

NEW YORK STATE

**COMMISSION ON JUDICIAL
CONDUCT**



**ANNUAL REPORT
2017**

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT



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*Denotes staff who left in 2016



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March 1, 2017

To Governor Andrew M. Cuomo,
Chief Judge Janet DiFiore, 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, 2016.

Respectfully submitted,

A handwritten signature in blue ink, reading "Robert H. Tembeckjian", is positioned above the printed name.

Robert H. Tembeckjian, Administrator
On Behalf of the Commission

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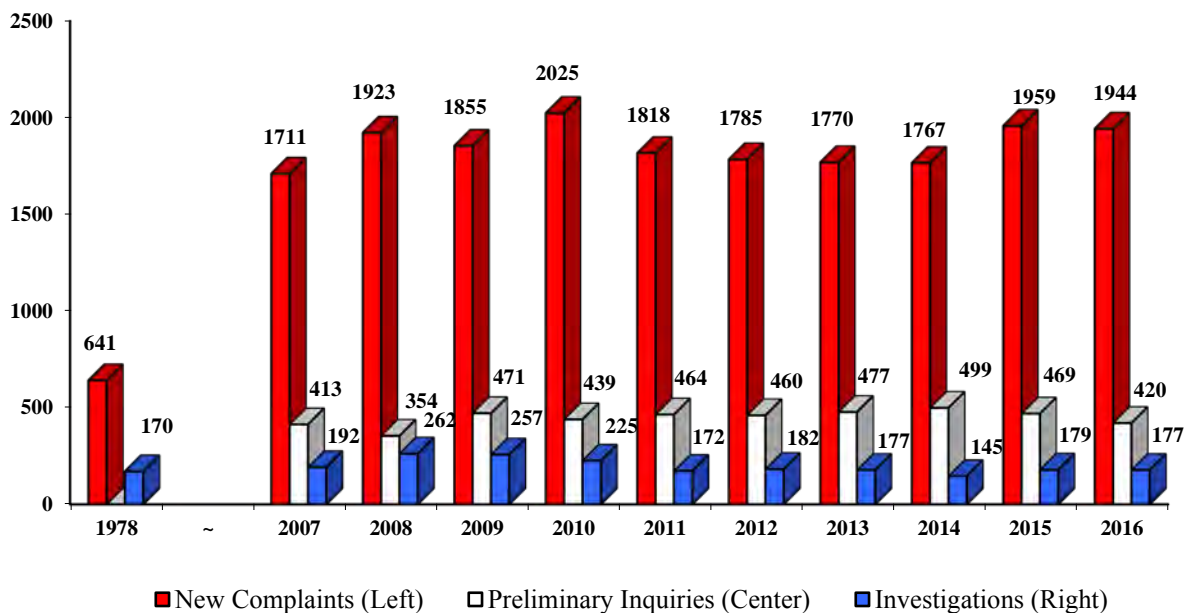
INTRODUCTION TO THE 2017 ANNUAL REPORT

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 3,350 judicial positions in the system filled by approximately 3,150 individuals, in that some town or village justices serve in more than one town or village court.

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 three decades of the Commission's existence. Since 2007, the Commission has averaged 1,856 new complaints per year, 447 preliminary inquiries and 197 investigations. Last year, 1,944 new complaints were received, the third highest total ever. 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 420 preliminary reviews and inquiries and 177 investigations.

This report covers Commission activity in the year 2016.



COMPLAINTS, INQUIRIES & INVESTIGATIONS IN THE LAST TEN YEARS

ACTION TAKEN IN 2016

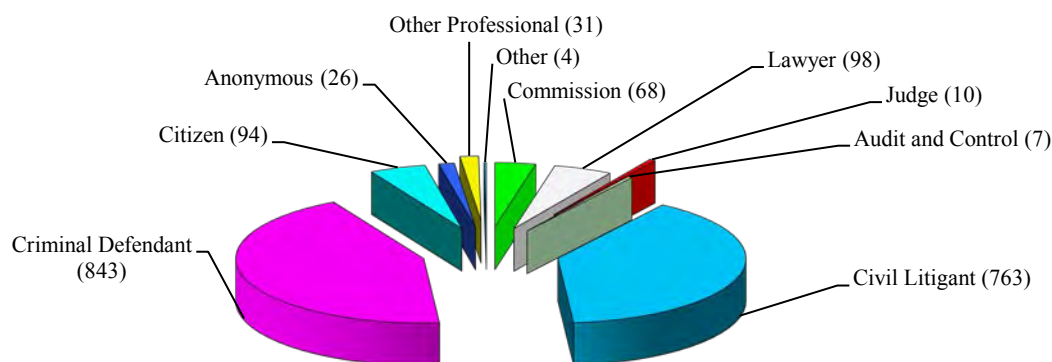
Following are summaries of the Commission's actions in 2016, including accounts of all public determinations, summaries of non-public dispositions, and various numerical breakdowns of complaints, investigations and other dispositions.

COMPLAINTS RECEIVED

The Commission received 1,944 new complaints in 2016. 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 2016 appears in the following chart.



COMPLAINT SOURCES IN 2016

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 2016, staff conducted 420 such preliminary inquiries, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

In 177 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 2016, in addition to the 177 new investigations, there were 175 investigations pending from the previous year. The Commission disposed of the combined total of 352 investigations as follows:

- 91 complaints were dismissed outright.
- 30 complaints involving 23 different judges were dismissed with letters of dismissal and caution.
- 19 complaints involving 15 different judges were closed upon the judge's resignation, three becoming public by stipulation and 12 that were not public.
- 16 complaints involving 12 different judges were closed upon vacancy of office due to reasons other than resignation, such as the expiration of the judge's term.
- 19 complaints involving 13 different judges resulted in formal charges being authorized.
- 177 investigations were pending as of December 31, 2016.

FORMAL WRITTEN COMPLAINTS

As of January 1, 2016, there were pending Formal Written Complaints in 28 matters involving eight judges. In 2016, Formal Written Complaints were authorized in 19 additional matters involving 13 judges. Of the combined total of 47 matters involving 21 different judges, the Commission acted as follows:

- 17 matters involving eight different judges resulted in formal discipline (admonition, censure or removal).
- Two matters involving two different judges were closed upon the judges' resignation from office and became public by stipulation.
- 12 matters involving two judges were closed upon vacancy of office due to reasons other than resignation, such as the expiration of the judge's term.
- 16 matters involving nine different judges were pending as of December 31, 2016.

SUMMARY OF ALL 2016 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 – 1,850,* ALL PART-TIME

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	149	177	326
Complaints Investigated	36	64	100
Judges Cautioned After Investigation	8	7	15
Formal Written Complaints Authorized	0	9	9
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	2	3	5
Judges Vacating Office by Public Stipulation	2	2	4
Formal Complaints Dismissed or Closed	0	0	0

NOTE: Approximately 716 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 – 384, ALL LAWYERS

Complaints Received	15	293	308
Complaints Investigated	0	18	18
Judges Cautioned After Investigation	0	0	0
Formal Written Complaints Authorized	0	1	1
Judges Cautioned After Formal Complaint	0	0	0
Judges Publicly Disciplined	0	1	1
Judges Vacating Office by Public Stipulation	0	1	1
Formal Complaints Dismissed or Closed	0	0	0

NOTE: Approximately 51 City Court Judges serve part-time.

TABLE 3: COUNTY COURT JUDGES – 128, FULL-TIME, ALL LAWYERS*

Complaints Received	224
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 ten who also serve as Surrogates, six who also serve as Family Court Judges, and 39 who also serve as both Surrogates and Family Court Judges.

TABLE 4: FAMILY COURT JUDGES – 147, FULL-TIME, ALL LAWYERS

Complaints Received	192
Complaints Investigated	9
Judges Cautioned After Investigation	3
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 5: SURROGATES – 30, FULL-TIME, ALL LAWYERS

Complaints Received	37
Complaints Investigated	2
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 6: DISTRICT COURT JUDGES – 49, FULL-TIME, ALL LAWYERS

Complaints Received	28
Complaints Investigated	1
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 7: COURT OF CLAIMS JUDGES – 70, FULL-TIME, ALL LAWYERS

Complaints Received	80
Complaints Investigated	2
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 – 326, FULL-TIME, ALL LAWYERS*

Complaints Received	337
Complaints Investigated	27
Judges Cautioned After Investigation	4
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	1

* Includes 12 who serve as Justices of the Appellate Term.

**TABLE 9: COURT OF APPEALS JUDGES – 7, FULL-TIME, ALL LAWYERS;
APPELLATE DIVISION JUSTICES – 54, FULL-TIME, ALL LAWYERS**

Complaints Received	58
Complaints Investigated	0
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Judges Vacating Office by Public Stipulation	0
Formal Complaints Dismissed or Closed	1

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

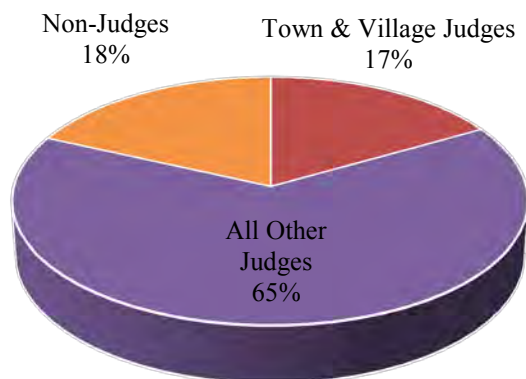
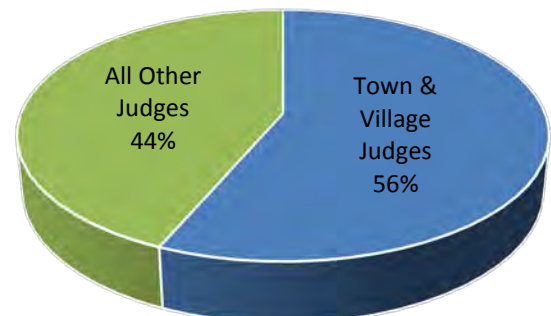
Complaints Received	354
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* The Commission reviews such complaints to determine whether to refer them to other agencies.

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, 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.

SUMMARY OF TABLES 1-10

**COMPLAINTS RECEIVED BY JUDGE TYPE****INVESTIGATIONS AUTHORIZED
TOWN & VILLAGE JUDGES v ALL OTHER JUDGES**

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.

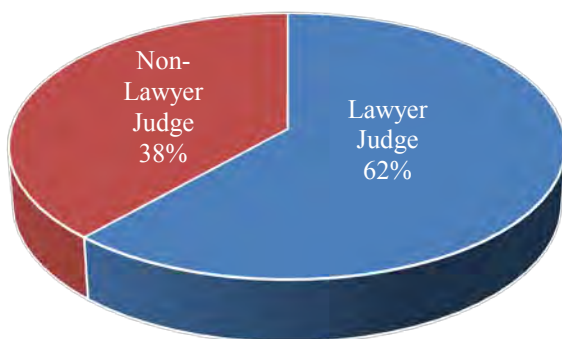
The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibits public disclosure by the Commission of the charges, hearings or related matters, absent a waiver by the judge, until the case has been concluded and a determination of admonition, censure, removal or retirement has been rendered.

Following are summaries of those matters that were completed and made public during 2016. The actual texts are appended to this Report in Appendix F.

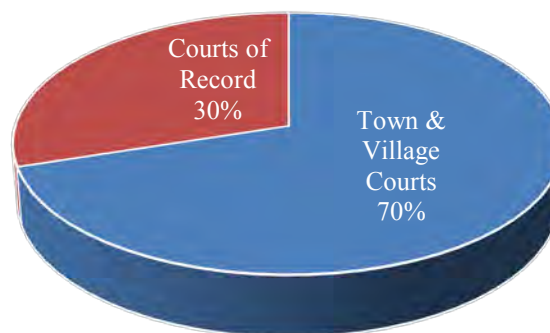
OVERVIEW OF 2016 DETERMINATIONS

The Commission rendered eight formal disciplinary determinations in 2016: one removal, one censure and six admonitions. In addition, five matters were disposed of by stipulation made public by agreement of the parties (three such stipulations were negotiated during the investigative stage, and two after a Formal Written Complaint had been served). Five of the 13 judges were non-lawyer judges and eight were lawyers. Nine of the 13 judges were town or village justices and four were judges of higher courts.

To put these numbers and percentages in some context, it should be noted that, of the roughly 3,150 judges in the state unified court system, approximately 60% are part-time town or village justices. About 61% of the town and village justices, *i.e.* 36% of all judges in the court system, are not lawyers. (Town and village justices serve part-time and need not be lawyers. Judges of all other courts must be lawyers.)



2016 DISPOSITIONS



1978-2016 DISPOSITIONS

DETERMINATION OF REMOVAL

The Commission completed one formal proceeding in 2016 that resulted in a determination of removal. The case is summarized below and the full text can be found in Appendix F.

Matter of Alan M. Simon

On March 29, 2016, the Commission determined that Alan M. Simon, a Justice of the Spring Valley Village Court and the Ramapo Town Court, Rockland County, should be removed from office for engaging in a pattern of bullying and otherwise abusive conduct. In its determination the Commission found that Judge Simon “abused his judicial position in order to bully, harass, threaten and intimidate his court staff, his co-judge and other village officials and employees with whom he dealt in an official capacity.” The Commission noted that the judge’s misconduct was compounded by his false testimony at the Commission hearing and his “continued insistence...that his actions were appropriate under the circumstances and consistent with the required standards of judicial behavior.” Judge Simon, who is an attorney, requested review by the Court of Appeals, which accepted the Commission’s determination of removal.

DETERMINATION OF CENSURE

The Commission completed one formal proceeding in 2016 that resulted in public censure. The case is summarized below and the full text can be found in Appendix F.

Matter of Maija C. Dixon

On May 26, 2016, the Commission determined that Maija C. Dixon, a Judge of the Rochester City Court, Monroe County, should be censured for using her judicial office to advance her own private interests in a dispute with an insurance company. On two occasions in 2013, in connection with a lawsuit she had brought against her insurance company after a car accident, Judge Dixon improperly contacted the judge who was presiding over her case. In its determination the Commission stated: “By engaging in such conduct, [Judge Dixon] conveyed the appearance not only that she was seeking special consideration because of her judicial status, but that she was attempting to influence the judge handling her case through prohibited, unauthorized *ex parte* communications.” Judge Dixon did not request review by the Court of Appeals.

DETERMINATIONS OF ADMONITION

The Commission completed six proceedings in 2016 that resulted in public admonition. The cases are summarized as follows and the full texts can be found in Appendix F.

Matter of Janet M. Calano

On May 9, 2016, the Commission determined that Janet M. Calano, a Justice of the Eastchester Town Court, Westchester County, should be admonished for improperly delegating her judicial duties. From May 2011 through May 2012, during Judge Calano’s first year in office, the judge impermissibly delegated her judicial duties in Vehicle and Traffic Law cases to the Eastchester Deputy Town Attorney. In those cases, the defendants and the Deputy Town Attorney reached

agreements involving pleas to reduced charges, the imposition of fines and surcharges, and on occasion, dismissal of charges. Although the Deputy Town Attorney advised defendants that the dispositions required judicial approval and that a judge would review them, Judge Calano never reviewed or approved the dispositions. In its determination the Commission stated: “Only judges have the authority and responsibility to accept or reject a negotiated plea; and dismissing and reducing charges, convicting defendants and imposing sentences are quintessential judicial functions requiring the exercise of judicial discretion.” Judge Calano, who is an attorney, did not request review by the Court of Appeals.

Matter of Walter W. Hafner, Jr.

On August 29, 2016, the Commission determined that Walter W. Hafner, Jr., a Judge of the Oswego County Court, should be admonished for making comments that were discourteous and inappropriate about a 14-year-old sex-crimes victim in one case, and in two other matters about the District Attorney and the prosecution of cases. In its determination the Commission stated that the judge’s comments about an alleged statutory rape victim were “insensitive and created the appearance that he was being critical of her.” The Commission noted that the judge’s inappropriate comments about purported “improprieties” in the prosecution of two related cases, one involving a relative of the District Attorney, were “especially improper since (i) that case was not before him, (ii) he seemed to have little information about the matter, and (iii) some of his information was inaccurate.” Judge Hafner did not request review by the Court of Appeals.

Matter of Michael A. Gary

On October 3, 2016, the Commission determined that Michael A. Gary, a Judge of the New York City Criminal Court and an Acting Justice of the Supreme Court, Second Judicial District, Kings County, should be admonished for improperly threatening a prosecutor with sanctions and contempt. In 2014, Judge Gary, while presiding over a rape trial, threatened to declare a mistrial with prejudice, hold the prosecutor in contempt of court and impose financial sanctions on the District Attorney’s office – all without basis in law – if the defendant in the case were arrested for threatening a witness who had just testified against him. In its determination the Commission found that despite Judge Gary’s explanation that he was “motivated by concern to avoid a mistrial so that the young victim would not have to testify again, and that he was also concerned that an immediate arrest and incarceration would impede the defendant’s ability to assist in preparing his defense,” the judge’s “baseless threats of contempt and sanctions against an attorney cannot be justified.” Judge Gary did not request review by the Court of Appeals.

Matter of Bruce R. Moskos

On October 3, 2016, the Commission determined that Bruce R. Moskos, a Justice of the New Lisbon Town Court, Otsego County, should be admonished for using the prestige of his judicial office in order to circumvent security procedures in a government building. On three separate occasions, between July 2013 and June 2015, Judge Moskos asserted his judicial position while attempting to bring a licensed gun into a County-owned building, contrary to a local law. In its determination the Commission stated that throughout the incidents Judge Moskos “repeatedly referred to his judicial status and asserted that his judicial position exempted him from security procedures and compliance with the local law prohibiting possession of a weapon in county

buildings.” The Commission noted: “Even if [Judge Moskos] was not abusive or discourteous in confronting the security officers, he should have recognized that his repeated insistence that his judicial status entitled him to special treatment would place them in a more difficult position in carrying out their assigned responsibilities.” Judge Moskos, who is not an attorney, did not request review by the Court of Appeals.

Matter of Lisa J. Whitmarsh

On December 28, 2016, the Commission determined that Lisa J. Whitmarsh, a Justice of the Morristown Town Court, St. Lawrence County, should be admonished for making public comments on Facebook concerning a pending proceeding. In 2016, Judge Whitmarsh made a post on her Facebook page criticizing the investigation and prosecution of a man who had been charged in another town court with falsely swearing that he had personally witnessed signatures on nominating petitions in support of his candidacy for the Morristown Town Council. The judge also clicked the “like” button next to some comments to her post. In its determination the Commission stated that the judge’s comments and her “likes” of other posts “conveyed not only [the judge’s] personal view that the prosecution was unjust, but the appearance that she was impugning the integrity of the prosecution and endorsing others’ criticisms of the District Attorney’s office and the District Attorney personally.” Judge Whitmarsh, who is not an attorney, did not request review by the Court of Appeals.

Matter of Carol A. Rumenapp

On December 30, 2016, the Commission determined that Carol A. Rumenapp, a Justice of the Milford Town Court, Otsego County, should be admonished for engaging in prohibited political activity. The Commission found that in 2015, Judge Rumenapp improperly circulated designating petitions for a candidate for Milford Town Supervisor and attested to the signatures on two other petitions in violation of the ethics rules. In its determination the Commission stated that circulating petitions for another candidate “clearly constitutes partisan political activity and ‘participating in’ the campaign of the candidate, conduct that is explicitly barred by the ethical rules.” Compounding the misconduct, the judge attested to signatures as “Town Justice” on two other designating petitions notwithstanding that the law requires attestation by a “Notary Public or Commissioner of Deeds,” although the judge is neither. The Commission noted that “a town or village justice is not a notary public simply by virtue of holding judicial office.” Judge Rumenapp, who is not an attorney, did not request review by the Court of Appeals.

OTHER PUBLIC DISPOSITIONS

The Commission completed five other proceedings in 2016 that resulted in public dispositions. The cases are summarized below and the full text can be found in Appendix F. Three of the matters were concluded during the investigative stage, and two after formal proceedings had been commenced.

Matter of Lisa J. Powers

On February 8, 2016, pursuant to a stipulation, the Commission closed its investigation of a complaint against Lisa J. Powers, a Justice of the Clare Town Court, St. Lawrence County, who resigned from office after being charged with third-degree grand larceny, a felony, for allegedly

stealing more than \$4,200 from the Russell Pee Wee Association, of which she was the treasurer. She subsequently pled guilty. Judge Powers, who is not an attorney, affirmed that she would neither seek nor accept judicial office at any time in the future.

Matter of Delmar R. House

On March 11, 2016, pursuant to a stipulation, the Commission closed its investigation of a complaint against Delmar R. House, a Justice of the West Carthage Village Court, Jefferson County, who resigned from office after being apprised by the Commission that it had commenced an investigation based upon an allegation that after consuming alcoholic drinks at a local bar, Judge House engaged in public conduct both inside and outside the bar with another patron that was inconsistent with his ethical obligation to act at all times in a manner that protects the integrity of the judiciary and the dignity of his judicial office. Judge House, who is not an attorney, agreed that he would neither seek nor accept judicial office at any time in the future.

Matter of Timothy J. Cooper

On June 2, 2016, pursuant to a stipulation, the Commission discontinued a proceeding involving Timothy J. Cooper, a Justice of the Evans Town Court, Erie County, who resigned from office after being served with a Formal Written Complaint alleging that on April 23, 2014, he operated his automobile under the influence of alcohol and caused an accident. The judge was convicted of driving while ability impaired on June 16, 2014. Judge Cooper, who is an attorney, affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Thomas K. Keefe

On August 15, 2016, pursuant to a stipulation, the Commission discontinued a proceeding involving Thomas K. Keefe, a Judge of the Albany City Court, Albany County, who agreed to relinquish his judicial office effective September 30, 2016, after a referee sustained 10 of 13 misconduct charges against him and after being apprised that the Commission's Administrator would recommend his removal from office. Judge Keefe had been served with a Formal Written Complaint that alleged *inter alia* that the judge (1) made impatient, discourteous and undignified remarks to and about the Albany County District Attorney's Office, conveying an appearance of bias against the DA's office; (2) made undignified remarks to a defendant; (3) dismissed charges *sua sponte* in two cases in violation of the Criminal Procedure Law; (4) engaged in *ex parte* meetings and conversations with a defendant, defendant's family members or counsel; and, (5) directed a defendant not to contact her attorney in violation of the defendant's constitutional rights and remanded the defendant to jail for one week for calling her attorney. Judge Keefe affirmed that he would neither seek nor accept judicial office at any time in the future.

Matter of Alan F. Steiner

On August 15, 2016, pursuant to a stipulation, the Commission closed its investigation of complaints against Alan F. Steiner, a Justice of the Philipstown Town Court, Putnam County, who resigned from office after being apprised by the Commission that it was investigating complaints alleging that he: (1) used his Facebook account to engage in direct or indirect political activity; (2)

delayed decision for more than a year in a small claims case; and (3) failed to timely complete required Continuing Judicial Education for the years 2010, 2011 and 2014. Judge Steiner, who is an attorney, agreed that he would neither seek nor accept judicial office at any time in the future.

OTHER DISMISSED OR CLOSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of two Formal Written Complaints in 2016 without rendering public dispositions. Both complaints were closed upon vacancy of the judges' office due to reasons other than resignation, such as the expiration of the judge's term.

MATTERS CLOSED UPON RESIGNATION

In 2016, 17 judges resigned while complaints against them were pending before the Commission, and the matters pertaining to those judges were closed. Two of those judges resigned while under formal charges by the Commission, both pursuant to public stipulation. Fifteen judges resigned while under investigation, three of those pursuant to public stipulation. 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 other 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 2016, the Commission referred 33 matters to other agencies. Twenty-seven matters were referred to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record-keeping or other administrative issues. Three matters were referred to an attorney grievance committee, one matter was referred to a district attorney, one matter was referred to the Attorney General, and one matter was referred to the Office of the State Comptroller.

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 with a finding that the judge's misconduct, albeit minor, 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 2016, the Commission issued 23 Letters of Dismissal and Caution. Fifteen town or village justices were cautioned, including eight who are lawyers. Eight judges of higher courts – all lawyers, as required by law – were cautioned. The caution letters addressed various types of conduct as indicated below.

Audit and Control. Two judges were cautioned for failing to file monthly reports and remittances with the State Comptroller or failing to deposit court funds, in a timely manner. Four judges were cautioned for failing to properly supervise court clerks, which resulted in misappropriated funds.

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. Four judges were cautioned for various isolated or promptly redressed conflicts of interest. One judge failed to disclose that a petitioner's law firm employed the judge's former campaign treasurer. A part-time judge presided over a matter in which the plaintiff was a recent client of the judge's law firm. A third judge made a condolence visit to someone who was engaged in pending litigation before the judge. A fourth failed to disclose on the record in criminal cases that the judge's spouse was employed by the District Attorney's office.

Delay. Three judges were cautioned for delay in rendering decisions in a relatively small number of matters. Section 100.3(B)(7) of the Rules Governing Judicial Conduct requires a judge to dispose of all judicial matters promptly, efficiently and fairly.

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. Two judges were cautioned for making inappropriate comments to attorneys or others appearing before them. Another judge was cautioned for raising his voice and shouting, conveying the impression that a decision was based on an emotional reaction.

Record-Keeping. One judge was 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. Another judge was cautioned for failing to properly maintain court files.

Violation of Rights. The Rules require that a judge respect, comply with, be faithful to and maintain professional competence in the law. Sections 100.2(A), 100.3(B)(1). Two judges were

cautioned for relatively isolated incidents of violating or not protecting the rights of parties appearing before them. One judge was cautioned for failing to provide a timely and individualized notice of adjournment to parties in a case. Another judge was cautioned for denying a defendant the right to be heard during a bail hearing.

Bias. One judge required an attorney to remove a head covering, notwithstanding that the attorney explained the religious nature of his attire.

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 nominated someone as a candidate for town justice and publicly spoke on his behalf during a nominating caucus.

Miscellaneous. The Rules prohibit a judge from making “any public comment about a pending or impending proceeding in any court within the United States or its territories.” Section 100.3(B)(8). One judge was cautioned for publicly commenting on a pending case, and another judge was cautioned for making inappropriate comments to a jury after a mistrial. A third judge was cautioned for failing to complete required Continuing Judicial Education courses in a timely manner.

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

COMMISSION DETERMINATION REVIEWED BY THE COURT OF APPEALS

Pursuant to statute, a respondent-judge has 30 days to request review of a Commission determination by the Court of Appeals, or the determination becomes final. In 2016, one judge requested review of a Commission determination, and the Court of Appeals upheld the Commission’s determination of removal.

Matter of Alan M. Simon

On March 29, 2016, the Commission determined that Alan M. Simon, a Justice of the Spring Valley Village Court and Ramapo Town Court, Rockland County, should be removed from judicial office for numerous instances of judicial misconduct, including a physical confrontation with a student worker and repeated misuse of the contempt power.

On April 27, 2016, Judge Simon 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 his brief to the Court, Judge Simon admitted the misconduct but argued that censure was the appropriate sanction.

In a decision dated October 20, 2016, the Court of Appeals accepted the Commission's determination that Judge Simon should be removed from office, holding that

the record is ... replete with instances in which petitioner used his office and standing as a platform from which to bully and to intimidate. To that end, it is undisputed that petitioner engaged in ethnic smearing and name-calling and repeatedly displayed poor temperament – perhaps most significantly, by engaging in a physical altercation with a student worker.

Those actions are representative of an even more serious problem. Petitioner – in what allegedly was a grossly misguided attempt to motivate – repeatedly threatened to hold various officials and employees of the Village of Spring Valley in contempt without cause or process. Those threats "exceeded all measure of acceptable judicial conduct."

Matter of Simon, 28 NY3d 35, 39 (2016) (citation omitted).

OBSERVATIONS AND RECOMMENDATIONS

The Commission traditionally devotes a section of its Annual Report to a discussion of topics of special note 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.

PROPOSED LEGISLATION

At various times over the years, the Commission has recommended legislation to address three important jurisdictional or operational matters as to which reform is needed. We consolidate those recommendations here and hope to work with leaders of the Executive, Legislative and Judicial Branches to effectuate change.

COURT OF APPEALS REVIEW OF COMMISSION DETERMINATIONS

Court of Appeals review of judicial disciplinary determinations is so important to the integrity of the judicial ethics enforcement system. In its 2010 and 2016 Annual Reports, the Commission recommended that the Legislature expand the jurisdiction of the Court of Appeals, to authorize the Court to review Commission determinations on its own motion, when it deems appropriate. Under present law, the only way for the Court to review a Commission determination remains at the request of the disciplined judge. Such review is rarely requested. In the last five years, while the Commission rendered 49 disciplinary determinations, only five of the disciplined judges opted for review – an average of one per year.¹

Both the Constitution and the Judiciary Law permit a disciplined judge to seek review by the Court of Appeals of any Commission determination of admonition, censure, removal or retirement. While there is nothing in the Constitution prohibiting the Legislature from granting the Court authority to undertake such review on its own motion, at present the Judiciary Law does not authorize the Court to do so.

In the vast majority of jurisdictions throughout the country, the state's highest court has authority to review all judicial disciplinary determinations. While the procedure varies from state to state – in some jurisdictions, for example, all judicial disciplinary decisions are filed with the high court as reviewable recommendations – the underlying principle is that in matters as sensitive as judicial discipline, the state's highest court should have the final authority. This serves important principles of both governmental checks and balances, and the independence of the judiciary.

There is no greater advocate for judicial independence than the New York State Court of Appeals. The Court's authority over the Commission is a great safeguard to the fairness not only of the Commission's decisions but of its operating procedures.

Of the 814 public disciplinary decisions rendered by the Commission since 1978, the Court has entertained 96 reviews, all at the initiation of the disciplined judge, according to law. The Court has accepted 80 Commission determinations and modified 16 others. While on 12 occasions it

¹ The 29 public resignation stipulations rendered in that same time period were not eligible for Court of Appeals review.

reduced and on two occasions it increased the discipline imposed by the Commission, only once did the Court reject a Commission determination outright – in *Matter of Greenfield*, 76 NY2d 293 (1990), involving unreasonable delay in rendering decisions. However, that decision was effectively reversed by the Court’s ruling in *Matter of Gilpatric*, 13 NY3d 586 (2009), which held that the *Greenfield* doctrine was “not workable” and affirmed the Commission’s jurisdiction in delay cases. (*Gilpatric* was remitted and resulted in a public admonition which the disciplined judge did not contest. 2011 Annual Report 97.²)

On various occasions, the Court has addressed the viability and fairness of Commission procedures. For example, in *Matter of Seiffert*, 65 NY2d 278 (1985), the Commission’s standard of proof (“preponderance of the evidence”) was affirmed. In *Nicholson v. Commission*, 50 NY2d 596 (1980), and *Matter of Doe*, 61 NY2d 56, 61 (1984), the Commission’s authority to investigate matters bearing a “reasonable relation to the subject matter under investigation” was affirmed. In *Matter of Petrie*, 54 NY2d 807 (1981), the Commission’s procedure for summary determination was upheld.

Under present law, if the disciplined judge chooses to accept a determination, the Court of Appeals cannot review it, even if it disagrees with the Commission’s decision. While one might speculate as to whether the Court, on its own motion, would be inclined to review many or any public Commission disciplinary determinations, of which there are approximately 10 per year, authorizing it to do so would affirm the principle that the state’s highest court is the ultimate authority on matters of judicial discipline. The Commission recommends that the Legislature amend the Judiciary Law to permit such *sua sponte* review by the Court of Appeals.

PUBLIC JUDICIAL DISCIPLINARY PROCEEDINGS

All Commission investigations and formal hearings are confidential by law. Commission activity is only made public at the end of the disciplinary process – when a determination of admonition, censure, removal or retirement from office is rendered and filed with the Chief Judge pursuant to statute – or when the accused judge waives confidentiality.³

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

As the Commission has consistently advocated since 1978 and commented upon in several Annual Reports, we restate the argument here for a change in the law regarding confidentiality.

It has been a fundamental premise of the American system of justice, since the founding of the republic, that the rights of citizens are protected by conducting the business of the courts in public. Not only does the public have a right to know when formal charges have been preferred by a

² Also available on the Commission’s website at [http://cjc.ny.gov/Determinations/G/gilpatric\(3\).htm](http://cjc.ny.gov/Determinations/G/gilpatric(3).htm).

³ The Commission has conducted over 800 formal disciplinary proceedings since 1978. Twelve judges have waived confidentiality in the course of those proceedings. Two others waived confidentiality as to investigations.

prosecuting authority against a public official, but the prosecuting entity is more likely to exercise its power wisely if it is subject to public scrutiny. A judge as to whom charges are eventually dismissed may feel his or her reputation has been damaged by the trial having been public. Yet the historical presumption in favor of openness is so well established that criminal trials, where not only reputations but liberty are at stake, have been public since the adoption of the Constitution.

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

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

It should be noted that even if Commission disciplinary proceedings were made public, the vast majority of Commission business would remain confidential. In 2016, for example, out of 1,944 new complaints received, 420 preliminary inquiries conducted and 177 investigations commenced, 13 Formal Written Complaints were authorized. Eight were carried over from 2015. Those 21 combined, as to which confidential investigations found reasonable cause to commence formal disciplinary proceedings, would have been the only pending matters made public last year.

On several occasions in recent years, the Legislature has considered bills to open the Commission's proceedings to the public at the point when formal disciplinary charges are filed against a judge. Such legislation has had support in either the Assembly or the Senate at various times, although never in both houses during the same legislative session. The Commission continues to advocate and work with the Legislature, the Governor and the Chief Judge toward enactment of a public proceedings law.

SUSPENSION FROM JUDICIAL OFFICE

In the majority of states, the judicial disciplinary commission has authority to recommend or initiate the suspension of a judge from office in either or both of the following circumstances: as an interim measure while a disciplinary inquiry against the judge is pending, or as the final discipline upon a formal finding that the judge engaged in misconduct. In New York, the Commission does not have such power. As discussed below, the power to suspend is addressed in limited fashion in the State Constitution.

Interim Suspension of Judge Under Certain Circumstances

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

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

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

There is no provision for the suspension of a judge who is charged with a misdemeanor that does not involve “moral turpitude.” Yet there are any number of misdemeanor charges that may not be defined as involving “moral turpitude” but that, when brought against a judge, would seriously undermine public confidence in the integrity of the judiciary. Misdemeanor level DWI or drug charges, for example, would seem on their face to fall in this category, particularly where the judge served on a criminal court and presided over cases involving charges similar to those filed against him or her.

Fortunately, it is rare for a judge to be charged with a crime, but it does occasionally happen. In 2008, a newly-elected Surrogate’s Court Judge was indicted for allegedly violating campaign finance laws, and was suspended with pay by the Court of Appeals pending trial.⁴

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

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

- the attorney’s default in responding to the petition or notice, or the attorney’s failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Departmental Disciplinary

⁴ The suspension was lifted after the judge was acquitted. The Commission subsequently censured the judge for the violating the campaign activity constraints of the Rules Governing Judicial Conduct. *Matter of Nora Anderson*, 2013 Ann Rep 75 (Comm on Jud Conduct 2012).

Committee made in connection with any investigation, hearing, or disciplinary proceeding, or

- a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or
- other uncontested evidence of professional misconduct.

Rules of the Appellate Division, First Department, §603.4(e)(1).⁵

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

- a “serious crime,” which is defined as a “felony” or a lesser crime that “reflects adversely on the judge’s honesty, trustworthiness or fitness as a judge in other respects,”
- “any crime a necessary element of which ... involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a ‘serious crime’,” and
- other misconduct for which there is “sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice.”

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

Suspension from Judicial Office as a Final Sanction

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

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

Since 1978, neither the Commission nor the Court of Appeals has had the authority to suspend a judge as a final discipline. While the legislative history of the 1978 amendments is not clear on the

⁵ See also, Rules of the Appellate Division, Second Department, §691.4(l)(1), Rules of the Appellate Division, Third Department, §806.4(f)(1), and Rules of the Appellate Division, Fourth Department, §1022.20(d)(3)(d).

reason for eliminating suspension as a discipline, there was some discussion among political and judicial leaders at the time suggesting that, if a judge committed misconduct serious enough to warrant the already momentous discipline of suspension, public confidence in the integrity of that judge was probably irretrievably compromised, thus requiring removal. There was also concern about the effect on court administration and public finances, especially in less populous counties and in the town and village courts, where it would be difficult to arrange and pay for temporary replacements, and where case management would be uprooted twice: when the temporary judge arrived and again when he or she left.

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

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

PARTICIPATING IN POLITICAL PARTY NOMINATING CAUCUSES

The Rules Governing Judicial Conduct prohibit most political activity by judges and judicial candidates, except for certain time-restricted activity in furtherance of one's own campaign for elected political office. Sections 100.0(Q) and 100.5 of the Rules.

Nothing in the Rules or in the Opinions of the Advisory Committee on Judicial Ethics prohibit a judge from freely exercising the right to vote in a primary or general election, or to join a political party. However, even when campaigning for oneself, a judge must take care not to engage in partisan politicking for others.

The Commission has found that there is often confusion among judges as to what they may and may not do at a political nominating caucus. In many towns and villages, for example, candidates for local office are chosen not in primaries but in meetings of their local political parties, in which registered party members or delegates pick their nominees, either by secret ballot, show of hands or acclamation.

There is no Rule or Advisory Opinion barring a judge from *attending* and *casting a vote* at such a party caucus, even if the vote is not by secret ballot. Doing so is akin to casting a ballot in a primary election. See Advisory Opinions 90-139, 90-153 and 09-180. However, since the Rules prohibit judges from lending the prestige of judicial office to advance the private interests of others, and from publicly endorsing another candidate for public office and making speeches on behalf of another candidate (Rules 100.2[C] and 100.5[A][1][e], [f]), those Advisory Opinions also constrain a judge or judicial candidate from conveying a preference for particular candidates at a nominating caucus.

While a judge therefore may attend and vote at a nominating caucus, the judge may not make a nominating speech for some other candidate or urge delegates to vote for a particular candidate for, say, town supervisor. *Matter of Herrmann*, 2010 Annual Report 172 (village justice censured *inter alia* for nominating a candidate at a caucus).

In a situation presented to the Commission last year, a judge's nomination of another candidate for elective office, at a local political party nominating caucus, coupled with the judge's public remarks in support of the candidate, amounted to a violation of the judge's obligation to avoid such improper political activity as endorsing other candidates. However, since his attendance and voting at the caucus was permitted, the judge seemed genuinely to believe that his other activities at the caucus were also permitted, particularly since he did not engage in politicking outside the caucus.

The Commission takes this opportunity to remind judges to acquaint themselves with the pertinent Commission determinations, Advisory Committee opinions and, even when engaging in permissible political activity for their own election, to avoid crossing the line to partisan advocacy for others.

