

NEW YORK STATE

**COMMISSION ON JUDICIAL
CONDUCT**



**ANNUAL REPORT
2013**

**NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT**



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NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

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March 1, 2013

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, 2012.

Respectfully submitted,

A handwritten signature in blue ink, reading "Robert H. Tembeckjian".

Robert H. Tembeckjian, Administrator
On Behalf of the Commission

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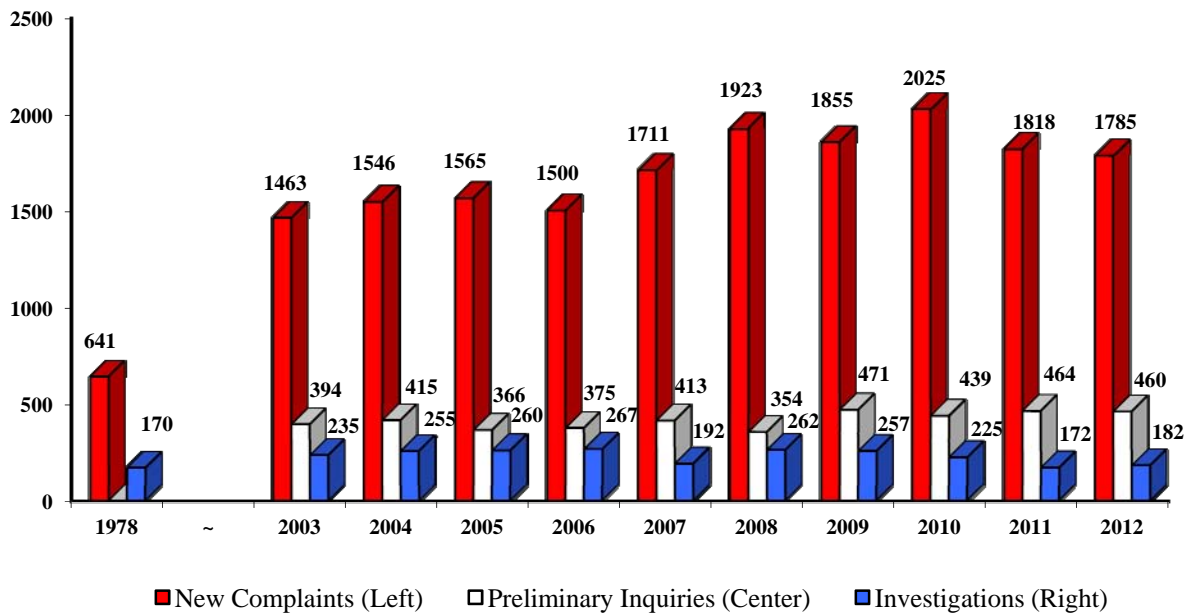
INTRODUCTION TO THE 2013 ANNUAL REPORT

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 2003, the Commission has averaged 1,719 new complaints per year, 415 preliminary inquiries and 231 investigations. Last year, 1,785 new complaints were received. Every complaint was reviewed by investigative and legal staff, and a 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 460 preliminary reviews and inquiries and 182 investigations.

This report covers Commission activity in the year 2012.



COMPLAINTS, INQUIRIES & INVESTIGATIONS IN THE LAST TEN YEARS

ACTION TAKEN IN 2012

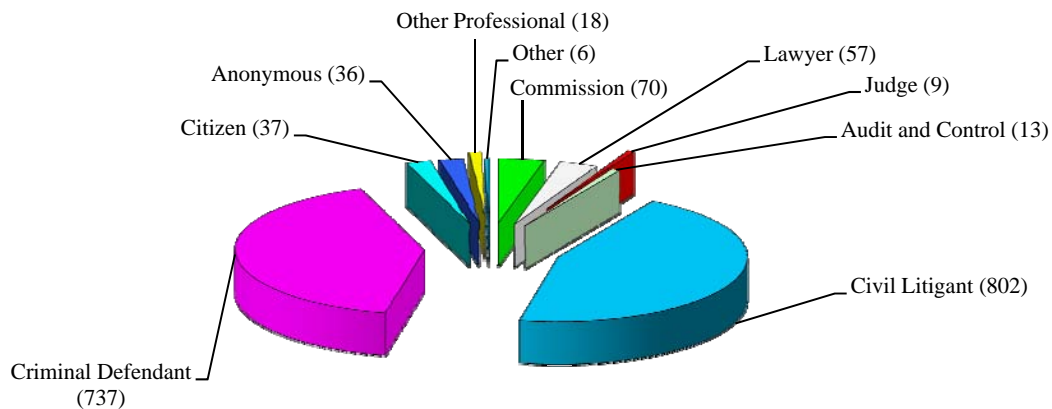
Following are summaries of the Commission’s actions in 2012, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

COMPLAINTS RECEIVED

The Commission received 1,785 new complaints in 2012. 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 intervene in a pending case, or reverse or remand trial court decisions.

A breakdown of the sources of complaints received by the Commission in 2012 appears in the following chart.



COMPLAINT SOURCES IN 2012

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 2012, staff conducted 460 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

In 182 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 2012, in addition to the 182 new investigations, there were 184 investigations pending from the previous year. The Commission disposed of the combined total of 366 investigations as follows:

- 100 complaints were dismissed outright.
- 27 complaints involving 25 different judges were dismissed with letters of dismissal and caution (one judge received two letters).
- 11 complaints involving 6 different judges were closed upon the judge's resignation.
- 16 complaints involving 11 different judges were closed upon vacancy of office due to reasons other than resignation, such as the expiration of the judge's term.
- 29 complaints involving 20 different judges resulted in formal charges being authorized.
- 183 investigations were pending as of December 31, 2012.

FORMAL WRITTEN COMPLAINTS

As of January 1, 2012, there were pending Formal Written Complaints in 32 matters involving 17 different judges. In 2012, Formal Written Complaints were authorized in 29 additional matters involving 20 different judges. Of the combined total of 61 matters involving 37 judges, the Commission acted as follows:

- 28 matters involving 15 different judges resulted in formal discipline (admonition, censure or removal from office).
- One matter involving one judge resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- Seven matters involving five different judges were closed upon the judge's resignation from office, all five becoming public by stipulation.
- One matter involving one judge was closed due to the expiration of the judge's term.
- One matter involving one judge was dismissed outright.
- 23 matters involving 14 different judges were pending as of December 31, 2012.

SUMMARY OF ALL 2012 DISPOSITIONS

The Commission's investigations, hearings and dispositions in the past year involved judges of various courts, as indicated in the following ten tables.

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

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	115	172	287
Complaints Investigated	41	62	103
Judges Cautioned After Investigation	6	9	15
Formal Written Complaints Authorized	6	6	12
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	3	5	8
Judges Vacating Office by Public Stipulation	1	4	5
Formal Complaints Dismissed or Closed	0	1	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

	<i>Part-Time</i>	<i>Full-Time</i>	<i>Total</i>
Complaints Received	45	276	321
Complaints Investigated	7	18	25
Judges Cautioned After Investigation	2	2	4
Formal Written Complaints Authorized	1	2	3
Judges Cautioned After Formal Complaint	1	0	1
Judges Publicly Disciplined	0	1	1
Judges Vacating Office by Public Stipulation	0	0	0
Formal Complaints Dismissed or Closed	1	0	1

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

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

Complaints Received	219
Complaints Investigated	18
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

* Includes seven who also serve as Surrogates, five who also serve as Family Court Judges, and 39 who also serve as both Surrogates and Family Court judges.

TABLE 4: FAMILY COURT JUDGES – 128, FULL-TIME, ALL LAWYERS

Complaints Received	154
Complaints Investigated	5
Judges Cautioned After Investigation	0
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: SURROGATES – 76, FULL-TIME, ALL LAWYERS

Complaints Received	29
Complaints Investigated	5
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 6: DISTRICT COURT JUDGES – 50, FULL-TIME, ALL LAWYERS

Complaints Received	27
Complaints Investigated	2
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

TABLE 7: COURT OF CLAIMS JUDGES – 86, FULL-TIME, ALL LAWYERS

Complaints Received	59
Complaints Investigated	0
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

TABLE 8: SUPREME COURT JUSTICES – 328, FULL-TIME, ALL LAWYERS*

Complaints Received	275
Complaints Investigated	23
Judges Cautioned After Investigation	4
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	0

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

**TABLE 9: COURT OF APPEALS JUDGES – 7 FULL-TIME, ALL LAWYERS;
APPELLATE DIVISION JUSTICES – 24 FULL-TIME, ALL LAWYERS**

Complaints Received	85
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	329
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* 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 2012. The actual texts are appended to this Report in Appendix F.

OVERVIEW OF 2012 DETERMINATIONS

The Commission rendered 15 formal disciplinary determinations in 2012: three removals, nine censures and three admonitions. In addition, five matters were disposed of by stipulation made public by agreement of the parties. Nine of the 20 respondents were non-lawyer trained judges and 11 were lawyers. Thirteen of the respondents were town or village justices and seven were judges of higher courts.

DETERMINATIONS OF REMOVAL

The Commission completed three formal proceeding in 2012 that resulted in a determination of removal. The cases are summarized below and the full text of the determinations can be found in Appendix F.

Matter of Michael M. Feeder

On January 31, 2012, the Commission determined that Michael M. Feeder, a Justice of the Hudson Falls Village Court, Washington County, should be removed from office for abusing his judicial power by jailing defendants in five cases without due process. In one case, Judge Feeder accepted a guilty plea at arraignment from an unrepresented defendant and sentenced him to 30 days in jail for violation of a local noise ordinance, notwithstanding that the defendant was under the influence of alcohol, learning-disabled and incapable of understanding and asserting his rights. In four other cases, the judge held defendants in summary contempt for their behavior in court and sentenced them to jail without following the procedures required by law. In its determination the Commission stated, "Viewed in their totality, [Judge Feeder's] handling of these matters showed a disregard for fundamental legal principles and casts serious doubt on his fitness to serve as a judge." The Commission also noted that Judge Feeder had been censured in 2009. Judge Feeder, who is not an attorney, did not request review by the Court of Appeals.

Matter of Diane L. Schilling

On May 8, 2012, the Commission determined that Diane L. Schilling, a Justice of the East Greenbush Town Court, Rensselaer County, should be removed from office for improperly intervening in the disposition of a speeding ticket issued to the wife of another judge and for

accepting special consideration with respect to a speeding ticket issued to her. Judge Schilling also served as the Director of the Office of Justice Court Support, which provides training, education and support to local judges. In its determination the Commission stated: “As an experienced judge and as an attorney with expertise in providing advice, support and training to local judges, [Judge Schilling] should have recognized and avoided any taint of favoritism.” Instead, the Commission said, the judge’s actions showed a “complete disregard for her ethical responsibilities and for the legal process she was sworn to uphold.” Judge Schilling did not request review by the Court of Appeals.

Matter of Bryan R. Hedges

On August 17, 2012, the Commission determined that Bryan R. Hedges, a Judge of the Family Court, Onondaga County, should be removed for engaging in a sexual encounter in 1972 with his then five-year-old, deaf and communications-challenged niece. The incident did not come to light until 2012, after the statute of limitations for criminal prosecution had expired. The Commission found that the judge’s conduct was an act of moral turpitude that disqualified him from being a judge, notwithstanding that it occurred long before he took office. In its determination the Commission stated: “The nature of [Judge Hedges’] conduct involving an admitted sexual act with a defenseless child is abhorrent and not attenuated by the passage of time.” Judge Hedges filed a request for review with the Court of Appeals, and the matter is pending.

DETERMINATIONS OF CENSURE

The Commission completed nine formal proceedings in 2012 that resulted in public censure. The cases are summarized below and the full texts can be found in Appendix F.

Matter of Robert P. Apple

On January 31, 2012, the Commission determined that Robert P. Apple, a Justice of the Pawling Village Court, Dutchess County, should be censured for driving after consuming alcohol in excess of the legal limit, resulting in a minor accident and his conviction for Driving While Intoxicated. The Commission found that Judge Apple “violated his ethical obligation to respect and comply with the law and endangered public safety.” In determining the appropriate disposition, the Commission noted that there was no indication that Judge Apple attempted to secure favorable treatment in connection with the incident, and that he has sought “preventative counseling” and attends Alcoholics Anonymous meetings. Judge Apple, who is an attorney, did not request review by the Court of Appeals.

Matter of Robin J. Curtis

On January 31, 2012, the Commission determined that Robin J. Curtis, a Justice of the Lyme Town Court, Jefferson County, should be censured for unlawfully issuing two orders of protection and, shortly before the orders were due to expire, issuing two additional orders without any legal basis. The judge issued the orders based on *ex parte* complaints and notwithstanding that there was no criminal action pending against the individual. The Commission found that the judge’s “abuse of judicial authority...was inconsistent with the requirements of the Criminal Procedure Law and overstepped the boundaries of his judicial role,

conveying the appearance that he was acting as a law enforcement officer, not as a judge.” The Commission also noted that as a judge for almost 20 years, Judge Curtis should have realized he lacked the authority to issue an order of protection in the absence of a pending criminal proceeding. Judge Curtis, who is not an attorney, did not request review by the Court of Appeals.

Matter of Paul M. Lamson

On March 20, 2012, the Commission determined that Paul M. Lamson, a Justice of the Fowler Town Court, St. Lawrence County, should be censured for engaging in a series of out-of-court communications about an impending sentence of a defendant. The Commission stated that the judge “never disclosed these communications to the defendant’s attorney notwithstanding that, in imposing the sentence, [the judge] clearly relied on the *ex parte* information he had received.” Noting that the judge had previously been cautioned to avoid *ex parte* communications, the Commission stated that, “prior discipline is an aggravating factor in favor of a strict sanction, especially where the prior discipline was based on similar misconduct.” Judge Lamson, who is not an attorney, did not request review by the Court of Appeals.

Matter of Paul M. Hensley

On June 22, 2012, the Commission determined that Paul M. Hensley, a Judge of the District Court, Suffolk County, should be censured for attending and participating in unlawful, for-profit poker games on several occasions. The games were unlawful under New York law because, among other things, the organizer kept a portion of the ante. While it is unlawful in New York to run such a game, it is not unlawful to attend or participate as a player. The Commission noted that since Judge Hensley’s judicial status was well-known at the facility where the games were held, his presence at the games “gave his judicial imprimatur to [the] unlawful activity.” The judge was also present at the facility when police executed a search warrant of the premises. While no players were arrested, the host of the poker game was charged with gambling related offenses. The judge compounded his misconduct by identifying himself as a judge during the police search, which “convey[ed] an appearance that he was asserting his judicial position to obtain special treatment.” Judge Hensley did not request review by the Court of Appeals.

Matter of Vincent Sgueglia

On August 10, 2012, the Commission determined that Vincent Sgueglia, a Judge of the County, Family and Surrogate’s Courts, Tioga County, should be censured for approving his own pistol permit as well as accidentally discharging a revolver within his chambers at the Tioga County Courthouse. Judge Sgueglia is the sole licensing official in Tioga County. The Commission stated that he should not have used his decision-making authority for his own benefit. The misconduct was compounded when the judge accidentally discharged a revolver, while attempting to repair it, in his chambers during a break in court proceedings. The Commission stated that “handling a gun in his chambers showed a lack of good judgment and notable disregard for the safety of others.” Judge Sgueglia, whose term in office ended on December 31, 2012, stipulated that he would not serve as a Judicial Hearing Officer after leaving the bench. Judge Sgueglia did not request review by the Court of Appeals.

Matter of Michelle A. Van Woeart

On August 20, 2012, the Commission determined that Michelle A. Van Woeart, a Justice of the Princetown Town Court, Schenectady County, should be censured for failing to disqualify herself promptly after appearance tickets were issued to her and her sons for violating a local dog ordinance, improperly communicating with the court to which the matters were transferred, and failing to keep proper records of the violations. After Judge Van Woeart and her sons were issued tickets by the local Animal Control Officer (ACO) for violating a “loose dog” ordinance the judge did not disqualify herself until several months later. She also made improper substantive comments in a letter to the judges of the transferee court, writing that the tickets were not properly served and that the dog in question belonged to her son. She did not send the ACO a copy of the letter. Judge Van Woeart, who is not an attorney, did not request review by the Court of Appeals.

Matter of Nora S. Anderson

On October 1, 2012, the Commission determined that Nora S. Anderson, a Judge of the Surrogate’s Court, New York County, should be censured for accepting \$250,000 in “disguised contributions” to her 2008 campaign for judicial office and failing to report the contributions as required. Judge Anderson accepted a \$100,000 gift and a \$150,000 personal loan from her employer and close friend, attorney Seth Rubenstein, and promptly funneled the money into her campaign. The Commission found that this conduct skirted the Election Law, under which a non-family member’s maximum contribution to the 2008 campaign was \$33,123; there is no limit on how much a candidate may contribute to his/her own campaign. Compounding the misconduct, Judge Anderson failed to report the loan on her financial disclosure statement to the Ethics Commission of the Unified Court System as required. Judge Anderson did not request review by the Court of Appeals.

Matter of Paul G. Buchanan

On December 11, 2012, the Commission determined that Paul G. Buchanan, a Judge of the Family Court, Erie County, should be censured for making an *ex parte* hospital visit to a party in a pending juvenile delinquency proceeding, being discourteous in court and denying due process in a custody case. Judge Buchanan visited a 14-year-old girl, over whose juvenile delinquency case he was presiding, in the psychiatric unit of a hospital. As to that incident, the Commission found that the judge “violated the well-established prohibition against *ex parte* communications and overstepped the appropriate boundaries between a judge and a party in a pending matter.” In addition, on two separate occasions the judge was discourteous to an attorney and a probation officer who appeared before him. On both occasions the judge shouted, demeaned and berated them. In another case, the judge refused to allow cross-examination of parties during a custody hearing. Judge Buchanan did not request review by the Court of Appeals.

Matter of Lee L. Holzman

On December 13, 2012, the Commission determined that Lee L. Holzman, a Judge of the Surrogate’s Court, Bronx County, should be censured for failing to take appropriate action after learning that one of his appointees – Michael Lippman, the counsel to the Bronx public administrator – had taken excessive fees from the estates of people who had died without leaving

a will. Judge Holzman learned in 2006 that Mr. Lippman had improperly taken excessive fees, and fees in advance of doing work on the estates, resulting in negative balances of \$300,000 to \$400,000. Instead of firing Mr. Lippman and reporting him to law enforcement or disciplinary authorities, the judge demoted him and implemented a repayment plan under which Mr. Lippman continued to handle newer estates without fee in order to make up for the unearned money he had received from older ones. Mr. Lippman was eventually fired in 2009. In determining the appropriate sanction, the Commission found that Judge Holzman's misconduct reflected "poor judgment, rather than knowing concealment of criminal behavior or intent to deceive." Judge Holzman did not request review by the Court of Appeals.

DETERMINATIONS OF ADMONITION

The Commission completed three proceedings in 2012 that resulted in public admonition. The cases are summarized as follows and the full texts can be found in Appendix F.

Matter of Brian D. Mercy

On June 22, 2012, the Commission determined that Brian D. Mercy, a Justice of the Glenville Town Court and an Acting Justice of the Scotia Village Court, Schenectady County, should be admonished for practicing law in Schenectady County before other part-time judges who also sit and practice law in that county. The Rules Governing Judicial Conduct prohibit part-time judges who practice law from doing so before other part-time judges who sit and practice law in the same county. Judge Mercy represented clients in seven matters in the Niskayuna Town Court (Schenectady County) before other part-time judges who practice law. While he did not physically appear in the Niskayuna court, the Commission concluded that his conduct, which included plea negotiations, letters and telephone calls, "violated the letter and spirit" of the rules. Judge Mercy acknowledged his misconduct and pledged "to adhere to the ethical rules in the future." Judge Mercy did not request review by the Court of Appeals.

Matter of Douglas Brian Horton

On December 10, 2012, the Commission determined that Douglas Brian Horton, a Justice of the Mexico Town Court, Oswego County, should be admonished for engaging in a physical altercation with his longtime girlfriend. During a local Fire Department annual dinner at a restaurant, the judge was involved in an altercation with his then-girlfriend in the foyer of the restaurant. During the argument Judge Horton grabbed the woman and pushed her, causing her to fall to the floor. She was not injured and no criminal charges were filed. The Commission stated that the judge "engaged in conduct that detracted from the dignity of his judicial office and brought the judiciary as a whole into disrepute." Judge Horton, who is not an attorney, did not request review by the Court of Appeals.

Matter of James A. McLeod

On December 11, 2012, the Commission determined that James A. McLeod, a Judge of the Buffalo City Court, Erie County, should be admonished for speaking to a defendant in a crude and offensive manner, undermining the decorum of the courtroom. Judge McLeod presided over two cases involving a 17-year-old defendant, who addressed the judge using vulgar language, laced with racial slurs. Without allocuting the defendant or having him enter a plea of guilty, the

judge convicted the teen in both cases, while engaging in a series of vulgar and inappropriate exchanges with him. The Commission stated that a “judge is required to be an exemplar of decorum and dignity in the courtroom, and not allow the proceedings to devolve into an undignified exchange of taunts, insults and obscenities.” Judge McLeod did not request review by the Court of Appeals.

OTHER PUBLIC DISPOSITIONS

The Commission completed five other proceedings in 2012 that resulted in public dispositions. The cases are summarized below and the full text can be found in Appendix F.

Matter of Richard H. Reome, Sr.

On May 3, 2012, pursuant to a stipulation, the Commission discontinued a proceeding involving Richard H. Reome, Sr., a Justice of the Schuyler Falls Town Court, Clinton County, who resigned from office after being charged, *inter alia*, with: (1) engaging in and/or considering improper out-of-court communications; (2) expressing bias in favor of law enforcement officers and/or against the defendants; (3) reducing charges against defendants without consent of the district attorney; (4) misinforming defendants that they were not entitled to court-appointed attorneys and/or failing to inform them of their right to plead guilty and demand supporting depositions from officers; (5) allowing and considering unsworn testimony and finding defendants guilty without conducting a trial; and (6) engaging in inappropriate questioning of defendants at arraignment. Judge Reome, who is not an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Michelle R. Miller

On August 8, 2012, pursuant to a stipulation, the Commission discontinued a proceeding involving Michelle R. Miller, a Justice of the Leon Town Court, Cattaraugus County, who resigned from office after being charged with failing to: (1) make timely reports to the State Comptroller of fines and penalties; (2) notify the Commissioner of Motor Vehicles to order the suspension of the drivers’ licenses of defendants who had failed to answer charges or to pay fines and surcharges; (3) deposit monies into the court account within 72 hours of receipt; and (4) cooperate with the Commission’s investigation. Judge Miller, who is not an attorney, affirmed that she would neither seek nor accept judicial office at any time in the future.

Matter of Robert L. Link

On September 20, 2012, pursuant to a stipulation, the Commission discontinued a proceeding involving Robert L. Link, a Justice of the Oppenheim Town Court, Fulton County, who resigned from office after being charged with: (1) failing to advise a defendant of the right to counsel or right to a hearing; (2) improperly eliciting admissions from the defendant; (3) considering and/or relying on *ex parte* communications; (4) finding the defendant guilty without a plea or trial and imposing sentence without giving the defendant an opportunity to contest charges; (5) failing to disclose his personal involvement in a defendant’s business operation in two cases and failing to disqualify himself; and (6) failing to mechanically record court proceedings. Judge Link, who is not an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Gary F. Anderson

On December 7, 2012, pursuant to a stipulation, the Commission discontinued a proceeding involving Gary F. Anderson, a Justice of the Bainbridge Town Court, Chenango County, who resigned from office after being charged with: (1) failing to advise a defendant of the right to counsel and to an adjournment to obtain counsel; (2) inappropriately questioning defendants at arraignment; (3) engaging in *ex parte* communications; (4) finding defendants guilty without a plea, a trial, or the opportunity for cross-examination; (5) allowing and considering unsworn statements and evidence which had not been properly admitted; (6) dismissing charges without notice to the prosecution; and (7) failing to mechanically record proceedings as required. Judge Anderson, who is not an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Heather L. Knott

On December 7, 2012, pursuant to a stipulation, the Commission discontinued a proceeding involving Heather L. Knott, a Justice of the Hague Town Court, Warren County, who resigned from office after being charged with: (1) failing to report a property damage accident and invoking her judicial status when charged with that offense; (2) giving testimony to the Commission that was false and/or lacking in candor; (3) appearing in Family Court representing a child while under the influence of alcohol; and (4) presiding over court proceedings while under the influence of alcohol. Judge Knott had been censured by the Commission in 1999 for, *inter alia*, invoking her judicial status during a traffic stop and presiding over court proceedings while under the influence of alcohol. At the time of her censure, the judge had stipulated that she promised she would refrain from using alcohol in the future. Judge Knott, who is an attorney, affirmed that she would neither seek nor accept judicial office in the future.

OTHER DISMISSED OR CLOSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of three Formal Written Complaints in 2012 without rendering public disposition. One complaint was disposed of with a Letter of Caution, upon a finding by the Commission that judicial misconduct was established but that public discipline was not warranted. One complaint was closed because the judge's term had expired, and one complaint was dismissed.

MATTERS CLOSED UPON RESIGNATION

Eleven judges resigned in 2012 while complaints against them were pending before the Commission. Six resigned while under investigation. Five resigned while under formal charges by the Commission, pursuant to public stipulation, and 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 2012, the Commission referred 17 matters to other agencies. Fourteen matters were referred to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record-keeping or other administrative issues. One matter was referred to the Chief Judge, the Administrative Board of the Courts and the Chief Administrative Judge, one matter was referred to the Deputy Chief Administrative Judge, and one matter was referred to an attorney grievance committee.

PUBLIC REPORT AND RECOMMENDATIONS

In March 2012 the Commission issued a public Report detailing its investigation of three complaints containing four allegations against Presiding Justice Luis A. Gonzalez of the Appellate Division, First Department. Judge Gonzalez waived confidentiality under section 45 of the Judiciary Law, permitting the release of the Report and the complaints that led to it.

Three of the allegations were not established and were dismissed. The fourth concerned hiring practices at the Appellate Division, First Department. The Report addressed hiring practices both before and during Judge Gonzalez's tenure and, in dismissing the complaint, made specific recommendations to make hiring practices for all four Appellate Divisions more uniform, transparent and free from even the appearance of nepotism and favoritism.

The Commission's recommendations were promptly adopted by the Administrative Board of the Courts and new procedures for hiring have been implemented.

The full text of the Report can be found on the Commission's website: www.cjc.ny.gov.

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(1) 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 2012, the Commission issued 26 Letters of Dismissal and Caution and one Letter of Caution. Fifteen town or village justices were cautioned, including six who are lawyers. Eleven judges of higher courts – all lawyers, as required by law – were cautioned. The caution letters addressed various types of conduct as indicated below.

Improper *Ex Parte* Communications. One judge was cautioned for engaging in an isolated and relatively minor instance of unauthorized out-of-court communications with a party in a pending case.

Record-Keeping. Five judges were cautioned for failing to mechanically record all court proceedings as required. Pursuant to section 30.1 of the Rules of the Chief Judge and Administrative Order 245-08 of the Chief Administrative Judge, all town and village court proceedings must be recorded.

Political Activity. The Rules Governing Judicial Conduct prohibit judges from publicly endorsing or publicly opposing (other than by running against) another candidate for public office and from participating in any political campaign for any office other than their own. One judge was cautioned for publicly criticizing a candidate in another race. Another judge circulated petitions for another candidate which did not include the judge's name. The Rules also prohibit judges from purchasing more than two tickets to politically sponsored dinners. One judge purchased multiple tickets to a political function as a "reward" for campaign staff.

Conflicts of Interest. All judges are required by the Rules to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned. One part-time judge who also practices law failed to disqualify himself from a matter that came before him after one of the parties had sought his legal advice regarding the matter.

Inappropriate Demeanor. The Rules require every judge to be patient, dignified and courteous to litigants, attorneys and others with whom the judge deals in an official capacity. Three judges were cautioned for being discourteous or making inappropriate comments in their official capacity to various individuals.

Finances. Four judges were cautioned for failing to file a financial disclosure statement with the Ethics Commission for the Unified Court System in a timely manner. Section 211(4) of the Judiciary Law and Section 40.2 of the Rules of the Chief Judge require judges to file an annual financial disclosure statement by May 15th of each succeeding year. Two judges were cautioned for failing to provide monthly reports and remittances with the State Comptroller in a timely manner.

Delay. Two judges were cautioned for excessive delay in rendering decisions in small claims cases, notwithstanding the statutory requirement that a decision in such matters be issued within 30 days. Section 100.3(B)(7) of the Rules Governing Judicial Conduct requires a judge to dispose of all judicial matters promptly, efficiently and fairly.

Violation of Rights. One judge was cautioned for imposing a fine that exceeded the statutory maximum and refusing to correct it when counsel brought the matter to the judge's attention.

Assertion of Influence. Two judges were cautioned for lending the prestige of judicial office to advance private interests. One utilized an email address for his private law practice which contained the word "judge," and another invoked his judicial office in promoting a charitable organization.

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 DETERMINATIONS REVIEWED BY THE COURT OF APPEALS

Pursuant to statute, a respondent-judge has 30 days to request review of a Commission determination by the Court of Appeals, or the determination becomes final. In 2012, the Court of Appeals upheld the Commission's determination of removal in one case. Another judge requested review by the Court of Appeals of a Commission determination, and the matter is pending.

Matter of Lafayette D. Young, Jr.

On October 7, 2011, the Commission determined that Lafayette D. Young, Jr., a Justice of the Macomb Town Court, St. Lawrence County, should be removed from office for presiding over eight matters involving his girlfriend's relatives without disclosing the relationship and for engaging in out-of-court communications about some of the matters.

Judge Young filed a request for review with the Court of Appeals, asking the Court to reject the Commission's determination that he be removed from office. In a decision dated June 26, 2012, the Court upheld the Commission's findings and issued an Order removing him from the bench. The Court of Appeals found that Judge Young "engaged in serious misconduct when he presided over matters involving persons with whom he and his paramour had close relationships" (*Matter of Young*, 19 NY3d 621, 626 [2012]). The Court stated: "Such conduct demonstrates a misuse of his judicial office and damages public confidence in his integrity and impartiality" (*Id.*). The Court found that the judge's misconduct in failing to disqualify himself from those cases was exacerbated by his *ex parte* communications in several of the matters.

Matter of Bryan R. Hedges

On August 17, 2012, the Commission determined that Bryan R. Hedges, a Judge of the Family Court, Onondaga County, should be removed from office for engaging in a sexual encounter with his then five-year-old niece (*supra* at 9). Judge Hedges filed a request for review with the Court of Appeals, and the matter is pending. Oral argument before the Court has been scheduled for March 19, 2013.

CHALLENGES TO THE COMMISSION'S PROCEDURES

Matter of Holzman v Commission on Judicial Conduct

As reported in the 2012 Annual Report, Bronx Surrogate Lee Holzman commenced a CPLR Article 78 proceeding in July 2011 seeking an order dismissing the Commission's Formal Written Complaint without prejudice to renew or, in the alternative, staying the Commission's proceeding against him. Judge Holzman claimed that it was unfair to require him to proceed to a hearing without the testimony of Michael Lippman, the former counsel to the Bronx Public Administrator. At the time of the hearing, Mr. Lippman was under indictment for his conduct while counsel to the Public Administrator, and his attorney indicated that Lippman would invoke his 5th Amendment privilege against self-incrimination if subpoenaed to testify in the Commission proceeding.

Judge Holzman's Article 78 petition was assigned to Supreme Court Justice Barbara Jaffe. After hearing argument on July 29, 2011, Justice Jaffe declined to sign a temporary restraining order and directed the Commission to file a Verified Answer to the Article 78 petition. The Commission filed its Verified Answer on August 12, 2011, and, on September 6, 2011, Justice Jaffe dismissed the petition.

The Commission's disciplinary hearing commenced on September 12, 2011. That morning, Judge Holzman filed a motion to renew and reargue before Justice Jaffe and sought a stay of the hearing, which was already underway. Justice Jaffe granted a temporary stay until September 20, 2011. Judge Holzman's motion was argued on September 21, 2011, and that same day, Justice Jaffe issued an order denying Judge Holzman's motion for a further stay.

On October 5, 2011, Judge Holzman filed a notice of appeal. He also sought a temporary restraining order to stay the hearing, which was scheduled to resume on October 11, 2011, and a stay pending appeal. Justice Sheila Abdus-Salaam granted a temporary restraining order and set an expedited briefing schedule. On December 6, 2011, the Appellate Division, First Department, denied Judge Holzman's request for a stay pending appeal. The parties filed their briefs, and oral argument was heard.

On March 1, 2012, the Appellate Division, First Department dismissed Judge Holzman's petition on the ground that he had failed to exhaust the administrative remedy available to him – proceeding to a Commission disciplinary hearing and then invoking his right under Judiciary Law § 44(7) to a review by the Court of Appeals of any Commission determination of misconduct. The Court found that Judge Holzman had not demonstrated that making his case in the ordinary course of a Commission proceeding was futile or would result in irreparable harm and noted that “the alleged ‘possibility of reputational harm’” did not warrant a stay.

Matter of Piraino v Commission on Judicial Conduct

Salina Town Court Justice Andrew Piraino brought this Article 78 petition seeking an order permanently enjoining the Commission from investigating or adjudicating charges that he imposed fines and surcharges in over 900 traffic cases that exceeded statutory maximums or fell

below statutory minimums. Judge Piraino argued that the Commission had no jurisdiction over “non-venal misapplication or misinterpretation of the law.”

On February 7, 2011, Onondaga County Supreme Court Justice John Cherundolo signed a temporary order prohibiting the Commission from taking any action in prosecution of the Formal Written Complaint and ordered the matter sealed. On February 18, 2011, the Commission filed an Answer and Memorandum of Law in opposition asserting, *inter alia*, that a writ of prohibition does not lie and that, in any event, the Commission clearly has jurisdiction to adjudicate whether a judge has been “faithful to the law” and has maintained “professional competence in it.” See Rules Governing Judicial Conduct, 22 NYCRR § 100.3(B)(1).

On April 26, 2011, Justice Cherundolo denied Judge Piraino’s application for a writ of prohibition “vacating” the Commission's Formal Written Complaint and dismissed his petition. The trial court found that

it is unclear whether the petitioner ultimately committed misconduct or violated the canons of judicial ethics. What is clear is that this is a determination to be made by the NYS Commission on Judicial Conduct. Petitioner’s imposition of improper fines in over 900 cases certainly warrants a hearing and a full record through which the Commission can reach a decision.

On June 6, 2011, Judge Piraino served a notice of appeal to the Appellate Division, Fourth Department, together with a motion directed to Justice Cherundolo for renewal and reargument.

On June 30, 2011, Justice Cherundolo issued a bench decision reversing his prior ruling, reinstated the stay of the Commission proceeding and implicitly re-sealed the Article 78 proceeding. In a lengthy decision read from the bench, Justice Cherundolo stated that he “did not understand” or “didn’t appreciate the facts and the law” until he read local newspaper accounts of his decision and that he needed additional information to decide whether there was “adequate mens rea ... to bring the Commission into play here.” He also wanted information as to the District Attorney’s recommendations in the cases described in the Formal Written Complaint so that he could decide “who might be really at fault” for the fines imposed by Judge Piraino in these cases.

Although Judge Piraino had never requested discovery, Justice Cherundolo directed the parties to confer and to provide the court with, among other things, information regarding: (1) Commission staff’s position as to Judge Piraino’s *mens rea* in each of the 900 cases listed in the Formal Written Complaint, (2) the recommendation of the District Attorney in all 900 cases, (3) how many of the 900 defendants were represented by counsel and the position taken by counsel with respect to the fines imposed, (4) whether there is a “computer program in effect” that would prohibit judges from issuing illegal fines, which “would be something easy to make happen,” (5) information as to “whether or not there is...an administrative overview in place and if there is how it operates,” (6) information regarding whether or how the judge is required to report to OCA and/or DMV and “the responsibility of the persons that they go to to evaluate whether or not they are consistent with ... the fine and surcharge guidelines,” (7) the Commission's position

with respect to the “ability or the obligation” of OCA to “administer or review, evaluate and give feedback to judges who submit the reports that they submit,” and (8) a memorandum of law from the Commission regarding “what connotes a judiciary ethics violation and what level of mens rea is necessary before someone can be charged by the Commission.”

On December 7, 2011, the Appellate Division granted the Commission's motion for leave to appeal. On November 9, 2012, after briefing and oral argument, the Appellate Division reversed. The Appellate Division found that the Commission “has jurisdiction to investigate and discipline [Judge Piraino] for the alleged judicial misconduct,” and that “even assuming, arguendo” that Justice Cherundolo properly granted leave to renew and reargue, his decision to reverse his initial order was error. Judge Piraino was not entitled to a writ of prohibition because his right to review by the Court of Appeals of any Commission determination provided an adequate remedy at law.

As a result, the Appellate Division reinstated the May 2011 order that dismissed Judge Piraino’s petition and unsealed the matter.

In the Matter of Releasing Records to the NYS Commission on Judicial Conduct, People v Seth Rubenstein

On May 17, 2012, Seth Rubenstein brought an Order to Show Cause seeking to vacate a May 2010 unsealing order signed by Administrative Judge Fern Fisher and to restrain Commission staff from using any “records ... or information” obtained pursuant to that order “in any pending investigation.” Judge Fisher’s order unsealed records in *People v Nora Anderson and Seth Rubenstein*, a criminal case in which Rubenstein and Manhattan Surrogate Nora Anderson were acquitted of two counts of filing a false instrument with the Board of Elections. Rubenstein argued that the Commission was not entitled to an unsealing order because it did not fall within any of the provisions of CPL 160.50.

In June 2011, the Commission authorized service of a Formal Written Complaint upon Judge Anderson alleging acts of misconduct related to the conduct for which she was indicted. Judge Anderson’s hearing before Commission Referee Hon. Richard D. Simons was scheduled to begin July 9th. In early April 2012, Rubenstein was served with a subpoena to testify at Judge Anderson’s hearing as a Commission witness, prompting his motion to vacate the unsealing order.

On May 17, 2012, Acting Supreme Court Justice Larry Stephen signed Rubenstein’s proposed Order to Show Cause, including the temporary restraining order staying Commission staff from “using” any documents from the criminal trial. The matter was made returnable before Judge Fisher on May 24, 2012.

On May 23, 2012, the Attorney General’s office submitted papers on behalf of the Commission. Oral argument was held in Judge Fisher’s chambers on May 24th. On May 25, 2012, Judge Fisher issued an order denying Rubenstein’s application in its entirety on the grounds that: (1) Rubenstein’s application to overturn an “administrative order” by order to show cause was procedurally improper, (2) Rubenstein had failed to establish any of the grounds for vacatur set

forth in CPLR 5015, and (3) the Commission was authorized to receive the criminal records by Judiciary Law § 42(3) and the public interest in the Commission's effective performance could “not be stymied by the statutory constraints of CPL 160.50.”

Rubenstein filed a Notice of Appeal on June 11, 2012. On June 12, 2012, Rubenstein’s counsel moved in the Appellate Division, First Department, for a preliminary injunction barring Commission staff from using records from his criminal trial in any proceeding. The Attorney General filed papers in opposition on June 19, 2012. On August 28, 2012, the Appellate Division issued an order denying Rubenstein’s application for a preliminary injunction.

Rubenstein perfected his appeal on July 9, 2012. Oral argument was held on October 3, 2012. On October 10th, the Attorney General’s Office notified the court that the Commission had released a determination in *Matter of Nora S. Anderson*, (see pages 75-94 of this Annual Report) and that as a result, Rubenstein’s appeal was moot.

On November 21, 2012, the Attorney General made a formal motion to have the appeal dismissed on the ground that it was moot. Rubenstein opposed the motion. On February 5, 2013, the Appellate Division granted the motion to dismiss, finding that “the matter has been rendered moot.”

OBSERVATIONS AND RECOMMENDATIONS

The Commission traditionally devotes a section of its Annual Report to a discussion of various topics of special note or interest that have come to its attention in the course of considering complaints. It does so for public education purposes, to advise the judiciary as to potential misconduct that may be avoided, and pursuant to its statutory authority to make administrative and legislative recommendations.

SETTING BAIL IN ONLY ONE FORM

The Court of Appeals decided a case in March 2012 regarding the mandate for the form in which bail must be set pursuant to the Criminal Procedure Law (CPL). Although the case did not directly involve the Commission, the Court's ruling effectively resolved an issue that had been raised before the Commission by some Justices of the Supreme Court.

A judge is obliged by the Sections 100.2(A) and 100.3(B)(1) of the Rules Governing Judicial Conduct to respect and comply with, and be faithful to and professionally competent in, the law.

CPL 520.10(1) states that the only forms of bail are the following:

- (a) Cash bail
- (b) An insurance company bail bond
- (c) A secured surety bond
- (d) A secured appearance bond
- (e) A partially secured surety bond
- (f) A partially secured appearance bond
- (g) An unsecured surety bond
- (h) An unsecured appearance bond
- (i) Credit card or similar device; provided, however, that notwithstanding any other provision of law, any person posting bail by credit card or similar device also may be required to pay a reasonable administrative fee...

CPL 520.10(2) identifies the methods of fixing bail.

The methods of fixing bail are as follows:

- (a) A court may designate the amount of bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one;
- (b) The court may direct that the bail be posted in any one of **two or more** of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms. (Emphasis added.)

Since the 1970s, when the statute was enacted, judicial education and training programs run by the Office of Court Administration have stressed the point, which is also reinforced by the court system's City, Town and Village Resource Center, that setting bail in one form only, typically by announcing "cash only," is contrary to CPL 520.10.

In 2007, after stating in an annual report that it agreed with the OCA and Resource Center interpretations, the Commission heard from some Supreme Court Justices who were concerned that discipline might be imposed against judges who disagree in good faith with that interpretation. The judges observed that a more restrictive interpretation of CPL 520.10, one that would permit bail to be set in one form only, is not precluded by appellate law.

Based upon the reasonable concerns expressed by the Supreme Court Justices, the Commission announced in its 2009 annual report that, where the matter arises in the future, and where the issue is solely a judge's good-faith interpretation of CPL 520.10, without aggravating circumstances that would otherwise constitute misconduct, the Commission would express its recommendation in an outright dismissal letter to the judge.¹ By not issuing even a Letter of Dismissal and Caution, the Commission hoped to avoid even a mistaken impression that a judge's independent exercise of discretion based on a good-faith interpretation of the statute would constitute cause for discipline.

In March 2012, the Court of Appeals put the issue to rest. In *People ex rel. Shaun McManus v Horn*, 18 NY3d 660 (2012), the Court unanimously ruled that CPL 520.10(2)(b) prohibits the setting of bail in only one form.

The Court's decision vitiates the concerns which prompted the Commission's self-imposed constraint since 2009 as to complaints alleging that only one form of bail was being set by certain judges. Where appropriate in the future, the Commission will inquire as to complaints raising this issue and, where warranted, apprise judges of the Court's decision and their obligation under the Rules to respect, comply with, be faithful to and competent in the law.

FINANCIAL DISCLOSURE

As noted on the official website of the Unified Court System, the Ethics in Government Act of 1987 was enacted "in order to promote public confidence in government, to prevent the use of public office to further private gain, and to preserve the integrity of governmental institutions. The Act accomplishes those goals by prohibiting certain activities, requiring financial disclosure by certain State employees, and providing for public inspection of financial statements."²

Pursuant to the Act, judges and justices of courts of record – that is, all courts except the town and village courts – and non-incumbent candidates seeking election to courts of record – are required to file annual financial disclosure statements, similar to that filed by other state officials and state government employees. Section 211(4) of the Judiciary Law and Section 40.2 of the Rules of the Chief Judge require judges to file an annual financial disclosure statement by May 15 of each succeeding year.

¹ To this point, several judges had received confidential Letters of Dismissal and Caution, expressing the view that the law required more than one form of bail to be set. Additionally, in a public censure primarily concerned with other misconduct, the Commission sustained a charge alleging that a city court judge improperly set bail in only one form. *Matter of Wylie*, 1991 Annual Report 89.

² <http://www.nycourts.gov/ip/ethics/aboutthecommission.shtml>

Since 1990, the Ethics Commission for the Unified Court System (UCS Ethics) has been responsible for administering the distribution, collection, review and maintenance of annual financial disclosure statements. The powers, duties and procedures of the UCS Ethics are set forth in 22 NYCRR Parts 40 and 7400.

When a judge is delinquent in submitting the annual statement and fails to respond to notices to cure, UCS Ethics is obliged to notify the Commission, pursuant to Section 40.1(k) of the Rules of the Chief Judge. Where investigation by the Commission reveals a valid excuse, discipline would not be imposed. Where the explanations are not persuasive – *e.g.*, the judge was busy, or misplaced the disclosure form, or did not check the mail carefully enough for it, or was distracted by personal matters – the Commission has typically issued a Letter of Dismissal and Caution, reminding the judge of the obligation not only to file but also to file promptly. Four such letters were issued in 2012 and three each in 2011 and 2010.

Where a financial disclosure statement is materially inaccurate, particularly in conjunction with other misconduct, the judge is subject to public discipline. In *Matter of Joseph S. Alessandro*, 13 NY3d 238 (2009), a Supreme Court Justice was removed for *inter alia* attempting to defraud a lender out of a \$250,000 loan, in connection with which he filed materially incomplete financial disclosure forms that omitted various assets and liabilities, at least some of which were connected to the fraud. In a jointly-decided companion case, *Matter of Francis M. Alessandro, Id.*, a New York City Civil Court Judge was admonished for his “careless omissions” of various assets and liabilities.

In *Matter of Nora S. Anderson*, reported *supra*, a Surrogate was censured for *inter alia* improperly accepting a loan which was one of two “disguised contributions” to her campaign for judicial office and which was not reported on her financial disclosure statement.

