that he needed to identify himself as a judge to make clear that the correspondence had nothing to do with his judicial role (Tr. 39, 63-64). He claimed that he had never seen the civil complaint in his lawsuit and could not comment on it (Tr. 58). He even refused to identify the envelope he had sent to the prison, which bore his judicial title:

> Q. Can we agree that that is the envelope that you sent your letter in?
> A. I don't remember.
> Q. Have you sent any other letters to Sing Sing Correctional Facility?
> A. I don't recall ….
> Q. Judge, that envelope has your name, your title and an address associated with the court. The date on the envelope is two days

after the date on your letter and you are saying that you are not sure if that's the letter that you sent? The envelope?
A. It has my name. It does not have my title. It does have my name.
Q. Does that envelope not say "Milton Town Justice"?
A. Yeah, it does. (Tr. 44-45)

This record of evasiveness, here depicted only in part, is an aggravating factor that elevates the required sanction. Recognizing that a judge's testimony as to his or her subjective intentions must be accorded due deference (*see, Matter of Kiley*, 74 NY2d 364 [1989]), we underscore that lack of candor in disciplinary proceedings by a judge, who administers oaths and "is sworn to uphold the law and seek the truth," cannot be condoned (*Matter of Myers*, 67 NY2d 550, 554 [1986]; *see also*, *Matter of Doyle*, 2008 Annual Report 111 [Comm on Judicial Conduct]). As the Court on the Judiciary stated, "Devious answers in disciplinary proceedings are viewed as proffered for lack of legitimate explanation and as compounding the weight of the charge in question" (*Matter of Waltemade*, 37 NY2d [a], [nn], [hhh] [Ct. on the Judiciary 1975]).

In its totality, the written record before us speaks clearly and warrants the sanction of censure. A judge who exercises authority over the lives and liberty of others, and who must command the respect of the public both on and off the bench, has a responsibility to be forthright and cooperative with the Commission when the judge's behavior is questioned.

We note that in his brief to the Commission, respondent now concedes the impropriety of his actions and agrees that public discipline is warranted.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Ms. Hubbard, Ms. Moore and Judge Ruderman concur. Mr. Emery files a concurring opinion in which Judge Ruderman joins.

Mr. Harding and Judge Konviser dissent only as to the sanction and vote that respondent be admonished.

Judge Peters was not present.

Dated: March 26, 2010

CONCURRING OPINION BY MR. EMERY, IN WHICH JUDGE RUDERMAN JOINS

I concur with my fellow Commissioners that Judge Calderon should be censured because his evasive, incredible responses under oath exacerbated the underlying misconduct in this case. I write to underscore what is, in my view, at the heart of this case: Judge Calderon's misuse of the prestige of his judicial status to protect his privacy, rather than to aid his civil case against the inmate. Had the latter been proved, the appropriate sanction might be removal, even without the lack of candor described so convincingly in the determination.

As the record stands, Judge Calderon misused his office in an attempt to maintain the privacy of his personal information, *i.e.*, to hide from an inmate his home address and telephone number. The judge testified, without contradiction, that that was his purpose in communicating with prison officials to request the confiscation of certain documents in the inmate's possession. His understandable concern about protecting his family's privacy is reflected consistently throughout this record; significantly, the only other witness who testified at the hearing, an assistant district attorney, supported the judge's testimony on this point, noting that the judge had expressed concern in this regard during the earlier criminal matter when the inmate was prosecuted. While this does not excuse his manipulation of prison officials and the invocation of his judicial prestige to add clout to his request, it is somewhat mitigating in determining an appropriate sanction.

Based on this record, it cannot be concluded that the judge's motive was a pecuniary one, related to the pending lawsuit, rather than a legitimate concern about protecting his privacy. As the Court of Appeals indicated in *Matter of Kiley*, 74 NY2d 364 (1989), a judge's testimony about his or her "particular subjective intention" should not be lightly disregarded, in the absence of "contrary objective proof" (*Id*. at 371, 370). Here, the record is devoid of such persuasive, objective proof. Although the documents that were confiscated (temporarily) as a result of the judge's request contained an admission that was detrimental to his interests in the lawsuit, the record supports that the judge may have reasonably believed, and indeed still believed at the hearing, that the inmate was not entitled to have these documents in his possession. It is debatable whether the judge recalled receiving a form letter 18 months earlier stating that the victim impact statement would be available to an unrepresented defendant, and it is not clear from the record whether the inmate was in fact entitled to keep a copy of the statement. Even the assistant district attorney testified that she did not know whether such statements were generally given to defendants.

Unfortunately, the record in this case is notably sparse in other respects. Had the record been developed further, there may have been more to support the suspicion that the judge was attempting to secure an advantage in his civil suit. For example, since Lieutenant Kerrigan was not called as a witness, the substance and tenor of their telephone conversation can be viewed only through the judge's uncontradicted testimony. The judge's version is all we have, including his assertion that he did not identify himself as a judge except to say that the inmate had sent him an envelope addressing him as "Honorable." The record does not indicate when, or how, Lieutenant Kerrigan or other prison officials learned of the pending lawsuit. At the

hearing, the judge was never asked about the basis for his statement, contained in his letter to Lieutenant Kerrigan, that the District Attorney and probation officials were "unaware of" how Rivera had obtained the victim impact statement and that those individuals agreed that Rivera was not properly in possession of that document. Nor were those individuals called as witnesses to contradict, or support, the judge's written statements and give context to his request to prison officials. Without more, the judge's testimony, though notably evasive, stands uncontradicted.

Under these circumstances, the majority limits its discipline to the misconduct the judge acknowledges: the assertion of his judicial prestige in a misguided, though understandable, effort to protect his privacy. Because the judge manipulated prison officials *for that purpose*, and because he compounded his misconduct by his lack of forthrightness in these proceedings, I believe censure is the appropriate sanction.

Dated: March 26, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to BRIAN M. DUGAN, a Justice of the Scipio Town Court, Cayuga County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission
Bond, Schoeneck & King, PLLC (by Joseph S. Nacca) for the Respondent

The respondent, Brian M. Dugan, a Justice of the Scipio Town Court, Cayuga County, was served with a Formal Written Complaint dated February 11, 2010, containing one charge. The Formal Written Complaint alleged that respondent failed to disqualify himself in a matter involving his business tenant and a long-time acquaintance and improperly involved himself in the matter by, *inter alia*, promoting and negotiating a financial settlement. Respondent filed an answer dated April 26, 2010.

On September 16, 2010, 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 September 29, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Scipio Town Court, Cayuga County, since 1992. His current term of office ends on December 31, 2011. He is not an attorney.

2. Respondent owned the premises in which Nana's Bakery and Café ("Nana's") was located, in Scipio Center, New York, and rented the property to Debbie Cook for approximately $750 per month. Ms. Cook was approximately $2,500 in arrears to respondent as of December 2008.

3. Lindsley Berry was an employee of Nana's. Respondent was socially acquainted with Ms. Berry for approximately 15 years. Respondent attended high school with Ms. Berry's now-deceased husband.

4. On or about December 19, 2008, respondent received a Warrant Request Form in his court mailbox seeking an arrest warrant for Lindsley Berry on a charge of Petit Larceny.

5. On or about January 26, 2009, respondent met with Onondaga County Sheriff Deputy Joseph Ryan concerning the status of the warrant request for Ms. Berry. Respondent told Deputy Ryan that he needed additional information about the case before he would issue a warrant. At Deputy Ryan's request, respondent agreed to view a surveillance video taken at Nana's depicting the alleged crime.

6. On or about January 31, 2009, respondent met with Deputy Ryan and Ms. Cook at Nana's and viewed the surveillance video. Before viewing the video, Ms. Cook told respondent that Ms. Berry stole money from her restaurant. During and after viewing the video, respondent asked Ms. Cook questions about the procedure for handling money in the restaurant and commented that nothing in the video indicated that a crime had occurred.

7. At the same meeting, respondent suggested to Ms. Cook that she could resolve the matter by entering into a financial settlement with Ms. Berry. Respondent asked Ms. Cook to propose a settlement amount and said that he would forward this amount to Ms. Berry.

8. On or about February 1, 2009, respondent telephoned Michael D'Agostino, a mutual friend of his and Ms. Berry's, described what had transpired between Ms. Cook and Ms. Berry and said that Ms. Cook was willing to settle with Ms. Berry for several thousand dollars.

9. On or about February 2, 2009, Mr. D'Agostino called respondent and informed him that Ms. Berry rejected the proposed settlement amount. Respondent and Mr. D'Agostino then discussed the fact that Ms. Berry might have to retain an attorney and would likely spend several hundred dollars to do so.

10. On or about February 3, 2009, Mr. D'Agostino called respondent and said that Ms. Berry would pay $300 if Ms. Cook signed a stipulation resolving the matter. Respondent agreed to present the settlement document and the money to Ms. Cook and to witness Ms. Cook accepting the money and signing the document.

11. On or about February 28, 2009, respondent went to Nana's and presented Ms. Cook with a Stipulation of Settlement and a money order from Ms. Berry for $300. When Ms. Cook told respondent that $300 was less than the amount allegedly taken by Ms. Berry, respondent replied that there would be no further offer from Ms. Berry.

12. Respondent signed the Stipulation as a witness and gave the $300 money order to Ms. Cook.

13. In or about late April 2008, Ms. Cook paid respondent $1,500 toward her rent arrearage.

Mitigating Factors:

14. Respondent acknowledges that it was inappropriate to intervene in an impending proceeding involving his tenant and a long-time acquaintance. While respondent intended to act only as a messenger to facilitate the resolution of a conflict, he now recognizes that his *ex parte* communications with the parties and his personal involvement in negotiating the terms of settlement compromised the integrity and independence of the judiciary and created at least the appearance that he used his judicial office for his personal benefit or the benefit of others.

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

16. Respondent has served as the Justice of the Scipio Town Court for 18 years and has never been disciplined by the Commission.

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)(6), 100.3(E)(1),

100.4(A)(1) 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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent failed to disqualify himself in a criminal matter involving his business tenant and a long-time acquaintance and continued his improper involvement in the matter by suggesting and promoting a financial settlement. Respondent's actions compromised his impartiality and overstepped the boundaries of his judicial authority.

Since his impartiality "might reasonably be questioned" (Rules, §100.3[E][1]), respondent was required to disqualify himself when he was presented with a request for an arrest warrant in a matter in which (i) the alleged victim was his tenant, (ii) the accused was a long-time social acquaintance, and (iii) the alleged crime had occurred on property owned by the judge. Instead of doing so, respondent told the deputy sheriff that he needed more information before issuing a warrant. While asking for additional information to justify an arrest warrant might be appropriate under other circumstances, in this case, because of respondent's relationship with the principals and the claim that the crime had occurred on premises he owned, any action taken by respondent was unavoidably tinged with the appearance of partiality. The impropriety of respondent's involvement was heightened by the fact that his subsequent meeting with the deputy to review the surveillance tape took place on respondent's property, which was also the scene of the alleged crime.

After opining that there was insufficient indication that a crime had occurred, respondent then suggested and actively promoted a financial settlement. Respondent's involvement in negotiating a civil settlement in a criminal case overstepped the boundaries of his judicial responsibilities. It is the proper role of a judge to preside in court proceedings, not to mediate disputes out of court. *See*, *Matter of Glover*, 2006 Annual Report 165 (Comm on Judicial Conduct) (with no case pending, judge attempted to mediate a neighborhood dispute, held *ex parte* meetings with both sides and sent a letter ordering one side to stop engaging in certain conduct or face contempt charges). Respondent's personal involvement in the negotiations compromised his impartiality and conveyed the appearance that he was promoting the settlement, thereby lending the prestige of judicial office to advance private interests (Rules, §100.2[C]). The fact that he appeared to promote a settlement in which an individual who owed him money would receive compensation compounds the appearance of impropriety.

With nearly two decades of experience as a judge, respondent should have realized that such activity is inconsistent with his judicial role and that he should have avoided any involvement in the matter.

In considering the sanction, we note that respondent has acknowledged his misconduct and has been cooperative throughout the proceedings.

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Emery, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Harding were not present.

Dated: October 6, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to JAMES P. GILPATRIC, a Judge of the Kingston City Court, Ulster County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
James E. Long for the Respondent

The respondent, James P. Gilpatric, a Judge of the Kingston City Court, Ulster County, was served with a Formal Written Complaint dated August 8, 2008, containing one charge. The Formal Written Complaint alleged that respondent failed to render decisions in a timely manner in 47 cases despite having received a confidential cautionary letter from the Commission in February 2004 for having delayed in rendering decisions.

On September 8, 2008, respondent filed an Answer and a motion to dismiss the Formal Written Complaint on the ground that, pursuant to *Matter of Greenfield*, 76 NY2d 293, 297 (1990), delayed decisions did not constitute misconduct absent certain aggravating factors not present in the instant case (namely, where the judge "defied administrative directives or has attempted to subvert the system by, for instance, falsifying, concealing or persistently refusing to file records indicating delays"). On October 6, 2008, the Administrator opposed the motion and cross-moved for summary determination. By decision and order dated December 16, 2008, the Commission denied respondent's motion and granted the Administrator's cross-motion.

After written and oral argument, the Commission rendered a determination dated June 5, 2009, sustaining the charge and determining that respondent should be admonished.

Pursuant to Section 44, subdivision 7, of the Judiciary Law, respondent requested review of the Commission's determination by the Court of Appeals. On December 15, 2009, after written and oral argument, the Court held that the *Greenfield* doctrine was "not workable" and that, notwithstanding the absence of the specific aggravating factors articulated in *Greenfield*, formal discipline could be appropriate for "delays [that] are lengthy and without valid excuse." *Matter of Gilpatric*, 13 NY3d 586, 590 (2009). Noting that the summary proceedings in this matter did not present a sufficient factual record for the Court to determine the appropriateness of an admonition, the Court remitted the matter to the Commission for further proceedings.

On April 7, 2010, the Administrator of the Commission, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, waiving further submissions and oral argument and recommending that respondent be admonished.

On April 15, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent is a Justice of the Supreme Court, Third Judicial District, having been elected in November 2009 to a 14-year term that commenced on January 1, 2010.

2. From 1994 through 2009 respondent served as a Judge of the Kingston City Court. Until April 1, 2007, respondent's position as a City Court judge was part-time, with a judicial salary of $54,400 per year. From April 1, 2007, until January 1, 2010, respondent was a full-time judge of the City Court, with a judicial salary of $108,800 per year.

3. Respondent was admitted to the practice of law in New York in 1977. While a part-time judge of the Kingston City Court, respondent maintained a private law practice. Upon becoming a full-time judge, respondent closed his private law practice.

4. On February 5, 2004, the Commission issued a confidential letter of dismissal and caution to respondent for failing to render decisions in a timely manner in two cases and failing to report one delayed case to his administrative judge as required by the Rules of the Chief Judge. The letter cautioned respondent that he must "dispose of all judicial matters promptly, efficiently and fairly." The Commission also advised respondent that the letter "may be used in a future disciplinary proceeding based on a failure to adhere to [its] terms" and that the Commission "may also consider the letter… in determining sanction in any future disciplinary proceeding, in the event formal charges are sustained and misconduct is established."

5. Respondent recognizes that the letter of dismissal and caution should have prompted him to render future decisions in a more timely manner.

6. Notwithstanding this caution, from July 2004 to March 2008, in 26 matters as set forth on Schedule A annexed to the Agreed Statement of Facts, respondent failed to render decisions in a timely manner, either within 30 days of final submission as required by Section 1304 of the Uniform City Court Act or within 60 days of final submission as required by Section 1001 of the Uniform City Court Act and Section 4213(c) of the Civil Practice Law and Rules.

7. Not counting the first 30 or 60 days after final submission, as the case may be, respondent's delays in rendering decisions in these 26 cases ranged from 136 days (over four months) to 935 days (over two and a half years). In ten of the cases, respondent delayed his decisions more than 240 days (eight months) beyond the 30 days authorized by Section 1304 of the Uniform City Court Act.

8. Of the 26 delayed matters, 22 were small claims actions awaiting decisions, three were summary proceedings awaiting decisions, and one was a motion in a civil case. The delayed cases did not involve particularly complex legal or factual issues. Most were typical small claims matters involving debt, damage or breach of contract claims between two parties, such as a landlord and tenant, contractor and client, or vendor and client. For example:

A. In *Velez v. Birchwood Village*, respondent delayed more than eleven months before deciding whether the defendant was entitled to $450 in attorney's fees.

B. In *Glass v. Krakle, LLC*, respondent took eight months to decide whether a tenant was entitled to the return of her $800 security deposit.

C. In *Riviello v. Time Out Hair Salon*, respondent took nine months to decide a customer's action to recover $90 from a hair salon for a "botched color job."

D. In *Rose v. Lockwood*, respondent took seven months to decide a small claims matter in which the claimant sought reimbursement for a $1,900 loan he had made to his stepdaughter, who admitted accepting the loan.