THE PROLIFERATION AND PERILS OF SOCIAL MEDIA

The proliferation of social media poses special concerns for judges and others who are bound by promulgated codes of ethics, particularly in an era where so little is truly private. On or off the bench, in person or by electronic communication, a judge must observe high standards of conduct and act at all times in a manner that promotes public confidence in the judiciary and is otherwise consistent with the Rules Governing Judicial Conduct.

In Formal Opinion 462 (2013), "Judge's Use of Electronic Social Networking Media," the American Bar Association cautioned judges who use electronic social media to "assume that comments posted [on such forums] will not remain within the circle of the judge's connections." *See also*, Opinion 08-176 of the New York Advisory Committee on Judicial Ethics.

In 2016, the Commission publicly admonished a judge who *inter alia* made comments on her Facebook page, critical of the prosecution of a case against a local town council candidate for alleged irregularities in the nominating petitions filed to qualify him for the ballot. *Matter of Whitmarsh*, 2017 Annual Report ___. The judge violated the rule that prohibits a judge from making public comments about any proceeding pending or impending in any court within the United States or its territories, and in doing so referred to her judicial position, thus violating a separate rule prohibiting the use of the prestige of office to advance a private interest. Sections 100.3(B)(8), 100.2(C).

Moreover, a judge must be wary of inviting or engaging in social media dialogue with lawyers, litigants, witnesses or others who may be involved in pending litigation. Particularly where pseudonyms are used, the judge may not know that a person who responds to his/her posting may be involved in a case before the judge or a judicial colleague. At the very least, the appearance of impropriety may well be created in such a circumstance, particularly if others who access the social

media page are aware that the judge's correspondent is also involved in a matter pending before the judge.

The *Whitmarsh* determination succinctly addressed the perils of social media engagement for all judges to consider.

The obligations potentially affected by evolving technology extend well beyond Rule 100.3(B)(8) and include, for example, the duty to refrain from *ex parte* communications, political endorsements, improper pledges and promises, and any extrajudicial activity that detracts from the dignity of judicial office or undermines public confidence in the judiciary (Rules, §§100.3[B][6], 100.5[A][1][e], 100.3[B][9], 100.4[A][2], 100.2[A]). While the ease of electronic communication may encourage informality, it can also, as we are frequently reminded, foster an illusory sense of privacy and enable too-hasty communications that, once posted, are surprisingly permanent. For judges, who are held to “standards of conduct more stringent than those acceptable for others” (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]) and must expect a heightened degree of public scrutiny, internet-based social networks can be a minefield of “ethical traps for the unwary” (John G. Browning, “Why Can't We Be Friends? Judges’ Use of Social Media,” 68 U. Miami L. Rev. 487, 511 [Winter 2014]).

The Advisory Committee on Judicial Ethics has cautioned judges about the public nature and potential perils of social networks and has advised that judges who use such forums must exercise “an appropriate level of prudence, discretion and decorum” so as to ensure that their conduct is consistent with their ethical responsibilities (Adv Op 08-176). Further, since the technology behind social media can change rapidly and unpredictably, it is essential that judges who use such forums “stay abreast of new features of and changes to any social networks they use” since such developments may impact the judge’s duties under the Rules (*Id.*).

These are excellent guidelines for any judge who joins and uses an online social network. At a minimum, judges who do so must exercise caution and common sense in order to avoid ethical missteps.

THE COMMISSION'S BUDGET

In 2007, for the first time in more than a generation, the Legislature significantly increased the Commission's budget, commensurate with its constitutional mandate and caseload. Since then, the resources allocated to the Commission have remained relatively flat, while the workload has increased. For example, the average number of complaints in the 10 years since 2007 has been 1,856, compared to an average of 1,438 in the 10 preceding years.

Consistently over the past decade, the Executive Budget has recommended no increase in the Commission's appropriation. Such "flat" funding is actually a decrease, because in order to meet rising expenses (such as rent increases) on the same dollar amount each year, the Commission has had to make significant cuts. Staff has been reduced from 55 authorized full-time employees to 50, with funding for only 45. That 18% reduction in workforce and other economies have also resulted in a slower disposition rate and more matters pending at year end.

In order to keep current and prevent even further cuts and delays in deciding matters, the Commission has requested an increase of approximately \$500,000 for the fiscal year beginning April 1, 2017, while the Executive Budget again recommends no increase at all. The Legislature has assisted the Commission in recent years with modest additions to the budget proposed by the Executive, which we hope it will do again.

SELECTED BUDGET FIGURES: 1978 TO PRESENT

Fiscal Year	Annual Budget ¹	New Complaints ²	Prelim Inquiries	New Investig'ns	Pending Year End	Public Dispositions	Attorneys on Staff ³	Investig'rs ft/pt	Total Staff
1978	1.6m	641	N.A.	170	324	24	21	18	63
1988	2.2m	1109	N.A.	200	141	14	9	12/2	41
1996	1.7m	1490	492	192	172	15	8	2/2	20
2000	1.9m	1288	451	215	177	13	9	6/1	27
2006	2.8m	1500	375	267	275	14	10	7	28½
2007	4.8m	1711	413	192	238	27	17	10	51
2008	5.3m	1923	354	262	208	21	19	10	49
2009	5.3m	1855	471	257	243	24	18	10	48
2010	5.4m	2025	439	225	226	15	18	10	48
2011	5.4m	1818	464	172	216	14	17	9	49
2012	5.4m	1785	460	182	206	20	19	9	49
2013	5.4m	1770	477	177	201	17	19	9	50
2014	5.5m	1767	499	145	171	12	18	7	47
2015	5.6m	1959	469	179	203	16	19	7	46
2016	5.6m	1944	420	177	193	13	19	7	45
2017	6.1m ⁴	~	~	~	~	~	19	7	45

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 by the Commission; the Executive Budget recommends \$5.6 million, *i.e.* no additional funding.

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,

JOSEPH W. BELLUCK, ESQ., *CHAIR*
PAUL B. HARDING, ESQ., *VICE CHAIR*
HON. ROLANDO T. ACOSTA
JOEL COHEN, ESQ.
JODIE CORNGOLD
RICHARD D. EMERY, ESQ.
HON. THOMAS A. KLONICK
HON. LESLIE G. LEACH
RICHARD A. STOLOFF, ESQ.
HON. DAVID A. WEINSTEIN
AKOSUA GARCIA YEBOAH

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
Joseph W. Belluck	Governor Andrew M. Cuomo	2008	3/31/2020
Paul B. Harding	Assembly Minority Leader Brian M. Kolb	2006	3/31/2017
Rolando T. Acosta	(Former) Chief Judge Jonathan Lippman	2010	3/31/2018
Joel Cohen	(Former) Assembly Speaker Sheldon Silver	2010	3/31/2018
Jodie Corngold	Governor Andrew M. Cuomo	2013	3/31/2019
Richard D. Emery	(Former) Senate Minority Leader John L. Sampson	2004	3/31/2020
Thomas A. Klonick	(Former) Chief Judge Jonathan Lippman	2005	3/31/2017
Leslie G. Leach	Chief Judge Janet DiFiore	2016	3/31/2020
Richard A. Stoloff	(Former) Senate President Pro Tem Dean Skelos	2011	3/31/2019
David A. Weinstein	Governor Andrew M. Cuomo	2012	3/31/2018
Akosua Garcia Yeboah	Governor Andrew M. Cuomo	2016	3/31/2021

Joseph W. Belluck, Esq., *Chair of the Commission*, 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 is an adjunct lecturer on mass torts. He is a partner in the Manhattan law firm of Belluck & Fox, LLP, which focuses on asbestos and serious injury 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 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 asbestos, product liability, tort law and tobacco control policy. He is an active member of several bar associations, including the New York State Trial Lawyers Association and was a recipient of the New York State Bar Association's Legal Ethics Award. He is also a member of the SUNY Board of Trustees and sits on the board of several not-for-profit organizations.

Paul B. Harding, Esq., *Vice Chair of the Commission*, 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.

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.

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 Of Counsel at 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 and a course named "How Judges Decide" at Fordham 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, and "Blindfolds Off: How Judges Decide" (ABA Publishing, 2014). Mr. Cohen has authored over 350 articles and columns for the New York Law Journal, Huffington Post and The Hill.

Jodie Corngold graduated from Swarthmore College. She oversees communications for Kolot Chayeinu, a synagogue in Brooklyn, and previously served as Director of Communications for the Berkeley Carroll School, a college preparatory school in Brooklyn. She sits on the Board of the Brooklyn Heights Montessori School, is a marathon runner, and is engaged in a variety of activities associated with her alma mater.

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 founding partner of Emery Celli Brinckerhoff & Abady LLP. His practice focuses on commercial litigation, civil rights, election law and litigation challenging governmental actions. Mr. Emery enjoys a national reputation as a litigator, trying and handling cases at all levels, from the U.S. Supreme Court to federal and state appellate and trial courts in New York, Washington, D.C., California, Washington state, and others. While a partner at Lankenau Kovner & Bickford, he successfully challenged the structure of the New York City Board of Estimate under the one-person, one-vote doctrine, resulting in the U.S. Supreme Court's unanimous invalidation of the Board on constitutional grounds. Before then, he was a staff attorney at the New York Civil Liberties Union and director of the Institutional Legal Services Project in Washington state, which represented persons held in juvenile, prison, and mental health facilities. He was also a law clerk for the Honorable Gus J. Solomon of the U.S. District Court for the district of Washington. He has taught as an adjunct at the New York University and University of Washington schools of law. Mr. Emery was a member of Governor Cuomo's Commission on Integrity in Government and sat on Governor Eliot Spitzer's Transition Committee for Government Reform Issues. He was appointed to the New York State Commissions on Judicial Conduct and Public Integrity and was appointed chair of the New York City Civilian Complaint Review Board. He is a founding member of the City Club, which addresses New York City preservation issues. He also is a founder and president of the West End Preservation Society, which has achieved the landmarked West End-Riverside Historic District. His honors include Landmark West's 2013 Unsung Heroes Award for his preservation work; the 2008 Children's Rights Champion Award for his civil rights work and support of children's rights; 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 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.

Honorable Thomas A. Klonick 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. Judge Klonick chaired the Commission for eight years, 2008-2016.

Honorable Leslie G. Leach is a graduate of Queens College, CUNY, the University of Massachusetts, with an MS in labor studies, and Columbia Law School. He presently serves as an elected Justice of the Supreme Court, Queens County. Justice Leach was appointed to the NYC Criminal Court first by Mayor David N. Dinkins in 1993 and then by Mayor Michael R. Bloomberg. He was an Acting Justice of the Supreme Court from 1995 to 2003. He was then elected as a Justice of the Supreme Court from 2004 to 2007, and served as the Administrative Judge of the Eleventh Judicial District, Queens County. In 2007, Justice Leach left the bench to serve as Andrew M. Cuomo's Executive Deputy Attorney General of the Division of State Counsel and, from 2011-2012, as Governor Cuomo's Appointments Secretary. Thereafter, he taught as Distinguished Lecturer at Queens College until his return to the bench in 2015. Justice Leach began his legal career at the labor law firm Jackson Lewis, and then served as a law clerk in the Criminal Court, Supreme Court, and with the Hon. Fritz W. Alexander II in the Appellate Division, First Department, and the NYS Court of Appeals. From 1985 to 1993, he was a staff attorney in the Departmental Disciplinary Committee and court attorney in the First Department. He taught as an adjunct at York College, CUNY for some 30 years. Justice Leach was a Director of the Macon B. Allen Black Bar Association, chaired the Association of the Bar of the City of New York's Special Committee to Encourage Judicial Service, and was a member of that bar's Council on Judicial Administration.

Richard A. Stoloff, Esq., graduated from the CUNY College of the City of New York, and Brooklyn Law School. He maintains a law practice, Richard A. Stoloff PLLC, in Monticello, New York. He also served for 19 years 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.

Akosua Garcia Yeboah received her B.A. from the State University of New York at New Paltz and her M.S. in Urban Planning and Environmental Studies from Rensselaer Polytechnic Institute. She is the Senior Information Technology Project Manager for the City of Albany, Office of the Mayor. She previously worked for IBM. Since 2011, Ms. Yeboah has served on the Attorney Grievance Committee of the Appellate Division, Third Department. She also served as a member of the Commission on Statewide Attorney Discipline in 2015. Ms. Yeboah served as a member and secretary of the Albany Citizen's Police Review Board from 2010 to 2015. Previously, she served as a member of the Advisory Board of the Center for Women in Government & Civil Society, and Chair of the Advisory Board of the New York State Office of the Advocate for Persons with Disabilities.

RECENT MEMBERS

Honorable Sylvia G. Ash served on the Commission from April 2016 through August 2016. She is a graduate of Howard University School of Law. In 2005, Justice Ash was elected to the New York City Civil Court serving in Kings County, and in 2010, she was elected as a Justice of the State Supreme Court. She currently serves as the Presiding Justice of the Commercial Division in Kings County Supreme Court. Prior to her judicial career Justice Ash served in various capacities in the District Council 37's Municipal Employees Legal Services Plan, including chief counsel of the Immigration Unit and supervising attorney of the Family and Administrative Law Units. Justice Ash also served as General Counsel for the NAACP's Social Service Chapter in New York City. After graduating law school, Justice Ash served as a clerk for the Hon. Dennis J. Braithwaite of the New Jersey Superior Court. Justice Ash currently serves as a Board Director of the Brooklyn Women's Bar Association, Judges and Lawyers Breast Cancer Alert Association, and the Judicial Friends Association. Justice Ash is a Director and a Master in the Nathan R. Sobel Kings County American Inns of Court, and an Executive Committee Member of the NYSBA Commercial & Federal Litigation Section. Justice Ash has been the recipient of numerous proclamations, citations and awards including the Brooklyn Bar Association Award for Recognition of Outstanding Achievement in the Science of Jurisprudence and Public Service.

Honorable Terry Jane Ruderman served on the Commission from October 1999 through March 2016. She served as Vice Chair of the Commission from 2011-2016. Judge Ruderman is a graduate of Pace University School of Law (*cum laude*), holds a Ph. D. in History from the Graduate Center of the City University of New York and Masters Degrees from City College and Cornell University. In 2015, Judge Ruderman was appointed to the state Supreme Court. She previously served as a Judge of the Court of Claims from 1995 to 2015. At the time of her appointment to the Court of Claims 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 New York State-Federal Judicial Council and the Cornell University President's Council of Cornell Women.

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 serves on the Board of Directors of the Association of Judicial Disciplinary Counsel. He 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.

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.

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.

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 has served on the Monroe County Bar Association (MCBA) Board of Trustees and is a member of the MCBA's Professional Performance Committee. She has served on 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 New Jersey Superior Court Judge Eugene H. Austin.

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. She also served as law clerk to United States District Court Judge Peter K. Leisure. Ms. Sparkler is an adjunct professor at Fordham University School of Law.

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.

Eteena J. Tadjigoueu, *Staff Attorney*, is a graduate of Boston University and Washington University in St. Louis School of Law, where she served as associate editor of the Journal of

Law & Policy, and earned a Dean's Service Award for providing seventy-five hours of community service during law school. Prior to joining the Commission, she worked as a communications professional in the non-profit global health sector. She is a member of the Albany County Bar Association.



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 Reiter, *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 has taught 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 writer and editor.

APPENDIX C: REFEREES WHO SERVED IN 2016

Referee	City	County
William I. Aronwald, Esq.	White Plains	Westchester
Peter Bienstock, Esq.	New York	New York
A. Vincent Buzard, Esq.	Pittsford	Monroe
Jay C. Carlisle, Esq.	White Plains	Westchester
Linda J. Clark, Esq.	Albany	Albany
Hon. John P. Collins	New York	Bronx
William T. Easton, Esq.	Rochester	Monroe
Maryann Saccomando Freedman, Esq.	Buffalo	Erie
David M. Garber, Esq.	Syracuse	Onondaga
Thomas F. Gleason, Esq.	Albany	Albany
Michael J. Hutter, Esq.	Albany	Albany
Nancy Kramer, Esq.	New York	New York
Roger Juan Maldonado, Esq.	New York	New York
Gregory S. Mills, Esq.	Clifton Park	Saratoga
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
Margaret Reston, Esq.	Rochester	Monroe
Lucille M. Rignanese, Esq.	Rome	Oneida
Hon. Stewart A. Rosenwasser	Montgomery	Orange
Laurie Shanks, Esq.	Albany	Albany
Hon. Felice K. Shea	New York	New York
James T. Shed, Esq.	New York	New York
Robert H. Straus, Esq.	New York	Kings

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. Sylvia G. Ash (2016)
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)
Jodie Corngold (2013-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. Leslie G. Leach (2016-present)
 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 (2009-13)
 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 (1999-2016)
 *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)
 Akosua Garcia Yeboah (2016-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, miscon-
 duct 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, 54,380 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 45,534 were dismissed upon initial review or after a preliminary review and inquiry, and 8,846 investigations were authorized. Of the 8,846 investigations authorized, the following dispositions have been made through December 31, 2016:

- 1,124 complaints involving 848 judges resulted in disciplinary action (this does not include the 63 public stipulations in which judges agreed to vacate judicial office). (See details below and on the following page.)
- 1,721 complaints resulted in cautionary letters to the judge involved. The actual number of such letters totals 1,585, 90 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct.
- 769 complaints involving 549 judges were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings.
- 586 complaints were closed upon vacancy of office by the judge other than by resignation.
- 4,453 complaints were dismissed without action after investigation.
- 193 complaints are pending.

Of the 1,124 disciplinary matters against 848 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 96 decisions by the Court of Appeals, 16 of which modified a Commission determination.

- 167 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);
- 347 judges were censured publicly;
- 269 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 96 determinations filed by the present Commission. Of these 96 matters:

- The Court accepted the Commission's sanctions in 80 cases (71 of which were removals, 6 were censures and 3 were admonitions);
- The Court increased the sanction from censure to removal in 2 cases;
- The Court reduced the sanction in 13 cases:
 - 9 removals were modified to censures;
 - 1 removal was modified to admonition;
 - 2 censures were modified to admonitions; and
 - 1 censure was rejected and the charges were dismissed.
- The Court remitted 1 matter to the Commission for further proceedings.

APPENDIX E: RULES GOVERNING JUDICIAL CONDUCT

22 NYCRR § 100 *et seq.*

Rules of the Chief Administrator of the Courts Governing Judicial Conduct

Preamble

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.

(12) It is not a violation of this Rule for a judge to make reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard.

(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

Added 100.3(B)(12) Mar. 26, 2015

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:
DECISIONS RENDERED BY THE
COMMISSION IN 2016

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

JANET M. CALANO,

a Justice of the Eastchester Town Court,
Westchester County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Honorable Sylvia G. Ash
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Terry Jane Ruderman¹
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Erica K. Sparkler, Of Counsel) for the Commission

Scalise, Hamilton & Sheridan LLP (by Deborah A. Scalise) for the
Respondent

¹ Judge Ruderman's term as a member of the Commission expired on March 31, 2016. The vote in this matter was taken on December 10, 2015.

The respondent, Janet M. Calano, a Justice of the Eastchester Town Court, Westchester County, was served with a Formal Written Complaint dated April 2, 2014, containing two charges. The Formal Written Complaint, as amended at the hearing, alleged that respondent: (i) impermissibly delegated her judicial duties from May 2011 through May 2012 in that she did not review or approve dispositions and sentences that the Deputy Town Attorney negotiated with defendants in traffic cases (Charge I), and (ii) altered original court records requested by the Commission by placing her initials on case files, next to the prosecutor's notation of plea agreements, which created the appearance and/or was intended to give the impression that respondent had reviewed and approved the dispositions (Charge II). Respondent filed a verified Answer dated June 28, 2014. The Commission rejected an Agreed Statement of Facts.

By Order dated December 17, 2014, the Commission designated Eleanor B. Alter, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 24, 2015, in New York City. A stipulation of facts was received in evidence, and respondent testified on her own behalf and called nine character witnesses. The referee filed a report dated September 9, 2015.

The parties submitted briefs with respect to the referee's report and the issue of sanctions. Commission counsel recommended the sanction of censure, and respondent's counsel recommended a sanction no greater than censure. On December 10, 2015, 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 Eastchester Town Court, Westchester County, since May 2011, when she was appointed to that position. She was subsequently elected to the position, and her current term expires on December 31, 2019.

2. Respondent was admitted to the practice of law in 1986. She has been engaged in the private practice of law and served as the Eastchester Deputy Town Attorney from 1994 through 2000 and thereafter as the Town Attorney until 2003.

3. When respondent became a judge, her co-judge was Domenick J. Porco, who had served as Eastchester Town Justice since 1992.² Respondent had known Judge Porco since the 1980's and had rented office space from him for her law practice.

4. In her first month as a judge, respondent sat with Judge Porco when he presided in court, and then he sat with her for a month when she presided. Thereafter, with some exceptions, respondent and Judge Porco presided in alternate months in the Eastchester Town Court. Court proceedings were conducted every Wednesday and on the third Thursday of every month.

As to Charge I of the Formal Written Complaint:

5. From May 2011 through May 2012, Deputy Town Attorney Robert M. Tudisco conducted weekly conferences with defendants in Vehicle and Traffic Law ("VTL") cases. The conferences took place each Tuesday in the Eastchester Town Court, and approximately 60 to 80 defendants appeared each week, including those who had

² Judge Porco resigned from judicial office effective September 30, 2014, pursuant to a Stipulation, which the Commission accepted. *See Matter of Porco*, 2015 NYSCJC Annual Report 183 (<http://www.cjc.ny.gov/Determinations/P/Porco.htm>).

pled not guilty by mail and some “walk-ins.”

6. When respondent had been the Deputy Town Attorney approximately ten years earlier, conferences and plea agreements in VTL cases were handled on Wednesdays, and the dispositions negotiated with defendants were placed on the record before a judge.

7. Respondent testified that shortly after she became a judge, she was told that “by statute” VTL matters had been moved to a conference day on Tuesdays.³ Respondent asked if she was required to be present during the conferences, and Judge Porco, who was not regularly present during the Tuesday conferences and did not participate in them, told her that a judge’s presence was not required.

8. From May 2011 through May 2012, neither judge was present during the Tuesday conferences when the Deputy Town Attorney negotiated pleas with defendants charged with VTL violations, and neither judge participated in them. In this regard, respondent continued the practice that predated her assuming judicial office.

9. From May 2011 through May 2012, in the majority of the VTL cases conferenced on Tuesdays, the Deputy Town Attorney and defendants reached agreements involving pleas to reduced charges, the imposition of fines and surcharges, and, in some instances, dismissal of charges. At the conferences, Mr. Tudisco advised defendants that

³ In 2009 VTL Section 1806 was amended to provide that when a defendant pleads not guilty by mail to a traffic infraction, the court must advise the defendant of an “appearance” date (rather than, as previously required, a trial date).

they would not appear before a judge that day but that the proposed dispositions would be reviewed by a judge and required a judge's approval. During the relevant time period, respondent was aware that Mr. Tudisco was making such representations to defendants.

10. The defendants in VTL matters where dispositions and sentences were negotiated at the Tuesday conferences neither signed plea agreements nor appeared before a judge to enter their pleas. In the majority of cases, such defendants paid their fines and/or surcharges to a court clerk immediately following the conferences. The court clerks entered the dispositions into the court's computer system and electronically transmitted the dispositions to the State without respondent having reviewed or approved them.

11. From May 2011 through May 2012 respondent did not review or approve the VTL plea agreements reached at the Tuesday conferences during the months in which she presided. Respondent now realizes that she should have reviewed and approved the dispositions.

12. On occasion, respondent spoke with the Deputy Town Attorney to ensure that he complied with certain parameters that had been established with respect to the dispositions (for example, respondent testified, a charge of passing a school bus would never be reduced). At the hearing before the referee, respondent testified that since the Deputy Town Attorney was "an officer of the court," she trusted that the dispositions he negotiated were within the parameters they had discussed and that he would ask her or Judge Porco about any dispositions that were outside of the parameters. Respondent never reviewed the negotiated dispositions to determine if they deviated from

the parameters.

13. For a period before respondent assumed judicial office, including the period that she was the Deputy Town Attorney, the judges of the Eastchester Town Court did review and approve plea agreements reached between defendants and the Deputy Town Attorney in VTL cases, but they had stopped doing so before respondent became a judge.

14. By failing to oversee and approve the dispositions in VTL cases conferenced on Tuesdays during the months in which she presided, including negotiated pleas, sentences and dismissal of charges, respondent effectively delegated her judicial duties to the Deputy Town Attorney and permitted him to dispose of cases without judicial oversight.

15. Respondent testified that during the relevant time period, she did not recognize that the court's procedures were improper because those practices were in place when she became a judge and she relied on her experienced co-judge for guidance. She also testified that she received no formal training when she took office, other than observing and being guided by Judge Porco; that as a new judge and "the first woman there," she "tread very lightly" and "held back a little bit" with respect to making changes in the court; and that during her first year on the bench she had other priorities, including improving court security and learning about handling criminal matters.

16. As of September 2012 respondent and Judge Porco instituted a requirement that VTL defendants who negotiate plea agreements with the Deputy Town Attorney sign a declaration form entering a plea conditioned on the specified sentence;

the form, which notes that the plea is subject to the court's approval, requires a judge's signature to indicate whether the plea is accepted or rejected. The form was revised in 2014 in response to directives from respondent's Supervising Judge.

17. Since January 2014, during the months she presides, respondent has been present in court on Tuesdays when the Deputy Town Attorney conducts plea negotiations in VTL cases. After a plea agreement is reached, the defendant appears before respondent on the record, and respondent reviews the signed declaration and, before accepting the plea, inquires to ensure that each defendant understands the plea agreement.

As to Charge II of the Formal Written Complaint:

18. On May 11, 2012, the Commission sent a letter to Rocco Cacciola, a clerk of the Eastchester Town Court, requesting copies of the court calendar and court files for all cases called in the Eastchester Town Court on five specified dates, all Tuesdays, over the previous year. The letter to Mr. Cacciola did not reveal the purpose of the Commission's request. Three of the five dates covered by the Commission's request were in months during which respondent had presided.

19. Respondent and Judge Porco discussed the Commission's letter. Judge Porco noted that it was not readily apparent from the court files which judge was responsible for each disposition, *i.e.*, which judge had presided during the month in which each agreement was reached. Judge Porco suggested that he and respondent should indicate which judge was presiding at the relevant time each plea agreement was

reached. The judges agreed that before the files were copied and sent to the Commission, they would indicate who was responsible for each disposition by initialing the top sheet of the respective files of cases in which plea agreements were reached at the Tuesday conferences conducted during months in which each of them had presided.

20. At that time, since the Commission's letter did not indicate the reason for the request, respondent did not know the Commission's purpose in seeking the records. Respondent testified at the hearing that she and Judge Porco assumed that the Commission was investigating a complaint that had come to their attention alleging favoritism towards Eastchester residents with respect to plea agreements in VTL cases. She also testified that although she had never reviewed the negotiated dispositions, she was confident that the matters were disposed of fairly and without favoritism.

21. Respondent and Judge Porco directed the court staff to retrieve the court files requested by the Commission. Thereafter, over a period of several days in late May and/or early June 2012, in the clerk's office in the presence of court staff, respondent placed her initials on the top sheet of approximately 189 original court files.

22. Respondent did not initial all of the approximately 700 files that were calendared for conference during the requested dates in months in which she had presided, but only initialed those cases in which there was a plea agreement involving reduced charges and/or dismissal of charges.

23. Respondent placed her initials next to the Deputy Town Attorney's handwritten notation of the plea agreement or dismissal. In one file, where the Deputy Town Attorney had written "Dismiss" on the top sheet, she wrote her initials below the

notation “OK.” When respondent initialed the files, she did not indicate the date on which she had written her initials.

24. Thereafter, the court files and calendars the Commission had requested were photocopied, and on June 20, 2012, Mr. Cacciola provided the copies to the Commission, including copies of the court files that were newly initialed by respondent. When the photocopied records were provided, neither respondent nor anyone on her behalf advised the Commission that respondent had placed her initials on the records after she became aware of the Commission’s request.

25. Upon taking statements from various witnesses, the Commission learned that (a) for a time prior to respondent’s becoming a judge, when the Eastchester justices were reviewing the plea agreements negotiated by the Deputy Town Attorney, it had been the judges’ practice to place their initials on the original files to signify that they had reviewed and approved the plea agreements, (b) Judge Porco had stopped doing so before respondent became a judge, and (c) respondent and Judge Porco had put their initials on the requested files only after the Commission had requested them.

26. Respondent acknowledges that it was improper to change the court records in any way after the Commission had requested them.

27. Respondent acknowledges that there were more appropriate and effective ways to identify for the Commission the judge presiding in each of the relevant VTL case files.

28. It was stipulated between respondent and counsel for the Commission, and respondent testified at the hearing, that when she initialed the files of

cases involving plea agreements: (i) her purpose was to indicate to the Commission that she accepted responsibility for the matters that were disposed of during the months in which she had presided, and (ii) she had no intent to mislead the Commission or to convey the impression that she had contemporaneously reviewed the negotiated dispositions since at that time, she did not know that the court's practices were improper and had no knowledge that the Commission was investigating a complaint alleging improper delegation of judicial duties.

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, as amended, are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

It is undisputed that for 13 months after assuming judicial office, respondent permitted the Deputy Town Attorney and her court staff to exercise judicial powers in her court by disposing of traffic cases without judicial oversight, and that thereafter she altered court records requested by the Commission in a manner that conveyed the impression that she had contemporaneously reviewed and approved those dispositions, when in fact she had not done so. Based on the totality of the circumstances presented and the record before us, including the stipulated facts presented at the hearing

and respondent's sworn testimony, we conclude for the reasons set forth below that the sanction of admonition is appropriate.

In weekly conferences in respondent's court, held in her absence, the Deputy Town Attorney who prosecuted traffic cases in that court effectively dictated the dispositions of dozens of cases each week. First, he negotiated with defendants, including those who had pled not guilty by mail (who were required by law to appear), and reached agreements to reduce or dismiss charges and the sentence to be imposed. Thereafter, though the Deputy Town Attorney had advised the defendants that the dispositions required judicial approval and would be reviewed by a judge, defendants immediately paid their fines to the court clerks, who entered the dispositions into the court's computer system and transmitted them to the State – all without judicial involvement or oversight. The defendants did not sign plea agreements, nor did they ever appear before a judge to enter their pleas and receive the protections afforded by law for arraignments on traffic violations. Since no judge was present, there was no judicial oversight to make certain that defendants were advised of their rights and that their pleas were understood, voluntary and not coercive.

Only judges have authority and responsibility to accept or reject a negotiated plea; and dismissing and reducing charges, convicting defendants and imposing sentences are quintessential judicial functions requiring the exercise of judicial discretion. Placing such responsibilities in the hands of the prosecutor, who is not a neutral arbiter but an advocate, is especially problematic. Though respondent testified that she occasionally spoke to the Deputy Town Attorney about "parameters" for

negotiated dispositions, a discussion of parameters is no substitute for reviewing dispositions in individual cases. Nor is it any excuse that, as respondent testified, Mr. Tudisco was an officer of the court whom she trusted to act appropriately. By abandoning her responsibility to review dispositions negotiated by the Deputy Town Attorney, respondent delegated these important judicial functions to the prosecutor and to court clerks, who accepted and processed the negotiated pleas. Such conduct was inconsistent with her obligation “to perform the duties of judicial office impartially and diligently” and “be faithful to the law,” and to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” (Rules, §§100.3[B][1], 100.2[A]).

The fact that these practices predated her tenure in office does not excuse respondent’s misconduct. In *Matter of Greenfeld*, 71 NY2d 389 (1988), the Court of Appeals rejected a similar defense in finding that an Acting Village Justice impermissibly delegated judicial duties to the Deputy Village Attorney by allowing the prosecutor to accept guilty pleas, set fines and enter the dispositions on court records. Rejecting the judge’s explanation that as an Acting Justice, he was obliged to follow the procedures of the Village Justice, the Court stated:

“That the procedures were instituted by petitioner’s predecessor, the deceased Village Justice, who directed petitioner as Acting Justice to follow them does not excuse the conduct. **Petitioner was responsible for his own conduct in the discharge of his judicial duties.**” (*Id.* at 392 [emphasis added])

As a judge of the Eastchester Town Court, respondent had equal status to her co-judge and the responsibility to ensure that the procedures in her court complied with the law.

See also Matter of Sardino, 58 NY2d 286, 291 (1983) (“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”).

Nor is it an excuse that respondent relied on her experienced co-judge for guidance, and specifically on his assurance that her presence was not required at the Tuesday plea conferences. Her absence from the conferences did not preclude her from subsequently reviewing and signing off on the dispositions, which was her responsibility as a judge. Although she was a new judge, respondent had been a lawyer for 25 years, including seven years as the Deputy Town Attorney, when pleas were reviewed and approved by a judge, and several years as Town Attorney. As a former prosecutor, she should have recognized that the disposition of cases – even traffic cases – requires judicial approval. Moreover, since respondent knew that the Deputy Town Attorney was advising defendants that the negotiated dispositions required judicial approval and would be reviewed by a judge, the prosecutor’s statements should have reinforced and reminded her of that important obligation.

After these practices had continued for a year in respondent’s court, the Commission requested court files and calendars from several nights on which negotiated pleas had been processed. Before the files were copied and sent to the Commission, respondent placed her initials on each of 189 files, next to the Deputy Town Attorney’s notation of the plea agreement, which conveyed the appearance that she had contemporaneously reviewed and approved the dispositions.

It is wrong for a judge to alter records in any way, for any purpose, after the Commission has requested them, and particularly improper to do so if the alterations might be misleading. Only after the Commission had interviewed various witnesses did the Commission learn that respondent had initialed the files only after the Commission had requested them. Had it been proved that respondent intended to mislead the Commission by conveying the false impression that she had contemporaneously reviewed the dispositions, there is little doubt that the sanction of removal would be appropriate. *See Matter of Jones*, 47 NY2d (mmm), (rrr) (Ct on the Judiciary 1979) (to conceal evidence of ticket-fixing, judge directed court clerks to erase notations on tickets and to remove letters from case files the Commission had requested, acts that are “specially subject to condemnation when performed by a public official engaged in obstructing an investigation into his own misconduct”).

However, after careful consideration of the entire record, we accept the stipulated facts and respondent’s testimony that her intent in initialing the files was not to deceive the Commission, but rather to indicate that she was responsible for the negotiated dispositions that occurred during the months she had presided, having mistakenly assumed that the Commission was investigating a complaint alleging favoritism with respect to plea agreements. Respondent’s testimony in this regard is supported by other evidence in the record before us. In particular, we note that respondent initialed the records in the clerk’s office over a period of several days in full view of court staff, indicating that she did not attempt to conceal her actions. We further note that since the Commission’s letter did not reveal the purpose of its request, respondent was not on

notice that the Commission was concerned about the delegation of judicial duties.

Moreover, although respondent's co-judge had previously initialed court files to signify that he had approved the plea agreements, he stopped doing so before respondent became a judge, and there is nothing in the record to indicate that respondent was aware of the prior practice.

In considering the sanction, we note that respondent has acknowledged that it was improper to change the records after the Commission requested them. We are also mindful that in following the procedures of her co-judge during her first year in office, she was likely influenced to trust his guidance not only because of his lengthy tenure as a judge but because of their longstanding professional relationship. Further, we note that respondent has taken steps to improve the court's procedures: in her second year as a judge, respondent (together with her co-judge) began to require VTL defendants who negotiated plea reductions to sign a form confirming the plea and requiring a judge's signature; the form was later revised after input from her Supervising Judge; and since January 2014, defendants who negotiated plea agreements have appeared before respondent on the record before the dispositions are finalized. Respondent has accepted responsibility for her conduct and has been cooperative with the Commission throughout its inquiry.

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

Mr. Harding, Mr. Cohen, Ms. Corngold, Judge Klonick, Judge Ruderman

and Judge Weinstein concur.

Mr. Emery dissents in an opinion and votes to remit the matter for further development of the record.

Mr. Belluck and Mr. Stoloff dissent as to the sanction and vote that respondent should be censured. Mr. Stoloff files an opinion, which Mr. Belluck joins.

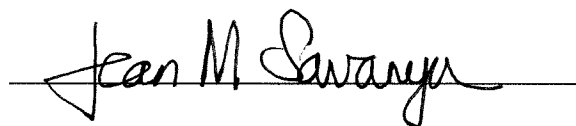
Judge Acosta was not present.

Judge Ash was not a member of the Commission when the vote was taken in this matter.

CERTIFICATION

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

Dated: May 9, 2016

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

JANET M. CALANO,

a Justice of the Eastchester Town Court,
Westchester County.

DISSENTING OPINION
BY MR. EMERY

The majority determines to admonish respondent based on an incomplete record that makes it impossible for me to determine with any degree of confidence whether that sanction is appropriate. Regrettably, the record is incomplete because we have not followed through with our commitment to have the record appropriately developed. When we rejected an earlier Agreed Statement and sent the matter to a referee, we directed that an adversarial proceeding take place to fully develop the factual record. Instead, the staff stipulated to facts central to the case that were very much in dispute and did not seek to develop the record as we directed. The majority's response now is to abandon the effort rather than require a full exploration of the evidence which, in my view, would be dispositive of the fundamental open question in this case.

There is no dispute that in placing her initials on 189 court files, next to the Deputy Town Attorney's notations of plea agreements and recommended dismissals, respondent conveyed the appearance that she had previously reviewed and approved the

dispositions when, in fact, she had not – the very conduct the Commission was investigating. The key issue is why she initialed these documents in the misleading way she did: did she initial the files in order to mislead the Commission – engaging in a cover-up as the Formal Written Complaint alleges – or did she merely initial them without any intent to mislead the Commission in order to identify the files as her cases?¹ Rather than probing this central issue and developing the record more fully, as we directed in rejecting the previously proffered Agreed Statement, we are now presented with stipulated facts stating, *inter alia*, that it is “not in dispute” that the judge did not intend to mislead the Commission (Ref Ex 1, pp 1, 8, 11). But the evidence, on its face, conveys a plainly contrary appearance. And plainly, this was *the* central factual dispute in the case.

Moreover, as set forth below, a simple review of the subsequent plea agreement documents and respondent’s notations *on them* would shed dispositive light on this central factual dispute. Regrettably, the record before us does not reveal whether the staff ever undertook that review, and now, the Commission declines to order it.