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

COERCING DEFENDANTS INTO PLEA BARGAINS

A judge is obliged by the Rules Governing Judicial Conduct to be and appear impartial, to comply with and be faithful to and professionally competent in the law, and to afford litigants and their lawyers the opportunity to be heard. Sections 100.2(A), 100.3(B)(1) and 100.3(B)(6).

In various cases, the Court of Appeals has held that legal error and judicial misconduct are not mutually exclusive. A judge may be disciplined for misconduct resulting from abuses of discretion or gross legal errors that, for example, deprive litigants of their fundamental rights, whether or not an appellate court has reviewed and ruled upon the merits of the judge’s rulings in the case. *See Matter of Feinberg*, 5 NY3d 206 (2005); *Matter of Bauer*, 3 NY3d 158 (2004); *Matter of Reeves*, 63 NY2d 105 (1984).

The Commission has written previously about the ethics rules implicated when a judge coerces or attempts to coerce a defendant into accepting a plea bargain. The Commission continues to receive complaints on the subject, and appellate courts continue to address it in deciding appeals in which the subject is raised. The Commission therefore considers it appropriate to reprise its most recent detailed exposition on the subject, from its 2007 annual report.

Judicial Intervention in the Plea Bargaining Process

New York state court judges are not prohibited from engaging in plea negotiations. *See People v Seaberg*, 74 NY2d 1 (1989). The standard plea bargaining process contemplates agreement by the prosecutor and defense counsel on a resolution that is consistent with the interests of each, *e.g.* that the defendant will plead guilty to a particular charge or charges, often less than the most serious charge the defendant faces, and that in exchange the remaining charges will be dismissed or the punishment for all charges will be resolved contemporaneously and tempered. The parties typically also agree upon a recommended sentence. The agreement is then subject to the approval of the judge, who must be satisfied that the agreed-upon disposition is consistent with the interests of justice. In his or her discretion, the judge may decide that, although the disposition is acceptable to the prosecutor, the conduct attributed to the defendant is too serious to permit a plea to a lesser crime, or that the plea is acceptable but the promised sentence is too high or too low. In so doing, the judge assesses whether the promised sentence is appropriate and proportionate to the crime. *See People v Farrar*, 52 NY2d 302 (1981).

Intervention by the court should in both appearance and effect favor neither prosecution nor defense. Section 100.2(A) of the Rules Governing Judicial Conduct requires a judge to “respect and comply with the law and . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” *See also Matter of Sardino*, 58 NY2d 286, 290-91 (1983) (Every judge must not only be impartial, but act “in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property”). Section 100.3(B)(4) of the Rules provides that “a judge shall perform judicial duties without bias or prejudice against or in favor of any person.”

New York Law Regarding Involuntary Pleas

As discussed below, the judge’s participation in negotiating and accepting a plea can exceed permissible bounds, rendering a guilty plea involuntary. A judge may not induce a guilty plea by threatening to impose a heavier sentence should the defendant proceed to trial. *See People v Stevens*, 298 AD2d 267 (1st Dept 2002); *People v Christian*, 139 AD2d 896 (4th Dept 1988); *People v Hollis*, 74 AD2d 585 (2d Dept 1980). Under New York state law, “a court wrongly burdens the defendant’s exercise of his right to trial when it indicates he will receive the maximum sentence, or maximum consecutive sentences, after trial, but a significantly lighter sentence after a plea.” *Stevens*, 298 AD2d at 268 (citation omitted).

A judge, however, does not exert any undue pressure on a defendant by discussing the potential sentence a defendant could receive upon conviction after a trial. *See People v Villone*, 302 AD2d 866 (4th Dept 2003); *People v Pagan*, 297 AD2d 582 (1st Dept 2002); *People v Lambe*, 282

AD2d 776 (3d Dept 2001); *People v Green*, 240 AD2d 513 (2d Dept 1997). For instance, in *People v Cornelio*, 227 AD2d 248 (1st Dept 1996), the Appellate Division held that the trial judge did not coerce a guilty plea by advising the defendant, who was charged with first degree robbery, that he faced “a possible 100 years in prison which, based on the facts known to it, it would not hesitate to impose.” New York state courts have also held that it was not coercive for a judge to remark that “if the defendant were to be convicted after trial, it would impose a sentence close to the maximum allowable under law.” *Green*, 240 AD2d at 514. *See also Britt v State*, 260 AD2d 6, 12-13 (1st Dept 1999) (lower court did not coerce guilty plea where it “merely advised claimant that, *in view of his four prior felony convictions*, he ‘would not be getting closer to the minimum, but closer to the maximum’” [emphasis in original]).

New York state courts have held that discussion of possible sentences a defendant could face is improper when the judge unequivocally or explicitly states that upon conviction a heavier sentence will be imposed. *See Stevens*, 298 AD2d at 268; *Christian*, 139 AD2d at 897; *Hollis*, 74 AD2d at 585. *Cf. People v Coleman*, 203 AD2d 729 (3d Dept 1994) (trial judge did not coerce guilty plea where the record “lack[ed] an explicit threat to give defendant a heavier sentence if he exercised his right to trial,” and the judge informed the defendant that consecutive sentences were legally permissible upon multiple convictions.)

In *Stevens*, 298 AD2d at 268, the Appellate Division found that the trial judge coerced a guilty plea when, in the course of plea negotiations, the judge told the defendant, “[O]nce we go forward, there will be no turning back. If you’re convicted after trial, given the circumstances of this case under which you were apprehended and the nature of your record, 25 to life, that’s what you’re going to get.” The court reasoned that the trial judge’s statements were “more than a description of the full range of possible sentences” or a “reasonable assessment of the sentencing prospects in the event of a conviction,” and constituted “outright coercion.” *Id.* at 268 (citations omitted).

In *People v Fanini*, 222 AD2d 1111 (4th Dept 1995), the Appellate Division found that the trial judge’s statement to the defendant prior to his plea – “Eight to life... What you would receive in the event of a conviction would be twenty-five” – constituted coercion and rendered the guilty plea involuntary. *See also People v Beverly*, 139 AD2d 971 (4th Dept 1988) (guilty plea coerced where prior to plea, the trial court told the defendant “if we have to go to trial and work” the court probably would impose the maximum sentence “on top of” the sentence for another crime).

In *People v Wilson*, 245 AD2d 161 (1st Dept 1997), the trial court advised the defendant of its personal “policy” of sentencing predicate felons convicted after trial to “the high end of the sentencing chart.” In reversing the conviction and vacating the plea, the Appellate Division concluded that the trial court “did not ‘threaten’ to impose a greater sentence — it virtually promised to do so, according to its stated ‘policy.’” *Id.* at 163-64. The inexorable effect of the trial judge’s statements, the Court found, was to coerce the defendant into pleading guilty.

Commission Action

Consistent with its obligation to enforce the Rules, the Commission will examine complaints which on their face provide credible indication that a judge may have coerced a guilty plea, in

violation of the judicial obligations to be impartial, respect and comply with the law, be faithful to and professionally competent in the law, and accord the parties their right to be heard.

The Commission has found it appropriate to issue confidential cautions where these Rules were violated in circumstances involving more than a good-faith error of law, such as where the judge attempted to elicit incriminating statements from the defendant; or declared as if speaking for the prosecutor that the plea offer would automatically increase every time the defendant rejected it, based on factors extrinsic to the case, such as the judge's view that the defendant's prior arrests should be held against him, without regard to whether acquittals or convictions had resulted from such arrests; or violated other rules in the process, such as the obligation to be patient, dignified and courteous toward litigants, lawyers and others.

Where the coercion is extreme and repetitive, public discipline is warranted. In *Matter of Bauer*, 3 NY3d 158 (2004), a city court judge was removed from office for *inter alia* coercing guilty pleas by setting exorbitant bail that defendants accused of minor offenses (such as bicycle violations) could not meet, then days later offering release if the incarcerated defendant pled guilty.

By calling attention to the informative appellate decisions addressing this issue, and also by suggesting here that OCA vigorously address it in judicial training and education programs, the Commission hopes to obviate its own involvement in the area by helping to eliminate the conduct that gives rise to it.

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 caseload. The 11,117 complaints which were processed and reviewed between 2007 and 2012 represent a 28% increase over the preceding 6 years. The average number of preliminary inquiries increased by 16% over that period (from 374 to 434). Significantly, despite these increases, the number of pending complaints has decreased by 25% (from 275 to 206).

In light of the significant financial stress constraining all of state government for several years, the Commission has proposed a "flat" budget of just under \$5.4 million for the sixth year in a row. This will again result in economies, since escalating contractual obligations such as rent would actually increase annual costs. Nevertheless, 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 ²	New Investig'ns	Pending Year End	Public Disciplines	Attorneys on Staff ³	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
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	1818	172	216	14	17	9	49
2012	5.4m	1785	182	206	20	19	9	49
2013	5.4m ⁴	~	~	~	~	19	9	50

¹ Budget figures are rounded off; budget figures are fiscal year (Apr 1 – Mar 31).

² Complaint figures are calendar year (Jan 1 – Dec 31);

³ Number includes Clerk of the Commission, who does not investigate or litigate cases

⁴ 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

HON. TERRY JANE RUDERMAN, VICE CHAIR

HON. ROLANDO T. ACOSTA

JOSEPH W. BELLUCK, ESQ.

JOEL COHEN, ESQ.

RICHARD D. EMERY, ESQ.

PAUL B. HARDING, ESQ.

NINA M. MOORE

RICHARD A. STOLOFF, ESQ.

HON. DAVID A. WEINSTEIN

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
Terry Jane Ruderman	Chief Judge Jonathan Lippman	1999	3/31/2016
Rolando T. Acosta	Chief Judge Jonathan Lippman	2010	3/31/2014
Joseph W. Belluck	Governor Andrew M. Cuomo	2008	3/31/2016
Joel Cohen	Assembly Speaker Sheldon Silver	2010	3/31/2014
Richard D. Emery	(Former) Senate Minority Leader John L. Sampson	2004	3/31/2016
Paul B. Harding	(Former) Assembly Minority Leader James Tedisco	2006	3/31/2013
Nina M. Moore	(Former) Governor David A. Paterson	2009	3/31/2013
Richard A. Stoloff	Senate President Pro Tem Dean Skelos	2011	3/31/2015
David A. Weinstein	Governor Andrew M. Cuomo	2012	3/31/2014
Vacant	Governor		3/31/2015

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 is a former lecturer for the Office of Court Administration's continuing Judicial Education Programs for Town and Village Justices.

Honorable Terry Jane Ruderman, *Vice Chair of the Commission*, graduated *cum laude* from Pace University School of Law, and 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 State 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.

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 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. He widely lectures on Professional Responsibility. 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). He also authored *Truth Be Veiled: A Justin Steele Murder Case* (Coffeetown Press, 2010), a novel on legal ethics and truth. Mr. Cohen has authored over 200 articles in legal periodicals – including a bimonthly column on “Ethics and Criminal Practice” for the New York Law Journal, and columns for Law.com and Huffington Post.

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 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.

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 headed the Research Council and the Faculty Development Council. She was appointed to the endowed Arnold R. Sio Chair in Diversity and Community for 2009-2011, as part of which she spearheaded campus-wide initiatives promoting faculty and student research on diversity. Moore previously held teaching positions at DePaul University, the University of Minnesota and Loyal University of Chicago. A member of the American Political Science Association, Moore was selected to chair the Constitutional Law and Jurisprudence Division of the national organization for 2011-2012. Professor Moore is the author of *Racial Tracking and Criminal Justice in America: Policy Makers, the Public, and Law Enforcement* (Cambridge University Press, forthcoming), *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 has served on the editorial board of the *Ralph Bunche Journal of Public Affairs*, and is also a member of the New York State Advisory Council on Underage Alcohol Consumption and Youth Substance Abuse.

Richard A. Stoloff, Esq., graduated from The City College of the City University of New York, and Brooklyn Law School. He is a partner in the law firm of Stoloff & Silver, LLP, in Monticello, New York, and he serves as Town Attorney for the Town of Mamakating. Mr. Stoloff is a past President of the Sullivan County Bar Association and has chaired its Grievance Committee since 1994. He is a member of the New York State Bar Association and has served on its House of Delegates. He is also a member of the American Bar Association and the New York State Trial Lawyers Association.

Honorable David A. Weinstein is a graduate of Wesleyan University and Harvard Law School, where he was Notes Editor for the Harvard Human Rights Journal. He is a Judge of the Court of Claims, having been appointed by Governor Andrew M. Cuomo in 2011 for a term ending in 2018. Judge Weinstein served previously as Assistant Counsel and First Assistant Counsel to Governors Cuomo, David A. Paterson and Eliot L. Spitzer, as a New York State Assistant Attorney General, as an Associate in the law firm of Debevoise & Plimpton, as Law Clerk to United States District Court Judge Charles S. Haight (SDNY) and as *Pro Se* Law Clerk to the United States Court of Appeals for the Second Circuit. He also served as an Adjunct Professor of Legal Writing at New York Law School and has written numerous articles for legal and other publications.

RECENT MEMBERS

Honorable Karen K. Peters served on the Commission from 2000 to October 15, 2012. She is Presiding Justice of the Appellate Division, Third Department, having been appointed to that position by Governor Andrew M. Cuomo on April 5, 2012. She 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, Governor Eliot L. Spitzer in 2007, and Governor Andrew M. Cuomo in 2011. Governor Cuomo appointed her as Presiding Justice on April 5, 2012. 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.

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 previously served as a Trustee of the Westwood Mutual Funds and the United Nations International School, and on the Board of Directors of the Civic Education Project. Mr. Tembeckjian has served on various ethics and professional responsibility committees of the New York State and New York City Bar Associations, and he has published numerous articles in legal periodicals on judicial ethics and discipline. He was a member of the editorial board of the Justice System Journal, a publication of the National Center for State Courts, from 2007-10.

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 of Union University. In 1979, she completed the course superior at the Institute of Touraine in Tours, France. Ms. Cenci joined the Commission staff in 1985. She has been a judge of the Albany Law School moot court competitions and a member of Albany County Big Brothers/Big Sisters.

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

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

Mark Levine, *Deputy Administrator in Charge of the Commission's New York office*, is a graduate of the State University of New York at Buffalo and Brooklyn Law School. He previously served as Principal Law Clerk to Acting Supreme Court Justice Jill Konviser and Supreme Court Justice Phylis Skloot Bamberger, as an Assistant Attorney General in New York,

as an Assistant District Attorney in Queens, and as law clerk to United States District Court Judge Jacob Mishler. Mr. Levine also practiced law with the law firms of Patterson, Belknap, Webb & Tyler, and Weil, Gotshal & Manges.

Mary C. Farrington, *Administrative Counsel*, is a graduate of Barnard College and Rutgers Law School. She previously served as an Assistant District Attorney in Manhattan, most recently as Supervising Appellate Counsel, until April 2011, when she joined the Commission staff. She has also served as Law Clerk to United States District Court Judge Miriam Goldman Cedarbaum, and as an associate in private practice with the law firm of Fried, Frank, Harris, Shriver & Jacobson in Manhattan.

Pamela Tishman, *Principal Attorney*, is a graduate of Northwestern University and New York University School of Law. She previously served as Senior Investigative Attorney in the Office of the Inspector General at the Metropolitan Transportation Authority. Ms. Tishman also served as an Assistant District Attorney in New York County, in both the Appeals and Trial Bureaus, where she prosecuted felonies and misdemeanors.

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 in Manhattan, 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 of New York at Buffalo (*summa cum laude*) and the SUNY 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 and Albany Law School. After practicing law with Adams & Hoeth in Albany, she served in public sector posts including Executive Director of the New York State Ethics Commission, Special Advisor to the Governor for Management and Productivity, Deputy Director of State Operations, and Executive Director of the New York State Office of Business Permits and Regulatory Assistance. She has lectured and written on public sector ethics and taught legal ethics at The Sage Colleges. She is a former member of the Advisory Committee of Albany Law School's Government Law Center and has extensive not-for-profit management experience.

Brenda Correa, *Senior 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.

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.

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.

S. Peter Pedrotty, *Staff Attorney*, is a graduate of St. Michael's College (*cum laude*) and the Albany Law School of Union University (*magna cum laude*). Prior to joining the Commission staff, he served as an Appellate Court Attorney at the Appellate Division, Third Department, and was engaged in the private practice of law in Saratoga County and with the law firm of Clifford Chance US LLP in Manhattan.

Erica K. Sparkler, *Staff Attorney*, is a graduate of Middlebury College (*cum laude*) and Fordham University School of Law (*magna cum laude*). Prior to joining the Commission staff, she was an associate in private practice with the law firms of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer and Gibson, Dunn & Crutcher. Ms. Sparkler also served as law clerk to United States District Court Judge Peter K. Leisure.

Daniel W. Davis, *Staff Attorney*, is a graduate of New York University (*cum laude*), earned a Masters in Public Administration at NYU and graduated from the Benjamin N. Cardozo School

of Law, where he was Articles Editor on the law review and a teaching assistant. Prior to joining the Commission staff, he was Senior Consultant with a business advisory firm.



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.



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.



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 2012

Referee	City	County
Hon. Frank J. Barbaro	Watervliet	Albany
Robert A. Barrer, Esq.	Syracuse	Onondaga
G. Michael Bellinger, Esq.	New York	New York
Peter Bienstock, Esq.	New York	New York
Jay C. Carlisle, Esq.	White Plains	Westchester
Linda J. Clark, Esq.	Albany	Albany
William T. Easton, Esq.	Rochester	Monroe
Vincent D. Farrell, Esq.	Mineola	Nassau
Paul Feigenbaum, Esq.	Albany	Albany
Edward B. Flink, Esq.	Latham	Albany
David Garber, Esq.	Syracuse	Onondaga
Henry Greenberg, Esq.	Albany	Albany
Trevor L.F. Headley, Esq.	New York	Kings
Victor J. Hershendorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
H. Wayne Judge, Esq.	Glens Falls	Warren
Nancy Kramer, Esq.	New York	New York
Sherman F. Levey, Esq.	Rochester	Monroe
Roger Juan Maldonado, Esq.	New York	New York
Gregory S. Mills, Esq.	Clifton Park	Saratoga
Hugh H. Mo, Esq.	New York	New York
Gary Muldoon, Esq.	Rochester	Monroe
Malvina Nathanson, Esq.	New York	New York
Steven E. North, Esq.	New York	New York
Edward J. Nowak, Esq.	Penfield	Monroe
Hon. Felice K. Shea	New York	New York
Hon. Richard D. Simons	Rome	Oneida
Steven Wechsler, Esq.	Syracuse	Onondaga

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 (1995-2011)
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 (2008-2011)
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 (2000-12)
*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)
Richard A. Stoloff (2011-present)
Hon. William C. Thompson (1990-98)
Carroll L. Wainwright, Jr. (1974-83)
Hon. David A. Weinstein (2012-present)

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, 46,940 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 38,772 were dismissed upon initial review or after a preliminary review and inquiry, and 8,168 investigations were authorized. Of the 8,168 investigations authorized, the following dispositions have been made through December 31, 2012:

- 1,072 complaints involving 814 judges resulted in disciplinary action. (See details below and on the following page.)
- 1,621 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1,498, 88 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 679 complaints involving 480 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 523 complaints were closed upon vacancy of office by the judge other than by resignation.
- 4,067 complaints were dismissed without action after investigation.
- 206 complaints are pending.

Of the 1,072 disciplinary matters against 814 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 92 decisions by the Court of Appeals, 16 of which modified a Commission determination.

- 164 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);
- 335 judges were censured publicly;
- 250 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 92 determinations filed by the present Commission. Of these 92 matters:

- The Court accepted the Commission's sanctions in 76 cases (67 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.
- One request for review is pending.

APPENDIX E: RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR § 100 *et seq.*

Rules of the Chief Administrator of the Courts Governing Judicial Conduct

Preamble

- Section 100.0** Terminology.
- Section 100.1** A judge shall uphold the integrity and independence of the judiciary.
- Section 100.2** A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.
- Section 100.3** A judge shall perform the duties of judicial office impartially and diligently.
- Section 100.4** A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.
- Section 100.5** A judge or candidate for elective judicial office shall refrain from inappropriate political activity.
- Section 100.6** Application of the rules of judicial conduct.

Preamble

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

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

The text of the rules is intended to govern conduct of judges and candidates for elective judicial office and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there

is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

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

Section 100.0 Terminology.

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

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

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

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

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

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

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

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit

union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Part"-refers to Part 100.

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

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

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

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

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

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

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

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

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

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

Historical Note

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

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

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

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

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

Historical Note

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

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

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

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

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

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

Historical Note

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

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

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

(B) Adjudicative Responsibilities.

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

(2) A judge shall require order and decorum in proceedings before the judge.

(3) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

(5) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.

(e) A judge may initiate or consider any ex parte communications when authorized by law to do so.

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

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

(9) A judge shall not:

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

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

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

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

(C) Administrative Responsibilities.

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

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

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

court. A judge also shall comply with the requirements of Part 8 of the Rules of the Chief Judge (22 NYCRR Part 8) relating to the Appointment of relatives of judges. Nothing in this paragraph shall prohibit appointment of the spouse of the town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that the justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(D) Disciplinary Responsibilities.

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

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

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

(E) Disqualification.

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

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

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

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

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

(i) is a party to the proceeding;

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

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

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

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

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

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

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

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

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 50.5 of the Rules of the Chief Judge (22 NYCRR 50.5).

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:
DETERMINATIONS RENDERED
BY THE COMMISSION IN 2012**

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

GARY F. ANDERSON,

a Justice of the Bainbridge Town Court,
Chenango County.

DECISION
AND
ORDER

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
Honorable Gary F. Anderson, *pro se*

The matter having come before the Commission on December 6, 2012; and
the Commission having before it the Stipulation dated November 20, 2012, with the
appended exhibits; and respondent having tendered his resignation from judicial office by

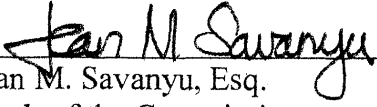
letter dated October 25, 2012, stating that he will vacate judicial office as of November 30, 2012, and having affirmed that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will become public upon being signed by the signatories and the Commission's Decision and Order thereto will become public; 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 was not present.

Dated: December 7, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

GARY F. ANDERSON,

STIPULATION

A Justice of the Bainbridge Town Court,
Chenango County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission, and the Honorable Gary F. Anderson (“respondent”), as follows:

1. Respondent has been a Justice of the Bainbridge Town Court, Chenango County, since November 2008. His current term expires December 31, 2013. Respondent is not an attorney.
2. Respondent was served with a Formal Written Complaint dated September 17, 2012, containing six charges alleging that he engaged in judicial misconduct in his handling of cases between in or about February 2011 to in or about September 2012. The allegations of the Formal Written Complaint include, *inter alia*, that respondent: (1) failed to advise a defendant of his right to counsel and to an adjournment to obtain counsel, (2) inappropriately questioned defendants at arraignment, (3) engaged in and considered improper *ex parte* communications concerning the merits of charges in three cases, (4) found a defendant guilty although he had not been served, (5) found a defendant guilty without a trial or the opportunity to cross-examine a witness

and found two other defendants guilty without guilty pleas or trial, (6) allowed and considered unsworn statement and evidence not properly admitted, (7) in two cases, dismissed the charges without notice to or the consent of the prosecution as required by law and (8) in three cases failed to mechanically record all proceedings before him as required by Administrative Order 245/08 issued pursuant to Section 30.1 of the Rules of the Chief Judge.

3. The Formal Written Complaint is appended as Exhibit A. The Complaint has not been adjudicated. Respondent enters into this Stipulation in lieu of filing an Answer to the Formal Written Complaint, without admitting the allegations of the charges.

4. Respondent tendered his resignation, dated October 25, 2012, a copy of which is annexed as Exhibit B. Respondent affirms that he will vacate judicial office as of November 30, 2012.

5. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from the date of a judge's resignation to complete proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.

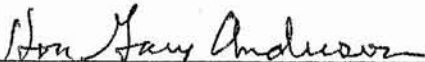
6. Respondent affirms that, once he has vacated his judicial office, he will neither seek nor accept judicial office at any time in the future.

7. Respondent understands that, should he abrogate the terms of this Stipulation and hold any judicial position at any time, the present proceedings before the Commission will be revived and the matter will proceed to a hearing before a referee.

8. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

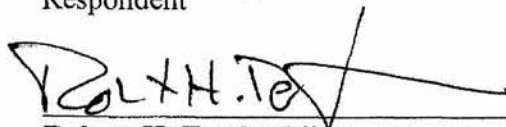
9. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that: (1) this Stipulation will become public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: 11/13/12



Honorable Gary F. Anderson
Respondent

Dated: 11/20/2012



Robert H. Tembeckjian
Administrator and Counsel to the Commission
(Thea Hoeth, Of Counsel)

EXHIBIT A: FORMAL WRITTEN COMPLAINT:
Available at www.cjc.ny.gov

EXHIBIT B: RESPONDENT'S LETTER OF RESIGNATION:
Available at www.cjc.ny.gov

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

NORA S. ANDERSON,

a Judge of the Surrogate's Court,
New York County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Brenda Correa, Of Counsel) for the Commission
Godosky & Gentile, P.C. (by David Godosky) for the Respondent

The respondent, Nora S. Anderson, a Judge of the Surrogate's Court, New York County, was served with a Formal Written Complaint dated July 29, 2011. The

Formal Written Complaint contains two charges of misconduct arising from her 2008 campaign for Surrogate. Charge I alleged that respondent and her then-employer participated in a series of financial transactions in which she accepted a purported gift and a purported loan from him and promptly funneled those funds to her campaign. Charge II alleged that after the primary election and before the general election, respondent's campaign held a fundraiser for the purpose of repaying a loan respondent had made to her campaign. Respondent filed a verified answer dated September 21, 2011.

On June 26, 2012, the Administrator, 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 19, 2012, the Commission accepted the Agreed Statement provided that the parties agreed that Charge II would be dismissed and the Agreed Statement would be modified to so reflect. The Clerk of the Commission so advised the Administrator and respondent's counsel. By joint letter dated September 21, 2012, the respective attorneys advised the Commission that they agreed that Charge II be dismissed.

Accordingly, the Commission makes the following determination:

1. Respondent has been a Judge of the Surrogate's Court, New York County, since 2009. Her term expires on December 31, 2022. She was admitted to the practice of law in New York in 1983.
2. At all times relevant to the matters herein, respondent was and is

married to Vincent A. Levell, an attorney employed by the New York State Unified Court System.

3. Prior to becoming a judge, respondent was employed as an attorney in the law firm of Seth Rubenstein, PC, in Brooklyn, New York, from 1999 to 2008. Respondent had previously worked as Chief and Deputy Chief Clerk in the Surrogate's Court, New York County. Over the years, the relationship between respondent and Mr. Rubenstein developed into one in which he was a friend and mentor. They were and remain very close. For example, in 2004, Mr. Rubenstein executed a last will and testament in which he bequeathed to respondent \$500,000.

4. In April 2008, respondent became a candidate for the Democratic nomination for Surrogate of New York County. She had never previously run for election to any office. Her opponents in the Democratic primary were Supreme Court Justice Milton A. Tingling and attorney John J. Reddy, Jr. The primary election date was September 9, 2008. The general election date was November 4, 2008. Winning the Democratic primary for Surrogate was tantamount to election, inasmuch as there was no Republican or other political party candidate on the ballot in the general election.

Respondent's Indictment and Acquittal on Criminal Charges

5. In December 2008, respondent and Seth Rubenstein were indicted by a New York County Grand Jury on various charges, including felonies and misdemeanors arising from monetary transactions that Rubenstein made to respondent during the 2008 campaign.

6. Eight of the ten criminal charges in the indictment were dismissed prior to trial on jurisdictional grounds by Supreme Court Justice Michael Obus. The District Attorney did not appeal the dismissal, and respondent and Mr. Rubenstein were tried on the two remaining counts of Offering a False Instrument for Filing in the First Degree. One count pertained to the filing of the 11 day Pre-Primary Report with the New York State Board of Elections on September 3, 2008, and the other count pertained to the filing of the 10 day Post-Primary Report with the New York State Board of Elections on September 20, 2008. On April 1, 2010, after a jury trial, respondent and Mr. Rubenstein were found not guilty of both charges. Respondent has not been prosecuted by any other entities.

7. The Commission, which had held its investigation of respondent in abeyance pending resolution of the criminal charges, thereafter investigated the matters herein and, *inter alia*, took sworn statements from respondent and Mr. Rubenstein.

8. The Formal Written Complaint dated July 29, 2011, charges respondent with ethical violations arising from monetary transactions between her and Mr. Rubenstein, not with criminal violations arising from the reports her campaign filed.

With respect to Charge I of the Formal Written Complaint:

Respondent's Campaign Structure

9. When respondent became a candidate for the Democratic nomination for Surrogate of New York County in April 2008, Seth Rubenstein played an active role in her campaign. Although he did not have an official title in respondent's campaign, Mr.

Rubenstein was actively involved in fundraising for respondent, was one of the signatories on the campaign's bank account and participated in the hiring of respondent's campaign staff, including designating a non-lawyer employee of his law firm (Janise Dawson) to serve as the campaign's treasurer. Ms. Dawson was not experienced in the role of campaign treasurer and did not make strategic campaign decisions.

10. The campaign committee hired Kalmen Yeger of Compliance New York as a consultant for campaign finance compliance purposes. Mr. Yeger was retained to provide advice as to all campaign filings and was the person in charge of such filings on behalf of respondent's campaign committee. Ms. Dawson consulted with and was advised by Mr. Yeger as to all campaign filings. Respondent was aware that the campaign had retained Mr. Yeger as a consultant with expertise in campaign filings.

11. Michael Oliva was respondent's campaign manager. He had experience in managing judicial campaigns.

Pertinent Provisions of the New York Election Law

12. Pursuant to Election Law Section 14-114(1)(b)(i), for the primary election in which respondent was a candidate, the maximum contribution for a non-family member was based on a formula of \$.05 times the total number of enrolled voters in the candidate's district, excluding voters in inactive status. The maximum campaign contribution for an individual other than the candidate in the 2008 primary election for New York County Surrogate was \$33,122.50. The principals in respondent's campaign – Mr. Rubenstein, Mr. Oliva and respondent herself – became aware of the maximum

contribution limits.

13. Under Election Law Section 14-114(6)(a), campaign loans that have not been repaid prior to the election date are considered to be campaign contributions that may not exceed the maximum contribution amount permitted by law. Mr. Rubenstein, Mr. Oliva and respondent herself were aware of this provision.

14. Election Law Section 14-120(1) further provides:

No person shall in any name except his own, directly or indirectly, make a payment or promise of payment to a candidate or political committee or to any officer or member thereof, or to any person acting under its authority or in its behalf or on behalf of any candidate, nor shall any such committee or any such person or candidate knowingly receive a payment or promise of payment, or enter or cause the same to be entered in the accounts or records of such committee, in any name other than that of the person or persons by whom it is made.

Mr. Rubenstein, Mr. Oliva and respondent herself were aware of this provision.

15. Election Law Section 14-100(9)(1) defines a “contribution” as “any gift, subscription, outstanding loan . . . advance, or deposit of money or any thing of value made in connection with the nomination for election, or election, of any candidate, or made to promote the success or defeat of a political party or principle, or of any ballot proposal[.]” The term “contribution,” as defined by Election Law Section 14-100(9)(1), refers to gifts or loans “made in connection with the nomination for election, or election.” Mr. Rubenstein, Mr. Oliva and respondent herself were aware of this provision.

16. There is no limit on how much a candidate may contribute to his/her own campaign. Mr. Rubenstein, Mr. Oliva and respondent herself were aware of this

provision.

Fundraising Associated with Respondent's Campaign

17. Respondent's campaign hired consultants to help with fundraising. Their efforts were largely unsuccessful, and on some occasions the campaign lost money on fundraising events.

18. Mr. Rubenstein contributed \$25,000 to the campaign and on April 14, 2008 he loaned the campaign \$225,000.

19. Thereafter, there were press reports and criticism by respondent's opponents as to Mr. Rubenstein's significant role in respondent's campaign, given that he was an active practitioner in Surrogate's Court.¹

20. By the summer of 2008, respondent's campaign was without sufficient funds to pay for campaign mailings, which respondent's campaign advisors considered necessary for respondent to win the primary election. A company that was chosen by Michael Oliva to handle campaign mailings would not send out a mailing until the campaign was able to pay for it in advance.

21. Respondent discussed the campaign's financial status with Mr. Rubenstein. Respondent knew that Mr. Rubenstein had attended the Election Law course given by Henry Berger at the State Bar Association.² Respondent believed that Mr.

¹ In view of their longstanding professional and personal relationship, respondent avers she would disqualify herself from any Surrogate Court matters involving Mr. Rubenstein. Neither Mr. Rubenstein nor his firm has ever appeared before respondent as Surrogate.

² Mr. Berger was a Member of the Commission on Judicial Conduct from 1988 to 2004, serving as Chair for 13 of those years.

Rubenstein understood the intricacies of the Election Law and, during her campaign, deferred to him on these matters. At the time, she did not personally review the Election Law or seek the advice of anyone else.

22. Mr. Rubenstein advised respondent that the Election Law permitted a candidate to receive money as a personal gift or loan, which the candidate could then convey to the campaign as a contribution or loan in his/her own name.

23. Respondent accepted Mr. Rubenstein's advice. Neither respondent nor Mr. Rubenstein sought advice on their plan from a lawyer specializing in election law, the Board of Elections, the Unified Court System's Judicial Campaign Ethics Center or the Advisory Committee on Judicial Ethics.

24. On August 12, 2008, Mr. Rubenstein gave respondent a check payable to her personally for \$100,000 from his personal funds as a gift. The purpose of the funds was to benefit respondent's campaign. Respondent promptly deposited the check into her personal bank account. On August 19, 2008, respondent issued a personal check payable to her campaign for \$100,000. This transaction was reported to the Board of Elections by respondent's campaign as a contribution of \$100,000 by respondent to her campaign.

25. On August 26, 2008, Mr. Rubenstein electronically wired \$150,000 from his personal bank account to respondent's brokerage account. The purpose of the funds was to benefit respondent's campaign. On that same date, respondent wire-transferred \$150,000 from her brokerage account to her campaign's bank account. This

transaction was reported to the Board of Elections by respondent's campaign as a loan of \$150,000 by respondent to her campaign. There was no written documentation of the loan, nor was there any collateral or other security associated with the loan.

26. Mr. Rubenstein told respondent that "personal" loans or gifts to a candidate were not specifically addressed in the Election Law, that it was permissible for her to convey to her campaign the \$250,000 he had gifted or loaned her, and that these transactions were equivalent to what Eliot Spitzer had done in connection with his 1994 campaign for New York State Attorney General.³ Mr. Rubenstein did not cite for respondent any examples other than the Spitzer campaign in support of his theory that his "gift" and "loan" totaling \$250,000 to respondent could properly be transferred to her campaign.

27. Both respondent and her husband (a court employee earning over \$88,256 in salary) filed mandatory financial disclosure statements with the Ethics Commission of the Unified Court System for the years at issue, but neither reported the \$150,000 loan from Mr. Rubenstein to respondent, which they were obliged to disclose.

28. Having now examined and reflected on both the letter and spirit of the relevant laws, respondent agrees that, notwithstanding the advice and opinions

³ In 1994, after his unsuccessful primary campaign, Mr. Spitzer apparently received a personal loan from his father to repay bank loans previously taken for the campaign. According to an article in the *New York Times* on October 28, 1998, Thomas R. Wilkey, then executive director of the State Board of Elections, opined that the "favorable loan terms" from Mr. Spitzer's father would "probably" not be construed as a campaign contribution. The article does not quote Mr. Wilkey or other election officials on the propriety of the personal loan itself.

provided to her:

- A. The two conveyances by Mr. Rubenstein, totaling \$250,000, for the benefit of her campaign, were contrary to the generally accepted and understood interpretation of the Election Law;
- B. The timing and circumstances of the funds transferred to her by Mr. Rubenstein show that such transfers were made in connection with her “nomination for election or election” and therefore were “contributions” by Mr. Rubenstein under the generally accepted and understood interpretation of Election Law Section 14-100(9)(1);
- C. Mr. Rubenstein interpreted the Election Law in a manner that permitted him to exceed the maximum allowable contribution to respondent’s campaign;
- D. Respondent should at least have consulted with such entities as the Board of Elections, the Judicial Campaign Ethics Center or the Advisory Committee on Judicial Ethics for specific guidance on her particular situation.

29. While it was not respondent’s intention to violate the Election Law, respondent accepts responsibility for not taking the necessary steps to ensure that her campaign’s finances were conducted in scrupulous compliance with the law. Respondent acknowledges that it is improper for a judicial candidate to accept, in the form of a personal gift or loan, monetary contributions from a person in an amount that exceeds the maximum that person may directly contribute to a campaign.

Total Funds Raised and Spent by the Three Campaigns

30. Respondent’s campaign reported having raised \$623,974.57 before the date of the primary and having spent \$610,721.43. Mr. Reddy’s campaign reported having raised \$636,404.53 before the date of the primary and having spent \$606,486.50. Judge Tingling’s campaign reported having raised \$124,944.00 before the date of the

primary and having spent \$126,344.91.

Results of the Primary

31. Respondent won the Democratic primary on September 9, 2008, with 28,638 votes, against 15,305 votes for Mr. Reddy, 14,758 votes for Judge Tingling and 180 votes spread among 15 write-in candidates.

Effects of the Rubenstein Money

32. Neither respondent nor the Administrator can quantitatively demonstrate the impact that the \$250,000 from Mr. Rubenstein had on the outcome of the 2008 primary. Respondent cannot demonstrate that she would have won the primary without the Rubenstein money, and the Administrator cannot demonstrate that she would have lost without it.

33. Both respondent and the Administrator agree that it is reasonable for the public to perceive that the \$250,000 from Mr. Rubenstein influenced the campaign, in that it gave respondent the means to publicize her candidacy among the electorate.

34. Respondent acknowledges that to date she has only repaid \$14,000 of the \$150,000 loan from Mr. Rubenstein.

35. Other than this case and the public reports concerning the campaign financing methods of Eliot Spitzer's campaign for Attorney General in 1994, neither respondent nor the Administrator is aware of any other New York campaign in which an individual made an unreported financial gift or loan to a candidate for the purpose of channeling the money to the candidate's campaign, in an amount above the maximum

such individual could have contributed to the campaign in his or her own name. Having now examined and reflected upon the applicable law and rules, respondent acknowledges that it is the generally accepted view that a campaign financing structure such as employed by her and Mr. Rubenstein is improper.

36. Both respondent and the Administrator agree that respondent's conduct with regard to the Rubenstein money undermined public confidence in the independence and integrity of the judiciary by undermining its confidence in the integrity and fairness of her election to the bench.

As to Charge II of the Formal Written Complaint:

37. Respondent won the Democratic primary for Surrogate of New York County on September 9, 2008. There were no other candidates on the ballot against her in the general election held on November 4, 2008. Respondent was therefore assured of victory.

38. Respondent was elected Surrogate of New York County on November 4, 2008, with 424,226 votes. There were 13 votes spread among 11 write-in candidates. Her nearest rival was a write-in candidate who received two votes.

39. On or about October 6, 2008, after respondent won the Democratic Party primary election for Surrogate of New York County, and before the general election in which she was the only candidate on the ballot, respondent's campaign held a fundraiser at Lattanzi Ristorante, in Manhattan, with a minimum requested contribution of \$1,000 for each attendee.

40. The stated purpose of the fundraiser at Lattanzi was to “retire the debt.” At the time, according to the campaign finance report filed by respondent’s campaign with the New York State Board of Elections, respondent was the campaign’s major, although not only, creditor and was owed approximately \$368,185 by the campaign.

41. The Advisory Committee on Judicial Ethics has repeatedly opined that a post-election fundraiser may not be held for the purpose of repaying loans made by the judge to his or her campaign committee. *See* Advisory Opinions 05-136, 03-119, 96-31 and 94-21.

42. Respondent believed that the prohibition on post-election fundraising to repay loans to the candidate pertained to the general election and not prior. Respondent did not seek an Advisory Opinion herself or consult anyone regarding the propriety of holding such a fundraiser.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.5(A)(4)(a) and 100.5(A)(5) 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. Charge II is not sustained and therefore is dismissed.

At a time when her 2008 campaign for the Democratic nomination for Surrogate needed funds before the primary, respondent engaged in a series of financial transactions with her employer and friend, Seth Rubenstein, that circumvented the contribution limits imposed by law and disguised the source of the funds. Instead of giving money to respondent's campaign committee – which would require disclosing the source of the funds – Rubenstein gave respondent a \$100,000 gift and a \$150,000 loan, which she accepted and promptly contributed to the campaign in her own name as a gift and loan. As respondent now stipulates, these transactions were inconsistent with the ethical standards required of judicial candidates and undermined public confidence in the integrity and fairness of her election to the bench.

Pursuant to the Election Law, the maximum amount an individual other than the candidate was permitted to contribute to her campaign was \$33,122. (There was no limit on the amount the candidate herself could contribute.) Thus, a \$100,000 gift to the campaign by Rubenstein would have far exceeded the amount permitted by law. A loan by Rubenstein to the campaign would be deemed a contribution, subject to the contribution limits, if not repaid prior to the election and, moreover, would require publicly disclosing the source of the funds. Having already been subject to press criticism for Rubenstein's active role in her campaign, respondent chose an alternative means of financing her campaign that effectively concealed the source of the funds from public disclosure.

There can be no doubt that the \$250,000 respondent accepted from

Rubenstein was a disguised contribution to her campaign since, as has been conceded, the purpose of the funds “was to benefit respondent’s campaign” (Agreed Statement, par 23, 24). Thus, regardless of whether these maneuvers were consistent with the Election Law, respondent, by accepting these monies directly from Rubenstein, violated the ethical mandate prohibiting judicial candidates from personally accepting campaign contributions and requiring that such funds be collected through a committee (Rules, §100.5[A][5]). Adding to the perception that these transactions were a charade whose purpose was to disguise Rubenstein’s contribution are the facts that: (i) the \$150,000 loan was undocumented; (ii) to date, four years after the loan, respondent has repaid Rubenstein only \$14,000; and (iii) respondent did not report the loan on her financial disclosure statements, which are required to be filed on an annual basis by the Rules of the Chief Judge (22 NYCRR §40.1).

In itself, respondent’s failure to report the outstanding loan, as required, is improper.⁴ As the Court of Appeals has stated, “Judges must complete their financial disclosure forms with diligence, making every effort to provide complete and accurate information”; the failure to fully disclose assets and liabilities on these forms “is a serious matter” (*Matter of Alessandro*, 13 NY3d 238, 249 [2009] [judge admonished for omitting

⁴ The Commission’s 2008 Annual Report states: “As noted on the official website of the Unified Court System, the Ethics in Government Act of 1987 was enacted ‘in order to promote public confidence in government, to prevent the use of public office to further private gain, and to preserve the integrity of governmental institutions. The Act accomplishes those goals by prohibiting certain activities, requiring financial disclosure by certain State employees, and providing for public inspection of financial statements’” (p. 23).

assets and liabilities on his financial disclosure forms and on loan applications, notwithstanding that the omissions reflected “carelessness rather than deliberate concealment of material information”). The information provided on these forms is open to public scrutiny so that, for example, lawyers and litigants can determine whether to request a judge’s recusal. Respondent’s acceptance of a loan of this size from a lawyer who is an active practitioner in Surrogate’s Court would raise serious questions, notwithstanding the stipulation that Rubenstein has never appeared before her and that, in view of their relationship, she would disqualify herself in his cases. By omitting this information from her financial disclosure forms, for reasons that are unexplained in the record before us, respondent compounded the appearance of impropriety (Rules, §100.2[A]).

The contribution limits are clear, and the system requires full disclosure and truthful reporting, not cover-ups. If permitted, transactions such those depicted herein would thwart the statutory framework and public policy by eviscerating the contribution limits and reporting requirements. The issue before us is not whether these transactions were contrary to law, but whether they were inconsistent with the ethical standards for judicial candidates.

While it is improper for a judicial candidate to personally accept campaign contributions (Rules §100.5[A][5]), a disguised contribution is equally impermissible. As the Court of Appeals has repeatedly emphasized, “deception is antithetical to the role of a judge who is sworn to uphold the law and seek the truth” (*Matter of Myers*, 67 NY2d 550,

554 [1986]; *see also, e.g., Matter of Heburn*, 84 NY2d 168, 171 [1994]; *Matter of Alessandro, supra*, 13 NY3d at 248). In *Matter of Spector*, 47 NY2d 462, 466 (1979), the Court of Appeals admonished a Supreme Court Justice for appointing the sons of other judges who were contemporaneously appointing the judge's son, a practice that was akin to "disguised nepotism." Criticizing the practice in which judges circumvented the prohibition against nepotism by appointing each other's relatives, thereby "seeking to accomplish the objectives of nepotism while obscuring the fact thereof," the Court stated:

...[D]isguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing. Second, and this is peculiar to the judiciary, even if it cannot be said that there is proof of the fact of disguised nepotism, an appearance of such impropriety is no less to be condemned than is the impropriety itself.
[Emphasis added] (*Id.*)

Thus, regardless of whether there was an intent to evade the contribution limits and reporting requirements, the deception inherent in respondent's financial transactions with Rubenstein was inconsistent with the ethical standards required of judicial candidates. Although the effect of Rubenstein's disguised contribution on the success of respondent's campaign cannot be quantified, it is reasonable to conclude that the amount had a favorable impact on the result.