9. Respondent's decisions in the 26 matters were generally from two to three pages in length, contained summaries of the claims and the evidence and at most contained a very brief discussion of any legal issues, often without citation to any legal authority.

10. In four cases, litigants or their attorneys wrote to respondent inquiring about the delayed decisions, as set forth below.

A. Two months after *Fabrico v. Eaton*, a small claims action, was fully submitted on May 10, 2006, the defendant's attorney sent respondent a letter dated July 10, 2006, inquiring about the delayed decision. Respondent did not reply to the letter. Without

excuse or explanation for the delay, respondent issued a decision on February 2, 2007, almost seven months after that letter was sent and nearly eight months (238 days) beyond the statutory time frame.

B. Five months after *Nace v. Klein*, a small claims action, was fully submitted on February 23, 2007, the claimant's attorney sent respondent a letter dated July 23, 2007, inquiring about the delayed decision. Respondent did not reply to the letter. Without excuse or explanation for the delay, respondent issued a decision on October 30, 2007, three months after that letter was sent and seven months (219 days) beyond the statutory time frame.

C. Nearly one year after *Rosenbaum v. Miller* was fully submitted on March 9, 2007, the claimant's attorney sent respondent a letter dated February 18, 2008, inquiring about the delayed decision. Without excuse or explanation for the delay, respondent issued a decision on February 26, 2008, more than ten months (324 days) beyond the statutory time frame.

D. More than six months after *Riviello v. Time Out Hair Salon*, a small claims action, was fully submitted on February 3, 2006, the claimant sent respondent a letter dated August 14, 2006, inquiring about the delayed decision. Respondent did not reply to the letter. Without excuse or explanation for the delay, respondent issued a decision on November 3, 2006, eight months (243 days) beyond the statutory time frame, after receiving two letters from his administrative judge, Supreme Court Justice George B. Ceresia, Jr., inquiring about the case (*infra* par. 11[B]).

11. In two cases, Administrative Judge Ceresia communicated with respondent about delayed decisions, as set forth below.

A. Judge Ceresia sent a letter to respondent on June 22, 2005, inquiring about the status of *Morales v. Lopez*, which was fully submitted on November 5, 2004. Judge Ceresia enclosed a letter from the plaintiff, who requested that he intervene on her behalf. Respondent did not reply to Judge Ceresia, who sent a second letter to respondent on August 1, 2005, asking for a response "within one week." Respondent replied on August 10, 2005, stating that he had been out of town assisting his wife on a business trip. On the same date, respondent issued a decision in *Morales*, 248 days (eight months) later than required by Section 1304 of the Uniform City Court Act.

B. Judge Ceresia sent a letter to respondent on September 7, 2006, inquiring about the status of *Riviello v. Time Out Hair Salon*, which was fully submitted on February 3, 2006. Judge Ceresia enclosed a letter from the plaintiff, who stated that she had written to respondent "pleading for a decision." Respondent did not reply, prompting Judge Ceresia to send a second letter to respondent on October 2, 2006, requesting that he respond "immediately." Again respondent did not reply. A month later, on November 3, 2006, without excuse or explanation for the delay, respondent issued a decision.

12. During the time periods set forth on Schedule A (July 2004 through March 2008), respondent was also engaged in the private practice of law (up to April 2007) and in two campaigns for election to public office. In 2004 respondent sought his party's nomination for

Supreme Court Justice, and in 2007 respondent ran for Kingston City Court Judge. Respondent recognizes that neither the obligations of his law practice nor his political activity was an excuse for failing to render decisions in a timely manner and that pursuant to Section 100.3(A) of the Rules Governing Judicial Conduct ("Rules"), the judicial duties of a judge take precedence over all the judge's other activities.

13. Respondent continued to delay issuing decisions in cases even after taking the bench full-time on April 1, 2007. As of that date, five of the cases on Schedule A were pending and already late. Litigants in three of those cases waited for periods of seven or eight months, until October and November 2007, for decisions in their cases. The litigants in *Tripp v. Meehan* waited until February 2008, 13 months after the decision was due.

14. Respondent also delayed unduly in deciding a case that was fully submitted to him after he became a full-time judge. He issued a decision in *Robles v. Anson*, a small claims case, 258 days (more than eight months) beyond the statutory time frame.

Mitigating Factors

15. Respondent reported all delayed matters on his quarterly reports to his administrative judge as required by the Rules of the Chief Judge (22 NYCRR §4.1).

16. There is no indication that respondent attempted to conceal the delays or to subvert the efforts of court administrators to monitor the delayed matters.

17. In the spring of 2006, while a part-time judge, respondent assumed additional adjudicative responsibilities by instituting a domestic violence court. Nine of the delays for which he was responsible pre-dated his assumption of that assignment.

18. Respondent now recognizes and acknowledges that "the judicial duties of a judge take precedence over all the judge's other activities" (Rules, §100.3[A]) and that whether serving part-time or full-time, he was obliged to perform his judicial duties diligently and to establish procedures and priorities to ensure that decisions are not unduly delayed. During the time respondent was receiving a salary of $54,400 per year for serving as a half-time judge, he continued to engage in the private practice of law, as permitted by the Rules. On seven of the eight quarterly reports of pending matters that respondent submitted to his administrative judge in 2005 and 2006, respondent stated that his delays were due to "insufficient time." Respondent concedes that because of his private practice of law, he was not devoting the time necessary to reduce his backlog of undecided cases.

Withdrawal of Specifications

19. After careful consideration of the Court of Appeals' decision in *Matter of Gilpatric*, *supra*, and further examination of the facts in light of that decision, the Administrator

withdraws 21 specifications from the Formal Written Complaint.[1] Although respondent delayed rendering decision in each of these 21 cases beyond the time required by statutory mandates, the Administrator notes that the delays in these 21 matters ranged between 60 and 120 days and that respondent was contemporaneously rendering decisions in other matters and was otherwise attending to a busy calendar.

20. The Administrator does not suggest that decisional delays of less than 120 days can never be misconduct or that there is any fixed numerical standard that establishes when delay rises to the level of misconduct. Each case must be examined individually. As to these 21 cases of lesser delay, the Administrator respectfully submits that withdrawal is appropriate.

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(A), 100.3(B)(1) and 100.3(B)(7) 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. 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.

Within 18 months of receiving a confidential letter of dismissal and caution from the Commission for failing to issue decisions in a timely manner, respondent developed a sizeable backlog of delayed cases that persisted over several years. Respondent's failure to render timely decisions in 26 cases over a period of more than three and a half years constitutes a pattern of "persistent or deliberate neglect of his judicial duties" (*Matter of Greenfield*, 76 NY2d 293, 295 [1990]), which is aggravated by numerous factors, including that: (1) respondent failed to heed the Commission's previous cautionary warning about such delays; (2) respondent received numerous letters from litigants or their attorneys inquiring about the delayed decisions; (3) in three cases in which litigants or their attorneys had written to him about the delays, respondent did not issue a decision until several months after receiving such letters; (4) in two cases, respondent received letters from his administrative judge inquiring about the delayed decisions; (5) in each of those two cases, respondent did not respond to his administrative judge's inquiry or issue a decision promptly, which necessitated a follow-up letter from the administrative judge; and (6) after his administrative judge's intervention, respondent did not eliminate his backlog of delayed cases and continued to have delays in subsequent matters. These persistent delays evidence deliberate neglect that warrants public discipline.

Respondent's delays were contrary to ethical standards and statutory mandates. A judge is required to "dispose of all judicial matters promptly, efficiently and fairly" (Rules,

[1] *Little v. Herdman, McCausland v. Sands and Rizzo, Hanowitz v. Troeger, Peppers v. Mehl, Mathis v. Olen, McMahon v. Wilkie, Rogers v. Ellenridge, Horowitz v. Chernick, Bohan v. Koltz, Miller v. Terpening, Cammarata v. Malik, Clarke v. White, Dinoris v. Vandemark, Puffer v. Gokey, Goralewski v. Brewer, Goralewski v. Kingston Pontiac, Hamberger v. Winkler, Kapilevich v. E3, Inc., Boyd v. Oakley, Ulster Credit Union v. Baker* and *Fairjohn Realty v. IPE*.

§100.3[B][7]). Contrary to the time limits imposed by law (30 days for small claims and 60 days for motions[2]), respondent delayed decisions for periods ranging from more than four months to (in two cases) more than a year. In *Quick v. Viviani*, a civil case consolidated with small claims, respondent's decision was delayed for over two and a half years.

We view such delays as significant misconduct because of the adverse consequences on individual litigants, who are deprived of the opportunity to have their claims resolved in a timely manner, and on public confidence in the administration of justice. Twenty-two of the delayed matters were small claims actions, which generally involve relatively simple issues and do not require a lengthy analysis. The "informal and simplified" procedures for small claims are intended to provide litigants with an efficient and just resolution to their legal disputes (Uniform City Court Act §1804). This goal is thwarted and litigants are adversely affected when decisions are unduly delayed. Litigants in such matters, who are often unrepresented and are hoping to receive a prompt adjudication of their claims, have little recourse when months pass without a decision; understandably, they may be concerned that if they complain about the delay, they risk antagonizing the judge who will be deciding their case.The cases depicted in this record offer a cross-section of the kinds of disputes that the "informal and simplified" procedures of small claims are intended to resolve expeditiously. In cases where the law required a decision to be issued within 30 days, a man claiming he was owed $1,900 by a relative had to wait seven months for a judgment; a tenant seeking the return of her $800 security deposit had to wait eight months for respondent's decision; and respondent took nine months to decide a customer's claim seeking $90 from a hair salon. To the litigants who filed these claims, the sums at issue were significant and the delays onerous. Moreover, for some litigants such cases may represent their only personal involvement with the courts, and an unduly delayed resolution of their dispute would necessarily have the effect of leaving them with the impression that our judicial system is inefficient and insensitive to their concerns.

Here, the record indicates that in several cases litigants or their attorneys who finally wrote to respondent inquiring about the delayed decisions did not receive any response from the court and still had to wait months for a decision. In two cases, litigants in delayed matters were constrained to contact respondent's administrative judge, who wrote to respondent; yet, even after hearing from his administrative judge, respondent did not issue a decision promptly or even reply to the administrative judge's letter, and a follow-up letter from the administrative judge was required before respondent finally issued a decision. Significantly, the inquiries from his administrative judge, which occurred in the summer of 2005 and in the fall of 2006, had no apparent effect in inducing respondent to issue prompt decisions in other delayed matters or to avoid delays in the future.

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[2] Uniform City Court Act §1304 ("Time for rendering judgment or decision. If a jury trial is not demanded or directed as provided in §1303, the court must render judgment within thirty days from the time when the case is submitted for that purpose, except when further time is given by the consent of the parties"); CPLR §4213(c) ("Time for decision. The decision of the court shall be rendered within sixty days after the cause or matter is finally submitted or within sixty days after a motion under rule 4403, whichever is later, unless the parties agree to extend the time").

In considering this record of delays, we find of particular significance respondent's failure to heed a Commission letter of dismissal and caution issued in February 2004, which addressed respondent's failure to render timely decisions in two cases as well as his failure to report a delayed case as required on his administrative reports. The Commission's directive, which warned that the letter "may be used in a future disciplinary proceeding based on a failure to adhere to [its] terms," reminded respondent of his obligation to "dispose of all judicial matters promptly, efficiently and fairly." Respondent has acknowledged that this cautionary letter should have prompted him to issue decisions in a more timely manner. A judge's disregard of a prior warning in a letter of dismissal and caution that his or her conduct was contrary to the Rules is a significant aggravating factor in disciplinary proceedings. *Matter of Cerbone*, 2 NY3d 479 (2004); *Matter of Assini*, 94 NY2d 26, 30-31 (1999) ("[r]ather than scrupulously following the letter and spirit of the Commission's caution, [the judge] continued the [prohibited activity]"); *Matter of Robert*, 89 NY2d 745, 747 (1997).

Despite this cautionary letter, despite receiving numerous inquiries from litigants about delays and despite the involvement of his administrative judge, respondent continued to have persistent delays. Therefore, based on the particular facts presented here, we conclude that respondent's conduct was contrary to the ethical rules and warrants a disciplinary sanction.

In making this determination, we are mindful of *Matter of Gilpatric*, 13 NY3d 586, 589-90 (2009), in which the Court of Appeals, reviewing the prior determination filed in this case, held that while "a judge's failure to promptly dispose of pending matters is primarily a matter for administrative correction," formal discipline could be appropriate "where the delays are lengthy and without valid excuse." In that decision, the Court expanded the parameters previously imposed on the Commission's jurisdiction over decisional delays by *Matter of Greenfield*, *supra*, where the Court had rejected a disciplinary sanction and dismissed a charge that a Supreme Court justice had engaged in misconduct by failing to render timely decisions in eight civil cases. In *Greenfield*, the Court identified specific aggravating factors as a jurisdictional predicate for a finding of misconduct based on delays in issuing decisions, namely, a judge's "defi[ance of] administrative directives" or "attempt[ ] to subvert the system by, for instance, falsifying, concealing or persistently refusing to file records indicating delays" (*supra*, 76 NY2d at 297). In *Gilpatric*, the Court modified those jurisdictional boundaries in light of the facts presented therein, stating:

> [A]fter nearly twenty years of experience with *Greenfield*, we think it is not workable to exclude completely the possibility of more formal discipline for such behavior, in cases where the delays are lengthy and without valid excuse …We now hold that lengthy, inexcusable delays may also be the subject of disciplinary action, particularly when a judge fails to perform judicial duties despite repeated administrative efforts to assist the judge and his or her conduct demonstrates an unwillingness or inability to discharge those duties.
> (*Matter of Gilpatric*, *supra*, 13 NY3d at 589-90)

Finding the factual record insufficient for the Court to determine the appropriateness of the sanction, the Court remitted the matter for further proceedings in which "the context in which the delays occurred [would] be fully explored," especially the judge's total caseload and other responsibilities, the involvement of administrative personnel and the judge's response to administrative intervention (*Id*. at 590). As the Court stated:

> Statistics alone are insufficient to support a finding of misconduct; disciplinary action must be based on a record demonstrating a judge's persistent lack of action in response to administrative recommendations or warnings (*Id*.).

In light of these guidelines, we have carefully considered the facts presented in this case. Based on the number of delayed decisions as well as the factors noted above (*i.e*., respondent's failure to heed the Commission's cautionary warning, his failure to issue a decision promptly even after litigants had contacted his court about the delays, his failure in two cases to issue a decision promptly after receiving a letter from his administrative judge or even to respond to the administrative judge's inquiry, and his inability to eliminate his persistent backlog of delayed cases or to avoid further delays after his administrative judge's intervention), we find that respondent's behavior falls within the parameters of misconduct established in *Greenfield* and *Gilpatric*.

In *Greenfield*, which involved delayed decisions in eight cases, the Court found that there was "no persistent or deliberate neglect" of judicial duties and that "[i]n the context of [the judge's] over-all performance these were isolated incidents" (*supra*, 76 NY2d at 295, 299). In contrast, the instant case involves a sustained pattern of delayed decisions in 26 cases over a period of more than three and a half years. Those delays were neither isolated nor inadvertent. There is no claim that respondent was unaware of the delayed matters; indeed, he reported all of the delayed cases, as he was required to do, on his quarterly reports to his administrative judge. Yet, notwithstanding that he had identified the delayed cases, respondent permitted numerous cases to linger for an additional three-month reporting period – and, in some cases, for several such periods – before finally disposing of the matters.

As respondent has acknowledged, neither the obligations of his law practice nor his political activity during two campaigns for election to judicial office excuses the delays depicted in this record. The judicial duties of a judge take precedence over all the judge's other activities (Rules, §100.3[A]). Every judge, whether part-time or full-time, is obligated to perform his or her duties appropriately with the resources provided and to establish priorities to ensure that decisions are not unduly delayed.

In considering an appropriate sanction, we note that respondent has acknowledged his misconduct and concedes that the Commission's letter of dismissal and caution should have prompted him to issue decisions in a more timely manner. We also note that respondent reported all the delayed matters as required on his quarterly reports. Thus, there is no indication that he attempted to conceal the delays or to subvert the efforts of court administrators to monitor the

delayed matters. *Compare*, *Matter of Washington*, 100 NY2d 873 (2003). It has also been stipulated that during this period respondent assumed additional adjudicative responsibilities.

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Emery, Mr. Harding, Ms. Hubbard, Ms. Moore and Judge Ruderman concur in the above determination.

Mr. Belluck concurs in the result.

Dated: April 27, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to GERARD E. MANEY, a Judge of the Family Court and an Acting Justice of the Supreme Court, Albany County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Charles F. Farcher, Of Counsel) for the Commission
Corrigan, McCoy & Bush, PLLC (by Joseph M. McCoy) for the Respondent

The respondent, Gerard E. Maney, a Judge of the Family Court and an Acting Justice of the Supreme Court, Albany County, was served with a Formal Written Complaint dated October 29, 2009, containing two charges. The Formal Written Complaint alleged that in June 2009 respondent operated a vehicle while under the influence of alcohol, resulting in his conviction for Driving While Ability Impaired, and that he asserted his judicial office in connection with his arrest. Respondent filed a verified answer dated December 7, 2009.

