

# ANNUAL REPORT

## 1989

### New York State Commission on Judicial Conduct

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1989 ANNUAL REPORT  
OF THE  
NEW YORK STATE  
COMMISSION ON JUDICIAL CONDUCT

COMMISSION MEMBERS

MRS. GENE ROBB, Chairwoman

HONORABLE MYRIAM J. ALTMAN  
(Term Commenced April 1, 1988)

HENRY T. BERGER, ESQ.  
(Term Commenced April 1, 1988)

JOHN J. BOWER, ESQ.

DAVID BROMBERG  
(Served 1976 to January 1988)

HONORABLE CARMEN BEAUCHAMP CIPARICK

E. GARRETT CLEARY, ESQ.

DOLORES DEL BELLO

VICTOR A. KOVNER, ESQ.

HONORABLE WILLIAM J. OSTROWSKI

HONORABLE ISAAC RUBIN

HONORABLE FELICE K. SHEA  
(Term Ended March 31, 1988)

JOHN J. SHEEHY, ESQ.

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GERALD STERN, ESQ.

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ROBERT H. TEMBECKJIAN, ESQ.

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DOLORES DELBELLO  
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HON. WILLIAM J. OSTROWSKI  
HON. ISAAC RUBIN  
JOHN J. SHEEHY  
CLERK  
ALBERT B. LAWRENCE

GERALD STERN  
ADMINISTRATOR  
ROBERT H. TEMBECKJIAN  
DEPUTY ADMINISTRATOR

To the Governor, the Chief Judge of the Court of Appeals 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. The report covers the period from  
January 1, 1988, through December 31, 1988.

Respectfully submitted,

Lillemor T. Robb, Chairwoman,  
On Behalf of the Commission

March 1, 1989  
New York, New York

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## INTRODUCTION

The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of misconduct against judges of the New York State unified court system. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding the independence of the judiciary. Judges must be free to act in good faith, but they also are accountable for their misconduct.

The ethics standards that the Commission enforces are found primarily in the Rules Governing Judicial Conduct and the Code of Judicial Conduct. The Rules are promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, pursuant to Article VI, Sections 20 and 28 of the New York State Constitution. The Code was promulgated by the American Bar Association and was adopted in 1972 by the New York State Bar Association.

This 1989 Annual Report covers the Commission's activities during calendar year 1988. As in previous annual reports, the Commission identifies "specific problem areas," which should be of assistance to judges and to the Office of Court Administration for its training programs.

A history of the development of the Commission, beginning with the creation in 1975 of a temporary State Commission on Judicial Conduct, and a description of the Commission's authority and procedures, are appended to this report.

## COMPLAINTS AND INVESTIGATIONS IN 1988

In 1988, 1109 new complaints were received. Of these, 909 were dismissed upon initial review, and 200 investigations were authorized and commenced.<sup>1</sup> As in previous years, the majority of complaints were submitted by civil litigants and by complaining witnesses and defendants in criminal cases. Other complaints were received from attorneys, judges, law enforcement officers, civic organizations and concerned citizens not involved in any particular court action. Among the new complaints were 53 initiated by the Commission on its own motion.

On January 1, 1988, 133 investigations and proceedings on formal charges were pending from the prior year.

Many of the new complaints dismissed upon initial review were frivolous or outside the Commission's jurisdiction (such as complaints against attorneys or judges not within the state unified court system). Some were from litigants who complained about a particular ruling or decision made by a judge in the course of a proceeding. Absent any underlying misconduct, such as demonstrated prejudice, intemperance, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate such matters, which belong in the appellate courts.

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<sup>1</sup>The statistical period in this report is January 1, 1988, through December 31, 1988. Detailed statistical analysis of the matters considered by the Commission is appended in chart form.

ACTION TAKEN IN 1988

Of the combined total of 333 investigations and proceedings on formal charges conducted by the Commission in 1988 (133 carried over from 1987 and 200 authorized in 1988), the Commission made the following dispositions in 172 cases:

- 104 matters were dismissed outright.
- 32 matters involving 31 different judges were dismissed with letters of dismissal and caution.
- 6 matters involving 6 different judges were closed upon resignation of the judge from office.
- 9 matters involving 7 different judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 21 matters involving 14 different judges resulted in formal discipline (admonition, censure or removal from office).

One hundred sixty-one matters were pending at the end of 1988.