While it is stipulated that respondent, an inexperienced judicial candidate, deferred to Rubenstein's advice on these transactions and believed that he understood the intricacies of the Election Law, a candidate's reliance on his or her advisors does not excuse misconduct that is a clear violation of the ethical rules (*see, Matter of Shanley*,

2002 Annual Report 157, sanction accepted, 98 NY2d 310 [2002] [“A judicial candidate’s inexperience or reliance on the advice of campaign officials does not excuse misconduct during a political campaign” since every candidate “must be familiar with the relevant ethical standards”)].⁵ Moreover, despite the stipulation that Rubenstein “had attended the Election Law course given by Henry Berger,” there is no indication that Mr. Berger’s course in any way suggested that such transactions were an appropriate way to fund a campaign or that Rubenstein asked him whether such transactions were permissible. We also note that while respondent’s campaign staff included a consultant in “campaign finance compliance” and a campaign manager with experience in managing judicial campaigns, there is nothing in the record before us indicating that any of her advisors – other than Rubenstein – approved these financial transactions, or even knew about them.

The totality of the record thus demonstrates that respondent violated the ethical standards cited herein, notwithstanding the dismissal (on jurisdictional grounds) of criminal charges arising out of these transactions and her acquittal of other charges. It is well-established that behavior that results in dismissal of criminal charges can be the

⁵ With respect to the stipulation that Rubenstein advised respondent that these transactions “were equivalent to” loans made by Eliot Spitzer’s father in connection with Spitzer’s 1994 campaign for attorney general (Agreed Statement, par 25), we believe that any such comparison, even on the limited facts presented, is ill-founded. Unlike Spitzer, respondent was a judicial candidate governed by an ethical code; her situation did not involve family money; and the lender was not her father, but a lawyer who was “an active practitioner” in the judge’s court (Agreed Statement, par 18). A judge’s campaign officials should only rely on ethical advice from the Advisory Committee and the Judicial Campaign Ethics Committee.

subject of disciplinary action. The standard of proof is different, and ethical standards are different from those in the Penal Law. *See, e.g., Matter of Cohen*, 74 NY2d 272, 278 (1989) (upholding the removal of a judge for directing settlement funds to a credit union that was giving the judge personal loans at favorable rates and waiving the interest, the same conduct that had been the basis of criminal charges resulting in his acquittal; although a *quid pro quo* was not proved, these transactions “clearly created the impression that he was exploiting his judicial office for personal benefit [and] the further, and far more damaging impression, that his judicial decisions were influenced by personal profit motives”). *See also, Matter of Mills*, 2006 Annual Report 218; *Matter of Roepe*, 2002 Annual Report 153.

In accepting the stipulated sanction of censure, we underscore the seriousness with which we view the improprieties depicted in this record. A judge’s election is tarnished and the integrity of the judiciary is adversely affected by misconduct that circumvents the ethical standards imposed on judicial candidates and provides an unfair advantage over other candidates who respect and abide by the rules. In such cases, we must consider whether allowing the respondent to retain his or her judgeship would reward misconduct and encourage other judicial candidates to ignore the rules, knowing that they may reap the fruits of their misconduct.

We note in mitigation that respondent, as an inexperienced judicial candidate, relied on a trusted advisor whose advice, viewed most favorably, exploited a loophole in the law while skirting the ethical mandates. As has been stipulated, it was not

respondent's intention to violate the Election Law, and she accepts responsibility for not having taken appropriate steps to ensure that her campaign's finances were conducted in scrupulous compliance with the relevant law and ethical rules. Accordingly, we conclude that the sanction of censure is appropriate. In doing so, we emphasize that every candidate for judicial office has an obligation to abide by the letter and spirit of these mandates in order to preserve the public's confidence in the integrity of its judiciary.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Cohen did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: October 1, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

ROBERT P. APPLE,

a Justice of the Pawling Village Court,
Dutchess County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Roger J. Schwarz, Of Counsel) for the Commission

Honorable Robert P. Apple, *pro se*

The respondent, Robert P. Apple, a Justice of the Pawling Village Court,
Dutchess County, was served with a Formal Written Complaint dated October 25, 2011,
containing one charge. The Formal Written Complaint alleged that respondent operated a

motor vehicle after consuming a quantity of alcohol that elevated his blood alcohol content to a level in excess of the legal limit. Respondent filed an Answer dated December 13, 2011.

On January 17, 2012, the Administrator 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 January 26, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Pawling Village Court, Dutchess County, since 1991. His current term expires on December 6, 2013. He was admitted to the practice of law in New York in 1984 and has been self-employed in the private practice of law for approximately 20 years.
2. On November 26, 2009, respondent consumed a number of alcoholic “cocktails” at his home. Sometime after consuming these cocktails, respondent drove his automobile, a Ford Focus, to a supermarket in Patterson, New York.
3. At approximately 1:57 PM, at the intersection of East Main Street and State Route 22 in the Village of Pawling, respondent drove his vehicle into the rear end of an automobile being operated by Oddny P. Olson, who resides in Stormville, New York. At the time of the accident, Ms. Olson’s vehicle was stopped at a traffic light. Respondent’s vehicle struck Ms. Olson’s vehicle with sufficient force to cause her

eyeglasses to fly off her face and for the bolts securing respondent's license plate to become embedded in Ms. Olson's vehicle's bumper.

4. A Sheriff's Deputy dispatched to the scene observed that respondent's eyes were glassy, that he staggered while walking and that he swayed while standing. The Deputy also detected the odor of alcohol on respondent's breath.

5. Respondent failed a field sobriety test administered at the scene.

6. Respondent was arrested and taken to the Pawling substation of the Dutchess County Sheriff's Department. At approximately 3:35 PM, nearly two hours after the accident, respondent was given a breathalyzer test, which indicated a blood alcohol content of .21%, more than two and a half times the legal limit of .08%.

7. Respondent was charged with Aggravated Driving While Intoxicated in violation of Vehicle and Traffic Law ("VTL") Section 1192(2-a), Driving While Intoxicated ("DWI") in violation of VTL Section 1192(2) and (3), and Following Too Closely in violation of VTL Section 1129(a).

8. On or about February 22, 2010, respondent appeared before Justice John D. Crodelle in the North East Town Court and pled guilty to DWI, a class "A" misdemeanor, in full satisfaction of all the charges.

9. On or about February 22, 2010, respondent was sentenced to a conditional discharge and directed to pay a \$500 fine and participate in a "Drunk Driver Program." Judge Crodelle also revoked respondent's license to operate a motor vehicle for a period of six months.

Mitigating Factors:

10. Respondent has expressed contrition for his actions. He also retained Martin D. Lynch, MS, a Licensed Professional Counselor specializing in alcohol and substance abuse, to evaluate respondent's consumption of alcohol before driving on November 26, 2009. Mr. Lynch concluded that it was an "isolated event" and that further counseling was not needed. Notwithstanding this opinion, respondent enrolled in, and regularly attends Alcoholics Anonymous meetings, and is receiving "preventative counseling."

11. There is no indication that respondent invoked his judicial office to secure favorable treatment at any time during his encounters with law enforcement authorities or others in connection with this incident.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 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. 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 a minor accident and his conviction for

Driving While Intoxicated. Such conduct is inconsistent with a judge's obligation to maintain high standards of conduct at all times, both on and off the bench (Rules, §§100.1, 100.2[A]).

Respondent should have recognized that driving after consuming "a number of alcoholic 'cocktails'" created a significant risk to the lives of others. Ignoring the risk of such behavior, he operated his vehicle notwithstanding that his blood alcohol content was well above the legal threshold for impairment. While it is fortunate that his behavior did not result in serious injury, his conduct resulted in an accident in which his car struck a vehicle stopped at a traffic light. After failing a field sobriety test, he was taken to the police station, where a breathalyzer test taken almost two hours after the accident showed a .21% blood alcohol content, more than twice the .08% legal limit. He later pled guilty to Driving While Intoxicated, a misdemeanor, in satisfaction of the charges against him. By violating the law which he is called upon to apply in his own court, respondent engaged in conduct that undermines his effectiveness as a judge 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, whether the judge was cooperative during arrest, whether the judge asserted his or her judicial office and sought special treatment, and the need and willingness of the judge to seek treatment.

See, e.g., Matter of Maney, 2011 Annual Report 106 (judge, convicted of Driving While Ability Impaired [“DWAI”], made an illegal U-turn to avoid a sobriety checkpoint, delayed taking a breathalyzer test and repeatedly invoked his judicial office while requesting “professional courtesy” and “consideration” [censure]); *Matter of Martineck*, 2011 Annual Report 116 (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; 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 operated a motor vehicle after consuming alcoholic beverages, “vehemently” protested her arrest and made offensive statements to the arresting officers [censure]); *Matter of Pajak*, 2005 Annual Report 195 (DWI conviction after causing a property damage accident [admonition]); *Matter of Stelling*, 2003 Annual Report 165 (two alcohol-related convictions [censure]); *Matter of Burns*, 1999 Annual Report 83 (DWAI conviction [admonition]); *Matter of Henderson*, 1995 Annual Report 118 (DWI 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 caused damage to 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 (1981) (two alcohol-related convictions and other non-charged alcohol-related 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]). In the wake of increased recognition of the dangers of driving while impaired by alcohol and the toll it exacts on society, alcohol-related driving offenses have been regarded with increasing severity.

In this case, we note that there is no indication that respondent invoked his judicial office in an attempt to secure favorable treatment (*compare, Matter of Maney, supra*). The record further reveals that although an evaluation determined that the incident was an “isolated event,” respondent has sought “preventative counseling” and attends AA meetings. Given the totality of the circumstances presented here, we conclude that the sanction of censure is appropriate.

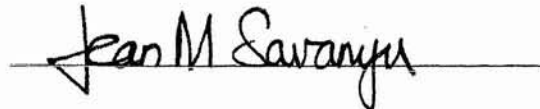
By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: January 31, 2012

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a stylized initial "J" and "S".

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

PAUL G. BUCHANAN,

a Judge of the Family Court, Erie
County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission

Harris Beach PLLC (by Richard T. Sullivan) for the Respondent

The respondent, Paul G. Buchanan, a Judge of the Family Court, Erie
County, was served with a Formal Written Complaint dated March 6, 2012, containing
three charges. The Formal Written Complaint alleged that respondent made an *ex parte*

hospital visit to a party in a juvenile delinquency proceeding (Charge I), was discourteous to a lawyer and a probation supervisor (Charge II), and issued a decision in a custody and visitation matter after foreclosing cross-examination of the parties and denying the attorneys an opportunity to be heard (Charge III). Respondent filed an Answer dated May 1, 2012.

On October 24, 2012, the Administrator, 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 December 6, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Family Court, Erie County, since 2004. His current term expires on December 31, 2013. He was admitted to the practice of law in New York in 1989.

As to Charge I of the Formal Written Complaint:

2. From September 2009 through January 2010, respondent presided in Erie County Family Court over *Matter of S [REDACTED] [REDACTED]*, a juvenile delinquency proceeding. Ms. [REDACTED] was 14 years old during this time period.

3. In November 2009, respondent released S [REDACTED] [REDACTED] to the

custody of her mother. About ten days later, Ms. [REDACTED] was transported to the Erie County Medical Center (ECMC) and then to the Women and Children's Hospital of Buffalo for treatment and observation due to an overdose of prescription medication. In early December 2009, S [REDACTED] was transported back to ECMC and placed in a psychiatric unit for treatment and observation.

4. In the first week of December 2009, within days after learning of S [REDACTED] overdose and hospitalization, respondent visited with her alone for approximately 15 minutes in the psychiatric unit at ECMC. Respondent gave her an age-appropriate book and cookies which he had purchased as gifts. Respondent told her that her mother and grandmother loved her and that she had a lot to live for.

5. Respondent neither notified nor sought authorization from S [REDACTED] [REDACTED] mother, doctor, attorney or the attorney for the presentment agency, for his psychiatric unit visit with her.

6. In the first week of January 2010, Amy M. McCabe, Esq., the presentment agency attorney, filed a motion seeking respondent's recusal from the [REDACTED] matter because of his *ex parte* psychiatric unit visit with S [REDACTED] [REDACTED]. Ms. [REDACTED] attorney, Jeffrey M. Priore, Esq., did not oppose the motion.

7. On January 14, 2010, respondent presided over the [REDACTED] matter. He did not acknowledge his private meeting with Ms. [REDACTED] and reserved decision on Ms. McCabe's recusal application. Mr. Priore took no position on the motion. Respondent addressed the pending issues in the case, signed an order directing secure

detention, and adjourned the case to March 2, 2010.

8. On January 15, 2010, respondent spoke with Frank J. Boccio, Chief Clerk of Court for Erie County Family Court, and had the [REDACTED] matter transferred to another Erie County Family Court Judge. Respondent did not enter a ruling on Ms. McCabe's recusal motion or indicate on the record the basis for the transfer.

9. Respondent signed an Order on Motion, entered on January 26, 2010, which stated that Ms. McCabe's recusal motion was "dismissed as moot" and that the [REDACTED] matter "had been previously administratively transferred...prior to decision."

As to Charge II of the Formal Written Complaint:

Matter of [REDACTED] [REDACTED]

10. On June 2, 2009, respondent presided in Erie County Family Court over *Matter of [REDACTED] [REDACTED]*, a Person in Need of Supervision (PINS) proceeding. Respondent stated that he would release Ms. [REDACTED] to her legal guardian, Cheryl Anderson, provided that Ms. [REDACTED] cooperate with Southwest Key Programs and Family Functional Therapy.

11. Assistant Erie County Attorney Amy M. McCabe responded that Ms. Anderson had been unsuccessful in meeting and communicating with Ms. [REDACTED]'s probation officer or a department supervisor. Respondent directed court clerk Lisa Juda to call Erie County Probation Department supervisor Nancy Lauria to the courtroom and he adjourned the matter until later that day.

12. Ms. Lauria was present in the courtroom when respondent recalled

the [REDACTED] matter, but respondent did not address Ms. Lauria or note her appearance on the record. Respondent released Ms. [REDACTED] under the same conditions that he had imposed earlier and adjourned the [REDACTED] matter.

13. As Ms. Lauria was exiting the courtroom, respondent sternly called out that he wanted to speak to her. When Ms. Lauria approached the counsel table, which was approximately six feet from the bench, respondent pointed at her and, in a raised and angry tone of voice, stated in words or substance, “Stay there” and “don’t come any closer.”

14. Respondent shook his finger at Ms. Lauria and yelled at her in a volume so loud that he was heard by courtroom personnel as well as others who were in an outside hallway behind the closed courtroom doors. Respondent chastised Ms. Lauria for signing and authorizing the submission to the court of a multi-agency Family Services Team (FST) report in the [REDACTED] matter that did not have the signature of the lead agency’s supervisor. The report had been authored by Luanne Kozlowski, Ms. [REDACTED]’s probation officer.

15. Respondent did not allow Ms. Lauria to explain, shouting over her as she said that she had acted with the authorization of Brian McLaughlin, the Director of Probation for the Erie County Department of Probation.

16. Respondent shouted that Ms. Lauria would “need to appear with an attorney” if she again signed an FST report to be submitted to the court without the signature of the lead agency’s supervisor.

17. Respondent's behavior embarrassed and emotionally upset Ms.

Lauria.

Matter of R [REDACTED] [REDACTED], Jr.

18. On March 3, 2010, respondent presided in the Erie County Family Court over *Matter of R [REDACTED] [REDACTED], Jr.*, a PINS proceeding, in which Mr. [REDACTED] was represented by David M. Glenn, Esq., an attorney with the Legal Aid Bureau of Buffalo, Inc.

19. Mr. Glenn, an attorney admitted to the New York State Bar in 1962, had appeared numerous times in respondent's court over the years. Respondent had never complained about Mr. Glenn or his professional performance.

20. Mr. Glenn advised the court that his client would waive a dispositional hearing if he could be placed in his choice of one of two youth treatment programs that had accepted him. Respondent asked why his client did not like the other program. Mr. Glenn responded that a different Legal Aid client had suffered a fractured wrist at the other program, and that the injury was allegedly caused by facility staff during a disciplinary incident. Upon further questioning by respondent, Mr. Glenn said that he believed the matter was being investigated but did not know what, if any, action Legal Aid had taken concerning the matter.

21. Respondent stated, "But what you also are telling me is that Legal Aid Bureau has taken the position that one of their clients was injured... and has taken no action on behalf of their client." When Mr. Glenn protested that he never said that,

respondent replied, "That's what you're leading me to believe."

22. Respondent shouted at Mr. Glenn in a loud and angry voice and interrupted Mr. Glenn's attempts to explain his position. Respondent berated Mr. Glenn and, in a condescending tone, lectured him concerning Legal Aid's "ethical and legal obligations" and the agency's "requirement and duty" to its injured client.

23. After the proceeding, respondent telephoned Pamela L. Neubeck, Esq., Mr. Glenn's supervisor, and demanded, without explanation, that Mr. Glenn never again be sent to his courtroom. When Ms. Neubeck told respondent that her office did not automatically reassign attorneys upon a complaint, respondent warned that he would recuse himself in any case where Mr. Glenn appeared as counsel.

24. Respondent subsequently spoke to David Schopp, Esq., Executive Attorney for Legal Aid, and repeated his statement that he would recuse himself if Mr. Glenn appeared in his courtroom. Respondent and Mr. Schopp eventually agreed that Mr. Glenn could continue to appear in respondent's court to finish cases in which he had already been assigned, with the understanding that Legal Aid would not assign Mr. Glenn to any future cases in respondent's court.

As to Charge III of the Formal Written Complaint:

25. On September 9, 2010, respondent presided in Chautauqua County Family Court over a custody and visitation hearing in *Jason J. Farrar v. Crystal M. Kinne*.

26. Following a brief recess after Mr. Farrar's direct testimony,

respondent asked James J. Spann, Jr., Esq., Mr. Farrar's attorney, if he intended to call Crystal Kinne as his final witness at the conclusion of Mr. Farrar's testimony. After Mr. Spann confirmed that was his intention, respondent stated that he was going to interrupt Mr. Farrar's testimony so that Ms. Kinne could be called by Mr. Spann to testify out of turn. Respondent reserved the right of the other attorneys in the matter to have Mr. Farrar recalled for the purpose of cross-examination.

27. At the conclusion of Ms. Kinne's direct examination by Mr. Spann, respondent told Ms. Kinne that she could "step down." John P. Rice, III, Esq., Ms. Kinne's attorney, asked, in reference to cross-examination, "Your honor, am I going to get an opportunity to ask her questions?" Respondent did not respond to Mr. Rice's question and again directed Ms. Kinne to step down from the stand. Respondent did not provide Mr. Rice or Kenneth M. Lasker, Esq., the law guardian, the opportunity to cross-examine Ms. Kinne.

28. Respondent did not have Mr. Farrar recalled to the stand so that he could be cross-examined. Respondent issued a decision from the bench. He noted that cross-examination of the parties was not conducted and stated, "I don't see the need for that cross-examination, because the Petitioner did not meet his burden of proof."

29. Mr. Lasker asked to be heard on the issue, and respondent replied, "I'm done."

30. Respondent repeatedly interrupted Mr. Lasker's attempt to make a record that he had not been allowed to question the witnesses or have his client heard by

the court, by loudly yelling at him, “Sir;” “Sir;” “Sir! Sir, stop! Stop right there!”

31. Mr. Lasker asked respondent, “I can’t even ask a question? I can’t cross-examine a witness to bring out the facts?” Respondent replied, “Sir! Sir, you had your opportunity to cross-examine the witnesses.”

Additional Factors

32. Respondent’s contact with S [REDACTED] [REDACTED] was motivated by concern for her well-being.

33. Respondent sought and received professional counseling to assist him in dealing with the emotional demands of being a Family Court Judge.

34. Respondent has served as a Judge of the Family Court, Erie County, for eight years and has not been previously disciplined for judicial misconduct. He regrets his failure to abide by the Rules and pledges to conduct himself faithfully in accordance with the Rules for the remainder of his term as a judge.

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(B)(3), 100.3(B)(6)(a) and 100.3(E)(1) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law.

Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent engaged in a series of improper acts, both on and off the bench, that were inconsistent with ethical standards. His unauthorized hospital visit to a 14-year old girl, a party in a juvenile delinquency proceeding who was being held for treatment and observation after an overdose of prescription medication, violated the well-established prohibition against *ex parte* communications and overstepped the appropriate boundaries between a judge and a party in a pending matter (Rules, §100.3[B][6][a]). *See, Matter of Singer*, 2010 Annual Report 228 (Family Court judge admonished, *inter alia*, for an *ex parte* hospital visit to a youth whom the judge had ordered to be held for a mental evaluation in a custody case). Respondent should have recognized that such an unauthorized, private visit, however well-intentioned, would create an appearance of impropriety and compromise his impartiality (Rules, §100.2[A]), and thus was inconsistent with the proper role of a judge. A judge is not a therapist or social worker and has a responsibility, especially when dealing with vulnerable, troubled litigants, to ensure that appropriate boundaries are maintained. Respondent's misconduct is exacerbated by his failure to disclose the *ex parte* meeting and his failure to recuse himself promptly thereafter. Upon learning of the *ex parte* meeting, the presentment agency attorney promptly moved for his recusal because of it, and since respondent's conduct had placed him in a position in which his impartiality could reasonably be questioned, his recusal was required under the ethical rules (Rules, §100.3[E][1]).

In three matters, respondent violated his obligation to be patient, dignified and courteous to attorneys and others with whom he deals in an official capacity (Rules, §100.3[B][3]). In the [REDACTED] case, he appears to have overreacted because of a perceived deficiency in a probation report, berating and shouting at a probation supervisor. In [REDACTED], even if respondent was understandably concerned that a Legal Aid client had been injured at a treatment facility, venting his anger against the lawyer who disclosed the incident – and barring the lawyer from the courtroom with no explanation – was not an appropriate response.

In *Farrar v. Kinne*, a custody and visitation matter, respondent not only was discourteous to the law guardian who was attempting to assert his rights as the attorney for the child, but also foreclosed the attorney from exercising his rights. Respondent conducted an abbreviated hearing that deprived the parties of a full right to be heard and created an appearance that he engineered the result. By foreclosing cross-examination, he failed to afford an essential element of due process. Foreclosing the mother's attorney from cross-examining the father seems to indicate that respondent had already decided he would rule in the mother's favor. Moreover, the child's attorney – the law guardian – had the right to question both parties and to “zealously advocate the child's position” (22 NYCRR §7.2[d]). Such attorneys are important participants in Family Court proceedings. In this case, if the law guardian believed that the father's request for custody/visitation was in the best interests of the child or that his client supported the request, his cross-examination might have buttressed the father's petition. Respondent rudely and

inappropriately foreclosed the attorney from exercising his proper function, which resulted in a decision made on an abbreviated record that did not afford the parties a full opportunity to be heard.

We note that respondent, who had served as a Family Court Judge for more than five years at the time of these events, has acknowledged that his actions were inconsistent with the ethical standards and the procedures required by law, and has pledged to conduct himself in accordance with the Rules in the future.

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

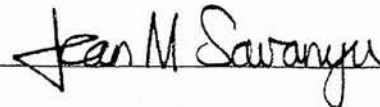
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Mr. Stoloff and Judge Weinstein concur.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 11, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

ROBIN J. CURTIS,

a Justice of the Lyme Town Court,
Jefferson County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission

Capone Law Firm LLP (by Andrew N. Capone) for the Respondent

The respondent, Robin J. Curtis, a Justice of the Lyme Town Court,
Jefferson County, was served with a Formal Written Complaint dated October 19, 2011,
containing two charges. The Formal Written Complaint alleged that respondent

unlawfully issued two orders of protection notwithstanding that there was no pending criminal action against the individual and thereafter issued two additional orders of protection without basis in law. Respondent filed an Answer dated November 14, 2011, and verified November 18, 2011.

On January 10, 2012, the Administrator, 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. The Commission had rejected an earlier Agreed Statement of Facts.

On January 26, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Lyme Town Court, Jefferson County, since 1991. Respondent's term expires on December 31, 2015. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On May 13, 2008, at a time when there was no criminal action pending against Arnold Montgomery, approximately five of his neighbors appeared before respondent in Lyme Town Court to complain about Mr. Montgomery's conduct and to request that respondent issue orders of protection on their behalf. Thomas DeMasi was among the neighbors who engaged in the exchange with respondent.

3. Respondent was familiar with both Mr. Montgomery and Mr. DeMasi from having presided over a matter in 2007 in which Mr. Montgomery was the alleged victim of harassment by Mr. DeMasi. Based on respondent's involvement in that matter, which was not prosecuted to conviction and had been finally resolved three months earlier, respondent had formed a negative opinion of Mr. Montgomery.

4. On May 13, 2008, after speaking *ex parte* with Mr. DeMasi and the other neighbors of Mr. Montgomery who had come to court, respondent issued two orders of protection against Mr. Montgomery. One order listed the following as protected persons: Linda DeMasi, Thomas DeMasi and Michael DeMasi. The second order listed the following as protected persons: Peggy Chambry, Walter Chambry, Krista Chambry, Kevin Chambry, Donna Walsh and Corey Walsh. Both orders had identical provisions directing Mr. Montgomery to refrain from offensive conduct against the listed persons and further directing in handwritten specifications, "Do not trespass on others['] property." The orders were to remain in effect until May 13, 2009.

5. The two May 13, 2008, *ex parte* orders of protection that respondent issued against Arnold Montgomery were served on Mr. Montgomery in May of 2008 by two Town of Lyme police officers.

6. The two May 13, 2008, *ex parte* orders of protection that respondent issued against Arnold Montgomery were unlawful because there was no pending criminal action against Mr. Montgomery, as required by Criminal Procedure Law §530.13.

7. On or about July 21, 2008, Trooper Keith Kloster of the New York

State Police served Mr. Montgomery at his home with a criminal summons dated July 14, 2008, alleging Trespass, a violation of Penal Law §140.05, and Criminal Contempt in the Second Degree, a violation of Penal Law §215.50(3), for allegedly walking on Thomas DeMasi's property on June 6, 2008, in violation of the May 13, 2008, order of protection. Mr. Montgomery appeared in the Lyme Town Court on the day he was served with the summons; he was arraigned on the Trespass and Criminal Contempt charges by respondent and released on his own recognizance. On or about August 4, 2008, Jane G. LaRock, Esq., filed a written notice of appearance as counsel for Mr. Montgomery.

8. On or about September 26, 2008, Mr. Montgomery was arrested at his home by New York State Troopers for the offenses of Harassment in the Second Degree, a violation of Penal Law §240.26(3), and Criminal Contempt in the Second Degree, a violation of Penal Law §215.50(3), for allegedly harassing Mr. DeMasi on August 22, 2008, in violation of the order of protection issued on May 13, 2008. Mr. Montgomery was processed on the Harassment and Criminal Contempt charges at the Watertown barracks of the New York State Police and released on an appearance ticket. On or about September 29, 2008, Ms. LaRock filed a written notice of appearance as counsel for Mr. Montgomery in this case.

9. On or about May 13, 2009, Mr. Montgomery's attorney filed a motion in the Lyme Town Court alleging, *inter alia*, that respondent acted without authority and contrary to Criminal Procedure Law §530.13, when he issued the May 13, 2008, orders of protection because no criminal action was pending against Mr.

Montgomery on that date. The District Attorney opposed the motion.

10. On or about August 8, 2009, respondent dismissed all pending charges on the ground that the May 13, 2008, orders of protection were improperly issued in the absence of a pending criminal proceeding.

As to Charge II of the Formal Written Complaint:

11. On or about April 14, 2009, Linda DeMasi and Thomas DeMasi sent respondent a letter: (1) advising that the May 13, 2008, orders of protection were about to expire, (2) requesting that respondent extend the orders and (3) requesting that the new orders include a “stay away” provision.

12. In or about April 2009, Peggy Chambry, Walter Chambry, Krista Chambry, Kevin Chambry, Donna Walsh and Corey Walsh also sent respondent a letter: (1) advising that the May 13, 2008, orders of protection were about to expire, (2) requesting that respondent extend the orders and (3) requesting that the new orders include a “stay away” provision.

13. On May 11, 2009, without prior notice to Mr. Montgomery or his attorney, respondent issued two orders of protection. One order listed the following as protected persons: Linda DeMasi, Thomas DeMasi and Michael DeMasi. The second order listed the following as protected persons: Peggy Chambry, Walter Chambry, Krista Chambry, Kevin Chambry, Donna Walsh and Corey Walsh. Each order included a “stay away” provision.

14. On May 12, 2009, the court mailed the two orders of protection

issued against Mr. Montgomery by respondent on May 11, 2009, to Mr. Montgomery.

15. Respondent also improperly included a provision in each order directing Mr. Montgomery to surrender any and all firearms that he owned or possessed, without finding that, or even considering whether, any of the factors mandated by Criminal Procedure Law §530.14 had been established.

16. On or about August 11, 2009, respondent wrote to Linda DeMasi, Thomas DeMasi, Michael DeMasi, Peggy Chambry, Walter Chambry, Krista Chambry, Kevin Chambry, Donna Walsh and Corey Walsh and advised each of them: (1) that the May 11, 2009, order was “based on a procedural error” and was invalid, (2) that the order was “vacated effective immediately,” and (3) that they could not re-apply for an order of protection unless a criminal action was pending in his court.

Mitigating Factors

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

18. Respondent mistakenly believed he was acting within his authority when he issued all of the orders of protection.

19. Respondent has no previous disciplinary record. Respondent regrets his failure to abide by the Rules in this instance and pledges to accord his conduct with the Rules 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) and 100.3(B)(1) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent’s misconduct is established.

In the absence of any criminal proceeding and based upon *ex parte* complaints from Mr. Montgomery’s neighbors, respondent issued two orders of protection against Mr. Montgomery directing him to refrain from offensive conduct against nine of his neighbors. Thereafter, when the orders were due to expire, respondent issued two additional orders upon the neighbors’ request, with no notice to Mr. Montgomery or his attorney. Respondent’s abuse of judicial authority in connection with a neighborhood dispute was inconsistent with the requirements of the Criminal Procedure Law (§530.13) and overstepped the boundaries of his judicial role, conveying the appearance that he was acting as a law enforcement officer, not as a judge. *See Matter of Barnes*, 2005 Annual Report 81 (judge issued an order involving disputed property although no case was pending); *Matter of Maclaughlin*, 2002 Annual Report 117 (judge sent a threatening letter to a landowner about code violations on her property, although no charges had been filed against her); *Matter of Colf*, 1987 Annual Report 71 (judge sent a letter threatening to hold an individual in contempt, based on *ex parte* information, although no civil or criminal action had been commenced). Respondent’s conduct also

created the appearance of prejudgment and bias against Mr. Montgomery, about whom respondent had formed a negative opinion as a result of an earlier case.

Respondent also failed to follow the law in that his orders directed Mr. Montgomery to surrender his firearms, without consideration of the factors mandated by law (*see* CPL §530.14).

As a consequence of respondent's unlawful orders, Mr. Montgomery was taken into custody twice, had to retain an attorney, and had criminal charges pending against him for over a year until they were dismissed. The fact that respondent vacated the orders after Montgomery's attorney filed a motion citing the applicable law mitigates but does not excuse respondent's misconduct.

Every judge is required to "respect and comply with the law" and to "be faithful to the law and maintain professional competence in it" (Rules, §§100.2[A], 100.3[B][1]). As a judge for almost two decades, respondent should have realized that he lacked authority to issue an order of protection in the absence of a pending criminal proceeding.

In considering the appropriate sanction, we note that respondent is contrite, has accepted responsibility for his conduct and has no previous disciplinary record.

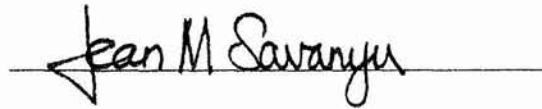
By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: January 31, 2012

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line. The signature is cursive and includes a stylized initial "J" and "M".

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

MICHAEL M. FEEDER,

a Justice of the Hudson Falls Village Court,
Washington County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk and Charles Farcher, Of Counsel)
for the Commission

Honorable Michael M. Feeder, *pro se*

The respondent, Michael M. Feeder, a Justice of the Hudson Falls Village
Court, Washington County, was served with a Formal Written Complaint dated April 23,

2010, containing five charges. The Formal Written Complaint alleged that respondent: (i) accepted a plea from an unrepresented defendant at arraignment and sentenced him to 30 days in jail notwithstanding that the defendant's ability to understand the proceedings was impaired by alcohol (Charge I), and (ii) in four cases, held defendants in summary contempt without complying with procedures required by law (Charges II-V). Respondent filed a verified answer dated June 20, 2010.

By Order dated September 16, 2010, the Commission designated Gregory S. Mills, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 12, 2010, in Albany, and the referee filed a report dated September 12, 2011.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Counsel to the Commission recommended the sanction of removal, and respondent recommended a sanction less than removal. On December 8, 2011, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a Justice of the Hudson Falls Village Court, Washington County, since October 1999. From 1998 to 2005 he served as a Justice of the Kingsbury Town Court. His current term expires on March 31, 2012. He is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On August 6, 2007, Donald Hammond was charged with Unnecessary Noise, a violation of Section 138-5 of the Code of the Village of Hudson Falls. Mr. Hammond was issued an appearance ticket directing him to appear in the Hudson Falls Village Court on August 23, 2007.
3. Throughout the day on August 23, 2007, Mr. Hammond consumed at least 24 beers and several “shots” of alcohol. He failed to appear in court as required, and respondent issued a warrant for Mr. Hammond’s arrest.
4. At approximately 9:47 PM on August 23, 2007, Mr. Hammond was arrested by the Hudson Falls Police Department. The Incident Report stated that the defendant “appear[ed] to be impaired with alcohol” at the time of his arrest. At 9:57 PM, Patrolman B. D. Kinderman completed a Suicide Screening Report, indicating that Mr. Hammond had a “history of drug and alcohol abuse,” a “history of counseling and mental health evaluation/treatment” and a “previous suicide attempt.” Mr. Hammond was held in custody overnight.
5. On August 24, 2007, at approximately 7:00 AM, Mr. Hammond was transported by the Hudson Falls Police to the Hudson Falls Village Court to be arraigned by respondent. At the time of the arraignment, respondent was aware of the defendant’s extensive criminal history and his history of drug and alcohol abuse.
6. At arraignment, respondent allowed Mr. Hammond to waive his right to counsel, accepted his guilty plea to the charge of Unnecessary Noise and

sentenced him to 30 days in jail.¹

7. Mr. Hammond was still under the influence of alcohol at the time he waived his right to counsel and entered his plea of guilty.

8. After arraignment, Mr. Hammond was transported to the Washington County Correctional Facility, where an initial Medical and Suicide Screening Report was prepared. The Medical Screening Report indicated that Mr. Hammond had been “drunk last night,” had consumed “24 beers/couple shots” and drank “daily.” The Suicide Screening Report, completed at 8:37 AM, indicated that Mr. Hammond appeared to be “under the influence of alcohol or drugs” and was exhibiting “signs of withdrawal.” The report also noted “DT’s starting.” (DT’s refer to Delirium Tremens, a symptom of severe alcohol withdrawal.) The officer who prepared the report suggested a 15-minute “medical check for DT’s.”

9. Mr. Hammond had attained an eighth grade education and suffered from learning disabilities causing him difficulties in reading and writing. Prior to accepting Mr. Hammond’s guilty plea, respondent did not ascertain or consider Mr. Hammond’s educational background and/or his learning disabilities.

10. Prior to accepting Mr. Hammond’s guilty plea, respondent did not conduct a searching inquiry, as required by law, to determine whether Mr. Hammond had knowingly and intelligently waived his right to counsel, including his appreciation of

¹The arraignments in *Hammond* and *Belair* (Ch. II) were not recorded. These two proceedings predate the statewide Administrative Order of the Chief Administrative, effective June 16, 2008, requiring that town and village justices mechanically record court proceedings.

the value of counsel and the inherent risks of self-representation.

11. Prior to accepting Mr. Hammond's guilty plea, respondent did not ascertain whether Mr. Hammond was under the influence of alcohol or drugs in the hours before his arrest or at the time of his arraignment. At the hearing before the referee, respondent testified that his knowledge of Mr. Hammond's history of alcohol abuse, based upon Mr. Hammond's previous appearances before him, influenced his determination that the defendant was sufficiently sober to understand the proceedings.

12. At the hearing before the referee, respondent also testified that Mr. Hammond "indicated" that he did not want an attorney. Respondent acknowledged that he "did not adequately explain" the importance of the right to counsel and testified that his knowledge of Mr. Hammond's prior criminal history influenced his determination that the defendant had knowingly and intelligently waived the right to counsel.

13. Respondent acknowledges that: (i) he should have ascertained and considered Mr. Hammond's educational background prior to accepting his plea; (ii) he should have conducted a searching inquiry to determine whether Mr. Hammond knowingly and intelligently waived his right to counsel; and (iii) he should have ascertained to what extent Mr. Hammond was under the influence of alcohol or drugs during arraignment to determine his mental capacity and ability to knowingly and intelligently waive the right to counsel or enter a plea.

As to Charge II of the Formal Written Complaint:

14. On August 26, 2007, at approximately 12:00 AM, Joshua Belair was

arrested by the Hudson Falls Police Department and charged with Disorderly Conduct, for allegedly arguing with police officers and yelling obscenities outside of a bar. In the five hours preceding his arrest, Mr. Belair had consumed approximately twelve beers.

15. At approximately 2:30 AM, Mr. Belair was brought before respondent for arraignment. Prior to arraignment, respondent was provided with Mr. Belair's Arrest Report, which stated that Mr. Belair "appears to be impaired with alcohol."

16. During the arraignment, Mr. Belair was disruptive and directed obscenities at the court. Respondent determined that the defendant was refusing to be arraigned and did not complete the arraignment. Respondent summarily held Mr. Belair in contempt of court and sentenced him to 30 days in jail.

17. Respondent prepared a commitment order stating that the defendant "did continue to use obscene language after being told on several occasions not to use that kind of language" and "refus[ed] to be arraigned."

18. Before holding Mr. Belair in contempt and sentencing him to jail, respondent did not ascertain to what extent the defendant was still under the influence of alcohol.

19. Prior to holding Mr. Belair in contempt, respondent failed to warn him that his continued conduct would result in contempt and did not offer him an opportunity to apologize or to make a statement on his own behalf.

20. Mr. Belair was transported to the Washington County Correctional

Facility, where an initial Medical and Suicide Screening Report was prepared and completed at 4:11 AM. The report noted that Mr. Belair had a “history of drinking,” appeared to be “acting and/or talking in a strange manner,” and was “apparently under the influence of drugs or alcohol”; the report included the comment “INTOX” and suggested a 15-minute “check for alcohol.”

21. Mr. Belair served nine days in jail. On September 4, 2007, respondent ordered Mr. Belair produced at the request of his newly retained defense counsel, Elan Cherney.

22. On that date, Mr. Belair and his attorney appeared before respondent. Mr. Belair apologized to the court and was purged of the contempt charge. Respondent arraigned Mr. Belair on the Disorderly Conduct charge; Mr. Belair pled guilty and was sentenced to a \$100 fine, a mandatory surcharge and a one-year conditional discharge. As a condition of discharge, respondent ordered Mr. Belair to undergo an alcohol evaluation.

23. Respondent acknowledges that prior to holding Mr. Belair in contempt of court, respondent should have ascertained the extent to which he was under the influence of alcohol prior to his arrest and arraignment and should have considered his level of intoxication.

24. Respondent acknowledges that Mr. Belair did not completely comprehend the consequences of his behavior and that before holding him in contempt of court, respondent should have offered Mr. Belair an opportunity to apologize and to make a statement on his own behalf.

As to Charge III of the Formal Written Complaint:

25. On October 29, 2007, Anthony Genier, Jr., was charged with Conspiracy in the Sixth Degree and Endangering the Welfare of a Minor. On December 16, 2007, Mr. Genier was charged with Violation of Curfew Ordinance, a violation of Section 82-3 of the Code of the Village of Hudson Falls. On December 17, 2007, Mr. Genier was charged with two counts of Petit Larceny.

26. On January 15, 2008, respondent accepted a plea agreement whereby Mr. Genier, with the assistance of counsel, pled guilty to Endangering the Welfare of a Minor,² a single count of Petit Larceny and Disorderly Conduct in satisfaction of all charges. Respondent adjourned the matter for completion of a presentence investigation and sentencing.

27. On March 4, 2008, Mr. Genier appeared with his attorney before respondent for sentencing. Respondent was aware that Mr. Genier was 16 years old at that time. Respondent sentenced Mr. Genier to a \$150 fine, a \$165 surcharge, participation in a Values Improvement Program and a one-year conditional discharge on the charge of Endangering the Welfare of a Minor, and a \$350 fine, restitution and a one-year conditional discharge on the charges of Petit Larceny and Disorderly Conduct. After

² Both the transcript from the March 4, 2008 court proceeding and the Orders and Conditions of Conditional Discharge evince that the Endangering and Conspiracy charges were merged, with the defendant entering a guilty plea to the Endangering charge. The Memorandum of Plea Agreement also shows that the two charges were to be merged, but erroneously indicates that the defendant was to plead guilty to Conspiracy.

sentencing, respondent ordered Mr. Genier to sit in the courtroom while his paperwork was completed.

28. While Mr. Genier was seated in the courtroom, respondent ordered him to stop talking. Several minutes later, respondent stated to Mr. Genier, “[Y]ou just got yourself 15 days” and summarily held him in contempt of court for talking, notwithstanding that Mr. Genier was talking quietly in the back of the courtroom. Respondent directed a court officer to “face [Mr. Genier] into a corner” of the courtroom.

29. At the oral argument before the Commission, respondent stated that he ordered that Mr. Genier’s chair be turned towards the wall for the purpose of segregating him from other defendants in order to avoid further disruption.

30. Respondent sentenced Mr. Genier to 15 days in jail for contempt. On the commitment order, respondent stated that the defendant “did continue to talk during Court after being warned three times not to talk.”

31. In his verified answer, respondent asserts that prior to holding Mr. Genier in contempt, he issued several warnings to the defendants assembled in the back of the courtroom not to talk or be disruptive.

32. Prior to holding Mr. Genier in contempt, respondent failed to warn him that his conduct could result in summary contempt resulting in incarceration and failed to offer Mr. Genier the opportunity to desist from the conduct or to make a statement on his own behalf.

33. Respondent acknowledges that Mr. Genier did not completely

comprehend that his behavior could lead to his incarceration. Respondent also acknowledges that before finding him in contempt, respondent should have warned Mr. Genier that his conduct could result in contempt of court and should have offered him an opportunity to desist from the conduct and to make a statement on his own behalf.

34. Mr. Genier served 15 days in jail on the summary contempt charge.

As to Charge IV of the Formal Written Complaint:

35. On March 17, 2008, Thomas Butterfield was brought before respondent for arraignment on charges of Criminal Contempt in the First Degree, Burglary in the Second Degree, Criminal Mischief in the Fourth Degree and Harassment in the Second Degree.

36. Prior to the arraignment, respondent was provided with a copy of Mr. Butterfield's Arrest Report, which stated that Mr. Butterfield "appears to be impaired with alcohol." Based upon his past experience with Mr. Butterfield, respondent knew that the defendant's usual demeanor was argumentative.

37. Prior to the arraignment, respondent was aware that Mr. Butterfield was intoxicated and more argumentative than usual, but respondent took no steps to ascertain how much alcohol Mr. Butterfield had consumed prior to his arrest or the level of his intoxication during arraignment.

38. During the arraignment, Mr. Butterfield asserted his right to counsel and stated that he did not understand the charges. (The transcript indicates that respondent advised Mr. Butterfield of the right to counsel and that the public defender

was present.) When Mr. Butterfield stated that the proceedings were “a God damn joke,” respondent replied that Mr. Butterfield was “going to get contempt of court.” Mr. Butterfield repeated “it’s a joke,” and respondent told Mr. Butterfield that he could not “address the court this way.” After respondent said that he had not received a letter from the purported victim, Mr. Butterfield called respondent’s statement “a God damn lie,” at which time respondent summarily held Mr. Butterfield in contempt of court and sentenced him to 15 days in jail.

39. Upon being held in contempt, Mr. Butterfield stated, “Big deal. Give me 100 days.” Respondent offered Mr. Butterfield the opportunity to retract his statement and apologize; Mr. Butterfield declined, stating, “No I will not.” Respondent then increased Mr. Butterfield’s sentence to 30 days in jail. Mr. Butterfield again called respondent “a God damn liar” and used obscenities.

40. Respondent prepared a commitment order stating that the defendant:

...did refuse to allow me to complete the arraignment, started to yell during the arraignment, continually interrupted me, said this was a “God Damn joke” and that I am a “God Damn liar.” When warned that he would be held in contempt and given an opportunity to apologize, he screamed that I should apologize to him and to give him 100 days. He then said “you’re a God Damn liar Feeder; I hope you rot in f***ing hell.”

41. Mr. Butterfield served 30 days in jail on the summary contempt charge.

42. Before finding Mr. Butterfield in contempt, respondent did not warn him that his conduct could result in summary contempt resulting in incarceration or offer him the opportunity to desist from the conduct, to make a statement on his own behalf or

to apologize to the court.

43. Before increasing his sentence, respondent did not warn Mr. Butterfield that this refusal to retract his statement and apologize could result in additional incarceration or offer him the opportunity to desist from the conduct or to make a statement on his own behalf.

44. Respondent acknowledges that before finding Mr. Butterfield in contempt, he should have warned him that his conduct could result in summary contempt resulting in incarceration and should have offered him the opportunity to desist from the conduct and to make a statement on his own behalf.

45. Respondent acknowledges that he should not have increased Mr. Butterfield's sentence without warning him that his refusal to retract his statement or apologize would result in a further period of incarceration, and without providing him with an opportunity to make a statement.

46. On March 28, 2007, respondent transferred the charges to County Court after they were subsumed in a Grand Jury Indictment.