By Order dated March 2, 2010, the Commission designated H. Wayne Judge, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on August 5, 2010, in Albany. The referee filed a report dated September 15, 2010.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Both parties recommended the sanction of censure. On November 4, 2010, 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 Judge of the Family Court and an Acting Justice of the Supreme Court, Albany County, since 1991. He has served as the Supervising Judge of the Family Courts for the Third Judicial District since 2002 and has presided over Family Treatment Court since 2002 and Juvenile Drug Court since 2006.

As to Charges I and II of the Formal Written Complaint:

2. On June 18, 2009, after consuming alcoholic beverages at a private club in Albany County, respondent drove his car while under the influence of alcohol. Respondent's car bears a license plate containing the initials "FCJ," which signifies Family Court Judge.

3. At approximately 8:30 PM, respondent's vehicle approached the Green Island Bridge, where local police were operating a sobriety checkpoint. Respondent made an illegal U-turn in an attempt to avoid the checkpoint.

4. Green Island Police Officer Stacy Vogel pursued respondent in a marked police vehicle, with its lights and siren turned on, for approximately half a mile before respondent pulled over his vehicle and came to a stop.

5. Officer Vogel approached respondent's vehicle and asked for his driver's license and registration. Respondent provided those documents and identified himself as a Family Court judge. Officer Vogel did not know that the license plate on respondent's vehicle signified that it was registered to a judge; nor did she recognize respondent or know him to be a judge.

6. Officer Vogel detected the odor of alcohol and asked respondent to step out of his vehicle. Officer Vogel administered two field sobriety tests to respondent, which he failed.

7. Officer Vogel asked respondent to take a sobriety test on an alcohol pre-screening device (PSD). Respondent refused to take the PSD test.

8. When Officer Vogel stepped away from respondent's vehicle to call for a back-up, respondent used mouthwash in an attempt to mask the odor of alcohol on his breath.

9. Shortly thereafter, Green Island Police Officer Jeffrey McCutchen arrived on the scene. Officer McCutchen detected the scent of mouthwash. Respondent told Officer Vogel that he had used mouthwash.

10. Respondent asked Officer McCutchen, who knew respondent to be a judge, "if there was anything we could do to resolve the matter" and if the officer could extend him "professional courtesy." Officer McCutchen replied that the matter was "out of [his] hands" because an investigator from the District Attorney's office was on the scene.

11. Officer McCutchen asked respondent to take a sobriety test on the PSD, and respondent complied. His blood alcohol content registered .15% on the device.

12. The threshold for driving while intoxicated is .08%. The elevated reading on the PSD reflected, in part, the alcohol-based mouthwash respondent had used as well as the alcoholic beverages he had consumed.

13. Respondent again asked Officer McCutchen for "professional courtesy."

14. Respondent was arrested at 9:02 PM, handcuffed and transported to the Green Island Police station. In the police car, respondent again referred to himself as a judge.

15. At the station, Officer Vogel advised respondent of his rights and read him a DWI warning. Respondent refused to sign an acknowledgment that he had been given the DWI warning.

16. Over the next hour, Officer Vogel repeatedly asked respondent to take a breathalyzer test, and he declined to do so. During that time, respondent searched extensively through a telephone book and made approximately eight telephone calls. He also repeatedly asked for "courtesy" and "consideration," requested that his arrest not be publicized and made numerous references to his judicial status, including that he had been a judge for 18 years, presides over drug court and puts people in jail, and was running for Supreme Court.

17. Respondent made several telephone calls in an attempt to reach an attorney. He also attempted to reach Albany County District Attorney David Soares, who respondent knew would be the prosecuting authority for the charges against him. Respondent told the officers that he was calling Mr. Soares for the purpose of trying to minimize publicity of his arrest. Respondent did not speak to Mr. Soares that night or thereafter about his arrest.

18. As a result of respondent's conduct as described in paragraphs 16 and 17, the administration of the breathalyzer test was delayed for approximately an hour.

19. At approximately 10:00 PM, after speaking to an attorney, respondent took a breathalyzer test. The test showed a blood alcohol content of .07%.

20. Respondent was charged with Driving While Intoxicated ("DWI"), a violation of Section 1192(3) of the Vehicle and Traffic Law; Driving While Ability Impaired ("DWAI"), a violation of Section 1192(1) of the Vehicle and Traffic Law; Failure to Yield Right of Way to an Emergency Vehicle, a violation of Section 1144(a) of the Vehicle and Traffic Law; and Illegal U-Turn, a violation of Section 1160(e) of the Vehicle and Traffic Law.

21. On August 4, 2009, respondent pled guilty in the Green Island Town Court to DWAI in full satisfaction of all charges. He was sentenced to a $300 fine, a $260 surcharge, a 90-day license suspension and attendance at a Victim Impact Panel and a Drinking Drivers Program.

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), 100.4(A)(2) 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 insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Respondent violated his ethical obligation to respect and comply with the law and endangered public safety by operating a motor vehicle while under the influence of alcohol, resulting in his conviction for Driving While Ability Impaired. *See*, *Matter of Martineck*, 2011 Annual Report ___; *Matter of Pajak*, 2005 Annual Report 195 (Comm on Judicial Conduct). By engaging in such conduct, respondent undermined his effectiveness as a judge and brought the judiciary as a whole into disrepute. Moreover, as shown by this record, respondent's misconduct is exacerbated significantly by numerous aggravating circumstances, including his repeated references to his judicial status during his arrest, his requests to the arresting officers for "professional courtesy" and "consideration," and his calculated attempts to avoid the full consequences of his wrongdoing.

In determining an appropriate disposition for alcohol-related driving offenses, the Commission in prior cases has considered mitigating and/or aggravating circumstances, including the level of intoxication, whether the judge's conduct caused an accident or injury, whether the conduct was an isolated instance or part of a pattern, the conduct of the judge during arrest, and the need and willingness of the judge to seek treatment. *See, Matter of Martineck*, *supra* (DWI conviction, based on a blood alcohol content of .18%, after the judge drove erratically and hit a mile marker post [censure]); *Matter of Burke,* 2010 Annual Report 110 (DWAI conviction after causing a minor accident [censure, in part for additional misconduct]); *Matter of Mills*, 2006 Annual Report 218 (though acquitted of DWI, judge admitted operating a motor vehicle after consuming alcoholic beverages, "vehemently" protested her arrest and made offensive statements to the arresting officers [censure]); *Matter of Pajak*, *supra* (DWI conviction after a property damage accident [admonition]); *Matter of Stelling*, 2003 Annual Report 165 (DWI conviction following a previous conviction for DWAI [censure]); *Matter of Burns*, 1999 Annual Report 83 (DWAI conviction [admonition]); *Matter of Henderson*, 1995 Annual Report 118 (DWAI conviction; judge referred to his judicial office during the arrest and asked, "Isn't there anything we can do?" [admonition]); *Matter of Siebert*, 1994 Annual Report 103 (DWAI conviction after causing a three-car accident [admonition]); *Matter of Innes*, 1985 Annual Report 152 (DWAI conviction; judge's car struck a patrol car while backing up [admonition]); *Matter of Barr*, 1981 Annual Report 139 (two alcohol-related convictions; judge asserted his judicial office and was abusive and uncooperative during his arrests, but had made "a sincere effort to rehabilitate himself" [censure]); *Matter of Quinn*, 54 NY2d 386, 395 (1981) (two alcohol-related

convictions and other non-charged incidents; judge was uncooperative and abusive to officers during his arrest and repeatedly referred to his judicial position [removal reduced to censure despite the judge's "manifest unfitness for judicial office," in view of the judge's retirement]). In the wake of increased recognition of the dangers of Driving While Intoxicated and the toll it exacts on society, alcohol-related driving offenses must be regarded with particular severity.

This case presents a series of aggravating factors that are especially disturbing. Respondent made an illegal U-turn to avoid a sobriety checkpoint, indicating that he recognized that he was impaired by alcohol. Pursued by police, he drove for a half a mile before stopping his vehicle. After a police officer smelled alcohol on his breath, respondent quickly rinsed his mouth with mouthwash to mask the odor (an action which also skewed the results of an alcohol pre-screening test). He initially refused to take a pre-screening sobriety test, though he complied with the request when a second officer arrived on the scene. At the police station, he delayed taking a breathalyzer test for an hour while leafing through a telephone book, making numerous phone calls, and rebuffing repeated requests that he take the test promptly; as the referee found, it was clear that respondent's behavior was calculated to delay administration of the test. He attempted to contact the District Attorney, who would be prosecuting the charges against him, in an apparent effort to minimize publicity of his arrest. Most troubling of all, both before and after his arrest, he repeatedly invoked his judicial office while making requests for what he called "professional courtesy" and "consideration." Although he never asked specifically that no charges be filed or that the charges be dropped or reduced, those requests, coupled with his gratuitous references to his judicial office, left no doubt that he was asking for favorable treatment simply because of his judicial status.[1]

Public confidence in the fair and proper administration of justice requires that judges, who are sworn to uphold the law, neither request nor receive special treatment when the laws are applied to them personally. It was unnecessary and improper for respondent to identify himself as a judge at the scene of his arrest and refer to his judicial office repeatedly thereafter, while asking for "courtesy" and "consideration." Such conduct is contrary to well-established ethical standards prohibiting a judge from using the prestige of judicial office to advance private interests (Rules, §100.2[C]) and is inappropriate even in the absence of an explicit request for special consideration. *See, Matter of Edwards*, 67 NY2d 153, 155 (1986).

In considering an appropriate sanction, we must weigh these factors against this isolated episode of misbehavior, respondent's 19 years as a judge, his acknowledgment of misconduct and his recognition that a severe sanction is appropriate.

Were the sanction of suspension from judicial office without pay available to us, we would impose it in this case to reflect the seriousness of respondent's misconduct in view of

[1] Most of the factual allegations of the Formal Written Complaint were undisputed. Respondent did not testify at the hearing, permitting a negative inference to be drawn as to certain facts, such as the amount of alcohol he consumed and his intent in asking for "courtesy" and "consideration" (*see*, *Matter of Reedy*, 64 NY2d 299, 302 [1985]).

the aggravating factors described herein.[2] Absent that alternative, we have concluded that respondent should be censured. Such a result not only underscores the seriousness of such misconduct, but also serves as a reminder to respondent and to the public that judges at all times are held to the highest standards of conduct, even off the bench (Rules, §100.2[A]).

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Harding, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck, Mr. Emery and Ms. Hubbard dissent as to the sanction and vote that respondent be removed from office. Mr. Belluck files a dissenting opinion, in which Mr. Emery joins.

Mr. Cohen files a concurring opinion, in which Mr. Coffey and Mr. Harding join.

Dated: December 20, 2010

CONCURRING OPINION BY MR. COHEN, IN WHICH MR. COFFEY AND MR. HARDING JOIN

While I agree with the majority that Judge Maney's conduct is clearly worthy of the Commission's proposed sanction of censure – in many respects more for his post-arrest conduct than for the impaired driving that led to it – I write separately to address briefly a point raised by staff and addressed in a footnote in the determination. Specifically, staff argued that a "negative inference" should be drawn against the judge because he did not testify or offer testimony in his own defense.

Although it is accurate that, at the August 5, 2010 hearing in this matter, there was no defense testimony or evidence, except as offered through cross-examining staff witnesses, it is also true that Judge Maney *did* testify when asked by staff to give an investigative deposition. Ten pages of his investigative admissions were used by staff at the hearing to prove its case in chief, suggesting that he testified fully and with candor. In short, he *cooperated* with staff – even if he chose not to testify at the hearing or to offer in evidence any portions of his investigative testimony to put the admissions in context.

[2] In our 2010 annual report, as we have done previously, we have urged the Legislature to consider a constitutional amendment providing suspension from office without pay as an alternative sanction available to the Commission.

We are informed by staff during oral argument that it is relatively uncommon for a respondent not to testify at a hearing about his or her conduct. One might easily draw the "inference" that such testimony would only further worsen the situation for a respondent in an incriminating way, as is likely the case here.[3] Nonetheless, a decision not to testify can also be viewed as an indication of remorse by the respondent, or a tacit acceptance of responsibility for his or her wrongdoing. Indeed, for example, at sentencing in criminal cases, trial judges sometimes comment favorably on the manner in which a defense has restrained itself so as not to further exacerbate the wrongdoing. Of course, a judge might also decline to testify if staff had not met its burden of proof.

Although the Court of Appeals has approved the Commission's use of an inference drawn from a judge's failure to testify (*see Matter of Reedy,* 64 NY2d 299, 302 [1985]), one should not be too hasty to assume that a respondent's demand for a hearing coupled with his or her decision to not testify is a negative factor in every case. It is certainly true that in this case one can look at the written word of the testimony before the referee given by staff's witnesses and the tape containing respondent's post-arrest conduct, including his own incriminating words *in haec verba*, and draw adverse inferences from that evidence. However, the "inference" to be drawn from a judge's decision not to testify is of a far different variety, and should be viewed far less reflexively against a respondent – including this one. I note that the referee, in sustaining the charge, expressly declined to use the negative inference in view of the judge's candor in his pleadings and investigative testimony (Rep. 7). In light of the evidence presented in this case, the Commission did not need to resort to use of this inference in determining guilt.

Dated: December 20, 2010

DISSENTING OPINION BY MR. BELLUCK, IN WHICH MR. EMERY JOINS

I respectfully dissent as to the sanction in this case because I believe the established facts of Judge Maney's behavior – a drunk driving[4] conviction exacerbated by blatant, repeated attempts to evade responsibility for his unlawful conduct, to obstruct the administration of justice and to obtain favorable treatment because of his judicial status – constitute egregious misconduct for which censure is too lenient. I believe this record of misbehavior establishes that the respondent is not fit to continue to serve as a judge and should be removed from office.

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[3] Although staff cites no authority for it and we find none, it is noteworthy that staff does not ask the Commission to employ the negative inference in deciding the punishment, only in deciding guilt – and, of course, respondent agrees.

[4] I use this term to include all of the offenses under Vehicle and Traffic Law §1192 pertaining to operating a vehicle while impaired by the consumption of alcohol, including Driving While Ability Impaired ("DWAI"), the charge to which Judge Maney pled guilty (VTL §1192[1]).

The record before us reveals the following facts. After consuming alcoholic beverages, the judge drove his vehicle and, spotting a sobriety checkpoint, he attempted to evade the roadblock by making an illegal U-turn. He then drove for half a mile while pursued by police. That conduct is telling since it indicates that the judge recognized that legally he should not have been driving, and he certainly knew that, by continuing to drive in that condition, he presented a heightened risk of injury to others. This bears repeating: not only was the judge driving drunk, but he attempted to evade the police and continued to drive drunk, endangering the lives of others (motorists, passengers, pedestrians and law enforcement personnel) after recognizing that legally he should not be driving.

This was only one of numerous efforts undertaken by the judge that evening to avoid the legal consequences of his behavior. Over the next few hours, he continued those efforts: by refusing to submit to an alcohol pre-screening device, by rinsing his mouth with mouthwash (which he conveniently happened to have in his car), and, most shockingly, by repeatedly referring to his judicial office, by repeatedly requesting "professional courtesy" and "consideration" from the arresting officers, and by attempting to contact the District Attorney when he was in custody. Each of these separate acts was a calculated effort to evade responsibility for his misconduct and to ensure that the law, which every judge is sworn to uphold, would not be applied to him personally. While each of these aggravating factors, standing alone, would notably compound the underlying misconduct, taken together they constitute a record of irresponsibility that cannot be condoned and irreparably damage his credibility and moral authority as a judge.

It is undisputed that prior to his arrest, the judge requested special consideration, which one of the police officers interpreted as a request not to be charged with any offense. It is also undisputed that Judge Maney initially refused to take an alcohol pre-screening test, then agreed to the test after rinsing his mouth with mouthwash. The fact that he used the mouthwash after he had already taken – and failed – the field sobriety tests and had been asked to take a pre-screening alcohol test strongly suggests that his purpose in using the mouthwash was to taint the results of the alcohol test.

At the police station, the judge refused to sign an acknowledgment that he had been given the DWI warning by the police. As a videotape of the booking process at the station shows, the judge repeatedly asked for special consideration and courtesy and referred to his judicial office. Underscoring his judicial status, he told the officers that he was running for Supreme Court and that he was trying to contact the District Attorney. Even as he was being asked at the police station to take the breathalyzer test, he repeatedly asked for "courtesy." There is no other plausible interpretation of the videotape than that the judge was seeking special treatment because of his judicial office and was attempting to delay administration of the test for more than two hours – the time period within which the test would be valid.

In sum, Judge Maney attempted to avoid a police checkpoint, to taint the field alcohol test and to delay the breathalyzer test at the station, and he repeatedly asserted the prestige of his judicial office and asked for special consideration.