The Commission's dispositions involved judges in various levels of the unified court system, as indicated in the tables on the following pages and in the appended chart.<sup>2</sup>

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<sup>2</sup>Notes as to Tables 1 through 10 on the following pages. The approximate number of judges serving in a particular court is noted in parentheses after the title of each table, followed by their percentage of the total judiciary. (It should be noted that an individual judge may be the subject of more than one complaint.) The "Percent of 1988 Matters" figure indicates the percentage of 1988 results involving judges of a particular court against the total number of Commission actions in the same category in 1988.



Table 1: Town and Village Justices (2400; 68.5%)

<u>1988 Dispositions</u>	<u>Lawyers</u>	<u>Non-Lawyers</u>	<u>Total</u>	<u>Percent of 1988 Matters</u>
Complaints Received	72	252	324	29%
Complaints Investigated	28	93	121	60.5%
Number of Judges Cautioned After Investigation	5	14	19	73%
Number of Formal Written Complaints Authorized	3	8	11	50%
Number of Judges Cautioned After Formal Complaint	0	1	1	20%
Number of Judges Publicly Disciplined	0	8	8	57%
Number of Formal Complaints Dismissed or Closed	1	4	5	83%

Table 2: City Court Judges (372; 11%)

<u>1988 Dispositions</u>	<u>All Lawyers; Part-Time</u>	<u>All Lawyers; Full-Time</u>	<u>Total</u>	<u>Percent of 1988 Matters</u>
Complaints Received	41	145	186	17%
Complaints Investigated	8	16	24	12%
Number of Judges Cautioned After Investigation	0	3	3	11.5%
Number of Formal Written Complaints Authorized	1	3	4	18%
Number of Judges Cautioned After Formal Complaint	2	0	2	40%
Number of Judges Publicly Disciplined	1	0	1	7.2%
Number of Formal Complaints Dismissed or Closed	0	0	0	0%

Table 3: County Court Judges (74; 2%)\*

<u>1988 Dispositions</u>	<u>All Lawyers; All Full-Time</u>	<u>Percent of 1988 Matters</u>
Complaints Received	91	8%
Complaints Investigated	6	3%
Number of Judges Cautioned After Investigation	1	4%
Number of Formal Written Complaints Authorized	2	9%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	2	14.3%
Number of Formal Complaints Dismissed or Closed	0	0%

Table 4: Family Court Judges (114; 3%)

<u>1988 Dispositions</u>	<u>All Lawyers; All Full-Time</u>	<u>Percent of 1988 Matters</u>
Complaints Received	111	10%
Complaints Investigated	12	6%
Number of Judges Cautioned After Investigation	1	4%
Number of Formal Written Complaints Authorized	0	0%
Number of Judges Cautioned After Formal Complaint	1	20%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	0	0%

\* Included in this figure are six judges who serve concurrently as County Court and Family Court judges. In addition, there are eleven judges who serve concurrently as County Court and Surrogate's Court judges, and 32 who serve concurrently as County Court, Surrogate's Court and Family Court judges.

Table 5: District Court Judges (49; 1.5%)

<u>1988 Dispositions</u>	<u>All Lawyers; All Full-Time</u>	<u>Percent of 1988 Matters</u>
Complaints Received	9	1%
Complaints Investigated	2	1%
Number of Judges Cautioned After Investigation	0	0%
Number of Formal Written Complaints Authorized	1	5%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	0	0%

Table 6: Court of Claims Judges (54; 1.5%)\*

<u>1988 Dispositions</u>	<u>All Lawyers; All Full-Time</u>	<u>Percent of 1988 Matters</u>
Complaints Received	9	1%
Complaints Investigated	2	1%
Number of Judges Cautioned After Investigation	0	0%
Number of Formal Written Complaints Authorized	0	0%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	0	0%

\* Some Court of Claims judges serve as Acting Justices of the Supreme Court. A complaint against a Court of Claims judge was recorded as a complaint against a Supreme Court justice if the alleged misconduct occurred in a Supreme Court-related matter.