As to Charge V of the Formal Written Complaint:

47. On March 26, 2008, Robert Syversen appeared before respondent for arraignment on a charge of Operating an Uninspected Motor Vehicle, a violation of Vehicle and Traffic Law Section 306(b), for which the maximum penalty was a \$100 fine.

48. On several occasions during the arraignment, respondent told Mr.

Syversen that he would be held in contempt of court for, *inter alia*, refusing to provide his date of birth, refusing to listen to a reading of his rights and refusing to enter a plea. Mr. Syversen asserted that he was not refusing to be arraigned but believed that he was not required to provide his date of birth, that he could waive the reading of his rights and that the entry of his plea could be adjourned.

49. Mr. Syversen ultimately provided respondent with his date of birth and other pedigree information. During the discussion of his plea, when Mr. Syversen asked respondent if he would “consider dropping the charge,” respondent advised Mr. Syversen that he was being held in contempt of court and sentenced to 15 days in jail unless he apologized. Mr. Syversen apologized and pled guilty to the traffic violation, and respondent imposed a \$50 fine, a \$55 mandatory surcharge and a conditional discharge.

50. When Mr. Syversen objected to and refused to sign the conditional discharge on the basis that it violated his religious beliefs, respondent summarily held Mr. Syversen in contempt of court and sentenced him to 15 days in jail. The transcript states:

DEFENDANT: ...I can't sign that it's against my religion. Sorry.

COURT: What do you mean it's against your religion sir?

DEFENDANT: It's, I'm a Christian and that violates my religion principles.

COURT: How's it violate your religions principles?

DEFENDANT: It's, just generally, I'd have to study, study the document, I can't sign it.

COURT: Are you refusing to sign this order sir?

DEFENDANT: It's against my religion, my religions principles, my religions principles as a Christian.

COURT: And what religions principles is it violating?
What religions principles is it violating sir?

DEFENDANT: I can't, you're asking me to explain
that right now under duress and--

COURT: We're done. Place him in custody. You've
got 15 days for contempt of court sir.

51. On the commitment order, respondent stated that the defendant "did continue to refuse to be arraigned, insisted on entering a plea only under duress, refused to sign the conditional discharge and continued to disrupt the proceedings after being given numerous opportunities to comply."

52. Mr. Syversen served six days in jail before respondent ordered him produced on April 1, 2008. On that date, Mr. Syversen apologized to the court and was purged of the contempt charge.³

53. On April 29, 2008, Mr. Syversen pled guilty by mail to Operating an Uninspected Motor Vehicle. Respondent imposed a \$50 fine and a mandatory surcharge.

54. Respondent did not include a conditional discharge as part of the disposition.

55. Respondent did not warn Mr. Syversen that his refusal to sign the conditional discharge could result in summary contempt resulting in incarceration.

56. Before finding Mr. Syversen in contempt, respondent did not offer him the opportunity to desist from the conduct, make a statement on his own behalf or apologize.

³ The transcript erroneously indicates that Syversen appeared before respondent on April 4, 2008.

57. Respondent acknowledges that he should have warned Mr. Syversen that refusing to sign the conditional discharge could result in summary contempt resulting in incarceration and that, before finding him in contempt, he should have offered Mr. Syversen the opportunity to desist from the conduct and to make a statement on his own behalf.

58. Respondent acknowledges that instead of holding Mr. Syversen in contempt for his refusal to sign the conditional discharge, respondent should have adjourned the matter for Mr. Syversen to obtain counsel.

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

In five cases respondent showed a profound disregard for the rule of law and failed to accord defendants fundamental due process while depriving them of liberty. In four of these cases, within a span of a few months, he abused the summary contempt power, ignoring clear procedural safeguards mandated by law and sentencing individuals to jail without issuing an appropriate warning or providing an opportunity to desist from the contumacious conduct. In an especially mean-spirited overreaction, he held in

contempt a sixteen-year old defendant, who was about to be released on a conditional discharge, and sentenced him to 15 days in jail for talking quietly in the back of the courtroom. In another case, he accepted a guilty plea at arraignment from an unrepresented defendant and sentenced him to 30 days in jail for a violation of local ordinance (Unnecessary Noise), despite having good cause to believe that the defendant was under the influence of alcohol and incapable of understanding and asserting his rights. Exacerbating this record of egregious misconduct is respondent's censure in 2009 for a variety of ethical transgressions; indeed, the disciplinary charges in the earlier matter were pending at the very time he engaged in the misconduct depicted in this case. Viewed in its totality, this record amply demonstrates that respondent lacks fitness for judicial office and that the sanction of removal is appropriate.

In *Hammond*, involving a defendant who had been drinking heavily prior to his arrest, the record establishes that prior to accepting the defendant's guilty plea at arraignment, respondent failed to make a searching inquiry into whether the defendant was capable of entering a plea or appreciated the "dangers and disadvantages" of waiving the fundamental right to the assistance of counsel (*see People v. Smith*, 92 NY2d 516, 520 [1998] and cases cited therein). It is well-established that at an arraignment, a judge not only must advise a defendant of the right to counsel and to have counsel assigned if he or she cannot afford one, but must "take such affirmative action as is necessary to effectuate" the defendant's rights; the court may permit a defendant to proceed without an attorney only "if it is satisfied that [the defendant] made such decision with knowledge of

the significance thereof” (CPL §170.10[4][a], [6]). As we have previously stated:

To determine whether a defendant has knowingly and intelligently waived this fundamental right, the court must “undertake a sufficiently “searching inquiry”” in order to be “reasonably certain” that a defendant appreciates the risks inherent in proceeding without an attorney (*People v. Smith, supra*, 92 NY2d at 520). While there is no rigid formula for such an inquiry, the record as a whole must reflect that the court has explored the relevant factors bearing on an intelligent and voluntary waiver of the right to counsel, including the defendant’s age, education, occupation and previous exposure to legal procedures (*People v. Arroyo*, 98 NY2d 101, 104 [2002]; *People v. Smith, supra*; *People v. Providence*, 2 NY3d 579, 582 [2004]).

Matter of Dunlop, 2009 Annual Report 83.

Respondent has acknowledged that prior to accepting the plea in *Hammond*, he did not conduct a searching inquiry, as required by law, to determine whether the defendant had knowingly and intelligently waived his right to counsel and appreciated the inherent risks of self-representation and the consequences of a guilty plea. He did not explore the defendant’s educational background or ascertain that the defendant had an eighth grade education and suffered from learning disabilities. Nor did respondent explore whether the defendant was under the influence of alcohol or drugs – despite knowing that the defendant had been intoxicated when arrested the previous evening, and despite the fact that a short time *after* the arraignment, a Suicide Screening Report prepared at the jail noted that the defendant appeared to be “under the influence of alcohol or drugs” and was exhibiting “signs of withdrawal.” Respondent’s testimony that he simply “thought [the defendant] had been in the holding cell long enough to sober up

considerably” (Tr. 133) is unpersuasive, especially in view of the absence of any significant inquiry into whether this vulnerable defendant was competent to proceed. By disregarding his obligations under well-established law, respondent engaged in misconduct and abused the power of his office.

Depriving a litigant of fundamental rights not only constitutes legal error, but may constitute judicial misconduct. *See Matter of Dunlop, supra; Matter of Reeves*, 63 NY2d 105, 109-10 (1984); *see also Matter of Feinberg*, 5 NY3d 206, 215 (2005) (legal error and misconduct “are not necessarily mutually exclusive”). In numerous cases the Court of Appeals has held that a pattern of violating fundamental rights of litigants constitutes serious misconduct warranting removal from office. *E.g., Matter of Bauer*, 3 NY3d 158 (2004); *Matter of Reeves, supra; Matter of Sardino*, 58 NY2d 286 (1983); *Matter of McGee*, 59 NY2d 870 (1983). Even a single instance of such behavior may constitute misconduct, especially where there is an egregious violation of well-established legal principles, resulting in a proceeding that was patently lacking in fundamental fairness (*Matter of Dunlop, supra*).

In four other cases, respondent abused his summary contempt power and deprived individuals of their liberty without due process. The exercise of the enormous power of summary contempt requires strict compliance with mandated safeguards, including giving the accused a warning that the conduct can result in contempt and providing an opportunity to desist from the contumacious conduct and to make a statement before a contempt adjudication (Jud Law §§750, 755; *see Rodriguez v.*

Feinberg, 40 NY2d 994 [1976]; *Katz v. Murtagh*, 28 NY2d 234 [1971]; *Pronti v. Allen*, 13 AD3d 1034 [3d Dept 2004]; *Loeber v. Teresi*, 256 AD2d 747, 749 [3d Dept 1998] [“Contempt is a drastic remedy which necessitates strict compliance with procedural requirements”]; *Doyle v. Aison*, 216 AD2d 634 [3d Dept 1995], *lv den* 87 NY2d 807 [1996]). Here, respondent not only wielded the power without reasonable basis⁴ – for example, in *Genier*, where the defendant was held in contempt for talking quietly in the back of the courtroom – but ignored the mandated procedures prior to the adjudication of contempt. Even if an individual is disorderly or disrespectful, a judge’s strict adherence to procedures required by law – including issuing a warning and providing an opportunity to desist – may well avoid the necessity of imposing a contempt citation to maintain order and decorum. The Court of Appeals and the Commission have held that abuse of the summary contempt power and the failure to observe the procedural safeguards may constitute misconduct warranting discipline. *Matter of Hart*, 7 NY3d 1 (2006); *Matter of Mills*, 2005 Annual Report 185; *Matter of Teresi*, 2002 Annual Report 163; *Matter of Recant*, 2002 Annual Report 139. Respondent’s exercise of the summary contempt power without complying with due process was a gross abuse of judicial authority.

⁴ Two intoxicated defendants were summarily held in contempt and sentenced to jail for their behavior at arraignment: Joshua Belair received a 30-day sentence for using obscenities at his 2:30 AM arraignment (notwithstanding that the maximum sentence he faced for the underlying charge was 15 days), and Thomas Butterfield received a 15-day sentence for calling the proceedings “a God damn joke,” a sentence which escalated to 30 days when the intoxicated defendant responded to the sentence by saying, “Big deal. Give me 100 days.” Another obviously confused individual (*Syversen*) was held in contempt and sentenced to 15 days with no warning for refusing to sign a conditional discharge because it violated his “religions principles [sic].”

With more than a decade of judicial experience, which included presiding over a drug court, respondent should be familiar with the requirements of due process and should understand that his duty to act in a neutral, judicious manner must take precedence over impulses arising from personal pique. Instead, his disregard of the rule of law and the basic rights of litigants was inconsistent with the fair and proper administration of justice. The conclusion is inescapable that respondent willfully ignored the law and, thus, violated his duty to be faithful to the law (Rules, §100.3[B][1]).

While respondent's misconduct and the salient facts have been stipulated, the record indicates that throughout this proceeding he offered various, inconsistent rationalizations for his misconduct. For example, when asked at the oral argument about the 15-day sentence for contempt he imposed in *Genier*, respondent explained, "I was under the impression, the mistaken impression that the term for a contempt like that was 15 days. I didn't realize that it could have been shorter" (Oral argument, p. 22); he said he could not recall why he believed a shorter sentence was unavailable (pp. 28-29).

Whether or not we believe that respondent – an experienced judge who attended a judicial training session on summary contempt procedures – harbored such a mistaken, draconian view of the law, it does not in the slightest mitigate his actions in that case. Significantly, he also acknowledged that during the 15 days that Mr. Genier served in jail, respondent never considered that the defendant could be brought back to court to purge the contempt (p. 27), though that is precisely what occurred in two other cases (*Belair* and *Syversen*), where the defendants were returned to court after serving a portion of their sentence,

apologized for their actions and were released. That history does not lend credence to respondent's statements to the Commission. The record in its totality strongly suggests that respondent, in a gross overreaction to Mr. Genier's courtroom demeanor, simply determined that this young defendant, who was due to be released on a conditional discharge after a negotiated plea, should spend 15 days in jail, then abused his judicial authority to make that happen.

With respect to respondent's explanations regarding the issuance of a warning prior to the contempt adjudications, the record is rife with inconsistencies. While respondent repeatedly implied that his only error was that his warnings were insufficiently clear,⁵ he has stipulated that he did not warn any of the defendants that the conduct that provoked the contempt adjudications could result in contempt. Indeed, in *Genier*, the record shows that respondent never mentioned contempt at all before holding the defendant in summary contempt for talking in the back of the courtroom. Nor does the record substantiate respondent's portrayal of his warnings to Mr. Genier: although the commitment order states that the defendant "did continue to talk during Court after being warned three times not to talk" (Stipulation, Ex W), the recording of the proceedings (Ex. 2) shows that respondent said once, "No more talking" before holding the defendant in contempt several minutes after that warning was issued. Respondent then told Mr.

⁵ He stated in his verified answer that his warnings to defendants prior to the adjudication of contempt "could have been more clearly given" (Answer, par 13, 20, 22, 28, 29, 38), and he testified at the hearing, "I understand that I have to be much, much clearer in conveying to defendants that their behavior or their actions are contemptuous" (Tr. 135).

Genier, “You continued to talk after being repeatedly warned not to” (Ex. 2; Stipulation, Ex U, p. 4), but no such “repeated” warnings are reflected on the record. In his answer, respondent states that he had warned all the defendants assembled in the courtroom not to talk (Answer, par. 22), but he was constrained to admit that he never warned that talking could result in contempt or incarceration (Stipulation, par. 33). Moreover, although he repeatedly insisted that Mr. Genier’s “quiet” talking was disruptive (Answer, par. 21; Tr. 135-36, 166; Oral argument, p. 21), he conceded at the oral argument that the record in *Genier* shows no indication that the proceedings were disrupted in any way (Oral argument, p. 24). And while respondent repeatedly maintained that he believed that he “was properly exercising judicial contempt powers pursuant to the protocol” he was taught at his judicial training program, he admitted that he “had not assiduously followed all the requirements” (Brief, p. 3; *see also* Answer, par 13, 20, 27-29, 37, 38). No explanation was offered for his failure to follow those requirements – “assiduously” or otherwise – in the cases here.

Viewed in their totality, respondent’s handling of these matters showed a disregard of fundamental legal principles and casts serious doubt on his fitness to serve as a judge. In deciding the appropriate sanction, we consider both the severity of the misconduct depicted in this proceeding and respondent’s prior censure for a variety of ethical transgressions, including using his judicial power to effect the arrest of a motorist and then taking action in the case, failing to disqualify notwithstanding a clear conflict, engaging in an *ex parte* communication, and imposing an adjournment in contemplation

of dismissal without the consent of the prosecutor (*Matter of Feeder*, 2010 Annual Report 143). While the misconduct in the earlier proceeding is different from the conduct here, respondent's argument that he has learned from his past mistakes and desisted from particular acts of misconduct when they were brought to his attention is hardly reassuring. His apparent inability to recognize and avoid misconduct, to apply fundamental principles of law and to adhere to the high ethical standards required of judges demonstrates that he is unfit to serve as a judge (*Matter of Cerbone*, 2 NY3d 479 [2004]).

Accordingly, by reason of the foregoing, we determine that the appropriate disposition is removal, making him ineligible for judicial office in the future (NY Const Art 6 §22[h]).

Judge Klonick, Judge Ruderman, Mr. Belluck, Mr. Cohen, Mr. Emery, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Harding did not participate.

Judge Acosta was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: January 31, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MICHAEL M. FEEDER,

a Justice of the Hudson Falls Village
Court, Washington County.

CONCURRING OPINION
BY MR. COHEN

Given the record established both at the hearing at which Judge Feeder testified and in his answers during his *pro se* argument to the Commission on December 8, 2011, it is clear that he is not fit, under the circumstances, to continue to serve as a judge. Accordingly, I have voted with my unanimous colleagues to remove him from his judgeship.

Nonetheless, I write separately to address an issue not directly raised in the Determination, in order to underscore why it is indeed necessary for the Commission to proceed to remove him, even though he stated to us during argument that he will not (have) run for re-election as Justice of the Hudson Falls Village Court to seek an additional term when his current term expires on March 31, 2012.

Notably, the Commission only learned of Judge Feeder's intention not to seek re-election during the December 8, 2011 argument when he was directly asked by Commissioner Emery why, given the pattern of his misconduct as a judge, he wanted to

continue as a judge. Only then did he state that he had “already announced” his intention not to seek re-election (Oral argument, pp. 36-37). When I inquired further about that “announcement” and whether it had been “formally” made, he stated that it had occurred, curiously, just one day earlier when, Judge Feeder stated, a newspaper reporter called him to determine if he was intending to run (*Id.* at 42-43). The timing of his “announcement” seemed odd indeed, given that Judge Feeder implied that it was unrelated to the fact that oral argument was scheduled for the very next day.

There is also some history here worth noting. As mentioned in the Determination (pp. 22-23), several years ago the Commission filed unrelated charges against Judge Feeder, resulting in the sanction of censure. According to the Determination in the prior matter, Judge Feeder had entered into a stipulation with the Commission agreeing that if he vacated judicial office before the Commission rendered a decision on the merits, the stipulation would be public and he would not seek or accept judicial office in the future (Determination 11/18/09, pp. 2-3). The record in that matter reveals that five months after the stipulation, shortly before the scheduled hearing in August 2008, the judge formally announced his resignation of his judgeship. When, consistent with its standard practice and as part of its duties to the public, the Commission made public the stipulation, Judge Feeder changed his mind, withdrew his resignation and proceeded to litigate the charges at the hearing (Hearing transcript 8/18/08, pp. 2-3, 6-8).

I write here not to “pile on,” given the unanimous vote to remove, but to explain why, notwithstanding the fact that Judge Feeder’s term will expire very shortly, it

is not sufficient to simply allow his term to silently run its course. Simply put, if the Commission were to close the matter in view of the judge's impending departure from the bench, Judge Feeder would be free to run for, or perhaps be appointed to, another judicial office, with the public never knowing the likely true reason that he decided not to seek re-election, *i.e.*, that these charges and their supporting proof are too substantial. That would be turnstile justice indeed, and poor policy. The sanction of removal makes a judge absolutely "ineligible" to hold judicial office in the future (NY Const. Art 6, §22[h]). Parenthetically, if Judge Feeder had resigned his judgeship, the Commission under Judiciary Law Section 47 would retain jurisdiction for 120 days past his resignation in order to file a determination of removal, likewise barring him from judicial office in the future; in extending the Commission's jurisdiction for that purpose, the statute underscores the rationale for removing a judge in certain circumstances notwithstanding the judge's departure from the bench. Not so, however, if the judge simply leaves the bench as his term expires, as he has asked to do here.

This is not to suggest – and is, in fact, part of the reason for this concurring opinion – that there might not be sympathetic facts and circumstances where it would be prudent and appropriate, indeed, for the Commission to allow a respondent judge to walk off into the sunset without a public detailing of the embarrassing allegations and facts that might have led the Commission to prefer charges in the first place. The conduct of some judges against whom charges are brought simply does not warrant a public humiliation, if it is clear that the conduct was aberrational for him or her and it is clear that that the respondent's days on the bench are essentially over.

This, however, is not such a case. Here, a continuation and public resolution of these proceedings is necessary as a deterrent against *this* particular judge holding further judicial office, and a vehicle to help ensure that his unfortunate conduct will not be replicated either by himself or by others.

Dated: January 31, 2012



Joel Cohen, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

BRYAN R. HEDGES,

a Judge of the Family Court,
Onondaga County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and David Duguay, Of Counsel)
for the Commission

Robert F. Julian, P.C. for the Respondent

The respondent, Bryan R. Hedges, a Judge of the Family Court, Onondaga
County, was served with a Formal Written Complaint dated May 3, 2012, containing one

charge. The Formal Written Complaint alleged that in or about 1972 respondent engaged in a sexual act with his five-year-old niece. Respondent filed a verified answer dated May 23, 2012, in which he admitted that in or about 1972 his five-year-old niece touched his hand while he was stroking his penis; he denied that his actions violated the cited ethical rules, and, as an affirmative defense, alleged that the Commission lacks jurisdiction because the incident predated his service as a judge by approximately thirteen years.

By Order dated May 24, 2012, the Commission designated William T. Easton, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 20 and 25, 2012, in Syracuse. The referee filed a report dated July 23, 2012, in which he sustained the charge of misconduct.

The parties submitted briefs and replies with respect to the referee's report and the issue of sanctions. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended that the charge be dismissed. On August 8, 2012, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent was a Judge of the Family Court, Onondaga County, from January 1, 1985 until his resignation on April 5, 2012, effective April 25, 2012.
2. Respondent was admitted to the bar in New York State in 1973. From 1975 to 1979 respondent was an Assistant District Attorney in Onondaga County.
3. E___ ("E.") was born in 1967. Her father's sister married

respondent in 1971.

4. At age three, E. was diagnosed as being profoundly deaf. At age five, she had an extremely limited vocabulary and had not yet begun learning to communicate with sign language.

5. In 1972, when she was approximately five years old, E. and her family visited her grandmother's home in Albany. On that occasion, as she was wandering around the house that morning, E. walked upstairs and through the open door to a third-floor bedroom, where respondent was lying on the bed. Respondent was masturbating on the bed.

6. E. entered the room, got onto the bed and knelt next to respondent. As respondent has acknowledged, E. touched his hand which was on his exposed penis. As he has further acknowledged, respondent continued to masturbate for two to four seconds, with E.'s hand on top of his hand, before he stopped.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2(A) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I is sustained¹, and respondent's misconduct is established.

¹ Charge I was amended at the hearing to strike the second sentence of par. 8, alleging that at the time of the incident, E__ and her parents were overnight guests at the house (Transcript 6/20/12, p. A1).

Respondent's admissions, as reflected in the above findings of fact, establish that in or about 1972 he engaged in an act of moral turpitude involving his five-year-old, deaf niece.² There can be no dispute that it would be intolerable for a person holding a position of public trust to engage in such behavior. *See Matter of Benjamin*, 77 NY2d 296, 298 (1991) (judge "physically forced himself on an unwilling victim"); *Matter of Stiggins*, 2001 Annual Report 123 (judge was convicted of assaulting a patient in a nursing facility).

The nature of respondent's conduct involving an admitted sexual act with a defenseless child is abhorrent and not attenuated by the passage of time. It thus reflects adversely on his fitness to perform the duties of a judge and is prejudicial to the administration of justice notwithstanding that it predates his ascension to the bench (*see* NY Const Art 6 §22[a] [empowering the Commission to consider complaints with respect to "fitness to perform" judicial duties and to discipline a judge "for cause, including, but not limited to,... conduct, on or off the bench, prejudicial to the administration of justice"; *see also Matter of Pfingst*, 33 NY2d [a], 409 NYS2d 986, 988 [Ct on the Jud 1973]). The term "for cause" has been interpreted to include conduct that occurs "prior to the taking

² The record before us contains two renditions of what occurred. E. recalls that respondent encouraged her to enter the room and placed her hand on his penis. Respondent denies that he encouraged her to enter the room or guided her hand, and he states that she touched his hand. The events in question occurred 40 years ago, when E. was five years old. Obviously, she recalled a traumatic event. Although the referee found E.'s testimony to be credible, it is sufficient for our purposes to conclude that even if the facts are as respondent has testified, his actions are indefensible (as he acknowledges) and are a sufficient basis upon which to render this determination.

of judicial office” (*Matter of Sarisohn*, 26 AD2d 388, 390 [2d Dept 1966]).

Since respondent’s resignation from the bench leaves us with only two options – closing the matter without action or issuing a determination of removal, which renders him ineligible for judicial office in the future (*see* NY Const Art 6 §22[h]; Jud Law §47) – we determine that the sanction of removal is warranted. (*See Matter of Backal*, 87 NY2d 1 [1995].)

While it would be rare indeed for conduct so remote in time to disqualify a person from serving as a judge, we find that under the unique circumstances in this case, respondent’s misconduct is of sufficient gravity as to render him unfit for judicial office. We thus conclude, contrary to the dissent, that the record before us requires the extraordinary sanction of removal notwithstanding respondent’s resignation, consistent with our obligation to the public and to the judiciary as a whole.

This determination is rendered pursuant to Judiciary Law Section 47 in view of respondent’s resignation from the bench.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Emery, Judge Peters and Mr. Stoloff concur. Mr. Belluck files an opinion, which Mr. Emery joins.

Mr. Cohen and Mr. Harding concur as to misconduct, dissent as to the sanction and vote to close the matter in view of respondent’s resignation. Mr. Cohen files

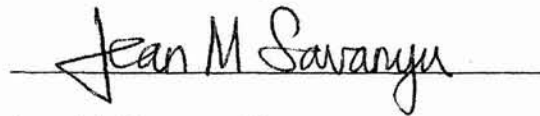
an opinion which Mr. Harding joins.

Ms. Moore did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: August 17, 2012

A handwritten signature in cursive script that reads "Jean M Savanyu". The signature is written over a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

BRYAN R. HEDGES,

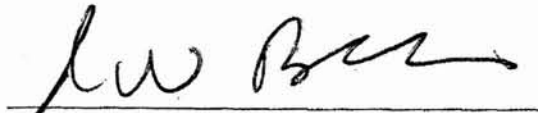
a Judge of the Family Court,
Onondaga County.

CONCURRING OPINION
BY MR. BELLUCK,
WHICH MR. EMERY
JOINS

I concur that respondent should be removed based on the circumstances of this case and the totality of the record before us. I want to underscore that this is an extreme remedy for an extreme set of facts, involving admitted sexual contact with a defenseless, particularly vulnerable child and a respondent who, for decades, failed to take full responsibility for his conduct and appears to have continued to obfuscate the truth. I certainly do not believe that the same high standards of off-the-bench behavior that are rightly required of current judges can be applied retroactively to every act in a judge's lifetime that occurred years or even decades before he or she became a judge. People make mistakes and can redeem themselves for their behavior. Despite indiscretions, they can be productive and significant members of society, the bar and bench. It is my firm belief that if you carefully examined any person's background you would find mistakes, ethical lapses and misjudgments. A person should not be disqualified from being a judge because of remote or minor indiscretions. This case does

not involve a mistake or minor indiscretion, and respondent has done little to atone for his admitted conduct. Therefore, I support removal in this unfortunate circumstance.

Dated: August 17, 2012



Joseph W. Belluck, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

BRYAN R. HEDGES,

a Judge of the Family Court,
Onondaga County.

OPINION BY MR. COHEN,
WHICH MR. HARDING
JOINS, CONCURRING
IN PART AND DISSENTING
IN PART

In 1972, 40 years ago, when respondent was 25 years old, not yet admitted to the Bar, he committed an horrific act in Albany County, New York against the then five year old girl. It was horrific whether one accepts her version of the events or the one respondent now tells (or has chosen to remember). Having reviewed the record, and in particular having listened to his surreptitiously recorded admissions in which he apologized for his offense, albeit in an icily, matter-of-fact narration, I concur that respondent's admissions, standing alone, establish that misconduct occurred.

Succinctly stated, it is inconceivable to me that respondent, now 65 years old, should remain on the bench, particularly in the position of a Family Court Judge. This, even though the conduct occurred 13 years before he became a Judge, and without any proof or allegation that respondent has replicated any such conduct within the last 40 years – and the Commission is unaware of any. Indeed, when the Commission informed respondent in early April 2012 that it would investigate this 40 year old event, he

resigned his judgeship immediately. Most importantly, then: respondent is no longer a judge.

One may therefore wonder why any proceeding is underway at all. Put simply, now a grownup, the victim, still emotionally troubled by the horrible incident and seeking a measure of justice, approached the District Attorney of Onondaga County, where respondent sat as a judge. One can easily understand her motivation in doing so. The District Attorney immediately took the unusual step of arranging for the victim's mother to "wear a wire" against respondent in Boulder, Colorado during a visit to her, in order to gain taped admission of his wrongdoing.¹ Having obtained the admission, however, and recognizing that the statute of limitations over the offense had expired 22 years earlier, the District Attorney promptly referred the matter to this Commission for appropriate action. Having received the complaint, the Commission authorized an investigation and contacted the judge to schedule his testimony. Respondent resigned immediately.

The Commission, however, was unsatisfied with the formal resignation. As reflected in the Determination, the Commission does indeed retain the power to "remove" a judge even after he resigns – to enable the Commission to assure itself that a respondent who has resigned while under investigation cannot later be elected or appointed to judicial office in New York State. Meaning, if "removed," he will be barred from judicial office in New York during the remainder of his lifetime.

¹ Parenthetically, neither the District Attorney nor grand jury in Onondaga County had any criminal jurisdiction over the alleged offense.

I am not unmindful that, particularly in the wake of the sexual abuse scandals at Penn State and Syracuse University (in Onondaga County), no public official or body wants to appear to have shown any leniency whatsoever to an alleged sex offender – even one whose offending act occurred so much earlier (longer in time than the lifetimes of many great and accomplished figures in history).

And so, the Commission instituted formal proceeding against respondent. The result is obvious: although respondent is a grossly unsympathetic figure given his conduct herein, the publication of the Determination herein will, even at this late date, publicly and permanently stigmatize him. Indeed, the staff's brief argues that unless the Commission does just that, it essentially becomes an enabler, *i.e.*, it "assist[s] the judge in concealing that conduct," if it simply allows him to "strategically" resign (Comm. br., at 20).

I do believe, and have previously written on this subject (*Matter of Feeder*, 2012 WL 447939 at *12), that in certain circumstances a judge should in fact be removed even after a resignation, both as a deterrent to himself and to others. Those circumstances are not present here. No judge (or would-be judge) will be deterred from committing an act of child molestation because he believes that some day he might be removed as a judge. Deterrence, instead, will result from criminal enforcement and civil lawsuits instituted by victims, where possible, or potential internet reportage of offending conduct, not the potentiality of disciplinary proceedings.

Moreover, there is no need to seek to deter respondent from similar misconduct while a judge. Clearly, he will never again become a judge, fully aware that

he would surely face a renewed – likely, and properly so, even more vigorous -- effort by this Commission to remove him.

To address the Commission’s concern that respondent might seek, once again, to become a judge or serve in another position of public trust, during oral argument I asked respondent if he would agree unequivocally to waive the confidentiality of these proceedings if he were ever to be elected or appointed to serve as a judge, judicial hearing officer, law guardian or in any other position of public responsibility. He unhesitatingly stipulated on the record that he would do so (Oral argument, pp. 62-63).² Given, too, the alacrity with which he resigned his judgeship when he was first apprised of the Commission investigation, it is inconceivable that he will allow himself to face any publicity over this sordid matter.

Indeed, no statute of limitation applies to discipline proceedings against judges in this state, and respondent should never again be a judge, despite how long ago the offending conduct occurred. Still, he has removed himself from his judgeship that, honesty compels one to conclude, he will never again seek or accept. Since “the purpose of judicial disciplinary proceedings is ‘not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents’” (*Matter of Reeves*, 63 NY2d 105, 111 [1984], quoting *Matter of Waltemade*, 37 NY2d [a], [III] [Ct on the Jud 1973]), we should be comforted by his prompt resignation – whatever its speculated motivation – not further punish that resignation by basically rejecting it. In this regard, it is worth noting that the District Attorney stated in his complaint letter to the Commission

²A respondent judge may waive confidentiality of a Commission proceeding (Jud Law §44[4]).

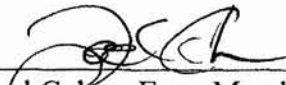
dated March 28, 2012, that, with the victim's support, he was "asking...the Commission ...to reap a small measure of justice for the terrible thing that was done to her and offer Judge Hedges the option to resign as quickly as possible" (Ex. B, pp. 2-3). A week later, the judge filed his resignation.

Beyond that, we should want to encourage judges, directly confronted with the error of their ways, as here, to quickly and unqualifiedly resign in the face of egregious allegations of wrongdoing of which they are clearly guilty. We should not, except in an appropriate case which this is not, require a formal, post-resignation removal simply for a disciplinary authority to gain a very public pound of flesh, fearful of criticism for supposed leniency if it does not demand removal.

Stated most directly – the horrific conduct of respondent, who has now descended from the bench leaving his robes and gavel behind, occurred 40 years ago. It is now time to close this book.

I dissent.

Dated: August 17, 2012



Joel Cohen, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

PAUL M. HENSLEY,

a Judge of the District Court,
Suffolk County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klionick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Pamela Tishman, Of Counsel) for the Commission

Long, Tuminello, Besso, Seligman, Werner & Sullivan (by David H. Besso)
for the Respondent

The respondent, Paul M. Hensley, a Judge of the District Court, Suffolk
County, was served with a Formal Written Complaint dated October 26, 2010, containing

one charge. The Formal Written Complaint alleged that respondent attended and participated in unlawful, for-profit poker games. Respondent filed an amended Answer dated May 16, 2011.

On June 5, 2012, the Administrator, 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. The Commission had rejected an earlier Agreed Statement.

On June 14, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the District Court, Suffolk County, since 2002. His current term expires on December 31, 2014. He was admitted to the practice of law in New York in 1987.
2. During 2008, respondent was an announced candidate for the position of District Court Judge and was actively campaigning for that position.
3. From August 13, 2008, to November 5, 2008, respondent attended and/or participated in numerous for-profit poker games called "Texas Hold 'Em" held at a facility owned and operated by the Fraternal Order of Eagles ("FOE") in Northport, New York.
4. Respondent is a member of the FOE but has never been an officer or otherwise managed its business affairs. It was well known among the membership that

respondent was a judge.

5. From August 13, 2008, to November 5, 2008, the FOE rented its facility on Wednesday evenings, for \$300 per time, to an individual named Frank Servidio, who organized and hosted the poker games on those evenings. On the nights that respondent attended, card games were usually taking place at one or two tables, with a dealer at each table provided by the host. In such games, it is called “raking the pot” when the dealer takes money from the ante or “pot” for the benefit of the “house” or host/organizer.

6. There were tournament games, in which players paid entry fees of \$120, and the evening’s top three or four winners were awarded prizes ranging from \$300 to \$1250, depending on the number of participants. There were also “cash games,” in which participants at the table played against each other for individual stakes, with a minimum buy-in of \$200.

7. The players included members of the FOE and their guests, or guests of Mr. Servidio, the host. Among the players in attendance on one or more occasions was a Suffolk County police officer.

8. While it is a crime under the New York State Penal Law to advance or profit from unlawful gambling activity, and to run (A) a for-profit game in which the dealer “rakes the pot” for the benefit of the “house” or (B) a tournament game where all the entry fees are not paid out in prizes to the players, it is not unlawful to attend gambling events, or to participate as a player.

9. On August 13, 2008, respondent participated in a for-profit tournament card game at the FOE. The total amount of the prizes paid out was less than the amount of entry fees collected from the players; the remaining funds were kept by the "house." Respondent understood that a cash game was scheduled to start later; however, respondent left the premises prior to the start of the cash game.

10. On August 20, 2008, respondent participated in a for-profit tournament card game at the FOE and observed prizes being paid to tournament winners from the pot. The total amount of prizes paid out was less than the amount of entry fees collected from the players; the remaining funds were kept by the "house."

11. On September 10, 2008, respondent attended for-profit cash card games at the FOE during which the dealer "raked the pot," but respondent did not play in such games.

12. Between October 1 and 8, 2008, respondent learned from other card players at the FOE that a Suffolk County police sergeant had come to the facility to investigate a complaint regarding an illegal Texas Hold 'Em poker game and noise. Respondent had not been there at the time. No arrests were made, and no additional action was taken.

13. On October 8, 2008, respondent went to the FOE to play cards. Smoking is not permitted inside the facility. Respondent did not observe anyone smoking cigarettes or marijuana inside or outside the FOE. However, on prior occasions he thought it possible that when some players stepped outside for a break, some may have

smoked marijuana.

14. In the course of conversation on October 8, 2008, during and between card games, respondent and other players commented on the possibility that the police would return to the FOE one day. In that context, respondent said it would be a good idea to “get rid of your pot,” to which one player responded, “I don’t have any,” to which respondent replied, “I’m not suggesting you do.”

15. On October 22, 2008, respondent attended for-profit cash card games at the FOE during which the dealer “raked the pot,” but respondent did not play in such games.

16. On November 5, 2008, respondent arrived at the FOE at approximately 11:45 PM, to celebrate his having been re-elected to District Court the day before. Respondent had been at other election celebrations earlier in the evening, including one at the local Knights of Columbus and one at his campaign manager’s home.

17. Approximately eight other men were present, with a congratulatory ice cream cake in honor of respondent’s re-election.

18. Although others may have been playing poker before respondent arrived, respondent himself did not play. About ten minutes after respondent arrived at the FOE, before the celebratory cake was eaten, four officers from the Suffolk County Police Department arrived and executed a search warrant of the premises.

19. At least some of the officers in attendance already knew respondent was a judge. In response to police officer inquiries that all in attendance identify

themselves and produce identification, respondent showed Detective Anthony Schwartz his New York State Driver's license and judicial identification card. Respondent also asked to speak to the "person in charge" and was directed to Lieutenant William Madigan.

20. Respondent and Lieutenant Madigan spoke in the kitchen of the FOE. Referring to the celebratory cake, respondent said he had been re-elected to the bench the day before, was at the FOE to celebrate, and had not played in any card games that night.

21. Lieutenant Madigan asked respondent if he would be conducting any arraignments that might eventuate from the search warrant then being executed at the FOE. Respondent responded that he was not assigned to arraignments.

22. Lieutenant Madigan asked respondent who was running the gaming tables, and respondent said he did not know because he only just arrived, but the Lieutenant could find out by determining who was sitting in the dealer's chair at each table. Respondent did not know whether one or two tables had been in use for poker before his arrival. Respondent said he knew that many of the people in attendance were members of the FOE.¹

23. While the police on the scene were talking to other players, respondent was approached by a man whom he recognized as a card player from previous

¹ The Administrator withdraws that portion of the Formal Written Complaint alleging that respondent made false statements to the police.

visits to the FOE. Unknown to respondent, the man was an undercover police officer. The man asked what respondent would do if the police asked him questions, and respondent said that he did not want to make a statement.

24. Frank Servidio, the host, was arrested and charged with gambling-related offenses. The charges were eventually disposed of on consent of the District Attorney with an Adjournment in Contemplation of Dismissal and were dismissed on July 23, 2009.

25. Neither respondent nor any of the other players were arrested or charged with any offenses. The police did not accord respondent special consideration or otherwise treat him differently than any of the other players at the FOE.

Additional Factors

26. Respondent's participation in the poker games did not violate any law, and he was not arrested or charged with a crime.

27. Respondent recognizes that his participation in for-profit tournament games and presence at for-profit cash games was inconsistent with his role as a judge and his obligation to respect and comply with the law, because he was voluntarily in the presence of those who *were* violating the law by operating such games. He acknowledges that, at least, he should have left the premises upon observing that illegal games were taking place.

28. Respondent is extremely remorseful and assures the Commission that such lapses in judgment will not recur. Respondent avers that he has not attended

any gambling tournaments or similar events since November 5, 2008.

29. Respondent has never before been disciplined by the Commission.

30. Respondent has submitted significant evidence of his good character.

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. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

Both on and off the bench, judges “are held to higher standards of conduct than members of the public at large and...relatively slight improprieties subject the judiciary as a whole to public criticism and rebuke” (*Aldrich v State Comm. on Judicial Conduct*, 58 NY2d 279, 283 [1983]). As the Court of Appeals has stated:

Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function....

Matter of Kuehnel v. State Comm. on Judicial Conduct, 49 NY2d 465, 469 (1980); *see*,

Rules §§100.1, 100.2(A). Under the facts presented in this record, respondent's participation as a player in unlawful, for-profit poker games violated these standards and reflects adversely on the judiciary as a whole.

While it has been stipulated that respondent's involvement in gambling activities as a player did not violate the law, the person or persons who ran and profited from the games were engaging in criminal conduct, as respondent should have recognized.² Thus, respondent and the other players who participated in the poker games made it possible for the crimes to occur. Significantly, even after learning that a police sergeant had come to the premises to investigate a complaint about the poker games, respondent continued to attend the games. This reckless behavior showed extremely poor judgment. Moreover, since respondent's judicial status was well known at the facility, his presence at and participation in the games gave his judicial imprimatur to this unlawful activity.

Respondent compounded his misconduct by his behavior when the police arrived to execute a search warrant and arrested the individual who organized and hosted the event. During these events, respondent made two gratuitous references to his judicial status, conveying an appearance that he was asserting his judicial position to obtain special treatment. Initially, when asked for identification, he identified himself as a judge by providing his judicial identification card while asking to speak to someone "in

² It is unlawful for a person to "knowingly advance[] or profit[] from unlawful gambling activity" (Penal Law §225.05 [Promoting Gambling in the Second Degree, a Class A misdemeanor]).

charge.” Then, after being directed to another officer, he again referred to his judicial office, volunteering that he had just been re-elected to the bench. By interjecting his judicial status into the incident, respondent conveyed an appearance that he was seeking special consideration because of his judicial office. *See Matter of Werner*, 2003 Annual Report 198 (during a traffic stop, judge gave the officer his judicial ID, which was an improper assertion of his judicial status). In addition, by advising another player (an undercover officer) that he did not want to make a statement to the police, respondent gave legal advice to one of the participants in the incident, which was, in itself, inconsistent with his role as a judge.

In its totality, respondent’s conduct showed insensitivity to the high ethical standards incumbent on judges and detracts from the dignity of judicial office. Such conduct affects public confidence in the integrity of the judiciary (Rules, §§100.4[A][2], [3]), even though it is unrelated to respondent’s performance on the bench. *See, Matter of Miller*, 1997 Annual Report 108 (judge harassed her former boyfriend by sending numerous anonymous, malicious mailings); *Matter of Kelso*, 61 NY2d 82, 84 (1984) (judge’s misconduct as an attorney warranted discipline notwithstanding that it was “unrelated, either directly or peripherally, to [his] judicial position”).

In considering the appropriate sanction, we note that respondent has no previous disciplinary record, is remorseful and has acknowledged that his conduct was inconsistent with his obligations as a judge.

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

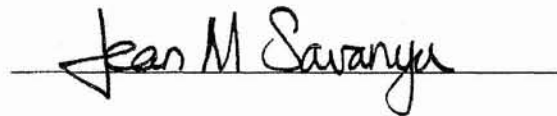
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore and Mr. Stoloff concur.

Judge Peters was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: June 22, 2012

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

LEE L. HOLZMAN,

a Judge of the Surrogate's Court, Bronx
County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters¹
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Mark Levine and Brenda Correa, Of Counsel)
for the Commission

Godosky and Gentile, P.C. (by David Godosky) for the Respondent

¹ Judge Peters resigned from the Commission effective October 15, 2012, and Judge Weinstein was appointed to the Commission on that date. The vote in this matter was taken on September 19, 2012.

The respondent, Lee L. Holzman, a Judge of the Surrogate's Court, Bronx County, was served with a Formal Written Complaint dated January 4, 2011, containing four charges. The Formal Written Complaint alleges that: (i) over a 14-year period respondent approved legal fees to Michael Lippman, counsel to the Public Administrator, based on affidavits of legal services that did not comply with the Surrogate's Court Procedure Act ("SCPA") and without consideration of the specified statutory factors (Charge I); (ii) despite knowing that Mr. Lippman had taken advance legal fees without court approval and/or fees in excess of Administrative Board Guidelines ("Guidelines"), respondent failed to report Mr. Lippman to law enforcement and disciplinary authorities and continued to award Mr. Lippman legal fees at the maximum amount recommended by the Guidelines and/or without considering the statutory factors (Charge II); (iii) respondent failed to adequately supervise court staff (Charge III); and (iv) respondent failed to disqualify himself from Mr. Lippman's cases notwithstanding that Mr. Lippman had raised campaign funds for respondent (Charge IV). Respondent filed a verified answer dated January 21, 2011.

By Order dated January 25, 2011, the Commission designated Honorable Felice K. Shea as referee to hear and report proposed findings of fact and conclusions of law. On February 2, 2011, respondent filed a motion to dismiss the Formal Written Complaint and to stay further proceedings. Commission counsel filed papers dated February 25, 2011, in opposition to the motion, and respondent filed a reply dated March 4, 2011. By order dated March 21, 2011, the Commission denied respondent's motion in

all respects.

By letter dated September 12, 2011, respondent waived confidentiality of the Commission proceedings pursuant to Section 44, subdivision 4, of the Judiciary Law. A public hearing was held in New York City on September 12² and December 14-16 and 19, 2011, and January 3-6, 9-13 and 17, 2012. The Referee filed a report dated July 18, 2012.

The parties submitted briefs with respect to the Referee's report and the issue of sanctions. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended dismissal. On September 19, 2012, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been Surrogate of Bronx County since 1988. His current term expires on December 31, 2012.
2. In 1974 respondent was appointed law secretary to the then Bronx County Surrogate. He served as head of the Surrogate Court's law department until 1988.
3. As surrogate, respondent has jurisdiction over all proceedings and actions "relating to the affairs of decedents, probate of wills, [and] administration of estates" (NY Const Art 6, §12[d]). In New York City, the surrogate appoints a public

² The hearing was stayed by order of the Supreme Court on September 12, 2011, and further stayed by the Appellate Division, First Department, on October 5, 2011. The stay was lifted on December 6, 2011.

administrator (“PA”) to administer the estates of persons who die intestate without an heir willing and able to do so (SCPA §1102). Pursuant to SCPA §1108(2)(a), New York City surrogates also appoint counsel to the PA to represent intestate decedents’ estates where no individual is available to file letters of administration. The PA is paid a salary by the City of New York (SCPA §1105), and counsel is paid “reasonable compensation” out of the administered estate (SCPA §1108[2][b]). At any one time during the years encompassed by the complaint, the Bronx PA’s office handled between \$30 million and \$57 million in estate funds.