The majority agrees that this conduct warrants more than a censure, stating plainly that if the Commission had the option of suspending Judge Maney without pay, they would vote to do so. At present, this Commission has four disciplinary options: a private letter of caution, admonition, censure and removal. I fail to understand how conduct that plainly requires a sanction more severe than censure – as the Commission unanimously agrees – results in a censure and not removal simply because we do not have the power to suspend. Since censure is plainly insufficient, the only available discipline is removal.

I am mindful of the cases cited by the majority indicating that no judge in New York has previously been removed for an alcohol-related driving offense.[5] As I have previously stated (*Matter of Burke*, 2010 Annual Report 110 [Comm on Judicial Conduct]), I believe that the past disciplinary decisions for drunk driving have been unduly lenient given the seriousness of such behavior and our increasing awareness of the enormous toll it exacts on society. I need not reiterate the statistics from my dissent in *Burke* as to the terrible consequences of such behavior. And I do agree that an alcohol-related driving offense should not result in automatic removal – the facts of each case must be considered. But here, the facts more than warrant removal.

Notably, the Court of Appeals has underscored that for many types of misconduct the severity of the sanction imposed "depends upon the presence or absence of mitigating and aggravating circumstances" (*e.g.*, *Matter of Rater*, 69 NY2d 208, 209 [1987] ["in the absence of any mitigating factors, [such conduct] might very well lead to removal … On the other hand, if a judge can demonstrate that mitigating circumstances accounted for such failings, such a severe sanction may be unwarranted"]).[6] In censuring Judge Burke, the Commission applied such an analysis, relying on the absence of any significant exacerbating factors and noting in mitigation that the judge was cooperative with the arresting officers and did not assert her judicial office or in any way seek special treatment during her arrest. Applying such an analysis in this case, which presents egregious aggravating circumstances and the absence of any mitigation, there is compelling support for the sanction of removal.

As noted above, Judge Maney repeatedly asserted his judicial office in an effort to receive special treatment and impede the administration of justice. Standing alone, such

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[5] Significantly, however, in reducing the sanction from removal to censure in *Matter of Quinn*, 54 NY2d 386, 392 (1981), a case involving a judge with two alcohol-related driving convictions, the Court of Appeals agreed that the petitioner was "unfit to continue as a judge" but reduced the sanction in view of the judge's retirement from the bench.

[6] *See also*, *Matter of Kiley*, 74 NY2d 364, 370 (1989) ("there likewise are no aggravating factors and thus a sufficient basis for removal is lacking"); *Matter of Edwards*, 67 NY2d 153, 155 (1986) ("as a general rule, intervention in a proceeding in another court should result in removal," but this does not "preclud[e] consideration of mitigating factors"); *Matter of Murphy*, 82 NY2d 491, 495 (1993) ("These are aggravating circumstances warranting removal"); *Matter of Dixon*, 47 NY2d 523, 525 (1979) ("In so deciding we consider various mitigating factors").

behavior constitutes significant misconduct. Numerous judges have been disciplined for asserting their judicial prestige with law enforcement officials or other judges to obtain special treatment for themselves, their friends and relatives.[7] One judge was admonished simply for handing a police officer a photo ID, identifying him as a town justice, during a traffic stop (*Matter of Werner*, 2003 Annual Report 198). By itself, Judge Maney's wielding of influence on his own behalf – not once, but repeatedly, in a crass effort to avoid responsibility for his unlawful behavior – was inexcusable and requires, in my view, the most severe sanction available.

Coupled with the aggravating factors noted above, I believe there are other compelling reasons here to support the sanction of removal. By 2010, our society as a whole has become more sensitive to the problems associated with driving under the influence of alcohol. It is a far more serious offense than it was 20 years ago because we are all better educated as to the corrosive, far-reaching effects of such irresponsible behavior on the public's safety and welfare. A judge in 2009 had the benefit of this educational process. In addition, as a judge for nearly 20 years, Judge Maney also had an opportunity to learn from the experiences of other judges who were publicly disciplined for alcohol-related driving offenses and to learn that, even without injuring anyone, such behavior requires a severe sanction.

In this regard, it should also be noted that Judge Maney had presided for seven years over a Treatment Court and also presided over a Drug Court, where he was regularly exposed to the destructive consequences of alcohol. With years of experience in Treatment Courts, where personal accountability and responsibility are of paramount importance, the judge would have regularly reminded defendants of the importance of such attributes. Certainly this judge had the benefit of a level of education and expertise on these subjects that was simply not available 20 years ago.

[7] *E.g.*, *Matter of Pennington*, 2004 Annual Report 139 (judge asserted his judicial office in a vulgar tirade towards a park official when stopped and charged with infractions) (censure); *Matter of Williams*, 2003 Annual Report 200 (judge misused his judicial prestige in asking another judge to vacate an order of protection issued against his friend) (censure); *Matter of Stevens*, 1999 Annual Report 153 (judge interfered in police investigation of a dispute involving his son and demanded that his son's antagonist be arrested) (admonition); *Matter of D'Amanda*, 1990 Annual Report 91 (judge used the authority of his office to avoid receiving three traffic tickets) (censure); *Matter of LoRusso*, 1988 Annual Report 195 (judge intervened with police on behalf of the son of a former court employee) (censure); *Matter of Montaneli*, 1983 Annual Report 145 (judge sought special consideration from the prosecutor and the presiding judge on behalf of a friend who was charged with a crime) (censure).

Unfortunately, the lesson Judge Maney apparently took from all of this education was to avoid checkpoints, to keep mouthwash in his car, and, when caught, to identify himself as a judge at the earliest opportunity and thereafter make frequent references to his judicial status, to repeatedly ask the police for "professional courtesy" and "consideration," and to delay taking a breathalyzer test as long as possible. Those were the wrong lessons, and his attempts to avoid getting caught and held accountable cannot be condoned.

It must be underscored that Judge Maney's conduct reflects not an isolated lapse of judgment, but a series of calculated transgressions that fly in the face of his two decades of ethics training as a judge. In this respect, his conduct was far more reprehensible than that of Judge Burke and other judges who drove while under the influence of alcohol. It is mind-boggling to me that in this case, where the facts are exponentially more serious than in *Burke* and the aggravating circumstances cry out for a harsher sanction, the Commission concludes that the same sanction – public censure – is appropriate. Such a result is plainly disproportionate.

For all these reasons, I am unpersuaded by the majority's view that censure is appropriate here because of the sanctions imposed in prior cases 20 or 30 years ago. Nor can I agree that removal should not be imposed because this was an isolated instance of misbehavior. As the Court of Appeals has held, even a single act of misconduct that is "completely incompatible" with the proper role of a judge may require the sanction of removal (*Matter of Blackburne*, 7 NY3d 213, 221 [2006]; *Matter of Gibbons*, 98 NY2d 448 [2002]).

Accordingly, I vote to remove Judge Maney from office.

Dated: December 20, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to DONALD P. MARTINECK, a Justice of the Somerset Town Court, Niagara County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission
Lawrence G. Stuart and Michael M. Mohun for the Respondent

The respondent, Donald M. Martineck, a Justice of the Somerset Town Court, Niagara County, was served with a Formal Written Complaint dated April 27, 2010, containing one charge. The Formal Written Complaint alleged that respondent operated a motor vehicle after consuming a significant quantity of alcohol and was convicted of Driving While Intoxicated. Respondent filed a verified answer dated May 13, 2010.

On September 23, 2010, 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 September 29, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Somerset Town Court, Niagara County, since 2007. His current term expires on December 31, 2010. Respondent is not an attorney.

2. On March 1, 2009, respondent consumed 40 or more ounces of wine over a period of approximately seven and a half hours while at a family member's home in North Tonawanda, New York.

3. Respondent left his family member's home at approximately 8:30 P.M. and began driving to his home in Barker, New York, approximately 35 miles away.

4. Respondent drove his vehicle partially off the right edge of the road, approximately 12 miles from his home, and struck a mile marker post, damaging his vehicle's right front fender and knocking the passenger-side mirror off his vehicle.

5. Respondent twice drove his vehicle across the center line of the road, approximately eight miles and six miles from his home, while traveling at approximately 55 mph. There was no oncoming traffic.

6. Approximately five miles from respondent's home, a Niagara County Sheriff's Office patrol deputy who was responding to a reckless driver complaint pulled his patrol car behind respondent's vehicle and activated his siren to initiate a stop. Respondent drove partially off the right edge of the road and crossed the center of the road before coming to a stop.

7. Respondent, who is 6'1" and weighed approximately 290 pounds, had difficulty exiting his vehicle and required assistance from a Niagara County Sheriff's Deputy to

maintain his balance. The deputy observed that respondent had a strong odor of alcohol on his breath and glassy eyes. The deputy did not conduct field sobriety tests with respondent due to his impaired motor condition.

8. Respondent was arrested and charged with two counts of Driving While Intoxicated ("DWI"), violations of Sections 1192(2) and (3) of the Vehicle and Traffic Law ("VTL"); Aggravated DWI (a .18% blood alcohol content), a violation of Section 1192(2-a) of the VTL; and Failure to Keep Right, a violation of Section 1120(a) of the VTL.

9. Respondent did not tell the Sheriff's Deputy that he is a judge and did not otherwise assert his judicial status at any time during his arrest.

10. On July 30, 2009, respondent pled guilty in the North Tonawanda City Court to DWI, a violation of Section 1192(3) of the VTL, in full satisfaction of all charges.

11. On October 1, 2009, respondent was sentenced to a six-month revocation of his driver's license, $895 in fines and surcharges, and a one-year conditional discharge that required him to attend a drinking driver program and continue counseling until successfully discharged.

Mitigating Factors:

12. Respondent was cooperative with law enforcement officers during his arrest and the administration of the chemical test, and never attempted to assert his judicial office.

13. Respondent voluntarily engaged in counseling shortly after his arrest to address and manage his stress related to health problems and the legal charges. Respondent continued in counseling pursuant to his conditional discharge until March 2010 when his treatment provider determined that "continued treatment was no longer necessary."

14. In February 2010 and August 2010, respondent obtained two assessments with New York State Office of Alcoholism and Substance Abuse Services ("OASAS") approved providers, which both recommended no treatment.

15. Respondent has complied with all the terms of his sentence. His conditional discharge expired on October 1, 2010.

16. Respondent has been cooperative with the Commission and its staff throughout the investigative and adjudicative proceedings in this matter.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.4(A)(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, and respondent's misconduct is established.

Respondent violated his ethical obligation to respect and comply with the law and endangered public safety by operating a motor vehicle after consuming a significant quantity of alcohol, resulting in his conviction for Driving While Intoxicated. *See*, *Matter of Burke*, 2010 Annual Report 110; *Matter of Pajak*, 2005 Annual Report 195 (Comm on Judicial Conduct). Such conduct is inconsistent with a judge's obligation to maintain high standards of conduct, both on and off the bench (Rules, §§100.1, 100.2[A]) and brings the judiciary as a whole into disrepute.

In determining an appropriate disposition for such behavior, the Commission in prior cases has considered mitigating and/or aggravating circumstances, including the level of intoxication, whether the judge's conduct caused an accident or injury, whether the conduct was an isolated instance or part of a pattern, the conduct of the judge during arrest, and the need and willingness of the judge to seek treatment. *See, Matter of Burke, supra* (DWAI conviction after causing a minor accident; judge was cooperative during the arrest and did not assert her judicial office [censure, in part for additional misconduct]); *Matter of Mills*, 2006 Annual Report 218 (though acquitted of DWI, judge admitted operating a motor vehicle after consuming alcoholic beverages, "vehemently" protesting her arrest and making offensive statements to the arresting officers [censure]); *Matter of Pajak*, *supra* (judge was convicted of DWI after a property damage accident [admonition]); *Matter of Stelling*, 2003 Annual Report 165 (DWI conviction following a conviction for DWAI [censure]); *Matter of Burns*, 1999 Annual Report 83 (DWAI conviction [admonition]); *Matter of Siebert*, 1994 Annual Report 103 (DWAI conviction after causing a three-car accident [admonition]); *Matter of Henderson*, 1995 Annual Report 118 (DWAI conviction; judge referred to his judicial office during the arrest and asked, "Isn't there anything we can do?" [admonition]); *Matter of Innes*, 1985 Annual Report 152 (DWAI conviction; judge's car caused damage to a patrol car while backing up [admonition]); *Matter of Barr*, 1981 Annual Report 139 (judge had two alcohol-related convictions, asserted his judicial office and was abusive and uncooperative during his arrests, but had made "a sincere effort to rehabilitate himself" [censure]); *Matter of Quinn*, 54 NY2d 386 (1981) (two alcohol-related convictions and other non-charged incidents; judge was uncooperative and abusive to officers during his arrest and repeatedly referred to his judicial position [removal reduced to censure in view of the judge's retirement and poor health]). In the wake of increased recognition of the dangers of Driving While Intoxicated and the toll it exacts on society, alcohol-related driving offenses must be regarded with particular severity.

In this case, respondent should have recognized that driving after consuming a substantial quantity of alcohol created a significant risk to the lives of others, and it is fortunate that his behavior did not result in serious injury. His impaired condition resulted in erratic driving, which included hitting a roadside mile marker. Even after hitting the marker, respondent continued to drive erratically at high speed for several miles, twice crossing the center line, before being stopped and placed under arrest. In satisfaction of the charges against him, respondent pled guilty to Driving While Intoxicated, a misdemeanor. By violating the law which he is called upon to apply in his own court, respondent engaged in conduct that undermines his own effectiveness as a judge.

While such conduct warrants a severe sanction, we note that respondent was cooperative during his arrest and did not identify himself as a judge, assert his judicial status or otherwise attempt to obtain special treatment because of his judicial office. Respondent has complied with the terms of his sentence and his one-year conditional discharge, which has now expired. We further note respondent's acknowledgment of misconduct and his recognition that a severe sanction is appropriate.

By reason of the foregoing, and mindful that the sanction of suspension from office is not available, the Commission determines that the appropriate disposition is censure.

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Emery, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Harding were not present.

Dated: October 12, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to PATRICK J. McGRATH, a Justice of the Supreme Court, Rensselaer County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Honorable Jill Konviser
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
Anderson, Moschetti & Taffany, PLLC (by Peter J. Moschetti, Jr.) for the Respondent

The respondent, Patrick J. McGrath, a Justice of the Supreme Court, Rensselaer County, was served with a Formal Written Complaint dated August 11, 2009, containing one charge. The Formal Written Complaint alleged that during his campaign for Supreme Court, respondent sent a letter to pistol permit holders which misrepresented his jurisdiction over such

permits and which made improper pledges or promises. Respondent filed a verified Answer dated September 4, 2009.

On January 11, 2010, 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 27, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Supreme Court since January 1, 2009, having previously served as a Judge of the County Court, Rensselaer County, from 1994 through December 31, 2008, and as a Judge of the Troy City Court from 1985 through 1993. Respondent was admitted to the practice of law in New York in 1979.

2. In 2008, respondent was a candidate for Justice of the Supreme Court, Third Judicial District, which includes Rensselaer County.

3. In October 2008, during his campaign for Supreme Court, respondent composed, signed and distributed a campaign letter on "Judge McGrath for Supreme Court" letterhead that was addressed to his "Fellow Pistol Permit Holder."

4. In the letter, respondent stated:

> As your County Judge for the past 14 years, I have been responsible for all pistol permits in Rensselaer County. **My pistol permit is very important to me as I know yours is to you.** I work closely on a daily basis with the pistol permit clerk … to make sure all permits and amendments are handled in a timely fashion. Since 1994, I have signed more than 20,000 permits and amendments. I also work closely with all of the Rod and Gun clubs…. (Emphasis in original.)

5. In the same letter, respondent stated:

> As Supreme Court Justice… **I will still be responsible for all pistol permits in Rensselaer County.** (Emphasis in original.)

Respondent knew at the time he made this statement that any judge or justice of a court of record with an office in the county may issue a pistol permit and that any judge exercising criminal or family court jurisdiction may revoke such a permit under Sections 265.00[10] and 400.00 of the Penal Law and Section 530.14 of the Criminal Procedure Law.

6. Respondent concluded the letter by stating:

> I ask for your support and vote on November 4th and look forward to serving the Pistol Permit holders for another 14 years.

Respondent signed the letter "Patrick J. McGrath, Rensselaer County Court Judge, Acting Supreme Court Justice."

7. Respondent sent the letter to approximately 7,000 individuals or addresses that had been provided to him by the New York State Rifle and Pistol Association.

8. Respondent's campaign letter misrepresented that, if elected to the Supreme Court, he would "**still be responsible for all pistol permits in Rensselaer County**" (emphasis in original) and would have exclusive jurisdiction over all such permits in Rensselaer County, and improperly conveyed that he would favorably consider future applications for and amendments to pistol permits.

9. In 2004 the Commission publicly admonished respondent for making public comments about a pending or impending proceeding while he was a candidate for re-election as County Court Judge, in violation of Sections 100.1, 100.2(A) and 100.3(B)(8) of the Rules Governing Judicial Conduct ("Rules").