A crucial element of respondent’s defense is that when she initialed the plea files in response to the Commission’s inquiry, she had no idea that the Commission was

¹ Respondent’s admission in the stipulation that there were “more appropriate and effective ways” to indicate the dispositions for which she was responsible is a stunning understatement. *Certainly* there were more efficient ways to convey that information. Since the Commission had requested court calendars and case files for five specific dates, a one-sentence letter could have disclosed that respondent was responsible for all the cases on three of those dates. Instead, the record reveals, she reviewed hundreds of files in multiple sittings with her co-judge over several days, determined which cases involved negotiated dispositions, and wrote her initials in those 189 files in a manner that mirrored the previous notations used by the judges of that court to indicate a proper review of pleas.

investigating her improper delegation of judicial duties. She claims she did not know, and had no reason even to suspect, that there was anything wrong with her court's procedures that omitted mandated judicial review of pleas and delegated such reviews to the Deputy Town Attorney. In accepting respondent's benign explanation of her intent, the majority ignores the clear and convincing evidence that she should have known that the court's procedure of not reviewing pleas was improper. See dissent of Commission Member Richard Stoloff.

As a lawyer with 25 years of experience both as a prosecutor and in private practice, respondent should have known that only judges have authority to reduce or dismiss charges and to impose sentences. And as the former Deputy Town Attorney a decade earlier, respondent knew that the dispositions she had negotiated then were reviewed and approved by a judge. Critically, throughout her tenure as a judge, she also knew that the Deputy Town Attorney was specifically advising VTL defendants in her court that the dispositions required judicial approval and would be reviewed by a judge. At the same time, she obviously knew that she was not reviewing them.

Given these facts, respondent's testimony that she had "nothing to hide" when the Commission requested the court files, and no reason to think that her failure to review the dispositions was misconduct is highly suspect and certainly not the stuff of stipulations. The majority accurately states that she did not *know* what the Commission was investigating since its letter did not reveal the purpose of its request (Determination, Finding 20). But that is a tautology. She certainly had ample reason to *suspect* the actual purpose of our investigation, especially when, by her own testimony, she was guided by

her experienced co-judge who subsequently resigned after being served with the same charges arising out of the Commission's investigation of these improper practices.

It would indeed be a remarkable coincidence if respondent, with no inkling that the Commission was investigating whether she had contemporaneously reviewed and approved the negotiated dispositions, initialed the requested files in a manner that conveyed the appearance that she had reviewed the pleas when, in fact, she had not. That seems to be a "coincidence" that the majority embraces. Without more information, I cannot reach for that conclusion. Even if she acted innocently, at the suggestion of her co-judge who had previously initialed court files in exactly the same manner to indicate that he had reviewed them, respondent's actions effectively disguised her own wrongdoing.

Further confusing the issue, respondent has acknowledged that sometime after initialing the files provided to the Commission, she started initialing all her court files with negotiated pleas on a regular basis to indicate that she *had* reviewed them. This testimony is key and potentially dispositive of the question of her intent when she initialed the files she had not reviewed – the heart of this case. To resolve this question, the Commission must evaluate evidence of her initialing practices immediately after she initialed the files produced to the Commission. If she initialed pleas and dispositions immediately after the Commission had requested the records, it would indicate that she *did* understand the significance of initialing the documents and that initialing was to convey review rather than mere identification of her cases. Thus, initials on plea documents that the Commission did not request would contradict her testimony that she

misconceived the thrust of the Commission's inquiry and reveal her as engaging in a cover-up. If, on the other hand, her reviews and initials began only sometime later when, as she claims, she "realized" that she had an obligation to personally review pleas, that would support her claim that she had acted innocently when she initialed the documents the Commission sought, *i.e.*, only to identify which cases were hers. Consistent with her rationale, it would make no sense for her to be initialing files the Commission was not seeking unless she was engaging in a cover-up, trying to make it appear that she was reviewing plea files when, in fact, she was not. For identification purposes, there would have been no reason to initial files the Commission had not requested unless she was trying to cover up her failure to review them.

The answer to this central question is not discernable in the record before us. The plea files subsequent to the requested files were never produced. Respondent's statements addressing the issue are contradictory: at the hearing before the referee she testified that she started initialing the files regularly after speaking to her attorney, which was "after the Commission came in a second time" (apparently January 2013, when records were subpoenaed), but then she added, "I don't really remember" (Tr 108-09). At the oral argument before the full Commission, the judge initially stated that she regularly began reviewing pleas "right after" the Commission had requested the records in May 2012 ("right after that we started reviewing, and then we added a declaration page in September 2012"); then, when I asked her if the Commission's request had brought to her attention that she had to review the dispositions, she stated that she was "mixing up the dates" and that she began reviewing the pleas only after speaking to her attorney the

following February (Argument, pp 73-74). Other evidence as to when she started reviewing the dispositions as required is similarly inconclusive.²

But the judge's ambiguous testimony is beside the point: that open question could be answered definitively, simply by reviewing the plea and disposition documents that respondent handled in the weeks and months immediately after June 2012. To reiterate, if the records have her initials, it is hard to see how she has been truthful with us as to her intent. Clearly, she would have been trying to falsely convey that she was reviewing pleas, when she hadn't. If they are not initialed, then I would accept her explanation that she was merely identifying *her* cases, despite my concerns about other notable gaps in the record as to issues that were never fully explored at the hearing. Thus, I am mystified by my fellow Commissioners' unwillingness to remit the matter to permit the record to be expanded on this simple issue.

Because the record is based almost entirely on stipulated facts presented to the referee that included factual conclusions about the very issues that should have been explored at an adversarial proceeding (including the judge's intent, motives, and what she knew or did not know), and because the only witnesses called at the hearing were respondent and her character witnesses, the abbreviated record that resulted makes it impossible to determine with any level of evidentiary certainty what really occurred and what the appropriate sanction should be. At this point, I cannot be confident that I know the facts. Certainly, if this is a cover-up she should be removed. It is the lack of rigor in

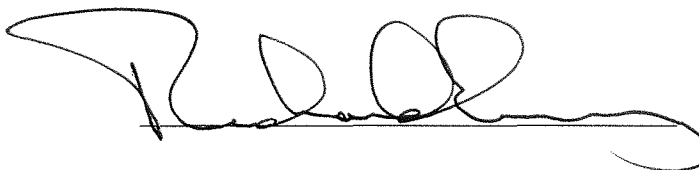
² The stipulated facts (Ref Ex 1, p 10) state that "respondent now contemporaneously reviews VTL dispositions."

this case that troubles me and threatens our oversight function.

In exercising our responsibility to protect the public from unfit incumbents, including judges who cover up their misconduct or who fail to understand the most basic principles of being a judge, it is our duty to have a complete record on which to determine what sanction is appropriate. *See Matter of Gilpatric*, 13 NY3d 586 (2009) (on review, Court of Appeals remitted the matter to the Commission for further proceedings since the judge's culpability could not be determined from the record presented).

Accordingly, on the facts presented here, I vote to remand the matter for further development of the record with respect to the issues described above.

Dated: May 9, 2016

A handwritten signature in black ink, appearing to read 'Richard D. Emery', written over a horizontal line.

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

JANET M. CALANO,

a Justice of the Eastchester Town Court,
Westchester County.

DISSENTING OPINION
BY MR. STOLOFF,
WHICH MR. BELLUCK
JOINS

In disciplining respondent for impermissibly delegating judicial responsibilities to the Deputy Town Attorney, the majority's determination minimizes a troubling aspect of respondent's conduct: her complicity in a practice that she knew was an outright deception. The record in this matter establishes that for at least 13 months (from May 2011 through May 2012) and likely several months longer (until February of 2013, when respondent first met with her attorney), the Deputy Town Attorney routinely represented to defendants that the dispositions they negotiated in conference required judicial approval and would be reviewed by a judge. That assurance, made and remade to dozens of defendants each week, was false: there was no judicial review or approval, as respondent admits. Notably, respondent also admits that *she knew that the Deputy Town Attorney was making these representations*, which she obviously knew were untrue. The record before us, which largely consists of stipulated facts and respondent's statements at the hearing and oral argument, does not indicate that respondent ever

questioned these misrepresentations of the court’s practices – or that those statements prompted her to question the practices themselves. Even if she was influenced by her experienced co-judge to accept the court’s procedures in permitting the Deputy Town Attorney to reduce charges, dismiss charges and impose fines, it is incomprehensible to me that a judge would acquiesce to a practice whereby defendants were regularly lied to in her own court. It is my opinion that respondent’s role in permitting this deception to continue for as long as it did constitutes a significant aggravating factor that warrants a stricter sanction than that determined by the majority.

In *Matter of Greenfeld*, 71 NY2d 389 (1988), the Court of Appeals accepted the Commission’s determination of removal for a Village Justice whose conduct bears notable similarities to the facts in this case. In *Greenfeld*, the Court found, based upon stipulated facts, that the judge permitted the Deputy Village Attorney “to perform the judicial duties of the Village Court in the absence of a judge by conducting conferences with defendants [in VTL cases] after the court had written to the defendants and advised them to appear for trial” (*Id.* at 390). As described by the Court:

“The Deputy Village Attorney accepted guilty pleas; determined the amount of fines to be paid by defendants and advised defendants of the amount of fines to be paid only after they had entered pleas of guilty; and entered the disposition of cases on official court records. In virtually every case that was disposed of without trial, the Justice presiding did not see the defendant after arraignment nor did he review the disposition of the case after the plea bargain was consummated.” (*Id.*)

It was also stipulated that when the administrative judge asked Judge Greenfeld (then an Acting Justice) and the Village Justice to respond to an anonymous complaint about the

court's procedures, Judge Greenfeld prepared and signed a letter that "falsely stated that the judge presiding in the Village Court reviewed and approved all plea bargains on the night that they were made and that if there were close questions or problems, the parties were brought before the Bench where judicial discretion was exercised" (*Id.* at 391).

In *Greenfeld*, the judge's misrepresentation to his administrative judge concealed his misconduct and prevented the implementation of corrective measures. In Judge Calano's case, had it been proved that she altered court records in order to conceal her misconduct and mislead the Commission, there is no question that the sanction of removal would have been appropriate. However, I believe that respondent's complicity in misrepresenting the court's procedures to defendants, which concealed that the judges of the court had abdicated their judicial responsibility to review pleas and impose sentences, cannot be overlooked since "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]).

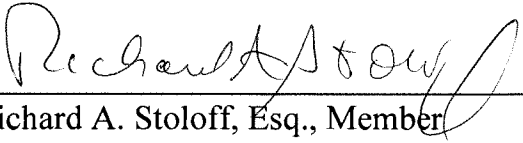
It is noteworthy that for all but three months of the period covered by Judge Greenfeld's misconduct, he was an Acting Village Justice who claimed he merely followed the procedures instituted by the judge who regularly sat in the court.¹ In respondent's case, her defense that she followed the procedures in place seems even less persuasive since she was not an Acting Justice, but a duly elected judge of the Easthampton Town Court with equal status to her co-judge.

¹ The Village Justice died on March 10, 1986. Judge Greenfeld served as Acting Village Justice of Valley Stream from April 1, 1983 to March 9, 1986 and on March 10, 1986 was appointed as Village Justice.

In an attempt to demonstrate her efforts to improve the court's procedures, respondent has emphasized that in September 2012, she and her co-judge instituted a requirement that VTL defendants who negotiated plea reductions with the Deputy Town Attorney sign a declaration form entering a guilty plea conditioned on a specified sentence. Significantly, that form (Resp Ex B) also represented to defendants that the plea "is subject to court's approval" and contained a line for the judge's signature to indicate whether the plea was approved or rejected. The record before us does not indicate whether respondent signed off on those forms – no completed forms are in evidence, and respondent's testimony emphasized that the purpose of the form was to obtain the defendant's signature – but even if she did, the form itself is too sparse to provide adequate review of the dispositions. The form was used only for plea reductions, not for charges that the Deputy Town Attorney dismissed; and even as to the negotiated reductions, the form specifies only the reduced charge a defendant has pled guilty to, not the original charge. More to the point, respondent's own testimony and her statements to the Commission at the oral argument indicate that even after her court had been using this form for months, she still did not understand her obligation to approve plea bargains and set fines until February 2013, when she first met with her attorney after the Commission had subpoenaed her court records. Therefore, in my opinion, a fair preponderance of the evidence establishes that even after this form was instituted respondent continued to misrepresent the court's practices to VTL defendants and continued to fail to exercise her judicial responsibilities.

For these reasons, I believe that the proper sanction under the facts of this case is no less than censure, and accordingly dissent from the majority opinion.

Dated: May 9, 2016



Richard A. Stolfo, 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

TIMOTHY J. COOPER,

a Justice of the Evans Town Court,
Erie County.

DECISION
AND
ORDER

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Honorable Sylvia G. Ash
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick,
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Connors LLP (by Terrence M. Connors) for the Respondent


The matter having come before the Commission on June 2, 2016; and the
Commission having before it the Stipulation dated May 10, 2016; and respondent having
tendered his resignation on February 5, 2016, and having affirmed that he retired and

vacated his judicial office as of March 4, 2016, 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 extent that the Stipulation will become public upon being signed by the signatories and that 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 matter is concluded according to the terms of the Stipulation, subject to being revived according to the terms of the Stipulation; and it is

SO ORDERED.

Dated: June 2, 2016



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

TIMOTHY J. COOPER,

STIPULATION

A Justice of the Evans Town Court,
Erie County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Timothy J. Cooper (“Respondent”), who is represented in these proceedings by Terrence M. Connors, Connors LLP, as follows:

1. Respondent served as Justice of the Evans Town Court, Erie County, from January 1, 1986 until February 5, 2016, when he tendered his resignation in order to effect his retirement on March 4, 2016, for reasons that he avers are unrelated to this proceeding.

2. Respondent was served with a Formal Written Complaint dated July 17, 2015, containing one charge alleging that on or about April 23, 2014, Respondent operated his automobile while under the influence of alcohol and caused a motor vehicle accident in the Town of Lewiston, New York. On or about June 16, 2014, Respondent was convicted of driving while ability impaired (VTL §1192[1]) and moving from lane unsafely (VTL §1128[a]).

3. The Formal Written Complaint is appended as Exhibit 1.

4. Respondent filed an Answer dated August 14, 2015, which is appended as Exhibit 2.

5. Respondent tendered his resignation on February 5, 2016, for reasons that he avers are unrelated to this proceeding. A copy is appended as Exhibit 3. Respondent affirms that he retired and vacated his judicial office as of March 4, 2016.

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.

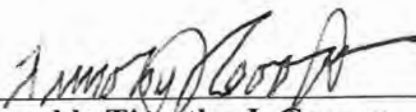
7. Respondent affirms that, having vacated his judicial office, he will neither seek nor accept judicial office at any time in the future.

8. 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.

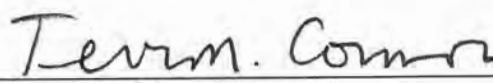
9. Upon execution of this Stipulation by the signatories below, this Stipulation will be presented to the Commission with the joint recommendation that the matter be concluded, by the terms of this Stipulation, without further proceedings.

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.

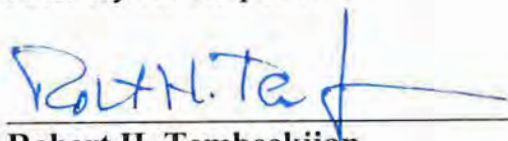
Dated: 5-2-16


Honorable Timothy J. Cooper
Respondent

Dated: 5-2-16


Terrence M. Connors
Connors LLP
Attorney for Respondent

Dated: May 10, 2016


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

THE FOLLOWING EXHIBITS ARE AVAILABLE AT WWW.CJC.NY.GOV
EXHIBIT 1: FORMAL WRITTEN COMPLAINT DATED JULY 17, 2015
EXHIBIT 2: RESPONDENT'S ANSWER DATED AUGUST 14, 2015
EXHIBIT 3: RESPONDENT'S LETTER OF RESIGNATION

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

MAIJA C. DIXON,

DETERMINATION

a Judge of the Rochester City Court,
Monroe County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Honorable Sylvia G. Ash
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Terry Jane Ruderman¹
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Herzfeld & Rubin, P.C. (by Lawton W. Squires) for the Respondent

¹ Judge Ruderman's term as a member of the Commission expired on March 31, 2016. The vote in this matter was taken on March 10, 2016.

The respondent, Maija C. Dixon, a Judge of the Rochester City Court, Monroe County, was served with a Formal Written Complaint dated October 9, 2014, containing one charge. The Formal Written Complaint alleged that in connection with a pending tort action in which respondent was the plaintiff and was represented by counsel, respondent telephoned the chambers of the judge who was handling her case, spoke to the judge about the matter over his repeated objections, and thereafter faxed and mailed the judge a letter containing details about her claim. Respondent filed a verified Answer dated November 5, 2014.

On November 5, 2014, respondent filed a motion for summary determination and/or dismissal of the Formal Written Complaint. Commission counsel opposed the motion on November 24, 2014, and respondent's counsel replied on December 1, 2014. By Decision and Order dated December 11, 2014, the Commission denied respondent's motion in all respects. The Commission rejected an Agreed Statement of Facts.

By Order dated December 16, 2014, the Commission designated Robert A. Barrer, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 24 and 25 and July 6, 2015, in Rochester. The referee filed a report dated December 16, 2015.

The parties submitted briefs with respect to the referee's report. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended dismissal or, if misconduct was found, a sanction less than removal. On March 10, 2016, the Commission heard oral argument and thereafter considered the

record of the proceeding and made the following findings of fact.

1. Respondent has been a Judge of the Rochester City Court, Monroe County, since 2007. Her term expires on December 31, 2016.

2. Respondent was admitted to the practice of law in New York in 1996. Prior to assuming judicial office, respondent worked at several private law firms, a private corporation and the City of Rochester Law Department. In private practice, respondent's work experience was in the areas of corporate law, employment law, personal injury defense and general defense work.

3. On June 23, 2006, respondent was involved in a motor vehicle accident when her parked car was struck by another vehicle. Respondent retained a former law school classmate, an associate at a personal injury law firm, to represent her, and in November 2008 she accepted a \$25,000 settlement from the no-fault carrier for her claim against the driver of the other vehicle. After her classmate left the firm in 2010, that firm, now called Gelber & O'Connell, LLC, continued to handle respondent's case. On September 13, 2010, the firm commenced an action on respondent's behalf entitled *Maija Dixon v. GEICO General Insurance Company* ("Dixon v. GEICO") in Monroe County Supreme Court, seeking additional damages from her insurance carrier under her supplemental uninsured/underinsured motorist ("SUM") policy, which provided for maximum coverage of \$100,000.

4. As a plaintiff in a personal injury action, respondent would be required during discovery to submit to a deposition and to disclose otherwise personal

information about the injuries that she claimed to have suffered. During the course of the litigation, respondent, who was aware of the pending litigation, does not appear to have been responsive to numerous communications from her attorneys attempting to assist in or confirm the scheduling of her deposition, and she did not appear for a deposition on several occasions. At the hearing, respondent testified that she never attempted to avoid being deposed, was frustrated about the lack of progress on her SUM claim and had wanted her claim to be resolved through arbitration.

5. The record establishes that respondent's counsel was diligently trying to move the case forward. Respondent testified that she did not believe this to be the case and was concerned whether her attorney was being truthful and proceeding in good faith.

6. *Dixon v. GEICO* was transferred to Supreme Court Justice J. Scott Odorisi on May 3, 2013.

7. Respondent knew Judge Odorisi personally and professionally and they were on a first-name basis; their chambers were located in the same building. Prior to his election to Supreme Court in 2012, Judge Odorisi, as a town justice, had occasionally substituted for respondent in the Rochester City Court. Respondent testified at the hearing that when Judge Odorisi was a candidate for Supreme Court, respondent, at his request, had provided a recommendation on his behalf to the County Bar Association.

8. After a conference on August 29, 2013, Judge Odorisi issued a scheduling order setting September 30, 2013, as the date by which respondent's deposition must be completed and requiring that the trial note of issue and certificate of

readiness be filed by December 13, 2013.

9. Respondent advised her attorney, Kristopher SchwarzmueLLer, that she wanted to settle the claim. Mr. SchwarzmueLLer informed her that GEICO had made a \$20,000 settlement offer, and on September 23, 2013, the Gelber firm sent respondent a release document for her signature. At the hearing, respondent testified that she believed that her attorney was pressuring her to settle her claim for less than the fair value and that she was dissatisfied with the settlement offer, which she felt was “nuisance value” and inadequate.

10. Respondent testified that Mr. SchwarzmueLLer told her that Judge Odorisi had threatened to dismiss the action if the settlement offer was not accepted; Mr. SchwarzmueLLer denied communicating that her case would be dismissed unless she settled. The referee found that both respondent and her attorney testified credibly as to this issue and that respondent may have misunderstood her attorney’s communication that if she did not appear for a deposition or settle the case, the defendant could make a motion to preclude and obtain a conditional dismissal order.

11. On October 1, 2013, at approximately 2:00 PM, after looking up Judge Odorisi’s telephone number in the building’s directory, respondent telephoned Judge Odorisi’s chambers, where his secretary, Maureen Ware, answered the phone. Respondent identified herself as “Judge Dixon” and asked to speak with Judge Odorisi, and her call was promptly transferred to him.

12. At the hearing, respondent testified that before calling Judge Odorisi, she specifically considered what she was going to say to him, that she was aware of the

prohibition against *ex parte* communications, and that while she was preparing to make the call, it occurred to her that it was improper for one judge to call another judge about a personal matter pending before the second judge. Prior to placing the call, respondent did not inform her attorney or opposing counsel that she intended to communicate directly with Judge Odorisi concerning her case.

13. Upon reaching Judge Odorisi, respondent told him, in sum and substance, “I need to talk to you,” and he responded, “Well, it can’t be, it’s not about this, your case, is it?” Respondent replied, “Well, actually, it is.” Judge Odorisi immediately told respondent that he could not talk to her about her case.

14. Over Judge Odorisi’s repeated objections and his efforts to terminate the conversation, respondent communicated to Judge Odorisi that she was unhappy with her attorney, that she wanted to avoid publicity, that she wanted to have the case transferred out of Rochester, and that she wanted a conference at which she, the attorneys and the insurance adjuster would be present.

15. Ms. Ware, who had left her desk after transferring the call, was in Judge Odorisi’s office during the conversation. She heard Judge Odorisi tell the caller several times that they could not discuss the case. According to Ms. Ware, the phone call lasted approximately two to three minutes.

16. At the hearing, respondent testified that she terminated the call as soon as Judge Odorisi stated that he could not discuss the case and that the phone call lasted “twelve seconds. Fifteen at the most.” She testified that the purpose of her call was solely to request a conference and denied that she was concerned about publicity or

wanted the case adjudicated outside of Rochester.²

17. Judge Odorisi testified that he was “very upset” by respondent’s call and “very upset that I was being put in this position.” Among other concerns, he perceived that he was being “set up” and that respondent’s call was intended to result in his recusal.

18. Immediately after respondent’s telephone call, Judge Odorisi initiated a conference call with all counsel in which he disclosed his communication with respondent, offered to disqualify himself if requested to do so, and directed Mr. Schwarzmüller to advise respondent not to contact him directly again. That same day, Judge Odorisi also wrote a letter to counsel confirming the substance of what had occurred and again asking Mr. Schwarzmüller to direct his client not to personally contact Judge Odorisi’s chambers while her case was pending.

19. On October 1, 2013, Mr. Schwarzmüller called respondent’s cell phone and left a voicemail message detailing the conference call that had been held. The next day, he sent respondent a letter that, *inter alia*, confirmed that he had left her a message regarding her telephone call to Judge Odorisi; advised her that Judge Odorisi considered her call to be inappropriate and had instructed counsel to advise her not to call him directly again; addressed the deadline of October 7 for accepting the settlement offer

² A few years earlier respondent was the complaining witness in a criminal case that resulted, according to her hearing testimony, in publicity “in every newspaper across the nation.” The referee found that respondent’s experience in that case, in which her testimony “concerned matters of an intimate nature,” “was at least a part of the reason why she appears to have been anxious to have her SUM claim resolved in the most expeditious fashion possible” (Rep 6-7).

and the need to be deposed if she wished to continue with the litigation; and offered to “do whatever it is you want me to do with regard to settling your case or moving forward with your case.” Mr. SchwarzmueLLer’s letter also cautioned respondent about the ethical issues raised by her contacting Judge Odorisi, stating:

“As an aside, based upon Judge Odorisi’s comments about your phone call to him, I would implore you to look at the big picture. You are a sitting Judge contacting another sitting Judge attempting to discuss your personal injury lawsuit to which he has been assigned. While I do not have citations to Judiciary Law at hand to cite to or the Code of Ethics, it is probable that said phone call was a violation of one or both. Your case is not the type of case that you should be risking your professional career for.”

After sending this letter on October 2, 2013, Mr. SchwarzmueLLer spoke to respondent later that day. Pursuant to his conversation with respondent, Mr. SchwarzmueLLer wrote to Judge Odorisi on October 3, 2013, and requested a conference.

20. On October 7, 2013, respondent sent Mr. SchwarzmueLLer an undated, two-page letter in response to his October 2, 2013 letter. Respondent copied Judge Odorisi on her letter and sent copies to him by both facsimile and regular mail. Respondent did not copy GEICO’s counsel on the letter, and prior to faxing and mailing it to Judge Odorisi, she did not inform her attorney or opposing counsel that she intended to communicate directly with Judge Odorisi.

21. Respondent’s undated letter, which was copied to Judge Odorisi, stated that she felt she had “no alternative” but to accept the settlement offer, and enclosed a signed release for her SUM claim in the amount of \$20,000. Her letter also included information discussing:

- the cause and extent of the damages respondent sustained as a result of the accident as they related to her claim;
- the medications she required as a result of the accident;
- her out-of-pocket medical expenses since the accident and her analysis of the monetary value of her case; and
- her objection to being challenged “with respect to my judicial career and a potential violation of judiciary law for contacting Judge Odorisi regarding this case”; and
- her reluctance to accept the proposed settlement.

22. When respondent’s letter arrived in Judge Odorisi’s chambers, his secretary gave it to the judge, who did not read the faxed letter or open the letter sent by mail. By letter dated October 9, 2013, Judge Odorisi sent respondent’s letter to her attorney and opposing counsel.

23. *Dixon v. GEICO* was settled for \$20,000 and the action was dismissed on November 6, 2013.

24. Respondent testified at the hearing that she made a “bad decision” by communicating with Judge Odorisi and that by doing so, she “clearly put my colleague in a very bad place. And for that, I am sorry.” She testified that she made the call to Judge Odorisi because she was “upset” with her attorney, who she felt was acting in bad faith and “refusing to act on my behalf.”

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A) and 100.2(C) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to

Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

On two occasions, respondent violated fundamental ethical principles by privately communicating with the Supreme Court Justice who was presiding over her pending lawsuit against her insurance company. First, in a telephone call to his chambers that she initiated, respondent asked the judge to schedule a conference in the matter and conveyed other concerns about her case. Several days later, after both Judge Odorisi and her lawyer had advised her that such communications were ethically impermissible, respondent ignored those warnings and sent the judge an *ex parte* letter that contained substantive information about her alleged injuries and medical treatment. By engaging in such conduct, respondent conveyed the appearance not only that she was seeking special consideration because of her judicial status, but that she was attempting to influence the judge handling her case through prohibited, unauthorized *ex parte* communications. Even absent a specific request for special consideration, such conduct is inimical to the role of a judge, who is required to observe the highest standards of conduct on and off the bench and is prohibited from asserting judicial influence to advance private interests (Rules, §§100.2[A], 100.2[C]; *Matter of Edwards*, 67 NY2d 153, 155 [1986]).

Having been a judge for nearly seven years at the time, respondent certainly knew that it is improper for a litigant who is represented by counsel to communicate directly with the judge hearing his or her case; that it is improper for any litigant to

contact the judge *ex parte*, with no notice to the litigant's adversary; and that a judge who receives such communications could not properly consider or act on them. Respondent also should have recognized that the receipt of such communications would place the judge handling her case in a compromising position, requiring him to promptly disclose the communications and offer to disqualify himself (which is what occurred here). As a litigant attempting to advance her personal interests, respondent disregarded these basic precepts, which are fundamental to ensuring the fairness and integrity of judicial proceedings.

Initially, when respondent telephoned Judge Odorisi's chambers and asked to speak to him, she identified herself as "Judge Dixon" to his secretary and, by doing so, was able to obtain immediate access to the judge. In itself, this was an improper assertion of her judicial position to advance her private interests, in violation of Rule 100.2(C). Although respondent maintained that her use of her judicial title had no significance, she certainly would have known that without her title, the likelihood that she would be able to bypass the judge's secretary without having to explain the purpose of her call would be greatly diminished. In these circumstances, there was at least the appearance that she used her judicial position to further her personal interests, with the immediate goal of speaking directly with the judge handling her case in order to convey her concerns about the matter.

Thereafter, when she spoke to Judge Odorisi for several minutes, over his repeated objections and attempts to terminate the call, she requested that he schedule a conference in her case and indicated that she wanted to avoid publicity and have her case

heard outside of the Rochester area. Since respondent was represented by counsel, those requests and concerns should have been conveyed by her attorney in an appropriate manner, on notice to her adversary, and it was plainly unnecessary for her to contact the judge directly.³ It can only be surmised that she did so in order to make a personal, private plea for favorable treatment, an implicit request for special consideration based on her judicial status. It should not inure to respondent's benefit that Judge Odorisi was unswayed by her personal plea and responded appropriately to her breach of judicial ethics – indeed, by doing the only thing a judge in his position could ethically do: attempting to terminate respondent's call, promptly disclosing the call to counsel, and offering to disqualify himself.

Although respondent asserts that her sole purpose in contacting Judge Odorisi was to request a conference and that she ended the call after a few seconds, as soon as Judge Odorisi indicated that he could not discuss her case, the record establishes that she raised multiple issues and continued to talk about her case over Judge Odorisi's objections. Judge Odorisi, who was on good terms with respondent, had no motive to overstate the extent of her communications. Judge Odorisi was clearly correct that respondent was unhappy with her attorney, and at that point he would not have been aware of that issue, or any other of respondent's concerns, unless she had raised them. While respondent denied at the hearing that she wanted her claim heard outside of

³ Respondent's conduct is not excused or mitigated by her claim that she did not trust her attorney to communicate her concerns. There is no indication in the record before us that she lacked competent counsel. If she was dissatisfied with her counsel, a personal injury firm that had represented her for several years, she had ample opportunity to replace them.

Rochester, the referee specifically found that she addressed that issue when she spoke to Judge Odorisi; while she insisted that she had no concern about publicity, her testimony reveals that the subject was clearly a sensitive one. Plainly, all these issues could not have been raised in the very brief communication that respondent described. The testimony of Judge Odorisi's secretary supports both the length of the conversation and Judge Odorisi's repeated attempts to terminate it. In sum, the record establishes convincingly that Judge Odorisi testified credibly concerning the substance of their conversation.

After Judge Odorisi's subsequent conference call with the attorneys about respondent's communication, respondent's lawyer informed her by voicemail message and by letter that Judge Odorisi had directed that she not contact him directly again. Undeterred by these warnings and by Judge Odorisi's own statements to her, a few days later respondent initiated another improper *ex parte* communication with him by faxing and mailing to his chambers a letter that contained details about her alleged injuries and medical treatment.

The purpose of respondent's letter, which states that she has accepted the settlement offer and encloses the signed release, is unclear. Notwithstanding her agreement to settle the case, her criticism of her attorney's handling of her claim, her statement that she feels she has "no alternative" but to accept the settlement offer, and her detailed description of her injuries and medical treatment could be viewed as an effort to undermine the settlement and influence the judge in her favor. Regardless of her intent, her conduct was improper. As a judge herself, respondent certainly knew that a judge

who receives such a letter could not consider it and must disclose it. Further, we reject the referee's conclusion that respondent's letter did not violate Rule 100.2(C) since Judge Odorisi did not read it. Her misconduct was complete when she sent the letter and was not ameliorated by Judge Odorisi's appropriate response.

It is especially troubling that respondent sent such a letter even after both Judge Odorisi and her own attorney had warned her of the impropriety of her earlier communication and conveyed that she was not to call the judge again. Only a hyper-technical interpretation of that advice would conclude that it pertained only to another *ex parte* telephone call, not an *ex parte* letter. No judge should require such warnings in the first place, and sending the letter under these circumstances suggests that respondent lacked an essential understanding of why her conduct was so improper.

When a litigant seeks to privately impart favorable information about her case to the judge presiding over the matter, the entire system of justice is subverted. When the litigant who does so is a judge, in an attempt to advance her personal interests in her own case, respect for the judiciary as a whole is diminished. Such conduct not only raises questions about respondent's judgment and behavior in her own court, but does a grave injustice to our judicial system. It suggests that there are "two systems of justice, one for the average citizen and another for people with influence," and that those who have the right "connections" can manipulate the system for their personal benefit by privately communicating with the judge handling their case (*see* NYSCJC, "Ticket-Fixing: Interim Report," 6/20/77, p 16). If parties in court proceedings and the public are to have faith in the integrity and fairness of judicial decisions, they must have confidence

that *ex parte* communications of the kind respondent initiated are unacceptable and will be subject to discipline.

In determining the appropriate sanction, we are mindful of several factors.

First, we note respondent's testimony that in contacting Judge Odorisi to request a conference with counsel and the insurance adjuster, she only wanted an opportunity to be heard as to the amount of the settlement offer. Although we emphasize that her private communications with Judge Odorisi were inexcusable, we are not persuaded that she acted with a venal intent to influence him.

Second, we note that her letter to her attorney, which she copied and sent to Judge Odorisi, indicated that she had accepted the settlement offer and, indeed, enclosed a signed release. Although sending this communication to Judge Odorisi was improper in that it addressed details of her case while the matter was still pending, the fact that she had accepted the settlement offer meant, as a practical matter, that the case would not come before Judge Odorisi for adjudication and was about to be concluded.

Third, while the Court of Appeals has stated in dictum that "[t]icket-fixing is misconduct of such gravity as to warrant removal" even for a single transgression (*Matter of Reedy*, 64 NY2d 299, 302 [1985]) and that "as a general rule, intervention in a proceeding in another court should result in removal" (*Matter of Edwards, supra*), the results in those two cases do not mandate removal here. In *Reedy*, the judge had previously been censured for similar misconduct, and there were additional aggravating circumstances that warranted the sanction of removal. In *Edwards*, involving a judge who made an implicit request for special consideration in his son's traffic case by

contacting the judge handling the matter, the Court emphasized that the *Reedy* dictum did not “establish[] a per se rule of removal in all cases” and reduced the sanction to censure in view of mitigating factors presented (*Id.*). In numerous other cases, the Court and the Commission have censured or admonished judges for asserting judicial influence to advance the private interests of the judge or others. *See, e.g., Matter of Lonschein*, 50 NY2d 569 (1980) (judge used prestige of office by contacting a city official on behalf of a friend who had applied for a license [admonition]); *Matter of Calderon*, 2011 NYSCJC Annual Report 86 (judge asserted his judicial office in asking prison officials to confiscate materials related to the judge’s lawsuit against an inmate [censure]); *Matter of Horowitz*, 2006 NYSCJC Annual Report 183 (judge intervened on behalf of friends in two pending matters in her own court [censure]); *Matter of Magill*, 2005 NYSCJC Annual Report 177 (judge asserted his judicial prestige by personally delivering the file of a case involving his spouse to the transferee court and leaving his judicial ID [admonition]); *Matter of D’Amanda*, 1990 NYSCJC Annual Report 91 (judge used his judicial position to avoid receiving three traffic tickets [censure]).

Finally, we note respondent’s testimony and her statements during the oral argument that she acted out of an “emotional” reaction and that she now recognizes the impropriety of her conduct and understands that her actions in contacting the judge handling her case placed that judge “in a very bad place.” We also note her assurance that she has learned valuable lessons from these events and is committed to ensuring that her conduct in the future will comport with the high standards of conduct required of every judge.

Based on the foregoing, we have concluded that a public censure reflects the seriousness with which we view the misconduct here. In imposing this sanction, we emphasize that such misconduct cannot be tolerated.

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

Mr. Belluck, Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Mr. Stoloff and Judge Weinstein concur.

Mr. Emery files a concurring opinion.

Mr. Cohen files a concurring opinion, which Judge Weinstein joins.

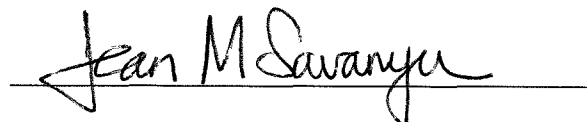
Judge Klonick and Judge Ruderman dissent as to the sanction and vote that respondent should be removed from office. Judge Klonick files an opinion, which Judge Ruderman joins.

Judge Ash was not a member of the Commission when the vote was taken in this matter.

CERTIFICATION

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

Dated: May 26, 2016

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

MAIJA C. DIXON,

CONCURRING OPINION
BY MR. EMERY

a Judge of the Rochester City Court,
Monroe County.

If ever there were a case where removal appears to be warranted, this is it.
But appearances can be misleading and, certainly, deceiving.

In order to get more money in a settlement for her personal injury, Judge Dixon personally contacted the judge who was handling her case. Dissatisfied with the final settlement offer and facing imminent dismissal of her claim, she called the judge's chambers, spoke to her judicial colleague and asked for his help to get a better deal; instead, he, quite properly, rebuffed her call and notified counsel. Several days later, after her lawyer told her she was risking her judicial career by trying to influence the judge improperly, she sent an *ex parte* letter to the same judge describing the details of her injuries and suffering and criticizing her attorney's efforts on her behalf. It is hard to conjure a more conscious and calculated campaign by a judge to use her judicial influence for personal gain.

I have written several times that, in my view, the use of judicial office for

personal gain is “the most serious of any [category of] misconduct that comes before the Commission” (*Matter of Cook*, 2006 NYSCJC Annual Report 119 [Emery Dissent] and *Matter of LaClair*, 2006 NYSCJC Annual Report 199 [Emery Dissent]; *see also Matter of Sullivan*, 2016 NYSCJC Annual Report 209 [Emery Dissent]; *Matter of Menard*, 2011 NYSCJC Annual Report 126 [Emery Dissent]; *Matter of Lew*, 2009 NYSCJC Annual Report 130 [Emery Dissent]; and *see Matter of Maney*, 2011 NYSCJC Annual Report 106 [Belluck Dissent]). Such behavior “strikes at the heart of our justice system,” invidiously perverting the fair and proper administration of justice and eroding public confidence in the judiciary as a whole (*Matter of Cook et al.*, *supra*). In this case, a judge attempted to wield her personal influence, as a judge, over the judicial system in which she presides to get more money for herself. There is no dispute that she was trying to get a judicial colleague to use his power to get her more money.

So this case, and, secondarily, my prior dissenting opinions, beg the question of why the Commission censures, rather than removes, Judge Dixon, and why I concur. The short answer is that the judge’s appearance before the Commission and her contrition and explanation of her conduct, and for me, her personal story, compel a more lenient sanction than removal. The misconduct here cannot be and is not excused; however, the sanction must fit the person and the particular circumstances of the case as well as the offense.

Judge Dixon is an individual who, through her faith, character, force of will and personality, got her education, became a lawyer and then a judge. She appears to have overcome numerous obstacles in her life to have attained her judicial position.