4. Michael Lippman began working as counsel to the Bronx County PA in 1970. During the years respondent served as law secretary to the Bronx Surrogate and later as head of the Surrogate Court’s law department, he knew Mr. Lippman, who worked in the same courthouse. When respondent was elected surrogate, he retained Mr. Lippman as counsel to the PA. Mr. Lippman served as counsel or associate counsel to the PA until April 2009, while also maintaining a private practice of law.

5. Mr. Lippman was indicted in Bronx County on July 7, 2010, on charges of Scheme to Defraud 1st degree (1 count), Offering a False Instrument for Filing 1st degree (4 counts), Falsifying Business Records 1st degree (4 counts), Grand Larceny 2nd degree (2 counts), Grand Larceny 3rd degree (3 counts) and Conflict of Interest (1 count). The charges were based on five cases in which Mr. Lippman represented the Bronx PA’s office.

As to Charge I of the Formal Written Complaint:

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

As to Charge II of the Formal Written Complaint:

7. In early 2006 respondent asked for the resignation of PA Esther Rodriguez after learning that she had violated respondent's order not to use a particular vendor, who was under investigation by the Department of Investigation ("DOI") and was about to be indicted.

8. Shortly after the PA's resignation in January 2006, respondent asked Deputy PA Steven Alfasi about problems in the PA's office. Mr. Alfasi told respondent that Mr. Lippman was "problematic" and "was running the office or trying to run the office as if it was his own." Mr. Alfasi also advised respondent that: (i) Mr. Lippman had requested and been paid legal fees before accountings were filed, and (ii) the PA's accountant, Paul Rubin, had reported that there were negative estate balances totaling \$300,000 to \$400,000 as a result of advance legal fees paid to Mr. Lippman.

9. During the time period relevant to the Formal Written Complaint, it had been a longstanding policy in the Bronx PA's office, pursuant to a directive of the surrogate, that 75% of the legal fee could be paid when the accounting was filed (generally at least seven months after letters of administration issued) and the remaining 25% would be held in escrow until the decree. This policy had been followed by respondent's predecessor, and respondent continued the policy upon becoming surrogate. The purpose of the protocol was to give counsel an incentive to act expeditiously in

handling estates and, further, to ensure that in the event that counsel failed to complete the work on an estate, funds would be available for another attorney to do so. Legal fees were paid by check issued by the PA.

10. Under guidelines promulgated in 2002 by the Administrative Board for the Offices of the Public Administrators pursuant to SCPA §1128, fee requests by PA counsel in New York City, in the absence of extraordinary circumstances, are limited to a maximum of 6% of the gross value of an estate, with decreasing percentages for estates larger than \$750,000. Pre-2002 guidelines had provided a 6% maximum fee for all estates regardless of size.

11. After hearing Mr. Alfasi's reports, respondent asked his chief court attorney, Mark Levy, to investigate the PA's office. Initially, in reviewing the trial balance reports of estates, Mr. Levy ascertained that Mr. Lippman was commingling 17 to 29 privately retained legal matters with PA estates – *i.e.*, using the facilities of the PA's office to service his private clients. Respondent directed Mr. Lippman to take his private matters out of the system and Mr. Lippman agreed to do so.

12. In examining trial balance reports of estates with negative balances, Mr. Levy found cases where the negative balances were caused by legal fees paid to Mr. Lippman in advance of the accounting. Based on his review of the matters, Mr. Levy told respondent that the 75/25 protocol had been violated "at least to the extent of \$100,000." Respondent questioned Mr. Lippman, who admitted that he had not followed respondent's directions with regard to the timing of legal fees but told respondent, "I

didn't think you would mind." Respondent did not accept this explanation and believed that Mr. Lippman knew that respondent would not approve his behavior. Respondent considered Mr. Lippman's violation of the fee protocol to be "a betrayal of trust."

13. Consequently, respondent determined that he no longer wanted Mr. Lippman to serve as chief counsel to the PA, and in late January 2006, he offered the position to Mr. Levy. Mr. Levy assumed that position in April 2006, and Mr. Lippman remained as associate counsel. For a time, Mr. Lippman continued to be assigned new cases, albeit in reduced numbers.

14. At respondent's request, Mr. Lippman prepared three lists of pending estates: one showed estates in which he had been paid legal fees consistent with the guideline amounts; one showed estates in which he had received less than the guideline amounts; and one showed estates in which he had received excess legal fees – *i.e.*, fees larger than the amount provided by the guidelines. Mr. Lippman gave the lists to respondent and Mr. Levy sometime before mid-April 2006. Mr. Levy had questions about the accuracy of the lists, but because of the backlog he inherited as counsel, he did not have time to analyze the case files and independently compute the extent of what Mr. Lippman owed. Mr. Lippman amended the lists within a month or so.

15. When respondent asked Mr. Lippman to explain the list of estates in which the legal fees he had taken exceeded the guideline amounts, Mr. Lippman said that in some estates his fees were based on the gross value of real estate without consideration of the mortgage (respondent generally took a mortgage into account in awarding legal

fees); some cases involved real estate that had title problems or a sale that had not closed; and some matters were large estates predating 2002 in which he believed he was entitled to the 6% fee authorized by the earlier guidelines rather than the lower percentage authorized by the 2002 guidelines.

16. In May 2006 respondent appointed John Raniolo as PA. At the same time, respondent implemented a remedial system/repayment plan under which Mr. Lippman would repay the excess legal fees he had received by transferring all fees that he earned going forward to estates he had previously overcharged. The calculations of overcharges and repayments during this period were made using the guideline amount of 6%. Respondent instructed Mr. Raniolo that when Mr. Lippman gave him an accounting for an estate in which he was entitled to a fee, Mr. Lippman would also tell him which estate or estates the fee should be deposited into, pursuant to the lists Mr. Lippman had prepared. Except for \$6,000 that Mr. Lippman was allowed to keep in order to pay a health insurance premium, all legal fees earned by Mr. Lippman from April 2006 until April 2009, when he was fired, were transferred to estates to which he owed money.

17. In June 2006 Mr. Levy and Mr. Raniolo suggested to respondent that Mr. Lippman's employment be terminated. Mr. Raniolo explained that he was having trouble getting along with Mr. Lippman and had to redo a lot of his accounts, and Mr. Levy suggested that the open cases could be completed without Mr. Lippman. In 2007 or early 2008, Mr. Levy again raised the issue of discontinuing Mr. Lippman as counsel. Respondent rejected the suggestions on the ground that as long as Mr. Lippman's work

was “satisfactory,” he could continue to work to repay the money he owed to estates in the PA’s office. After that point, Mr. Lippman was not assigned any new cases.

18. As counsel, Mr. Levy operated on a crisis basis, giving priority to individuals who clamored to have their cases addressed. As cases of fee overcharges not on Mr. Lippman’s lists came to their attention, respondent and Mr. Levy became aware that Mr. Lippman “probably was more over extended than we thought.”

19. At some point, concerned about the number of Mr. Lippman’s cases that remained open, respondent concluded that more help was needed. In the fall of 2008, he asked John J. Reddy, Jr., who had been counsel to the PA in New York County for 23 years, to take that position in the Bronx. Before Mr. Reddy agreed to accept the position, Mr. Levy advised him of the disarray in the PA’s office and that there had been visits by the DOI and FBI. Mr. Reddy asked for more information so that he could assess the situation, and Mr. Levy gave him the three lists Mr. Lippman had prepared and 250 trial balance reports of Mr. Lippman’s open cases. Mr. Levy told Mr. Reddy that respondent’s goal was to make sure that by the end of respondent’s term, no person or estate had been prejudiced by Mr. Lippman’s conduct.

20. After analyzing the records for several weeks with his staff, Mr. Reddy found that the PA had paid Mr. Lippman “haphazardly,” that fees were frequently transferred in and out of estates and returned “when it was clear that money had to be returned,” and that in 60 cases Mr. Lippman had overcharged estates. Mr. Reddy also ascertained that in numerous cases Mr. Lippman took legal fees before doing any legal

work, causing estates to incur negative balances, and that in 15 to 20% of the cases the entire legal fee was paid before an accounting was filed. While it would be normal for about 10% of open cases to have negative balances from such items as the payment of taxes or the purchase of a death certificate, about 40% of the estates had negative balances as a result of advance payments to Mr. Lippman. According to Mr. Reddy's analysis, Mr. Lippman had received over \$450,000 in legal fees in excess of the guideline amounts, but, based on the guideline figure of 6% of the value of each estate's gross assets, net fees totaling \$149,000 could still be earned by those estates. None of these calculations included interest.

21. Mr. Reddy began work as counsel to the PA in the spring of 2009, and respondent gave him permission to fire or retain personnel. In April 2009 Mr. Reddy fired Mr. Lippman. Mr. Rubin, the PA's accountant, was also terminated.

22. Mr. Reddy planned to finish the work on the estates Mr. Lippman had overcharged and to look to Mr. Lippman for repayment. As he and his staff worked on the estates, they found more open cases than they had anticipated. They also found many inaccuracies and omissions in Mr. Lippman's files and ascertained that Mr. Lippman "almost regularly" had misstated his legal fees in the accountings. Mr. Reddy's office prepared affidavits amending the accountings to reflect the correct amounts and the dates legal fees were paid. In every case, the parties to the proceedings were notified of the misrepresentations.

23. As of January 6, 2012, when Mr. Reddy testified at the hearing, all

but 19 of Mr. Lippman's cases had been closed. Mr. Reddy estimated that his office had performed legal services with a value of \$500,000 to \$1,000,000 on cases for which Mr. Lippman had been paid. In addition, Mr. Lippman still owed between \$125,000 and \$150,000 to overcharged estates. None of these figures included interest.

24. In 2006 the FBI questioned respondent about the timing of the legal fees paid to Mr. Lippman. Respondent told the FBI that Mr. Lippman had violated the protocol by taking advance fees but that he did not think that Lippman had violated any law.

25. In 2006, at the time respondent implemented the remedial system/repayment plan, he knew that Mr. Lippman had been paid excessive fees as well as unauthorized advance fees, that the advance fees and excessive fees were a large sum, and that the number of overcharged estates was significant. Respondent was aware of the following in 2006:

(a) From his conversation with Deputy PA Alfasi, respondent knew that Mr. Lippman was a problem in the PA's office.

(b) Respondent knew from Mr. Alfasi that Mr. Lippman was being paid legal fees in advance of accountings in violation of respondent's protocol, a court directive.

(c) Respondent knew from Mr. Alfasi that, according to the PA's accountant, there were negative balances in estates totaling \$300,000 to \$400,000 caused by advance legal fees paid to Mr. Lippman.

(d) Respondent knew from his chief court attorney Mark Levy that Mr. Lippman had commingled his retained matters with the PA's estates.

(e) Mr. Levy's investigations, reported to respondent in early 2006, showed an estimated \$100,000 in unauthorized advance fees.

(f) When respondent confronted Mr. Lippman with accusations of unauthorized legal fees, Mr. Lippman gave respondent an explanation which respondent did not believe, *i.e.*, Mr. Lippman said he thought that respondent would not mind his violation of the 75/25 protocol. Thus, he knew that Mr. Lippman had lied to him, and he felt his trust had been betrayed.

(g) From the lists Mr. Lippman had provided to respondent, respondent knew that there were numerous estates in which the fee paid Mr. Lippman was in excess of the Guideline amount.

(h) Respondent knew that law enforcement entities were investigating payments of Mr. Lippman's legal fees.

(i) Respondent knew that Mr. Lippman liked to gamble and frequented gambling establishments.

26. Notwithstanding that respondent had evidence in 2006 that there was a substantial likelihood that Mr. Lippman had committed substantial violations of the Code of Professional Responsibility, respondent failed to report Mr. Lippman to disciplinary authorities. Based on the knowledge respondent had in 2006, the probability and egregiousness of substantial misconduct by Mr. Lippman was so high that it seriously

called into question Mr. Lippman's honesty, trustworthiness and fitness to practice law. Respondent had a duty to report Mr. Lippman to disciplinary authorities in order to protect the estates in respondent's court from an attorney whose conduct put estates at risk.

27. The information in respondent's possession in 2006 also strongly pointed to larcenous conduct on the part of Mr. Lippman. Respondent was aware that law enforcement entities were investigating the PA's office and had performed audits of the office. He had a duty to share the information he had with law enforcement authorities.

28. Respondent did not share information with law enforcement entities. Mr. Levy testified that he gave Mr. Lippman's lists to the DOI, the FBI and the Bronx District Attorney's office.

29. The remedial system/repayment plan implemented by respondent in 2006 was not an appropriate response to Mr. Lippman's large scale taking of advance and excess fees. By allowing a lawyer who had cheated the PA's office, overcharged estates, lied to him and breached his trust to continue to represent the PA in the administration of estates, respondent put at further risk the estates under his care.

30. Respondent's mistake was compounded by the details of the system he set up whereby he directed that Mr. Lippman would decide which overcharged estates to repay and which cases were to be closed out on a "matching basis" – *i.e.*, Mr. Lippman's new fee would be matched to an amount that had been overcharged on a case on the list. Although some overcharged estates were repaid, new cases of overcharged

estates were discovered, and progress in clearing the backlog was slow.

31. Respondent and Mr. Lippman had a long professional relationship. When Mr. Lippman served as counsel to the PA, they worked closely together, and they saw each other on social occasions. Mr. Lippman gave a party at his home to celebrate respondent's re-election and attended the wedding of respondent's daughter.

32. The long and close professional relationship between respondent and Mr. Lippman influenced respondent's decisions in 2006 not to report Mr. Lippman to disciplinary and law enforcement authorities and not to fire Mr. Lippman but instead to set up a repayment plan.

As to Charge III of the Formal Written Complaint:

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

As to Charge IV of the Formal Written Complaint:

34. 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), 100.3(B)(1) and 100.3(D)(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 II is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is

established. Charges I, III and IV are not sustained and therefore are dismissed.³

Under well-established ethical guidelines, 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” (Rules, §100.3[D][2]). As the Referee found, with the knowledge respondent had in 2006 that Michael Lippman, his appointee as counsel to the public administrator, had committed acts that “strongly pointed to larcenous conduct” and had “overcharged estates, cheated the PA’s office, lied to him and breached his trust” (Rep. 42, 44), the appropriate action for respondent, under Rule 100.3(D)(2), was to fire Mr. Lippman and report him to

³ In view of the dissenter’s comments as to Charge I, it seems appropriate to comment on the dismissal of the charge. While we share the Referee’s concerns that Mr. Lippman’s affirmations of legal services provide insufficient detail as to the services rendered in each case, we cannot conclude, in the circumstances presented, that approving legal fees based on such affirmations constitutes judicial misconduct. We note that all of Mr. Lippman’s fee requests were supported by affirmations of legal services, in sharp contrast to the facts established in *Matter of Feinberg*, 5 NY3d 206 (2005), involving a surrogate who awarded excessive legal fees to his long-time close friend in the absence of affidavits. Mr. Lippman’s affirmations, though largely consisting of “boilerplate” description of customary procedures, contain some case specific information, including a statement of estate assets and the hours he claimed to have worked. The record before us indicates that other New York City surrogates during this period accepted affidavits that were “similar in essence” or contained “even less detail” (Rep. 26, 18). To a significant extent, as the Referee concluded, the Administrative Board Guidelines give shelter to the use of such affidavits concomitant with the entrenched practice of awarding legal fees as a uniform percentage of estate assets. A “rule of thumb” fee (which takes into account the costs of administering smaller, less profitable estates), applied uniformly, effectively diminishes the importance of knowing the details of the work done in a particular case. Nevertheless, we believe that the statutory requirement of affidavits “setting forth in detail the services rendered” (SCPA §1108[2][c]) necessarily means that meaningful, specific information should be provided, rather than a generalized description of customary practices. In this regard, we note that the revised Guidelines, effective May 2012, require counsel to maintain contemporaneous time records, which “shall be provided upon request to any party to the proceeding,” a requirement that should encourage appropriate documentation and reporting of the legal services performed.

disciplinary and law enforcement authorities. Instead, respondent failed to report Mr. Lippman's misconduct and permitted him to remain in a position of public trust for three years under an ill-conceived plan to repay the unauthorized monies he had collected, thereby putting the estates under his care at further risk and conveying the appearance of favoritism. Respondent's abdication of his ethical responsibilities, which was influenced by his long and close professional relationship with Mr. Lippman, constitutes serious misconduct.

As the Referee concluded in her cogent, comprehensive report, in 2006 respondent had evidence that Mr. Lippman had engaged in gross misconduct in several respects, triggering a duty to take appropriate disciplinary action (Rep. 36-43). From the lists Mr. Lippman himself had prepared, respondent knew that Mr. Lippman had taken legal fees in numerous estates that exceeded the amounts that would ultimately be permitted under Administrative Board Guidelines. Significantly, notwithstanding that Mr. Lippman had offered generalized, plausible explanations for the excess fees, respondent had ample information that should have made him skeptical of the information Mr. Lippman provided. Indeed, respondent has acknowledged that at that point he no longer had confidence in Mr. Lippman, knew that Mr. Lippman had lied to him, and viewed his actions as "a betrayal of trust." Respondent also knew, from information provided to him by his chief court attorney and by the deputy PA, that Mr. Lippman had frequently taken advance fees from estates at a time when he was not entitled to do so, resulting in substantial negative balances in the affected estates. Such advance fees

violated respondent's longstanding policy that no legal fees could be paid prior to the accounting, that 75% of the fee could be paid at the accounting, and the remainder would be paid upon the decree. This was also gross misconduct by Mr. Lippman, even when the fees might ultimately be within the guideline recommendations, since it not only violated the court's specific directive but eliminated any incentive for the attorney to complete the legal work in a timely manner and put the affected estates at risk.

While the full extent of Mr. Lippman's malfeasance did not become evident until several years later, the record clearly supports the Referee's conclusion that in 2006 "respondent had evidence that there was a substantial likelihood that Mr. Lippman had committed substantial violations of the Code of Professional Responsibility" (Rep. 81). (*See*, under the Disciplinary Rules in effect in 2006, DR 2-106[A] [prohibiting an attorney from charging an excessive fee] and DR 7-106[A] [prohibiting an attorney from "disregard[ing]... a standing rule of a tribunal or a ruling of a tribunal"].)

While it is generally within a judge's discretion, after assessing all the relevant, known circumstances, to determine what "appropriate action" is required by Rule 100.3(D)(2), the Advisory Committee on Judicial Ethics has held that a judge *must* report a lawyer's alleged misconduct to a disciplinary authority when "the alleged substantial misconduct rose to such an egregious level that it seriously called into question the attorney's honesty, trustworthiness or fitness as a lawyer" (Adv Op 10-85; *see also* Op 07-129). The purpose of the reporting requirement "is not to punish attorneys for the slightest deviation from perfection, but to protect the public from attorneys who

are unfit to practice law” (Adv Op 10-85, as amended 12/9/11). We agree with the Referee that under the circumstances presented, “the probability and egregiousness of substantial misconduct by Mr. Lippman was so high that it seriously called into question Mr. Lippman’s honesty, trustworthiness and fitness to practice law” and thus, in order to protect the estates in his court, respondent had a duty to terminate Mr. Lippman’s employment and report him to the disciplinary committee (Rep. 42).

As a judge, respondent also had an obligation to be forthcoming and cooperative with law enforcement entities. Every judge is obliged to act at all times in a manner that promotes public confidence in the integrity of the judiciary (Rules, §100.2[A]). In 2006 respondent knew that the FBI was investigating the PA’s office; indeed, the FBI had specifically questioned him about the timing of the payment of Mr. Lippman’s legal fees. Respondent was also aware that other law enforcement entities had been investigating the PA’s office and had conducted numerous audits. With the information he had that implicated Mr. Lippman’s honesty and integrity, respondent had a duty to share the information he had with law enforcement entities, consistent with the ethical requirement that he take “appropriate action” under the circumstances presented. Respondent’s failure to do so was inconsistent with his ethical responsibilities and, moreover, created an appearance that he was attempting to conceal the malfeasance in the PA’s office in order to protect his longtime colleague, and himself, from the consequences of exposure.

Respondent’s various explanations for his failure to share information with

law enforcement are unconvincing. Even if, as he maintains, he sincerely believed that Mr. Lippman's conduct, insofar as he was aware at the time, was not contrary to law and also believed that law enforcement entities probably had more information than he did, that would not excuse respondent's failure to share information in his possession that strongly hinted at serious wrongdoing (*i.e.*, Mr. Lippman's admission that he had taken excessive fees in substantial amounts from numerous estates). Nor are we persuaded by respondent's explanation that he did not contact other agencies so as not to interfere with ongoing investigations and to avoid the appearance that he was misusing his judicial prestige in order to obtain information. Respondent should have recognized that his failure to act not only was a dereliction of his ethical responsibilities, but conveyed the appearance of impropriety and favoritism.

Despite having evidence in 2006 casting doubt on Mr. Lippman's integrity and fitness to practice law, respondent permitted him to remain as associate counsel representing estates for three more years, under an unorthodox repayment plan in which Lippman continued to earn fees that were used to make refunds to overcharged estates. Indeed, for three years Mr. Lippman himself was entrusted with the sole responsibility for designating which estates should receive the repayments, and though the lists he had prepared supposedly showed all the estates that required reimbursement, additional cases in which he owed money were continually being discovered. The beneficiaries of the depleted, at-risk estates were never informed that Mr. Lippman had effectively "borrowed" substantial, interest-free sums from the estates by taking unauthorized

advance payments. Moreover, for at least a year after he had notice of Mr. Lippman's misconduct, respondent continued to assign him new cases in the PA's office, generating new fees which were used in the repayment process; yet even after three years, when Mr. Lippman's employment was finally terminated, he still owed substantial sums to estates he had overcharged.⁴ Throughout this period, respondent resisted several suggestions that Mr. Lippman be fired, insisting that the attorney could continue to work to repay the monies he owed as long as his performance was "satisfactory." Respondent's notably lenient treatment of Mr. Lippman, which permitted him to continue to work in a position of public trust in order to repay the monies he owed, conveyed the appearance that respondent was motivated by favoritism arising out of their long professional relationship.

It is no defense that the information disclosing the full extent of Mr. Lippman's malfeasance was not developed until several years later, after Mr. Reddy and his firm were brought in and conducted an exhaustive examination of the records. Surrogates have enormous discretion and responsibility, but with that authority comes the responsibility to act. With the knowledge he had in 2006, respondent had a duty to ascertain the actual damage as expeditiously as possible and to take appropriate action to alert disciplinary authorities and law enforcement officials of the situation. This is particularly so since respondent's chief court attorney, who replaced Lippman as chief counsel, readily admitted that he had questions about the accuracy of Mr. Lippman's

⁴ As of January 2012, according to Mr. Reddy, Mr. Lippman still owed between \$125,000 and \$150,000 to overcharged estates.

lists but did not have the time to verify the calculations.

In sum, we believe that respondent's response to Mr. Lippman's wrongdoing was plainly inadequate and inconsistent with his ethical responsibilities and, thus, warrants public discipline.

While we recognize the issues presented by the surrogate's involvement in the internal operations of the PA office under the present system (insofar as the public administrator is a party appearing before the surrogate in the matters at issue), we note that respondent's conduct in hiring Mr. Reddy in 2009 – three years after he first had notice of the significant problems involving Mr. Lippman's conduct – finally set in motion a process to determine the full scope of the damage caused by Lippman and to ensure that the overcharged estates were made whole and that appropriate procedures were followed. That was an important but insufficient step, as the proper functioning of that important office should not depend on the integrity of one individual. We also note that the facts presented in this record may indicate the need for consideration of appropriate measures to regulate the conduct of PA counsel and clarify the responsibility for the oversight and operations of the PA office, which has been described as “a municipal agency whose relationship to the City is akin to that of a neglected stepchild” (*Matter of Alayon*, 28 Misc3d 311, 320 [Surr Ct Kings Co 2010], *aff'd* 86 AD3d 644 [2d Dept 2011]).

In determining that the sanction of censure, rather than removal, is appropriate, we find support in the interplay of several factors. First and foremost, we are

persuaded by the record before us that respondent's repayment plan, while misguided and ill-conceived, was motivated by a sincere desire to ensure that the estates under his care were made whole by the individual who had already been paid and who was perhaps in the best position to complete the work expeditiously. Thus, contrary to the dissent, we are unable to find by a preponderance of the evidence that respondent intentionally put estates at risk in order to "cover up...the criminal acts of his appointee" and to advance his own interests (Emery Dissent, p. 1). For example, we note the testimony of court staff about respondent's ongoing concern to make sure that by the end of respondent's term, "no person or estate had been in any way prejudiced" by Mr. Lippman's conduct (Tr. 1102), and respondent's affirmative actions in demoting Mr. Lippman, appointing his chief court attorney to assess the damage and ultimately to replace Mr. Lippman as counsel, and, finally, bringing in Mr. Reddy to remedy the situation when previous remedial measures proved too slow and ineffective. We find that respondent's wrongdoing reflects poor judgment, rather than knowing concealment of criminal behavior or intent to deceive.

Regrettably, in the decision to retain Mr. Lippman as counsel, respondent's judgment was clouded by his long professional association with an attorney who had served as counsel for several decades and whom he regarded as competent, prompting respondent too readily to accord him the benefit of a doubt. (*See, Matter of Edwards*, 67 NY2d 153, 155 [1986].) However, respondent's conduct stands in sharp contrast to that in *Matter of Feinberg*, in which the judge appointed as counsel his long-time close personal friend, who had limited experience in Surrogate's Court, and routinely awarded

him excess fees without requiring affidavits and without reviewing the court files, thereby showing “a shocking disregard for the very law that imbued him with judicial authority,” “an unacceptable incompetence in the law,” and “indifference if not cynicism toward his judicial office” (*supra*, 5 NY3d at 214, 215, 216).

We also note, with respect to respondent’s cooperation with law enforcement entities, respondent’s testimony that he instructed the PA’s office to cooperate in providing information, and the testimony of his chief court attorney that he gave the Lippman lists of overcharged estates to the FBI, DOI and the district attorney’s office. Finally, we are mindful of respondent’s lengthy and unblemished tenure as a judge and his impending departure from the bench at the end of this year, upon reaching the mandatory retirement age.

As the Court of Appeals has stated, “[r]emoval is an extreme sanction and should be imposed only in the event of truly egregious circumstances” (*Matter of Cunningham*, 57 NY2d 270, 275 [1982], citing *Matter of Steinberg*, 51 NY2d 74, 83 [1980]). “[R]emoval should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment” (*Matter of Shilling*, 51 NY2d 397, 403 [1980], citing *Matter of Steinberg, supra*, at p 81) (*Id.*). After a careful review of the entire record, we thus conclude that censure is the appropriate sanction.

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

Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Harding,

Judge Peters and Mr. Stoloff concur.

Judge Klonick and Ms. Moore dissent as to Charge I and vote to sustain the charge, and dissent as to the sanction and vote that respondent be removed from office.

Ms. Moore files an opinion, which Judge Klonick joins.

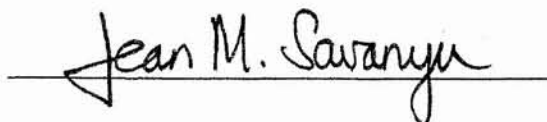
Mr. Emery dissents as to the sanction and votes that respondent be removed from office. Mr. Emery files an opinion.

Judge Weinstein did not participate in the matter.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 13, 2012

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

OPINION BY MS. MOORE,
WHICH JUDGE KLONICK
JOINS, DISSENTING AS
TO THE SANCTION AND
THE DISMISSAL OF
CHARGE I

While I concur with the majority's decision that respondent's grossly inadequate response to his appointee's malfeasance warrants a severe sanction, I respectfully dissent from the decision to dismiss Charge I, and from the determined sanction of censure. Because respondent routinely failed to follow a plainly-worded state law over the course of fourteen years and because he failed to take appropriate action despite overwhelming evidence of his appointee's wrongdoing, I believe that removal from office, the most severe sanction available to us under the constitutionally-created disciplinary scheme, is warranted.

I. Respondent Failed To Comply with the Surrogate's Court Procedure Act

The gravamen of Charge I is that in hundreds of cases respondent awarded legal fees to Michael Lippman, counsel to the Bronx Public Administrator, based on "boilerplate" affirmations of legal services that did not contain detailed information as to

the actual services rendered to estates and, thus, did not comply with Surrogate's Court Procedure Act ("SCPA") §1108(2)(c). That respondent failed to conduct the review mandated by SCPA §1108(2)(c) is established unequivocally by the evidentiary record before us.

SCPA §1108(2)(c) requires that:

"Any legal fees allowed by the court [to counsel to Public Administrators within the City of New York] shall be supported by an affidavit of legal services *setting forth in detail the services rendered, the time spent, and the method or basis by which requested compensation was determined.* In fixing counsel fees, the court shall consider the time and labor required, *the difficulty of the questions involved, the skill required to handle the problems presented, the lawyer's experience, ability and reputation, the amount involved and benefit resulting to the estate from the services, the customary fee charged by the bar from similar services, the contingency or certainty of compensation, the results obtained, and the responsibility involved.*" (Emphasis added.)

The Referee found, following extensive hearings and review of 177 exhibits totaling more than 14,000 pages:

"A preponderance of the evidence shows that in hundreds of cases, between 1995 and April 2009, respondent approved legal fees for Michael Lippman based on affirmations that did not set forth in detail the services rendered as required by statute." (Rep. 19)

Instead of adhering to the plainly-worded dictates of SCPA§1108(2)(c), respondent routinely ignored those requirements and approved fees based on deficient affidavits that did not enable him to consider the statutorily mandated factors. The "boilerplate" affirmations he reviewed contain many paragraphs of non-estate specific information and generalities about procedures which do, in fact, supply some of the

information required by the SCPA. The majority is satisfied that Mr. Lippman's affirmations include a statement of estate assets and "the hours he claimed to have worked" (Determination, p. 15, n. 3). Significantly, however, as the Referee found, "Mr. Lippman's affirmations of legal services contain *no details* (emphasis added) as to the legal services performed" (Rep. 17). More precisely:

"They do not document what actual work was done in the particular case. There is no indication of what legal issues were involved, how complex they were, or what was done to resolve them. There is no information showing how the hours claimed were spent with regard to the specific estate." (Rep. 17-18)

Accordingly, the Referee concluded that the affirmations of legal services reviewed by respondent did not give him all of the information needed to make individualized fee judgments for the estates he was charged with protecting.

Coupled with the Referee's cogent analysis and conclusion is, in essence, respondent's own admission that in the years encompassed by the Formal Written Complaint he awarded millions of dollars in legal fees to Mr. Lippman based on affirmations that were in substantial part the same in every case (Tr. 2016).

Notwithstanding respondent's claim that Commission counsel "cherry-picked" the cases cited in support of Charge I, he conceded that in fact *all* of Mr. Lippman's affirmations were substantially similar. Respondent had routinized his approval of legal fees to Mr. Lippman to the point that the affirmations in the 30 cases set forth in Schedule A of the Formal Written Complaint are so strikingly similar that they contain the same typographical errors (see Rep. 14, n. 7).

Unsurprisingly, then, when asked at the hearing about the extent and nature of the legal work done in the *Diane Glasco* case, respondent could not describe with any specificity how Mr. Lippman had spent the 56 hours he claimed to have worked; nor could he offer any specifics as to the 400 hours of legal work allegedly done in the *Estate of Helen Marks*, other than that the case involved a complicated kinship issue (Tr. 2343). Yet, respondent awarded Mr. Lippman more than \$100,000 in legal fees in the *Marks* case (Rep. 21).

It bears emphasizing that respondent was thoroughly familiar with the SCPA and the statutory requirements. According to the Referee's report, respondent testified with a copy of the SCPA at his side and "alluded many times to sections of the statute from memory" (Rep. 20). There is no doubt whatsoever that respondent was fully aware of the requirements at issue here. It should be noted also that no one has argued that the statutory requirement is either onerous or unreasonable. Clearly, it is not. While there is no impropriety in using a template with some boilerplate language as the starting point for an affidavit, surely it would require no great effort for a lawyer to include a few sentences or paragraphs describing the specific work that was done in a particular case – especially when such an affidavit is the basis for a fee request of many thousands of dollars. Certainly the judge approving the request should demand more specificity and detail.

Systematic approval of deficient affidavits thwarts the important purpose for which the statutory requirements of SCPA §1108(2)(c) were established. As the Court of Appeals stated in *Matter of Feinberg*, 5 NY3d 206, 214 (2005), the purpose of

the requirements is to ensure that beneficiaries of estates “are paying only for the actual cost of administering the estates.” The legislative history and background of SCPA §1108(2)(c) detailed in *Feinberg* underscored the need to assure that legal fees are commensurate with the services provided. *See, Matter of Alayon*, 28 Misc3d 311, 318 (Surr Ct Kings Co 2010) (“[I]f legal fees are not fixed based on the actual work performed, there is no question that an injustice results, as the subject estates have been diminished without regard to the benefits conferred upon them by [counsel’s] legal services”), *aff’d*, 86 AD3d 644 (2d Dept 2011). Boilerplate affidavits necessarily disguise any differences between the services provided in a relatively simple case and one with complex issues. By describing in general terms both the services provided in every case and those that would have been provided if needed, the template affidavits obscure the actual work that was done in a particular case. As such, they not only fail to achieve, but actually undermine the objectives of SCPA §1108(2)(c).

II. The Administrative Board Guidelines Call for Compliance with SCPA §1108(2)(c)

Just as the Surrogate’s Court Procedure Act imposed on respondent the duty to give individualized consideration to the statutory factors before setting counsel fees, so too do the Administrative Board Guidelines authorized by SCPA §1128 to structure compensation of counsel to public administrators. The Guidelines do so explicitly. Thus, I find unpersuasive the Referee’s conclusion, which the majority accepts, that misconduct should not be found because the Guidelines effectively “enable[] legal fees to be awarded without relationship to legal work done” in that they

instruct compliance with the SCPA but also recommend a “rule of thumb” legal fee of 6% of estate assets (Rep. 24).

The establishment by the Administrative Board for the Offices of the Public Administrators of monetary parameters within which surrogates are to set legal fees did not eliminate the requirement that surrogates consider the factors prescribed in SCPA §1108(2)(c) when setting fees. The Guidelines state that 6% is the *maximum* fee that should be requested, not that that amount must be awarded in every case, with no showing of the work that was actually done. Indeed the majority’s own opinion straddles the fence with respect to the requirements imposed on surrogates. It asserts, on the one hand, that the Guidelines diminish the importance of knowing the details of the work done in a particular case yet concedes, on the other hand, that the statutory requirement of affidavits “setting forth in detail the services rendered” demands “meaningful, specific information” (Determination, p. 15, n. 3). The practical difference between “details” and “specificity” in this context is a difference without a distinction. What is in fact meaningfully specific is the ten-point list of statutory factors carefully delineated in SCPA §1108(2)(c) that are required to be considered in awarding fees. Critically, moreover, the Referee’s report itself concedes that the 2002 Amended Guidelines explicitly direct public administrators in New York to “require counsel to support their request for compensation with *an affidavit complying with SCPA §1108(2)(c)*” (Emphasis added) (Rep. 63). The Referee further observed that the Interim Report accompanying the 2002 Guidelines underscores that “the Surrogate retains complete discretion to fix reasonable counsel fees *in accordance with the factors listed in SCPA §1108(2)(c)*”

(Emphasis added) (Rep. 63). In view of the fact that the Referee herself acknowledges that the Guidelines expressly call for compliance with SCPA §1108(2)(c), it is odd the majority nonetheless accepts the rationale that the Guidelines somehow excuse respondent's failure to comply with SCPA §1108(2)(c).

It is interesting to note that respondent played a central role in devising the very Guidelines by which the majority now intimates he is sheltered from accountability. Respondent was Chair of the Administrative Board for the Offices of the Public Administrators that enacted the 2002 Guidelines and was a member of the Board that enacted the May 2012 Guidelines (Rep. 23-24, n.11). As such, the majority's decision effectively permits respondent to take cover under the so-called "internal inconsistency" he himself played a role in authoring.

Finally, even if there were sufficient grounds upon which to conclude that the Administrative Guidelines are faulty, it should go without saying that a state law is superior to any administrative guidelines promulgated in furtherance of the law. The Administrative Board for the Offices of the Public Administrators owes its existence and its authority to Surrogate's Court Procedure Act §1128. It cannot, therefore, supersede its institutional capacity and eviscerate core provisions of the very Act it is charged to help execute. The Guidelines do not, nor can they "give shelter" to respondent's failure to comply with SCPA §1108(2)(c).

III. The "Everybody Does It" Defense Lacks Supporting Evidence

Equally unpersuasive is the notion that respondent's transgression should

be excused by the fact that, during this time period, other New York City surrogates also accepted similarly deficient affidavits (Rep. 18). The majority's implicit endorsement of respondent's defense that, in essence, "everybody does it" lacks a viable evidentiary base. More precisely, the record before us is insufficient to demonstrate an entrenched pattern of non-compliance with SCPA §1108(2)(c) in the years at issue. No testimony was elicited at the hearing with respect to the format of affidavits generally accepted by surrogates of New York, Queens, and Kings counties. Nor was there testimony regarding the circumstances under which the fees were approved in the out-of-county cases that were introduced into evidence by respondent. And, although some of those out-of-county affidavits contained an offer to submit additional details upon request, there was no testimony as to whether additional details were in fact requested and received by surrogates in the other counties.

Juxtaposed to the 30 affirmations introduced as proof of respondent's practice in Bronx County alone during 1995 to April 2009 along with the extensive testimony surrounding those affirmations, only 14 affidavits of legal services from attorneys who served as counsel to the Public Administrator in other counties constitute enough proof for the majority of a so-called widespread, longstanding practice.¹ The surrogates in other counties were not given an opportunity to explain whether the affidavits the respondent chose to present as evidence were representative of the affidavits they required in their courts. Moreover, it is important to highlight that eleven

¹ See the affidavits in evidence from New York County, Kings County and Queens County (Ex. Q, R, S, T, V, W, EE, FF, GG, HH, II, JJ, KK). At least one (Ex. U) was deemed by the Referee an exception.

of the 14 out-of-county affidavits offered by respondent were submitted before the 2005 *Feinberg* decision that underscored the requirement of affidavits of legal services. That leaves a grand total of three pertinent deficient affidavits in evidence submitted in other counties of New York City post-*Feinberg*. Only in a make-believe world does N = 3 constitute a representative subset of the thousands of affidavits approved by New York City surrogates in the years following the 2005 *Feinberg* ruling. Neither does the larger N = 14 satisfy a common sense, let alone a legal threshold for what constitutes proof of a widespread pattern in the context of tens of thousands of affidavits approved in New York City counties in the nearly 20 years since enactment of SPCA §1108(2)(c) in 1993.

Even assuming the roughly three to 14 out-of-county affidavits presented by the respondent are more than a cherry-picked, biased sample of surrogate decision-making in New York City, such evidence would not excuse respondent's misconduct. In *Matter of Sardino*, 58 NY2d 286, 291 (1983), the Court of Appeals explained that similar misconduct of other judges does not provide a defense to a finding of judicial misconduct:

“Each Judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a Judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense. Indeed one of the obvious reasons for establishing a permanent Commission on Judicial Conduct is to elevate judicial performance by insuring that the practices in the various courts comply with the high standards required of judicial officers.”

This principle was reaffirmed in *Matter of Duckman*, 92 NY2d 141, 154 (1998) and again in *Matter of Feinberg*, 5 NY3d 206, 215 (n. 4) (2005). It is time to change the practice if

it is a practice.

IV. Proper Commission Response to Widespread Pattern of Problematic Judicial Behavior

Our response should not be to turn a blind eye to conduct that is clearly contrary to the law, nor to excuse judges who fail to follow the law. The proper Commission response to a *bona fide* widespread pattern of problematic judicial behavior is to confront, rather than excuse the behavior. Past instances of widespread lapses in judgment by judges prompted the Commission to do more than look the other way. In March 2012 the Commission issued a public report and recommended a set of reforms in response to complaints brought against the Presiding Justice of the Appellate Division, First Department, alleging that the judge engaged in inappropriate hiring practices. No state laws were proven to have been violated following extensive investigation of the complaints in that case, unlike in the instant case. The system-wide hiring-related reforms recommended by the Commission were subsequently adopted.

In 1977 the Commission issued a public report in addition to, not in lieu of, formal disciplinary charges against more than 200 judges found to have “fixed” traffic tickets. The Commission opted to both sanction the judges involved as well as use a public report as a mechanism for redressing the widespread problem of ticket-fixing. The latter is the proper course of action were the Commission actually provided with concrete evidence of a widespread pattern of disregarding SPCA §1108(2)(c) on the part of New York City surrogates.

Today’s decision is instead grounded in the hope that the revised May 2012

Guidelines will somehow induce compliance on the part of respondent and others similarly situated, where extant mandates obviously failed to do so. It is important to note that the majority asserts the new requirement that counsel maintain contemporaneous time records “*should encourage*” appropriate documentation and reporting of the legal services performed (Determination, p. 15, n. 3; emphasis added). It is my view that SCPA §1108(2)(c), the previously existing Guidelines, and *Feinberg* also *should* have encouraged appropriate documentation. They did not, because respondent chose to ignore them, even though he should have complied with them.

The negative repercussions that potentially flow from the majority’s decision to not sanction respondent for systematically failing to abide by a state law are many. First and foremost, the determination potentially undermines public trust in the judiciary and legal process. There is reasonable cause for concern whenever a judge rests his or her non-compliance with a state law on a claim that other judges are equally non-compliant. This is especially so when that judge’s credentials include more than forty years of experience as an attorney and nearly 25 years of service on the bench. Rarely can the typical respondent or defendant in a legal proceeding expect a court of law to accept the “everybody does it” defense as exculpatory. The public will likely find little solace in knowing that the Commission on Judicial Conduct has given a New York State judge a special pass to ignore a state law that is directed squarely at his office.

The majority’s decision also gives a blank check to counsels to the Public Administrators. It is in all likelihood a big blank check. In general, the upper limits of the Public Administrators’ counsels’ fees are considerable. During the years

encompassed by the instant complaint, the Bronx Public Administrator's office at any one time handled between \$30 million and \$57 million in estate funds. Between 2001 and 2005 alone, Mr. Lippman's annual earnings from Public Administrator legal fees ranged from \$768,500 to \$1,496,140 (Ex. 93). (In *Matter of Feinberg*, as much as \$9.5 million in legal fees from estate funds, over a period of five and a half years, were at stake.) Indicted in July 2010 in Bronx County of scheme to defraud, offering a false instrument for filing, falsifying business records, grand larceny and conflict of interest, Mr. Lippman profited enormously, in part, from respondent's failure to perform his judicial duties. Moreover, the Referee found that, as of the January 6, 2012 hearing date, a total of 19 Lippman cases remained open and Mr. Lippman still owed between \$125,000 and \$150,000 to overcharged estates, not including interest. In addition, Mr. Reddy's office had performed legal services with an estimated value of \$500,000 to \$1,000,000 on cases for which Mr. Lippman had been paid.

Where the Court of Appeals decision in *Matter of Feinberg* affirms the requirements of SCPA §1108(2)(c) and, thus, provides clarity, the majority's decision in this case stands to impart confusion. Although the question of the sufficiency of the affidavits of legal services was not before the Court in *Feinberg*, the holding nonetheless underscored the purpose and practical necessity of the statutory requirements that respondent failed to meet. The financial interests of the family members and other survivors of intestate decedents are potentially jeopardized by the majority's decision not to insist that surrogates comply with the statutory requirements designed to protect those interests. That these individuals consist of vulnerable segments – namely, “beneficiaries

of estates that, by definition, lack interested parties capable of offering independent review” – makes the majority’s weakening of the force of those requirements all the more troubling (Rep. 62).

Implicit in the majority’s decision is an expectation that the state legislature may ultimately accept the virtually impossible mission of writing a law that is even clearer than the Surrogate’s Court Procedure Act, or that the Administrative Board will explain why its directive to comply with SCPA §1108(2)(c) is not inconsistent with the Guidelines imposed.² Absent either of these outcomes, we can reasonably expect, at best, confusion as to the precise requirements imposed on surrogates and, at worst, actualization of the widespread pattern the majority now theorizes to exist.

V. Commission Enforcement of the Rules of Judicial Conduct

Instead of turning a blind eye and passing the buck, the Commission should instead fulfill its duty to enforce the existing Rules Governing Judicial Conduct in this case. The buck should stop here. The New York State Constitution authorizes the Commission to “determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office” (Art 6, §22[a]). Section 100.2 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct requires a judge to “respect and comply with the law” and “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” By definition, failure to follow a state law constitutes judicial misconduct. The

² The Referee opined that the so-called disconnect between the Administrative Guidelines and its authorizing statute “might be addressed by the Legislature” (Rep. 25).

majority's own opinion acknowledges that the responsibility for the estates in question was ultimately rested in respondent's hands insofar as it notes, one, that respondent "had a duty to report Mr. Lippman to disciplinary authorities in order to protect the estates in *respondent's court ...*" and, two, that by failing to do so respondent "put at further risk the estates under *his care ...*" (Determination, p. 13; emphasis added). The statutorily required oversight on respondent's part was made all the more necessary in this case because he was well aware Mr. Lippman "liked to gamble and frequented gambling establishments" (Determination, p. 12). In my view, respondent effectively abdicated his duties under state law not at the point at which he failed to report Mr. Lippman after the fact, but at the point at which he failed to maintain the watchful eye envisaged by SCPA §1108(2)(c) before the fact.

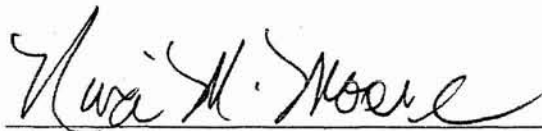
By dismissing Charge I of the Formal Written Complaint, the majority effectively holds that even though Section 100.2 of the Rules requires respondent to comply with the statutory requirements of SCPA §1108(2)(c), and even though respondent systematically failed to abide by those requirements, he did not violate the Rules Governing Judicial Conduct. I respectfully disagree, and vote to sustain Charge I.