10. In view of his prior discipline, respondent should have been especially sensitive during his most recent campaign to those rules which govern a judicial candidate's statements. To that end, respondent could have sought an opinion from the Advisory Committee on Judicial Ethics or the Judicial Campaign Ethics Center, regarding the propriety of the language he proposed for his October 2008 campaign letter.

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)(9)(a), 100.3(B)(9)(b), 100.5(A)(4)(a), 100.5(A)(4)(d)(i), 100.5(A)(4)(d)(ii) and 100.5(A)(4)(d)(iii) 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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

The campaign activities of judicial candidates are significantly circumscribed. *Matter of Maney,* 70 NY2d 27 (1987). Among other requirements, a judicial candidate may not "knowingly … misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent" (Rules, §100.5[A][4][d][iii]). Nor may a candidate make commitments, pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office (Rules, §100.5[A][4][d][i], [ii]; *see also*, §100.3[B][9][a], [b]). To do so compromises the judge's impartiality. *See, Matter of Birnbaum,* 1998 Annual Report 73 (Comm on Judicial Conduct). As the Court of Appeals has stated, even an implied pledge or promise may violate the ethical standards:

> [C]andidates need not preface campaign statements with the phrase "I promise" before their remarks may reasonably be interpreted by

> the public as a pledge to act or rule in a particular way if elected. A candidate's statements must be reviewed in their totality and in the context of the campaign as a whole to determine whether the candidate has unequivocally articulated a pledge or promise of future conduct or decisionmaking that compromises the faithful and impartial performance of judicial duties.

Matter of Watson, 100 NY2d 290, 298 (2003).

Respondent's letter addressed to his "fellow pistol permit holder[s]," which he sent to 7,000 individuals during his 2008 campaign for Supreme Court, was inconsistent with these ethical standards. Viewed in their entirety, the statements contained in respondent's letter conveyed bias and the appearance of bias in favor of pistol permit holders and implied that as a judge he would favorably consider their interests. Advising his "fellow pistol permit holder[s]" that he "look[s] forward to serving [them] for another 14 years" reinforces the implied promise, especially after saying that he knows their permits are "very important" to them and telling them how well he has served their interests in the past. In this context, stating that he has "signed more than 20,000 permits and amendments" and will be considering future applications further reinforces the implied promise to view such applications favorably. Respondent has stipulated that his campaign letter "improperly conveyed that he would favorably consider future applications for and amendments to pistol permits" (Agreed Statement, par. 8), contrary to the ethical standards.

A judge's role is to serve the public as a whole, not a specific constituency. "Judges must apply the law faithfully and impartially -- they are not elected to aid particular groups" (*Matter of Watson*, *supra*, 100 NY2d at 302). Campaign statements that single out a particular class of litigants for special treatment are inconsistent with judicial impartiality and the appearance of impartiality, which are essential to the role of a judge.

Moreover, respondent's statement that as a Supreme Court Justice he "will still be responsible for all pistol permits in Rensselaer County" misstated the law and was likewise inconsistent with the Rules. As a matter of law, any judge or justice of a court of record in the county may issue a pistol permit and any judge exercising criminal or family court jurisdiction may revoke such a permit (*see* Penal Law, §§265.00[10], 400.00; CPL §530.14), although administratively the procedures for handling such permits and amendments vary statewide. Respondent's representation that he had exclusive jurisdiction over such permits not only was legally incorrect, but buttressed the biased message conveyed in his letter.

In imposing discipline, we note that in 2004 respondent was admonished for commenting publicly about a pending case at a time when he was a candidate for re-election. Matter of McGrath, 2005 Annual Report 181 (Comm on Judicial Conduct). In view of his previous discipline, respondent should have been especially sensitive to the ethical rules.

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

Judge Klonick, Mr. Coffey, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Judge Konviser, Ms. Moore, Judge Peters and Judge Ruderman concur.

Dated: February 5, 2010

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to ANDREA L. MCINTYRE, a Justice of the Theresa Village Court, Jefferson County.

DECISION AND ORDER

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Kathleen Martin, Of Counsel) for the Commission
Honorable Andrea L. McIntyre, *pro se*

The matter having come before the Commission on September 29, 2010; and the Commission having before it the Formal Written Complaint dated May 27, 2010, and the Stipulation dated July 30, 2010; and respondent having resigned from judicial office by letter dated June 28, 2010, effective July 28, 2010, which was extended to August 11, 2010, and having affirmed that she will neither seek nor accept judicial office 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 Stipulation is accepted and that the pending proceeding be discontinued and the matter closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Mr. Belluck and Mr. Harding were not present.

Dated: October 4, 2010

STIPULATION

Subject to 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 Andrea L. McIntyre ("respondent"), as follows.

1. Respondent has served as a Justice of the Theresa Village Court since May 2008. She previously served as a Justice of the Theresa Town Court, Jefferson County, from April 1, 2008 to October 31, 2008. She is not an attorney. Her current term of office expires on March 31, 2014.

2. Respondent was served by the Commission with a Formal Written Complaint dated May 27, 2010, which alleged *inter alia* that respondent failed to (1) deposit approximately $11, 080 in court funds within 72 hours of receipt; (2) filed reports and/or remit court funds within ten days of the month succeeding collection; (3) notify the Commissioner of the Department of Motor Vehicles (DMV) to order the suspension of the driver's licenses of 30 defendants who failed to appear of answer charges filed against them; (4) notify the DMV to order the suspension of the driver's licenses of 23 defendants who did not pay fines totaling approximately $4,765; (5) certify to the DMV, or report to the appropriate enforcement agency, the traffic convictions of pronounce sentence on 105 defendants convicted of various vehicle and traffic charges; and (7) advise 18 defendants of a trial date or an appearance date upon receipt of a not guilty plea. The Formal Written Complaint is appended hereto as Exhibit 1.

3. There is no evidence that respondent converted any court funds for her personal use.

4. Respondent tendered her resignation from judicial office on July 26, 2010, effective August 11, 2010, and has submitted copies of the Village of Theresa and the Office of Court Administration. Copies of respondent's resignation letters are appended hereto as Exhibit 2 and Exhibit 3.

5. Pursuant to Section 47 of the Judiciary Law, the Commission's jurisdiction over a judge continues for 120 days after resignation from office.

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

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

8. 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: July 30, 2010

s/ **Honorable Andrea L. McIntyre**
Respondent

s/ **Robert H. Tembeckjian**
Administrator & Counsel to the Commission
Kathleen Martin, Of Counsel

EXHIBIT 1: FORMAL WRITTEN COMPLAINT: Available at www.cjc.ny.gov
EXHIBIT 2. JUDGE'S LETTER OF RESIGNATION: Available at www.cjc.ny.gov
EXHIBIT 3. JUDGE'S LETTER OF RESIGNATION: Available at www.cjc.ny.gov

♦ ♦ ♦

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to JEFFREY L. MENARD, a Justice of the Mooers Town Court, Clinton County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.[1]
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Jill S. Polk and Cheryl L. Randall, Of Counsel) for the Commission
Stephen A. Johnston for the Respondent

[1] Mr. Cohen was appointed to the Commission on July 15, 2010. The vote in this matter was taken on June 3, 2010.

The respondent, Jeffrey L. Menard, a Justice of the Mooers Town Court, Clinton County, was served with a Formal Written Complaint dated June 18, 2009, containing five charges. The Formal Written Complaint alleged that respondent: (i) failed to disqualify himself in cases involving his nephews (Charge I), his employers' sons (Charge II) and his co-justice (Charge III); (ii) notarized his mother's petition in an eviction proceeding filed in his court (Charge IV); and (iii) failed to assign counsel to eligible defendants charged with violations (Charge V). Respondent filed a verified Answer dated July 24, 2009.

By Order dated September 3, 2009, the Commission designated Matthew J. Kelly, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 28, 2009, in Lake George, on October 29, 2009, in Plattsburgh, and on November 12, 2009, in Albany. The referee filed a report, which was received on March 16, 2010.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of removal, and respondent's counsel recommended admonition. Respondent's counsel waived oral argument. On June 3, 2010, the Commission heard oral argument by Commission counsel and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Mooers Town Court, Clinton County, since January 1997. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. In three cases involving traffic tickets issued to his nephews, as set forth below, respondent did not disqualify himself or transfer the cases to another judge.

3. Alex Menard, the son of respondent's brother, was issued a ticket for Unsafe Start on March 27, 2005, returnable in the Mooers Town Court. Respondent, as a member of the local Fire Department, went to the scene of the accident and spoke to his nephew. Later, Alex Menard spoke to respondent to get advice about the ticket.

4. At the time, respondent was the only judge in the Mooers Town Court since his co-judge had recently resigned and the new co-judge did not assume the bench until January 2006.

5. Alex Menard mailed in a plea of guilty to the charge on or about March 31, 2005.

6. In the Mooers Town Court, it was the practice for respondent's court clerk, Nettie Rabideau, to open the mail and to impose fines for mailed-in guilty pleas to certain traffic offenses pursuant to a schedule created by respondent. Thereafter, respondent would deposit the fine monies into the court account and would sign the monthly reports to the State Comptroller, certifying the dispositions.

7. Pursuant to this practice, the court clerk received Mr. Menard's guilty plea and imposed a $95 fine and a $55 surcharge, which Mr. Menard paid.

8. On August 3, 2005, Alex Menard received a ticket for No Front Plate Attached, returnable in the Mooers Town Court.

9. Mr. Menard called respondent to ask if the charge was a "drop ticket," which could be dismissed if the violation were corrected. Respondent told his nephew that it was not such a ticket.

10. Mr. Menard went to the court office when court was not in session and entered a plea of guilty in writing. The court clerk received the plea and imposed a $25 fine and a $55 surcharge, which Mr. Menard paid.

11. That night, Ms. Rabideau told respondent that his nephew had come in and pled guilty, and she asked respondent what to do with the matter. Respondent told the clerk that it was all right to keep the case and to deposit the fine in the court account.

12. At the Commission hearing, respondent testified that he knew it was improper to handle his relatives' cases but that he did not disqualify himself from his nephew's case because it would have entailed writing to the County Court judge and he "figured a Front Plate wasn't worth all the hassle"; he testified that he "probably should have done it" but "got lazy."

13. On December 15, 2007, Jamie Menard, the son of respondent's brother, was issued a Speeding ticket for driving 86 mph in a 55 mph zone, returnable in the Mooers Town Court.

14. Jamie Menard contacted respondent and asked for advice regarding the matter. Respondent told Mr. Menard that there was nothing respondent could do and that judges "can't reduce any tickets anymore" and "got to go by the book." Mr. Menard hired an attorney in the matter.

15. The District Attorney's office and Mr. Menard agreed to a reduction to a reduced Speeding charge and submitted the plea agreement to the court, in which Mr. Menard pled guilty to a reduced charge. Respondent's court clerk received the papers, accepted the plea and imposed a $95 fine and a $55 surcharge, which Mr. Menard paid. The clerk issued a fine receipt bearing respondent's name.

As to Charge II of the Formal Written Complaint:

16. Since 1993 respondent has worked full time at Dragoon's Farm Equipment ("Dragoon's"), a business owned by Gary and Wayne Dragoon and their father. Gary Dragoon is respondent's supervisor. Dragoon's and the town court are situated across the street from each other.

17. Daniel Dragoon and Robbie Dragoon are the sons of the owners of Dragoon's and have worked there with respondent. Daniel Dragoon still works there and speaks to respondent every day.

18. As set forth below, respondent did not disqualify himself in two traffic cases in which Daniel Dragoon was the defendant and one case in which Robbie Dragoon was the defendant, and respondent did not disclose to the prosecution that the defendants were his co-workers and his employers' sons.

19. On February 28, 2005, Daniel Dragoon received a ticket for Speeding 40 mph in a 30 mph zone, returnable in the Mooers Town Court on March 24, 2005.

20. On the return date, Daniel Dragoon went to the court at lunch time and spoke to respondent about the Speeding ticket. Respondent said that the ticket "was taken care of," or words to that effect. Later, before the start of court, respondent gave his court clerk the yellow copy of Mr. Dragoon's ticket and told her to dismiss it. The ticket was dismissed in the interests of justice on that date. The court records do not reflect the reasons for the dismissal as required by law.

21. Trooper Gilmore, the issuing officer, testified in the Commission proceeding that he does not recall whether he consented to the dismissal but does not believe that he did so.

22. Respondent testified that he does not remember the disposition of the ticket and does not know why he dismissed it. During the investigation, he testified that he believed that Trooper Gilmore was present in court on the return date and consented to the dismissal. At the hearing, after listening to the testimony of the trooper that he was not present and does not believe he consented to the dismissal, respondent testified that he believed that an assistant district attorney consented to dismissal of the ticket because otherwise he would not have dismissed it.

23. On September 16, 2007, Daniel Dragoon was issued a ticket for Speeding 73 mph in a 55 mph zone, returnable in the Mooers Town Court.

24. Mr. Dragoon applied to the District Attorney's office for a reduction of the charge. The District Attorney's office offered a reduction to Failure To Obey a Traffic Control Device, based in part upon the fact that Mr. Dragoon had no prior Speeding convictions. By mail, Mr. Dragoon sent the court a form accepting the proffered plea.

25. On January 2, 2008, the court accepted Daniel Dragoon's plea and imposed a fine of $95 and a surcharge of $55, which Mr. Dragoon paid.

26. On October 1, 2005, Robbie Dragoon was issued two tickets, for Uninspected Vehicle and Failure To Produce License, returnable in the Mooers Town Court.

27. On October 13, 2005, the Failure To Produce License charge was dismissed since the defendant had a valid driver's license.

28. On October 20, 2005, Mr. Dragoon pled guilty to the Uninspected Vehicle charge, either by mail or at the court. The plea was processed by the court clerk, and Mr. Dragoon was fined $25 with a $55 surcharge.

As to Charge III of the Formal Written Complaint:

29. From July 2006 until October 2007, in four small claims cases in which his co-justice was the claimant, respondent did not disqualify himself or disclose to the opposing party that the claimant was his co-justice.

30. Cynthia Sample, respondent's co-justice from January 2006 until March 31, 2009, was the owner of Cindy's Country Store in Mooers Forks.

31. On July 17, 2006, respondent's court clerk mailed Jason Billings a notice

to appear in *Cindy's Country Store Sample v. Jason Billings*, alleging that he owed the claimant $57.20.

32. On August 31, 2006, a hearing was held before respondent. Kristin Nephew, the niece of Judge Sample's partner and an employee of Cindy's Country Store, appeared on behalf of the store. Ms. Nephew testified and submitted the bill into evidence, and Mr. Billings admitted that he owed the amount claimed. Respondent issued a verbal decision that Mr. Billings owed the amount claimed and noted that Mr. Billings agreed to pay the money by the next week.

33. On July 19, 2006, respondent's court clerk mailed Jason Williams a notice to appear in *Cindy's Country Store Sample v. Jason Williams*, alleging that he owed the claimant $327.61.

34. On August 29, 2006, Mr. Williams paid the amount owed.

35. On October 9, 2007, respondent's court clerk mailed Robert Rabideau a notice to appear in *Cindy L. Sample v. Robert Rabideau*, alleging that he owed the claimant $62.62.

36. Shortly thereafter, the defendant's father told respondent that his son was in the hospital. Respondent said that he would "take care of it."

37. Respondent subsequently dismissed the claim for failure to prosecute.

38. On October 9, 2007, respondent's court clerk mailed Debbie Rabideau a notice to appear in *Cindy L. Sample v. Debbie Rabideau*.

39. Respondent failed to maintain complete case histories in the four cases noted above, including a record of disposition, as required by 22 NYCRR §214.11.

As to Charge IV of the Formal Written Complaint:

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

As to Charge V of the Formal Written Complaint:

41. 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)(4), 100.3(B)(6), 100.3(C)(1), 100.3(C)(2), 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. Charges I through III 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 IV and V are not sustained and therefore are dismissed.

By failing to disqualify himself in several cases in which his nephews, his employers' sons and his co-justice were parties, respondent created an appearance of partiality and violated well-established ethical standards. His failure to recuse in each of these circumstances, or even to disclose his relationship to the parties, cast doubt on the impartiality of his decisions and undermined public confidence in the integrity and independence of the judiciary as a whole. While such conduct is strictly prohibited, we are persuaded that under the totality of the circumstances presented, the sanction of removal is not required.

A judge must recuse in any matter in which a relative within the sixth degree of relationship 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 LaBombard*, 11 NY3d 294 (2008). The failure to recuse in such matters is improper, notwithstanding that in the three cases here, involving traffic tickets issued to respondent's nephews, the defendants did not personally appear before respondent, their guilty pleas were processed by the court clerk, and there is no indication of favoritism in the dispositions accorded.