When asked at our proceeding about her background, she self-effacingly described it as follows:

“I am from Rochester and I returned to Rochester after law school. I started law school, wow, I started law school at the time with a one-year old. I don’t know if that’s quite how I’m supposed to answer this. Both of my children are outside of this room with me. That one-year old is now 25 and I have a 15-year old. So he was about five at the time that I ran for office. But they are both here. My background is I am a domestic violence survivor and I don’t know that I have ever told that story, so. But I started law school with that and my one-year old in tow with me and returned back to Rochester to go back home and my parents, who are great supporters, both are, of whom have a business in Rochester. My father is in the ministry there and my mother is in ministry with him and they also work together in the funeral home, of which my mother has been in business doing that since I was two. And, so I wasn’t expecting actually to be in office but I started out with the city law department and moved forward in private practice and until I went from Underberg & Kessler to run for office and was a single parent, so single parent of the two boys so I am very proud of them. My son lives here in New York and he is hoping to join the Fire Department and my other son is moving forward. He’s in 9th grade. I am still with him and we are proud of our city residents and I am still a city resident in the 19th Ward. So, we work very hard to support our citizens in the city of Rochester and to support people who are very much young people. And so my boys are part of that community and to bring them up, so, as I said to have access to justice is very important to me. I am very passionate about it, maybe a little more than I should be for our community which I represent.

As you may know City Court is largely populated by people of color and our community is largely populated by people of color in the city of Rochester. Running for office, I was nominated by the party to run and supported and elected by one of the largest percentages for our city and hopefully, as I am up for reelection, this is, the timing of this is very difficult. But I am hopeful that you will see that I am truly sincere and that I am truly remorseful. I don’t say that just for

these proceedings. But if you find that I am worthy of remaining on the bench, I will not make this mistake or any other mistake like this ever again.” (Oral argument, pp 52-54)

The events that led to her misconduct were quite ordinary – an accident when her parked car (in which she and her child were sitting) was struck by another vehicle, and her personal injury lawsuit. Like many litigants, she became very upset with her lawyers and the insurance company. She misguidedly believed that she was being denied justice by being offered what she thought was an unfair settlement. Her outrage, in my view, rather than greed, animated her misconduct. And, as a consequence, she utterly distorted her proper role as a judge in the system of justice which she had sworn to uphold. She twisted her ideals into a distorted picture of what was happening to her in her case. She lost perspective and did not listen to good advice and even clear warnings. This was inexcusable, especially for a judge. And we are not excusing it.

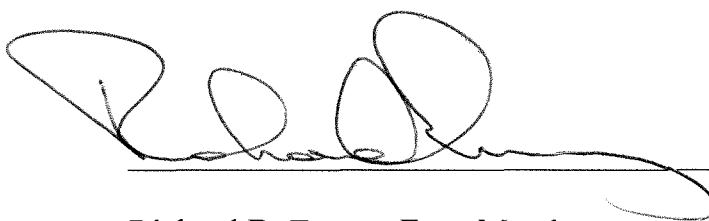
What we are doing, in my view, is calibrating our response. It is clear that she will never again behave in this self-justifying way. No doubt she blindly believed that she was a victim rather than a judge exerting her office. To the extent she rationalized at all, it was to believe that all she was doing was correcting an injustice. It is seriously disturbing that this rationalization was to benefit herself rather than some other victim of our flawed system. But I have no doubt that she subjectively believed she was doing the “right” thing. I also have no doubt that she has learned her lesson and that nothing remotely like this will ever happen again.

Moreover, it is important that, other than our system of law itself, there was no victim here. The judge whom she contacted responded appropriately, notified counsel

of her *ex parte* contacts, did not read her letter, and offered to recuse. Judge Dixon got no more money than was offered and no one responded to her improper efforts. No ticket was fixed. No merchant gave her goods. No crime went unpunished or improperly imposed. No one, other than Judge Dixon, suffered the ignominy or injury of her lost bearings.

Therefore, under what I consider to be unique circumstances, somewhat analogous to those in *Matter of Landicino*, a case we recently decided (2016 NYSCJC Annual Report 129 [judge repeatedly asserted his judicial position during his arrest for DWI, but demonstrated a compelling record of rehabilitation]), I think justice commands the disposition of censure.¹

Dated: May 26, 2016

A handwritten signature in dark ink, appearing to read 'Richard D. Emery', written over a horizontal line.

Richard D. Emery, Esq., Member
New York State
Commission on Judicial Conduct

¹My colleagues' (Cohen and Weinstein) concurrence requires a rejoinder. Put simply, pretending, as I believe they do, that we assess mitigation "irrespective" of a forthright assessment, at least, of the person and her story as that relates to the likelihood of future misconduct is ignoring the obvious. Their blinkered paradigm for sanctions that would have us ignore salient evidence on the crucial issue of future misconduct does not serve our mission to protect the public and "safeguard the Bench from unfit incumbents" (*Matter of Reeves*, 63 NY2d 105, 111 [1984]). This is something that I think we do regularly. We certainly did it in *Landicino* (and see, e.g., *Matter of Martin*, 2003 NYSCJC Annual Report 216 [noting in detail judge's record of community service]). I am not willing to assess mitigation in a case of this sort of extreme misconduct without honestly confronting the reasons for doing so. Neither their concurrence nor the majority accomplishes this in my view. I hope my concurrence does.

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

MAIJA C. DIXON,

a Judge of the Rochester City Court,
Monroe County.

CONCURRING OPINION
BY MR. COHEN, WHICH
JUDGE WEINSTEIN
JOINS

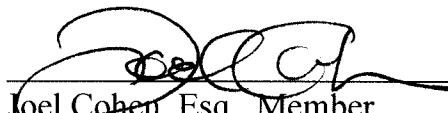
I concur in the result, but write separately to address some of the comments made in Commissioner Emery’s concurring opinion.

While Commissioner Emery’s concurrence correctly argues that a sanction “must fit the person and the particular circumstances of the case as well as the offense,” I do not believe that the Commission would – or should – make its decisions based on the idiosyncratic backgrounds of those respondents who come before it, as is suggested by his concurrence. Judges should be disciplined or not – and the appropriate discipline should be determined – based on many factors, including what they have done wrong and how they react to their conduct when they are confronted with it. In this context, a judge’s efforts at rehabilitation following an alcohol-related incident are relevant, while a judge’s upbringing and personal history are not. I like to believe – and do believe – that we decide individual cases irrespective of the respondents’ ethnic, marital or financial backgrounds, or the personal journeys that led them to the bench. If we start going down

another road, we risk treating judges who require discipline differently based on their backgrounds; meaning, we risk giving some judges a “break” because of factors that should not enter into the calculus of whether they acted improperly.

I think that such an approach is not only unwise, but entirely unnecessary. As the majority notes, the imposition of censure in this case is fully consistent with the sanctions we have imposed for comparable misconduct in the past (*see* cases cited in the majority opinion at p. 16). As to the equities of the case, Judge Dixon’s stated remorse in the context of her improper conduct – which, in my view, she addressed with utter candor – is the key factor weighing against her removal, not her “personal story.”

Dated: May 26, 2016


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

MAIJA C. DIXON,

a Judge of the Rochester City Court,
Monroe County.

DISSENTING OPINION
BY JUDGE KLONICK,
WHICH JUDGE
RUDERMAN JOINS

I respectfully dissent from the sanction of censure because I believe that respondent's serious misconduct in abusing her judicial position for personal gain demonstrates her lack of fitness to serve as a judge and therefore warrants the most severe sanction available to this Commission. This is especially so in view of the numerous, significant aggravating factors present and the absence of any mitigation in the record before us.¹

¹ The Court of Appeals has stated that the severity of the sanction imposed for various types of misconduct "depends upon the presence or absence of mitigating and aggravating circumstances" (*Matter of Rater*, 69 NY2d 208, 209 [1987] ["in the absence of any mitigating factors, [such conduct] might very well lead to removal ... On the other hand, if a judge can demonstrate that mitigating circumstances accounted for such failings, such a severe sanction may be unwarranted"]). See also *Matter of Edwards*, 67 NY2d 153, 155 [1986] ["as a general rule, intervention in a proceeding in another court should result in removal," but this does not "preclud[e] consideration of mitigating factors"]; *Matter of Kiley*, 74 NY2d 364, 370 [1989] [in lending the prestige of judicial office to advance defendants' interests in two cases, judge's conduct in one case was mitigated by his motivation to help his friends through "an emotional trauma," without benefit to himself, and "[w]hile no similar mitigating factors inhere in ... the [other] case, there likewise are no aggravating factors and thus a sufficient basis for removal is lacking").

Standing alone, respondent's initial communication with the judge who was presiding over her lawsuit against her insurance company warrants a severe sanction. Dissatisfied with the defendant's settlement offer and facing dismissal of her claim unless her deposition was scheduled, respondent used her judicial status to obtain special access to Judge Odorisi in order to speak with him privately about her case², then spoke to him for several minutes about the matter over his repeated objections. But this was not her only transgression. Six days later, respondent initiated a second *ex parte* communication with the judge by sending him a letter containing details about her alleged injuries. Respondent's behavior showed a shocking insensitivity to her ethical obligations, including the duty to avoid using the prestige of judicial office to advance her personal interests (Rules, §100.2[C]).

The particulars of respondent's telephone call and letter to Judge Odorisi are especially troubling and present numerous aggravating factors.

The record demonstrates that respondent's call to the judge was not an impulsive act. Respondent testified that before placing the call, she had to look up his phone number in the court directory, which gave her an opportunity to reflect upon the call she was about to make. She acknowledged that before placing the call, she thought

² The record reveals that respondent was acquainted with Judge Odorisi who, as a town justice, had occasionally substituted for her in City Court prior to his election to Supreme Court in 2012. The record also reveals that during his campaign for Supreme Court, a year before the events in this case, respondent, at Judge Odorisi's request, had provided a recommendation on his behalf to the County Bar Association. These circumstances support the appearance that when respondent contacted him in connection with her case, she was seeking favorable treatment not as an ordinary litigant, but as a fellow judge who had previously done a favor for him.

about what she was going to say, which suggests that her words were carefully chosen and purposeful. She also admitted that she recognized beforehand that it was wrong to make the call, but that realization did not stop her from doing so.

Further aggravating her misconduct, respondent persisted in her efforts to assert her personal interests *ex parte* even after she had received several specific admonitions that her conduct was improper. To be sure, as an experienced attorney and a full-time judge for more than seven years, respondent did not need Judge Odorisi or her own attorney to tell her that such communications are wrong; there should not be a single judge who does not know that such conduct is contrary to the ethical rules. The fact that she was undeterred even by multiple warnings about her behavior and repeated the misconduct is inexcusable.

First, as the record shows, Judge Odorisi told her at the outset of their conversation that they could not discuss her case, and he repeated that admonition several times, yet she persisted in conveying her concerns about her case before he was able to terminate the call. Shortly thereafter, her attorney left her a voicemail message detailing the telephone conference that her improper phone call had precipitated. Finally, her attorney's letter dated October 2, 2013, contained an explicit warning in the strongest possible terms about the impropriety of contacting the judge handling her case and the ethical consequences of such conduct:

“As an aside, based upon Judge Odorisi’s comments about your phone call to him, I would implore you to look at the big picture. You are a sitting Judge contacting another sitting Judge attempting to discuss your personal injury lawsuit to which he has been assigned. While I do not have citations to Judiciary Law at hand to

cite to or the Code of Ethics, it is probable that said phone call was a violation of one or both. Your case is not the type of case that you should be risking your professional career for.”

Yet, even after Judge Odorisi’s admonitions and even after her own attorney advised her that her call was likely an ethical breach and warned her against engaging in conduct that could jeopardize her judicial career, a few days later respondent again communicated privately with Judge Odorisi by sending him, both by fax and mail, an *ex parte* letter about her case.

In addition, respondent’s hearing testimony raises serious questions about her credibility and forthrightness as well as her appreciation of the gravity of her misconduct. The record establishes that respondent repeatedly attempted to minimize the purpose, substance and duration of her phone call. While respondent insisted that she ended the call in a matter of seconds when Judge Odorisi said they could not discuss her case, the evidence establishes that he repeated that admonition several times over the next two to three minutes in an effort to terminate the call. Respondent maintains that she only asked for a conference, yet Judge Odorisi’s credible testimony establishes that she addressed several other issues during the conversation, including dissatisfaction with her attorney, concern about publicity and wanting the case heard outside of Rochester. As the majority notes, Judge Odorisi was on good terms with respondent and had no motive to overstate the extent of her wrongdoing. Plainly, the issues she raised were more than could have been addressed in the very brief exchange that respondent described.

Even by itself, a request for a conference would have been improper in these circumstances. Since respondent was represented by counsel, any such request

should properly have been made by her attorney. If, as respondent asserts, she did not trust her lawyer, she could have communicated with Judge Odorisi's law clerk, who was also listed in the court directory. Contacting the judge who was handling her case in order to speak to him privately strongly suggests that her intent was not simply to ask for a conference, but to use her personal influence in an *ex parte* conversation in order to obtain the desired conference and a more favorable result.

A careful examination of respondent's letter to her attorney supports this conclusion:

"I contacted Judge Odorisi and indicated to him that I was the plaintiff in a suit before him and that I felt my attorney was acting in bad faith with respect to settlement. To address that concern, I requested a **settlement** conference before the court with my attorney, defense counsel and the adjuster." (Emphasis added.)

If respondent's intention was to address her displeasure with her attorney's representation, there was no need for the adjuster to be present. Further, if she was displeased with her counsel, she could have discharged him and retained new counsel. She did not need a settlement conference to do so.

Events immediately preceding her call to Judge Odorisi buttress the interpretation and conclusion that she was seeking the court's intervention to engage in settlement discussions to, hopefully, increase the offer. Under a scheduling order issued by Judge Odorisi in late August 2013, respondent's case was subject to possible dismissal if she did not submit to a deposition by September 30, 2013. Two days prior to her deposition scheduled for September 25, 2013, respondent indicated to her attorney that she had reluctantly decided to accept the settlement, but did not return a signed release.

Thereafter, she called Judge Odorisi and then sent him a letter. If respondent intended to accept the offer and settle the case, there would have been no need for the conference she sought. Her undated letter to her attorney sent on October 7th and copied to Judge Odorisi, which enclosed the signed release, is equivocal regarding settlement and conveys an inconsistent message about her position. By contacting the judge, respondent attempted to orchestrate two possible scenarios: (1) obtaining a conference with the judge through which the offer might be increased, or (2) forcing the judge to recuse with the likely assignment of her case to an out-of-county judge as she desired, where public attention was less likely. Both scenarios had the potential to personally benefit her.

Moreover, respondent's statements throughout this proceeding demonstrate that she still believes that her *ex parte* communications with Judge Odorisi were justified because of her perception that she was being treated unfairly. She repeatedly denied that she intended to seek any special treatment as a litigant and maintains that she contacted the judge only because "something was wrong" in what her attorney was telling her. When asked at the hearing whether she knew it was wrong to call the judge to ask for some activity on her behalf, she responded, "I did [but] I wasn't asking for personal activity. I was asking for a conference" (Tr 236). While she was never asked specifically how she would feel if she were contacted directly by a litigant, respondent addressed that issue when she was asked during the investigation whether she had reflected after her call on the appropriateness of contacting the judge. Significantly, according to testimony that was introduced at the hearing, she responded:

"I reflected on hoping that Judge Odorisi would call the attorneys

and schedule a court appearance. Because if I was contacted by a litigant on a case that said that their attorneys were acting in bad faith, the first thing I would do is notify the attorneys, I've been contacted by your client, attorneys, and I'd get them both on the phone, the attorneys on both sides, I've been notified by the client in this particular case, I want a conference in this case with everyone. Because I want to know what's going on. I would like to -- **something clearly is not correct if the client feels the need to reach out to me.**" (Emphasis added.) (Tr 251-52)

When questioned at the hearing about her prior testimony, respondent did not disagree with it (Tr 252).

Further, during her appearance before the Commission at the oral argument, respondent stated that at the time of these events she was serving on a court committee about access to justice, and therefore felt particularly "frustrated" and "a "sense of injustice" because, in her own case, in her words, "it seemed like here is a circumstance where I am experiencing what people complain about. I don't have access" (Oral argument, pp 47-48). Of course, any suggestion that her conduct was about obtaining "access to justice" is completely misplaced. By using her judicial position to have a private conversation with the judge handling her case to advance her personal interests, she sought and obtained special access that would be unavailable to an ordinary litigant, including the defendant on the other side of her lawsuit. Such statements indicate that she fails to recognize the fundamental concept that unauthorized, private communications between a judge and a litigant cannot be tolerated because they erode public confidence in the fairness and impartiality of the judiciary.

The Commission and the Court of Appeals have found that exploiting the judicial position for personal gain, or even conveying the appearance of doing so, is

egregious misconduct that may warrant the most severe penalty (*see Matter of Cohen*, 74 NY2d 272 [1989] [judge received favorable loan treatment from a credit union while using his judicial office to benefit the company, which created an appearance of impropriety]). Using judicial prestige to advance private interests in connection with a pending or impending matter is of particular gravity since it “strikes at the heart of the justice system which is based on equal justice and the impartiality of the judiciary” (*Matter of Horowitz*, 2006 NYSCJC Annual Report 183; *see also Matter of Schilling*, 2013 NYSCJC Annual Report 286).

The Court of Appeals has also stated that “as a general rule, [a judge’s] intervention in a proceeding in another court should result in removal,” even for a single transgression, although this does not preclude consideration of mitigating factors (*Matter of Edwards, supra*; *Matter of Reedy*, 64 NY2d 299, 302 [1985] [judge removed for a single incident of ticket-fixing]). While I recognize that in some instances judges who abused their judicial position have been censured or admonished, the aggravating factors noted above, in my view, make this case one of the most serious the Commission has ever encountered for this type of conduct. This is particularly so since in this case – unlike, for example, the assertion of judicial influence in traffic cases or in administrative matters with no adverse party – respondent’s abuse of her judicial position to advance her own interests would be detrimental to the opposing party who lacks access to special influence. While Mr. Emery’s concurrence argues for leniency because there was “no victim here,” that was only because respondent’s intervention was unsuccessful, which in no way should inure to her benefit; equally important, whenever such conduct occurs,

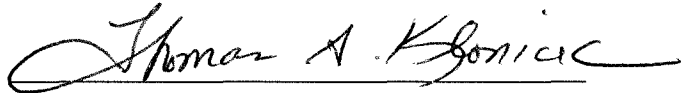
there *is* harm to public confidence in our system of justice. As Mr. Emery’s concurrence concedes, it is hard to imagine a worse course of conduct than a judge wielding personal influence over the judicial system in which she presides to get more money for herself.

This case is also distinguishable from previous Commission cases in that here there are no mitigating factors present. For example, in some cases mitigation was found in the fact that the judge was motivated by a desire to help a family member or close friend in difficult circumstances (*e.g.*, *Matter of Edwards*, *supra*, 67 NY2d at 155 [sanction reduced from removal to censure for a town justice who intervened in another court concerning his son’s case, in part because the judge’s “judgment was somewhat clouded by his son’s involvement”]; *Matter of Lonschein*, 50 NY2d 569, 573 [1980] [judge had no “malevolent or venal motive,” but acted under “a sincere, albeit misguided desire” to “remedy a perceived injustice” by expediting the license application of “a dear friend”]); such mitigation is absent here, where respondent was trying to get a judicial colleague to use his power in an effort to get her more money and to minimize publicity of her litigation in the county in which she presides. Nor was respondent a new judge who may have been unfamiliar with judicial ethics; indeed, her background should have given her additional insight into how such matters are properly handled and why *ex parte* communications of the kind she initiated are so damaging to our system of justice. Moreover, although respondent has conceded – as she must – that her conduct was wrong, genuine contrition is lacking, given her persistent efforts to rationalize and minimize her behavior. Finally, as the majority notes, it is not mitigating that Judge Odorisi, who was mindful of the ethical concerns, did not open the letter she sent him and

was not influenced by her intervention.

Accordingly, I vote that respondent should be removed from judicial office.

Dated: May 26, 2016

A handwritten signature in black ink, reading "Thomas A. Klonick". The signature is fluid and cursive, with a large initial "T" and a long horizontal flourish at the end.

Honorable Thomas A. Klonick, 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

MICHAEL A. GARY,

a Judge of the New York City Criminal
Court and an Acting Justice of the
Supreme Court, 2nd Judicial District,
Kings County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach¹
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Mark Levine and Erica K. Sparkler, Of Counsel)
for the Commission

Greenberg & Wilner, LLP (by Harvey L. Greenberg) for the Respondent

¹ Judge Leach was appointed to the Commission on September 12, 2016. The vote in this matter was taken on August 11, 2016.

The respondent, Michael A. Gary, a Judge of the New York City Criminal Court and an Acting Justice of the Supreme Court, 2nd Judicial District, Kings County, was served with a Formal Written Complaint dated February 29, 2016, containing one charge. The Formal Written Complaint alleged that after being informed that a defendant had threatened a witness, respondent threatened to hold an assistant district attorney in contempt, to declare a mistrial with prejudice and to impose sanctions on the District Attorney's Office if the defendant was arrested before the trial concluded. Respondent filed a verified Answer dated March 22, 2016.

On July 27, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On August 11, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the New York City Criminal Court since 1987 and an Acting Justice of the Supreme Court, 2nd Judicial District, Kings County, since 1994. His current term expires on December 31, 2020. Respondent was admitted to the practice of law in New York in 1975.

2. As set forth below, while presiding over the trial in *People v Kevin Bartholomew* on March 13 and 14, 2014, respondent, without basis in law, threatened to:

(1) hold an assistant district attorney in contempt of court if the defendant was arrested for threatening a witness in the case, (2) declare a mistrial with prejudice if the defendant was arrested, and (3) impose financial sanctions upon the District Attorney's Office if a mistrial was declared because of the arrest. Respondent also yelled and acted in a discourteous manner toward the assistant district attorney.

3. In March 2014 respondent presided over a jury trial in *People v Kevin Bartholomew*, in which the defendant was charged with raping his daughter.

4. On Wednesday March 12, 2014, Assistant District Attorney (“ADA”) Lisa Nugent called Joleane Joseph, the defendant's former girlfriend and mother of his minor son, to testify. Ms. Joseph testified on direct examination and was cross-examined through the afternoon session. She returned the next day and was cross-examined for the morning session on March 13th.

5. Ms. Joseph completed her testimony before court was recessed for lunch. Toward the end of the luncheon recess, and before trial resumed, there was an off-the-record conference during which ADA Nugent informed respondent that the defendant, who was free on bail, had allegedly approached Ms. Joseph as she was leaving the courthouse during the lunch break and said to her, “You’re dead.” ADA Nugent also informed respondent that Ms. Joseph had been taken to the 84th Precinct stationhouse to make a complaint against the defendant.

6. During the conference, respondent spoke to ADA Nugent in a raised voice and threatened to hold her in contempt if the defendant was arrested for threatening

Ms. Joseph.

7. On the record, ADA Nugent summarized the threat the defendant had allegedly made against Ms. Joseph. Respondent directed that the defendant was not to be arrested for making a threat while the rape trial was ongoing. Addressing ADA Nugent, respondent continued, “Because if he is, then I will hold you in contempt for violating my direct order.”

8. Respondent also said that if the defendant was arrested, defense counsel “will make a motion for a mistrial ... [a]nd it is very, very likely that I will grant that mistrial motion with prejudice.” Respondent asked ADA Nugent, “Do you understand what with prejudice means?”

9. Respondent then told ADA Nugent to notify her supervisors to “coordinate with the police personnel from the 84th Precinct ... such that nothing happens to this man until this case is over.”

10. After calling her supervisor, ADA Nugent advised respondent, “We have no control over ... the police department.” Respondent replied, “Don’t give me any BS about you have no control over the police department You can certainly tell a detective or police officer investigating that on the orders of the DA’s Office, no arrest is to be made until it is authorized by your office.”

11. ADA Nugent requested the defendant’s remand on the rape charge in light of his threat to the witness. Respondent denied the request, and the trial resumed.

12. The next day, Friday March 14, 2014, during a morning recess of the

trial, respondent raised the issue of the defendant's arrest again, stating:

“Let's make something crystal clear, People. Today is Friday. We are going to finish the People's case now with this last witness. The defense case is supposed to start on Monday. If you were to have ... Mr. Bartholomew arrested any time between now and Monday ... Mr. Bartholomew ... would not be in a position to prepare his defense.

* * *

If there is a mistrial, if this case has to be delayed because you have unnecessarily and unjustifiably prevented the defendant from seeing his attorney and preparing his defense and this matter has to be adjourned, I will consider, one, financial sanctions against your office. And number two, I will certainly consider a mistrial with prejudice.”²

13. ADA Nugent's supervisor, ADA Coleen Balbert, then approached the bench and told respondent that the District Attorney's Office would not advise the Police Department to refrain from arresting the defendant. Respondent directed ADA Balbert to have the detective or a supervising officer in the courtroom at 2:15 that afternoon.

14. After the lunch recess, ADAs Nugent and Balbert returned to the courtroom accompanied by Lieutenant Joseph LaBella and Detective William Bush.

² While the Administrator takes no position on whether the defendant should or should not have been remanded, respondent avers and the trial transcript corroborates that he had the following concerns. Had the defendant been remanded on Thursday March 13, the Department of Corrections would have had to insure his presence in court for the resumption of trial on Friday March 14. However, such remand would have meant his continued incarceration over the weekend, likely at Riker's Island, which would likely have impeded his ability to meet with counsel to prepare for the commencement of his defense on Monday March 17. Any custodial movement of the defendant associated with his arrest and processing on the new charge may have further impeded his ability to meet with counsel for trial preparation purposes. In addition, at the time of these discussions on March 13 and 14, respondent considered that the defendant had not formally been charged with threatening his girlfriend and had been coming to court as required while out on bail throughout the course of this case.

ADA Balbert stated that, according to Police Department policy, the defendant should have been arrested in connection with threatening the witness.

15. Respondent acknowledged on the record that he had no authority to order the Police Department to refrain from arresting the defendant. However, he beseeched the officers not to arrest the defendant until after the trial concluded. Respondent explained his concern that an arrest might require a mistrial and cause the victim to have to testify again about being raped by her father.

16. Lieutenant LaBella did not want to interfere with the felony rape trial and agreed with defense counsel that the defendant would not be arrested before the conclusion of the trial, but would surrender to the police after the verdict.

17. On March 18, 2014, the defendant was found guilty and was remanded pending sentence.

18. Although the police intended and were prepared to arrest the defendant promptly for threatening Ms. Joseph's life, they delayed doing so because of respondent's statements. Respondent sentenced the defendant to 15 years in prison and 20 years of post-release supervision. After sentence was imposed, the police arrested and charged the defendant with menacing, a B misdemeanor, having a maximum possible sentence of 90 days in jail. However, the Kings County District Attorney's Office chose not to prosecute the defendant on the menacing charge and it was dismissed for failure to prosecute. Notably, the prosecution had never requested an Order of Protection on behalf of Joleane Joseph in the three years this case had been pending trial, nor did they do so at

the time they represented she had been allegedly threatened by the defendant Mr. Bartholomew.

Additional Factors

19. Respondent acknowledges that it was wrong and without basis in law to threaten to (A) hold the prosecutor in contempt if the defendant was arrested, (B) declare a mistrial with prejudice if the defendant was arrested and (C) impose financial sanctions upon the District Attorney's Office if a mistrial was declared because of the defendant's arrest.

20. Consistent with his statements on the record in the *Bartholomew* case, respondent testified under oath during the Commission's investigation that he was motivated by his concerns (A) to conclude the case and avoid a mistrial and (B) to spare the young victim from having to testify again at a retrial. In doing so, he conceded in his testimony that he spoke in a rash fashion to the prosecutor. Furthermore, respondent believed a mistrial would result if the trial was delayed by the defendant's arrest on the menacing charge because, as evidenced in the trial record and respondent's Answer, two jurors reported to the Court Officer that they would not be able to return after Monday, March 17th, and only one alternate juror remained.

21. As the *Bartholomew* trial transcript demonstrates, respondent acknowledged contemporaneously and on his own that he could not directly order the police not to arrest the defendant. When the two police officers involved in this matter came into respondent's court, respondent expressed his preference that the police not

arrest the defendant until after the trial was concluded, and he explained why he was making this unusual request. However, respondent did not order them to postpone the arrest.

22. Lieutenant LaBella, the supervising police officer in this matter, testified under oath during the Commission's investigation that, in postponing the arrest as requested by respondent, the police acted in a manner they considered appropriate under the circumstances, *i.e.*, agreeing to delay the arrest and to facilitate the defendant's surrender through an agreement with defense counsel, which is not unusual. Lieutenant LaBella also testified that while respondent's request to postpone the arrest was unusual and caused the police some concern, respondent did not control their actions.

23. Respondent never held ADA Nugent or anyone else in contempt in connection with the *Bartholomew* case.

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)(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.

On several occasions over two days, respondent threatened to use his judicial power to punish an assistant district attorney and her office though he lacked any

lawful basis to do so. After learning that the defendant had allegedly threatened a witness who had just completed her testimony, respondent repeatedly told the ADA that he would hold her in contempt and would consider granting a mistrial with prejudice if the defendant was arrested before the trial concluded. He underscored his threats with a snide question (“Do you understand what with prejudice means?”), derided the ADA’s statement that her office had no control over the police department, and made clear that he would hold her personally responsible if an arrest was made. The next day, with a supervisor present, respondent reiterated his threat of a mistrial with prejudice and warned that he would consider financial sanctions against her office if a mistrial occurred.

Respondent has explained that he was motivated by concern to avoid a mistrial so that the young victim would not have to testify again, and that he was also concerned that an immediate arrest and incarceration would impede the defendant’s ability to assist in preparing his defense. Nevertheless, baseless threats of contempt and sanctions against an attorney cannot be justified. Such behavior is inconsistent with the high standards of judicial decorum required of every judge (Rules, §100.3[B][3]; *see Matter of Hart*, 2009 NYSCJC Annual Report 97; *Matter of Shkane*, 2009 NYSCJC Annual Report 170).

The fact that respondent did not act on his threats does not excuse the misconduct (*Matter of Hart, supra*; *Matter of Waltemade*, 37 NY2d [nn], [iii] [Ct on the Judiciary 1975])[judge engaged in misconduct by inappropriately threatening lawyers and witnesses with “sanctions” and contempt, notwithstanding that his threats were never

followed by a contempt citation or other disciplinary action])). As the record indicates, respondent never had occasion to carry out his threats since the police agreed to delay the arrest after respondent made a direct plea. In any event, regardless of whether he intended to follow through on the threats he made, the threats were inappropriate since he had no lawful basis to act on them. Such statements to a prosecutor – especially by a judge who “yelled” and spoke in “a raised voice” – are highly intimidating and could only be perceived as a serious warning of very significant consequences, including a mistrial with prejudice in a case involving a serious crime. As respondent has acknowledged, his discourteous conduct was inconsistent with the required standards of judicial behavior.

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

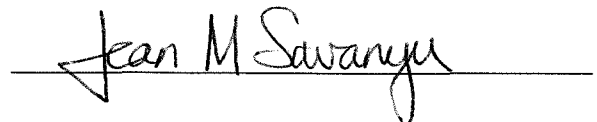
Mr. Belluck, Mr. Harding, Judge Acosta. Mr. Cohen, Ms. Corngold, Mr. Emery, Judge Klonick, Mr. Stoloff and Judge Weinstein concur.

Judge Leach did not participate.

CERTIFICATION

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

Dated: October 3, 2016

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

DETERMINATION

WALTER W. HAFNER, JR.,

a Judge of the County Court,
Oswego County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Honorable Sylvia G. Ash¹
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Gerald Stern for the Respondent

¹ Judge Ash resigned from the Commission on August 11, 2016. The vote in this matter was taken on June 2, 2016.

The respondent, Walter W. Hafner, Jr., a Judge of the County Court, Oswego County, was served with a Formal Written Complaint dated November 18, 2013, containing one charge. The Formal Written Complaint alleged that respondent made inappropriate remarks about the alleged victim in a sexual assault case. Respondent filed a verified Answer dated January 3, 2014. Respondent was served with a Second Formal Written Complaint dated May 27, 2015, containing two charges. The Second Formal Written Complaint alleged that on two occasions respondent made improper statements to or about the District Attorney and the prosecution of cases. Respondent filed a verified Answer dated June 18, 2015.

On May 23, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On June 2, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the County Court, Oswego County, since 1999. Respondent's current term expires on December 31, 2018.

As to Charge I of the Formal Written Complaint:

2. On November 15, 2010, while presiding over *People v Steven M.*

Swank, respondent failed to be patient, dignified and courteous when he made condescending and inappropriate remarks about a teenage sexual assault victim during a plea discussion while the jury was deliberating.

3. Steven M. Swank was indicted on April 15, 2010, on one count of rape in the second degree (Penal Law §130.30[1]), two counts of criminal sexual act in the second degree (Penal Law §130.45[1]), and one count of unlawfully dealing with a child in the first degree (Penal Law §260.20[2]). From November 9, 2010, to November 16, 2010, respondent presided over a jury trial in *People v Steven M. Swank*.

4. At trial, evidence was offered that the defendant, who was about 30 years of age, had provided alcohol to a 14-year-old girl and then engaged in sexual intercourse and oral sexual conduct with her. The defendant, who had no criminal record, denied having sex with the girl, and there was no eyewitness testimony or DNA evidence presented confirming the girl's testimony that she and the defendant had sex. The incident was not reported to law enforcement for more than seven months after it occurred. At the time of Mr. Swank's trial, about two years after the incident, the girl had given birth to a child fathered by a different man.

5. Respondent avers, and the administrator has no information to the contrary, that from the beginning of the trial to the jury deliberations, respondent's judicial actions were consistent with his duties and he showed no favoritism to either side.

6. On November 15, 2010, the jury was in its second day of deliberations. In the courtroom, outside of the jury's presence, respondent, the defense

counsel and the prosecutor discussed the possibility that the jury may be deadlocked, based in part on a note from one juror stating that she was troubled about her participation in the deliberations. After that juror appeared before respondent and counsel to express and be questioned about her concerns, the juror returned to deliberate with the other jurors.

7. While the jurors continued to deliberate, respondent initiated a discussion with counsel regarding a possible plea disposition of the case. Respondent suggested a plea to the Class A misdemeanor of endangering the welfare of a child, which would not require the defendant to register as a sex offender. That suggestion was based on respondent's understanding that the defendant refused to plead guilty to any charge that would compel him to register as a sex offender. Assistant District Attorney Gregory S. Oakes replied that he would consider a plea to two other Class A misdemeanors (sexual misconduct and unlawfully dealing with a child) and that sexual misconduct would require Mr. Swank to register as a sex offender. Respondent asked Mr. Swank's attorney, David E. Russell, whether his client would plead guilty to endangering the welfare of a child. Mr. Oakes noted his opposition to a plea to that charge and reiterated his plea offer.

8. Respondent clarified that the charge of unlawfully dealing with a child was based on giving the girl alcohol, and Mr. Russell indicated he would have to talk to Mr. Swank about a plea to that charge. Respondent said, "Certainly nothing that had anything to do with even touching that girl."

9. Addressing Mr. Oakes, respondent stated, “Frankly, I was a little surprised that you still want him to plead to a sex crime when she is apparently not upset at the whole incident, from her testimony.”

10. Mr. Oakes responded that the point of the New York State statute was that 14-year-olds could not have consensual sexual relations with adults. Respondent replied:

“I understand, but you weren’t successful. She’s got a baby. She’s only sixteen now. So the statute didn’t save her, did it [?] ... I don’t think it’s going to save her.”

11. Respondent’s comments were made in the presence of the attorneys in the case and court personnel. The victim was not present.

12. The plea-bargain attempt failed. On the following day, November 16, 2010, the jury returned a verdict finding Mr. Swank guilty of all charges. The defendant moved to set aside the verdict based on post-trial statements of the victim’s sister. After a hearing, respondent denied the motion. The Appellate Division, Fourth Department, affirmed the conviction.

Additional Factors as to Charge I

13. Respondent acknowledges that the comments he made to explore a plea bargain were inappropriately focused on the victim and created the appearance that he was being critical of her. Respondent avers that his comments, at a point in time when it appeared that the jury was deadlocked, were part of an attempt to demonstrate to both counsel that a plea bargain might be an acceptable alternative. Respondent acknowledges

that his choice of words was careless, harsh and insensitive and asserts that in the future he will be more sensitive to the appearance such comments convey.

As to Charge II of the Formal Written Complaint:

14. On September 5, 2013, while presiding over *People v Lee A. Johnson, Jr.*, respondent failed to be patient, dignified and courteous when he made loud and derogatory statements in response to the Oswego County District Attorney's inquiry into advancing the defendant's trial date in place of another case.

15. On December 10, 2012, seven days after Lee A. Johnson, Jr., was arrested, arraigned and held on \$10,000 cash/\$20,000 bond, he appeared with his defense attorney, Mary A. Felasco, before Judge Spencer J. Ludington in Fulton City Court for a preliminary hearing. No hearing was held and the matter was waived to superior court. On that same date, both Mr. Johnson and Ms. Felasco signed a "Waiver for Pre-Plea Probation Investigation and Report," authorizing the Oswego County Probation Department to proceed with an investigation of Mr. Johnson and submit a report to the Court "in contemplation of a plea of guilty to the crime[s] of Rape 3rd." The executed waiver stated: "**THE DEFENDANT**, by execution of this document, **EXPRESSLY WAIVES any time limitations contained in the Criminal Procedure Law, including but not limited to CPL §§30.30, 180.80, 190.80, 30.20 and the Sixth Amendment to the U.S. Constitution**" (emphasis in original document). The waiver did not specify a termination date. The "Court Order for Investigation and Report" was dated December 10, 2012, and indicated January 23, 2013 as the return date.

16. On January 23, 2013, Mr. Johnson, Ms. Felasco and Assistant District Attorney Thomas Christopher appeared before respondent for the pre-plea report. Respondent indicated that, upon a guilty plea, he would sentence Mr. Johnson to a four-year determinate sentence of incarceration with ten years of post-release supervision along with \$1,425 in various charges and an order of protection. The matter was adjourned for a report.

17. On February 8, 2013, Mr. Johnson, Ms. Felasco and Mr. Christopher again appeared before respondent. No plea agreement was reached.

18. The District Attorney provided Mr. Johnson and Ms. Felasco a “Notice of Presentment to Grand Jury” dated February 14, 2013, advising that evidence against Mr. Johnson was scheduled for presentment on February 27, 2013.