VI. The Sanction of Removal Is Appropriate

While I cannot agree with some of the characterizations contained in Mr. Emery's dissent, I share his view that based on the record before us, the sanction of censure is unduly lenient. Although "the ultimate sanction of removal is not normally to be imposed for poor judgment, even extremely poor judgment" (*Matter of Shilling*, 51

NY2d 397, 403 [1980]), respondent's demonstrated dereliction of his ethical responsibilities, both in his systematic disregard of an important statutory mandate and in his unacceptable response to his appointee's malfeasance, compels the conclusion that he is unfit for judicial office.

Dated: December 13, 2012

A handwritten signature in cursive script, reading "Nina M. Moore". The signature is written in black ink and is positioned above a horizontal line.

Nina M. Moore, Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

OPINION BY MR. EMERY
DISSENTING AS TO
THE SANCTION

It is hard to disagree with any aspect of the majority's decision except its obtuse attempt to justify the sanction of censure as a response to this dissent. This is clearly a removal case. The notion that the majority can say what it does about Surrogate Holzman's misconduct and then censure him defies logic, precedent and common sense. Removal is the only sanction which is commensurate with respondent's uncontroverted, sustained, self-aggrandizing misconduct. And that is because it is clear that respondent's three-year cover-up of the criminal acts of his appointee and long-time colleague was actually an attempt to protect himself from scandal and cover up his own misconduct.

Cover-ups, as we have come to learn, in many walks of life are often more egregious than the substantive offenses being concealed. But for a judge to protect himself by covering for an appointee he supervised is a particularly grievous assault on the majesty of the judiciary. It is equivalent, in my view, to corruption.

In this case, respondent's misconduct was worse than a simple cover-up. It was compounded by his bizarre scheme to have Lippman handle estate funds after 2006, when it was discovered that he had systematically taken fees that he had not earned. By constructing this scheme that allowed Lippman to continue earning fees for years – ostensibly to pay back what he had stolen but really to avoid the scandal of thefts by *his* appointee on *his* watch – respondent enabled a continuing fraud. It is as if the United States attorney's office told Madoff when his Ponzi scheme was discovered, "Keep the investments going so that what you make in the market can be returned to your victims." Remember, even if Lippman had been fired in 2006, he would have been responsible for repaying the monies he owed. Respondent has no excuse or justification for secretly helping him repay those monies – especially by retaining him in a position of trust. In effect, respondent was imposing on future estates a person whom he knew could not be trusted. And he told no one other than his trusted insiders, even while he knew law enforcement agencies were breathing down Lippman's proverbial neck.

Respondent knew that as long as he kept his secret scheme in-house, the scandal in his court would not be revealed. He knew better than anyone that Lippman's victims were virtually all intestate estates where the beneficiaries had no one to look to for oversight other than the judge (respondent) who is the sole "disinterested" repository of trust and accountability in the system of public administration. Instead of carrying out his sworn duty, he hid the truth from the victims by not disclosing Lippman's dishonesty and not reporting Lippman to the law enforcement agencies that were engaged in ongoing active investigations, or to disciplinary authorities with oversight over attorney

malfeasance. As we all know, it is all too common for disciplinary committees to disbar attorneys for misuse of client funds.¹ Knowingly enabling that conduct is no less culpable.

As the trenchant Referee's report (to which both the majority and I appropriately defer) explains, as of 2006 when Lippman's thefts were first discovered:

"Mr. Levy's investigations, reported to respondent in early 2006, showed an estimated \$100,000 in unauthorized advance fees. When respondent confronted Mr. Lippman, Mr. Lippman gave respondent an explanation which respondent did not believe. *He felt his trust had been betrayed...* Respondent knew that law enforcement authorities were investigating payments of Mr. Lippman's legal fees ... and he knew 'for a long period of time that Mr. Lippman liked to gamble' and frequented gambling establishments."

(Rep. 39) (Citations omitted; emphasis added)

Respondent testified: "I certainly felt that what he did was a betrayal of trust *to me*" (Tr. 2549; emphasis added). A "betrayal of trust to me" might seem a somewhat displaced concern. What about the trust of the beneficiaries of the estates for which respondent was responsible? Nowhere in his testimony is this concern expressed. Any of his concerns for the victims were, apparently, subsumed by his concern for himself. So the repayment scheme on which the majority determination so heavily relies to mitigate respondent's misconduct seems *not* to have had the primary purpose of helping the victims; rather, the evidence supports the conclusion that it was, as I have

¹ In 2011, the Lawyers Fund for Public Protection determined that the dishonest conduct of 46 disbarred, suspended or deceased lawyers in New York State was responsible for documented client losses totaling \$9.9 million (2011 Annual Report of the Lawyers Fund for Public Protection, pp. 14, 22).

concluded, animated by respondent's solipsism. As such, any mitigation on this basis is indulging unsupported, *post hoc* spin of the facts and is plain error.

Respondent also learned that Lippman had commingled his personal law practice funds with those of estates administered by the Public Administrator (Rep. 28). Over the next three years, he learned that Lippman had under-reported both the amounts he owed and the number of estates he had overcharged. Nevertheless, respondent did not report or fire Lippman, and he allowed Lippman to continue to represent estates and collect fees. Notably, the Referee finds that respondent's motivation for this egregious judicial misconduct was based, in significant part, on his long *personal* and professional relationship with Lippman:

"Michael Lippman started work as counsel to the Bronx County PA in 1970. In 1974, respondent came to work in the Bronx County courthouse as Law Secretary to the then Bronx County Surrogate and later was appointed head of the Surrogate Court's Law Department where he served until he became Surrogate in 1988. During the years that the two men worked in the same courthouse, they saw each other frequently on court business. When respondent was elected Surrogate, he retained Mr. Lippman as counsel to the PA.

During the ensuing years, respondent and Michael Lippman had a close working relationship. In addition to appointing Mr. Lippman as chief counsel to the PA, respondent conferred with him about the staffing needs of the PA's office and, in consultation with Mr. Lippman, selected the attorneys who served as associate counsels... Mark Levy, respondent's Chief Court Attorney, testified that in January 2006, while Mr. Levy was working in respondent's chambers, 'Mr. Lippman came in and said to the Surrogate, "Do I still have a job?"' This incident bespeaks Mr. Lippman's familiarity with the Surrogate and his chambers.

On occasion, respondent and Michael Lippman saw each other outside the courthouse as well. Respondent knew that Mr. Lippman had season's tickets to Yankee Stadium, and testified that 'over the years there were at least three or four years that I went to Opening Day games with Mr. Lippman.' Respondent could recall at least twice when the two men had lunch together with other parties present. Mr. Lippman attended the wedding of respondent's eldest daughter. Mr. Lippman gave a party at his upstate home for more than 100 people to celebrate respondent's re-election. Mr. Lippman also made telephone calls 'for a couple of months' in an effort to raise money for respondent's 2001 re-election.

When respondent learned that Esther Rodriguez [the Public Administrator] had disobeyed his direction to stop using John Rivera as a vendor, he summarily fired her. When respondent learned that Michael Lippman had taken excess and advance fees and had disobeyed a direction of the court, respondent retained his services as associate counsel and permitted him to represent estates for three more years, albeit Mr. Lippman's fees were used to make refunds. The damage to the estates from the pilfering of Mr. Rivera was miniscule compared to the damage to the estates by Mr. Lippman as it was known to respondent in 2006.

I conclude there was proof by a preponderance of the evidence that the long and close relationship between respondent and Michael Lippman influenced respondent's decision in 2006 not to fire Michael Lippman and his decision not to report Michael Lippman to the DDC and to law enforcement, and instead to set up a repayment plan."

(Rep. 45-47) (Citations omitted.)

Perhaps most revealing of respondent's personal interest, the Referee quoted Mark Levy, respondent's chief court attorney, as stating in 2008 that "the goal 'was to make sure that *by the time the judge's term was completed* [December 31, 2012] that absolutely no person or estate had been in any way prejudiced by...[Mr. Lippman's] conduct'" (Rep. 32-33 [emphasis added]). While the majority seems to view this *goal* as

entirely altruistic (*i.e.*, respondent wanted to ensure that every estate was made whole and no beneficiary was prejudiced), I think it is more to the point that respondent's goal was self-serving: if respondent's plan was successful, he would leave office without anyone ever knowing of Lippman's misdeeds, and the perfidy of respondent's role in enabling them would not come to light.

The majority concludes, as did the Referee, that respondent's cover-up "conveyed the appearance that respondent was motivated by favoritism arising out of their long professional relationship" (Determination, p. 20). My view is that the record shows that his motivation was both professional and personal. However, that conclusion is not necessary to the result I advocate.

I am unpersuaded by the rationale – which the majority seems to swallow hook, line and sinker – that when respondent confronted Lippman over his admission that he had overcharged numerous estates, Lippman "offered generalized, plausible explanations for the excess fees" (Determination, p. 16), such as that his fee estimates had been based on faulty assessments of real estate. As the majority is constrained to acknowledge, albeit in a substantial understatement, "respondent had ample information that should have made him skeptical of [this] information" (*Id.*). Certainly the Referee did not make any finding that his "explanations" were "plausible." Even if, at that point, respondent did not know with 100% certainty that Lippman was a thief, he had more than enough information to know beyond any doubt that Lippman was neither ethical nor trustworthy. Moreover, by his own testimony, he felt "betrayed."

Nor am I persuaded by any argument that it took several years before the magnitude of Lippman's misconduct was discovered. In fact, it is clear that between 2006 and 2009 the onion of Lippman's dishonesty unpeeled even in the face of his attempts to minimize it. Respondent's claim that he was unaware of the extent of Lippman's theft is not a defense because when the circumstances cried out for a thorough, independent assessment of the damage, respondent ignored the cacophony of warning bells and whistles. His only response was to demote Lippman as chief counsel (while allowing him to keep working on cases and even assigning him new cases) and to institute the repayment plan – a scheme that continued for three years, even as respondent continued to learn new details of his appointee's unethical and, likely, criminal behavior.

On this record, respondent's offenses are removable taken separately, let alone combined. They include:

1. Failure to fire an employee known to have engaged in mishandling court monies. We have regularly disciplined town justices for this violation, standing alone (*Matter of Jarosz*; *Matter of Burin*), notwithstanding that the amounts at issue were nowhere near the six-figure totals in this case.
2. Failure to report serious attorney misconduct and evidence of criminal activity that would likely result in disbarment and/or prosecution (see Adv Ops 10-85 [requiring a judge to report a lawyer to a disciplinary authority when the lawyer's alleged substantial misconduct "seriously calls into question the attorney's honesty, trustworthiness or fitness as a lawyer"], 07-129 [judge should report attorney, who admitted that

- he/she committed perjury, to disciplinary authority]; 09-142 [judge should report attorney who, the judge concluded, had sought to deceive the court and “repeatedly acted in an extremely unprofessional manner in defiance of court directives”]).
3. Cover-up to benefit a colleague and/or friend (*Matter of Schilling* [judge engineered a scheme to fix a Speeding ticket issued to the wife of a colleague by effectively erasing all copies of the ticket from the system] [removal]).
 4. Cover-up to conceal wrongdoing and avoid public exposure and embarrassment (*Matter of Marshall* [judge altered court calendar to conceal that she had disposed of four cases prior to the scheduled court date] [removal]; *Matter of Kadur* [judge made false entries in court documents, deliberately misspelling her son’s name in order to conceal that she had presided over her son’s cases] [removal]).
 5. Using judicial office in a manner that undermines confidence in the judiciary (*Matter of Gelfand*, 70 NY2d 211, 216 [1987] [judge based staffing decisions in his court to further his interests in maintaining a personal relationship with a court employee; his “repeated misuse of his judicial powers...[was] inimical to his role as a judge”] [removal]).

In the determination finding censure appropriate, the majority agrees with each finding by the Referee and adds to the culpability of respondent by essentially concluding that he lied to the Commission about the motives for his misconduct.

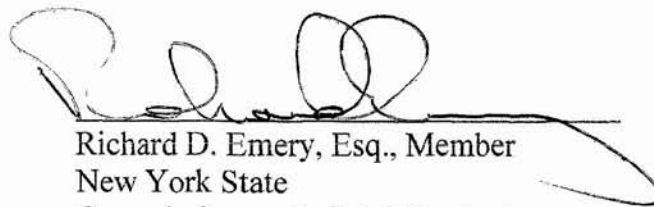
Without using that inflammatory term, the majority states that respondent's "explanations for his failure to share information with law enforcement are unconvincing" (Determination, p. 19). And the majority finds: "Nor are we persuaded by respondent's explanation that he did not contact other agencies so as not to interfere with ongoing investigations and to avoid the appearance that he was misusing his judicial prestige in order to obtain information" (Determination, p. 19). Usually, when we conclude that a respondent has not told us the truth, even about his motives, we do not indulge mitigation. *E.g., Matter of Marshall*, 8 NY3d 741 (2008); *Matter of Mason*, 100 NY2d 56 (2003); *Matter of Gelfand*, 70 NY2d 211 (1987). I recognize that the Court of Appeals has warned us that lack of candor as an aggravating factor should be used cautiously when applied to testimony regarding a judge's subjective intentions (*Matter of Kiley*, 74 NY2d 364, 370-71 [1989]). But when the record compels us to reject the judge's testimony about his motivations, it is certainly proper to note our concerns and test any claimed mitigation against those credibility issues.

In asserting that mitigation supports censure rather than removal, the best the majority can muster is the very essence of respondent's misconduct – that "respondent's judgment was clouded by his long professional association with an attorney who had served as counsel for several decades" (Determination, p. 22). Why the majority has lost its bearings in this case is a total mystery to me. Perhaps it is unduly influenced by the impending end of respondent's term (Determination, p. 23). If so, say so. Perhaps the dismissal of several other charges based on the Referee's findings influenced my colleagues. Perhaps respondent's engaging personality at our hearing

clouded clear judgment. Or perhaps excellent lawyering on his behalf led the majority astray. I am perplexed and disappointed in the lack of accountability this case will convey to others.

What I do know is that this is one of the most egregious cases that has ever been litigated before this Commission during the nine years that I have served. To allow respondent to escape removal on these undisputed facts out of deference or undue leniency towards a retiring judge degrades our function to a degree I have not yet witnessed. Respondent's favoritism towards Lippman should not be compounded by our favoritism towards him.

Dated: December 13, 2012



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

DOUGLAS BRIAN HORTON,

a Justice of the Mexico Town Court,
Oswego County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (John J. Postel and Kathleen Martin, Of Counsel)
for the Commission

James K. Eby for the Respondent

The respondent, Douglas Brian Horton, a Justice of the Mexico Town
Court, Oswego County, was served with a Formal Written Complaint dated June 1, 2012,

containing one charge. The Formal Written Complaint alleges that respondent physically assaulted his girlfriend while attending a banquet. Respondent filed an answer dated June 20, 2012.

On September 24, 2012, the Administrator, 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 December 6, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Mexico Town Court, Oswego County, since 2008. His current term expires on December 31, 2013. He is not an attorney.
2. Respondent has been a member of the Mexico Volunteer Fire Department since 1986.
3. On or about March 27, 2010, respondent and Lisa Cote, his longtime girlfriend, attended the annual dinner of the Mexico Town Volunteer Fire Department at the Eis House, a local restaurant/banquet hall. At the time, respondent and Ms. Cote had been romantically involved for approximately nine years, had lived together for approximately eight years and had a five year-old son. For months prior to the event, Ms. Cote and respondent had been experiencing problems in their relationship.

4. At the event, respondent and Ms. Cote each consumed multiple alcoholic drinks. At about midnight, as they prepared to leave the event, respondent and Ms. Cote entered the foyer that also served as a coatroom. Ms. Cote asked respondent about why he had been dancing with other women, but not with her. Respondent told Ms. Cote to “[s]hut the fuck up,” or words to that effect, and an argument ensued.

5. When Ms. Cote opened the door of the coatroom in order to re-enter the bar area, respondent hooked his arm across Ms. Cote, pulling her back into the coatroom. As respondent and Ms. Cote continued to argue, respondent pushed her into the cloakroom wall, causing her to fall to the floor. Ms. Cote was not physically injured and did not require medical attention.

6. Kenneth Dingman, another guest, came to Ms. Cote’s assistance, helping her up off the floor and saying to respondent, “Does that make you feel like a big man,” or words to that effect. Respondent and Mr. Dingman argued. Other banquet guests appeared in the coatroom and separated the two men. Respondent left the restaurant without Ms. Cote and returned home.

7. Someone called 911 and two New York State Troopers responded by appearing at the restaurant. Ms. Cote told the Troopers that she did not want to file a complaint against respondent. Thereafter, one of the other banquet guests drove her home.

8. On April 1, 2010, as a result of the incident with Ms. Cote, respondent was suspended from the Mexico Volunteer Fire Department for 30 days,

directed to seek counseling and prohibited from drinking alcoholic beverages at Fire Department events for the next six months.

9. Ms. Cote and respondent ended their relationship in November 2010.

Additional Factors

10. Respondent has no previous disciplinary record.
11. The confrontation of March 27, 2010, took place within the context of the end of a long-term relationship.
12. Respondent and Ms. Cote terminated their relationship in the fall of 2010 and have worked out mutually agreeable arrangements concerning the shared custody of their child.
13. Since respondent and Ms. Cote terminated their relationship, there have been no further confrontations between them.
14. Respondent states that he deeply regrets having engaged in a physical confrontation with Ms. Cote, and he apologizes for having brought disrepute to the judiciary by virtue of his conduct.
15. Respondent has been contrite and cooperative with the Commission throughout its inquiry.

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 is sustained and respondent's misconduct is established.

By engaging in an unseemly public altercation with his longtime girlfriend that culminated in him pushing her and causing her to fall to the ground, respondent engaged in conduct that detracted from the dignity of his judicial office and brought the judiciary as a whole into disrepute. That they had been arguing and had both consumed "multiple alcoholic drinks" prior to the incident is not an excuse. Respondent has stipulated that his conduct was inconsistent with the high ethical standards which judges are obliged to observe "at all times," both on and off the bench (Rules, §100.1).

As the Court of Appeals has stated, even off the bench every judge remains "clothed figuratively with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others." *Matter of Kuehnel*, 49 NY2d 465, 469 (1980). Any conduct, on or off the bench, "inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual judge to carry out his or her constitutionally mandated function" (*Id.*).

For one who holds a position of public trust and who presides over cases involving domestic violence in which he is called upon to pass judgment over the actions of others, such conduct adversely affects respondent's ability to administer the law effectively and impartially (*see, Matter of Roepe*, 2002 Annual Report 153). The fact that respondent's girlfriend decided not to file a complaint against him with the troopers who were called to the scene does not mitigate the wrongfulness of his conduct.

In accepting the recommended sanction of admonition, we note that respondent has no previous disciplinary record and has had no further confrontations with Ms. Cote since they ended their relationship in late 2010. We also note that respondent is contrite and apologizes for having brought disrepute to the judiciary by his conduct.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Mr. Stoloff and Judge Weinstein concur.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 10, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

HEATHER L. KNOTT,

a Justice of the Hague Town Court,
Warren County.

DECISION
AND
ORDER

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the
Commission

John C. Turi for the Respondent

The matter having come before the Commission on December 6, 2012; and
the Commission having before it the Stipulation dated December 6, 2012, with the

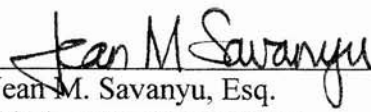
appended exhibits; and respondent having tendered her resignation from judicial office by letter dated October 11, 2012, and having affirmed that she vacated judicial office as of November 1, 2012, and that she will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will become public upon being signed by the signatories and the Commission's Decision and Order thereto will become public; 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 was not present.

Dated: December 7, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

HEATHER L. KNOTT,

STIPULATION

a Justice of the Hague Town Court,
Warren County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission on Judicial Conduct ("Commission"), and the Honorable Heather L. Knott ("respondent"), who is represented in these proceedings by John C. Turi, Esq., as follows:

1. Respondent was admitted to the practice of law in New York in 1991. She had been a Justice of the Hague Town Court, Warren County, since 1994.
2. Respondent was served with a Formal Written Complaint ("Complaint") dated September 14, 2012, containing four charges. The Complaint alleged that respondent failed to report a property damage accident and invoked her judicial status when notified by police that she was being charged for that offense, notwithstanding that she had previously been censured for similar conduct. The Complaint further alleged that respondent gave testimony to the Commission that was false and/or lacking in candor as to why she had failed to report the accident; that respondent appeared in Family Court representing a child while under the influence of alcohol, notwithstanding that she had represented to the Commission in 1999 that she

would refrain from the use of alcohol; and that respondent presided over court proceedings while under the influence of alcohol, notwithstanding her representation to the Commission in 1999 that she would refrain from the use of alcohol.


3. The Formal Written Complaint is appended as Exhibit 1.
4. Respondent enters into this Stipulation in lieu of filing an Answer to the Complaint, without admitting the allegations of the charges.
5. Respondent tendered her resignation, dated October 11, 2012, a copy of which is annexed as Exhibit 2. Respondent affirms that she vacated judicial office as of November 1, 2012.
6. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from the date of a judge's resignation to complete proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.
7. Respondent affirms that, having vacated her judicial office, she will neither seek nor accept judicial office at any time in the future.
8. Respondent understands that, should she abrogate the terms of this Stipulation and hold any judicial position at any time, the present proceedings before the Commission will be revived and the matter will proceed to a hearing before a referee.
9. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

10: Respondent waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (A) this Stipulation will become public upon being signed by the signatories below, and (B) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: 12-4-12.


 Honorable Heather L. Knott
 Respondent

Dated: 12-5-12


 John C. Turi
 Attorney for Respondent

Dated: 12-6-2012

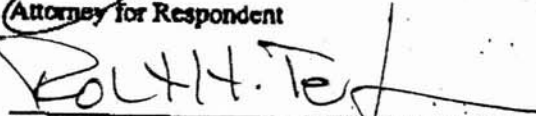

 Robert H. Tembeckjian
 Administrator and Counsel to the Commission
 (Cathleen S. Conci, Of Counsel)

EXHIBIT 1: FORMAL WRITTEN COMPLAINT:
 Available at www.cjc.ny.gov

EXHIBIT 2: RESPONDENT'S LETTER OF RESIGNATION:
 Available at www.cjc.ny.gov

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

PAUL M. LAMSON,

a Justice of the Fowler Town Court,
St. Lawrence County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk, Of Counsel) for the Commission

Lekki Hill Duprey & Bhatt, PC (by Lloyd G. Grandy II) for the Respondent

The respondent, Paul M. Lamson, a Justice of the Fowler Town Court, St. Lawrence County, was served with a Formal Written Complaint dated November 3, 2011, containing two charges. The Formal Written Complaint alleged that in 2009 respondent

initiated, permitted and/or considered *ex parte* communications in connection with a criminal case notwithstanding that he had previously been cautioned by the Commission to avoid *ex parte* communications. Respondent filed a verified answer dated December 27, 2011.

On March 6, 2012, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Judiciary Law §44(5), stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument.

On March 15, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Fowler Town Court, St. Lawrence County, since November 2005. His current term expires December 31, 2013. By administrative order in June 2011, respondent received a temporary appointment to serve as Justice for the Town of Hermon until December 31, 2011. Respondent is not an attorney.

As to Charge I of the Formal Written Complaint:

2. On August 12, 2009, Alan Bigwarfe was arrested by state troopers and the Gouverneur police and charged in the Town of Fowler with Criminal Contempt 1st Degree, Assault 3rd Degree, Unlawful Imprisonment 2nd Degree and Resisting Arrest, after allegedly assaulting his former girlfriend in the Town of Fowler and fleeing to the Town of Gouverneur.

3. On August 13, 2009, respondent arraigned Mr. Bigwarfe in the Town of Fowler on the above charges and remanded him to the St. Lawrence County Correctional Facility where he was held without bail. Respondent directed the Office of Indigent Defense to assign Mr. Bigwarfe counsel, issued an order of protection on behalf of the alleged victim, scheduled a preliminary hearing for August 17, 2009, and then adjourned the hearing until August 18, 2009.

4. The St. Lawrence County Public Defender's Office was assigned to represent Mr. Bigwarfe. On August 18, 2009, Mr. Bigwarfe and Assistant Public Defender Steven Ballan appeared for the preliminary hearing, ready to proceed. Assistant District Attorney (ADA) Jonathan Becker appeared on behalf of the People and advised respondent that he was not ready to proceed because he could not reach his witness.

5. Due to the People's inability to proceed and upon the request of ADA Becker, respondent dismissed the felony contempt charge, without prejudice. Respondent set bail at \$2,500 cash or \$10,000 bond on the other charges and adjourned the matter to September 2, 2009.

6. On September 2, 2009, St. Lawrence County Public Defender Mary Rain appeared in court on behalf of Mr. Bigwarfe, and ADA Becker appeared on behalf of the People. Mr. Bigwarfe, who remained incarcerated, was not produced in court. Respondent advised the parties that there was a warrant for Mr. Bigwarfe's arrest in the Town of Gouverneur for a charge of Assault 2nd Degree and adjourned the case until October 7, 2009.

7. On September 3, 2009, Mr. Bigwarfe was arraigned on the Assault 2nd Degree charge by Justice Stanley H. Young, Jr., in Gouverneur Town Court. Since the Gouverneur charge was related to the August 12, 2009 Fowler charges, the Gouverneur case was retained by respondent in the Fowler Town Court for disposition.

8. On September 24, 2009, respondent stopped at the St. Lawrence County Public Defender's office to visit an acquaintance. Respondent saw Mr. Ballan, who told him that he was attempting to get the district attorney to agree to time served in exchange for a guilty plea by Mr. Bigwarfe to Resisting Arrest in satisfaction of all the charges. Respondent told Mr. Ballan that he could not agree to time served, but would think about an appropriate sentence for Mr. Bigwarfe and would let Mr. Ballan know. Respondent did not disclose his *ex parte* conversation with Mr. Ballan to the prosecution.

9. Later that day, respondent sent Mr. Ballan an e-mail, in which he wrote with reference to *People v Bigwarfe*:

I gave some thought to our conversation [about Mr. Bigwarfe] on the way home. If the DA offers the Resisting Arrest and [sic] Harassment charge in Satisfaction, I would agree to a CD for 12 months. If the DA gives it to you in Writing, the Minute you get a copy to me I will release him. he would do no more time. With his history, I think a CD would be appropriate.

Respondent neither copied the district attorney's office on the e-mail nor disclosed to the district attorney's office that he sent the e-mail to Mr. Ballan.

10. In September 2009, at the Gouverneur municipal building, respondent and Gouverneur Village Police Chief David Whitton engaged in a

conversation regarding restitution for damages to officers uniforms. Respondent did not immediately comprehend that the Police Chief was seeking restitution in the *People v. Alan Bigwarfe* cases pending before him.

11. Upon returning to his office at the courthouse, respondent realized that the restitution the Police Chief was seeking was in regard to the charges pending before him. Despite this awareness, respondent did not disclose his conversation with Chief Whitton to the prosecutor or defense counsel.

12. On September 25, 2009, respondent sent Mr. Ballan a second e-mail, in which he wrote concerning the *Bigwarfe* case:

One issue not addressed is restitution for the officers (sic) uniforms. I beleive [sic] there was damage to the police uniforms, not positive though. If there was and restitution and its [sic] paid prior to sentencing then I will waive surcharge.

Again, respondent neither copied the district attorney's office on the e-mail nor disclosed to the district attorney's office that he sent the e-mail to Mr. Ballan.

13. Prior to respondent's email of September 25, 2009, to Mr. Ballan, the issue of restitution or damage to police officers' uniforms had not been raised by defense counsel or the prosecutor.

14. On or about October 4, 2009, Chief Whitton sent a letter, by facsimile and regular mail, to respondent requesting that Mr. Bigwarfe pay restitution in the amount of \$241.01. Chief Whitton did not send the letter to, or discuss the matter with, the probation department, the district attorney or the public defender. Respondent

had intended to forward the letter to the prosecution and defense attorneys, but neglected to do so.

15. On October 7, 2009, Ms. Rain, ADA Becker and Mr. Bigwarfe appeared in court. Respondent accepted Mr. Bigwarfe's plea of guilty to Resisting Arrest and Harassment 2nd Degree in full satisfaction of all the charges pending in both the Fowler and Gouverneur courts, ordered a pre-sentence investigation (PSI) by the probation department and adjourned sentencing to December 2, 2009. At the time Mr. Bigwarfe entered his guilty plea, he affirmed that no promises had been made with respect to sentencing. Prior to taking judicial action, respondent did not disclose his communications with Mr. Ballan and Chief Whitton and did not offer to disqualify himself.

16. On December 2, 2009, Ms. Rain, ADA Becker and Mr. Bigwarfe appeared in court for sentencing. After discussing the PSI, which recommended a "substantial period of incarceration," respondent sentenced Mr. Bigwarfe to consecutive jail terms of 365 days incarceration on the Resisting Arrest charge and 15 days on the Harassment charge, and ordered restitution of \$241.01 plus administrative surcharges. Prior to taking judicial action, respondent did not disclose his communications with Mr. Ballan and Chief Whitton and did not offer to disqualify himself.

17. The probation department, the district attorney and the public defender never received a copy of Chief Whitton's letter and did not know a written request for restitution had been made to respondent by Chief Whitton. The PSI included

no indication of a request or recommendation for restitution, nor were there any details regarding a police officer's damaged uniform. Both sides agreed, however, that restitution was appropriate.

18. Thereafter, the public defender's office filed a CPL §440.20 motion to vacate the sentence imposed on Mr. Bigwarfe, alleging that respondent's September 24, 2010 *ex parte* e-mail to Mr. Ballan was a commitment to a sentence of time served. The district attorney opposed the motion on the ground that there had been no sentencing promise. After submissions by both parties, respondent denied the motion in a written decision dated February 1, 2010.

19. The public defender appealed respondent's determination to County Court Judge Jerome J. Richards, who in an October 6, 2010 decision, affirmed respondent's determination, finding that the sentence imposed was legal. Judge Richards concluded, *inter alia*, that respondent's preliminary discussions with defense counsel were "*ex parte* and improper," but were not a commitment to a particular sentence.

20. Respondent acknowledges that he should not have engaged in *ex parte* communications with either Steven Ballan or Chief David Whitton.

As to Charge II of the Formal Written Complaint:

21. By Letter of Dismissal and Caution dated October 2, 2008, the Commission cautioned respondent, *inter alia*, to avoid *ex parte* communications, after he acknowledged having made numerous *ex parte* phone calls to a represented defendant. At the time the letter was issued, respondent understood that he was not to engage in any

ex parte communications, including those with counsel for a party. Notwithstanding his receipt of this letter, respondent engaged in *ex parte* communications in the matter of *People v. Alan Bigwarfe*, as stipulated above.

Mitigating Factors

22. Respondent recognized and admitted wrongdoing at the earliest available opportunity. He is remorseful and assures the Commission that lapses such as occurred here will not recur.

23. Each of the improper *ex parte* communications occurred during a single criminal case that resulted in multiple charges in different jurisdictions. Respondent's conduct did not result in any actual favoritism or bias. At the time Mr. Bigwarfe entered his guilty plea, he acknowledged that no promises had been made as to sentencing. The sentence and restitution imposed by respondent were affirmed on appeal.

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)(6) and 100.3(E)(1) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Prior to imposing the sentence in a criminal matter, respondent engaged in a series of *ex parte* communications about the impending sentence with the defendant's

attorney and the Police Chief. These out-of-court communications, without the knowledge or consent of all the parties, were contrary to well-established ethical and legal principles.

Section 100.3(B)(6) of the Rules prohibits a judge from initiating or considering unauthorized *ex parte* communications with respect to a pending or impending matter. Engaging in such conduct deprives the parties of the full right to be heard according to law and to have their cases decided based upon a proper record of submissions to the court. *See, e.g., Matter of Bishop*, 2010 Annual Report 104 (judge ruled against the defendant in a summary eviction proceeding based on an *ex parte* communication); *Matter of Williams*, 2008 Annual Report 101 (after reserving decision in a Harassment case, judge spoke to the arresting officer concerning a matter affecting the defendant's credibility); *Matter of More*, 1996 Annual Report 99 (judge dismissed charges in three traffic cases without notice to the prosecutor and disposed of three other cases based on *ex parte* communications); *Matter of Racicot*, 1982 Annual Report 99 (judge contacted a defendant's employer, co-workers, neighbors and others to obtain information about disputed evidentiary issues).

Here the record reveals that prior to imposing sentence in the *Bigwarfe* case, respondent discussed the sentence with the defendant's attorney and later sent the attorney two emails about sentencing, without disclosing these communications to the District Attorney. Respondent's emails stated that he had considered the substance of the attorney's *ex parte* proposals as to the sentence, and laid out the sentencing parameters he

would accept. Respondent also engaged in an *ex parte* conversation with the Gouverneur Police Chief concerning the issue of restitution and later received a letter from the Police Chief requesting restitution in the case; respondent never disclosed these communications to the defendant's attorney notwithstanding that, in imposing the sentence, respondent clearly relied on the *ex parte* information he had received. Respondent should have recognized that such unauthorized communications would compromise his impartiality and create an appearance of impropriety (Rules, §§100.1 and 100.2[A]). Indeed, in a subsequent motion to vacate the sentence, the defendant's attorney argued that respondent's undisclosed, out-of-court statements to him were a commitment as to the sentence. Although the County Court upheld the sentence, the court criticized respondent's "*ex parte* and improper" communications, which undermine public confidence in the integrity and independence of the judiciary.

In imposing sanction, we note respondent's prior Letter of Dismissal and Caution in 2008 for making numerous *ex parte* telephone calls to a defendant. Having been cautioned less than a year earlier about such conduct, respondent should have been particularly sensitive to the impropriety of engaging in any *ex parte* communications. Prior discipline is an aggravating factor militating in favor of a strict sanction, especially where the prior discipline was based on similar misconduct. *Matter of Rater*, 69 NY2d 208, 209-10 (1987).

Although respondent's conduct was contrary to fundamental principles of law, several additional factors must be noted. It appears that respondent did not seek out

the defendant's attorney to discuss the sentence, but spoke to him initially in a chance encounter. It has been stipulated that respondent's *ex parte* communications did not result in actual favoritism or bias. We also note that his misconduct was limited to a single criminal case. Thus, this case can be distinguished from cases involving judges who have been disciplined for repeatedly conducting *ex parte* investigations out of court. *E.g.*, *Matter of VonderHeide*, 72 NY2d 658 (1988) (judge routinely made telephone calls outside of court in order to determine the facts in pending matters, and engaged in significant additional misconduct) (removal); *Matter of Racicot* (censure), *supra*; *Matter of More* (admonition), *supra*. Further, we note that respondent has acknowledged the impropriety of his conduct and has pledged to avoid such misconduct in the future.

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

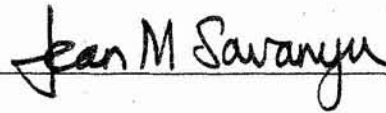
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: March 20, 2012

A handwritten signature in black ink, reading "Jean M Savanyu", is written over a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

ROBERT L. LINK,

a Justice of the Oppenheim Town Court,
Fulton County.

DECISION
AND
ORDER

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk, Of Counsel) for the Commission

Girvin & Ferlazzo, P.C. (by James E. Girvin) for the Respondent

The matter having come before the Commission on September 19, 2012;
and the Commission having before it the Stipulation dated August 17, 2012, with the
appended exhibits; and respondent having tendered his resignation from judicial office by

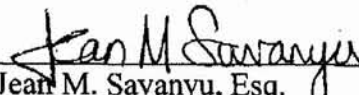
letter dated June 6, 2012, effective June 30, 2012, and having affirmed that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation and the Commission's Decision and Order thereto 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.

Judge Peters did not participate.

Dated: September 20, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

ROBERT L. LINK,

STIPULATION

a Justice of the Oppenheim Town Court,
Fulton County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission, and the Honorable Robert L. Link ("respondent"), who is represented in these proceedings by James E. Girvin, Esq., as follows:

1. Respondent has been a Justice of the Oppenheim Town Court, Fulton County, since January 1, 2004. His current term expires December 31, 2014.

Respondent is not an attorney.

2. Respondent was served with a Formal Written Complaint dated April 17, 2012, containing three charges alleging that he engaged in judicial misconduct in his handling of cases between in or about May 2009 to September 2010. The allegations of the Formal Written Complaint included, *inter alia*, that: (1) in one case respondent failed to advise a defendant of the right to counsel or the right to a hearing, improperly elicited admissions from the defendant, considered and/or relied upon *ex parte* communications, found the defendant guilty without a plea or trial and imposed sentence without giving the defendant an opportunity to contest the charges, (2) in two cases respondent failed to

disclose his own and his family's personal involvement in a defendant's business operation, engaged in and/or considered improper *ex parte* communications and failed to disqualify himself or seek remittal of disqualification and, (3) in two cases respondent failed to mechanically record court proceedings.

3. The Formal Written Complaint is appended hereto as Exhibit A. The Complaint has not been adjudicated. Respondent enters into this Stipulation in lieu of filing an Answer to the Formal Written Complaint, without admitting the allegations of the charges.

4. Respondent tendered his resignation, dated June 6, 2012, a copy of which is annexed as Exhibit B. Respondent affirms that he vacated his judicial office as of June 30, 2012.

5. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from the date of a judge's resignation to complete proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.

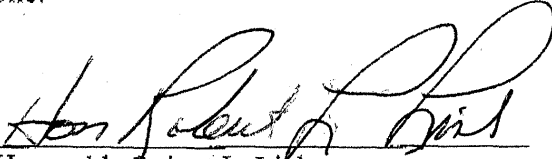
6. Respondent affirms that, having vacated his judicial office, he will neither seek nor accept judicial office at any time in the future.

7. Respondent understands that, should he abrogate the terms of this Stipulation and hold any judicial position at any time, the present proceedings before the Commission will be revived and the matter will proceed to a hearing before a referee.

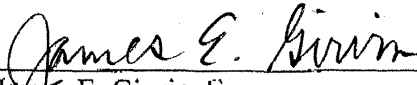
8. Upon execution of this Stipulation by the three signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

9. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will become public upon being signed by the three signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: 8/8/12


 Honorable Robert L. Link
 Respondent

Dated: 8/14/12


 James E. Girvin, Esq.
 Attorney for Respondent

Dated: AUGUST 17, 2012

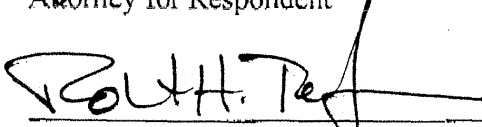

 Robert H. Tembeckjian, Esq.
 Administrator and Counsel to the Commission
 (Jill S. Polk, Of Counsel)

EXHIBIT A: FORMAL WRITTEN COMPLAINT:

Available at www.cjc.ny.gov

EXHIBIT B: RESPONDENT'S LETTER OF RESIGNATION:

Available at www.cjc.ny.gov

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

JAMES A. McLEOD,

a Judge of the Buffalo City Court,
Erie County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (David M. Duguay, Of Counsel) for the Commission

Michael M. Mohun for the Respondent

The respondent, James A. McLeod, a Judge of the Buffalo City Court, Erie County, was served with a Formal Written Complaint dated September 14, 2012, containing one charge. The Formal Written Complaint alleged that respondent was

discourteous to a defendant and convicted him without a plea or trial. Respondent filed a verified answer dated October 10, 2012.

On November 27, 2012, the Administrator, 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 December 6, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the Buffalo City Court, Erie County, since 1999. His current term expires on December 31, 2018. Respondent was admitted to the practice of law in New York in 1975.

2. On February 16, 2011, respondent presided over the custodial arraignment part of the Buffalo City Court. Two of the cases on the calendar that day involved defendant T [REDACTED], who was 17 years old at the time.

3. In one case, Mr. [REDACTED] was charged with two misdemeanors: Criminal Possession of a Controlled Substance in the Seventh Degree, in violation of Penal Law Section 220.03, and Obstructing Governmental Administration in the Second Degree, in violation of Penal Law Section 195.05. The conduct that led to these charges was alleged to have occurred on November 3, 2010.

4. In the other case, Mr. [REDACTED] was charged with two violations:

Harassment in the Second Degree, in violation of Penal Law Section 240.26(3), and Trespass, in violation of Penal Law Section 140.05. The conduct that led to these charges was alleged to have occurred on February 4, 2011:

5. Prior to any plea discussion, respondent characterized the harassment charge as “thuggery” and asked Mr. [REDACTED] if he understood what the word meant. When the defendant said he did not, respondent stated:

It means being a bully, trying to impress people....That’s not good. Especially when they say you can’t follow through on any of those wolf cries. If they were to gang up on you, you would be the first one yelling mama as you’re running home.

6. Mr. [REDACTED]’s attorney, Daniel E. Barry, Jr., proposed that Mr. [REDACTED] be permitted to plead guilty to Trespass and Disorderly Conduct, in satisfaction of all the charges. The prosecutor indicated that he would accept those pleas “[w]ith orders of protection,” and respondent agreed.

7. Addressing the Trespass charge, respondent asked Mr. [REDACTED], “What’s going on with you over there, Mr. Tough guy...?” After Mr. [REDACTED] replied that he did not recall, respondent stated, “Don’t play me.”

8. Without allocuting Mr. [REDACTED] or having him enter a plea of guilty, respondent convicted him of Trespass and sentenced him to 75 hours of community service, setting March 16, 2011, as the due date for the mandatory surcharge payment.

9. Addressing the Disorderly Conduct offer, respondent informed Mr. [REDACTED] that the police had seen him throw away some drugs. Mr. [REDACTED] denied doing so, and respondent replied, “...don’t play me like I’m stupid, you’re not bright enough to

outsmart me. You want to try it again?"

10. Mr. [REDACTED] again said that he did not have the drugs.

11. Without allocuting Mr. [REDACTED] or having him enter a plea of guilty, respondent convicted him of Disorderly Conduct and sentenced him to 15 days in jail, the maximum sentence, setting March 16, 2011, as the due date for the mandatory surcharge payment.

12. Mr. [REDACTED] responded:

Kiss my ass. Fuck you, you bitch ass nigger. You don't fucking scare me, nigger. I don't care. Kiss my ass, suck my dick, fuck you. I see you next court date, pussy.

13. Respondent thereafter stated, "I think we should vacate the plea."

Mr. Barry, the defense attorney, responded, "You're going to have to recuse yourself..." and respondent agreed. Mr. Barry added, "Judge, I don't know that he was interested in taking a plea," and Mr. [REDACTED] said, "Pussy."

14. Respondent replied, "That's his problem. That's what pussies do." Respondent then vacated Mr. [REDACTED]'s Disorderly Conduct conviction and set March 22, 2011, as the trial date for the matter.

15. Respondent then fixed bail at \$50,000, to which Mr. [REDACTED] responded, "You can keep the bail, and keep the trial, and suck my dick."

16. Respondent replied to Mr. [REDACTED], "Why don't you pull it out for me." Mr. [REDACTED] responded that he would if he were not in handcuffs.

17. Respondent stated, "Probably need a magnifying glass, too."

18. Respondent ordered bail set at \$50,000 or, in the alternative, release under supervision. On February 24, 2011, Mr. [REDACTED]'s release under supervision was approved by the Probation Department.

Additional Factors

19. Respondent recognizes that, even when baited by a disrespectful and profane party, a judge must (A) remain patient, dignified and courteous, (B) refrain from and not escalate the disrespect and profanity directed toward the court, and (C) maintain, not participate in undermining, the decorum of the courtroom. Respondent accepts full responsibility for failing to maintain high standards of conduct when he spoke in an undignified and discourteous way to Mr. [REDACTED].

20. Respondent acknowledges that he failed to comport with the law when he convicted Mr. [REDACTED].

21. Respondent was instrumental in the creation of the Adolescent Diversion Court Program in the Buffalo City Court which provides at-risk youth with educational and treatment resources necessary to assist them in leading productive and law-abiding lives. Respondent has handled the majority of the workload in this court program since its inception.

22. In his 13 years on the bench, respondent has not been previously 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 for the remainder of his term as a judge.

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

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) and 100.3(B)(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.

Every judge must be “patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity” (Rules, §100.3[B][3]). Even in the face of provocative, disrespectful comments by a litigant, a judge is required to be an exemplar of decorum and dignity in the courtroom and not allow the proceedings to devolve into an undignified exchange of taunts, insults and obscenities. Respondent’s statements to T [REDACTED] [REDACTED], a young defendant in his courtroom, were inconsistent with these standards and violated his duty not only to maintain decorum, but to be faithful to the law and avoid even the appearance of impropriety (Rules, §§100.2[A], 100.3[B][1]).

The record indicates that prior to any plea discussions, respondent abandoned his proper role as a neutral and detached magistrate by making remarks that presumed guilt, characterizing the defendant’s alleged conduct as “thuggery” and taunting

him (“If they were to gang up on you, you would be the first one yelling mama as you’re running home”). Instead of allocuting the defendant as to the proposed pleas, respondent questioned him about drugs he allegedly threw away, potentially eliciting admissions to more serious crimes while continuing to mock and insult him (“Mr. Tough guy”; “you’re not bright enough to outsmart me”). *See, Matter of Austria*, 1996 Annual Report 51. Engrossed in this intemperate colloquy, respondent ignored fundamental due process by convicting the defendant without a plea or allocution.