The record shows that it was the practice for respondent's court clerk to open the mail and to impose fines for mailed-in guilty pleas to certain traffic offenses pursuant to a schedule created by respondent. Pursuant to this practice, the clerk processed the pleas of respondent's nephews, including, in one instance, a plea to a reduced charge, which the defendant had negotiated with the District Attorney's office without any involvement by respondent. While such a delegation of authority (especially as to accepting a plea agreement) may be questionable,[2] the routine handling of the pleas by the court clerk indicates that respondent's relatives were treated no differently than other defendants facing similar charges. Nevertheless, it is the judge, not the clerk, who is responsible for every disposition and whose name appears on court records and reports of the case. A judge cannot avoid responsibility for handling a relative's case by delegating such authority to court staff. When respondent learned that his relatives' tickets were returnable in his court (and the record indicates that he knew about the ticket in each of these cases prior to the return date), he should have ensured that the case was either assigned to his co-justice or, during the period when he was the sole judge presiding in the court, transferred to another jurisdiction. Respondent testified that he knew it was improper to handle his relatives' cases but that he did not transfer one such case, when the court clerk brought it to his attention after she had accepted the plea, because the matter (involving a plea to No Front Plate) "wasn't worth the hassle" and he "got lazy." This lapse was inexcusable, as he now concedes.

It was also improper for respondent to dispose of several traffic tickets issued to his co-workers, who were also the sons of his employers, without disclosing his relationship to the defendants. In view of the relationship, respondent's impartiality "might reasonably be questioned," and thus his disqualification was required, subject to remittal (Rules, §100.3[E][1]). Respondent's dismissal of a Speeding charge against Daniel Dragoon is especially troubling. Although the issuing officer did not appear on the return date and respondent dismissed another case that night for that reason, respondent's comments to Mr. Dragoon earlier that day strongly suggest that he had already determined to dismiss the ticket prior to court. Moreover, the record indicates that respondent did not disclose his relationship with the defendant and did not set forth in court records the basis for the dismissal, as required by law (CPL §170.40[2]). Respondent, who testified that he does not recall the disposition, gave inconsistent testimony concerning the matter, though he insisted that he would not have dismissed the charge without the prosecutor's consent. While the totality of the evidence is somewhat inconclusive, at the very least the favorable disposition accorded to the defendant was tainted by respondent's relationship to the defendant and conveyed the appearance that the disposition was based not on the merits, but on favoritism. *See*, *Matter of Lew*, 2009 Annual Report 130 (Comm on Judicial Conduct) (judge circumvented the normal judicial process in dismissing a Speeding ticket issued to the wife of a friend [censure]). The Court of Appeals has stated that even a single incident of ticket-fixing "is misconduct of such gravity as to warrant removal" (*Matter of Reedy v. Comm on Judicial Conduct*, 64 NY2d 299, 302 [1985]), although mitigating factors may warrant a reduced sanction (*Matter of Edwards*, 67 NY2d 153 [1986]).

[2] As stated in the written plea offer by the District Attorney, which the defendant accepted by signing and sending it to the court, "the Court has the option to reject this offer" (Comm. Ex. 8).

As to the other cases involving respondent's co-workers, we note that there is no indication of partiality in the dispositions, two of which involved mailed-in guilty pleas and the other one a Failure To Produce License charge that was dismissed upon determining that the defendant had a valid driver's license.

Respondent also failed to disqualify himself in four small claims actions in which his co-justice was the claimant. In such circumstances, disqualification is required, subject to remittal, since the judge's impartiality "might reasonably be questioned" (Rules, §100.3[E][1]). In one of the matters, respondent presided at a hearing and issued a decision in favor of his co-justice, without disclosing the relationship or offering to disqualify himself. By handling these cases, respondent conveyed the appearance that he was complicit in using the court as a collection agency for his co-justice's business.

In determining an appropriate sanction, we have considered the totality of the circumstances presented here, including the role of the court clerk and the fact that respondent, a non-lawyer, serves in a small community and testified that he believed that he could handle these matters fairly. We also note that respondent has been contrite and cooperative and has an unblemished record in 14 years as a judge. In view of respondent's testimony that he now takes steps to ensure his disqualification in every case that comes before him involving his relatives, his co-workers and his co-justice, we are persuaded that the appearance of partiality will not be repeated.

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Ms. Moore and Judge Ruderman concur, except as follows.

As to Charge III, Mr. Belluck dissents and votes to dismiss the charge.

As to Charge IV, Judge Klonick and Ms. Moore dissent and vote to sustain the charge.

As to the sanction, Mr. Coffey dissents and votes that respondent be admonished; Mr. Emery and Ms. Hubbard dissent and vote that respondent be removed from office, and Mr. Emery files a dissenting opinion.

Mr. Cohen did not participate.

Judge Peters was not present.

Dated: October 13, 2010

DISSENTING OPINION BY MR. EMERY

The majority's decision censuring rather than removing Judge Menard is inexplicable. In the face of compelling proof that he "fixed" a Speeding ticket for his employer's son and engaged in a spree of other ethical transgressions (indisputably presiding over cases of his co-judge's business, his nephews and his co-workers who were also his employers' sons), he is allowed to remain on the bench, according to the majority, because he is "a non-lawyer, serves in a small community and testified that he believed that he could handle these matters fairly" (Determination, p. 13). This double standard invoked by the Commission leaves the public at risk and, essentially, tells the rural communities of our state that they deserve only second-class justice. We should not ascribe to this hypocrisy. It is also contrary to clearly established law.

The Court of Appeals specifically guarantees equal justice to the nearly nine million people who live in this State's towns and villages. The fact that most justices in such communities are not lawyers does not mean that a diluted version of justice is sanctioned. The Court of Appeals has affirmed repeatedly that jurists who sit in our town and village courts are held to the same high standards of ethical behavior as lawyer-judges who serve on the State's urban and appellate courts.

The Court has stated: "[The ethical rules] exist to maintain respect toward everyone who appears in a court and to encourage respect for the operation of the judicial process at all levels of the system" (*Matter of Roberts*, 91 NY2d 93, 97 [1997]). In removing a town justice for a series of blatant ethical violations, the Court specifically rejected the argument that the judge's lay status should be considered as mitigating:

> Contrary to petitioner's assertion, the fact that he is a nonlawyer is not a factor in mitigation. The Code of Judicial Conduct applies to "[anyone], whether or not a lawyer, who is an officer of a judicial system performing judicial functions" (Compliance With Code of Judicial Conduct, McKinney's Cons Laws of NY, Book 29, Appendix, p 539) and the Rules Governing Judicial Conduct should be similarly construed to further the objective of maintaining the "independent and honorable judiciary" which is "indispensible to justice in our society" (22 NYCRR 100.1).

Matter of Fabrizio, 65 NY2d 275, 277 (1985). *See also*, *Matter of VonderHeide*, 72 NY2d 658, 660 (1988) ("We also reject the contention that the charges should not be sustained in view of petitioner's status as a nonlawyer and his lack of training. Ignorance and lack of competence do not excuse violations of ethical standards. As a Judge, petitioner had an obligation to learn about and obey the Rules Governing Judicial Conduct").

It is unimaginable that a Supreme Court Justice in Buffalo, Syracuse, Albany or Brooklyn could get away with an avalanche of ethical transgressions similar to those presented in this case. Any less than rigorous enforcement of judicial conduct and ethics throughout the State is anathema to a fair-minded concept of equality. There is no precedent or principle which

supports pragmatic application of rural zones of relaxed judicial ethics. Yet that is exactly what we have here.

Treating some judges more leniently simply because they are not lawyers is not only a dramatic and totally unwarranted departure from established law, but a pandering and patronizing insult to these jurists. It creates a second-class status for them and suggests that they are somehow not "up to" understanding the law and ethical principles. The "mitigating" factor of being a non-lawyer judge can now be expected to do much damage in the future.

Obviously, no advanced legal training is prerequisite to a judge – even a non-lawyer – recognizing that "[a]ny involvement" in a family member's case is highly improper and must be avoided (*Matter of Wait*, 67 NY2d 15, 18 [1986]). Minimizing the misconduct here because the dispositions in the judge's relatives' cases were, for the most part, processed by the court clerk without a personal appearance before the judge sets a dangerous precedent for future cases. Members of the public have no way of knowing whether a judge has directed the clerk to enter a particular disposition and, understandably, might suspect that the judge's relatives got special treatment. At a minimum, the appearance stinks.

Nor can there be any serious debate that dismissing a Speeding ticket issued to the son of his employer – without a trial, without notice to the prosecutor, and without a record of the reasons for the disposition – constitutes "ticket-fixing," a practice which the courts of this State and this Commission have long excoriated. While the majority concedes that even a single incident of ticket-fixing "is misconduct of such gravity as to warrant removal" although "mitigating factors may warrant a reduced sanction" (Determination, p. 12), the only apparent "mitigating" factor presented as to the disposition here is the lame claim that the judge could "not remember the disposition" and "does not know why he dismissed" the charge against his employer's son (Determination, par. 22). As I have previously stated, this category of misconduct "strikes at the heart of our justice system, and removal is the only sanction that is commensurate with the corrosive effect of judicial decision-making perverted by a judge's personal interests." *Matter of Lew*, 2009 Annual Report 130 (Emery Dissent); *see also*, *Matter of Cook*, 2006 Annual Report 119 (Emery Dissent).

No matter how much mercy the Commission might wish to dispense, most jurists would immediately resign if caught in such a web of influence peddling and favoritism. Judge Menard is an outlier in the judicial landscape and he should be dealt with as such. He should be removed from the bench; no less is tolerable in this case.

Dated: October 13, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to NORMAN A. PERKINS, a Justice of the Machias Town Court, Cattaraugus County

DECISION AND ORDER

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Kathleen Martin, Of Counsel) for the Commission
Honorable Norman A. Perkins, *pro se*

The matter having come before the Commission on December 8, 2010; and the Commission having before it the Formal Written Complaint dated October 12, 2010, and the Stipulation dated November 23, 2010; and respondent having resigned from judicial office on October 28, 2010, effective December 3, 2010, and having affirmed that he will neither seek nor accept judicial office 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 Stipulation is accepted and that the pending proceeding be discontinued and the matter closed pursuant to the terms of the Stipulation; and it is

SO ORDERED.

Dated: December 9, 2010

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 Norman A. Perkins ("respondent"), as follows.

1. Respondent has served as a Justice of the Machias Town Court, Cattaraugus County, since 2004. His current term of office expires on December 31, 2011. Respondent is not an attorney.

2. Respondent was served by the Commission with a Formal Written Complaint dated October 12, 2010, which alleged *inter alia* that respondent : (1) in one matter, (a) issued two Warrants of Eviction notwithstanding that Notices of Petitions and/or Petitions had not been served and filed and no hearing had been held as required by law, and (b) was impatient, undignified and discourteous to the respondent's attorney and encouraged the petitioner's husband to take private punitive action against the respondents; (2) in a second matter, issued a Warrant of Eviction notwithstanding that a Notice of Petition and/or Petition had not been served and filed as required by law; (3) advised parties in six small claims actions that they were required to retain an attorney if they wished to appeal his decision; and (4) commended a small claims litigant after he made a derogatory and insulting comment about Jewish people. The Formal Written Complaint is appended hereto as Exhibit 1.

3. Respondent tendered his resignation from judicial office on October 28, 2010, effective December 3, 2010, and has submitted copies to the Town of Machias and the Office of Court Administration. A copy of respondent's resignation letter is appended hereto as Exhibit 2.

4. Pursuant to Section 47 of the Judiciary Law, the Commission's jurisdiction over a judge continues for 120 days after resignation from office.

5. Respondent affirms that he will neither seek nor accept judicial office in the future.

6. Respondent understands that, should he remain on the bench beyond December 3, 2010, or return to the bench at any time, or otherwise abrogate the terms of this Stipulation, the Formal Written Complaint will be revived and proceed.

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

8. 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: November 23, 2010

s/ **Honorable Norman A. Perkins**
Respondent

Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(**Kathleen Martin**, Of Counsel)

EXHIBIT 1: FORMAL WRITTEN COMPLAINT: Available at www.cjc.ny.gov
EXHIBIT 2. JUDGE'S LETTER OF RESIGNATION: Available at www.cjc.ny.gov

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to NORMAN J. PETERS, a Justice of the Collins Town Court, Erie County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission
Michael M. Mohun for the Respondent

The respondent, Norman J. Peters, a Justice of the Collins Town Court, Erie County, was served with a Formal Written Complaint dated February 11, 2010, containing one charge. The Formal Written Complaint alleged that respondent told the Collins Town Board that unless his salary was increased, he would not preside over the court dates scheduled by his former co-justice and would dismiss the cases scheduled on the next such date. Respondent filed a verified answer dated April 3, 2010.

On July 17, 2010, 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 September 29, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Collins Town Court, Erie County, since 1986. He is not an attorney.

2. On or about August 31, 2008, Paul North, respondent's co-justice, retired from the Collins Town Court. The Collins Town Board did not appoint a replacement, and respondent began presiding over Judge North's calendar as well as his own.

3. On several occasions in September and October 2008, respondent asked Kenneth Martin, the Collins Town Supervisor and member of the Town Board, to increase his salary by using the remainder of Judge North's salary. Respondent also made this request at a meeting of the Collins Town Board on October 6, 2008.

4. In or about October 2008, Supervisor Martin informed respondent that the Collins Town Board declined to authorize additional compensation for respondent because it could not reallocate monies from Judge North's salary.

5. Respondent had been involved in preparing the Collins Town Court budgets for approximately 22 years and was aware of the revenues collected by the court.

6. On November 3, 2008, respondent appeared at an open Town Board meeting on the town budget which was attended by all five Town Board members, the Town Attorney and Prosecutor, the Town Clerk, two members of the local news media, and approximately twelve community members including respondent's wife.

7. Respondent stated at the meeting that he was owed $2,350 for the work he had performed in presiding over his retired co-justice's cases. When Supervisor Martin responded that the Town did not have the funds, respondent suggested that the Town Attorney's position be eliminated to free additional funds.

8. Respondent stated at the meeting that unless he received additional pay he would not preside over the seven remaining court dates in 2008 that had previously been scheduled by his retired co-justice. Respondent further stated that he would direct his court clerk to advise the defendants who appeared on the 77 cases scheduled for November 5, 2008, that their cases were dismissed.

9. In response to Collins Town Attorney and Prosecutor James Musacchio's admonition that respondent could not dismiss cases without a proper legal basis, respondent stated, "I'm the judge" and "[t]hey're scheduled and if those people show up, they will be dismissed."

10. The Town Board adjourned to executive session and, in response to respondent's threatened action, authorized compensation to respondent in the amount of $3,000 to cover his additional duties in the Collins Town Court from September 1, 2008, through December 31, 2008.

Factors in Mitigation

11. Respondent appeared for all court calendars scheduled by his retired co-justice in 2008, and all scheduled matters were adjudicated in accordance with the law and Rules.

12. Respondent acknowledges that his conduct was inappropriate. His

threatened action was spurred by his mistaken belief that he was entitled to additional financial compensation in the same manner provided on two occasions in 1988, when he sat as the sole justice and received the absent justice's salary in addition to his own.

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

14. Respondent has served as a Collins Town Court justice since 1986 and has never been disciplined for judicial misconduct. He regrets his failure to abide by the Rules in this instance and pledges to conduct himself in accordance with the Rules as he has previously done during his many years in office.

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(C)(1) 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. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

It was improper for respondent to tell the Town Board that unless he received additional compensation, he would not preside over the court dates scheduled by his former co-justice and would direct his clerk to advise defendants who appeared that their cases were dismissed. A judge is required to perform all the duties of judicial office diligently and impartially (Rules, §100.3), and refusing to do so out of pique or attempting to extract a higher salary by refusing to work would be highly improper. *See*, *Matter of Himelein*, 2010 Annual Report 182 (judge disqualified himself from numerous cases involving legislators' law firms and urged other judges to do the same, as a "tactic" to further the judges' interests in achieving legislative approval for a pay raise); *see also*, *Matter of Reeves*, 63 NY2d 105 (1984) (judge refused to work for two days to protest an alleged shortage of staff); *Matter of Leff*, 1983 Annual Report 119 (judge refused to perform his assigned duties for six months because he viewed the assignment as punitive and retaliatory).

Even though he never acted on his threat, respondent's coercive comments were inappropriate. Such comments, linking the disposition of cases with a request for additional compensation, are contrary to the role of a judge, which is to dispose of cases based on the merits. *See, Matter of Tauscher*, 2008 Annual Report 217 (judge made threatening statements to the Town Board explicitly linking his discretionary ability to set fines with a proposed salary increase). Significantly, respondent reiterated his threat even after the town attorney told him that he could not dismiss cases without a proper legal basis. By making such statements at an open meeting of the Town Board, which was attended by the media and the public, respondent undermined public confidence not only in the integrity and impartiality of his court, but in the judiciary as a whole.

Even if respondent viewed his compensation as inadequate and sincerely believed that he was entitled to a higher salary for handling an increased caseload, his statements were improper, as he has acknowledged in this proceeding. There is no justification for refusing to

discharge one's judicial duties as a tactic to achieve a pay raise, and even threatening to do so cannot be condoned. Because respondent's improper statements, which resulted in his being granted additional compensation, were public, he created the appearance that a judge may make such threats with impunity. Accordingly, a public disciplinary sanction is warranted.