19. On February 25, 2013, Mr. Johnson and Ms. Felasco signed a “Waiver of Speedy Trial/Waiver of CPL §190.80 and §180.80” that provided for Mr. Johnson “to gain more time for the purpose of negotiating a plea bargain” by waiving the statutory provisions mandating his release from custody based upon the non-occurrence of Grand Jury action within 45 days of his confinement. Mr. Johnson further agreed both that the waiver nullified “any time that has so far accumulated for the purpose of CPL §190.80” and that the 45-day period set forth in CPL §190.80 “begins anew the day after this agreement is rescinded or revoked.” The waiver, which was unlimited in duration, stated directly above the signatures of Mr. Johnson and Ms. Felasco: “This matter has been discussed between defendant and counsel for the defendant and the defendant is in

accord with this waiver.” The waiver was forwarded to the District Attorney’s Office under cover of letter from Ms. Felasco dated February 26, 2013, which stated that she had met with Mr. Johnson and that he had agreed to voluntarily provide a DNA sample to the District Attorney’s Office.

20. Under cover of letter dated March 29, 2013, Assistant District Attorney Allison M. O’Neill forwarded a copy of the lab report in Mr. Johnson’s case to Ms. Felasco.

21. By letter dated April 24, 2013, Ms. Felasco acknowledged receipt of Mr. Johnson’s lab report, confirmed Mr. Johnson’s rejection of the People’s plea offer of rape in the third degree, and rescinded the speedy trial waiver signed on February 25, 2013.

22. The District Attorney provided Mr. Johnson and Ms. Felasco a second “Notice of Presentment to Grand Jury” dated April 26, 2013, advising that evidence against Mr. Johnson would be presented on May 29, 2013.

23. On May 17, 2013, after unsuccessful plea negotiations, Ms. Felasco filed an application seeking Mr. Johnson’s release on his own recognizance for the prosecution’s failure to take timely grand jury action.

24. On May 20, 2013, Mr. Johnson, Ms. Felasco and Ms. O’Neill appeared before respondent concerning Ms. Felasco’s application seeking Mr. Johnson’s release. Mr. Johnson acknowledged that he had signed the February 25, 2013 speedy trial waiver but claimed that he felt pressured by his attorney. Respondent relieved Ms.

Felasco as Mr. Johnson's attorney and replaced her with Anthony J. DiMartino, Jr.

25. On May 22, 2013, Ms. O'Neill filed a response to Ms. Felasco's application for the defendant's release on his own recognizance.

26. On May 24, 2013, Ms. O'Neill, Mr. Johnson and Mr. DiMartino appeared before respondent for further legal argument and a decision concerning Mr. Johnson's custodial status. Respondent determined that Mr. Johnson was not legally entitled to be released on his own recognizance.

27. On May 29, 2013, an Oswego County Grand Jury heard evidence against Mr. Johnson.

28. On June 5, 2013, a ten-count indictment was filed against Mr. Johnson, charging him with one count of rape in the first degree (Penal Law §130.35[1]); one count of rape in the third degree (Penal Law §130.25[3]); one count of sexual abuse in the first degree (Penal Law §130.65[1]); two counts of unlawful imprisonment in the second degree (Penal Law §135.05); one count of menacing in the third degree (Penal Law §120.15); and four counts of harassment in the second degree (Penal Law §240.26[1]). Mr. Johnson's bail was subsequently reduced to \$5,000 cash or \$10,000 bond. Mr. Johnson had been in pre-trial detention for six months at that point.

29. On September 5, 2013, respondent presided over a preliminary conference in *People v Lee A. Johnson, Jr.*, for the purpose of either accepting a plea resolution or scheduling a trial. After Mr. DiMartino informed the court that Mr. Johnson rejected the prosecution's plea offer, respondent indicated that Mr. Johnson's case would

be scheduled for trial as the second jury matter on December 9, 2013. Mr. DiMartino responded that Mr. Johnson had been incarcerated for nine months and moved for his release from custody pending trial.

30. Oswego County District Attorney Gregory S. Oakes,² who was present in the courtroom, asked respondent if Mr. Johnson's case could be tried in October in place of a previously scheduled trial in the matter *People v James E. Rogers*, the first of two pending indictments against Mr. Rogers, who was not in custody. The first *Rogers* matter was the oldest case on respondent's calendar and had been pending longer than the court system's promulgated "standards and goals" for the timely disposition of matters. Mr. Rogers' first attorney had succumbed to illness during his representation, and by September 2013 four different attorneys had appeared on his behalf.

31. Respondent, who asserts that he had told Mr. Oakes' office earlier that the first Rogers case had to be tried in October, yelled at Mr. Oakes, in a frustrated tone, stating *inter alia* as follows:

"...How come [Mr. Johnson] isn't indicted by January 1st? Why is it June? So don't come here now and make this argument. Okay? It -- it just doesn't hold water. I don't understand why it happens. You indict people in your office. Okay? Why does it take till June? Why does it take over six months to get him indicted? He's always said no rape occurred. He should have been indicted in January. Okay?"

² Mr. Oakes was elected as Oswego County District Attorney on November 8, 2011, and took office on January 1, 2012.

32. Respondent announced that he would continue Mr. Johnson's bail at \$5,000 cash/\$10,000 bond. After ruling on Mr. Johnson's bail, respondent, who was aware that the District Attorney's Office had a practice of asking defense counsel to sign speedy trial waivers, stated to Mr. DiMartino:

"And maybe the defense counsel – ...if you want to make the argument he's nine months in custody – shouldn't sign speedy trial waivers, shouldn't ask for pre-plea investigations, and should be beating on Mr. Oakes' door repeatedly, constantly, daily, I want my client indicted. Okay?"

33. Respondent thereafter yelled in an angry tone:

"They don't indict people. They leave them sit in the jail forever. For whatever reason, I don't have any clue."

34. After Mr. DiMartino noted that he was not Mr. Johnson's first attorney, respondent engaged in a loud angry dispute with Mr. Oakes, as follows:

"THE COURT: ... So, it isn't just this case, it's for many cases. Okay?"

MR. OAKES: No, that's just absolutely not true, your Honor.

THE COURT: Oh, really?

MR. OAKES: Yes.

THE COURT: You wanna have an argument today about it? I'll go get my figures. Okay? I'll show you right now how many cases we have divestitures that are sitting forever. You wanna start this debate? We can start it. And it's not only people in custody, it's all these people that are out on Pretrial Release. I'll get probation down here that's monitoring them, asking – okay? It is absolutely true, Mr. Oakes. And I can give you the numbers, and I can give you the divestitures. I can show you the divesti – there are many cases that are old.

In fact, they're so old, I've been dismissing them lately. Just the other day I released somebody on a 190.80 motion that wasn't indicted in 45 days. You wanna have the debate, we'll have it another day, and I can give you the numbers. You got – I betcha at least 25, 50 cases, okay, that are way old. Not all in custody. Because the only ones you keep hearing about is from the sheriff complaining about the jail being full and all these people sitting over there forever. Okay? You got hundreds more out there that nothing's happening. So you better go back with your office and figure out what's going on.

MR. OAKES: And your Honor, again, I wasn't trying to raise this – this Court is raising the issue that the DA's Office is –

THE COURT: You raised it. You said it's not true. It is absolutely true.

MR. OAKES: No, you're the one, your Honor, who started the idea the DA's Office isn't moving, we're the only ones with indictment – last year we filed over 300 SCI's and indictments. If I look back, you have not had 300 SCI's and indictments filed in this court.

THE COURT: What do I care how many hundred there are? If they're making arrests, you gotta do something with them. Okay? He's complaining he's been in jail for nine months. And he's been saying from day one he didn't commit any rape. So why does it take till June to indict him? Got an answer?

MR. OAKES: Your Honor, I'm not gonna argue about the merits of this particular case and why it took long exactly. We have six months to indict the case. He was indicted within the statutory period of time. Again, there's no 30.30 issues here. Again, my understanding was that cases where a defendant is in custody take priority over those cases where a defendant's not in custody. That was the only issue I was raising. But again, if the Court wants to keep the matter on for December 9th, keep the matter on for December 9th. And certainly if this Court wants to have a discussion –

THE COURT: You know – see, you know –

MR. OAKES: – we can have a discussion –

THE COURT: You know, you started this whole thing, Mr. Oakes. You know, I gave him a trial date, and then you start in, you wanna change my trial schedule. Why don't you run your own calendar, and leave me run mine. Okay? I gave him a date, and that's the date. Okay? Don't start suggesting everything. Okay?

MR. OAKES: That's fine, your Honor. Your Honor, I was simply asking.

THE COURT: You run your calendar, I'll run mine. Okay?

MR. OAKES: Certainly, your Honor.

THE COURT: Always got a suggestion. Again today. Now you want me to change Rogers that's six months old, the oldest case, and give him another date, and this date, and switch everything around. I've gotta do one and two, because I can't even figure out who's going to trial, because you keep these offers open till the last minute. I don't even know what Rancier's (ph) gonna do. I think he's coming in and pleading, but I don't know, because you keep the offer open. Can't even figure out which case is going to trial.

So go back up into your office and figure out your own calendar. Okay? And if you want a list of all the divestitures, and you want all of them, you can have them. There's many of them, and they're really old. Couple weeks ago I dismissed a couple for speedy trial, lack of speedy trial. They were way over six months. I think they were like a year and a half that I dismissed those indictments.

MR. OAKES: Indictments, your Honor?

THE COURT: Yeah, they were indictments, weren't they? Oh, no, they weren't indictments, excuse me. They never were indicted. A year and a half old. Okay. We're all done, right?

MR. DIMARTINO: Yes, your Honor."

35. By letter dated October 29, 2013, respondent advised counsel that Mr. Johnson's matter was scheduled for trial on November 12, 2013.

36. By letter dated November 7, 2013, respondent confirmed that the jury trial in Mr. Johnson's matter would commence on November 12, 2013.

37. On November 15, 2013, the jury in *People v Lee A. Johnson, Jr.* returned a verdict acquitting Mr. Johnson of five charges: one count of rape in the first degree (Penal Law §130.35[1]); one count of rape in the third degree (Penal Law §130.25[3]); one count of unlawful imprisonment in the second degree (Penal Law §135.05); one count of menacing in the third degree (Penal Law §120.15); and one count of harassment in the second degree (Penal Law §240.26[1]). The jury convicted Mr. Johnson of four charges: one count of unlawful imprisonment in the second degree (Penal Law §135.05) and three counts of harassment in the second degree (Penal Law §240.26[1]). The single count of sexual abuse in the first degree (Penal Law §130.65[1]) had been dismissed by motion of the District Attorney, without objection, on November 14, 2013.

Additional Factors as to Charge II

38. Pursuant to CPL §190.80, a felony defendant who has been held in custody for more than 45 days without action by the grand jury must be released upon the defendant's application. Pursuant to CPL §30.30, a criminal case can be dismissed if the People are not ready for trial within six months of commencement, unless that time is extended by various statutory factors. As in this case, however, a defendant may waive these time limits.

39. Respondent handles post-indictment felony cases and is aware that

some cases are not presented to the grand jury until at or near the statutory time limits, including cases in which defendants are in custody. Respondent recognizes that there are legitimate reasons why a particular case may not be expeditiously presented to a grand jury.

40. Respondent became angry with Mr. Oakes for suggesting that respondent alter the court's trial schedule by placing the *Johnson* case ahead of the *Rogers* case, which had been pending longer, and for challenging respondent's observations about moving cases expeditiously. Respondent regrets his tone and volume in addressing the District Attorney. Respondent recognizes his ethical obligation under the Rules to be "patient, dignified and courteous" and that he failed to meet that standard. He pledges to be more sensitive in the future.

As to Charge III of the Formal Written Complaint:

41. On October 16, 2013, while presiding over *People v A__*, respondent failed to be patient, dignified and courteous when he made disparaging and provocative comments regarding the familial relationship between Oswego County District Attorney Gregory S. Oakes and a potential witness, who was a defendant in a related case that was not before respondent. Respondent stated that there appeared to have been impropriety in the prosecution of both cases and that the defendant A__ and the relative of Mr. Oakes "got away with a burglary basically."

42. On December 19, 2012, A__ was charged with burglary in the second degree (Penal Law §140.25) and criminal possession of stolen property in the

third degree (Penal Law §165.50), both felonies. On January 7, 2013, B___, a cousin of Oswego County District Attorney Gregory Oakes, was arraigned in the Albion Town Court on the misdemeanor charge of making a punishable false written statement (Penal Law §210.45) in connection with the law enforcement investigation of A___. B___ was a potential witness against A___, but was not charged with any felony and was not a co-defendant of A___. No charges were filed against B___ in the Oswego County Court.

43. On February 5, 2013, District Attorney Gregory Oakes petitioned for the appointment of a special prosecutor in *People v A___* and *People v B___* because of his relationship to B___. Respondent appointed David Russell as Special District Attorney in both cases.

44. On October 10, 2013, respondent appointed Michael G. Cianfarano to serve as Special District Attorney in place of Mr. Russell, whom he had relieved after communication between them concerning questions regarding the timing of A___'s prosecution.

45. On October 16, 2013, respondent presided over an appearance in the A___ case. Neither Mr. Russell nor Mr. Oakes was present in the courtroom.

46. Mr. Cianfarano advised respondent that he intended to prepare an application to have the A___ case returned to the Albion Town Court to be resolved by a misdemeanor plea with restitution. Respondent inquired twice about B___, whose case was not before respondent. Respondent gratuitously referred to B___'s familial relationship with the District Attorney, stating as follows:

- A. “What happened to [B__], the District Attorney’s cousin?”
- B. “So, you don’t even know what happened to the co-defendant, the ...DA’s cousin?”

47. While questioning A__’s attorney as to why he was still in custody in excess of ten months, respondent looked through the file and found a letter which refreshed his recollection that he had appointed a Special District Attorney to prosecute both B__ and A__. The file also contained a letter to respondent from Mr. Russell dated August 16, 2013, advising respondent that A__ was being held in custody on a local sentence and was scheduled to be released on October 17, 2013.

48. Respondent identified the charges against both A__ and B__, commented that Mr. Russell had been originally appointed as Special District Attorney in both cases, stated that there appeared to have been impropriety in the prosecution of the cases and indicated that he believed A__ and B__ to be guilty. In doing so, respondent stated *inter alia*:

- A. “In the meantime, we have a C violent felony burglary and over \$6,000 of restitution, and nothing’s happened. There seems to be more to this story than this Court’s being informed of, that’s for sure.”
- B. “And the special prosecutor in the application was appointed for the purposes of avoiding the appearance of impropriety. Well, there certainly appears to be a lot of impropriety in how both of these cases were handled.”
- C. “I mean, they got away with a burglary basically. Nobody prosecuted it. Obviously, the improprieties continue.”

Additional Factors as to Charge III

49. Respondent acknowledges that he should not have identified the

relationship between B__ and the District Attorney during the proceeding in A__'s case, and acknowledges further that his comments on October 16, 2013, created the appearance of bias, notwithstanding that he took no action in *People v A__* that was contrary to the defendant's interests.

50. Respondent avers that he had a significant concern on October 16, 2013, that the felony charge in the A__ matter would likely be dismissed in accordance with law because it had not been prosecuted by the special prosecutor, who had been replaced.

Additional Factors Generally

51. Respondent has been cooperative with the Commission throughout its inquiry, regrets his failure to abide by the Rules in these matters and pledges to conduct himself 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) 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 and Charges II and III of the Second Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent's misconduct is established.

Respondent has acknowledged that on three separate occasions he made inappropriate statements that were inconsistent with his obligation to be “patient, dignified and courteous” in performing his judicial duties (Rules, §100.3[B][3]).

In the *Swank* case, respondent’s comments about an alleged victim of statutory rape were insensitive and created the appearance that he was being critical of her. In a plea discussion with counsel as the jury was deliberating, respondent told the prosecutor that he was “a little surprised” by a proposed plea that would require the defendant to register as a sex offender since the victim, who was then age 16, was “apparently not upset at the whole incident, from her testimony.” (The alleged crime had occurred two years earlier.) When the prosecutor said that the point of the statute was that a 14 year-old could not consent to sexual activity, respondent commented that the victim now had a baby (fathered by a different man) and added, “She’s only 16 now. So the statute didn’t save her, did it ... I don’t think it’s going to save her.”

Our system of justice is designed to protect young teenagers from sexual abuse, and such individuals must be viewed with sensitivity and respect. While respondent has acknowledged that his comments were insensitive, he avers that he made the statements in an attempt to determine whether a plea disposition might be acceptable, a discussion that had heightened significance since the possibility that the jury was deadlocked had been raised. In plea discussions, blunt statements, opinions and speculation that would be inappropriate in other contexts may be part of the process in achieving an agreement. Although such a discussion at that stage might appropriately

include a frank assessment of any factors that might be relevant to the likelihood of conviction and an appropriate plea, respondent's choice of words could be perceived as a harsh, judgmental statement about a young woman who was the alleged victim of a serious crime. We note that the victim was not present when respondent made the comments at issue. (Compare *Matter of Fromer*, 1985 NYSCJC Annual Report 135, involving a judge who made "crude" statements about a rape victim to a newspaper reporter [censure].)

Respondent's statements to and about the prosecutor on two other occasions were also inconsistent with Rule 100.3(B)(3). In *Johnson*, respondent overreacted when the District Attorney suggested that the trial be moved ahead of an older case and, while questioning why it had taken six months to indict a defendant who was in custody, he yelled, "They don't indict people. They leave them sit in the jail forever" and "It isn't just this case, it's for many cases." When the District Attorney responded that respondent's statements were "absolutely not true," respondent, over several minutes, angrily insisted that there were "hundreds more out there that nothing's happening," that he had to dismiss numerous cases because of prosecutorial inaction and that he had "the numbers" to support his statements. Loudly and repeatedly, he also told the prosecutor to "go back to your office and figure out what's going on" and "You run your calendar. I'll run mine." Throughout the exchange, Mr. Oakes challenged respondent's statements and vigorously defended his office, his handling of the *Johnson* case, and his suggestion that the trial be moved ahead of a case that involved a defendant who was not in custody.

The ethical standards recognize a judge's responsibility to dispose of cases "promptly, efficiently and fairly" (Rules, §100.3[B][7]). The need to ensure that justice is administered in a timely manner is particularly acute where, as in *Johnson*, a defendant had been in custody for a period past the statutory time limits (though he had waived his rights under those provisions). While a judge can properly question a prosecutor about perceived inordinate delays, this duty, like all of a judge's responsibilities, must be exercised in a courteous, dignified manner.

A month later, respondent made inappropriate comments about the prosecution of two related cases, one of which involved a defendant who was the District Attorney's relative. Respondent told the new special prosecutor he had appointed that both defendants (one whose case was before respondent and one, the District Attorney's cousin, whose case was pending in a town court) "got away with a burglary" because it appeared that a serious charge had not been prosecuted, and he added that "there certainly appears to be a lot of impropriety in how both of these cases were handled," improprieties that "continue." Respondent's professed concern that a felony charge would likely require dismissal because of inaction by the first special prosecutor did not warrant his gratuitous criticism and innuendo about "improprieties." The special prosecutor may have had legitimate reasons for not pursuing the matters, and, on the record presented, respondent's criticism seems to have been based on mere suspicion. Such statements are detrimental to public confidence in the fair and proper administration of justice.

Respondent's criticism of the handling of the case involving the District

Attorney's relative was especially improper since (i) that case was not before him, (ii) he seemed to have little information about the matter, and (iii) some of his information was inaccurate (the relative was not A___'s "co-defendant," as respondent stated, and was never charged with a felony). By making such comments, respondent violated his duty as a judge to be an exemplar of dignity, courtesy and neutrality. *See Matter of Dillon*, 2003 NYSCJC Annual Report 101 (judge's "excessive, demeaning diatribe" "excoriat[ed]" defense counsel for making "scurrilous" legitimate arguments criticizing the police and prosecutors, whom the judge lavishly praised [admonition]); *Matter of Williams*, 2002 NYSCJC Annual Report 175 (admonishing a judge, *inter alia*, for "unwarranted public criticism" accusing the district attorney's office, with no basis, of making plea offers based on political considerations).

While respondent's comments in the *Swank* and *Johnson* matters, standing alone, might otherwise warrant a confidential caution, his statements in the matter set forth in Charge III, in our view, elevate this matter to public discipline. We therefore conclude that the sanction of admonition is appropriate and accept the stipulated disposition. In doing so, we note that respondent has been cooperative with the Commission, regrets his failure to abide by the Rules in these matters and pledges to conduct himself in accordance with the Rules for the remainder of his term as a judge.

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

Mr. Belluck, Mr. Harding, Judge Acosta, Judge Ash, Mr. Cohen, Ms.

Corngold, Mr. Emery, Judge Klonick, Mr. Stolloff and Judge Weinstein concur.

CERTIFICATION

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

Dated: August 29, 2016

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

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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2, of
the Judiciary Law in Relation to

DELMAR R. HOUSE,

a Justice of the West Carthage Village Court,
Jefferson 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Honorable Delmar R. House, *pro se*


The matter having come before the Commission on March 10, 2016; and
the Commission having before it the Stipulation dated March 3, 2016, with the appended

exhibit; and Judge House having tendered his resignation from judicial office by letter dated February 23, 2016, effective March 1, 2016, and having affirmed that he will neither seek nor accept judicial office at any time in the future, and 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 that 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.

Dated: March 11, 2016



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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2,
of the Judiciary Law in Relation to

DELMAR R. HOUSE,

STIPULATION

a Justice of the West Carthage Village Court,
Jefferson County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Delmar R. House.

1. Judge Delmar R. House has served as a justice of the West Carthage Village Court, Jefferson County, since January 1, 2008. His current term expires on December 31, 2019. He is not an attorney.
2. Judge House was apprised by the Commission in March 2016 that it was investigating a complaint that, in or about August 2015, after consuming alcoholic drinks at a local bar, he engaged in public conduct both inside and outside the bar with another patron that was inconsistent with his ethical obligations to act at all times in a manner that promotes public confidence in the integrity of the judiciary and to conduct his extra-judicial activities so as not to detract from the dignity of his judicial office.
3. Judge House has submitted his resignation by letter dated February 23, 2016, addressed to Village of West Carthage Board Members. Judge House's resignation was effective March 1, 2016. A copy of the resignation letter is annexed as Exhibit A.

4. 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.

5. Judge House affirms that, having vacated his judicial office, he will neither seek nor accept judicial office at any time in the future.

6. Judge House understands that, should he abrogate the terms of this Stipulation and hold any judicial position at any time in the future, the Commission's investigation of the complaint would be revived, he would be served with a Formal Written Complaint on authorization of the Commission, and the matter would proceed to a hearing before a referee.

7. 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.

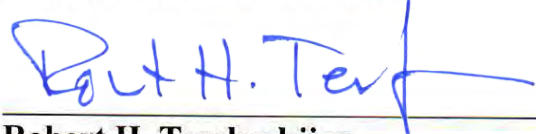
8. Judge House waives confidentiality as provided by Section 45 of the Judiciary Law, to the extent that (1) this Stipulation will become public upon being signed by the signatories below, and (2) the Commission's Decision and Order regarding this Stipulation will become public.

Dated: 3/2/16



Honorable **Delmar R. House**

Dated: March 3, 2016



Robert H. Tembeckjian

Administrator and Counsel to the Commission
(**John J. Postel and Kathleen Martin,**
Of Counsel)

THE FOLLOWING EXHIBITS ARE AVAILABLE AT WWW.CJC.NY.GOV
EXHIBIT A: JUDGE'S LETTER OF RESIGNATION

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

THOMAS K. KEEFE,

a Judge of the Albany City Court,
Albany County.

DECISION
AND
ORDER

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Honorable Sylvia G. Ash
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick,
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and S. Peter Pedtrotty, Of Counsel)
for the Commission

Stephen F. Downs and Mark S. Mishler for the Respondent

The matter having come before the Commission on August 11, 2016; and
the Commission having before it the Stipulation dated August 5, 2016; and respondent
having been served with a Formal Written Complaint dated November 13, 2014, and

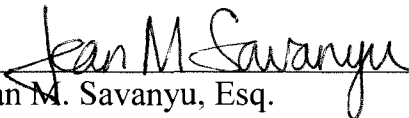
having filed an Answer dated December 31, 2014, and an Amended Answer dated September 10, 2015; and a hearing before a referee, Hon. Stewart A. Rosenwasser, having been held on June 23, 24 and 25 and September 16, 17 and 18, 2015, and the referee having filed a Report dated June 13, 2016; and respondent having tendered his resignation by letter dated August 5, 2016, effective September 30, 2016, and having affirmed that once he has vacated his judicial office on or before September 30, 2016, 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 extent that the Stipulation will become public upon being signed by the signatories and that 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 matter is concluded according to the terms of the Stipulation, subject to being revived according to the terms of the Stipulation; and it is

SO ORDERED.

Judge Ash was not present.

Dated: August 15, 2016


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

THOMAS K. KEEFE,

STIPULATION

a Judge of the Albany City Court,
Albany County.

IT IS HEREBY STIPULATED AND AGREED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Thomas K. Keefe ("Respondent"), who is represented in these proceedings by Stephen F. Downs and Mark S. Mishler, as follows:

1. Respondent was admitted to practice law in New York in 1983. He has been a Judge of the Albany City Court, Albany County, since 2003. Respondent's current term expires December 31, 2022.

2. Respondent was served with a Formal Written Complaint dated November 13, 2014, containing thirteen charges, a copy of which is appended as Exhibit 1.

3. Respondent filed an Answer, dated December 31, 2014, and an Amended Answer dated September 10, 2015. A copy of the Amended Answer is annexed as Exhibit 2.

4. By Order dated February 25, 2015, the Commission designated Hon. Stewart A. Rosenwasser as Referee to hear and report in this matter. A hearing was held before the Referee on June 23, 24 and 25, 2015, and September 16, 17 and 18, 2015. Counsel

for the Commission called 17 witnesses and introduced 133 exhibits into evidence.

Respondent called seven witnesses, testified on his own behalf and introduced 79 exhibits into evidence.

5. The parties submitted post-hearing briefs to the Referee, who issued a Report dated June 13, 2016, in which he found that all but three of the Charges (VII, IX and X) were sustained. The Commission set a schedule for briefs and scheduled oral argument for October 20, 2016. Respondent was advised that Commission Counsel would recommend that Respondent should be removed from office. The Commission has not considered the Report or rendered a Determination.

6. Respondent submitted his resignation, dated August 5, 2016, to become effective September 30, 2016. A copy of Respondent's letter of resignation is appended as Exhibit 3.

7. Respondent affirms that he will vacate his judicial office on or before September 30, 2016.

8. 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.

9. Respondent affirms that, once he has vacated his judicial office on or before September 30, 2016, he will neither seek nor accept judicial office at any time in the future.

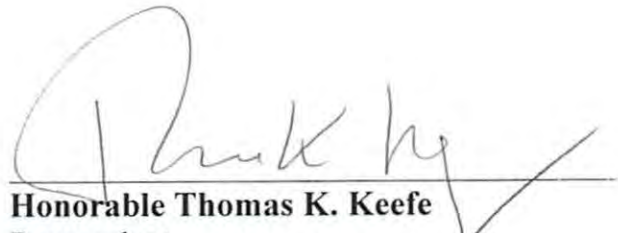
10. Respondent understands that, should he abrogate the terms of this Stipulation and hold any judicial position at any time after September 30, 2016, the present proceedings before the Commission will be revived, and the matter will proceed to a Determination by the Commission.

11. 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.

12. 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.

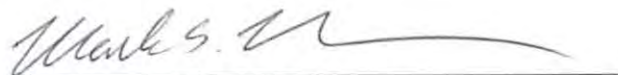
Dated:

8/5/16



Honorable Thomas K. Keefe
Respondent

Dated:

8/5/16


Mark S. Mishler, Esq.
Attorney for Respondent

Dated: August 5, 2016


Robert H. Tembeckjian
Administrator and Counsel to the Commission
(**S. Peter Pedrotty** and **Cathleen S. Cenci**, Of Counsel)

THE FOLLOWING EXHIBITS ARE AVAILABLE AT WWW.CJC.NY.GOV

EXHIBIT 1: FORMAL WRITTEN COMPLAINT DATED JULY 17, 2015

EXHIBIT 2: RESPONDENT'S ANSWER DATED AUGUST 14, 2015

EXHIBIT 3: RESPONDENT'S LETTER OF RESIGNATION

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

BRUCE R. MOSKOS,

a Justice of the New Lisbon Town Court,
Otsego County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (S. Peter Pedrotty, Of Counsel) for the Commission

Michael A. Santo for the Respondent

The respondent, Bruce R. Moskos, a Justice of the New Lisbon Town Court, Otsego County, was served with a Formal Written Complaint dated March 28, 2016, containing one charge. The Formal Written Complaint alleged that on three

occasions respondent asserted the prestige of judicial office while attempting to enter a county-owned building in possession of a firearm, in violation of local law.

Respondent filed a Verified Answer dated April 14, 2016.

On August 31, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On September 15, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the New Lisbon Town Court, Otsego County, since 1981. Respondent's current term expires on December 31, 2017. He is not an attorney.

2. On three separate occasions in July 2013, May 2015 and June 2015, as set forth below, respondent asserted the prestige of judicial office while attempting to enter an Otsego County-owned building in possession of a firearm, in violation of a local law prohibiting the possession of weapons in county buildings.

3. The Meadows Office Complex (hereinafter "the Meadows") is a building owned by Otsego County and located in the Town of Middlefield, Otsego County. It houses offices of the Otsego County Board of Elections and the Department of Social Services, among other county departments.

4. At all times relevant to the matters herein, a sign was posted by the exterior door to the public entrance of the Meadows, stating “No Weapons Permitted.” Posted below this sign was a copy of County of Otsego Local Law No. 2 of 1995, titled “A Local Law Banning Possession of Firearms and Other Dangerous Weapons in Otsego County Buildings” (hereinafter “Local Law”).

5. The Local Law prohibits, *inter alia*, “any individual from bearing or having in his/her possession, either openly or concealed, any firearm ... in any building owned, leased, or operated by the County of Otsego,” and further states, “This local law shall not apply to law enforcement officials only” (emphasis in original). Failure to comply with the Local Law is punishable by confinement in the Otsego County Correctional Facility for a term not to exceed three months and/or a fine not to exceed \$500.

6. At all times relevant to the matters herein, a walk-through metal detector was located just inside the public entrance to the Meadows.

7. At all times relevant to the matters herein, respondent possessed a license to carry a concealed firearm and carried a .380-caliber Ruger pistol in his pants pocket.

The July 2013 Incident

8. On July 10, 2013, respondent entered the public entrance to the Meadows and started to walk around the metal detector without going through it. Security Officer B. Eric Ashley stopped respondent and advised him that he had to empty

his pockets and walk through the metal detector before proceeding. Respondent replied that he was not required to do so because he was a judge.

9. At one point during this exchange, respondent told Mr. Ashley, in sum or substance, that he knew Deputy Chief Administrative Judge Michael Coccoma.

10. Ultimately, respondent emptied some items from his pockets and walked through the metal detector, setting off the alarm. Mr. Ashley used a handheld metal detector and discovered respondent's pistol in his pocket. Respondent asserted to Mr. Ashley that he was permitted to bring the pistol into the building because he was a judge. Mr. Ashley told respondent that he could not bring the gun into the building. When respondent repeated that he should be allowed to enter the building with his pistol, Mr. Ashley directed respondent's attention to the "No Weapons Permitted" sign and the posted Local Law.

11. Respondent left the building and returned several minutes later without the pistol and was permitted to enter the building.

12. At no time in his conversations with Mr. Ashley did respondent raise his voice or display anger.

The May 2015 Incident

13. In May 2015 respondent entered the public entrance to the Meadows and started to walk around the metal detector without going through it. Security Officer Chris Trong, who at the time was busy screening several other individuals, directed respondent to stop and return to the metal detector. Respondent replied, "It's okay, I'm a

judge,” and attempted to proceed around the metal detector. Mr. Trong again directed respondent to return to the metal detector, which respondent did.

14. After Mr. Trong finished screening the other individuals, respondent twice attempted to walk around the metal detector while telling Mr. Trong, “I’m a judge. Everybody knows me.” At one point, Mr. Trong stepped in front of respondent to block his path and respondent placed his hand lightly on Mr. Trong’s chest, but did not push or otherwise exert force. After Mr. Trong advised respondent that he would call the sheriff’s department if respondent did not comply, respondent emptied some items from his pockets, but not his pistol. He then walked through the metal detector, setting off its alarm.

15. Mr. Trong used a handheld metal detector and detected respondent’s pistol in one of his pockets. When Mr. Trong asked respondent what was in his pocket, respondent replied that he needed to go to his car, but did not tell Mr. Trong that the item in his pocket was a pistol. Respondent then left the building and returned several minutes later without the pistol.

16. At no time in his conversations with Mr. Trong did respondent raise his voice or display anger.

The June 2015 Incident

17. On June 10, 2015, respondent entered the public entrance of the Meadows. Mr. Ashley recognized respondent and asked if he was carrying his pistol. Respondent said yes and stated that he was permitted to carry his firearm into the

building.

18. Mr. Ashley directed respondent's attention to the "No Weapons Permitted" sign and the posted Local Law. Respondent stated that he had just left another county building where he had been permitted to carry his pistol inside.

19. Mr. Ashley told respondent he could either secure his pistol in his vehicle or secure it in the office of an investigator for the Otsego County District Attorney's Office. Respondent chose the latter, and Mr. Ashley escorted respondent to the office of Investigator William Davis.

20. Respondent identified himself to Mr. Davis as New Lisbon Town Justice Bruce Moskos and stated that he visits courts all over the state and that he frequently enters government and/or court buildings, without having to surrender his pistol, including Otsego County buildings and buildings in New York City. Respondent further stated that he had just attempted to visit Judge Burns during lunchtime and asked whether Mr. Ashley and Mr. Davis would subject Judge Coccoma or Judge Burns to the same treatment. Respondent was referring to Otsego County Court Judge Brian Burns.

21. Mr. Davis secured respondent's pistol in a lockbox. Respondent later returned to Mr. Davis' office to retrieve his pistol.

Additional Factors

22. Respondent has no previous disciplinary history over his lengthy career on the bench.

23. Respondent has been cooperative throughout the Commission's

inquiry.

24. While respondent now understands that his conduct in identifying himself as a judge during these three incidents was inappropriate and created at least the appearance that he was attempting to use the prestige of his judicial office to enter the building with his pistol, respondent avers that he did so because he believed at the time that his status as a judge exempted him from security procedures in county buildings.

25. Respondent avers that he does not recall seeing the sign of the Local Law posted on the entrance to the Meadows, but acknowledges that he nevertheless should have been aware of the law and the sign.

26. Respondent avers – and the Administrator has no evidence to the contrary – that following the June 10, 2015 incident, he has not carried or attempted to carry his pistol into Otsego County buildings. Respondent avers that he will continue to refrain from such activity 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 100.2(C) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

On three occasions respondent asserted his judicial position in an attempt to

circumvent a county-owned building's security procedures and avoid being compelled to relinquish his firearm. His actions, as stipulated, "created at least the appearance that he was attempting to use the prestige of his judicial office to enter the building with his pistol," contrary to County of Otsego Local Law No. 2 of 1995. By engaging in such conduct, he violated his ethical duty to respect and comply with the law, to avoid even the appearance of impropriety, and to refrain from using his judicial status to advance his private interests (Rules, §§100.2[A], 100.2[C]).

Throughout the incidents, respondent repeatedly referred to his judicial status and asserted that his judicial position exempted him from security procedures and compliance with the local law prohibiting possession of a weapon in county buildings. Notwithstanding his professed belief that, as a judge, he was entitled to special treatment for security purposes, the local law, which was posted at the entrance to the building, exempts "law enforcement officials only." Since that law was enacted in 1995, it seems unlikely that respondent – as a judge for 35 years and a gun owner – would have been unfamiliar with it. It was specifically brought to his attention in the first two incidents. Indeed, the fact that in the first two incidents he did not reveal that he had a gun or produce it when he emptied his pockets suggests that he was attempting to conceal the gun because he knew that bringing it into the building was prohibited. Regardless of whether the security procedures were enforced on other occasions, he was obligated to comply with those requirements when they were properly enforced by security officials. Even if he was not abusive or discourteous in confronting the security officers, he should

have recognized that his repeated insistence that his judicial status entitled him to special treatment would place them in a more difficult position in carrying out their assigned responsibilities.

At the very least, the first incident put respondent on notice that he was expected to comply with the security procedures in place at that location. Thus, each subsequent incident was increasingly improper because of his prior experience. If he believed that he should not be subjected to the same procedures and standards required of the general public, he could have pursued the subject within the law by appealing to officials who might have given him an exception to the law, rather than by confronting the security personnel on subsequent occasions with the same arguments and assertions of his judicial status. Moreover, his gratuitous allusions to two administrative judges, apparently to bolster his assertion of special influence, appeared to assume that those individuals would receive special treatment because of their judicial status, thereby extending the appearance of impropriety to the judiciary as a whole.

In accepting the stipulated sanction, we note that 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 and impair the public’s respect for the judiciary. We also note that despite his efforts to circumvent the required procedures and avoid complying with the law, respondent ultimately cooperated with security personnel and relinquished his firearm, and he has agreed he will not attempt to bring his gun into

county buildings in the future.

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

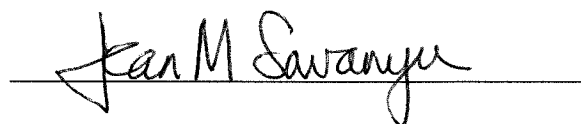
Mr. Belluck, Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Judge Klonick, Mr. Stoloff and Judge Weinstein concur.

Judge Leach did not participate.

CERTIFICATION

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

Dated: October 3, 2016

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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2, of
the Judiciary Law in Relation to

LISA J. POWERS,

a Justice of the Clare Town Court,
St. Lawrence 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci, Of Counsel) for the Commission

Dumas and Narrow, PC (by Edward F. Narrow) for Judge Powers

The matter having come before the Commission on February 4, 2016; and
the Commission having before it the Stipulation dated January 6, 2016, with the appended
exhibit; and Judge Powers having tendered her resignation from judicial office on

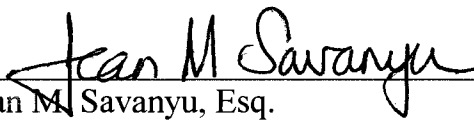
December 9, 2015, by letter dated December 1, 2015, effective immediately, and having affirmed that she will neither seek nor accept judicial office at any time in the future, and having waived confidentiality as provided by Judiciary Law §45 to the limited extent that the Stipulation will become public upon being signed by the signatories and that 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. Harding was not present.

Dated: February 8, 2016



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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2,
of the Judiciary Law in Relation to

LISA J. POWERS,

STIPULATION

a Justice of the Clare Town Court,
St. Lawrence County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H. Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Lisa J. Powers and her attorney, Edward F. Narrow, of Dumas and Narrow, P.C.