Respondent compounded his misconduct by responding in kind to the defendant’s use of profane language, continuing the exchange of taunts and insults even after he had agreed to recuse himself. The requirement to be courteous and patient to every litigant applies equally to those who may be difficult and disrespectful. Indeed, the more offensive a litigant’s behavior, the more important a judge’s obligation to act with dignity and restraint. Even if provoked by a perceived lack of respect for the court, respondent’s conduct cannot be excused. As the Court of Appeals has stated, “respect for the judiciary is better fostered by temperate conduct, not by hot-headed reactions to goading remarks” (*Matter of Cerbone*, 61 NY2d 93, 96 [1984]; *see also, Matter of Evens*, 1986 Annual Report 103 [“Whether or not respondent correctly perceived that the lawyers and litigants before him were disrespectful should not be at issue. The controlling factor is that... respondent’s conduct, whatever may have provoked it, was inappropriate, unprofessional and intemperate”]). Even a single instance of intemperate language may be the basis for a finding of misconduct. *See Matter of Going*, 1998 Annual Report 129;

Matter of Mahon, 1997 Annual Report 104.

While respondent may have been attempting to reach the young defendant by using such language, his inappropriate comments contributed to the atmosphere of disrespect and lack of decorum. See *Matter of Trost*, 1980 Annual Report 153 (rejecting a Family Court judge's defense that his use of intemperate language was an attempt "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"). Such invective undermined his obligation to be dignified and patient, and set a poor example for everyone present. Moreover, a litigant who is the subject of such comments may reasonably perceive that the judge is biased. Respondent had sufficient judicial remedies at his disposal, including contempt (with appropriate warnings) or removing the defendant from the courtroom.

In accepting the stipulated recommendation of admonition, we note that respondent's improper comments were limited to a single occasion. Further, respondent has acknowledged that his actions were inconsistent with the ethical standards and the procedures required by law, and has stipulated that he will avoid such misconduct in the future.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Mr. Stoloff and Judge Weinstein concur.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: December 11, 2012

A handwritten signature in cursive script, reading "Jean M. Savanyu", is written over a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

BRIAN D. MERCY,

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

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (S. Peter Pedrotty, Of Counsel) for the Commission

Robert P. Roche for the Respondent

The respondent, Brian D. Mercy, a Justice of the Glenville Town Court and
an Acting Justice of the Scotia Village Court, Schenectady County, was served with a

Formal Written Complaint dated March 12, 2012, containing one charge. The Formal Written Complaint alleged that respondent represented clients in seven cases before other part-time lawyer-judges in Schenectady County. Respondent filed a verified answer dated March 26, 2012.

On June 7, 2012, the Administrator, 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 June 14, 2012, the Commission accepted the Agreed Statement and made the following determination.

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

2. Respondent was admitted to the practice of law in New York in 2001. At all times relevant to the matters herein, in addition to serving as a part-time town or village court justice in Schenectady County, respondent was engaged in the private practice of law in Schenectady County.

3. From in or about 2002 until in or about December 2008, respondent was an associate at the Law Offices of Kouray & Kouray, which maintains an office in

Schenectady, New York. In or about December 2008, respondent formed the Law Office of Brian D. Mercy, PLLC., which maintains an office at 514 State Street, Schenectady, New York.

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

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

6. As set forth below, from in or about April 2008 to in or about April 2009, respondent represented private legal clients in seven cases in the Niskayuna Town Court, Schenectady County, before Judges Swinton and Zonderman, notwithstanding that Judges Swinton and Zonderman, like respondent, are part-time town court justices in Schenectady County who are also permitted to practice law, and notwithstanding a promulgated rule that prohibits a part-time judge from practicing law in a court in the county in which his or her court is located, before judges who are permitted to practice law.

7. Respondent acknowledges that his representation of clients in cases in the Niskayuna Town Court, before Judges Swinton and Zonderman, violated Section

100.6(B)(2) of the Rules Governing Judicial Conduct.

People v Sharran Sukhoo

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

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

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

11. On May 7, 2008, a Memorandum of Negotiated Plea was prepared and signed by the Assistant District Attorney and Judge Zonderman, in which the People and the court agreed to accept a guilty plea to the reduced charge of violating Section 1110(a) of the VTL in exchange for a \$100 fine and \$55 surcharge. The Memorandum

was not signed by respondent or Mr. Sukhoo.

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

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

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

People v Alyssa Singh

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

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

17. On July 15, 2008, respondent wrote a letter to the Niskayuna Town

Court, to the attention of the Assistant District Attorney, enclosing a copy of the supporting deposition and requesting that the People consent to an adjournment in contemplation of dismissal because the supporting deposition showed that “the officer has no first hand knowledge of the alleged infraction.”

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

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

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

People v David Pierpont

21. On August 8, 2008, David J. Pierpont was charged by the Niskayuna Police Department with Failure To Yield Right of Way at a Stop Sign, in violation of VTL Section 1142(a). The ticket was returnable in the Niskayuna Town Court on September 10, 2008.

22. On August 18, 2008, respondent wrote the Niskayuna Town Court a letter advising that he represented Mr. Pierpont on the charge and entering a not guilty

plea on his behalf. Respondent also communicated that he intended to negotiate a disposition with the Assistant District Attorney through the mail.

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

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

People v Katrina L. Dryer

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

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

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

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

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

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

People v Robert Pierpont

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

32. On January 23, 2009, Mr. Pierpont signed a sworn affirmation in which he stated, *inter alia*, "I authorize my attorney, BRIAN D. MERCY, PLLC./MEGAN M. MERCY, ESQ. to enter a plea of guilty on my behalf." Respondent notarized the affirmation.

33. On February 18, 2009, Mr. Pierpont appeared in Niskayuna Town

Court and pleaded guilty to Facilitating Aggravated Unlicensed Operation, in violation of VTL Section 511-a(1). Judge Swinton accepted Mr. Pierpont's plea, convicted him of said charge in full satisfaction of all charges and sentenced him to pay a fine of \$200 and a surcharge of \$85.

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

People v Phoolmattie Dehal

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

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

37. On March 30, 2009, respondent sent a letter on his law firm letterhead by facsimile to the Niskayuna Town Court, addressed to "Your Honor." He wrote: "Ms. Dehal is scheduled to appear before you on 4/1/09. I have spoken with

ADA Laurie Hammond-Cummings and she has consented to an adjournment of one month while we determine a restitution figure.” Respondent went on to request an adjournment until April 29, 2009. As a result, Judge Swinton adjourned the matter to April 29, 2009.

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

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

People v John Thomas

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

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

42. On February 4, 2009, Megan M. Mercy, respondent’s wife, appeared with Mr. Thomas at his arraignment before Judge Swinton at the Niskayuna Town Court. At the arraignment, Ms. Mercy gave the court respondent’s business card with “Megan

Mercy, esq.” handwritten across the top. After Mr. Thomas entered a not guilty plea, the matter was adjourned until March 4, 2009.

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

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

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

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

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

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

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

Additional Factors

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

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

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

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.6(B)(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.

A part-time lawyer-judge may practice law subject to certain ethical restrictions designed to eliminate conflict and the appearance of any conflict between the exercise of judicial duties and the private practice of law. Among other restrictions, a judge may not practice law in any court in the same county before another judge who is permitted to practice law (Rules, §100.6[B][2]), although the partners and associates of the judge's law firm may do so (Rules, §100.6[B][3]; Adv Op 88-60, 93-71). *See, Matter of Sack*, 1995 Annual Report 130; *Matter of DeLollo*, 1980 Annual Report 149. The record establishes that respondent violated this well-established ethical rule by representing clients in seven cases in the Niskayuna Town Court before judges who, like respondent, are part-time lawyer-judges who are permitted to practice law.

Upon becoming an acting justice in 2007, respondent had a responsibility to learn about and adhere to the applicable restrictions on his practice of law. Thus, he should have recognized the impropriety of any involvement in these seven matters, which he handled in the 17 months after becoming a judge. Notwithstanding that he did not physically appear in the Niskayuna Town Court in connection with the cases (which included five traffic cases, a code violation, and two felony charges), respondent's involvement in each of these cases was inconsistent with the ethical mandates. The stipulated conduct (including requesting adjournments, entering pleas, and negotiating dispositions) clearly constituted the practice of law, which is prohibited by Rule

100.6(B)(2), and violated the letter and spirit of the ethical standards. The prohibition against the practice of law provides no exception for correspondence, telephone calls, or other aspects of legal representation. Nor does the rule exempt an acting justice, as respondent was at the time of these events.

We note that after Judge Swinton refused to respond to respondent's correspondence in the *Thomas* case, citing Rule 100.6(B)(2), respondent did not communicate again with the court in that case and never appeared again in the Niskayuna court. We also note that respondent has acknowledged his misconduct and pledges to adhere to the ethical rules in the future. Every part-time lawyer-judge is required to scrupulously abide by the applicable restrictions on the practice of law in order to avoid conduct that may create an appearance of impropriety.

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

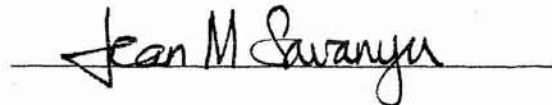
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore and Mr. Stoloff concur.

Judge Peters did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: June 22, 2012

A handwritten signature in black ink, reading "Jean M. Savanyu", is written over a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MICHELLE R. MILLER.,

a Justice of the Leon Town Court,
Cattaraugus County.

DECISION
AND
ORDER

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (John J. Postel, Of Counsel) for the Commission
Honorable Michelle R. Miller, *Pro se*

The matter having come before the Commission on August 8, 2012; and the Commission having before it the Stipulation dated July 6, 2012, with the appended exhibits; and respondent having tendered her resignation from judicial office by letter

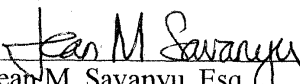
dated June 11, 2012, effective June 19, 2012, and having affirmed that she will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation and the Commission's Decision and Order thereto 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.

Ms. Moore was not present.

Dated: August 8, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MICHELLE R. MILLER,

STIPULATION

A Justice of the Leon Town Court,
Cattaraugus County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission, and the Honorable Michelle R. Miller (“respondent”), as follows.

1. Respondent has served as a Justice of the Leon Town Court, Cattaraugus County, since January 2007. She is not an attorney. Her current term of office expires on December 31, 2012 .
2. Respondent was served by the Commission with a Formal Written Complaint dated April 30, 2012, containing five charges, which alleged *inter alia* that:
 - A. From in or about January 2011 through in or about August 2011, respondent failed to make timely reports to the State Comptroller with regard to the collection of fines and penalties, and failed to remit fines and penalties to the State Comptroller and the Town of Leon in a timely manner, contrary to the requirements of Section 1803 of the Vehicle and Traffic Law, Section 27(1) of the town Law and Section 99-a of the Finance Law;
 - B. Since May 19, 2008, respondent has failed to notify the Commissioner of Motor Vehicles, pursuant to Section 514(3) of the Vehicle and Traffic Law, to order the suspension of the drivers’ licenses of certain defendants who failed to answer charges pending against them;


- C. Since 2008, respondent has failed to notify the Commission of Motor Vehicles, pursuant to Section 514(3) of the Vehicle and Traffic Law, to order the suspension of the drivers' licenses of certain defendants who failed to pay fines and surcharges imposed by the court;
 - D. Since September 26, 2011, respondent has failed to deposit into the court account within 72 hours of receipt, as required by Section 214.9 of the Uniform Rules for the Justice Courts, a \$175 money order paid by a defendant in connection with his Speeding conviction; and,
 - E. Respondent failed to cooperate with the Commission's investigation of the matters set forth in Charges I through IV of the Formal Written Complaint, in that she failed to respond to two letters of inquiry from the Commission staff and failed to appear on two scheduled occasions to give testimony. The Formal Written Complaint is appended hereto as Exhibit 1.
3. Respondent has not filed a verified Answer in response to the Formal Written Complaint.
 4. There is no evidence that respondent converted any court funds for her or anyone else's personal use.
 5. Respondent tendered her resignation from judicial office effective June 19, 2012. A copy of respondent's resignation letter is appended hereto as Exhibit 2.
 6. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from the date of a judge's resignation to complete the proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.
 7. Respondent affirms that she will neither seek nor accept judicial office in the future.

8. Respondent understands that, should she abrogate the terms of this Stipulation and hold any judicial position at any time, the present proceedings before the Commission will be revived and the matter will proceed to a hearing before a referee.

9. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

10. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law to the extent that (1) this Stipulation will become public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: July 3, 2012


Honorable Michelle R. Miller
Respondent

Dated: July 6, 2012

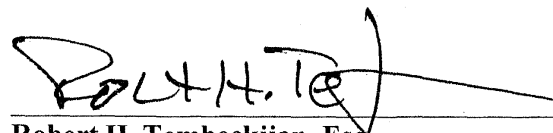

Robert H. Tembeckjian, Esq.
Administrator & Counsel to the Commission
(John J. Postel, Of Counsel)

EXHIBIT 1: FORMAL WRITTEN COMPLAINT:

Available at www.cjc.ny.gov

EXHIBIT 2: RESPONDENT'S RESIGNATION LETTER:

Available at www.cjc.ny.gov

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

RICHARD H. REOME, SR.,

a Justice of the Schuyler Falls Town Court,
Clinton County.

DECISION
AND
ORDER

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Thea Hoeth, Of Counsel) for the Commission
Darrell L. Bowen for the Respondent

The matter having come before the Commission on May 3, 2012; and the Commission having before it the Stipulation dated April 2, 2012, with the appended exhibit; and respondent having tendered his resignation from judicial office by letter

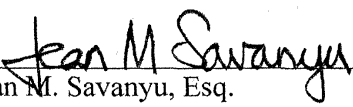
dated March 21, 2012, and having affirmed that he vacate his judicial office on or before April 28, 2012, and that he will neither seek nor accept judicial office at any time in the future; and respondent having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation and the Commission's Decision and Order thereto 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. Harding was not present.

Dated: May 3, 2012



Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

RICHARD H. REOME, SR.,

STIPULATION

a Justice of the Schuyler Falls Town Court,
Clinton County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Esq., Administrator and Counsel to the Commission, and the Honorable Richard H. Reome, Sr. ("respondent"), who is represented in these proceedings by Darrell L. Bowen, Esq., as follows:

1. Respondent has been a Justice of the Schuyler Falls Town Court, Clinton County, since 1998. His current term will expire on December 31, 2013. Respondent is not an attorney.

2. Respondent was served with a Formal Written Complaint dated February 3, 2012, containing charges alleging that he engaged in judicial misconduct in his handling of cases between on or about April 2, 2009 and on or about September 30, 2010. The allegations of the Formal Written Complaint included, *inter alia*, that in seven cases, respondent engaged in and/or considered and/or relied upon improper *ex parte* communications; in seven cases respondent expressed bias in favor of law enforcement officers and/or against the defendants; in two cases, respondent reduced charges against defendants without the consent of the district attorney; in six cases respondent

misinformed defendants that they were not entitled to court-appointed attorneys, apparently based upon his misconstruing the right to counsel in some charges below the misdemeanor level, and/or failed to inform them of their right to plead guilty and demand supporting depositions from officers; in two cases, respondent allowed and considered unsworn testimony; in two cases he found defendants guilty of zoning/housing violations without conducting a trial; in some cases he engaged in inappropriate questioning of defendants at their arraignments; and in one case he failed to rule on a motion to dismiss the charge against the defendant.

3. Respondent enters into this Stipulation in lieu of filing an Answer to the Formal Written Complaint.

4. Respondent tendered his resignation, dated March 21, 2012, a copy of which is annexed as Exhibit A. Respondent affirms that he will vacate his judicial office on or before April 28, 2012.

5. Pursuant to Section 47 of the Judiciary Law, the Commission has 120 days from the date of a judge's resignation to complete the proceedings, and if the Commission determines that the judge should be removed from office, file a determination with the Court of Appeals.

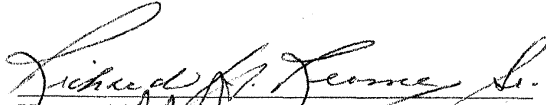
6. Respondent affirms that, after vacating his judicial office on or before April 28, 2012, he will neither seek nor accept judicial office at any time in the future.

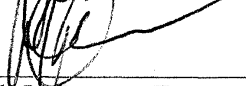
7. Respondent understands that, should he remain on the bench beyond April 28, 2012, or thereafter return to any judicial position at any time, or otherwise

abrogate the terms of this Stipulation, the present proceedings before the Commission will be revived and the matter will proceed to a hearing before a referee.

8. Upon execution of this Stipulation by the three signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

9. Respondent waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (A) this Stipulation will become public upon being signed by the three signatories below, and (B) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: 3/27/12 
 Honorable Richard H. Reome, Sr.
 Respondent

Dated: 3/27/12 
 Darrell L. Bowen, Esq.
 Attorney for Respondent

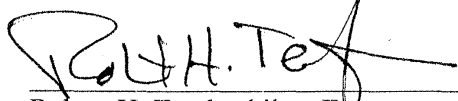
Dated: April 2, 2012 
 Robert H. Tembeckjian, Esq.
 Administrator and Counsel to the Commission
 (Thea Hoeth, Of Counsel)

EXHIBIT A: RESPONDENT'S LETTER OF RESIGNATION:
 Available at www.cjc.ny.gov

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DIANE L. SCHILLING,

a Justice of the East Greenbush Town
Court, Rensselaer County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and S. Peter Pedrotty,
Of Counsel) for the Commission

E. Stewart Jones Law Firm PLLC (by E. Stewart Jones, Jr., and James C.
Knox) for the Respondent

The respondent, Diane L. Schilling, a Justice of the East Greenbush Town
Court, Rensselaer County, was served with a Formal Written Complaint dated May 3,

2011, containing two charges. The Formal Written Complaint alleged that respondent: (i) improperly intervened in the disposition of a Speeding ticket issued to the wife of another judge and (ii) four years earlier, accepted special consideration with respect to a Speeding ticket issued to her. Respondent filed a verified answer dated May 23, 2011.

By Order dated June 1, 2011, 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 August 29 and 31, 2011, in Albany, and the referee filed a report dated January 6, 2012.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended admonition. On March 15, 2012, the Commission heard oral argument and thereafter considered the record of the proceeding. The vote in this matter was taken on March 15, 2012, and the Commission made the following findings of fact.

1. Respondent has been a Justice of the East Greenbush Town Court, Rensselaer County, since 2002.
2. Respondent is an attorney. Prior to becoming a judge, respondent was the East Greenbush Town Attorney. In that capacity, she prosecuted traffic violations in the East Greenbush Town Court.
3. Since 2003, respondent has been employed in various positions with the Office of Court Administration ("OCA"). She initially served as counsel in the

Training and Education Unit of the City, Town and Village Resource Center, which provides training and education to local judges. After a restructuring, the Resource Center became the Office of Justice Court Support, and respondent was appointed special counsel to the Deputy Chief Administrative Judge for the courts outside of New York City. In late June 2009 she became Director of the Office of Justice Court Support.

As to Charge I of the Formal Written Complaint:

4. At 5:40 AM on Saturday, May 30, 2009, East Greenbush Police Officer Brandon Boel issued a Speeding ticket to Lisa C. Toomey. Ms. Toomey is the wife of Sand Lake Town Justice Paul Toomey, who was then Director of the Office of Justice Court Support. Ms. Toomey was driving Judge Toomey's car, which had a license plate that included the letters "SMA," the acronym for the State Magistrates Association. The ticket was returnable in the East Greenbush Town Court on June 11, 2009, a date on which respondent's co-judge, Kevin Engel, was scheduled to preside.

5. Respondent knew Judge Toomey from their work together, from the fact that they were judges in adjoining towns and from social interactions. Judge Toomey had recommended that respondent be hired by OCA and was initially her supervisor. Their relationship was cordial and friendly.

6. In issuing the ticket, Officer Boel followed normal procedures, including notifying the police dispatcher of the stop, at which time he also conveyed the license plate number.

7. After the ticket was issued, Ms. Toomey immediately called Judge

Toomey, who told her that she should plead not guilty and let the process follow the ordinary course.

8. Officer Boel returned to the East Greenbush police station when his shift ended at 7:00 AM. The police station is located in the same building as the East Greenbush Town Court. Because Officer Boel had radioed the license plate number to the dispatcher, some officers at the station knew of the ticket issued to Ms. Toomey and were discussing the fact that the ticket had been issued to a car with a judge's license plate. Officer Boel, a relatively new officer at the time, had not known what "SMA" signified.

9. The traffic ticket is a five-page document in which writing on the first page is imprinted on the underlying pages. Following normal procedures, Officer Boel placed two copies of the ticket in a bin at the police station for the Town Court, gave one copy to the dispatcher for entry into the police department's computer, and put his officer's copy in a drawer; the fifth copy had been given to Ms. Toomey.

10. Officer Boel left the police station shortly after 7:00 AM. He testified that he did not see respondent that morning.

11. Respondent testified that she arrived at the police station at approximately 8:00 AM that same day, stopping briefly there on her way to court to do some paperwork. She testified further that when she arrived at the police station, Officer Boel was being teased by some officers, whom she could not identify at the hearing, for having issued a ticket to a car with an "SMA" license plate. She testified further that

Officer Boel approached her, asked her if she knew Judge Toomey, said that he had “made a mistake” and asked her to relay a message to Toomey that he (Officer Boel) would take care of the ticket with his sergeant. As did the referee who presided at the hearing, we find this testimony not credible.

12. At 8:17 AM, respondent sent an email message to Judge Toomey. The subject line of the message read: “I know,” and the message continued: “No sgt due in until tomorrow then it should be corrected.” Judge Toomey received respondent’s email message but did not respond to it.

13. At the hearing before the referee, respondent acknowledged that it was wrong to send the May 30 email to Judge Toomey. She testified that she sent the message as a “favor” to Judge Toomey and his wife because Judge Toomey was a colleague and judge and she “wanted to stay in his good graces.”

14. After receiving a copy of the Toomey ticket, the police dispatcher entered the ticket information into the police department’s computer system. Thereafter, pursuant to his normal practice, the dispatcher placed this copy of the ticket in a bin for the monthly mailing to Traffic Safety Law Enforcement and Disposition (“TSLED”), the agency that tracks tickets from their issuance to police until their final disposition.

15. Senior Court Clerk Joanne Millens received the court copies of the Toomey ticket. While she does not specifically recall what she did with the ticket, her normal practice is to sort the tickets received from the police department and to give to Judge Engel’s clerk the tickets with return dates on the nights Judge Engel was scheduled

to preside, and give to respondent's clerk the tickets with return dates on respondent's scheduled court nights. Judge Engel's clerk, Eileen Donahue, testified that she never received the court copies of the Toomey ticket.

16. Judge Toomey testified that on May 31, 2009, he received on his court-issued BlackBerry a text message from respondent that stated: "Need driver copy to void," and that he did not respond to the message. Respondent denies sending this text message to Judge Toomey. The referee did not make a specific finding as to whether respondent sent the text message to Judge Toomey since, in his findings and conclusions, he relied heavily on respondent's admissions of misconduct. Accordingly, we make no further findings with respect to this allegation.

17. Officer Boel testified that a day or two after he issued the Toomey ticket, Police Sergeant Michael Condo asked him for the officer's copy of the ticket and that he (Boel) gave this copy to Sergeant Condo. The whereabouts of this ticket is unknown. Sergeant Condo was not called as a witness at the hearing.

18. On two occasions in early June 2009, respondent and Judge Toomey discussed his wife's ticket. Respondent asked Judge Toomey for his wife's copy of the ticket and said that she needed that copy of the ticket so it could be destroyed. At the hearing, respondent admitted having incidental, private conversations with Judge Toomey about the ticket on at least two occasions in June. While her hearing testimony about the substance of those conversations was vague, respondent acknowledged that she asked when the ticket was returnable, and she acknowledged that her conversations with

Judge Toomey about the pending ticket were improper. Respondent denied that she asked for the ticket or discussed “destroying” the ticket.

19. On June 24, 2009, Judge Toomey learned that respondent was about to replace him as Director of the Office of Justice Court Support. Respondent testified that for about two or three weeks prior to that date, she had had discussions with OCA officials about the position. After June 24th, there was no further social relationship between respondent and Judge Toomey, who was assigned to another position with OCA.

20. On June 26, 2009, Lisa Toomey mailed her Speeding ticket to the East Greenbush court with a plea of not guilty. Since Judge Engel’s clerk had not received the court copy of the ticket from the police, she placed Ms. Toomey’s ticket in the “orphan” file of tickets that were not in the system.

21. On December 23, 2009, having heard nothing from the East Greenbush court about her ticket, Ms. Toomey sent a letter to the court by certified mail to ascertain the status of the ticket. She received a voice mail message in response, asking her to call the court. Ms. Toomey left a return voice mail message with the court asking for a written response to her letter. She then received another telephone message from a court clerk asking her to call to discuss the status of the ticket. Ms. Toomey did not call the court and since that time has had no other communication with the court about the ticket. The ticket was never prosecuted.

22. There is no record of the Toomey ticket in the East Greenbush Town Court except the copy of the ticket that Ms. Toomey sent to the court with her plea of not

guilty. The court copies of the ticket (received from the police department) are missing, and the court's copy of Ms. Toomey's letter of December 23, 2009, is missing. TSLED, the agency which would normally receive the dispatcher's copy of the ticket from the police, has no record of the ticket issued to Ms. Toomey.

23. In 2010, Judge Toomey requested an opinion from the Advisory Committee on Judicial Ethics with respect to whether he had an ethical obligation to report respondent's conduct to the Commission. After receiving an opinion from the Committee that he was obligated to report the matter, Judge Toomey sent a complaint to the Commission.¹

24. Respondent's attempt to attribute nefarious motives to Judge Toomey, by implying that he engaged in wrongdoing in complaining about respondent's actions in an effort to regain his former position, is unpersuasive and is rejected. In this regard we adopt the reasoning of the referee who conducted the hearing.

As to Charge II of the Formal Written Complaint:

25. On June 23, 2005, respondent was issued a ticket for Speeding by New York State Trooper C. Donovan. Respondent was driving her car, which had an "SMA" license plate.

26. Shortly thereafter, Trooper Donovan discussed the ticket with other

¹ Section 100.3(D)(1) of the Rules Governing Judicial Conduct states: "A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action."

troopers, who told him that “SMA” stands for State Magistrates Association and that he had given a ticket to a judge before whom the troopers appear in court. Thereupon, Trooper Donovan called respondent on her cell phone, having gotten the number from the police dispatcher, and told respondent that they had met on the side of the road that morning and that he wanted to come to her office. Respondent agreed, and the trooper arrived at her office about an hour later.

27. Trooper Donovan told respondent about his conversation with other troopers and asked that she return the Speeding ticket to him because he intended to void it. Respondent gave him the ticket. Respondent testified that she assumed the trooper was taking the ticket back because he knew that she was a judge.

28. Later that same day, the Speeding ticket issued to respondent was voided by State Police Sergeant Corso, to whom Trooper Donovan reported.

29. Sometime in late 2009 or early 2010, in a conversation with colleagues at the Office of Justice Court Support, respondent recounted that she had been issued a Speeding ticket several years earlier and that after the issuing officer learned what the “SMA” license plate meant, he came to her office and took back the ticket.

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) 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.

Charges I and II are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Upon learning that the spouse of a judge had been issued a Speeding ticket returnable before respondent's co-justice, respondent intervened in the matter and engaged in a substantial effort to accord favoritism. This scheme to circumvent the normal judicial process, in which, to a significant extent, respondent has acknowledged participating, resulted in the disappearance of the ticket from the system and, thus, the absence of any prosecution. As depicted in this record, respondent's actions showed a complete disregard for her ethical responsibilities and for the legal process she was sworn to uphold, which "cannot be viewed as acceptable conduct by one holding judicial office." *Matter of VonderHeide*, 72 NY2d 658, 660 (1988).

As respondent acknowledges, within hours after the ticket had been issued to the wife of Sand Lake Town Justice Paul Toomey, respondent went to the East Greenbush police station – at 8:00 AM on a Saturday morning – and, shortly thereafter, sent an email message to Judge Toomey, her friend, colleague and former boss at the agency that provides advice and education to local justices. Respondent's email message (which stated in the subject line: "I know," and then continued: "No sgt due in until tomorrow then it should be corrected") clearly telegraphed respondent's participation in a scheme to extend favoritism in connection with the ticket and, at the very least, bestowed her judicial imprimatur on the conduct. Like the referee, we reject respondent's hearing testimony that in sending this email, she was merely relaying a message from the issuing

officer, who told her that he had “made a mistake” by issuing a ticket to the wife of a judge (Tr. 312). In crediting the testimony of Officer Boel, who denied seeing respondent that morning or asking her to relay a message about the Toomey ticket, the referee noted that Boel processed the ticket in the normal course before leaving the station when his shift ended at 7:00 AM, distributing a copy to the police dispatcher and two copies for transmittal to the East Greenbush Town Court (located in the same building as the police station); such conduct seems plainly inconsistent with an intent or plan by him to “correct” or void the ticket the following day. In either event, whether it was Boel who asked her to say that the matter would be “corrected” or whether that was her own observation, respondent’s conduct in sending that message to Toomey was clearly part of a wrongful scheme to accord favorable treatment to a defendant solely because of the defendant’s connection to a judge. At the very least, respondent’s actions indicated that she was complicit in the favoritism and, as her attorney conceded at the oral argument, conveyed to the participants in the scheme, including police who appeared before her, that she approved it (Oral argument, pp. 37-38, 40).

Respondent has also admitted that on at least two occasions shortly thereafter, she and Judge Toomey discussed the pending Speeding ticket. While her testimony at the hearing about the substance of these conversations was notably vague, respondent admitted asking about the return date of the ticket; though she denied that she asked for the ticket or discussed “destroying” the ticket, she acknowledged that any conversations with Toomey about the ticket, which was pending in the East Greenbush

court, were improper. We believe that the record, in its totality, supports a finding that respondent asked Judge Toomey for his wife's copy of the ticket so it could be destroyed.² At a minimum, her actions conveyed the appearance that she was following up on her email message to Judge Toomey about the ticket (which had advised him that "it should be corrected") in furtherance of the scheme to void the ticket and erase it from the system.

Under the circumstances, it is thus apparent that respondent tried to influence the outcome of the Speeding charge against Lisa Toomey. Respondent testified that she had no intention to influence the outcome of the ticket (Tr. 319-20). We refrain from concluding that her misguided view of her intentions constituted lack of candor (*see, Matter of Kiley*, 74 NY2d 364, 370-71 [1989]), but we are not persuaded that her testimony was credible as to certain facts in dispute.

The record establishes that ultimately the Toomey ticket was never prosecuted and, for all practical purposes, disappeared entirely from the system. Of the five copies of the ticket, only the defendant's copy of the ticket, which Ms. Toomey sent to the court with a not guilty plea, has been accounted for. The two court copies of the ticket, which were transmitted by the police to the East Greenbush Town Court, could not be located (Judge Engel's clerk testified that she never received them); the police dispatcher's copy, which would normally be sent to TSLED, was apparently never

² We note that in his discussion of the facts, the referee states that respondent "asked Judge Toomey for his wife's copy of the Ticket....[and] said she needed that copy to destroy the ticket" (Rep. 8).

transmitted since that agency has no record of the issuance of the ticket; and according to Officer Boel, the officer's copy, which he usually retains, was given to a sergeant a day or two later at the sergeant's request (it was not produced at the hearing). As stated by the referee: "Although the mechanics of the destruction of the Ticket are unclear, respondent's role in that process suffers from no such infirmity" (Rep. 9). By sending the May 30 email to Judge Toomey about "correct[ing]" the Speeding ticket, and by discussing the pending ticket with Judge Toomey, respondent was inextricably involved in subverting the normal judicial process, which ultimately led to the disappearance of the ticket.

As a former town attorney and as an experienced judge, there can be no question that respondent was familiar with the process surrounding the issuance and prosecution of traffic tickets. Respondent also knew from personal experience that a ticket could disappear since in 2005 a Speeding ticket issued to her was voided after she acquiesced in favoritism extended to her by the trooper. As recounted by respondent to OCA co-workers in a conversation at her office, the trooper who had issued the ticket contacted her by cell phone upon learning that she was a judge, asked to come to her office, and then asked to take back the ticket so it could be voided. Respondent returned the ticket to the trooper notwithstanding that she assumed that he was withdrawing the ticket because of her judicial status. Like the Toomey ticket, the Speeding ticket issued to respondent was never prosecuted. Notwithstanding that she did not initiate the favoritism that was afforded to her, her cooperation in the impropriety permitted it to occur. The

impropriety was compounded by telling her colleagues, in an agency which advises judges on the law, of her experience in cooperating with an effort to have her own ticket voided after the trooper learned she was a judge. Under the circumstances presented, we agree with the referee's conclusion that the example set by respondent "falls well short of the standard of behavior expected of a judge" (Rep. 16). As the Court of Appeals has noted, judges must be aware "that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved" (*Matter of Lonschein*, 50 NY2d 569, 572 [1980]). "There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary" (*Id.*).³

Ticket fixing strikes at the heart of our system of justice, which is based on equal treatment for all.⁴ As this Commission stated more than 30 years ago, ticket fixing results in "two systems of justice, one for the average citizen and another for people with.... the right 'connections'" (*Ticket-Fixing: The Assertion of Influence in Traffic*

³ The Commission has repeatedly evaluated cases of judges attempting to use their judicial office to influence the disposition of traffic violations. This case represents a stark example of this problem and raises a systemic issue of how judicial license plates distort the normal process of enforcing traffic laws and the delicate position faced by law enforcement officers when they stop a vehicle with judicial plates. The Commission has decided that a public report is required to address the issue of whether or not the Rules Governing Judicial Conduct may be violated by the use of judicial license plates in the context of judges, in effect, using their judicial office to avoid the consequences of being stopped for offenses under the Vehicle and Traffic Law.

⁴ The Court of Appeals has used the term "ticket-fixing" to refer to "misconduct in connection with the disposition of ... Speeding tickets" (*Matter of Conti*, 70 NY2d 416, 417, 418 [1987]; see also, *Matter of Bulger*, 48 NY2d 32, 33 [1979] [censuring judge "for showing and seeking favoritism in the disposition of charges involving traffic violations"]).

Cases,” Interim Report, June 20, 1977, p. 16). Such favoritism “is wrong, and always has been wrong” (*Matter of Byrne*, 47 NY2d [b] [Ct on the Judiciary 1979]); indeed, it may be contrary to law.⁵ After the Commission uncovered a widespread pattern of ticket fixing throughout the state in the late 1970’s, more than 140 judges were disciplined for engaging in this misconduct. Subsequent incidents of ticket fixing were regarded with particular severity, since judges now had the benefit of a significant body of case law concerning the impropriety of this behavior. In 1985 the Court of Appeals stated that even a single incident of ticket fixing “is misconduct of such gravity as to warrant removal” (*Matter of Reedy*, 64 NY2d 299, 302 [1985]). In view of these precedents, every judge should be well aware that such conduct is strictly prohibited.

We thus conclude that respondent has engaged in serious misconduct. In reaching this conclusion, we accord due deference to the findings of the referee who conducted the hearing. We note that the referee, after carefully weighing the witnesses’ credibility and evaluating the evidence, concluded that respondent’s testimony as to her purported discussion with Boel was not credible but determined that respondent’s lack of candor at the hearing was not established. Based on our own thorough examination of the entire record, we find no basis to reject the referee’s findings and conclusions. (*Compare, Matter of Marshall*, 2008 Annual Report 161 [referee’s findings were “unclear” and

⁵ Section 207, subdivision 5 of the Vehicle and Traffic Law provides that disposing of a traffic ticket “in any manner other than that prescribed by law” constitutes a misdemeanor. While there is no indication that respondent committed a crime, the statute represents a public policy against any form of ticket fixing or unauthorized disposition of a ticket.

inconsistent on their face], determination accepted, 8 NY3d 741 [2007].)

In weighing the sanction to be imposed, we are guided by the principle that “as a general rule, intervention in a proceeding in another court should result in removal,” though mitigating factors may warrant a reduced sanction (*Matter of Edwards*, 67 NY2d 153, 155 [1986] [judge’s intervention in his son’s case was mitigated by several factors, including that his “judgment was somewhat clouded by his son’s involvement” and he “forthrightly admitted” his misconduct]). *See also*, *Matter of Reedy*, *supra*; *Matter of Kiley*, 74 NY2d 364, 370 [1989] [judge’s intervention was motivated by sympathy for his friends’ “emotional trauma,” with no “element of venality, selfish or dishonorable purpose”). We note that with respect to the Toomey ticket, there can be no excuse that respondent’s judgment was “clouded,” and there was plainly a “dishonorable purpose” in doing a favor for a colleague that would result in erasing all traces of his wife’s Speeding ticket from the system. While we have duly considered the mitigation presented in this case, including respondent’s public service, her previously unblemished record and her admission of wrongdoing, the nature and gravity of the proven impropriety in this case cannot be overlooked. As the Court of Appeals has stated, in certain cases ““no amount of [mitigation] will override inexcusable conduct’ (*Bauer*, 3 NY3d at 165)” (*Matter of Restaino*, 10 NY3d 577, 590 [2008]). Significantly, as an experienced judge and as an attorney with expertise in providing advice, support and training to local justices, respondent should have recognized and avoided any taint of favoritism.

While we are mindful that removal is an extreme sanction and should only

be imposed in the event of truly egregious circumstances (*Matter of Steinberg*, 51 NY2d 74, 83 [1980]), we note that judges “are held to higher standards of conduct than the public at large, and thus what might be acceptable behavior when measured against societal norms could constitute ‘truly egregious’ conduct” requiring a severe sanction (*Matter of Mazzei*, 81 NY2d 568, 572 [1993] [citations omitted]). We believe that respondent’s actions showed a serious lack of judgment and an indifference to the special obligations of judges that are unacceptable for a member of our state’s judiciary. *Matter of Conti*, 70 NY2d 416, 419 (1987). Such behavior jeopardizes public confidence in the integrity of the judiciary as a whole, which is indispensable to the administration of justice in our society (*Matter of Levine*, 74 NY2d 294, 297 [1989]), and warrants removal from office.

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

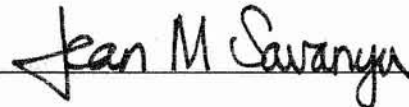
Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery, Mr. Harding, Ms. Moore, Judge Peters and Mr. Stoloff concur.

Mr. Belluck was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: May 8, 2012

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written in a cursive style and is positioned above a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

VINCENT SGUEGLIA,

a Judge of the County, Family and
Surrogate Court, Tioga County.

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Kathleen Martin, Of Counsel) for the Commission

Pope & Schrader, LLP (by Alan J. Pope) for the Respondent

The respondent, Vincent Sgueglia, a Judge of the County, Family and
Surrogate's Courts, Tioga County, was served with a Formal Written Complaint dated

March 31, 2011, containing two charges. The Formal Written Complaint alleged that respondent: (i) issued himself a pistol license and (ii) discharged a pistol in his chambers. Respondent filed a verified Answer dated June 22, 2011.

On June 7, 2012, the Administrator, 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. The Commission had rejected an earlier Agreed Statement.

On June 14, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the County Court, Family Court and Surrogate's Court of Tioga County since 1993. Respondent's current term expires on December 31, 2012, by which time he will be 70 years old. Respondent agrees that he will not seek appointment as a judicial hearing officer after the conclusion of his term. He was admitted to the practice of law in New York in 1968.

As to Charge I of the Formal Written Complaint:

2. On or about September 6, 2005, respondent completed a State of New York Pistol/Revolver License Application seeking a permit to carry concealed pistols, including a Kel Tec Automatic .380, a Glock Automatic 9 Millimeter and a Walther Automatic .22. Respondent listed his present occupation as county judge.

Respondent then submitted the permit application to the Tioga County Sheriff's Department for the required background investigation of himself as the applicant.

3. From September 6, 2005, through November 3, 2005, the Tioga County Sheriff's Office investigated respondent's application for the issuance of a pistol permit. After its investigation, the Sheriff's Department recommended approval of respondent's permit application. As it does with all applications, the Sheriff's Department returned the permit application to respondent.

4. On or about November 3, 2005, respondent, a licensing officer authorized to review and issue pistol permits in Tioga County by virtue of his judicial office, approved his own Pistol/Revolver License Application for a "have-and-carry-concealed" license, authorizing his largely unrestricted possession of three pistols: a Kel Tec Automatic .380, a Glock Automatic 9 Millimeter and a Walther Automatic .22. The permit contained no restrictions.

5. Respondent mistakenly believed that he could sign his own permit because he is the sole licensing officer in Tioga County pursuant to Penal Law Section 265.00(10). Respondent is the only Tioga County Court Judge, and there is no other judge or justice of a court of record having an office in Tioga County.

6. Between February 6, 2006, and September 15, 2010, the Sheriff's Department approved 14 amendments to respondent's permit, noting the addition of 17 pistols. Pursuant to the usual practice in Tioga County, it was not necessary for respondent to approve these amendments to his permit. Other than filing his applications,

respondent played no role in approving the amendments to his pistol permit.

7. As the licensing officer for Tioga County, respondent is also empowered by Penal Law Sections 400.00(1) and 400.00(9) to issue amendments to pistol permits. Respondent had previously authorized the Tioga County Sheriff's Department to amend the pistol permits of prior approved licensees who provided notice that they were acquiring and/or disposing of pistols other than those listed on their original permit, and who were not seeking a change in any other terms of their licenses. Licensees seeking to add pistols to their permit were required to show the source of the firearm and to attest that they had not been arrested, indicted, convicted or suffered a mental illness since the time of the issuance of their original license.

8. Respondent did not consult his Administrative Judge or any other official of the Office of Court Administration, nor did he request an Opinion from the Advisory Committee on Judicial Ethics, as to whether he could issue himself a pistol permit or whether another judge from outside Tioga County could do so in his stead.

9. On reflection, respondent realizes that it was inappropriate for him to take judicial action on his own pistol permit application and that he should have consulted with court officials to arrange for another judge to handle the matter.

10. Respondent has submitted a pistol permit application for his various firearms and requested that Deputy Chief Administrative Judge Michael V. Cocomma assign that application to another judge to consider and rule upon. The application review is underway before another judge.

As to Charge II of the Formal Written Complaint:

11. Whenever a member of the public brings a firearm, loaded or not, to the Tioga County Courthouse, it is standard procedure for court security to take the firearm and place it in a locker in a public area supervised by court security. When the individual leaves the courthouse, the firearm is returned.

12. Respondent provided evidence of the following, which the Administrator accepts.

A. At all times relevant to the matters herein, it was respondent's practice to carry a firearm to and from court as a matter of personal safety.

B. Respondent began carrying a firearm to court after having been directly threatened by individuals on two occasions. In November 2002, when respondent was campaigning for re-election, a man carrying a pick-axe approached him, cursed at him and said he wished respondent dead for having ruined his life. On a separate occasion, when respondent was in the public square in front of the courthouse, he was approached by a man who said he wished respondent dead.

C. On several occasions, respondent has been followed after leaving the court parking lot by unknown drivers who have continued toward his home. On those occasions, respondent took circuitous routes to evade the unknown driver following him and subsequently reported the incidents to police or court security officers. On one such occasion, respondent drove into the State Police barracks parking lot in order to evade the unknown driver, and on another occasion he drove into the Owego Police Station parking

lot. Respondent has never identified these individuals.

D. In November 2010, Harvey Smith, a Tioga County jail inmate, was charged with a felony in connection with his attempt to recruit a fellow inmate to murder respondent.

13. Respondent advised court security personnel that he was regularly carrying a loaded gun into the courthouse, and court security officers assigned to the courthouse were advised that respondent carried a firearm to court. Respondent did not advise his administrative judge that he was bringing a gun to the courthouse.

14. Respondent's standard practice was to keep the firearm in a drawer in his chambers while he was in the courthouse. This practice was adopted to eliminate the necessity for a court officer to obtain and secure respondent's firearm in the locker, which is located in another part of the courthouse, and then to retrieve it when respondent left. Respondent routinely entered and left the courthouse with the knowledge of court security, utilizing a non-public entrance located on the opposite side of the building from where the secure public entrance and secure lockers are located.

15. There were no administrative policies prohibiting judges from bringing firearms into their chambers and no promulgated procedures for court security staff to follow in such circumstances.

16. On January 21, 2010, respondent carried a .38 caliber Smith and Wesson revolver into the Tioga County Courthouse. Respondent knew there was a faulty mechanism on the revolver that was used to cock the firearm and rotate the cylinder.

When respondent reached his chambers he took the revolver out of his pocket and placed it in a desk drawer.

17. At about 10:30 AM on January 21, 2010, during a break in court proceedings and while alone in his chambers, respondent decided to try to repair the mechanism. Respondent did not know that the revolver was loaded but as a standard protocol he pointed it in a safe direction at a concrete wall. While respondent was manipulating the revolver for repair, it accidentally discharged. Respondent does not know mechanically what caused the gun to discharge. Respondent did not check to determine if the gun was loaded, and when he started to fix it he still believed it was unloaded.

18. Immediately after the revolver discharged, respondent emptied the remaining bullets from the revolver. Respondent's court assistant, Deborah Simonik, who was located in the courtroom next to respondent's chambers, promptly notified court security that the gun had accidentally discharged and that no one was hurt.

19. At the time the firearm was discharged, respondent's secretary, Lisa Mistretta, was in an office across the hall from his chambers, located away from the wall into which the bullet was fired.

20. Following Ms. Simonik's notification, two court officers, Sergeant Charles Scudiero and Lieutenant John Sullivan, interviewed respondent regarding the discharge of the revolver in his chambers.

21. Later that morning, Captain Carl Fennisey of the New York State

Unified Court System Court Security Office contacted Tioga County Sheriff Gary Howard and requested an investigation of the discharge of a firearm in respondent's chambers.