In mitigation, the record reflects that respondent appeared for all the court dates scheduled by his former co-justice and that the scheduled matters were adjudicated in accordance with the appropriate standards. We also note that respondent has an otherwise unblemished record in 24 years of service as a judge, has acknowledged that his comments were improper, and has pledged to conduct himself in the future in accordance with the ethical Rules.

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Emery, Ms. Moore, Judge Peters and Judge Ruderman concur.

Ms. Hubbard dissents and votes to reject the Agreed Statement on the basis that the proposed disposition is too harsh.

Mr. Belluck and Mr. Harding were not present.

Dated: October 6, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to NICOLE S. POST, a Justice of the Maine Town Court, Broome County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
Hinman, Howard and Kattell, LLP (by Richard C. Lewis) for the Respondent

The respondent, Nicole S. Post, a Justice of the Maine Town Court, Broome County, was served with a Formal Written Complaint dated May 27, 2010, containing three charges. The Formal Written Complaint alleged that respondent failed to appear for sentencing on a violation of Dog Running at Large and failed for seven months to pay the fine imposed; served simultaneously as both judge and court clerk of the Maine Town Court; and participated in fund-raising activities on behalf of her and her son's sports teams.

On September 23, 2010, 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 either admonished or issued a letter of caution, and waiving further submissions and oral argument.

On September 29, 2010, the Commission accepted the Agreed Statement of Facts and made the following determination.

1. Respondent has been a Justice of the Maine Town Court, Broome County, since January 1, 2007. Respondent's term expires on December 31, 2010, at which time the position will be abolished. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On May 22, 2007, respondent was charged in the Maine Town Court with seven counts of Dog Running at Large, a violation of a local leash law.

3. On or about August 14, 2007, Broome County Court Judge Martin E. Smith transferred the charges to the Chenango Town Court.

4. On October 31, 2007, respondent was arraigned in the Chenango Town Court. Respondent rejected a proposed plea agreement from the District Attorney and requested a trial. Prior to trial, six of the seven charges were dismissed on the motion of the Chenango County District Attorney.

5. On February 29, 2008, after a nonjury trial, Chenango Town Justice Thorold J. Smith found respondent guilty of the remaining charge of Dog Running at Large and set sentencing for April 16, 2008.

6. Respondent did not appear for sentencing on April 16, 2008, and did not request an adjournment or otherwise communicate with the court.

7. On April 17, 2008, Judge Smith sent a notice to respondent informing her that she had failed to appear for sentencing and setting April 23, 2008, as the new sentencing date. The notice, which was marked "Final Warning," advised respondent that a bench warrant could be issued for her arrest based upon her failure to appear.

8. Respondent did not appear for sentencing on April 23, 2008, and did not request an adjournment or otherwise communicate with the court.

9. On June 24, 2008, Judge Smith sent a letter to respondent informing her that he had imposed a fine of $50, to be paid no later than July 24, 2008.

10. Respondent did not pay the fine by July 24, 2008, and did not request an extension of time to pay the fine or otherwise communicate with the Chenango Town Court about the matter.

11. Two months later, on October 2, 2008, Judge Smith signed an order converting the unpaid fine to a civil judgment and directing the Broome County District Attorney to file a certified copy of the order in the Broome County Clerk's Office. The court's order was mailed to respondent on or about the same day. Respondent still did not pay the fine or communicate with the court.

12. Sometime in October 2008, W. Howard Sullivan, a Judge of the County, Family and Surrogate's Courts (Chenango County) who served as Supervising Judge for the Sixth Judicial District, met with respondent and discussed her failure to pay the fine. Despite this conversation, respondent did not pay the fine or communicate with the court.

13. On October 22, 2008, Judge Sullivan sent a letter to respondent, confirming their conversation and directing respondent to expedite payment of the fine because "as an officer of the court, it is important that court directives not be ignored."

14. Nearly three months later, on January 20, 2009, respondent satisfied the judgment against her by paying the $50 fine.

As to Charge II of the Formal Written Complaint:

15. In January 2006, respondent was the Clerk of the Maine Town Court. As clerk, respondent reported to the Maine Town Court's two part-time justices, Howard Dingman and Donald Magill.

16. In November 2006, respondent became a candidate for Maine Town Justice when Judge Dingman decided not to run for re-election.

17. Prior to the election, in fall 2006, Judge Magill sent an undated letter to the Maine Town Board recommending that respondent continue as court clerk upon becoming a judge and receive her clerk's salary "separately from her salary as judge." Judge Magill also recommended that the Board reinstate the post of deputy clerk. The Board implemented Judge Magill's recommendations and appointed him the deputy clerk of the Maine Town Court.

18. Respondent was elected a Maine Town Justice and took office on January 1, 2007.

19. On January 10, 2007, the Maine Town Attorney sent a memorandum to respondent stating that he had spoken with Diane Schilling, a Deputy Counsel with the Office of Court Administration, who advised that it created a conflict of interest for a town justice to serve

concurrently as that town's court clerk. The Town Attorney also stated that Ms. Schilling suggested that respondent obtain an opinion from the Advisory Committee on Judicial Ethics (erroneously referred to as the "Ethics Advisory Board") and refrain from serving as court clerk without an opinion.

20. Respondent did not obtain an opinion from the Advisory Committee. Rather, respondent served as a justice and a court clerk of the Maine Town Court for more than one year and nine months, from January 2007 to October 2008. During that time, respondent collected two annual salaries: a judicial salary of $7,300 per year and a clerical salary of approximately $9,000 per year.

21. In October 2008 Supervising Judge W. Howard Sullivan met with respondent and discussed the matter of her serving as both a judge and a court clerk in the same court. Judge Sullivan then sent a letter to respondent dated October 22, 2008, confirming their discussion that a judge may not serve as a clerk for another judge in the same court.

22. On October 28, 2008, respondent attended a meeting with Judge Magill, the Maine Town Attorney, Town Council members and Judge Deborah Jo Harter, Special Counsel to the Administrative Judge for Justice Courts, Sixth Judicial District. At the meeting, Judge Harter advised respondent that she could not serve as court clerk and judge of the court.

23. On October 30, 2008, the Maine Town Board notified respondent and Judge Magill that effective immediately, the positions of Court Clerk and Deputy Court Clerk would no longer be paid and that the judges would assume responsibility for operation of the court.

As to Charge III of the Formal Written Complaint:

24. On two occasions in late 2007 and early 2008, respondent personally participated in fund-raising activities on behalf of her son's sports teams in the Maine Town Hall, which houses the Maine Town Court.

25. In November or December 2007, respondent asked Michael Dopko, who was then the Maine Town Code Enforcement Officer, to purchase a raffle ticket to benefit the Maine/Endwell Wrestling Club. Respondent's son was a member of the club. Respondent sold Mr. Dopko one raffle ticket at a cost of $100.

26. In late 2007 or early 2008, respondent solicited Stephen Cornwell, then an Assistant District Attorney who regularly appeared before respondent, to purchase a raffle ticket costing approximately $100 to benefit the Maine/Endwell Wrestling Club. When Mr. Cornwell responded that the District Attorney's office had a policy that prohibited him from purchasing a ticket, respondent suggested that Mr. Cornwell's wife purchase the ticket instead. Mr. Cornwell declined the offer.

27. On another occasion in August 2009, respondent participated in a fundraising car wash in the Town of Maine to benefit the Maine Women's Softball Team, of

which respondent was a member. Respondent attended the car wash and allowed her vehicle, which bore a judge's license plates and was readily recognizable in the community, to be prominently displayed promoting the car wash.

Mitigating Factors

28. As to Charge I, all relevant events occurred during a period of significant domestic and financial difficulties for respondent. Respondent recognizes that she nevertheless should have paid the fine promptly or contacted the Chenango Town Court in a timely manner to seek a payment schedule or some other accommodation, and that those actions were even more necessary once her Supervising Judge gave her an explicit directive to pay the fine.

29. As to Charge II, the payment of separate judicial and clerical salaries for each of the co-justices was a method proposed and adopted by the town board on the recommendation of respondent's experienced co-justice. Respondent acknowledges that she should have sought an Advisory Opinion concerning whether she was permitted to hold the positions of town justice and court clerk in the same court when the question first arose and that avenue was recommended to her, or that she should have resigned one of the positions.

30. As to Charge III, respondent acknowledges that she should not have approached anyone, least of all individuals who appear before her in court, to purchase raffle tickets, nor should she have been involved in any way in fund-raising activities on behalf of civic organizations.

31. Respondent's judicial position has been abolished by the Maine Town Board with the expiration of her term on December 31, 2010. Respondent avers that she will neither seek nor accept judicial office at any time 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), 100.2(B), 100.2(C), 100.4(A)(1), 100.4(A)(2), 100.4(A)(3), 100.4(C)(3)(b)(i) and 100.6(B)(4) 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.

Both on and off the bench, every judge is required to adhere to prescribed ethical standards of behavior in order to preserve the integrity and independence of the judiciary. Respondent's extra-judicial conduct, as set forth in the stipulated facts, did not comply with those standards.

After being convicted of a Dog Running at Large violation, respondent failed to appear for sentencing, even when she was advised that a warrant could be issued for her non-appearance, and failed for seven months to pay the $50 fine imposed in her absence. Although failing to make prompt payment of a lawful fine might be mitigated by her personal and financial difficulties during this period, respondent significantly exacerbated the situation by not

communicating with the court about the matter and completely ignoring the proceedings. Even after the fine was converted to a civil judgment, respondent failed to contact the court to attempt to arrange a payment schedule or some other accommodation to her circumstances. As her supervising judge advised her, it is unacceptable for an officer of the court to ignore court directives, and by ignoring the proceedings, she diminished her own authority to demand compliance with her directives as a judge. It is particularly serious that following the intervention of her supervising judge, who directed her to expedite the payment, respondent still did not contact the court and did not pay the fine until three months after his directive.

It was also improper for respondent to serve simultaneously for almost two years as judge and court clerk of her court, despite being advised that it was a conflict to do so. The two positions are incompatible under Section 100.6(B)(4) of the Rules, as the Advisory Committee on Judicial Ethics has concluded (Adv Op 98-113, 03-22). In this regard, we note that it appears that respondent followed the lead of her experienced co-judge, who had proposed the plan, adopted by the Town Board, to pay separate judicial and clerical salaries for both judges. Nonetheless, having been placed on notice of the potential conflict, at the very least respondent should have sought an Advisory Opinion as to her own situation when that avenue was recommended to her by the Town Attorney.

Respondent's participation in fund-raising for her and her son's sports teams also violated well-established ethical standards. Judges are prohibited from lending the prestige of judicial office to advance private interests (Rules, §100.2[C]) and are specifically barred from "personally participat[ing] in the solicitation of funds or other fund-raising activities" (Rules, §100.4[C][3][b][i]). No matter how worthy the cause, judges must avoid such conduct since any involvement by a judge in fund-raising can have a considerable coercive effect. Attorneys and others cannot help but feel pressured to contribute to a charity promoted by the judge, and the public might believe that those who contribute to a favored charity of the judge's might be treated favorably in court. *See*, *Matter of Harris*, 72 NY2d 335, 337 (1988) (judge's participation in mock "Jail Bail for Heart" proceedings to benefit the American Heart Association "violated both the letter and the spirit" of the ethical prohibition). For decades the Advisory Committee on Judicial Ethics has warned judges not to engage in fund-raising (*e.g.*, barring such diverse activities as acting in a fund-raising play [Adv Op 92-79], participating in a fund-raising telethon [Adv Op 98-154], and modeling in a fund-raising fashion show [Adv Op 98-33]), and the Commission has addressed the subject on numerous occasions in its annual reports.

It is especially improper to engage in such activities in or near the court or to solicit contributions from individuals who appeared in the judge's court, as respondent did by asking an assistant district attorney and the code enforcement officer to buy $100 raffle tickets. *See*, *Matter of McNulty*, 2008 Annual Report 177 (Comm on Judicial Conduct)(judge was admonished for fund-raising activity on behalf of a civic organization, which included direct solicitations of attorneys who appeared before her and posting flyers and collecting checks in the courthouse). Respondent's suggestion to an assistant district attorney that his wife buy a raffle ticket, after he had said that his office policy prohibited him from doing so, was particularly coercive and insensitive to her ethical responsibilities.

In its totality, respondent's misconduct represents a significant departure from the high standards of conduct required of every judge. In considering an appropriate disposition, we note that respondent has acknowledged her misconduct and avers that she will neither seek nor accept judicial office in the future upon the expiration of her term on December 31, 2010. Accordingly, while we might otherwise consider a more severe sanction, we accept the negotiated disposition in this matter.

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Emery, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Mr. Belluck and Mr. Harding were not present.

Dated: October 12, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to DAVID M. TRICKLER, a Justice of the Birdsall, Burns and Grove Town Courts, Allegany County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission
Brian C. Schu for the Respondent

The respondent, David M. Trickler, a Justice of the Birdsall, Burns and Grove Town Courts, Allegany County, was served with a Formal Written Complaint dated July 19, 2010, containing one charge. The Formal Written Complaint alleged that respondent failed to disqualify himself in a Harassment case notwithstanding that he was acquainted with the

defendant and the alleged victim and had personal knowledge of the underlying facts. Respondent filed a verified answer dated July 27, 2010.

On September 22, 2010, 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 September 29, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Burns Town Court since November 1, 1980, a Justice of the Grove Town Court since November 1, 1994, and a Justice of the Birdsall Town Court since January 1, 2002. Respondent's terms in the Burns Town Court and the Birdsall Town Court expire on December 31, 2013; his term in the Grove Town Court expires on December 31, 2011. Respondent is not an attorney.

2. Respondent's sister and her husband were very good friends with William L. Ellis and his wife, Julie Meyer, who lived across the street. Respondent was acquainted with Mr. Ellis and Ms. Meyer, having had numerous social contacts with them over the years.

3. On August 25, 2007, respondent was outdoors performing caretaking chores at his sister's residence in the Village of Canaseraga, which is within the jurisdiction of the Burns Town Court.

4. At around 12:30 PM, respondent noticed that there was a commotion at the Ellis residence. Respondent observed several people at the residence and heard people hollering back and forth. Respondent also noticed that Mr. Ellis' truck was parked in the driveway.

5. After the onset of the commotion, Ms. Meyer walked across the street to where respondent stood. Respondent commented to Ms. Meyer that things sounded "hot" at her residence.

6. Ms. Meyer told respondent that Mr. Ellis had shoved her and that he was taking some of her belongings from the house. She stated that Mr. Ellis wanted to take a shotgun and that his mood and tone made her feel worried about him having the weapon.

7. Ms. Meyer told respondent that she had blocked, or was going to block, Mr. Ellis' truck in the driveway to prevent him from leaving. Respondent observed that Ms. Meyer appeared upset.

8. Ms. Meyer asked for respondent's advice, and respondent told her that there was nothing he could do and that she should call the police.

9. Respondent left his sister's residence minutes after his conversation with Ms. Meyer ended. At the time he left, respondent saw people at the back door of the Ellis house taking property in and out. He did not see law enforcement personnel arrive at the Ellis residence.

10. Mr. Ellis was charged with Harassment in the Second Degree, a violation of Section 240.26(1) of the Penal Law, and was issued an appearance ticket returnable in the Burns Town Court on September 10, 2007.

11. Prior to September 10, 2007, respondent received an accusatory instrument concerning the incident between Mr. Ellis and Ms. Meyer. After reading the documents, respondent knew that he had observed and spoken to Ms. Meyer about the incident. Respondent also knew that he was scheduled to preside over the case and that he should disqualify himself.

12. On September 10, 2007, respondent arraigned Mr. Ellis, who appeared without counsel, on the charge of Harassment in the Second Degree, arising from the altercation with Ms. Meyer on August 25, 2007. Respondent entered a not guilty plea on Mr. Ellis' behalf and adjourned the matter for Mr. Ellis to hire an attorney. Respondent then released Mr. Ellis on his own recognizance.

13. At the same appearance, respondent issued a "no contact" order of protection in favor of Ms. Meyer and an alleged witness to the charged incident. Mr. Ellis signed the order in court. The order was valid through the next-scheduled court date on October 15, 2007.

14. On October 15, 2007, Mr. Ellis appeared in court without counsel. Respondent extended the order of protection for Ms. Meyer and the alleged witness to October 15, 2008, and adjourned the case to the next-scheduled court date in November for Mr. Ellis to appear with counsel.

15. Prior to his November court date, Mr. Ellis retained Joseph G. Pelych, Esq., as counsel. Mr. Pelych requested an adjournment to the next-scheduled court date in December, and respondent granted the request.

16. On December 17, 2007, Mr. Ellis appeared before respondent with Mr. Pelych. Respondent informed Mr. Pelych and Assistant District Attorney Andrew Cornell that he knew both parties and was a potential witness in the case. Mr. Pelych requested an adjournment to discuss the conflict and a possible disposition of the case with Mr. Ellis.