1. Lisa J. Powers has been a Justice of the Clare Town Court, St. Lawrence County, since January 7, 2015. Her current term expires on December 31, 2019. Judge Powers is not an attorney. At times relevant to the allegations herein, she was employed at the North Country Savings Bank in Canton, New York.

2. Judge Powers was apprised by the Commission in December 2015 that it was investigating a complaint that she had been charged with third degree grand larceny, a felony, for allegedly stealing more than \$4,200 from the Russell Pee Wee Association, of which she was treasurer.

3. On December 15, 2015, Judge Powers pled guilty to a reduced charge of fourth degree grand larceny, also a felony, admitting that between October 2007 and July 2014, she stole an amount exceeding \$1,000 from bank accounts belonging to the Russell Pee Wee Association at the North Country Savings Bank, where she was employed.

4. On December 9, 2015, Judge Powers tendered to the Clare Town Board her resignation from judicial office by letter dated December 1, 2015, a copy of which is annexed as Exhibit 1. Her resignation was effective immediately.

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.

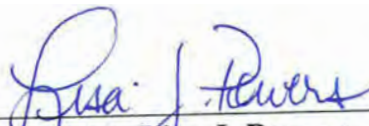
6. Judge Powers affirms that, having vacated her judicial office, she will neither seek nor accept judicial office at any time in the future.

7. Judge Powers understands that, should she abrogate the terms of this Stipulation and hold any judicial position at any time in the future, the Commission's investigation of the complaint would be revived, she would be served with a Formal Written Complaint on authorization of the Commission, and the matter would 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. Judge Powers 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.

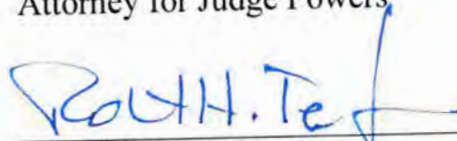
Dated: 12/23/15


Honorable Lisa J. Powers

Dated: 12/23/15


Edward F. Narrow
Dumas and Narrow, PC
Attorney for Judge Powers

Dated: Jan. 6, 2016


Robert H. Tembeckjian
Administrator and Counsel to the Commission
(Cathleen S. Cenci, Of Counsel)

THE FOLLOWING EXHIBIT IS AVAILABLE AT WWW.CJC.NY.GOV
EXHIBIT 1: JUDGE'S LETTER OF RESIGNATION

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

CAROL A. RUMENAPP,

a Justice of the Milford Town Court,
Otsego County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah¹

APPEARANCES:

Robert H. Tembeckjian (Cathleen S. Cenci and Thea Hoeth, Of Counsel)
for the Commission

Rothermel & Wilson, PLLC (by Richard A. Rothermel, Esq.) for the
Respondent

The respondent, Carol A. Rumenapp, a Justice of the Milford Town Court,

¹ Ms. Yeboah was appointed to the Commission on November 29, 2016. The vote in this matter was taken on October 20, 2016.

Otsego County, was served with a Formal Written Complaint dated August 9, 2016, containing one charge. The Formal Written Complaint alleged that respondent (i) engaged in prohibited political activity by circulating a designating petition for another candidate for elective office and (ii) improperly attested to the signatures on two other designating petitions. Respondent filed a Verified Answer dated August 18, 2016, in which she admitted all of the allegations in the Formal Written Complaint.

On September 28, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On October 20, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Milford Town Court, Otsego County, since January 1, 2004. Her current term expires on December 31, 2019. Respondent is not an attorney, a notary public or a commissioner of deeds.

2. As set forth below, in July 2015 respondent lent the prestige of judicial office to advance her private interests as a candidate for judicial office and the private interests of two other candidates for elective office, engaged in prohibited partisan political activity and failed to respect and comply with the law in that:

A. Respondent carried and/or circulated a Republican Party designating

petition for Robert E. Moore, Sr., a candidate for election as Milford Town Supervisor, and requested and/or collected up to 20 signatures in support of Mr. Moore's candidacy;

B. Respondent attested as "Town Justice" to the signatures on a Conservative Party designating petition for her own town justice candidacy and for that of Timothy Knapp as candidate for town tax collector, notwithstanding that the law and the petition itself require attestation by a "Notary Public or Commissioner of Deeds," and respondent is neither; and

C. Respondent attested as "Town Justice" to the signatures on an Independence Party designating petition for her own town justice candidacy and for that of Timothy Knapp as candidate for town tax collector, notwithstanding that the law and the petition itself require attestation by a "Notary Public or Commissioner of Deeds," and respondent is neither.

3. Respondent and Robert E. Moore have known each other for many years. In the 1980's, Mr. Moore was a town justice and asked respondent to be his court clerk. She served in that capacity for approximately ten years. Respondent and Mr. Moore were also co-judges in the Milford Town Court for approximately nine years before he retired as a judge in 2013.

4. In July 2015 Mr. Moore was seeking election to the position of Milford Town Supervisor. In 2015 respondent was a candidate for re-election as Milford Town Justice, whose judicial salary is set by the town supervisor and members of the town board.

5. On July 3, 2015, at the request of Mr. Moore, respondent carried Mr.

Moore's designating petitions to the homes of numerous Town of Milford residents who were listed as registered members of the Republican Party, and obtained the signatures of 20 individuals on the designating petitions. Respondent was accompanied to these homes by Timothy Knapp, who was then a candidate for re-election as the Milford Town Tax Collector.

6. On July 3, 2015, respondent signed the "Statement of Witness" portions of Mr. Moore's designating petitions, indicating that she witnessed all of the signatures on the petitions. Mr. Knapp had also witnessed the signatures being placed on the petitions, but he did not sign the petitions as a witness. Respondent gave the designating petitions to Mr. Moore, who filed or caused them to be filed with the Otsego County Board of Elections.

7. On July 6, 2015, respondent attested to the signatures on a Conservative Party designating petition for herself as candidate for town justice and for Timothy Knapp as candidate for Milford Town Tax Collector, in the portion of the form designated "Notary Public or Commissioner of Deeds," notwithstanding that respondent is neither a notary public nor a commissioner of deeds. Instead, respondent wrote her title as "Town Justice, Town of Milford" and that her "Commission expires 12/31/15," when in fact it was her term as town justice that was due to expire on that date.

8. On July 6, 2015, respondent attested to the signatures on an Independence Party designating petition for her own town justice candidacy and for that of Timothy Knapp as candidate for Milford Town Tax Collector, in the portion of the form designated "Notary Public or Commissioner of Deeds," notwithstanding that

respondent is neither a notary public nor a commissioner of deeds. Instead, respondent wrote her title as “Town Justice, Town of Milford” and that her “Comm. expires 12/31/15,” when in fact it was her term as town justice that was due to expire on that date.

Additional Factors

9. Respondent has been cooperative throughout the Commission’s inquiry.

10. Respondent acknowledges that, having previously run for election and re-election to judicial office, she knew or should have known that her political activity on behalf of other candidates in 2015 was prohibited under the Rules. She assures the Commission that she will not repeat this conduct.

11. Respondent also acknowledges that, although she believed her judicial status authorized her to witness certain documents in her judicial capacity, any such authority did not apply to the facts herein, in that she knew she was not acting in her judicial capacity when she signed the Conservative and Independence party petitions. Moreover, respondent is not a notary or a commissioner of deeds and was not legally authorized to sign the candidates’ designating petitions as such. She assures the Commission that she will not repeat this conduct.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.5(A)(1)(c), 100.5(A)(1)(d) and 100.5(A)(1)(e) 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.

Judges and judicial candidates are strictly prohibited from engaging in political activity except for certain, limited activity in connection with a candidate's own campaign for judicial office during a prescribed "window period" (Rules, §§100.5[A][1], 100.0[Q]). Even during a candidate's "window period" of permitted political activity, he or she may not, under the ethical standards, engage in partisan political activity, participate in another candidate's campaign for office or publicly endorse another candidate for public office (Rules, §100.5[A][1][c], [d], [e]). Respondent has acknowledged that by carrying a designating petition on behalf of a candidate for town supervisor while she was a candidate for re-election as town justice, she engaged in conduct that was inconsistent with these ethical mandates.

Although there is no specific provision in the Rules addressing nominating or designating petitions, the Advisory Committee on Judicial Ethics has stated that circulating a petition for another candidate "is tantamount to an endorsement of that person" and is, therefore, prohibited, unless the judge's name also appears on the petition as a candidate (Adv Ops 09-148, 98-99, 97-75, 91-96). Collecting signatures on a designating petition for another candidate clearly constitutes partisan political activity and "participating in" the campaign of the candidate, conduct that is explicitly barred by

the ethical rules (Rules, §100.5[A][1][c], [d]). Such conduct may warrant public discipline, especially where the judge also engaged in other improper activity (*see Matter of King*, 2008 NYSCJC Annual Report 145 [disciplining a judge who circulated a nominating petition for another candidate and engaged in additional prohibited political activity]). Moreover, a judge's political activity in support of a candidate for town supervisor, a public official who, along with the members of the town board, determines the judge's salary, necessarily creates an appearance of impropriety.

Respondent has also acknowledged that three days later, she failed to comply with the law by improperly attesting to signatures on two other designating petitions, which listed both herself and a candidate for another office. By law, signatures on a designating petition must be either witnessed by "a witness who is a duly qualified voter of the state and an enrolled voter of the same political party," or authenticated by a notary or commissioner of deeds, who must administer an oath to the signatories (Election Law §6-132[2] and [3]). Witnessing a petition under the first option requires a sworn statement that the subscribing witness is an enrolled voter in the same party for which signatures are being sought. Because of that requirement, respondent, who had affirmed that she was an enrolled member of the Republican Party in witnessing the petition for a town supervisor candidate, could not similarly witness the signatures on petitions of other political parties. Instead, she signed the joint petitions on the portion of the form requiring attestation by a "Notary Public or Commissioner of Deeds," notwithstanding that she holds neither qualification. Above a line stating "Signature and Official Title of Officer Administering Oath," she signed as "Carol A. Rumenapp, Town

Justice, Town of Milford,” and wrote beneath that: “My Commission expires 12/31/15,” which was the expiration date of her term as town justice. The statement she signed attested that the signatories had signed in her presence and were “duly sworn” by her.

A town or village justice is not a notary public simply by virtue of holding judicial office, although such judges have limited powers to administer an oath, make an acknowledgment and take a deposition (*see* Real Property Law §298; CPLR 2309[a], 3113[a][1]). Thus, respondent’s attestation on the petitions as “Town Justice” did not comply with the statutory requirements. *See Russell v. Board of Elections*, 45 NY2d 800, 802 (1978) (holding that a town justice’s authentication of a nominating petition was invalid because of the “unambiguous” language of the Election Law provision limiting officials who can sign such statements). On the facts presented, we cannot conclude that respondent, who is not a lawyer, acted with an intent to mislead or engage in fraud; rather, the stipulated facts suggest that she acted in the mistaken belief that she had authority to authenticate the signatures in this fashion since her judicial status authorized her to administer oaths and witness certain documents in her judicial capacity. We note that if respondent were a notary, she could properly have authenticated the signatures on a petition of any political party during her applicable window period as a candidate (*see* Adv Ops 15-145, 03-42, 98-99).

Respondent has stipulated that she will not repeat this conduct and has acknowledged that, as a judge for eleven years at the time of these events, she knew or should have known that her political activity on behalf of other candidates was prohibited under the Rules. In admonishing respondent, we remind every judge and judicial

candidate of the obligation to know and abide by the ethical rules as interpreted and applied by the Commission and the Advisory Committee.

We are constrained to reply to our colleague Mr. Emery's opinion that the ethical rules barring such activity impermissibly tread on First Amendment rights. This state's highest court has held that New York's restrictions on political activity by judges and judicial candidates – including the specific rules cited in the instant case – are constitutionally permissible because they are “narrowly tailored to further a number of compelling state interests, including preserving the impartiality and independence of our state judiciary and maintaining public confidence in New York State's court system” (*Matter of Raab*, 100 NY2d 305, 312 [2003]). In our view, nothing in the recent Supreme Court decision cited by the dissent, *Williams-Yulee v. Fla. Bar*, 135 S Ct 1656, 191 L Ed2d 570 (2015), permits a judge to circulate a designating petition for another candidate, as respondent did here, or otherwise weakens or diminishes the Court of Appeals' holding in *Raab*. Indeed, in upholding a Florida rule prohibiting judicial candidates from personally soliciting campaign contributions, the Supreme Court in *Williams-Yulee* applied an analysis similar to that in *Raab* while affirming that political speech by judicial candidates can be regulated by narrowly tailored restrictions that serve a compelling state interest.

While our dissenting colleague treats the *Raab* decision as though the Court of Appeals intended to limit application of the challenged restrictions to the particular political activities in *Raab*, we find nothing in the Court's rationale in *Raab* to support such a conclusion or to suggest that circulating a petition for another candidate would be

permitted under the applicable rules. Though the judge's conduct in *Raab* was different, the rationale for these restrictions is the same: to further the state's interests in preserving the impartiality and independence of our state judiciary and maintaining public confidence in the state's court system. These mandatory limitations on political activity not only serve to promote the public's confidence that judges are free of even the appearance of bias, favoritism or corruption that might arise from political entanglements, but to protect judges themselves from pressures by party leaders or others to engage in partisan activity on behalf of a political organization or candidate.

The Commission is not a court, and it is our role to interpret and apply the ethical rules, not to make broad constitutional pronouncements. To the extent that any aspect of the rules is constitutionally challenged, we believe that the courts are in the best position to make such a determination.

Guided by *Raab* and in the absence of contrary controlling precedent, we believe, as the Commission has previously stated, that "the rules governing political activity for judges and judicial candidates seek to achieve a reasonable balance between the goals of prohibiting judges from being involved in politics and permitting judges to campaign effectively," while respecting their First Amendment rights (*Matter of Campbell*, 2005 NYSCJC Annual Report 133).

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

Mr. Belluck, Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Judge

Klonick, Judge Leach and Mr. Stoloff concur.

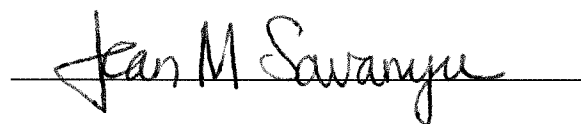
Mr. Emery and Judge Weinstein vote to reject the Agreed Statement of Facts and file dissenting opinions.

Ms. Yeboah did not participate.

CERTIFICATION

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

Dated: December 30, 2016

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

CAROL A. RUMENAPP,

a Justice of the Milford Town Court,
Otsego County.

DISSENTING OPINION
BY MR. EMERY

INTRODUCTION

This case coalesces two issues of vital importance to this Commission that I have frequently addressed during my 13 years as a member: first, the right of a judge or judicial candidate to participate in political expression guaranteed by the First Amendment, fettered only to the extent compelled by the state interest in integrity of the judiciary, and second, our responsibility as an independent Commission to reject a negotiated *proposed* disposition if the result is inconsistent with precedent or otherwise unacceptable.

In this case, the majority finds that a single act of political activity having little or no connection to maintaining the integrity of the judiciary – collecting signatures on a petition for another candidate – constitutes misconduct. Because I believe that respondent’s “political” activity is constitutionally protected expression that does not even run afoul of ethical prohibitions and, certainly, does not threaten judicial integrity, I vote to reject the Agreed Statement of Facts. I do so even though the respondent has

agreed with Commission staff to accept a public sanction in order to avoid further proceedings in her case. This charge against her should be dismissed.

I. A JUDGE HAS A RIGHT TO ENGAGE IN POLITICAL EXPRESSION AND ASSOCIATION WITHIN CONSTITUTIONAL STRICTURES

Our duty is to interpret the Rules Governing Judicial Conduct (“Rules”) in a way that is consistent with constitutional strictures. No precedent of the Supreme Court, the Court of Appeals or any other influential court permits the conduct in this case to be deemed sanctionable misconduct.

The Supreme Court has jealously policed any government intrusions into the rights of citizens to participate in the political process. The Court has repeatedly affirmed that a compelling governmental interest is the only basis on which to legitimately diminish the right to full political participation, and then the method of any such diminution must be the least restrictive one available that achieves the government’s compelling need. We start from this basic proposition when we evaluate any compromise or abridgement of the right to full political participation.

A. HISTORY AND BACKGROUND

Every judge of this state’s unified court system is required to “refrain from inappropriate political activity,” as described in Section 100.5 of the Rules. Essentially, judges are prohibited from “directly or indirectly” engaging in any political activity except, to a strictly limited extent, activity in connection with the judge’s own campaign for judicial office during a prescribed “window period” before and after a nominating convention, primary or general election (Rule 100.5[A][1] and [2]). These rules and their

interpretations are complex and only sophisticated election practitioners even pretend to be able to apply them.

Among other restrictions, a judge or judicial candidate may not endorse other candidates or participate in their campaigns, make speeches on behalf of a political organization or candidate, attend political gatherings, or solicit funds for or make a contribution to a political organization or candidate (Rule 100.5[A][1][c], [d], [e], [f], [g], [h]). This particular combination of restrictions, the New York Court of Appeals has told us, is designed to ensure “that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption,” while simultaneously “respect[ing] the First Amendment rights of judicial candidates and voters” (*Matter of Raab*, 100 NY2d 305, 315 [2003]). Applying a strict scrutiny analysis and finding a compelling state interest, the Court in *Raab* rejected a First Amendment challenge to the political activity restrictions at issue set forth above.¹ *Raab* was decided shortly after a Supreme Court decision invalidated a Minnesota rule prohibiting judicial candidates from “announcing” their views on disputed legal and political issues (*Republican Party of Minn. v. White*, 536 US 765 [2002]).

Last year the Supreme Court addressed the constitutionality of another restriction on political activity by judicial candidates, upholding the application of a Florida rule that precluded otherwise protected speech (personal solicitation of campaign contributions). *Williams-Yulee v. Fla. Bar*, 135 S Ct 1656, 191 L Ed2d 570 (2015).

¹ Prior to serving on this Commission, I represented the respondent-judge in *Raab* before the Commission and the Court of Appeals.

Once again, accepting the basic proposition that strict scrutiny requires a compelling interest as a basis to regulate judicial speech in campaigns, the Court concluded that the rule in Florida was narrowly tailored to promote the state's compelling interest in a fair and impartial judiciary free from corruption and the appearance of corruption. Writing for the majority, Chief Justice Roberts applied a stringent First Amendment analysis to the rule at issue, carefully weighing the competing interests and issues at stake.

While opining that judicial candidates may be treated differently from campaigners for political office since “the role of judges differs from the role of politicians,” he underscored the narrow scope of the Court’s ruling on the particular facts presented, stating: “We have emphasized that ‘it is the rare case’ in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. ... This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny” (*supra*, 191 L Ed2d at 585, 584).²

² In the wake of *White* and now *Williams-Yulee*, states facing constitutional challenges to restrictions on political activity by judges and aspiring judges have applied a rigorous First Amendment analysis in grappling with these issues. A recent case, illustrating the difficulty of navigating these cross-currents, is *Winter v. Wolnitzek*, 834 F3d 681 (6th Cir 2016), where the Sixth Circuit, considering challenges to eight separate provisions in Kentucky’s Code of Judicial Conduct, provided a thorough and thoughtful analysis of the constitutional merits of each provision. Ultimately, the court struck down three of the challenged provisions (regarding campaigning, speeches and misleading statements) as facially invalid, upheld three others, upheld one provision as constitutionally valid on its face but not as applied, and remanded one for further consideration. Among other recent cases, see, e.g., *Wolfson v. Concannon*, 811 F3d 1176 (9th Cir 2016), *cert den*, 2016 LEXIS 6222 (10/11/16) (Ninth Circuit, sitting en banc, held that the challenged provisions in Arizona’s Code of Judicial Conduct were neither constitutionally underinclusive or overbroad [including, *inter alia*, bans on soliciting funds or making speeches for a political organization or candidate, making contributions to a candidate or political organization in excess of permitted amounts, publicly endorsing or opposing other candidates, and actively taking part in any political campaign other than his/her campaign for judicial office]); *In re Judicial Campaign Complaint Against O’Toole*, 24 NE3d 1114 (Ohio

Buttressed by *Raab* and *Williams-Yulee*, the Commission has continued to punish judges for political activity in contexts far beyond the limited, factually different scenarios of those cases, without engaging in any analysis of whether a compelling governmental interest justified precluding the specific conduct at issue.³ And in finding misconduct, the Commission continues in many cases – as here – to rely on *ad hoc* opinions by the Advisory Committee on Judicial Ethics that conclude, without providing

2014) (applying strict scrutiny, Ohio Supreme Court held that a provision banning campaign statements that, “if true, ... would be deceiving or misleading to a reasonable person” is unconstitutional because it chills the exercise of legitimate First Amendment rights); *Siefert v. Alexander*, 608 F3d 974, *petition for re-hearing en banc den*, 619 F3d 776 (7th Cir 2010), *cert den*, 131 S Ct 2872 (2011) (applying strict scrutiny, Seventh Circuit upheld bans in the Wisconsin Code of Judicial Conduct on endorsements and solicitation of contributions but held that prohibiting judges and judicial candidates from belonging to a political party and announcing their party affiliation was unconstitutional); *Bauer v. Shepard*, 620 F3d 704 (7th Cir 2010) (rejecting challenges to provisions in Indiana’s Code of Judicial Conduct prohibiting judges and judicial candidates from holding leadership roles in political parties and making speeches on behalf of a political organization).

³ *E.g.*, *Matter of Fleming*, 2016 NYSCJC Annual Report 83 (contributions by judge’s law firm and spouse); *Matter of Sakowski*, 2016 NYSCJC Annual Report 178 (contributions by judge and his law firm); *Matter of Burke*, 2015 NYSCJC Annual Report 78 (contributions by judge’s law firm); *Matter of Kelly*, 2012 NYSCJC Annual Report 113 (contributions by judge’s law firm); *Matter of Michels*, 2012 NYSCJC Annual Report 130 (misleading campaign literature); *Matter of McGrath*, 2011 NYSCJC Annual Report 120 (campaign literature conveyed bias); *Matter of Chan*, 2010 NYSCJC Annual Report 124 (personal solicitation of campaign contributions and campaign literature that was misleading and conveyed bias); *Matter of Herrmann*, 2010 NYSCJC Annual Report 172 (nominated a candidate at a caucus); *Matter of Yacknin*, 2009 NYSCJC Annual Report 176 (solicited political support in court from an attorney appearing before her); *Matter of King*, 2008 NYSCJC Annual Report 145 (served as a party chair, circulated petition for another candidate and displayed signs on his property endorsing other candidates); *Matter of Kulkin*, 2007 NYSCJC Annual Report 115 (misrepresented facts about his opponent); *Matter of Spargo*, 2007 NYSCJC Annual Report 127 (spoke at party fund-raiser and engaged in “unseemly” political activity including distributing gift certificates while campaigning and buying drinks for patrons at a bar when he was a candidate); *Matter of Farrell*, 2005 NYSCJC Annual Report 159 (made phone calls supporting another candidate and made a prohibited payment to a political organization); *Matter of Campbell*, 2005 NYSCJC Annual Report 133 (endorsed other candidates); *Matter of Schneier*, 2004 NYSCJC Annual Report 153 (improper use of campaign funds).

even lip service to the First Amendment interests at issue, that particular scenarios are inconsistent with the political activity rules and therefore prohibited (my recent dissents in *Matter of Fleming* and *Matter of Sakowski*, *supra* n. 3, cite numerous examples).

Without the rigorous First Amendment compliance required both by *Raab* itself and by *White* and *Williams-Yulee*, the Commission continues to view *Raab* and *Williams-Yulee* as a blanket endorsement of every pre-existing judicial campaign restriction imposed by New York's rules and interpreted by the Advisory Committee, no matter how picayune, as a license to inflict public misconduct penalties on judges who engage in any activity that has a whiff of politics.

B. CONSTITUTIONAL ANALYSIS

Rather than read *Williams-Yulee* as a sledgehammer that allows the Commission to crush virtually any political activity that appears “desirable” as a matter of preferred judicial policy, we must view these precedents as a scalpel that carves respect for the Court's clear message: that judicial campaign speech and conduct are core First Amendment activity, that a compelling interest must be identified if a narrow restriction is to be upheld, that strict scrutiny requires analysis of the campaign activity at issue to determine whether the compelling governmental interest (integrity of the judiciary) legitimately requires restriction of that particular activity, and that the rule restricting judicial speech is the least restrictive available to support the compelling governmental interest at stake.

Plainly, *Williams-Yulee* did not address any campaign activity beyond judicial candidates directly soliciting funds. Notably, neither *Williams-Yulee* nor *Raab*

addressed the New York common practice of judicial candidates and sitting judges soliciting money through committees, knowing exactly who contributed, and soliciting funds through these same committees from lawyers who appear before the judge once elected.

Of course, the ultimate hypocrisy in our campaign regulatory scheme is the failure to restrict these donations in a meaningful way. Until we do, we will have no moral or legal high ground to restrict far more mundane and benign political judicial behavior, as we do now. Of course, privately we all acknowledge that donations from lawyers and entities to judges before whom they appear are the sanctified lifeblood of judicial campaigns even though such donations are plainly as corrupting as the solicitations in *Williams-Yulee*. But as long as we do not have public financing of campaigns, and despite recent limitations on the size of contributions, no one can handle the fundamental truth that New York cannot have judicial elections without such plainly corrupting contributions.

Beyond this glaring hypocrisy, which crystallizes the First Amendment over- and underbreadth defects of prohibiting far less corrosive campaign practices (*see Matter of Fleming, supra*, Emery Dissent; *Matter of Sakowski, supra*, Emery Dissent; *Matter of Herrmann, supra*, Emery Dissent; *Matter of Yacknin, supra*, Emery Dissent; *Matter of Spargo, supra*, Emery Concurrence/Dissent; *Matter of King, supra*, Emery Concurrence; *Matter of Farrell, supra*, Emery Concurrence; *Matter of Campbell, supra*, Emery Concurrence), neither *Williams-Yulee* nor *Raab* addresses the myriad campaign issues that the Advisory Committee and this Commission routinely prohibit. And those

controlling cases certainly never addressed the issue now before the Commission: carrying a petition to support a person's attempt to get on the ballot. Nothing in *Williams-Yulee* or *Raab* compels, let alone suggests, that strict scrutiny would uphold a broadly-worded ban on "partisan political activity" that was applied to prohibit ballot access petitioning.

This reasoning by the Commission tramples basic First Amendment principles. It clearly treads on the free expression and associational rights of the judge and does not serve any compelling interest, let alone a fair and impartial judiciary free from corruption or the appearance of corruption.

C. JUDGE RUMENAPP'S CONDUCT

Accepting an Agreed Statement of Facts, the majority publicly disciplines Judge Rumenapp for *circulating a petition* for a candidate for Town Supervisor, concluding that such conduct violates the ethical rules prohibiting a judge from engaging in "any partisan political activity" except for certain limited activity permitted in connection with his or her own campaign for judicial office (Rule 100.5[A][1][c]), "participating in" any other political campaign (Rule 100.5[A][1][d]) and "publicly endorsing" another candidate for public office (Rule 100.5[A][1][e]).

In the absence of any specific ethical rule addressing designating or nominating petitions, the majority bolsters its argument for misconduct by relying on language contained in a brief Advisory Committee letter-opinion, devoid of any probative analysis, opining that circulating petitions for another candidate "is tantamount to an endorsement of that person" and is therefore prohibited (Adv Op 09-148) (Determination,

p 6). Yet, only three months earlier the Committee had concluded that publicly voting for a candidate at a political caucus is permissible under the ethical rules (Adv Op 09-180). The Committee offers no explanation (and it would be difficult to contrive a reasonable one) why the former conduct – which could well be motivated by a desire to give voters a choice of candidates – constitutes an impermissible “endorsement” of a candidate while the latter conduct, which undeniably conveys a direct and public preference for a particular candidate, does not.

Collecting signatures to allow someone’s name to be placed on a ballot is a fundamental part of our political system – as is signing such a petition, which a judge is permitted to do under present guidelines whether or not the judge is a candidate at the time (*see* Adv Ops 89-89, 99-125). It is debatable whether carrying such a petition constitutes an “endorsement” of that individual. Carrying a petition only supports a person’s right to run for public office by being on the ballot, and neither circulating nor signing such a petition commits an individual to vote for the candidate. But unquestionably, it is core political expression that cannot be infringed by restrictions that bear no relationship to a narrowly defined compelling state interest in the integrity of the judiciary. In concluding that circulating petitions for another candidate falls under the broad category of prohibited “partisan political activity” (*e.g.*, Adv Ops 09-148, 15-145), the Advisory Committee does not even attempt to analyze the expressive and associational interests at stake.

Nor does the Committee – or the determination in this case – explain why such conduct is prohibited, even during a judge’s window period of permitted political

activity, during which it is perfectly proper for a judicial candidate to circulate a joint nominating or designating petition that includes her own name as a nominee along with the names of other candidates (Adv Op 97-75; *see also* Ops 91-94, 91-96, 98-99, 02-64, 09-148, 10-83). That advice, and other opinions permitting various political activities with and on behalf of other candidates on the same “slate” or “team” which are not deemed “an impermissible ‘endorsement’”⁴ (Adv Ops 15-121, 13-137/13-152/13-153), may well be based on a pragmatic recognition of the realities of a system that requires judges to run for office. But such *ad hoc*, byzantine interpretations of the ethical standards (as set forth in approximately 4000 Advisory Opinions that we expect judges to be familiar with) create a minefield for a well-intentioned judge attempting to avoid running afoul of the guidelines, not to mention serious over-breadth and under-inclusiveness defects.

Based on the Advisory Committee’s tortured guidelines, if Judge Rumenapp, a registered Republican who at the time of these events was seeking re-election as Town Justice and gathering signatures for her own candidacy, had been listed as a judicial candidate on the Republican Party petition for the Town Supervisor candidate, she could have carried the petition and collected signatures with impunity.

⁴ *E.g.*, a candidate may openly support other candidates at a political caucus (Adv Ops 09-180), may campaign door to door with and attend forums with other candidates on the same “slate” (Adv Ops 90-166, 91-94), may be on campaign literature and advertisements with such candidates, including literature that characterizes the slate as a “team” (Adv Ops 13-137/13-152/13-153, 90-166, 91-94, 91-107), may attend fund-raisers for such candidates (Adv Op 91-94), and may permit his or her campaign committee to establish Facebook connections with the campaign committees of other candidates on the same slate (Adv Op 15-121).

This is a sophistic distinction that bears little relationship to common sense let alone constitutional analysis. But because she was not listed on the petition as a candidate, the awesome machinery of this Commission geared up to prosecute her, and now holds her up to public opprobrium for conduct that she now has to allocute was wrong and promise never to repeat. This is like shooting a cannon to kill sparrows, especially since there is no indication that respondent engaged in any other activity in support of the candidate (such as carrying his campaign literature, wearing a campaign button, or urging voters to support him) while carrying the petition.⁵

At a time when this Commission's inadequate budget has strained our resources and led to an increasing backlog and growing delays in the timely completion of pending matters, the expenditure of our resources in pursuing this case with the zeal and effort necessary to impose public discipline is, in my view, particularly misguided. It sends the wrong message about the Commission's priorities and ability to differentiate between serious misconduct and hyper-technical, constitutionally doubtful transgressions.

II. OUR RESPONSIBILITY AS A COMMISSION

As an independent constitutionally consecrated Commission, our core

⁵ The other misconduct in the record before us relates to respondent's authentication of the signatures on two joint petitions that she properly carried three days later, conduct that seems to have been based on a mistaken, and not entirely unreasonable, belief about her authority. It is noteworthy that in *Russell v. Board of Elections*, 45 NY2d 800, 802 (1978), which invalidated signatures on a nominating petition because authentication by a town justice did not satisfy the statutory requirement of authentication by a notary public or commissioner of deeds (Election Law §6-132), two judges – Chief Judge Breitel and his soon-to-be successor Judge Cooke – strongly dissented, criticizing the majority for its “blind adherence to a rather vague statute,” noting that such justices have statutory authority to administer oaths and affirmations, and stating that “in any other context the authentication would be accepted.”

responsibility is protecting the public from judicial misconduct. To do so, we must determine the appropriate discipline in cases before us, without regard to public clamor or other extrinsic or pragmatic considerations unrelated to the merits of each particular case. While the Commission, in exercising that responsibility, has occasionally rejected negotiated stipulations for various reasons, in my view the Commission has too often abdicated its authority by accepting stipulations simply because the parties agreed. Of course the parties' agreement is a weighty factor in favor of acceptance; however, overarching values can and should trump that interest when the precedent does not serve our core function. I have expressed that view in dissenting from Commission determinations in numerous cases⁶ and do so again here.

Unlike courts and prosecutors whose functions and responsibilities are defined by concepts of separation of powers – executive contrasted with judicial functions – we are an administrative disciplinary agency that has final and ultimate constitutional responsibility for protecting the public from wayward jurists. By the same token, we are duty bound to protect judges from overreaching when staff pursues unsupportable charges, notwithstanding that we may have initially authorized such charges based on a staff report. We must not accept pragmatic dispositions when misconduct has not occurred.

As distinct from courts that are bound by separation of powers restraints

⁶ *Matter of Lustyik*, 2015 NYSCJC Annual Report 128; *Matter of Ridsdale*, 2012 NYSCJC Annual Report 148; *Matter of Valcich*, 2008 NYSCJC Annual Report 221; *Matter of Honorof*, 2008 NYSCJC Annual Report 133; *Matter of Clark*, 2007 NYSCJC Annual Report 93.

and the correlative deference to an independent public official – the prosecutor, our role, as an administrative disciplinary agency, gives us the ultimate responsibility over all aspects of the matters that come before us: unlike a judge, we are empowered, *inter alia*, to authorize investigations, to initiate investigations on our own motion, to authorize investigative testimony by a judge, to exercise guidance and oversight when our staff (led by an administrator whom we appoint) reports to us during investigations, to initiate formal proceedings by authorizing charges, and, only then, to determine the ultimate disposition and sanction.

A court cannot direct that a case be prosecuted; we can and do. Our institutional procedural safeguards ensure that once the Commission has authorized formal charges, the staff independently prosecutes those matters without our participation. But, having sole responsibility for the ultimate disposition, we properly exercise our authority throughout such proceedings when we appoint referees, decide motions and review stipulations. A sanction imposed pursuant to a stipulation containing a joint recommendation by the staff and the respondent-judge is just as much *our* responsibility and *our* decision as a disposition and sanction after a full adversary process.

Our authority to reject stipulations is not only inherent in the Commission's structure, but codified in the Judiciary Law, which, in providing for an agreed statement of facts in lieu of a hearing, spells out that such a stipulation is "[s]ubject to the approval

of the Commission” (Jud Law §44[5]⁷). Moreover, the plain language of the Agreed Statement itself underscores that the agreement is a recommendation subject to Commission approval and that it may be rejected. The Agreed Statement states that the parties “recommend” the disposition and that “if the Commission accepts” the stipulation, the sanction will be imposed without further submissions but “[i]f the Commission rejects” it, “the matter shall proceed to a hearing.”⁸

The Commission’s own determinations indicate that on numerous occasions Agreed Statements have been rejected. Notably, in several instances after an Agreed Statement was rejected, the Commission ultimately imposed a harsher sanction or more lenient sanction after a hearing was held. In one recent case where the Commission had rejected an Agreed Statement containing a recommendation of censure, the staff subsequently recommended the judge’s removal after a hearing was held. And even if the ultimate disposition after a hearing is the same sanction recommended previously by stipulation, the disposition is supported by a fuller record that adds credibility to the

⁷ The statute states: “Subject to the approval of the commission, the administrator and the judge may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission shall make its determination upon the pleadings and the agreed statement of facts.”

⁸ In *Matter of Abramson*, 2011 NYSCJC Annual Report 62, the administrator defended the Commission’s authority to reject a negotiated stipulation. In that case, the Commission rejected a stipulation recommending that the matter be closed in view of the judge’s resignation and proceeded to remove the judge; when the judge later argued that the stipulation should be enforced because the administrator, as “the Commission’s lawyer,” had signed it, the administrator argued that the stipulation was only “a joint recommendation,” underscored in his argument the separate and distinct roles of the administrator and the Commission at that stage of the proceedings, and stated that absent Commission approval, the stipulation was “a nullity.” The Court of Appeals denied the judge’s motion to enforce the stipulation on jurisdictional grounds (*Matter of Abramson*, 15 NY3d 936 [2010]).

result. These results show that rejecting a stipulation has value in ensuring that the ultimate result is fair and credible.

Facing the pressure of Commission proceedings, the significant expense of defending against misconduct charges at a hearing⁹ and the uncertain outcome if charges are contested, it is hardly surprising that a judge charged with misconduct might agree to any sanction that concludes the proceedings expeditiously and allows the judge to remain in office, even if the Commission might have imposed a more lenient disposition. It is sometimes the case that the Commission would dismiss or opt for a confidential caution even though staff exacted an agreement from a respondent that imposes a public finding of misconduct. Conversely, if the staff agrees to a sanction less than removal when removal might be required, it is our duty to the public to refuse to accede to such a negotiated result. As Commission members, we should be vigilant about such considerations and not rationalize a disposition simply because the judge and the staff have agreed to it. Again, agreement that produces a negotiated disposition is a weighty factor in favor of its acceptance. But it does not relieve us of our responsibility to assure that the ultimate result constitutes a fair and proper resolution.

Additionally, apart from the consequences to the particular judge, accepting a negotiated sanction that appears too harsh simply because the parties have jointly recommended it “undermines the significance of [the] sanction when it is appropriately imposed and undermines public confidence in the Commission’s ability to properly

⁹ For a modestly compensated part-time judge, these pressures may be particularly acute. According to the Town of Milford’s website, Judge Rumenapp’s salary in 2013 was \$8,325.

distinguish between serious wrongdoing and less serious misbehavior” (*Matter of Ridgeway*, 2010 NYSCJC Annual Report 205 [Belluck Dissent]). Accepting a questionable sanction “has the potential to unbalance the structure of penalties the Commission imposes [and] muddies our guidance as to the relative severity of different forms of misconduct” (*Matter of Williams*, 2016 NYSCJC Annual Report 231 [Weinstein Dissent]). Every public sanction imposed on particular facts becomes “precedent” that can be used to support an argument for a similar disposition in future cases, to the detriment of a respondent-judge.

The jurisprudence of this Commission is its bedrock, its claim to integrity. It should be jealously guarded and nurtured.