22. Two Sheriff's Department investigators, Senior Investigator Patrick Hogan and Investigator Casey Rhodes, thereafter arrived at the courthouse to investigate. They found the .38 caliber bullet embedded in a wall in respondent's chambers, close to the floor. An elevator shaft is located on the other side of the wall from where the bullet was lodged. As a result of their investigation, it was determined that respondent had accidentally discharged the firearm. Prosecution was neither recommended nor initiated.

23. The Tioga County Courthouse is located in the Village of Owego. Section 153-3 of the Village Ordinances of Owego prohibits the discharge of a firearm "whether on public or private property within the corporate limits of the village," with three exceptions: (a) in self-defense, (b) in the discharge of official duty or (c) in target practice at an indoor range. Respondent did not receive a summons or ticket for violating the local ordinance.

24. Although all court staff and police officers involved in this matter knew respondent to be a judge, at no time did respondent invoke his judicial title or influence with them to avert an investigation into the discharge of his firearm, impede their inquiries, evade a summons or otherwise interfere with their duties.

25. Respondent acknowledges that the accidental discharge of his revolver was contrary to the local ordinance and that the ordinance does not distinguish

between intentional and accidental discharge. Respondent recognizes that his conduct did not fall within the three exceptions contained in the ordinance.

26. No action was taken to revoke or amend respondent's permit as a result of the incident.

27. After January 21, 2010, respondent stopped bringing a firearm to the courthouse.

28. Upon reflection, respondent acknowledges that his chambers was not an appropriate location for him to have been repairing a personal firearm.

29. Respondent's intention was to carry a firearm for personal safety. Respondent recognizes that the Office of Court Administration employs court officers whose duties include providing security services to judges within the courthouse.

Mitigating Factors

30. On reflection and mindful of the safety of others, respondent has not brought a firearm into the courthouse since January 21, 2010.

31. Respondent has been contrite throughout the Commission inquiry.

32. Respondent has served as the Judge of the County Court, Family Court and Surrogate's Court of Tioga County for 19 years 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 faithfully in accordance with the Rules for the remainder of his term as a judge.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1), 100.3(C)(1), 100.3(E)(1), 100.3(E)(1)(a)(i) and (ii) 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. Charges I and II of the Formal Written Complaint are sustained, and respondent’s misconduct is established.

A judge may not exercise his or her decision-making authority for the judge’s personal benefit. By approving his own application for a pistol permit, respondent clearly violated this fundamental precept. Approving a pistol permit involves the exercise of discretion; it is not ministerial, and there is no inherent right to carry a concealed weapon. Even if respondent’s application would likely have been approved by any other licensing officer, especially since the Sheriff’s Department raised no objection, respondent’s approval of his own application was inappropriate.

Since respondent is the sole licensing officer in the county, it would have been appropriate under the circumstances to consult his Administrative Judge or other court officials or to seek an Advisory Opinion as to how he could properly obtain a permit. Instead, as respondent has stipulated, he violated well-established ethical standards by failing to disqualify himself in a matter in which his impartiality might reasonably be questioned and as to which he had a personal stake and personal knowledge concerning the underlying facts, thereby creating an appearance of impropriety (Rules,

§§100.2[A], 100.3[E][1], 100.3[E][1][a][i], [ii]).

Respondent compounded his misconduct by accidentally discharging his gun in his chambers, while attempting to repair it. Handling a gun in his chambers showed a lack of good judgment and a notable disregard for the safety of others. Every year, the accidental discharge of firearms is responsible for hundreds of fatalities and thousands of injuries in the United States.¹ Respondent should have recognized that his chambers was not an appropriate location for him to have been repairing a weapon that has the capacity for causing serious physical harm or death to himself or another. Thus, he is responsible even for the “accidental” discharge of the gun, which, as stipulated, was contrary to a local ordinance prohibiting the discharge of a firearm within village limits; the ordinance does not distinguish between intentional and accidental discharge.

Even off the bench, every judge must observe “standards of conduct on a plane much higher than for those of society as a whole.” *Matter of Kuehnel*, 49 NY2d 465, 469 (1980). Any departure from this exacting standard of personal conduct may undermine a judge’s effectiveness as a judge and impair the public’s respect for the judiciary as a whole.

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

¹ In 2009, there were 613 such deaths and 18,610 injuries, according to the National Center for Injury Prevention and Control (2010 Statistical Handbook of the U.S. Census Bureau).

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Cohen, Mr. Emery,
Mr. Harding, Ms. Moore and Mr. Stoloff concur.

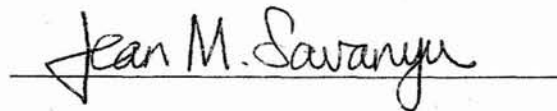
Mr. Belluck dissents and votes to reject the Agreed Statement on the basis
that the facts as presented in Charge II do not provide a basis for a finding of misconduct.

Judge Peters did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State
Commission on Judicial Conduct.

Dated: August 10, 2012

A handwritten signature in cursive script that reads "Jean M. Savanyu". The signature is written over a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MICHELLE A. VAN WOEART,

a Justice of the Princetown Town Court,
Schenectady County.

DETERMINATION

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters
Richard A. Stoloff, Esq.

APPEARANCES:

Robert H. Tembeckjian (Jill S. Polk, Of Counsel) for the Commission
Capasso & Massaroni LLP (by John R. Seebold) for the Respondent

The respondent, Michelle A. Van Woeart, a Justice of the Princetown Town Court, Schenectady County, was served with a Formal Written Complaint dated January 10, 2012, containing two charges. The Formal Written Complaint alleged that respondent

failed to expeditiously transfer from her court tickets issued to herself and her sons for violations of a dog-control ordinance, sent improper messages to the animal control officer and the judges of the transferee court, and failed to maintain proper records of the tickets. Respondent filed a verified answer dated February 2, 2012.

On June 6, 2012, the Administrator, 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. The Commission had rejected an earlier Agreed Statement.

On June 14, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Princetown Town Court, Schenectady County, since 1997. Her current term expires on December 31, 2013. She is not an attorney. At all times relevant herein, respondent has been the only Justice of the Princetown Town Court. She also serves as one of two court clerks in the Princetown Town Court.¹

¹ Although the Commission considers the positions of justice and clerk of the same town court to be incompatible, requiring that respondent vacate one or the other, respondent received an Opinion from the Advisory Committee on Judicial Ethics, distinguishing her situation from others in which it previously declared such positions incompatible (Op. 11-92). Judiciary Law 212(2)(1)(iv) provides as follows: "Actions of any judge or justice of the uniform [sic] court system taken in accordance with findings or recommendations contained in an advisory opinion issued by the [Advisory Committee] shall be presumed proper for the purposes of any subsequent investigation by the [Commission]." Although the Opinion at issue was issued in the course of

2. Matthew and Mark Van Woeart are respondent's sons, now approximately 24 and 29 years of age, respectively.

As to Charge I of the Formal Written Complaint:

The tickets issued on or about September 23, 2009

3. On September 23, 2009, Dawn Campochiaro, the Princetown Animal Control Officer ("ACO"), issued appearance ticket number 541 to Matthew Van Woeart and appearance ticket number 542 to Mark Van Woeart for Dog Running at Large, a violation of Section 3 of the Princetown dog-control ordinance.² The tickets were returnable before respondent in the Princetown Town Court on October 7, 2009.

4. Tickets for violations of the local ordinance are issued in triplicate as follows: the white copy is to be served upon the defendant, the pink copy is to be filed in the court and the yellow copy is maintained by the ACOs.

5. Ms. Campochiaro attached each defendant's white ticket on the door of his residence. Since Matthew Van Woeart lived at respondent's home, his copy was attached to the door of their joint residence.

6. Ms. Campochiaro placed the court's pink copies and the supporting depositions in the court clerk's window slot at the courthouse, which was the protocol for

the Commission's investigation, the Commission did not consider it appropriate to proceed further against respondent with regard to her simultaneously holding the town court justice and town court clerk positions.

² The tickets of September 23, 2009, and October 28, 2009, issued to Mark Van Woeart, both misspell his first name as "Marc."

filing with the court when the office was not open.

7. Prior to the October 7, 2009, return date, respondent knew that a copy of each ticket and supporting deposition had been filed in the Princetown Town Court, knew that her sons were named defendants on the tickets, and knew that the tickets were returnable in her court. Neither Ms. Campochiaro nor the defendants appeared in court on the return date.

The tickets issued on or about October 28, 2009

8. On October 28, 2009, Ms. Campochiaro issued appearance ticket number 560 to respondent and Matthew Van Woert and appearance ticket number 561 to Mark Van Woert for Dog Running at Large, a violation of Section 3 of the Princetown dog-control ordinance. The tickets were returnable before respondent in the Princetown Town Court on November 4, 2009.

9. These tickets were also issued in triplicate, in accordance with the usual practice. Ms. Campochiaro attached the white copy of Mark Van Woert's ticket to the door of his house. She brought the white copy of the ticket issued to respondent and Matthew Van Woert, along with the court's pink copies of both tickets and the supporting depositions, to the Princetown court clerk's office.

10. Prior to the November 4, 2009, return date, respondent knew that a copy of each ticket and supporting deposition had been filed in the Princetown Town Court, knew that she and her sons were named defendants on the tickets, and knew that the tickets were returnable in her court. Neither Ms. Campochiaro nor any of the

defendants, including respondent, appeared in court on the return date.

Respondent's conduct with respect to the tickets

11. On October 28, 2009, Ms. Campochiaro informed respondent by email that she had placed Matthew's and respondent's copy of the October 28, 2009, ticket in the court clerk's mail slot and asked whether the September 23, 2009, tickets had been transferred to the Town of Rotterdam.

12. On October 29, 2009, at 9:27 AM, respondent replied to Ms. Campochiaro by email that the "case has to go to the county court judge to be transferred." Respondent also advised Ms. Campochiaro to "look at the cpl for service of appearance ticket."

13. Later that day at 5:57 PM, respondent sent Ms. Campochiaro a second email. Respondent wrote:

[I] read Mr. Lee's deposition and agree he shouldn't have to feel threatened in his own driveway. But he said when he rode by the house he saw the dogs loose. Correct me if I'm wrong, but I don't think our dog law says dogs have to be leashed on our own property.

Respondent also stated, "I will let you know when Judge Drago sends these matters to another court."

14. On November 8, 2009, in another email to Ms. Campochiaro, respondent said that she was unable to request a transfer of the case and asked Ms. Campochiaro to come to the court. Respondent further advised Ms. Campochiaro that "[i]t's an easy fix though."

15. On November 23, 2009, Ms. Campochiaro went to the court and, at the behest of respondent, signed accusatory instruments for the tickets issued on October 28, 2009. Respondent did not request the execution of an accusatory instrument for the September 23, 2009, tickets.

16. Respondent did not request that the tickets be removed from her court until January 5, 2010. On that date, by letter to County Court Judge Drago, respondent requested that the “attached violations of the Princetown Town Law” be transferred to another jurisdiction. Respondent did not advise Ms. Campochiaro of this request.

17. Judge Drago issued an order dated January 12, 2010, transferring the matters to Duanesburg Town Court. Respondent did not advise Ms. Campochiaro that the matters had been transferred.

18. By letter dated January 26, 2010, respondent sent the judges of the Duanesburg Town Court “[a]ll necessary paperwork relative to this case” and the order of transfer. While respondent does not recall what specific “paperwork” she sent to the Duanesburg Town Court, all of the original tickets and documents were in the disposing court’s file prior to resolution.

19. In the January 26, 2010 letter, respondent informed the transferee justices that she had recused herself because the “alleged violations have named [her] sons.” She further advised “that service was not complete, due to the appearance tickets being left at the house, taped to the door on the case involving my son, Mark Van Woert

and his dog Hanna,” and that her copy had been left in her office. Respondent also alleged that the dog “Sophie” was registered to her son Matthew and stated that she was “[h]opeful of getting my name removed from the informations” because “[I] was unnecessarily named on the appearance ticket and information.” Respondent did not advise Ms. Campochiaro that the matters were sent to Duanesburg Town Court or provide her with a copy of the letter.

20. Respondent acknowledges that the statements contained in her January 26th letter were *ex parte* communications to the transferee judges, expressed her biased judicial opinion on a matter from which she had recused herself, and were improper.

21. By letter dated February 1, 2010, Duanesburg Town Justice Robert B. Butler recused himself from the matter due to his familiarity with respondent. By letter dated February 3, 2010, Duanesburg Justice Rita LaBelle recused herself because of her familiarity with respondent’s family. By order dated February 5, 2010, Judge Drago removed the matters to Scotia Village Court, where they were disposed of on June 23, 2010. Respondent was granted a six-month adjournment in contemplation of dismissal, without the imposition of a fine or conditions.

Respondent failed to keep adequate records

22. Respondent acknowledges that she did not keep complete and accurate records of the above proceedings pertaining to her and her sons, as required by Section 214.11 of the Uniform Civil Rules for the Justice Courts. The only record

respondent maintained in the Princetown Town Court of the tickets issued to her and her sons was a large envelope with a hand written label entitled *Town of Princetown versus Van Woeart*.

- A. This record did not have a docket number assigned to it and did not contain a copy of the September 23, 2009, or October 28, 2009, appearance tickets.
- B. Copies of the emails between respondent and the ACO were not maintained in this envelope.
- C. There was no record of the documents sent to Judge Drago on January 5, 2010.
- D. There was no record of the documents forwarded to the transfer court on January 26, 2010.
- E. None of the September or October 2009 tickets were entered into the Princetown Town Court computer system.

Respondent failed to follow her own protocol in processing and transferring the appearance tickets

23. Respondent acknowledges that she failed to follow her own court's regular procedure for processing and transferring appearance tickets, in that she failed to input information from the appearance tickets issued to her and to her sons in September and October 2009 into the court's computer system, failed to generate a docket number, failed to affix a label with the computer generated docket number and case name onto the file folder and failed to maintain copies of the original documents in the file folder once the matter was transferred.

As to Charge II of the Formal Written Complaint:

24. In 2005, on two separate occasions, respondent was warned by

Darrell Corbett, the Princetown Animal Control Officer (“ACO”), that her dogs were running onto neighbors’ property. In one instance the dogs allegedly tore up garbage and killed wild ducks; in another instance the dogs allegedly attacked and injured a neighbor’s dog. Respondent paid the veterinarian bill for the injured dog.

25. On March 11, 2006, Mr. Corbett received a complaint from April Lopuch regarding respondent’s dogs being on her property. On that date, Mr. Corbett took a supporting deposition from Ms. Lopuch.

26. On March 11, 2006, before Mr. Corbett had issued any tickets to respondent, respondent advised him that the dogs were “going to run free” and that he should just “write [her] a ticket.”

27. On March 13, 2006, Darrell Corbett issued appearance ticket number 545 to respondent and appearance ticket number 544 to Mark Van Woert for Dog Running at Large, a violation of Section 3 of the Princetown dog-control ordinance, and Dangerous Dog under Section 121 of the Agriculture & Markets Law (since renumbered Section 123). The tickets were returnable before respondent in the Princetown Town Court on March 29, 2006.

28. These tickets were issued in triplicate, in accordance with the usual practice. Mr. Corbett personally served Mark Van Woert by handing him a copy of his ticket at his home and personally served respondent by handing her a copy of her ticket at her home. Mr. Corbett filed the court’s copies of the tickets by handing them to respondent at the Princetown town courthouse.

29. Prior to the March 29, 2006, return date, respondent knew that a copy of each ticket had been filed in the Princetown Town Court, knew that she and her son were named defendants on the tickets, and knew that the tickets were returnable in her court. Mr. Corbett did not appear in court on the return date and did not file an accusatory instrument for either of the tickets.

30. Respondent did not request that the tickets be removed from her court. There is no record that the tickets were transferred to another court. There is no record of the disposition of the tickets.

31. Respondent failed to keep complete and accurate records of the proceedings as required by Section 214.11 of the Uniform Civil Rules for the Justice Courts and/or failed to properly supervise court personnel, with the result that the records required by that section were not maintained.

- A. There is no record at all of the tickets in the Princetown Town Court.
- B. There is no file.
- C. There is no docket number.
- D. There are no copies of the tickets or supporting depositions.
- E. There is no request for removal to another court.
- F. There is no order of transfer.
- G. There is no record that the tickets were ever entered into the Princetown Town Court computer system.

Additional Observations

32. Respondent has admitted the charges, is remorseful, and assures the

Commission that lapses such as occurred here will not recur.

33. With respect to the appearance tickets issued in September and October 2009, while respondent failed to immediately disqualify herself, she ultimately effectuated transfers to the Duaneburg Town Court once the ACO filed an accusatory instrument.

34. With respect to the appearance tickets issued on March 13, 2006, no charge was actually pending before respondent since the ACO never filed any accusatory instruments with respect to the appearance tickets and never followed up on the matter.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(6), 100.3(C)(1), 100.3(C)(2), 100.3(E)(1)(d)(i), and 100.4(A)(1), (2) and (3) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I and II of the Formal Written Complaint are sustained, and respondent’s misconduct is established.

After respondent and her sons were issued appearance tickets in 2009 with respect to violations of a local ordinance, respondent engaged in a series of acts that were contrary to the ethical rules.

Section 100.3(E)(1)(d)(i) of the Rules requires a judge to disqualify himself or herself “in a proceeding in which the judge’s impartiality might reasonably be

questioned,” including instances where the judge or a relative within the sixth degree of relationship to the judge or the judge’s spouse is a party to the proceeding. It is clear from this record that respondent did not expeditiously transfer the 2009 matters in which she and her sons were the defendants. Upon learning that she and her sons had been served with appearance tickets that were returnable in her court, where she is the sole judge, respondent should have promptly disqualified herself and sent the matters to County Court with an explanation that she was recused because she and her sons were the prospective defendants. Even if she believed that no charges were pending in the absence of an accusatory instrument³, allowing tickets issued to her and her children to languish in her court created an appearance of impropriety and should have been avoided. Moreover, even if the initial delay might be attributed to the absence of an accusatory instrument, the record indicates that after an accusatory instrument was signed, respondent did not write to the County Court requesting the transfer of the matters until six weeks later.

Respondent compounded her misconduct by making biased, *ex parte* comments about the matters in her letter to the judges of the transferee court. Section 100.3(B)(6) of the Rules prohibits a judge from initiating or considering unauthorized *ex parte* communications with respect to a pending or impending matter. As has been stipulated, respondent’s comments in her letter, which was not copied to the ACO,

³ A criminal action is commenced by the filing of an accusatory instrument, which must be filed before an arraignment can take place (*see*, CPL §§100.05, 150.50[1]). *See*, Agreed Statement, ¶38 (stipulating with respect to the 2006 appearance tickets issued to respondent and her son that “no charge was actually pending before respondent” since an accusatory instrument was never filed).

expressed her biased judicial opinion on a matter from which she had recused herself and were improper. Identifying the defendants as her sons, explaining why the service of the tickets was defective, and stating that she was “hopeful” of having her name removed from the matters since the dog was registered to her son all could be viewed as an attempt to assert her judicial office and influence the judges who would be deciding the matters. Such conduct is inconsistent with well-established ethical principles. *See, Matter of Allen*, 2012 Annual Report 64.

Additionally, with respect to both the 2006 and 2009 tickets issued to her sons and herself, respondent failed to maintain complete and accurate records of the matters as required by law (22 NYCRR §214.11). It appears that the tickets were never entered into the court’s computer system; no file was created, and no docket number was assigned; and the court’s records do not contain either the originals or copies of the court’s copy of the tickets. Although it was stipulated that respondent sent all the paperwork relative to the 2009 tickets to the transferee court, a judge is specifically required to maintain copies of all original documents forwarded to another court (22 NYCRR §214.11[a][1]). Respondent’s failure to maintain proper records of these matters created an appearance of impropriety (Rules, §100.2[A]). Since respondent and her sons were parties to the matters, and since respondent herself is the court clerk, she should have been especially sensitive to the requirements regarding proper record-keeping.

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

Judge Klonick, Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Harding and Ms. Moore concur.

In an opinion, Mr. Stoloff concurs as to the sanction of censure but dissents as to certain stipulated findings and conclusions and votes that Charge II was not sustained.

In separate opinions, Mr. Cohen and Mr. Emery dissent and vote to reject the Agreed Statement of Facts on the basis that the record requires factual development at a hearing in order to determine the appropriate sanction.

Judge Peters did not participate.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: August 20, 2012

A handwritten signature in black ink that reads "Jean M. Savanyu". The signature is written over a horizontal line.

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MICHELLE A. VAN WOEART,

a Justice of the Princetown Town Court,
Schenectady County.

OPINION
BY MR. STOLOFF
DISSENTING IN PART
AND CONCURRING
AS TO SANCTION

While I agree with the majority's conclusion that the appropriate sanction for respondent's conduct is censure, I cannot agree with certain stipulated findings, and the inferences therefrom, in the Agreed Statement of Facts and in the Determination.

While respondent's *ex parte* communication with respect to the 2009 appearance tickets warrants censure, the record on balance, in my view, evidences several mitigating factors: (a) that respondent assisted in causing the animal control officer ("ACO") to file an Information naming respondent and her son, which was a condition precedent to the court obtaining jurisdiction of the matter; (b) that the 2006 and 2009 matters could not be transferred unless or until the accusatory instrument was filed, and respondent had no obligation to assist in that regard; (c) that a docket number could not be created until such time as an accusatory instrument was filed with the Court; (d) that overall, respondent may have been trying to do the right thing, though perhaps clumsily; and (e) that the purported record-keeping "deficiencies" with respect to both the 2006 and

2009 matters are relatively minor at best.

Had it not been for the *ex parte* communication which could be construed or misconstrued as an attempt to unduly influence the judge to whom the matter was eventually assigned, I believe the appropriate sanction would have been admonition at most and potentially a confidential letter of caution.

Consideration of respondent's handling of these matters and her alleged record-keeping deficiencies requires careful analysis of the Criminal Procedure Law. With respect to the appearance tickets issued to respondent and her son on March 13, 2006 (Ex. J¹), the ACO failed to file an accusatory instrument with respect to the matters, a condition precedent to their prosecution. From my analysis, it seems clear that respondent never transferred the 2006 matters because no accusatory instrument was ever filed, for which respondent cannot be faulted.

With respect to the appearance tickets dated September 23, 2009 and October 28, 2009 (Ex. A and B), the record shows that respondent actually advised the ACO to file the required accusatory instrument naming the respondent and her son. In a series of communications between respondent and the ACO between October 28, 2009 and November 8, 2009, respondent imparted to the ACO that she could not request the County Court Judge to transfer the case, stating: "*I'll explain when you come in. It's an easy fix*" (Ex. C, D and E) (Emphasis added). Accusatory instruments were then created

¹ All references to Exhibits are those attached to the Agreed Statement of Facts.

and sworn to on November 23, 2009 (Ex. F).² Had no accusatory instrument been filed, the matters could not have been prosecuted.

A criminal action is commenced upon the filing of an accusatory instrument in the criminal court. An accusatory instrument can consist of an Information, Simplified Information, Prosecutor's Information, Misdemeanor Complaint or Felony Complaint (see CPL §100.05), and is defined in CPL §100.10. The relevant section is CPL §100.10(1), which defines an Information.³ It is the Information that serves as the basis for the commencement of the criminal action and for the prosecution thereof in the local criminal court.⁴

Following the filing with the local criminal court of the Information, the defendant must be arraigned thereon (CPL §170.10[1]). The exceptions to that section are irrelevant to this matter.

Thus, in order for the court to have jurisdiction to remove an action from one criminal court to another, the criminal action must be based upon an Information, a Simplified Information, Prosecutor's Information or a Misdemeanor Complaint (CPL §170.15). Since a criminal action is not commenced until an Information is filed, one cannot seek to have the matter removed absent the filing of the Information.

² In the record before us, the supporting depositions are not attached to each Information.

³ These charges cannot be commenced by a Simplified Traffic Information, Simplified Parking Information, Simplified Environmental Conservation Information, Prosecutor's Information, Misdemeanor Complaint or Felony Complaint. Since there was no prior conviction that the dog was a dangerous dog under Agriculture & Markets Law §121, the dangerous dog charge in 2006 would not be a misdemeanor.

⁴ The Information commences a criminal action only when filed with the local criminal court (see *People v. Quilès*, 179 Misc2d 59, 63, 683 NYS2d 775, 779 [Crim Ct NY Co 1998]).

An appearance ticket (defined in CPL §150.10) is not an Information. It serves solely as a notice to appear and does not commence a criminal action (Preiser, Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL §150.10). The public servant who filed the appearance ticket is required to file the same with the court at or prior to the court date (CPL §150.50). An appearance ticket is merely an invitation to appear, and the filing of the accusatory instrument, not the appearance ticket, gives the lower court jurisdiction.⁵

Further, an appearance ticket is not an Information as it fails to contain factual allegations which, if true, would establish every element of the offense charged and the defendant's commission thereof. A prosecution of a violation of the town's Dog Control Law necessarily presupposes a criminal action which must be commenced by the filing of a valid and sufficient accusatory instrument in order for the local criminal court to obtain jurisdiction.

Here, respondent did not waive her right to be prosecuted by an Information, and the record reveals that rather than attempting to avoid prosecution (which, as a defendant, she had a right to do), respondent actually helped assist the ACO in moving the case forward. As noted above, on November 8, 2009, as a courtesy, she advised the ACO by email that she could not ask the County Court Judge to transfer the case but asked the ACO to stop by that week, stating, "I'll explain when you come in. It's an easy fix." The appearance ticket did not provide the lower court with jurisdiction

⁵ *People v. Coore*, 149 Misc2d 864, 865, 566 NYS2d 992, 993 (Yonkers City Ct 1991).

to render a judgment of conviction or even to arraign the defendant.⁶

It is my opinion that advising the ACO to file an Information charging respondent and her sons with the violation referred to in the appearance tickets should be viewed as a significant mitigating factor. This should be the duty of the prosecutor or Town Attorney. Without respondent's proactive assistance, the case could not have moved forward.

With respect to the absence of a file or docket number for the matters, it must be noted that the appearance ticket, without being accompanied by an Information, is not a document which would create or cause the court or its clerk to create a file. Where no accusatory instrument is filed on or before its return date, many courts return the appearance ticket to the officer or merely place the ticket in a dead file, as the court lacks jurisdiction without the filing of the accusatory instrument. Apparently this is what respondent did with respect to the 2006 matters. Further, as noted above, respondent understood that the matters could not be transferred in the absence of an Information, which explains the absence of a transfer order or a request for removal to another court. Therefore, in my view, the absence of these records should not be viewed as evidence of misconduct.

I know of no rule which requires the court to teach the prosecutor how to prosecute a case. It is my opinion that, with respect to the 2006 appearance tickets, the court's failure to advise the ACO that he was required to file an Information should not

⁶ *People v. Roslyn Sephardic Center*, 17 Misc2d 74, 847 NYS2d 332 (Sup Ct App Term 2d Dept 2007).

be raised to the level of actionable misconduct, nor is it exacerbating. Neither the court nor a defendant is required to advise a prosecutor how to obtain jurisdiction in the local criminal court. Accordingly, since the gist of Charge II seems to be respondent's alleged failure to transfer the matters and the absence of a file and other records, it is my opinion the charge should not be sustained.

Furthermore, from the record I do not know whether the ACO, a Town Attorney or the District Attorney prosecutes the charges in the Princetown Town Court or the Duanesburg Town Court, as the record and the Agreed Statement of Facts are silent on this matter.

There is no doubt that a portion of respondent's letter to the justices of the Town of Duanesburg contained *ex parte* communications. However, in my view the second paragraph of the letter does not clearly have the import assigned in the dissents of either Mr. Cohen or Mr. Emery. Under the CPL, the appearance ticket must be served personally, rather than being taped to a door, left at one's office, or slid under a window (CPL §150.40[2]).⁷ If the recipient (defendant) does not appear in court, then the process must continue with the defendant being personally served with either a summons or an appearance ticket, since a defendant's failure to respond even to a properly served appearance ticket does not subject him to any adverse action in the case pending against

⁷ *People v. Giusti*, 176 Misc2d 377, 381, 673 NYS2d 824, 827 (Crim Ct NY Co 1998); *People v. Gross*, 148 Misc2d 232, 239, 560 NYS2d 227, 233 (Crim Ct Kings Co 1990).

him.⁸ While respondent should not have presented the information regarding how the appearance ticket was served to the Duaneburg judges in this manner, she may well have intended it simply as an explanation, should she or her son have chosen not to appear in court on the new return date, or to indicate that she would voluntarily appear in court and permit herself to be arraigned, thus waiving the improper service.

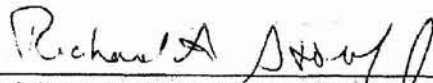
Violations of a town Dog Control Law generally can be alleged against either the owner of the dog or the harbinger of the dog. While it may not be unusual for the ACO to charge both and then have one party communicate with the ACO indicating that he or she is the dog owner as opposed to the other party charged, respondent's statement ("I am hopeful of getting my name removed from the information regarding my other son Matthew's dog, Sophie") can too easily have been misconstrued. While respondent might not have intended to affect the outcome of her case by such a communication, she should have been mindful that her statement could have been construed as an attempt to influence the court to whom the matter was assigned to dismiss the charges against her upon yet unproven facts, as opposed to an intended communication with the ACO for a reasonable purpose. Correspondingly, I view respondent's statement that she was unnecessarily named on the appearance ticket and Information not as a clear request that the court dismiss the charge, but rather as an explanation that the dog was registered to her son, a fact which is undisputed. Since it would be up to the ACO and not the court to amend the Information accordingly, the

⁸ *People v. Byfield*, 131 Misc2d 884, 886, 502 NYS2d 346, 348 (Crim Ct NY Co 1986). In fact, the only potential consequence of failing to appear in response to a properly served appearance ticket would be prosecution pursuant to Penal Law §215.58 (*Id.*, fn 2).

prosecution would have continued and the issue of the registration ultimately determined.

For the foregoing reasons, I concur that the appropriate sanction is censure while disagreeing with certain stipulated facts and conclusions in the Agreed Statement of Facts and in the Determination.

Dated: August 20, 2012


Richard A. Stoloff, Esq., Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MICHELLE A. VAN WOEART,

a Justice of the Princetown Town Court,
Schenectady County.

DISSENTING OPINION
BY MR. COHEN

The majority has determined that the appropriate sanction for respondent's conduct is public censure. At day's end, it may well be that the majority is correct and I would concur in that sanction. Nonetheless, without further development of the record addressed to respondent's intent and based solely upon the Stipulation between the parties, I am unable to do so.

To my mind, the critical issue is the precise intent of respondent when she, albeit belatedly, recused herself from the companion complaints against herself and her sons and transferred those complaints by letter to the two judges of Duanesburg Town Court. In so doing, on January 26, 2010 on Princetown Town Court letterhead, she wrote the following without copying the Animal Control Officer ("ACO") who issued the tickets:

I have enclosed paperwork and ORDER transferring the Dog violations to your town. Since the alleged violations have named my sons on this matter, I have recused myself from

this case. I have enclosed a copy of the Animal Control Law for the Town of Princetown and all necessary paperwork relative to this case.

I would like you to be aware, however, that service was not complete, due to the appearance tickets being left at the house, taped to the door on the case involving my son, Mark Van Woeart and his dog Hanna. The appearance tickets were left at my office slid under my window. I am hopeful of getting my name removed from the informations regarding my other son Matthew's dog, Sophie. She is registered to him and I feel I was unnecessarily named on the appearance ticket and information.

Contact me if you need anything further. (Emphasis added.)

The majority has accepted that respondent's purpose in doing so was wrongful. On this issue, the parties stipulated -- and the determination accepts -- that the statements contained in the letter "were *ex parte* communications to the transferee judges, expressed her biased judicial opinion on a matter from which she had recused herself, and were improper" (Determination, par. 20).

It may be that to gain that Stipulation, both sides had to compromise somewhat -- the Commission staff not obtaining from respondent a stipulated admission that respondent actually intended to influence the outcome of the proceedings against respondent and her sons, and respondent not obtaining a stipulated admission from the Commission that respondent merely intended a formal, on the record, statement to the newly assigned judges(s) of her position as a litigant. The process of obtaining a stipulation to deal with somewhat disputed circumstances and events often requires a give and take between the litigants which sometimes leaves certain relevant but nuanced facts

or conclusions on the cutting room floor.

Now, it may well be that in writing her letter, respondent was actually attempting to communicate *pro se* on behalf of her sons and herself, and simply chose an extremely poor way in which to do so. Her course of action would not have been ideal, to be sure, but that may have been her true motivation.

On the other hand, perhaps respondent simply, and in raw fashion, tried to get the letter's recipients to see her as a judge of coordinate jurisdiction who should (euphemistically) be accorded a "favor" that, pure and simple, would be simply unavailable to someone without robes. The fact that she communicated in a writing that would or at least could become part of a court record undermines the notion that her action was corrupt (as proposed by Commissioner Emery); "corrupt" *ex parte* communications are typically made verbally.


In my judgment, simply looking at a letter written by a respondent in cold type does not allow the Commission, or at least me, the ability to truly know what motivated respondent in those few brief moments in which she decided to author the offending letter and executed on her intention.

Most will agree that one of the most disturbing forms of judicial misconduct that warrants sanction is conduct intended to personally benefit the judge who commits it. Without the answer to the pivotal question which the stipulated facts do not answer to my satisfaction – *i.e.*, whether respondent was transparently trying to use her judgeship to improperly (or perhaps, corruptly) influence other judges to shortcut and actually undermine the judicial process in her (and her family's) favor – I am unable to determine

whether the recommended sanction of public censure is the appropriate one.¹

Accordingly, I respectfully dissent for the limited purpose of rejecting the Stipulation of Facts as presently constructed, opting instead for a factual hearing limited to the testimony of respondent on her intent in writing her letter (and any testimony she might wish to proffer at a hearing bearing on that intent).

Dated: August 20, 2012



Joel Cohen, Esq., Member
New York State
Commission on Judicial Conduct

¹ At the same time, I see no need, in dissent, for the more extravagant words or sentiments expressed by my colleague in dissent to critique the majority's judgment in endorsing the sanction of public censure, respondent's mothering skills, or a supposed disparity in upstate versus downstate justice.

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

MICHELLE A. VAN WOEART,

a Justice of the Princetown Town Court,
Schenectady County.

DISSENTING OPINION
BY MR. EMERY

Paragraph 21 of the Agreed Statement, which the majority has accepted in its determination (par. 20), characterizes the central misconduct at issue in this case as follows:

Respondent acknowledges that the statements contained in her January 26th letter were *ex parte* communications to the transferee judges, expressed her biased judicial opinion on a matter from which she had recused herself, and were improper.

The problem is that this description of the misconduct here is sanitized with legal jargon of which George Orwell would be envious. Were it to resemble what really *happened* in this case, I might not dissent. But the facts, even as presented in the Agreed Statement, when deciphered for what they really mean, provide a clear picture that demonstrates that respondent Van Woeart's actions were far more malicious and corrosive of the judicial process than the determination conveys.

In her *ex parte* letter to the judges of the Duaneburg Town Court, to whom she was transferring the cases in which she and her sons were named as defendants, respondent did two things which the majority ignores in its determination. First, in response to the tickets against her and her two sons for Dog Running At Large, respondent – the judge before whom these charges were originally returnable – intentionally incriminated her sons in an effort to exonerate herself. In writing to the judges to whom she was transferring a case she should have never touched in the first place, she threw her sons under the proverbial bus. She specifically informed the transferee judges that “Hanna” was her son Mark’s dog and that “Sophie” was her son Matthew’s (Agreed Statement, par. 20). Though she had been named by the Animal Control Officer (ACO), she was attempting to have her name removed, *ex parte*, from the accusations by implicating her children.

Second, she pointedly urged, *ex parte*, the transferee judge to dismiss the charges against her. By providing information that incriminated her sons, she was “[h]opeful of getting my name removed from the informations” because “I was unnecessarily named on the appearance ticket and information” (Agreed Statement, par. 20). She also told the transferee judges, *ex parte*, that the service of the tickets was legally deficient.

This sort of bald-faced, corrupt behavior should not be clothed in bland, obfuscatory language. Incriminating your children to benefit yourself in your official judicial capacity does qualify, in the nether world of legalism, as “express[ing] her biased judicial opinion,” which is “improper” (Determination at pp. 12-13). But that is obtuse.

We have an obligation to call it what it was – corrupt. Respondent was using her judgeship for her personal benefit – to avoid the legal consequences of her alleged unlawful conduct. It is the moral and ethical equivalent, in my view, of offering the transferee judges a bribe to drop her charges. Perhaps it is even worse because she was using her official position not only to benefit herself, but to do so by incriminating others – her children.

I am unpersuaded that there can be any mitigating spin on such blatant misconduct. Commissioner Stoloff's circumlocutions about the applicable procedures which he thinks mitigate other aspects of Van Woeart's misconduct do not address this central point. Commissioner Cohen's dissent essentially agrees with me employing homogenized language. The fact that the underlying charges against Van Woeart were of a relatively minor nature is of no significance. The corruption is the use of judicial office for personal benefit – an attempt to avoid the consequences of the charges against her – no matter how trivial those charges and consequences may have been. *See Matter of Schilling*, 2013 Annual Report ___ (May 8, 2012) (judge removed for misconduct related to the disposition of two Speeding tickets). Moreover, it is clear that in her *ex parte* letter, respondent was lobbying privately for a favorable result. In her cover letter sending the case to another court, there was no need for her to describe why the service of the tickets was deficient or why she should not have been named as a defendant, and any claim that she was merely informing the transferee court of legal issues she would raise in the future is simply more obfuscation. Notably, she did not copy the letter to the ACO

who had issued the tickets, or even notify the ACO that the cases had been sent to the Duaneburg court.

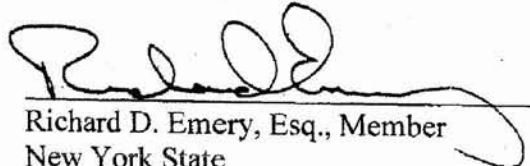
Nor does Van Woert's status as a non-lawyer entitle her to lenience. As I have previously written, a two-tier system of disciplinary sanctions, in which non-lawyer justices are treated with comparative lenience, is anathema to a fair-minded system of justice and equal treatment under the law. *Matter of Menard*, 2011 Annual Report 126 (Emery Dissent). The Court of Appeals has agreed with this view (*Matter of Roberts*, 91 NY2d 93, 97 [1997]; *Matter of Fabrizio*, 65 NY2d 275, 277 [1985]; see also *Matter of VonderHeide*, 72 NY2d 658, 660 [1988] ["Ignorance and lack of competence do not excuse violations of ethical standards"]). Non-lawyer judges such as Van Woert cannot get a pass because they "don't get it." There is no "Upstate Justice" and "Downstate Justice"; there is justice. But this Commission continues to accord undue lenience to non-lawyer judges who engage in stupid, but nonetheless corrupt, conduct which tramples due process in their communities.

Three meetings ago we voted to remove a judge who is a lawyer for similar ticket fixing shenanigans. *Matter of Schilling*, *supra*. This case is comparable to *Schilling* in several respects, including that records pertaining to the matters in which the judge acted improperly are missing from both judges' courts. In other respects, the misconduct presented here is arguably worse. Not only did Van Woert attempt to fix a ticket, but she also had record-keeping violations related to these cases (all the more inexcusable since she is also the court clerk), and she unduly delayed her recusal for reasons that are unexplained in the record presented to us. Moreover, the record shows

that several years earlier a ticket issued to Van Woeart for a similar violation also suspiciously disappeared from the court records.

Why the majority has decided to minimize the seriousness of Van Woeart's misconduct totally escapes me. Certainly no one has explained to me what I am missing and why she should continue as a judge, given the plain misconduct she has admitted. Consequently, I vote to reject the Agreed Statement. I believe that the matter should proceed to a hearing at which respondent will get the due process she does not seem to understand, even for her own children.

Dated: August 20, 2012



Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

APPENDIX G: STATISTICAL ANALYSIS OF COMPLAINTS

COMPLAINTS PENDING AS OF DECEMBER 31, 2011								
SUBJECT OF COMPLAINT		STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		<i>PENDING</i>	<i>DISMISSED</i>	<i>CAUTION</i>	<i>RESIGNED</i>	<i>CLOSED*</i>	<i>ACTION*</i>	
<i>INCORRECT RULING</i>								
<i>NON-JUDGES</i>								
<i>DEMEANOR</i>		16	15	1	1	1	4	38
<i>DELAYS</i>		4	3	2	1	2	3	15
<i>CONFLICT OF INTEREST</i>		4	7	1	1	2	3	18
<i>BIAS</i>		3	4	0	2	0	0	9
<i>CORRUPTION</i>		6	8	0	0	0	3	17
<i>INTOXICATION</i>		1	1	0	1	0	1	4
<i>DISABILITY/QUALIFICATIONS</i>		0	0	0	0	0	0	0
<i>POLITICAL ACTIVITY</i>		4	5	4	0	4	1	18
<i>FINANCES/RECORDS/TRAINING</i>		5	15	6	3	4	2	35
<i>TICKET-FIXING</i>		1	1	0	0	0	2	4
<i>ASSERTION OF INFLUENCE</i>		8	4	2	2	0	1	17
<i>VIOLATION OF RIGHTS</i>		14	9	3	2	2	6	36
<i>MISCELLANEOUS</i>		0	0	2	1	1	1	5
TOTALS		66	72	21	14	16	27	216

*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 2012								
SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		<i>PENDING</i>	<i>DISMISSED</i>	<i>CAUTION</i>	<i>RESIGNED</i>	<i>CLOSED*</i>	<i>ACTION*</i>	
<i>INCORRECT RULING</i>	998							998
<i>NON-JUDGES</i>	329							329
<i>DEMEANOR</i>	82	32	4	2	1	1	0	122
<i>DELAYS</i>	52	6	4	0	0	0	0	62
<i>CONFLICT OF INTEREST</i>	43	19	1	0	0	0	0	63
<i>BIAS</i>	24	4	0	0	0	0	0	28
<i>CORRUPTION</i>	23	3	2	0	0	0	0	28
<i>INTOXICATION</i>	1	5	0	0	0	0	0	6
<i>DISABILITY/QUALIFICATIONS</i>	5	0	0	0	0	0	0	5
<i>POLITICAL ACTIVITY</i>	12	7	2	0	0	0	0	21
<i>FINANCES/RECORDS/TRAINING</i>	6	9	3	2	1	0	0	21
<i>TICKET-FIXING</i>	0	1	0	0	0	0	0	1
<i>ASSERTION OF INFLUENCE</i>	7	14	4	2	1	0	0	28
<i>VIOLATION OF RIGHTS</i>	9	35	7	0	1	0	0	52
<i>MISCELLANEOUS</i>	12	5	2	1	0	0	1	21
TOTALS	1603	140	29	7	4	1	1	1785

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ALL COMPLAINTS CONSIDERED IN 2012: 1785 NEW & 216 PENDING FROM 2011								
SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		<i>PENDING</i>	<i>DISMISSED</i>	<i>CAUTION</i>	<i>RESIGNED</i>	<i>CLOSED*</i>	<i>ACTION*</i>	
<i>INCORRECT RULING</i>	998							998
<i>NON-JUDGES</i>	329							329
<i>DEMEANOR</i>	82	48	19	3	2	2	4	160
<i>DELAYS</i>	52	10	7	2	1	2	3	77
<i>CONFLICT OF INTEREST</i>	43	23	8	1	1	2	3	81
<i>BIAS</i>	24	7	4	0	2	0	0	37
<i>CORRUPTION</i>	23	9	10	0	0	0	3	45
<i>INTOXICATION</i>	1	6	1	0	1	0	1	10
<i>DISABILITY/QUALIFICATIONS</i>	5	0	0	0	0	0	0	5
<i>POLITICAL ACTIVITY</i>	12	11	7	4	0	4	1	39
<i>FINANCES/RECORDS/TRAINING</i>	6	14	18	8	4	4	2	56
<i>TICKET-FIXING</i>	0	2	1	0	0	0	2	5
<i>ASSERTION OF INFLUENCE</i>	7	22	8	4	3	0	1	45
<i>VIOLATION OF RIGHTS</i>	9	49	16	3	3	2	6	88
<i>MISCELLANEOUS</i>	12	5	2	3	1	1	2	26
TOTALS	1603	206	101	28	18	17	28	2001

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ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975								
SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		<i>PENDING</i>	<i>DISMISSED</i>	<i>CAUTION</i>	<i>RESIGNED</i>	<i>CLOSED*</i>	<i>ACTION*</i>	
<i>INCORRECT RULING</i>	19,809							19,809
<i>NON-JUDGES</i>	6,363							6,363
<i>DEMEANOR</i>	3,573	48	1261	332	124	121	256	5,715
<i>DELAYS</i>	1,494	10	184	96	36	21	29	1,870
<i>CONFLICT OF INTEREST</i>	740	23	490	162	58	28	140	1,641
<i>BIAS</i>	1,911	7	283	57	31	20	33	2,342
<i>CORRUPTION</i>	527	9	133	14	39	23	40	785
<i>INTOXICATION</i>	59	6	39	7	14	4	29	158
<i>DISABILITY/QUALIFICATIONS</i>	63	0	33	2	18	14	6	136
<i>POLITICAL ACTIVITY</i>	361	11	290	192	23	32	51	960
<i>FINANCES/RECORDS/TRAINING</i>	296	14	320	205	137	93	103	1,168
<i>TICKET-FIXING</i>	27	2	89	160	44	62	169	553
<i>ASSERTION OF INFLUENCE</i>	235	22	174	86	29	9	62	617
<i>VIOLATION OF RIGHTS</i>	2,494	49	515	222	93	53	94	3,520
<i>MISCELLANEOUS</i>	820	5	256	86	33	43	60	1,303
TOTALS	38,772	206	4067	1621	679	523	1072	46,940

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