17. On January 21, 2008, respondent granted a request made by Mr. Ellis to recuse himself from *People v. Ellis.*

18. On June 16, 2009, Judge Thomas P. Brown of the Allegany County Court entered an order transferring *People v. William L. Ellis* to the Bolivar Village Justice Court for further proceedings.

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 (E)(1) and 100.3(E)(1)(a)(ii) 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 arraign the defendant, issue an order of protection and take other judicial action in *People v. William Ellis* notwithstanding that he knew the defendant and the complaining witness, had personal knowledge of the events that resulted in the Harassment charge and was a potential witness in the case.

A judge's disqualification is required in a proceeding in which the judge's impartiality might reasonably be questioned, including instances where the judge has personal knowledge of disputed evidentiary facts (Rules, §100.3[E][1][a][ii]; *Matter of VonderHeide*, 72 NY2d 658 [1988] [disqualification was required since the judge had witnessed the events underlying the criminal charges]). Since he knew both the defendant and the complaining witness, had observed at least some of the underlying events and had spoken to the complaining witness about the matter, respondent knew that he was obligated to disqualify himself from any participation in the *Ellis* case when it came before him. Nevertheless, instead of immediately stepping down, respondent arraigned the defendant and presided over three court appearances in the case before finally disqualifying himself. Not until the third court appearance did respondent disclose that he knew the parties and was a potential witness in the case. Prior to his recusal, respondent exercised his judicial discretion by releasing the defendant on his own recognizance, granting a one-month order of protection and then extending it to one year, and granting several adjournments. Although respondent eventually disqualified himself at the request of the defendant's attorney, his failure to do so promptly, when the case first came before him, resulted in a needless, four-month delay.

Given his relationship with the parties and his connection to the underlying events, respondent's participation in the case created an appearance of impropriety (Rules, §100.2[A]). Although there is no indication of favoritism, his intentional disregard of the law and dereliction of his ethical responsibilities constitute misconduct.

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Cohen, Mr. Emery, Ms. Hubbard, Judge Peters and Judge Ruderman concur.

Ms. Moore dissents and votes to reject the Agreed Statement on the basis that the proposed disposition is too lenient.

Mr. Belluck and Mr. Harding were not present.

Dated: October 7, 2010

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In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to WALTER V. TRIPP, a Justice of the Mount Morris Town and Village Courts, Livingston County.

THE COMMISSION:
Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

APPEARANCES:
Robert H. Tembeckjian (John J. Postel and David M. Duguay, Of Counsel) for the Commission
Honorable Walter V. Tripp, *pro se*

The respondent, Walter V. Tripp, a Justice of the Mount Morris Town and Village Courts, Livingston County, was served with a Formal Written Complaint dated August 3, 2009, containing two charges. The Formal Written Complaint alleged that respondent: (i) coerced or attempted to coerce a defendant in a traffic case into pleading guilty and retaliated against him for making a complaint to the Commission and (ii) threatened a defendant's father with criminal charges for alleged discourtesy to the court clerk, the judge's spouse. Respondent filed an answer dated September 24, 2009.

On April 2, 2010, 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 April 15, 2010, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Mount Morris Village Court, Livingston County, since April 1, 1999, and a Justice of the Mount Morris Town Court since January 1, 2000. His terms expire on March 31, 2011 and December 31, 2011, respectively. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On May 6, 2008, Michael Rivera was issued two traffic tickets for Passing a Stop Sign. The tickets were returnable in the Mount Morris Town Court before respondent on May 12, 2008, but were adjourned until June 23, 2008.

3. On June 23, 2008, Mr. Rivera arrived at the courthouse after respondent completed his docket and respondent directed him to his chambers to be arraigned. Mr. Rivera explained that he was late because of car trouble.

4. Respondent was familiar with Mr. Rivera from having presided over approximately 15 court appearances during the preceding 10-year period. Respondent did not recall Mr. Rivera missing any court appearances during that time.

5. At arraignment, Mr. Rivera reaffirmed the pleas of not guilty that he had previously entered by mail. Respondent told Mr. Rivera that if he pleaded not guilty he would have to post $500 bail and that if he could not make bail he would be committed to jail until his trial the following month.

6. When Mr. Rivera replied that he could not afford to post $500 bail and asked to speak to an attorney, respondent told Mr. Rivera that he was not eligible for assigned counsel because he was charged with traffic infractions, and reiterated that he could plead guilty or plead not guilty and go to jail if he could not post bail.

7. Mr. Rivera thereafter attempted to withdraw his not guilty pleas and plead guilty to the charges by signing "Section A" on each ticket. In a section provided for a statement of explanation on each ticket, Mr. Rivera wrote "I plead guilty for fear of going to jail" and "I plead guilty over fear of going to jail."

8. Upon seeing the written pleas, respondent did not accept Mr. Rivera's guilty pleas and instead released him without bail, telling Mr. Rivera that he would have a trial and to "bring money" to the trial.

9. Respondent was loud and visibly angry during his discussion with Mr. Rivera.

10. The District Attorney offered no plea bargain or other reduction of the charge in this case.

11. At a bench trial on July 28, 2008, respondent found Mr. Rivera guilty of both charges of Passing a Stop Sign and ordered him to pay $410, the maximum allowable fines and surcharge. The amount of the fine was consistent with respondent's general practice in such cases. Respondent ordered Mr. Rivera to pay the fine and surcharge by August 6, 2008, approximately half the period of time that he customarily provided to others for paying such fines.

12. On August 5, 2008, Mr. Rivera asked respondent for an extension of time to pay his fines. At the time, respondent was aware that Mr. Rivera had made a complaint against him to the Commission about his conduct in Mr. Rivera's case.

13. Although it was respondent's practice to grant requests for extensions of time to pay fines, he denied Mr. Rivera's request and stated in words or substance, "Let me get

this straight. You turned me in to the state and you want me to do you a favor? What do you think I ought to do?"

14. Respondent then warned Mr. Rivera that if he did not timely pay the fines he would issue a bench warrant for his arrest.

As to Charge II of the Formal Written Complaint:

15. The clerk of the Mount Morris Town Court is Bonnie Tripp, who is respondent's wife.

16. On July 29, 2008, Sean McCollister, age 19, pleaded guilty by mail to two traffic infractions: No Seat Belt and Unregistered Motor Vehicle. The same day, respondent sent Mr. McCollister a fine notice imposing fines and surcharges totaling $255 and notifying him that payment in full was due by August 13, 2008.

17. On August 11, 2008, Sean McCollister's father, Michael McCollister, called the Mount Morris Town Court and asked court clerk Bonnie Tripp for a two-week extension to pay his son's fine. Mr. McCollister told Ms. Tripp that other courts granted 30 days to pay a traffic fine.

18. Following the phone call, Ms. Tripp left the following written message for respondent:

> "Father of Sean McCollister was rude said he didn't believe a word I was telling him. Registration should be a fix-it slip. Only gave a week to pay fine. Only Mt. Morris would do that."

19. Ms. Tripp orally told respondent that Mr. McCollister had called her a liar.

20. Prior to Sean McCollister's court appearance, Ms. Tripp wrote "NO BREAKS" and "Very Rude" next to Sean McCollister's name on respondent's court calendar.

21. On August 13, 2008, Mr. McCollister appeared with Sean McCollister before respondent. When Mr. McCollister asked for additional time to pay Sean's fine, respondent denied the request. When Mr. McCollister offered respondent his son's license, respondent testily replied:

> "I'm going to tell you something right now. The law doesn't say you take his license for that, but I can put you in jail for 30 days for contempt of court. You call and harass the clerk the way you did, you, your attitude and all, you're real close to that. You understand that?"

22. Mr. McCollister asked to pay Sean's fine the following week, when he would receive his paycheck, and said that he would send a money order on August 22, 2008.

23. Respondent gave Mr. McCollister until August 20, 2008, to pay the full amount of the fine. Respondent warned Mr. McCollister that he would issue a warrant for Sean McCollister's arrest if the full fine was not paid within seven days. He also warned Mr. McCollister, "[T]he next time you call and harass the clerk like that, we're going to do harassment charges."

24. Mr. McCollister apologized and said he had not intended to be disrespectful to the clerk, and respondent accepted the apology.

Mitigating Factors:

25. As to Charge I, respondent recognizes that his conduct toward Mr. Rivera was coercive and retaliatory, and he commits himself to avoid even the appearance of such misconduct in the future.

26. As to Charge II, respondent recognizes that it was improper for him, based upon a hearsay belief that Mr. McCollister had acted rudely toward his court clerk, to raise the specter of a harassment charge and to deny Mr. McCollister's request for an extension of time to pay his son's fine. Respondent also recognizes that, since his court clerk is also his wife, he must be especially careful to avoid even the appearance that he is exercising his judicial authority in particular cases based on that relationship.

27. Respondent was cooperative with the Commission throughout its inquiry and freely expressed his contrition regarding both charges.

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)(3) and 100.3(B)(4) 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.

In two routine traffic cases, respondent allowed his hostile emotions to influence his judicial conduct and judgment and threatened individuals with incarceration out of apparent bias and personal pique.

In one case, involving a defendant whom he knew from prior court appearances in other matters, respondent coerced a guilty plea by threatening to set bail and warning the defendant that if he insisted on pleading not guilty, he could be committed to jail for a month until the trial. Intimidated by respondent's threats, the defendant changed his plea to guilty, writing on the tickets, "I plead guilty for fear of going to jail." Reversing course, respondent then refused to accept the plea and released the defendant without bail, but, showing bias and prejudgment, he warned the defendant to "bring money" when he appeared for trial.

By threatening to impose bail for routine traffic charges against a defendant who, to respondent's knowledge, had never missed a court appearance, respondent appeared to act out

of personal animus, rather than based on appropriate consideration of the factors required to be considered in setting bail (CPL §510.30[2][a]). *See*, *Matter of Muskopf*, 2000 Annual Report 133; *Matter of Kelsen*, 1998 Annual Report 145 (Comm on Judicial Conduct). That personal animus was again evident when, after convicting the defendant after a bench trial and imposing the maximum fine permitted by law, he gave the defendant half the time he customarily gave for paying the fine. Later, after learning that the defendant had complained about his conduct to the Commission, respondent again departed from his usual practice by denying the defendant's request for an extension, stating sarcastically, "You turned me in to the state and you want me to do you a favor?" He also threatened to issue a bench warrant if the fine was not paid on time. Retaliating against an individual who has complained about a judge's conduct is especially improper and threatens the integrity of the judicial disciplinary system. *Matter of Tavormina*, 1990 Annual Report 164 (Comm on Judicial Conduct).

Respondent also acted improperly in a second case a week later, threatening a defendant and his father out of pique because of a perceived affront to the court. Advised by his wife, the court clerk, that the defendant's father had been "very rude" when he called the court to request an extension for paying a fine, respondent reacted testily when the defendant and his father appeared in court. After threatening the father with 30 days in jail for "harassing" the clerk, respondent warned that he would issue a warrant for the defendant's arrest if the fine was not paid on time and reiterated that "we're going to do harassment charges" if the father "harassed" the clerk again. Respondent's threats were an intemperate response to the clerk's complaint of rudeness. *See*, *Matter of Wiater*, 2007 Annual Report 155 (Comm on Judicial Conduct) (judge angrily threatened a defendant with jail after being told that the defendant had left an offensive message on the court's answering machine). Even if provoked by a perceived lack of respect for the court, respondent's behavior was injudicious.

While it is permissible for a judge's spouse to serve as court clerk (*see* Rules, §100.3[C][3]), a judge must not permit the relationship to influence the judge's obligation to be fair, impartial and courteous towards litigants and others with whom the judge deals in an official capacity (Rules, §100.3[B][3]).

In mitigation, we note that respondent has been cooperative in the Commission proceedings, expressed contrition regarding both incidents and commits himself to avoiding such misconduct in the future.

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

Judge Klonick, Mr. Coffey, Judge Acosta, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Hubbard, Ms. Moore, Judge Peters and Judge Ruderman concur.

Dated: April 20, 2010

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APPENDIX G: STATISTICAL ANALYSIS OF COMPLAINTS

COMPLAINTS PENDING AS OF DECEMBER 31, 2009								
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING								
NON-JUDGES								
DEMEANOR		9	43	7	3	1	5	68
DELAYS		6	8	3	0	1	2	20
CONFLICT OF INTEREST		5	15	1	2	3	5	31
BIAS		1	5	1	0	0	0	7
CORRUPTION		4	7	0	0	1	0	12
INTOXICATION		1	0	0	0	0	2	3
DISABILITY/QUALIFICATIONS		0	0	0	0	0	0	0
POLITICAL ACTIVITY		11	5	4	3	1	1	25
FINANCES/RECORDS/TRAINING		4	4	7	3	1	0	19
TICKET-FIXING		2	0	0	1	0	0	3
ASSERTION OF INFLUENCE		4	6	1	2	0	3	16
VIOLATION OF RIGHTS		10	18	5	3	0	3	39
MISCELLANEOUS		0	0	0	0	0	0	0
TOTALS		57	111	29	17	8	21	243

*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 2010

UBJECT F OMPLAINT S C O	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	TATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	1164							1164
NON-JUDGES	354							354
DEMEANOR	102	38	7	1	0	0	0	148
DELAYS	38	S 12	1	2	0	0	0	53
CONFLICT OF INTEREST	20	19	6	3	0	0	0	48
BIAS	18	8	4	0	1	0	0	31
CORRUPTION	20	5	2	0	0	0	0	27
INTOXICATION	1	2	1	0	0	0	0	4
DISABILITY/QUALIFICATIONS	1	0	1	0	0	0	0	2
POLITICAL ACTIVITY	20	11	2	2	0	1	0	36
FINANCES/RECORDS/TRAINING	9	21	3	3	1	0	0	37
TICKET-FIXING	1	3	0	0	0	0	0	4
ASSERTION OF INFLUENCE	11	12	3	3	0	0	0	29
VIOLATION OF RIGHTS	24	28	7	0	1	0	0	60
MISCELLANEOUS	17	10	0	0	0	1	0	28
TOTALS	1800	169	37	14	3	2	0	2025

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ALL COMPLAINTS CONSIDERED IN 2010: 2025 NEW & 243 PENDING FROM 2009								
SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
INCORRECT RULING	1664							1164
NON-JUDGES	354							354
DEMEANOR	102	47	50	8	3	1	5	216
DELAYS	38	18	9	5	0	1	2	73
CONFLICT OF INTEREST	20	24	21	4	2	3	5	79
BIAS	18	9	9	1	1	0	0	38
CORRUPTION	20	9	9	0	0	1	0	39
INTOXICATION	1	3	1	0	0	0	2	7
DISABILITY/QUALIFICATIONS	1	0	1	0	0	0	0	2
POLITICAL ACTIVITY	20	22	7	6	3	2	1	61
FINANCES/RECORDS/TRAINING	9	25	7	10	4	1	0	56
TICKET-FIXING	1	5	0	0	1	0	0	7
ASSERTION OF INFLUENCE	11	16	9	4	3	0	3	46
VIOLATION OF RIGHTS	24	38	25	5	3	0	3	98
MISCELLANEOUS	17	10	0	0	0	1	0	28
TOTALS	1800	226	148	43	20	10	21	2268

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ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

UBJECT F OMPLAINT S	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	TATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	*DISMISSED*	*CAUTION*	*RESIGNED*	*CLOSED**	*ACTION**	
C O *INCORRECT RULING*	17,780							17,780
NON-JUDGES	5730							5730
DEMEANOR	3376	47	1211	324	120	119	251	5448
DELAYS	1400	S 18	168	91	32	19	26	1754
CONFLICT OF INTEREST	669	24	476	157	56	26	131	1539
BIAS	1869	9	273	57	28	18	33	2287
CORRUPTION	482	9	122	14	`39	23	37	726
INTOXICATION	56	3	37	7	11	3	28	145
DISABILITY/QUALIFICATIONS	57	0	33	2	18	14	6	130
POLITICAL ACTIVITY	335	22	275	185	22	26	47	912
FINANCES/RECORDS/TRAINING	286	25	289	195	130	86	100	1111
TICKET-FIXING	27	5	88	160	43	62	165	550
ASSERTION OF INFLUENCE	211	16	157	78	24	9	60	555
VIOLATION OF RIGHTS	2459	38	481	213	90	50	87	3418
MISCELLANEOUS	786	10	248	81	29	41	57	1252
	35,523	226	3858	1564	642	496	1028	43,337

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TOTALS

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NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

61 BROADWAY, SUITE 1200
NEW YORK, NEW YORK 10006
(646) 386-4800
(646) 458-0037 (FAX)

CORNING TOWER, SUITE 2301
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223
(518) 453-4600
(518) 486-1850 (FAX)

400 ANDREWS STREET, SUITE 700
ROCHESTER, NEW YORK 14604
(585) 784-4141
(585) 232-7834 (FAX)

WWW.CJC.NY.GOV