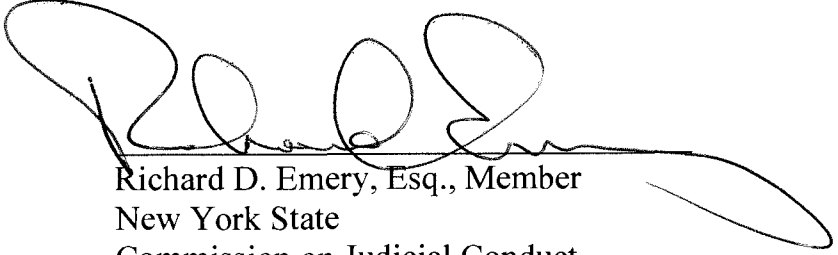
CONCLUSION

As I have previously stated, “too often the Commission has become a peripatetic watchdog of judicial campaign activity” (*Matter of Sakowski, supra; Matter of Fleming, supra; Matter of Chan, supra*, Emery Dissents). See *Matter of Michels, supra; Matter of Kelly, supra; Matter of McGrath, supra; Matter of Chan, supra; Matter of Herrmann, supra; Matter of Yacknin, supra; Matter of King, supra; Matter of Spargo, supra; Matter of Farrell, supra; Matter of Campbell, supra; Matter of Schneier, supra; Matter of Crnkovich*, 2003 NYSCJC Annual Report 99; *Matter of Raab, supra; Matter of Watson*, 100 NY2d 290 [2003]), and, in my view, our role should be hands off except in the clearest cases of profoundly corrosive political activity. This case, involving constitutionally protected conduct that poses little or no threat to public confidence in the

integrity of its judiciary, is not a case that warrants the Commission's intervention. We should not accept such a result even if the judge agrees.

For these reasons, I vote to reject the Agreed Statement and, respectfully, dissent.

Dated: December 30, 2016



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

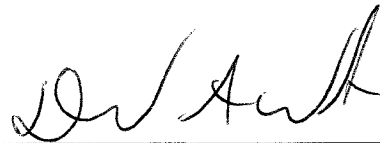
CAROL A. RUMENAPP,

a Justice of the Milford Town Court,
Otsego County.

DISSENTING OPINION
BY JUDGE WEINSTEIN

I express no view on the constitutional arguments made by Mr. Emery, which I believe concern matters outside the authority of this Commission. I agree with my dissenting colleague, however, that the Commission should give careful and independent scrutiny to the sanction imposed pursuant to an Agreed Statement of Facts. For the reasons well stated in Mr. Emery's opinion, I think the violations in this case are based on hyper-technical distinctions that do not impact in any material way the public's confidence in the judiciary. I believe they would have better been addressed via a private letter of caution.

Dated: December 30, 2016



Honorable David A. Weinstein, 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

ALAN M. SIMON,

a Justice of the Spring Valley Village
Court and the Ramapo Town Court,
Rockland 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.
Jodie Corngold
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

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

Kantor Davidoff Mandelker Twomey Gallanty & Kesten P.C. (by
Lawrence A. Mandelker) and Joseph A. Maria for the Respondent

The respondent, Alan M. Simon, a Justice of the Spring Valley Village
Court and the Ramapo Town Court, Rockland County, was served with a Formal Written

Complaint dated December 11, 2013, containing four charges. The Formal Written Complaint alleged that respondent: (i) threatened to hold a student working in the Spring Valley court clerk's office and other Village employees in contempt, threatened to arrest the student with no lawful basis and grabbed his arm (Charge I); (ii) imposed monetary sanctions against a legal services agency without basis or authority in law and was discourteous to the agency's attorneys (Charge II); (iii) threatened to hold various individuals in contempt without basis or authority in law for conduct occurring outside the courtroom (Charge III); and (iv) was rude and discourteous to various Village officials and employees (Charge IV). Respondent filed a verified Answer dated January 14, 2014.

Respondent was served with a Second Formal Written Complaint dated October 2, 2014, containing two charges. The Second Formal Written Complaint alleged that respondent engaged in impermissible political activity by permitting a candidate for Rockland County Executive to quote him in a campaign press release (Charge V) and was rude and discourteous to various Village officials and employees (Charge VI). Respondent filed a verified Answer dated October 31, 2014.

By Order dated November 25, 2014, the Commission designated Mark S. Arisohn, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 17, 18, 19, 20, 23 and 25, 2015; March 30 and 31, 2015; and April 1, 2015, in New York City. The referee filed a report dated July 14, 2015.

The parties submitted briefs with respect to the referee's report. Counsel to

the Commission recommended the sanction of removal, and respondent's counsel recommended dismissal of the charges or, if misconduct was found, a sanction less than removal.¹ On February 4, 2016, 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 Spring Valley Village Court since 2005 and a Justice of the Ramapo Town Court since 2011. His term in the Spring Valley Village Court expires in 2017, and his term in the Ramapo Town Court expires in 2019. He is an attorney and was admitted to practice law in New York in 1968.

As to Charge I of the Formal Written Complaint:

2. In July 2012 Maxary Joseph, while a student at John Jay College of Criminal Justice, was hired to work in the Spring Valley Village Court clerk's office after meeting with Mayor Noramie Jasmin. When Mr. Joseph began working in the clerk's office, the chief court clerk, Elsie Cheron, advised Mr. Joseph that he would be working with court documents. Mr. Joseph was aware that he was working on closed and sealed cases.

3. Ms. Cheron told all three Spring Valley justices that the mayor had hired Mr. Joseph as a student worker in the court clerk's office. Judges David Fried and

¹ On January 22, 2016, the Commission received a letter from an attorney on respondent's behalf, which respondent's counsel asked the Commission to consider on the issue of sanctions. Commission counsel argued that the letter should not be considered since character evidence should be presented at the hearing and most of the letter's contents would be inadmissible character evidence under New York law. The Commission determined that if misconduct was found, the letter would be reviewed and considered only on the issue of sanctions.

Christine Theodore reacted positively because the office needed help. Respondent told Ms. Cheron that he did not want a student worker in the clerk's office and asked for Mr. Joseph's resume. Ms. Cheron told respondent that she would try to get it.

4. The next day, when Mr. Joseph began working in the court clerk's office, respondent again asked Ms. Cheron for Mr. Joseph's resume, and she responded that she would try to get it but had been busy. Respondent told her that if Mr. Joseph did not leave or if she did not get him out of the office, respondent would physically remove him from the office. Respondent also told Ms. Cheron that he would hold her in contempt if she did not follow his orders. Respondent was angry and screamed at Ms. Cheron, and his voice was loud and threatening.

5. On July 18, 2012, Mr. Joseph's second day of work in the court clerk's office, respondent arrived at the courthouse in the afternoon in order to interview Mr. Joseph and make sure that he understood the confidential nature of court records. Mr. Joseph was working on court files of criminal and traffic cases, getting documents ready for scanning, removing staples and putting files in chronological order. When respondent saw Mr. Joseph, he told Mr. Joseph, in a loud, angry voice, to leave the office and that he did not belong there and was not supposed to be there.

6. Respondent then spoke to Ms. Cheron in the hallway near her office. He stated, "Did I not give you the order for Maxary not to be here? What is he doing here?" Ms. Cheron told respondent that the mayor wanted to speak with him about why he did not want the student worker in the clerk's office. While speaking to Ms. Cheron, respondent was screaming and yelling, and his tone was intimidating.

7. Ms. Cheron told Mr. Joseph that respondent did not want him there and to go to the mayor's office because she did not want any problems. Mr. Joseph left and went to the mayor's office. Mayor Jasmin told Mr. Joseph to return to his desk in the clerk's office. Mr. Joseph returned to the clerk's office and continued doing the work he had been assigned.

8. Thereafter, upon seeing Mr. Joseph in the clerk's office, respondent told Mr. Joseph in an angry and loud voice that he was going to issue a warrant for Mr. Joseph's arrest.

9. Respondent called the Spring Valley Village Police and spoke with a desk sergeant. During the telephone call, which was recorded, respondent stated:

“There's a young man in my office that I just held in contempt. And I'm in the process as soon as they give me the information and I need somebody to take him into custody. Be prepared, the mayor may be next.”

Respondent's statement to the sergeant was inaccurate in that he had not actually held anyone in contempt, although he did threaten it. At the hearing, respondent acknowledged that he gave the inaccurate report to the police in an effort to get them to do what he wanted.

10. Shortly thereafter, respondent went to the Village police office in the municipal building. Respondent, who was holding a commitment order known as a “blue card,” told Lieutenant John Bosworth that he was sentencing a young man to 15 days in jail and needed somebody to bring him into the courtroom. Lieutenant Bosworth told respondent that he was not comfortable with making that decision and bringing the young

man into court and would have to discuss the matter with his chief. Respondent replied that if the police were not going to comply with his order, he would call the Sheriff's Department.

11. Respondent then called Rockland County Sheriff Louis Falco and reported that a young man was going through his records or files, that he wanted Sheriff Falco or someone from the Sheriff's office to come to the court and remove the man and that he wanted to hold the man in contempt and "wanted it investigated." Sheriff Falco believed that respondent wanted the Sheriff's office to arrest Mr. Joseph. He told respondent that he would get back to him and then called Village Police Chief Paul Modica. Sheriff Falco described respondent as "upset."

12. Spring Valley Police Lieutenants Bosworth and Kleinertz saw respondent in the police break room while he was on the telephone with the Sheriff's office. When respondent finished his conversation, the lieutenants told him that they would not bring Mr. Joseph into the courtroom until they spoke with the mayor and the village attorney. Respondent said that he would give them a reasonable amount of time and otherwise he would hold the police department in contempt. The lieutenants reported the conversation to Chief Modica.

13. Meanwhile, Sheriff Falco called Chief Modica and told him that he had just received a phone call from respondent requesting the Sheriff to send deputies to Spring Valley to arrest two police lieutenants and an individual whom respondent was holding in contempt of court. Chief Modica assured Sheriff Falco that he could handle the matter and that it was not necessary to send anyone to Spring Valley.

14. Deputy court clerk Gary Roxas, who was at his desk in the clerk's office, received a telephone call from respondent asking him to come to the courtroom to help him set up the laptop that operates the courtroom audio recorder. Mr. Roxas went to the courtroom, where respondent, who was on the bench, told Mr. Roxas that he was going to hold Mr. Joseph in contempt. Judge Fried saw respondent in the courtroom, holding a securing order or "blue card," the document that a judge would use to transfer custody of an arrestee to the Sheriff.

15. In the clerk's office, Judge Fried told Mr. Joseph that he would "take care of it" and to keep doing his job, and that if Mr. Joseph had any issues, he should speak to the court clerk and/or the mayor.

16. Respondent called court officer Simeon Naemit, who was off duty that day. Respondent, who has a personal friendship with Officer Naemit, asked him to come to the court as respondent needed assistance. As a result of the call, Mr. Naemit, who was not in uniform, went to the court.

17. Respondent told Officer Naemit to arrest Mr. Joseph and take him into custody and that he was finding Mr. Joseph in contempt and sentencing him to 15 days. Judge Fried told Officer Naemit not to follow respondent's instruction because it was an illegal order and that Judge Fried would hold Naemit accountable if he seized Mr. Joseph. Respondent told Judge Fried to "stay out of it" and that it was not his business. Respondent was red in the face and enraged; his voice was loud, angry and very aggressive, and his arms were flailing.

18. Respondent then left the courtroom, said that he would do it himself

and walked towards the court clerk's office. When Judge Fried pleaded with respondent not to do it, respondent cursed and told Judge Fried to "have a stroke and die."

19. Respondent entered the clerk's office and, in a loud and angry voice, ordered Mr. Joseph to go to the courtroom. As he approached Mr. Joseph's desk, respondent started arraigning Mr. Joseph, telling him that he had a right to remain silent and that he was being found in contempt and sentenced to a period of incarceration of 15 days. Respondent stood next to the chair where Mr. Joseph was sitting and grabbed Mr. Joseph's right forearm, trying to pull him out of the chair. Respondent, who was in a rage, was pulling Mr. Joseph, screaming and yelling, "Get out! You're not supposed to be here!" Respondent grabbed Mr. Joseph's right forearm a second time with such force that Mr. Joseph's chair began to slide towards respondent. Mr. Joseph never touched respondent.

20. Judge Fried told Mr. Roxas to call the police and told respondent that he was committing a crime. In response, respondent said that he was holding Judge Fried in contempt and sentencing him to 15 days. At this time, the court clerk's office was in chaos, and the clerks were screaming and telling respondent, "No, no! Don't do that! Stop!"

21. While these events were transpiring, Chief Modica and Lieutenants Bosworth and Kleinertz, who were in Mayor Jasmin's office describing what had occurred between respondent and the police, heard screaming and yelling coming from the court clerk's area. The officers went to the court clerk's office, where respondent was screaming and yelling at the top of his lungs at Mr. Joseph.

22. Respondent told Mr. Joseph, “Get out of here, you don’t belong here,” and yelled that he had held him in contempt of court and was sentencing him to 15 days in jail. Lieutenant Bosworth saw Mr. Joseph stand up, raise his hands in the air and say, “Judge, don’t touch me.” Officer Naemit tried to calm respondent, to keep him away from Mr. Joseph, and to get him to stop screaming. Judge Fried told the police to arrest respondent because he had assaulted Mr. Joseph.

23. Lieutenant Kleinertz escorted Mr. Joseph out of the court clerk’s office. Chief Modica and Lieutenant Bosworth asked respondent to go into the hallway with them. In the hallway, respondent was still yelling and screaming that Mr. Joseph should not be working in the clerk’s office and that he had had no say in Mr. Joseph’s hiring. Respondent said, “If the kid is in the office tomorrow there’s going to be a fucking problem.” Respondent also stated that he wanted Mr. Joseph arrested and held in contempt of court because he had no right to be in the clerk’s office since there was confidential information there. Respondent also said that Mayor Jasmin had “no fucking right” to hire anyone and assign them to the clerk’s office.

24. Chief Modica, the village attorney and Officer Naemit, who were in the hallway with respondent, tried to calm the situation. It was suggested that if there was a question about a hiring in the court, respondent should have taken it up with the mayor, to which respondent replied, “She’s a fucking bitch. Why would I even talk to her?” He added that he was contemplating holding Mayor Jasmin in contempt. During the conversation respondent was agitated, yelling and visibly upset.

25. Ms. Cheron testified that “it was a scary day,” and Mr. Roxas

described the incident as “shocking” and “upsetting.”

26. Respondent falsely testified at the hearing that he “never grabbed Max’s arm” but only “touched him on his elbow. He pulled away. That’s the only time I touched him.” Previously respondent had testified, “I held his right arm to lead him out. As soon as I touched his right arm, he pulled away from me and that was the end of my contact with him.”

27. At the hearing respondent testified, with respect to his actions on July 18, 2012, that he was motivated by concern that Mr. Joseph was handling confidential documents and that he believed he acted appropriately. He added, “On second thought, I probably could’ve acted better, but I do believe I acted appropriately.” He also testified, “From today’s vantage point, I see that there are things that maybe I could’ve done better,” but he believes that his behavior on that date was consistent with the ethical rules and with the dignity and prestige associated with being a judge.

As to Charge II of the Formal Written Complaint:

28. On June 26, 2012, Judy Studebaker, a staff attorney with Legal Services of the Hudson Valley (“LSHV”) since 1976 who specializes in housing related matters, met with Malcolm Curtis at the LSHV office in White Plains. Mr. Curtis claimed that he had been illegally locked out of his apartment and had been sleeping on the street or in a homeless shelter.

29. E’Schonda McClendon, an LSHV paralegal, prepared a pro se order to show cause for Mr. Curtis to file in the Spring Valley Village Court. Mr. Curtis, who

did not have his lease because he had no access to his apartment, told Ms. McClendon and Ms. Studebaker that his landlord was Cheryl Scott, so Ms. McClendon captioned the order to show cause “Malcolm Curtis v. Cheryl Scott.” Ms. Studebaker reviewed the papers with Mr. Curtis and, after ascertaining that he was unable to afford the \$20 court filing fee, told him that the order to show cause contained an order permitting him to proceed as a poor person without paying a filing fee. Mr. Curtis filled out the petition attached to the order in which he stated that he was unable to pay the filing fee because he had minimal assets and his only income was \$780 a month from SSI. The pro se petition was signed by Mr. Curtis and notarized.

30. It was common practice for LSHV to help pro se petitioners complete paperwork even though LSHV was not providing them with formal legal representation at the time of such assistance. The paperwork prepared by LSHV states: “Form prepared by Legal Services of the Hudson Valley as a courtesy to pro se tenants. No attorney/client relationship exists and none is to be inferred between ‘Tenant’ and Legal Services of the Hudson Valley.”

31. When respondent saw the papers shortly thereafter, he directed Ms. Cheron not to accept the order to show cause until Mr. Curtis paid the court fee. On June 27, 2012, after Mr. Curtis contacted LSHV, Ms. Studebaker called Ms. Cheron, who told her that “it was the procedure of the court, that everyone had to pay a filing fee” even if they were poor.

32. Later that day respondent called Ms. Studebaker and said that he wanted to know “how in the world [LSHV] had sent Mr. Curtis to his court without the

filing fee.” Ms. Studebaker told respondent that Mr. Curtis was proceeding as a poor person and that respondent should sign the order to show cause so Mr. Curtis could get repossession of his apartment. When respondent insisted that the filing fee had to be paid, Ms. Studebaker again explained that Mr. Curtis could not afford the fee and had attached an affidavit to his petition in support of his request to proceed as a poor person. Respondent interrupted her, shouting and repeating that the filing fee had to be paid. Respondent’s voice, which Ms. Studebaker described at the hearing as “rude and nasty,” got increasingly louder, and while she was in mid-sentence respondent slammed the phone down.

33. Ms. Studebaker contacted Supervising Judge Charles Apotheker’s office and was advised to call the court clerk and tell her that if respondent did not want to sign the order for poor person’s relief, he should write “denied” on the order so an appeal could be taken. Ms. Studebaker spoke to Ms. Cheron, explained what Judge Apotheker had said, and requested that respondent write “denied” on the order to show cause. Ms. Cheron indicated that respondent would not do that.

34. Judge Apotheker’s office called Ms. Cheron and told her that the court can waive fees for people who are indigent, and Ms. Cheron reported that to respondent. Respondent refused to allow Mr. Curtis to file as a poor person in part based on “rumors” that Mr. Curtis had dealt drugs.

35. After learning that respondent wanted Mr. Curtis to provide a copy of his lease, Ms. Studebaker called Ms. Cheron and explained that Mr. Curtis had no access to his lease because he was locked out of his apartment. Respondent, who was

listening in on the call, began shouting that nothing was going to be done until Mr. Curtis paid the filing fee. Ms. Studebaker told respondent that the CPLR allowed Mr. Curtis to proceed as a poor person and that the filing fee should be waived. Respondent interrupted her and shouted loudly that the fee had to be paid. Respondent again slammed down the telephone while Ms. Studebaker was in the middle of a sentence.

36. Respondent directed Ms. Cheron to go to the Spring Valley Building Department and check a landlord registry to determine the owner of the property where Mr. Curtis resided. Ms. Cheron did so and reported to respondent that the landlord was Holland Management. Respondent crossed out the portion of the proposed order that permitted Mr. Curtis to proceed as a poor person, changed the name of the respondent-landlord from Cheryl Scott to “Holland Mgt Co” and added, “Landlord Must Present to this Court a signed copy of this Lease.”

37. On June 28, 2012, Ms. Studebaker was contacted by the Spring Valley court clerk and told that the return date for the order to show cause, originally scheduled for July 5, 2012, had been advanced to that afternoon. Ms. Studebaker also learned during that telephone call that respondent had done an investigation to determine who the landlord was, had contacted the landlord and had directed the landlord to appear.

38. Later that day, because Ms. Studebaker was on trial, LSHV attorney Marianne Henry appeared before respondent on behalf of Mr. Curtis. Also present were representatives of Holland Management and an attorney with the Legal Aid Society of Rockland County. After questioning Mr. Curtis under oath about his income and expenses, respondent granted Mr. Curtis’s application to proceed as a poor person.

39. Respondent asked Ms. Henry about the papers that LSHV had prepared on behalf of Mr. Curtis. Ms. Henry explained that she did not prepare the papers and that she had only been assigned to the case that day. Respondent then asked Ms. Henry how the identity of the landlord was determined, and she replied that she believed that Mr. Curtis had a signed lease agreement with Cheryl Scott. Respondent stated that that was not correct and asked Ms. Henry whether her office did any independent investigation to determine the identity of the landlord. Ms. Henry replied that LSHV ordinarily asks a tenant for a copy of their lease but that Mr. Curtis had no access to his lease because he had been unlawfully locked out of his apartment. Respondent then questioned Ms. Henry about the source of LSHV's funding and whether she believed that the action on behalf of Mr. Curtis had been filed in a timely and proper manner. Ms. Henry stated, "Your Honor, that I can't say because I wasn't the attorney that did it. We sometimes have a lot of people call us and we do the best we can."

40. Respondent then stated, "It is my sense of it, is if you're doing the best you can, you should be put out of business. It is my opinion that you did not represent this individual who had a very valid and an emergency claim, and that it was done in something less than a professional capacity." Respondent ignored Ms. Henry's attempts to respond and, without giving her an opportunity to speak, found that LSHV "failed to meet the minimum standard of the representation of Mr. Curtis" and "undertook to represent him in a poor and terrible manner."

41. Without consulting Mr. Curtis, respondent relieved LSHV as counsel and appointed the Legal Aid Society to represent Mr. Curtis. Then, without

authority in law, respondent imposed sanctions on LSHV in the amount of \$2,500 and directed LSHV to pay the sanction directly to the Legal Aid Society.

42. Respondent then put on the record the independent research he had conducted in order to determine the identity of Mr. Curtis's landlord:

“[T]he court conducted an investigation to determine the owner of the property. The owner of the property we found out, based upon looking at the property list, which by the way anybody can find on a computer, is Holland Management Company.”

43. Respondent reversed the sanction against LSHV in December 2013, after an Article 78 proceeding brought by LSHV was dismissed and after the Commission had questioned him about it.

44. At the hearing before the referee, respondent testified that he did not consider that his statements to Ms. Henry might be disrespectful and that even in retrospect he believes that he acted appropriately. He testified that he believed LSHV had acted improperly in sending a homeless, indigent tenant who had a valid and emergency claim to court without proper representation and with papers that named the wrong party. He testified that he reversed the sanction *sua sponte* because the decision in the Article 78 proceeding indicated that he was “probably in error” in imposing the sanction.

As to Charge III of the Formal Written Complaint:

45. In November 2011 Richard Deere was hired by the Education and Assistance Corporation to be the case manager for the Rockland County misdemeanor drug court. Mr. Deere, who had previously worked in the Spring Valley Village Court as

an intern, was a former student of Judge Fried, who was assigned to oversee the drug court. Mr. Deere was not assigned an office by the Village of Spring Valley until January 2012.

46. Judge Fried obtained approval from Mayor Jasmin for Mr. Deere to use Judge Fried's desk in chambers until he was given an office. Between November and January, Mr. Deere worked at Judge Fried's desk in the chambers assigned to Judges Fried and Theodore. Respondent's chambers were immediately in front of and attached to the chambers that were shared by Judges Fried and Theodore.

47. In December 2011 respondent came into the back chambers where Mr. Deere was sitting and told Mr. Deere to leave the premises immediately or he would be held in contempt and charged with loitering or trespassing. Respondent was angry and yelling. Mr. Deere left and telephoned Judge Fried from the parking lot. Judge Fried went to the municipal building and walked Mr. Deere back into chambers.

48. Respondent, in a very angry, loud voice, told Judge Fried that Mr. Deere had no right to be present and threatened to hold Mr. Deere in contempt and to charge him with trespassing.

49. A week or two later, respondent asked court officer Victor Reyes to escort Mr. Deere out of the municipal building and told Officer Reyes that if Mr. Deere gave him a hard time, he should arrest him. Officer Reyes went to Judge Fried's chambers, where Mr. Deere was reviewing drug court materials, and told Mr. Deere to leave the building or he would be arrested. Mr. Deere gathered his belongings and Officer Reyes escorted him out of the building. Mr. Deere telephoned Judge Fried, who

again escorted Mr. Deere back to Judge Fried's chambers.

50. At the hearing, respondent testified that his actions toward Mr. Deere were motivated by his concerns about court security, and he maintained that Mr. Deere was not authorized to be in the judges' chambers unless a judge was present.

51. Respondent falsely testified that he did not threaten to hold Mr. Deere in contempt. He acknowledged that he did mention trespass and "may have mentioned" that he would arrest Mr. Deere for trespass if he refused to leave.

52. On May 24, 2012, when Spring Valley Police Lieutenants Bosworth and Oleszczuk were in Mayor Jasmin's office for a briefing, respondent appeared, wearing his robe. Speaking to the mayor in a rude and discourteous manner, respondent ranted and raved at top of his lungs that he wanted his own office and would hold the mayor in contempt if he did not get his own office. He also stated, "This is the David Fried show. I'm out of here." Mayor Jasmin told respondent that she was in a meeting and asked respondent to leave several times. At the hearing, respondent denied that he threatened the mayor with contempt but admits that he went to her office to complain that he wanted a private office.

53. In 2012 respondent told Officer Reyes several times to arrest Mayor Jasmin. On one occasion, he told Officer Reyes to tell Mayor Jasmin that respondent wanted to speak to her, to bring her to the courtroom and to lock her up if she did not accompany him to the courtroom. When Officer Reyes conveyed respondent's message, Mayor Jasmin stated that if respondent wanted to speak to her, he should come to her office. On another occasion, during the summer of 2012, when Officer Reyes went to

Mayor Jasmin's office on respondent's order, the mayor was in a meeting with Lieutenants Bosworth and Oleszczuk, and when Officer Reyes reported that to respondent, respondent became upset and told Reyes to lock her up and lock up the two lieutenants. On a Monday night in 2012, when respondent was on the bench and about to start traffic court, he told Officer Reyes that he wanted to speak to Mayor Jasmin, Chief Modica and the village attorney, directed Officer Reyes to ask these officials to come to his courtroom and instructed him that if they refused to come Officer Reyes should arrest them. Respondent's voice was very loud. Instead of doing as respondent directed, Officer Reyes, who did not think he had authority to arrest those individuals, left the courtroom and smoked a cigarette. Neither Mayor Jasmin, Chief Modica nor the village attorney had a case on the court's calendar that night.

54. Chief Modica testified that respondent told him in 2012, "I may be calling on you later to arrest Jasmin.... I'm holding her in contempt."

55. At the hearing, respondent admitted that he told Officer Reyes on multiple occasions to arrest the mayor. He testified that he did so because conditions in the court office were "a shamble," but that it "was a joke."

56. In the spring of 2012, respondent moved his chambers to the jury room. When Mayor Jasmin asked Judge Fried if he had any objections to the move, Judge Fried said he did not but added that when he presided over court, he wanted to use the staff bathroom in the jury room, at the back of respondent's new chambers, in order to avoid using the public restroom because of safety concerns and the chance that ex parte communications might occur.

57. In late May or early June 2012, while Judge Fried was presiding over a morning calendar, he got the key to respondent's chambers so he could use the staff bathroom. The same or next day, respondent told Judge Fried that he was not happy that he had used the restroom attached to respondent's chambers. Judge Fried told respondent that when court was in session he was concerned about safety and ethics and would use the staff restroom. Respondent threatened to charge Judge Fried with criminal trespass. At the hearing, respondent denied that he threatened his co-judge with arrest.

58. Police Chief Modica testified that one evening in the spring of 2012, he received a call at his home on his cell phone from respondent, who told Chief Modica to bring his toothbrush the next day because he "was throwing [Chief Modica] in jail for contempt of court." When Chief Modica asked what he had done, respondent did not tell him why he was being held in contempt, but repeated, "Bring your toothbrush, you're going to jail in the morning." At the hearing, respondent testified that he threatened Chief Modica with contempt because the police had not come to court that night because of "a job action."

59. Respondent testified at the hearing that he believes it was appropriate to threaten Spring Valley employees with contempt "so that you can get a level of performance from them in accordance with our obligations to the court, to our ethics obligations and to what they are supposed to do." He testified that "[s]ometimes it's absolutely necessary" to threaten village employees with contempt to "motivate people to do what I thought was the right and proper thing."

As to Charge IV of the Formal Written Complaint:

60. After the incident involving Maxary Joseph described in Charge I, respondent avoided speaking to chief court clerk Elsie Cheron, treated her badly, bullied and harassed her. He would not acknowledge her as the chief clerk, talked down to her and would only communicate with deputy court clerk Gary Roxas, who found it difficult to be placed “in the middle.” Respondent referred to Ms. Cheron as “the so-called clerk,” “traitor,” the “mayor’s clerk” and the “mayor’s pet.” Ms. Cheron testified that he treated her “like an animal,” a “nobody,” that “It’s been hell for me, for two years and three months,” that she is “stressed every day” she goes to work, and that when she hears respondent approaching she is “scared” and has “palpitations.”

61. Respondent testified that he does not consider calling Ms. Cheron such names degrading or that referring to her by these names violates the ethical rules.

62. On July 12, 2012, a week before the incident involving Maxary Joseph, respondent ordered Ms. Cheron into his courtroom. Court was not in session but respondent was on the bench wearing his robe and a stenographer was present. Respondent stated on the record that the appearance was “a proceeding,” although at the hearing respondent maintained that this session with Ms. Cheron was not a court proceeding but merely a “meeting.”

63. Respondent spoke to Ms. Cheron about the court officers assigned to the court. He had divided the court officers into two groups and wanted Ms. Cheron to assign only group “A” officers, not “B” officers, to the courtroom. Respondent stated on the record that if Ms. Cheron failed to follow his order, he would “consider it

contemptuous and act and punish accordingly.”

64. Respondent also told Ms. Cheron that if she did not agree with his directive, “You have 30 days to appeal it in writing.” Respondent again told Ms. Cheron that he would hold her in contempt and she “will be out.” Respondent was screaming, yelling, angry and loud. When Ms. Cheron asked respondent why he was yelling at her, he stated, “That’s the way it’s going to be.” The following colloquy then ensued:

“THE COURT: I heard you. Get an attorney, I’m considering holding you in contempt. Get your attorney and we will have a hearing this afternoon.

MS. CHERON: You can put me in jail.

THE COURT: I will.”

65. After this exchange, Ms. Cheron was “scared” and did not know whether she needed to hire an attorney, and she found the experience “traumatizing.”

66. At the hearing, respondent testified that he believes that his statements to Ms. Cheron on July 12, 2012, were not degrading to her, but rather that what he said and did on that occasion should have left Ms. Cheron feeling “empowered.” In respondent’s words: “if she has any other feeling, I honestly don’t understand it.” He believed that threatening Ms. Cheron with contempt would provide “inspiration” for her “to follow what [he] felt was the proper thing to do to have a more safe surrounding in the court.”

67. On November 29, 2012, respondent again ordered Ms. Cheron to appear in the courtroom. He was on the bench in his robe, and the courtroom was filled with attorneys and individuals waiting for their cases to be called. On the record in open

court, respondent started screaming at Ms. Cheron that when he had called the court clerk's office at 9:00 AM, no one answered the telephone.

68. During the proceeding, respondent said, "Consider it a warning that you have not done your job properly today." He continued, "You're directed by me that at 9:00 in the morning when the phone rings that somebody should answer it" and "If they fail to do that then ... I will act accordingly." Ms. Cheron understood this to mean that respondent would hold her in contempt. Respondent dismissed Ms. Cheron by stating, "You may leave the Court room now. You're not needed here. Go sit by the phone and answer it."

69. At the hearing, Ms. Cheron testified that during this incident, respondent was "screaming" at her "in open court, in front of everybody, like [she was] a criminal, telling [her] to explain to him why [she] did not answer the phone when he called." Ms. Cheron testified that "this was the most humiliating day for me" and that the exchange "scared" her.

70. At the hearing, respondent testified that he did not believe that his conduct as reflected in the transcript on November 29, 2012, was abusive. He also stated that he regretted how he handled the issue and that "in all due honesty, [it] probably was demeaning to everybody, including me, to be part of it," but "I felt I had really no choice in the matter because I felt I had an obligation" to make sure the telephones were answered.

71. In early December 2009, on Judge Fried's first day on the bench, he presided over an arraignment. Towards the end of the arraignment respondent, who was

present in the courtroom, asked Judge Fried to step off the bench. Respondent spoke to Judge Fried in the hallway and told him that his arraignment was “terrible minus ten.” When Judge Fried said that he had followed the procedures that he had learned in training given by the Office of Court Administration in Syracuse, respondent replied in a firm, angry voice that Judge Fried should not “listen to those fucks from Syracuse.” At the hearing, Judge Fried testified that respondent’s comments had made him feel “very bad.” Respondent testified that his comments to his co-judge in “a private conversation” were made without animus and were “meant to be motivating and educational” since Judge Fried, who had asked him to observe the arraignment, had handled the proceeding in a manner that was overly formal and lacked “a level of humanity and flexibility.”

72. At a meeting in January 2012 Supervising Judge Apotheker told the Spring Valley judges that they were required to take the bench in a timely manner. After the meeting, respondent told Officer Reyes to keep a log of when the three judges took the bench, and Reyes complied. When Judge Fried learned about the monitoring he informed Judge Apotheker. In a letter dated February 22, 2012, to respondent, Judge Apotheker wrote that it was “inappropriate for any justice to monitor another justice i[n] any way and this practice should end immediately.” Respondent replied that he would immediately end the practice.

73. After Judge Apotheker’s letter, respondent continued to monitor Judge Fried. On a day when Judge Fried was about 20 minutes late to court because he was reviewing a search warrant, respondent told Judge Fried to get his “fucking ass in the chair.” According to Judge Fried, respondent was “furious” that court was starting after

10:00 AM, used a loud voice and “scream[ed]” at Judge Fried. On another occasion, Judge Fried heard respondent instruct Mr. Roxas and Ms. Cheron to report to him when Judge Fried took the bench.

74. Respondent testified that he did not consider it demeaning to the other judges to have a court officer monitor them and that he had misunderstood his Supervising Judge’s directive with respect to the importance of taking the bench on time.

As to Charge V of the Second Formal Written Complaint:

75. In the fall of 2013 Edwin Day and David Fried were candidates for the position of Rockland County Executive. In mid-September 2013 Mr. Day’s campaign learned that during Mr. Fried’s 2009 campaign for Spring Valley Village Justice, he had received a donation of office space from Joseph Klein, whom Mr. Day described as a “slumlord.” Mr. Day’s campaign issued a media advisory stating that Mr. Fried had accepted an “in-kind donation from a notorious slumlord.” Shortly thereafter, Mr. Day was told that respondent had information regarding the donation of office space.

76. Mr. Day called respondent and asked him if he had any information about the donation. Respondent told Mr. Day that Mr. Fried had contacted him during the 2009 campaign about a donation of campaign office space and that after visiting the space and recognizing that the location was owned by Empire Management, of which Joseph Klein was principal, respondent told Mr. Fried that he would not accept the space because Mr. Klein had many cases before the Spring Valley Justice Court.

77. Mr. Day asked respondent if he had any objection “if we cited you

as an authority and used this information publicly,” and respondent said he had no objection.

78. After that telephone conversation, Mr. Day wrote a statement that reflected what he and respondent had discussed. That same day, he called respondent again and read him the statement. Respondent confirmed that it accurately reflected what he had told Mr. Day. Mr. Day again confirmed with respondent that respondent had no objection to having his statement used publicly in “a press release, or whatever.”

79. The Day campaign issued a media advisory entitled “Judge Alan Simon: David Fried Knew of Slumlord Donation before 2009 election.” The media advisory stated in pertinent part:

“In response to the aforementioned additional inquiries by our campaign, we had the occasion to speak to Mr. Fried’s 2009 running mate, Justice Court of Spring Valley the Hon. Alan M. Simon. He had the following statement, transcribed word for word with his approval, and informed us that there was at least one witness to the conversation he describes:

‘During our campaign in 2009, I received a call from David Fried telling me that somebody had donated office space. He asked me if I wanted to share the space with him. Even though I really did not need the space, I initially accepted as it would provide some convenience during the campaign.

Subsequently I met Mr. Fried at the office space that was being used and I immediately recognized the space as being part of Joseph Klein’s firm, Empire Management.

I informed David that I was not going to be part of this arrangement and told him directly that accepting this office space would be highly improper, as not only was Mr. Klein and Empire Management one of the biggest housing violators in Spring Valley, but also that there are many cases involving

Mr. Klein that are before the Spring Valley Court. With that I separated myself from the matter.’”

80. The quotation attributed to respondent in the media advisory is the one Mr. Day had read to respondent during their second telephone conversation, in which respondent told Mr. Day that it was permissible for him to use that quotation in the media advisory and to attribute the quotation to respondent.

81. The media advisory was sent to various local media outlets. The press release was covered by the news media.

82. At the time of his conversation with Mr. Day, respondent, who was then a candidate for re-election as Spring Valley Village Justice, knew that the ethical rules prohibited judges from being involved in political activity aside from their own campaign. At the hearing, respondent testified that he believed his conduct was in compliance with the ethical rules because he only provided factual information concerning his own actions and observations. He further testified that the statement that was disseminated did not accurately reflect the comments he had made to Mr. Day.

As to Charge VI of the Second Formal Written Complaint:

83. In May 2013 respondent called chief court clerk Elsie Cheron into his chambers and asked her to write a letter to the Commission stating that he was a good judge who “does his job.” Ms. Cheron was shocked by the request and told respondent she would think about it. A couple of weeks later respondent asked Ms. Cheron whether she would write the letter, and Ms. Cheron told him she would not do so. After Ms. Cheron refused to write the letter, respondent refused to talk to her. Respondent

attempted to have her fired from her position.

84. Each employee in Spring Valley had a code that permitted him or her to enter certain areas of the municipal building. Only Ms. Cheron, Mr. Roxas and the judges were given access to Ms. Cheron's private office. In July 2013 Ms. Cheron received a federal subpoena requesting records. After receipt of the subpoena Ms. Cheron, Mayor Jasmin and Chief Modica decided that while the federal matter was pending, access to Ms. Cheron's office would be limited to Ms. Cheron and Mr. Roxas.

85. Shortly thereafter, while respondent was presiding at traffic court and a file needed for an arraignment could not be found, respondent left the bench and tried unsuccessfully to open the door to Ms. Cheron's office. Respondent then directed a court clerk to telephone Ms. Cheron and tell her "to come here and bring her attorney with her." Respondent voice was loud and he "wasn't happy."

86. When Ms. Cheron received the message that respondent needed access to her office, she went to the clerk's office. When she arrived, a court clerk advised her not to go into the courtroom, telling her that respondent was "really upset."

87. On September 16, 2013, Ms. Cheron told respondent that she had filed a police report because the door to her office had been left open all weekend. Respondent told Ms. Cheron that he had ordered that her office door remain open and that if the police want to secure her office, an officer should be posted at the door. Respondent also told Ms. Cheron that in December when the new mayor took office, he

would make sure she was not the clerk anymore.² Ms. Cheron asked, “Is that a threat?” and respondent replied, “No. This is not a threat. This is a promise.” During this encounter respondent was angry, yelling and loud.

88. On Saturday, December 7, 2013, Spring Valley Police Sergeant Roxanne Lopez was assigned to oversee the officers working the 8:00 AM to 4:00 PM shift. When Sergeant Lopez arrived for her shift, she was informed that the department was looking for a man who had allegedly assaulted his girlfriend in the Town of Ramapo and then had either pistol whipped or threatened to pistol whip a taxi driver in Spring Valley. Sergeant Lopez was also told that a prisoner was being held in Spring Valley for arraignment. Sergeant Lopez decided not to call for a judge to come to the Spring Valley court to arraign the prisoner in case the suspect in the other case was captured. Sergeant Lopez did not want to inconvenience a judge by asking the judge to come to Spring Valley more than once.

89. While Sergeant Lopez was in the field, she received a phone call from the dispatcher advising her that respondent had arrived in Spring Valley to arraign a defendant. Sergeant Lopez was surprised because she had not called respondent or authorized anyone else to call him. Sergeant Lopez immediately drove back to the police station and got the prisoner to be arraigned, and she and Detective Claussen walked the

² By law, a village court clerk is appointed by the mayor “only upon the advice and consent of the village justice or justices” (Village Law §4-400[1][c][ii]), and the mayor has sole authority to discharge a court clerk (*see Bishopp v Spring Valley*, 213 AD2d 441 [2d Dept 1995]). The record reflects that in the fall of 2013 respondent informed the mayor-elect that he would not consent to Ms. Cheron’s reappointment and that she continued in the position as a holdover.

prisoner to the courtroom, which they found locked. After waiting about ten minutes, Sergeant Lopez called the police desk and asked if they could contact respondent and inform him that they were waiting for him. After a few more minutes, Sergeant Lopez left the prisoner with Detective Claussen. A short time later, Detective Claussen told Sergeant Lopez that respondent wanted to see her. When she entered the courtroom, respondent complained that he had not received the proper paperwork and that he had been waiting a long time for the police to bring the prisoner. Sergeant Lopez responded that she had not called respondent. Respondent interrupted Sergeant Lopez, raised his hands in the air and said in a very loud, agitated voice, “You know that I have problems with your chief of police and members of this police department.” Sergeant Lopez said that she had no knowledge of any problems between respondent and the police department and reiterated that the Spring Valley police had not called respondent. Respondent stated that he was “starting to have a problem” with Sergeant Lopez and continued to insist that he had been called by the Spring Valley police to arraign a defendant. Respondent appeared very angry and agitated and spoke with his hands raised in the air, and he cut off Sergeant Lopez and would not permit her to speak.

90. Ramapo Police Detective Margaret Braddock arrived and told respondent that the Ramapo Police Department had been waiting for him to appear because they needed him to review a search warrant. It was the Ramapo Police Department that had called respondent but he had mistakenly gone to Spring Valley instead.

91. On January 2, 2014, Ms. Cheron and Mr. Roxas were told that

respondent ordered them to report to the courtroom. Ms. Cheron was afraid to enter the courtroom because respondent had previously told her that he was going to hold her in contempt, but she obeyed respondent's order because she was concerned that if she did not, respondent would get angrier. She testified at the hearing that every time she was called into the courtroom by respondent she was "scared" and did not know if she was "going to walk out or be in handcuffs," but she felt she had no choice.

92. When Ms. Cheron and Mr. Roxas entered the courtroom, respondent was on the bench. Court officers, a court clerk and the court stenographer were also present, and the court stenographer made a record of what transpired. Respondent stated that he was uncomfortable working with Ms. Cheron, would not work with her and would not consent to her reappointment as chief clerk. He stated that the Spring Valley Village Board was compelled to listen to him and if they did not listen to him, he would "add other counts" to a federal lawsuit he had brought against Spring Valley and Spring Valley employees, including Ms. Cheron. Respondent told Mr. Roxas that he was going to receive a lot more responsibility and that it "may come quicker" than Mr. Roxas anticipated.

93. Respondent testified that he does not see how his conduct on January 2, 2014, as reflected in the transcript of the incident, was inappropriate or might be degrading or intimidating to court employees.

94. In May 2013 Ms. Cheron spoke to Spring Valley Village Justice Susan Smith about the fact that court officers were staying after court was over in order to be paid for additional hours. Judge Smith told Ms. Cheron to distribute a

memorandum informing the court officers that once court was over, they should finish everything, turn off the lights, and go home. On May 29, 2013, Ms. Cheron wrote a memo to the court officers and copied the judges. Ms. Cheron showed the memo to the judges, including respondent, who told Ms. Cheron that he had no problem with it.

95. About a month later, on June 27, 2013, respondent returned the memo to Ms. Cheron with the following handwritten statement: “Please refrain from any and all edicts or policy statements without first discussing with the judges.” It was signed by respondent and copied to the other judges.

96. On March 19, 2014, respondent signed an order stating *inter alia* that:

“Elsie Cheron is suspended from any administrative duties in reference to the court and directed to cease any operations and to refer them to the judge sitting at the time and to refer all matters regarding court security to Judge Alan M. Simon.”

The order had signature lines for Spring Valley Village Justices Theodore and Desir. As of February 2015, neither of the other two judges had signed the order.

97. In April 2014 respondent sent a letter to the State Comptroller’s Office Justice Court Fund, regarding his March 2014 monthly report of cases and remittances. The letter stated:

“The undersigned justice has not personally audited the proceeds and makes no representative [sic] on this regard. Also this court has no legally appointed Chief Clerk. I have no confidence in the person pretending to be Chief Clerk who’s [sic] appointment I have not approved and has not been appointed to serve.”

98. Respondent has referred to Ms. Cheron as part of the “Haitian

mafia.” He also has called Ms. Cheron “the mayor’s clerk” and “the pretend clerk.”

99. In the spring of 2014, when Mayor Demeza Delhomme was in the hallway of the municipal building with another man, respondent told the man not to listen to the mayor because he was a liar. Respondent was yelling at the time. Respondent also stated that he did not “want to fucking talk to” the mayor.

100. In September 2014 respondent met Mayor Delhomme as the mayor was walking out of the municipal building with another man. In a loud voice, respondent called the mayor “a three dollar bill.” The mayor said he would call the police, and respondent told him to call them if he wanted to.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C), 100.3(B)(1), 100.3(B)(3), 100.3(B)(6), 100.3(C)(1) and 100.5(A)(1)(c) and (d) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charges I through IV of the Formal Written Complaint and Charges V and VI of the Second Formal Written Complaint are sustained insofar as they are consistent with the above findings and conclusions, and respondent’s misconduct is established.

On repeated occasions over several years, respondent abused his judicial position in order to bully, harass, threaten and intimidate his court staff, his co-judge and other village officials and employees with whom he dealt in an official capacity. Without

lawful basis, he repeatedly threatened such individuals with contempt or arrest over routine personnel or administrative issues in his court. On a frequent basis, he also subjected them to demeaning treatment, insults and angry diatribes in response to perceived disrespect or shortcomings in the performance of their duties and, in one instance, exhibited a shocking display of physical aggression in the court clerk's office. Such "a pattern of injudicious behavior and inappropriate actions...cannot be viewed as acceptable conduct by one holding judicial office" (*Matter of VonderHeide*, 72 NY2d 658, 660 [1988]) and warrants his removal from judicial office.

Epitomizing respondent's misconduct is his response to the hiring of a college student to work in the court clerk's office in the summer of 2012. In an incident that escalated into a melee, respondent, who was displeased because the student, Maxary Joseph, had been hired by the mayor without respondent's input or approval, acted in a manner that failed to show "even a modicum of sensitivity or self-control so vital to the demands of his position" (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]) as he attempted to have the student removed from the premises, threatened him with arrest and contempt, and made similar threats against others who attempted to thwart respondent's efforts to effectuate the arrest.

Initially, after ordering Mr. Joseph to leave the office and threatening him with arrest when he returned at the mayor's direction, respondent called the police and told them he had held an individual in contempt (a statement respondent later admitted was untrue) and that he wanted him arrested for trespassing; he also told the police "the mayor may be next." Then, with a commitment order in hand, he went to the police

office in the municipal building, announced that he was sentencing an individual to jail for 15 days, and said he would hold the police in contempt unless they assisted him. He called the sheriff's office and said he wanted the matter investigated, summoned an off-duty court officer to the court for assistance, and directed a court clerk to set up the recording equipment in the courtroom. When his co-judge attempted to intervene, respondent threatened him with contempt and told him to "have a stroke and die."

Respondent also ignored the pleas of court clerks, who were shocked and frightened by respondent's evident rage as he screamed at Mr. Joseph and, while standing next to the student's desk, ordered him into the courtroom and began to advise him of his rights. In an alarming display of injudicious temperament, respondent grabbed Mr. Joseph's arm and attempted to pull him out of his chair, yanking him with such force that the chair began to slide toward respondent. When police, who had rushed to the clerk's office after hearing screaming and yelling, tried to calm the situation and suggested that respondent discuss his concerns about hiring with the mayor, he responded by referring to the mayor in profane, vulgar terms and added that he was contemplating holding her in contempt.

Respondent's judicial position gave him enormous power over Mr. Joseph, who was at great risk of severe consequences if he reciprocated with physical aggression. It is noteworthy that throughout this entire excruciating incident, which unfolded over some two hours, the young man remained calm and respectful while the behavior of respondent, whose judicial position required him to observe the highest standards of conduct and to treat others with appropriate respect (Rules, §§100.1, 100.2[A],

100.3[B][3]), lacked any semblance of dignity or restraint. Although respondent had ample opportunity as these events occurred to reflect on the circumstances and consider the consequences of his actions, he ignored the most basic principles of appropriate professional behavior and was evidently unwilling or unable to control himself.

At the hearing, even while admitting most of the particulars regarding the incident (except that he denied grabbing Mr. Joseph's arm and maintained he only "touched him on the elbow," testimony that the referee concluded was false), respondent defended his actions, claiming that he was motivated by concern that Mr. Joseph was handling confidential materials without having been screened by him. Even on reflection, nearly three years after the event, he merely conceded, "On second thought, I probably could've acted better, but I do believe I acted appropriately." Whatever the merits of respondent's objections to the student's hiring or his professed concern about confidentiality, his response to the situation far exceeded any rational boundaries of permissible behavior. Nor is it any excuse that, as respondent argued, the events must be viewed in the context of his ongoing political conflict with a mayor who treated him with hostility and disrespect. Notwithstanding any such considerations, Mr. Joseph was entirely blameless and deserved to be treated with respect, as respondent sadly failed to recognize.

It is beyond dispute that any physical confrontation or aggressive, unwanted physical contact initiated by a judge in the workplace would be highly inappropriate. *See Matter of Allman*, 2006 NYSCJC Annual Report 83 (after berating an attorney, judge left the bench, walked into the well of the courtroom and "firmly

grabbed” the lawyer by both arms while continuing to yell at him). Where, as here, a physical confrontation is coupled with multiple threats of arrest and contempt, a two-hour display of unrelenting rage and aggression, and a stream of invective and vitriol, public confidence in respondent’s fitness to serve as a judge is irredeemably damaged.

The record before us demonstrates that such behavior by respondent was not an isolated occurrence. He not only regularly treated certain village employees and officials, including the chief court clerk, his co-judge and the mayor, in a demeaning and discourteous manner and referred to them in disparaging terms, but abused his judicial power on other occasions by threatening to hold those individuals and others in contempt of court or to have them arrested with no lawful or reasonable basis. In one instance, for example, after summoning the chief court clerk into the courtroom so he could berate her on the record with respect to the assignment of court officers, respondent warned that he would hold her in contempt unless she complied with his order and told her to “get an attorney” and that she had “30 days to appeal.” Incredibly, even after the clerk had testified that this incident was “traumatizing,” respondent maintained that his actions on that occasion were not only appropriate but should have left the clerk feeling “empowered,” and that “if she has any other feeling, I honestly don’t understand it.”

Among numerous other incidents, he also screamed at the mayor that he would hold her in contempt unless he got his own office; repeatedly told a court officer (who properly ignored respondent’s directives) to arrest the mayor or bring her to the courtroom, and gave the officer similar instructions with respect to the police chief and village attorney; threatened to have his co-judge arrested for trespass for walking through respondent’s

office in order to use a staff restroom; and threatened a newly-hired drug court case manager, who had permission to use the judges' chambers as a temporary office, with contempt or arrest when he attempted to do so. Such baseless threats were patently impermissible and inconsistent with the proper exercise of a judge's summary contempt power, which is appropriate "only in exceptional and necessitous circumstances" in order to restore order and decorum in the courtroom (*see, e.g., Matter of Hart*, 7 NY3d 1, 7 [2006]; *Matter of Singer*, 2010 NYSCJC Annual Report 228; 22 NYCRR §701.2[a][1]; *see also* Jud Law §755). Viewed in their totality, these incidents present a disturbing picture of respondent's "intolerant, near-obsessive reaction" to numerous individuals with whom he had a contentious relationship and his complete disregard of his ethical obligations, which require a judge to observe high standards of conduct, both on and off the bench, and to be "patient, dignified and courteous" to those with whom the judge deals in an official capacity (*Matter of Waltemade*, 37 NY2d [nn], [iii] [Ct on Jud 1975]; Rules, §§100.1, 100.2[A], 100.3[B][3]; *see also Matter of Assini*, 94 NY2d 26, 29 [1999] [in the course of his official duties, judge repeatedly disparaged his co-judge and referred to her in vulgar and offensive terms, which was "absolutely indefensible conduct"]).

It is no defense that respondent – according to his testimony – never intended to follow through on his threats, never held anyone in contempt in his judicial career, and only made such threats in an effort to "motivate people to do what I thought was the right and proper thing." Using his judicial position to make baseless threats of contempt in order to intimidate and browbeat, even if the threats were never carried out, is improper since it is inconsistent with the standards of dignity and courtesy required of

a judge (*see* Rule 100.3[B][3]; *Matter of Waltemade, supra* [judge's threats of "sanctions" and contempt against attorneys and witnesses were improper notwithstanding that none were followed by a contempt citation or other disciplinary action]; *Matter of Hart*, 2009 NYSCJC Annual Report 97; *Matter of Shkane*, 2009 NYSCJC Annual Report 170). Moreover, the recipients of such threats, which were usually delivered with explosive anger, could only assume that respondent, who had the power to act on them, intended to do so (and in the incident involving Maxary Joseph, he clearly did attempt to do so).

Respondent's rude and discourteous manner also extended to attorneys when he was acting in an adjudicative capacity. In a case involving an indigent tenant who had been illegally locked out of his apartment, respondent mistreated two attorneys from a legal services agency that had assisted the tenant in preparing an order to show cause. In two telephone conversations, he shouted at one attorney while repeatedly insisting that the tenant had to pay a \$20 filing fee and twice hung up the phone in mid-sentence as she spoke; later, in court, he excoriated another lawyer because of an error in papers the agency had prepared, using language that was disproportionate to a simple mistake that was easily corrected (*e.g.*, "If you're doing the best you can, you should be put out of business"). Ignoring the limits of his legal authority, he then imposed a sanction of \$2,500 against the agency without lawful basis (as a town justice, he lacked authority to impose a monetary sanction [22 NYCRR Rule 130-1.1(a)]) and removed the agency from representing the tenant without consulting with their client or giving the agency an opportunity to be heard.

The record also establishes that respondent engaged in impermissible political activity in 2013 when his former co-judge David Fried was a candidate for county executive. By providing information to Fried's opponent that he knew might be damaging to Mr. Fried's campaign and permitting such information to be used publicly and attributed to him, respondent injected himself into that campaign, engaged in partisan political activity and used the prestige of his office to advance the private interests of another, conduct that is specifically barred by the ethical rules (Rules, §§100.2[C], 100.5[A][1][c], [d]).

Compounding these multiple instances of impropriety is respondent's continued insistence at the hearing that his actions were appropriate under the circumstances and consistent with the required standards of judicial behavior. With the exception of one or two grudging concessions that "maybe I could've done better," he repeatedly insisted that his actions were justified by his righteous motives and by the misbehavior of others, showing little or no insight into the effects of his own behavior "upon public confidence in his character and judicial temperament" and in the judiciary as a whole (*Matter of Aldrich*, 58 NY2d 279, 283 [1983]). His "fail[ure] to recognize the inappropriateness of his actions or attitudes," as evidenced by his testimony over two days at the hearing, provides scant assurance that similar impropriety will not be repeated in the future (*Id.*; *Matter of Reeves*, 63 NY2d 105, 110-11 [1984]).

We thus conclude that the record before us, in its totality, demonstrates that respondent lacks fitness to serve as a judge and, accordingly, that the sanction of removal is appropriate.

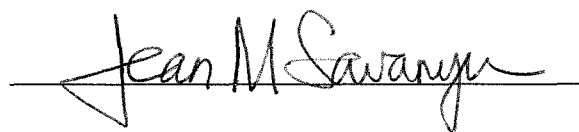
By reason of the foregoing, the Commission determines that the appropriate disposition is removal.

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

CERTIFICATION

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

Dated: March 29, 2016

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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2, of
the Judiciary Law in Relation to

ALAN F. STEINER,

a Justice of the Philipstown Town Court
and an Acting Justice of the Cold Spring
Village Court, Putnam County.

DECISION
AND
ORDER

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Honorable Sylvia G. Ash
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick,
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Mark Levine and Kelvin S. Davis, Of Counsel)
for the Commission

Scalise and Hamilton, LLP (by Deborah A. Scalise) for Judge Steiner

The matter having come before the Commission on August 11, 2016; and
the Commission having before it the Stipulation dated August 1, 2016, with the appended

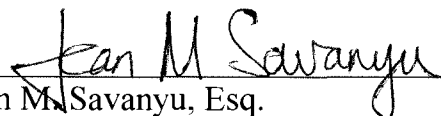
exhibit; and Judge Steiner, by letter dated July 27, 2016, having notified the Office of Court Administration, the Philipstown Town Supervisor and Board and the Cold Spring Village Board that he will resign and relinquish his judicial positions on September 20, 2016, and having affirmed that, upon vacating his judicial office, he will neither seek nor accept judicial office at any time in the future, and 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 that 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.

Judge Ash was not present.

Dated: August 15, 2016



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 Investigation of Complaints
Pursuant to Section 44, subdivisions 1 and 2,
of the Judiciary Law in Relation to

ALAN F. STEINER,

STIPULATION

a Justice of the Philipstown Town Court and an
Acting Justice of the Cold Spring Village Court,
Putnam County.

THE FOLLOWING IS HEREBY STIPULATED by and between Robert H.
Tembeckjian, Administrator and Counsel to the Commission, and the Honorable Alan F.
Steiner and his attorney, Deborah A. Scalise, of Scalise and Hamilton, LLP.

1. Alan F. Steiner has been a Justice of the Philipstown Town Court and an Acting Village Justice of the Cold Spring Village Court, Putnam County, since June 14, 2000. His current terms expire on December 31, 2016. Both positions were part-time positions. Judge Steiner is an attorney, having been admitted to practice in 1972.
2. Judge Steiner was apprised by the Commission in April 2016 that it was investigating complaints alleging that Judge Steiner: (1) used his Facebook account to engage in direct or indirect political activity; (2) delayed decision for more than a year in *Anthony Fiore v Energy Savers and Air Quality Services, Inc.*, a small claims case; and failed to timely complete required Continuing Judicial Education (CJE) for the years 2010, 2011 and 2014.

3. The Commission interviewed witnesses, reviewed documents and heard from Judge Steiner with respect to all three Complaints. Judge Steiner offered explanations in mitigation of certain aspects of the complaints. Judge Steiner avers and the Administrator does not refute that Judge Steiner has since completed his CLE requirements and removed all commentary from his Facebook account.

4. Judge Steiner submitted a letter dated July 27, 2016, to the Office of Court Administration, the Philipstown Town Supervisor and Board as well as the Cold Spring Village Board, stating that he will relinquish his judicial positions on September 20, 2016. A copy of the letter is appended as Exhibit A.

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. Judge Steiner affirms that, upon vacating his judicial office, he will neither seek nor accept judicial office at any time in the future.

7. Judge Steiner understands that, should he abrogate the terms of this Stipulation, remain in office beyond September 20, 2016, and/or hold any judicial position at any time in the future, the Commission's investigation of the complaints would be revived, he would be served with a Formal Written Complaint on authorization of the Commission, and the matter would proceed to a hearing before a referee.

8. Judge Steiner 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:

7/28/16


Honorable Alan F. Steiner

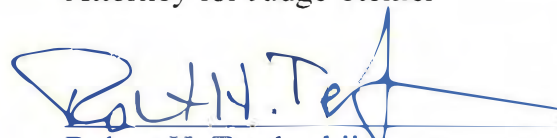
Dated:

7/28/16


Deborah A. Scalise
Scalise & Hamilton, LLP
Attorney for Judge Steiner

Dated:

August 1, 2016


Robert H. Tembeckjian
Administrator and Counsel to the Commission
(Mark Levine, Kelvin S. Davis, Of Counsel)

THE FOLLOWING EXHIBIT IS AVAILABLE AT WWW.CJC.NY.GOV
EXHIBIT A: JUDGE'S LETTER OF RESIGNATION

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

LISA J. WHITMARSH,

a Justice of the Morristown Town Court,
St. Lawrence County.

THE COMMISSION:

Joseph W. Belluck, Esq., Chair
Paul B. Harding, Esq., Vice Chair
Honorable Rolando T. Acosta
Joel Cohen, Esq.
Jodie Corngold
Richard D. Emery, Esq.
Honorable Thomas A. Klonick
Honorable Leslie G. Leach
Richard A. Stoloff, Esq.
Honorable David A. Weinstein
Akosua Garcia Yeboah

APPEARANCES:

Robert H. Tembeckjian (S. Peter Pedrotty and Cathleen S. Cenci,
Of Counsel) for the Commission

Michael F. Young for the Respondent

The respondent, Lisa J. Whitmarsh, a Justice of the Morristown Town Court, St. Lawrence County, was served with a Formal Written Complaint dated October 28, 2016, containing one charge. The Formal Written Complaint alleged that respondent

made improper public comments on her Facebook account about a matter pending in another court and failed to delete public comments about the matter made by her court clerk. Respondent filed a Verified Answer dated November 16, 2016.

On December 2, 2016, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts pursuant to Section 44, subdivision 5, of the Judiciary Law, stipulating that the Commission make its determination based upon the agreed facts, recommending that respondent be admonished and waiving further submissions and oral argument.

On December 7, 2016, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Justice of the Morristown Town Court, St. Lawrence County, since January 1, 2014. Her term expires on December 31, 2017. She is not an attorney.

2. As set forth below, from March 13, 2016 to March 28, 2016, with respect to *People v David VanArnam*, a matter then pending in the Canton Town Court, St. Lawrence County, respondent made public comments on her Facebook account about the pending proceeding and failed to delete public comments about the pending proceeding made by a Morristown Town Court clerk.

3. On March 3, 2016, a felony complaint was filed in the Canton Town Court charging David VanArnam with Offering a False Instrument for Filing in the First Degree, in violation of Penal Law Section 175.35(1). The felony complaint alleged that

Mr. VanArnam, who was running for election to the Morristown town council, had filed nominating petitions in which he falsely swore that he personally witnessed the signatures on the petitions. On March 7, 2016, Mr. VanArnam was issued an appearance ticket, directing him to appear in the Canton Town Court on March 16, 2016.

4. Facebook is an internet social networking website which allows its users to, *inter alia*, post and share content on their own Facebook pages as well as on the pages of other users. Facebook users are responsible for managing the privacy settings associated with their accounts. At the option of the account holder, the content on one's internet Facebook page may be viewable by the public or restricted to one's Facebook "friends."

5. In March 2016, respondent maintained a Facebook account under the name "Lisa Brown Whitmarsh." Respondent had approximately 352 Facebook "friends." Respondent's Facebook account privacy settings were set to "Public," meaning that any internet user, with or without a Facebook account, could view content posted on her Facebook page.

6. On March 13, 2016, respondent posted a comment to her publicly viewable Facebook account, as shown on Exhibit A to the Agreed Statement of Facts, criticizing the investigation and prosecution of Mr. VanArnam. Respondent commented, *inter alia*, that she felt "disgust for a select few," that Mr. VanArnam had been charged with a felony rather than a misdemeanor because of a "personal vendetta," that the investigation was the product of "CORRUPTION" caused by "personal friends calling in personal favors," and that Mr. VanArnam had "[a]bsolutely" no criminal intent.

7. Respondent's post also referred to her judicial position, stating, "When the town board attempted to remove a Judge position – I stood up for my Co-Judge. When there is a charge, I feel is an abuse of the Penal Law – I WILL stand up for DAVID VANARNUM" [sic] [emphasis in original].

8. Other Facebook users posted comments on respondent's Facebook page, commending respondent's statements in her post of March 13, 2016, and/or criticizing the prosecution of Mr. VanArnam. The first Facebook user to comment was Morristown Town Court Clerk Judy Wright, who posted the following on March 13, 2016, at 7:58 AM: "Thank you Judge Lisa! You hit the nail on the head." Respondent did not delete the court clerk's comment, which was viewable by the public.

9. In two comments, posted on respondent's Facebook page on March 13, 2016, at 8:02 AM and 8:56 AM, respondent's husband, Gary Whitmarsh, questioned whether the complainant in the *VanArnam* case had a "close personal relationship" with "our prosecutor" and called the matter a "real 'Rain Wreck,'" referring to St. Lawrence County District Attorney Mary Rain. These comments were viewable by the public.

10. Respondent clicked the "like" button next to some of the comments to her post, including, *inter alia*, the following:

- one comment posted on March 13, 2016, at 8:12 AM, stating that the charges against Mr. VanArnam were "an abuse of our legal system" and "uncalled for";
- a comment posted on March 13, 2016, at 9:22 AM, criticizing District Attorney Rain; and

- another comment by Mr. Whitmarsh posted on March 13, 2016, at 2:10 PM, stating, “This is what’s wrong with our justice system.”

11. Respondent’s “likes” of these comments were visible to the public when viewed online by hovering one’s cursor over the “like” button next to each comment.

12. According to the Facebook online Help Center, clicking the “like” button is a way for Facebook users to indicate that they “enjoy” a post. The person who posted the content receives a notification that another Facebook user has “liked” it. *See* <https://www.facebook.com/help/452446998120360>.

13. Respondent’s March 13, 2016, post about the *VanArnam* case was shared at least 90 times by other Facebook users.

14. On March 16, 2016, respondent posted on her public Facebook account a website link to a news article reporting that the charge against Mr. VanArnam had been dismissed.

15. On March 23, 2016, a local news outlet posted an article on its website reporting on respondent’s Facebook comments concerning the *VanArnam* case and re-printed respondent’s Facebook post of March 13, 2016, in its entirety.

16. On March 28, 2016, respondent removed all postings concerning the *VanArnam* matter from her Facebook page after receiving a letter from District Attorney Rain questioning the propriety of her comments and requesting her recusal from all matters involving the District Attorney’s office.

17. On August 29, 2016, based upon the same conduct for which he was

earlier charged, Mr. VanArnam was indicted by a grand jury for Offering a False Instrument for Filing in the First Degree and Making an Apparently Sworn False Statement in the Second Degree. On November 30, 2016, the indictment was dismissed with leave to re-present within 30 days.

Additional Factors

18. Respondent has been cooperative and contrite throughout the Commission's inquiry.

19. Respondent avers – and the Administrator has no evidence to the contrary – that she had set her Facebook account privacy settings to “Public” for an unrelated reason a few years earlier. At the time of her posting about the *VanArnam* case, respondent did not realize that her privacy settings were still set to “Public” and had intended her post to be seen by her Facebook “friends” only. Nevertheless, respondent recognizes that commenting about a pending case to an intended audience of 352 individuals is still an impermissible “public” comment under the Rules.

20. Respondent avers that she will refrain from all similar conduct in the future.

21. Respondent deleted all postings concerning the *VanArnam* matter promptly upon her receipt of District Attorney Rain's letter and, by letter dated March 28, 2016, informed District Attorney Rain of that fact.

22. Soon after receiving District Attorney Rain's letter, respondent recused herself from all matters involving the District Attorney's office to avoid any appearance of impropriety.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(C) and 100.3(B)(8) of the Rules Governing Judicial Conduct (“Rules”) and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent’s misconduct is established.

By posting public comments on her Facebook page criticizing the prosecution of an individual whose case was pending in another court, respondent violated Section 100.3(B)(8) of the Rules, which prohibits a judge from “mak[ing] any public comment about a pending or impending proceeding in any court within the United States or its territories.” As the language of the rule makes clear, the prohibition is not limited to comments about cases in the judge’s own court. *See Matter of McKeon*, 1999 NYSCJC Annual Report 117 (judge’s televised comments addressing the merits of the pending O.J. Simpson case, the witnesses’ credibility and the attorneys’ strategies in that matter violated the rule). Comments posted on Facebook are clearly public, regardless of whether they are intended to be viewable by anyone with an internet connection or by a more limited audience of the user’s Facebook “friends.” Even such a “limited” audience, we note, can be substantial, and to the extent that such postings can be captured or shared by others who have the ability to see them, they cannot be viewed as private in any

meaningful sense.¹ Accordingly, a judge who uses Facebook or any other online social network “should ... recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly” (Adv Op 08-176).

Respondent’s comments about the VanArnam matter, posted on her Facebook page ten days after a felony complaint against him was filed in another town court, addressed the defendant’s culpability (stating that he “is not a criminal” and had “[a]bsolutely” no criminal intent) and criticized the prosecution in intemperate language, suggesting that it arose from a “personal vendetta” and that the investigation was the product of “CORRUPTION” caused by “personal friends calling in personal favors.” These statements were improper (*see Matter of Williams*, 2002 NYSCJC Annual Report 175 [judge’s “unwarranted public criticism of the prosecutor,” alleging with no basis that his office was making prosecutorial decisions for political reasons, was inconsistent with the Rules]). Regardless of respondent’s intent, her comments – and her “likes” of comments criticizing the District Attorney that were posted in response to her message – conveyed not only respondent’s personal view that the prosecution was unjust, but the appearance that she was impugning the integrity of the prosecution and endorsing others’ criticism of the District Attorney’s office and the District Attorney personally. Her statements, which were viewable online for 15 days and were reported by the media, were inconsistent with her duty to “act at all times in a manner that promotes public

¹ See ABA Formal Opinion 462, “Judge’s Use of Electronic Social Networking Media,” (2/21/13) (advising that judges who use electronic social media “must assume that comments posted [on such forums] will not remain within the circle of the judge’s connections”).

confidence in the integrity and impartiality of the judiciary” (Rule 100.2[A]) and resulted in her recusal from all matters involving the District Attorney’s office. Moreover, by referring to her judicial position in the same post (stating that she had once “stood up for my Co-Judge”), respondent lent her judicial prestige to her comments, which violated the prohibition against using the prestige of judicial office to advance private interests (Rule 100.2[C]).

We note further that since Rule 100.3(B)(8) mandates that a judge “require similar abstention [from public comment about pending proceedings] on the part of court personnel subject to the judge’s direction and control,” the comments posted by respondent’s court clerk on respondent’s Facebook page were also objectionable. Respondent promptly deleted her own post and all references to the VanArnam matter on her Facebook page after the District Attorney contacted her and questioned the propriety of her statements.

In accepting the stipulated sanction of admonition in this matter, we note that respondent has been cooperative and contrite throughout the Commission’s inquiry and avers that she will refrain from all similar conduct in the future. We also take this opportunity to remind judges that the Rules Governing Judicial Conduct apply in cyberspace as well as to more traditional forms of communications and that in using technology, every judge must consider how such activity may impact the judge’s ethical responsibilities.

The obligations potentially affected by evolving technology extend well beyond Rule 100.3(B)(8) and include, for example, the duty to refrain from *ex parte*

communications, political endorsements, improper pledges and promises, and any extra-judicial activity that detracts from the dignity of judicial office or undermines public confidence in the judiciary (Rules, §§100.3[B][6], 100.5[A][1][e], 100.3[B][9], 100.4[A][2], 100.2[A]). While the ease of electronic communication may encourage informality, it can also, as we are frequently reminded, foster an illusory sense of privacy and enable too-hasty communications that, once posted, are surprisingly permanent. For judges, who are held to “standards of conduct more stringent than those acceptable for others” (*Matter of Kuehnel*, 49 NY2d 465, 469 [1980]) and must expect a heightened degree of public scrutiny, internet-based social networks can be a minefield of “ethical traps for the unwary” (John G. Browning, “Why Can’t We Be Friends? Judges’ Use of Social Media,” 68 U. Miami L. Rev. 487, 511 [Winter 2014]).

The Advisory Committee on Judicial Ethics has cautioned judges about the public nature and potential perils of social networks and has advised that judges who use such forums must exercise “an appropriate level of prudence, discretion and decorum” so as to ensure that their conduct is consistent with their ethical responsibilities (Adv Op 08-176). Further, since the technology behind social media can change rapidly and unpredictably, it is essential that judges who use such forums “stay abreast of new features of and changes to any social networks they use” since such developments may impact the judge’s duties under the Rules (*Id.*).

These are excellent guidelines for any judge who joins and uses an online social network. At a minimum, judges who do so must exercise caution and common sense in order to avoid ethical missteps.

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

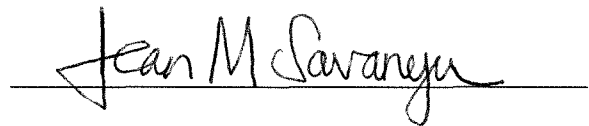
Mr. Belluck, Mr. Harding, Judge Acosta, Mr. Cohen, Ms. Corngold, Mr. Emery, Judge Klonick, Judge Leach, Mr. Stoloff and Judge Weinstein concur.

Ms. Yeboah did not participate.

CERTIFICATION

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

Dated: December 28, 2016

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

APPENDIX G: STATISTICAL ANALYSIS OF COMPLAINTS

COMPLAINTS PENDING AS OF DECEMBER 31, 2015								
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>		15	16	5	2	10	5	53
<i>DELAYS</i>		2	3	5	1	0	0	11
<i>CONFLICT OF INTEREST</i>		4	5	3	0	2	0	14
<i>BIAS</i>		11	3	4	1	1	0	20
<i>CORRUPTION</i>		2	0	0	0	0	1	3
<i>INTOXICATION</i>		0	0	0	1	1	0	2
<i>DISABILITY/QUALIFICATIONS</i>		0	0	0	1	1	0	2
<i>POLITICAL ACTIVITY</i>		3	12	1	1	0	2	19
<i>FINANCES/RECORDS/TRAINING</i>		7	8	6	5	3	0	29
<i>TICKET-FIXING</i>		3	1	0	0	0	0	4
<i>ASSERTION OF INFLUENCE</i>		5	0	0	0	0	2	7
<i>VIOLATION OF RIGHTS</i>		11	11	1	0	7	4	34
<i>MISCELLANEOUS</i>		1	0	0	2	2	0	5
TOTALS		64	59	25	14	27	14	203

*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.

NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 2016								
SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW OR PRELIMINARY INQUIRY	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	CAUTION	RESIGNED	CLOSED*	ACTION*	
<i>INCORRECT RULING</i>	1,124							1,124
<i>NON-JUDGES</i>	354							354
<i>DEMEANOR</i>	81	29	3	0	2	0	0	115
<i>DELAYS</i>	41	2	2	4	1	0	0	50
<i>CONFLICT OF INTEREST</i>	27	11	5	0	0	0	0	43
<i>BIAS</i>	22	6	1	0	0	0	0	29
<i>CORRUPTION</i>	48	7	1	0	0	0	0	56
<i>INTOXICATION</i>	5	2	0	0	0	0	0	7
<i>DISABILITY/QUALIFICATIONS</i>	2	3	0	0	1	0	0	6
<i>POLITICAL ACTIVITY</i>	13	7	4	0	0	0	0	24
<i>FINANCES/RECORDS/TRAINING</i>	10	7	3	1	1	0	0	22
<i>TICKET-FIXING</i>	0	0	0	0	0	0	0	0
<i>ASSERTION OF INFLUENCE</i>	5	10	6	0	1	0	3	25
<i>VIOLATION OF RIGHTS</i>	18	43	7	0	1	1	0	70
<i>MISCELLANEOUS</i>	17	2	0	0	0	0	0	19
TOTALS	1,767	129	32	5	7	1	3	1,944

*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.

ALL COMPLAINTS CONSIDERED IN 2016: 1944 NEW & 203 PENDING FROM 2015								
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>	1,124							1,124
<i>NON-JUDGES</i>	354							354
<i>DEMEANOR</i>	81	44	19	5	4	10	5	168
<i>DELAYS</i>	41	4	5	9	2	0	0	61
<i>CONFLICT OF INTEREST</i>	27	15	10	3	0	2	0	57
<i>BIAS</i>	22	17	4	4	1	1	0	49
<i>CORRUPTION</i>	48	9	1	0	0	0	1	59
<i>INTOXICATION</i>	5	2	0	0	1	1	0	9
<i>DISABILITY/QUALIFICATIONS</i>	2	3	0	0	2	1	0	8
<i>POLITICAL ACTIVITY</i>	13	10	16	1	1	0	2	43
<i>FINANCES/RECORDS/TRAINING</i>	10	14	11	7	6	3	0	51
<i>TICKET-FIXING</i>	0	3	1	0	0	0	0	4
<i>ASSERTION OF INFLUENCE</i>	5	15	6	0	1	0	5	32
<i>VIOLATION OF RIGHTS</i>	18	54	18	1	1	8	4	104
<i>MISCELLANEOUS</i>	17	2	0	0	0	2	0	21
TOTALS	1,767	193	91	30	21	28	17	2,147

*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.

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>	24,201							24,201
<i>NON-JUDGES</i>	7,660							7,660
<i>DEMEANOR</i>	3,942	44	1,345	348	137	133	265	6,214
<i>DELAYS</i>	1,636	4	199	110	39	23	32	2,043
<i>CONFLICT OF INTEREST</i>	831	15	525	174	59	33	145	1,782
<i>BIAS</i>	1,998	17	299	63	33	22	34	2,466
<i>CORRUPTION</i>	651	9	146	14	44	23	43	930
<i>INTOXICATION</i>	68	2	41	8	19	5	31	174
<i>DISABILITY/QUALIFICATIONS</i>	66	3	34	2	22	15	6	148
<i>POLITICAL ACTIVITY</i>	428	10	321	199	26	38	55	1,077
<i>FINANCES/RECORDS/TRAINING</i>	327	14	366	224	158	103	105	1,297
<i>TICKET-FIXING</i>	28	3	94	160	46	62	169	562
<i>ASSERTION OF INFLUENCE</i>	253	15	203	98	40	15	72	696
<i>VIOLATION OF RIGHTS</i>	2,565	54	607	232	109	68	107	3,742
<i>MISCELLANEOUS</i>	880	2	273	89	35	46	60	1,385
TOTALS	45,534	193	4,453	1,721	769	586	1,124	54,380

* 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.



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