Table 7: Surrogates (76; 2%)\*

<u>1988 Dispositions</u>	<u>All Lawyers; All Full-Time</u>	<u>Percent of 1988 Matters</u>
Complaints Received	33	3%
Complaints Investigated	3	1.5%
Number of Judges Cautioned After Investigation	0	0%
Number of Formal Written Complaints Authorized	0	0%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	1	7.2%
Number of Formal Complaints Dismissed or Closed	0	0%

Table 8: Supreme Court Justices (312; 9%)

<u>1988 Dispositions</u>	<u>All Lawyers; All Full-Time</u>	<u>Percent of 1988 Matters</u>
Complaints Received	220	20%
Complaints Investigated	30	15%
Number of Judges Cautioned After Investigation	2	7.5%
Number of Formal Written Complaints Authorized	4	18%
Number of Judges Cautioned After Formal Complaint	1	20%
Number of Judges Publicly Disciplined	2	14.3%
Number of Formal Complaints Dismissed or Closed	1	17%

\* Included in this total are eleven Surrogates who serve concurrently as County Court judges and 32 who serve concurrently as Family Court and County Court judges.

Table 9: Court of Appeals Judges and Appellate Division Justices (54; 1.5%)

<u>1988 Dispositions</u>	<u>All Lawyers; All Full-Time</u>	<u>Percent of 1988 Matters</u>
Complaints Received	13	1%
Complaints Investigated	0	0%
Number of Judges Cautioned After Investigation	0	0%
Number of Formal Written Complaints Authorized	0	0%
Number of Judges Cautioned After Formal Complaint	0	0%
Number of Judges Publicly Disciplined	0	0%
Number of Formal Complaints Dismissed or Closed	0	0%

Table 10: Non-Judges

<u>1988 Dispositions</u>	<u>Number</u>	<u>Percent of 1988 Matters</u>
Complaints Received	113	10%

### Formal Proceedings

No disciplinary sanction may be imposed by the Commission 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 with respect to charges served, hearings commenced or other matters, absent a waiver by the judge, until a case has been concluded and a final determination has been filed with the Chief Judge of the Court of Appeals and forwarded to the respondent-judge. Following are summaries of those matters which were completed during 1988 and made public pursuant to the applicable provisions of the Judiciary Law. Copies of the determinations are appended.

### Determinations of Removal

The Commission completed five disciplinary proceedings in 1988 in which it determined that the judge involved be removed from office.

### Matter of Clement F. Quarantello

The Commission determined that Clement F. Quarantello, a justice of the Murray Town Court, Orleans County, be removed from office for conducting a proceeding without hearing the defendant, indicating bias against a Legal Services attorney and

failing to be candid with the Commission. (Judge Quarantello is not a lawyer.)

In its determination of April 15, 1988, the Commission found that Judge Quarantello heard a plaintiff in an eviction proceeding before the defendant and her attorney arrived and before the time scheduled for the hearing, then signed a warrant of eviction. When the defendant, represented by a Legal Services lawyer, appeared at the designated time, Judge Quarantello advised them that he had already signed the warrant of eviction and declared that "legal aid" was not entitled to a trial in his court. The Commission also found that, in connection with its investigation, Judge Quarantello falsely stated that he had held a hearing in the case in which all parties were present. The judge also indicated that he does not "care for" legal aid attorneys.

The Commission held that Judge Quarantello had denied the defendant her fundamental right to be heard, demonstrated partiality and attempted to deceive the Commission.

Judge Quarantello requested review of the Commission's determination by the Court of Appeals but did not pursue the matter. The Court therefore dismissed the request for review for want of prosecution on August 11, 1988.

Matter of Leroy A. VonderHeide

The Commission determined that Leroy A. VonderHeide, a justice of the Northampton Town Court, Fulton County, be removed from office for engaging in ex parte communications, exhibiting

intemperate behavior, failing to disqualify himself in a case in which he had personal knowledge of the facts and abusing his judicial authority. (Judge VonderHeide is not a lawyer.)

In its determination of June 22, 1988, the Commission found that in connection with three criminal cases, Judge VonderHeide had interviewed various witnesses and made judgments based on these unsworn, ex parte conversations, that he failed to disqualify himself in two criminal cases in which he had witnessed the underlying events, that he assumed the role of policeman or prosecutor in two cases by insisting that additional charges be lodged, and that he conducted an arraignment and coerced a guilty plea from a person never charged by the police. The Commission also found that Judge VonderHeide displayed anger and profanity in a street confrontation with a young man.

By this series of improper acts, the Commission held, Judge VonderHeide prejudiced the fair and proper administration of justice and demonstrated his unfitness to be a judge.

Judge VonderHeide requested review of the Commission's determination by the Court of Appeals, which ordered his removal on December 15, 1988. Matter of VonderHeide, 72 NY2d 658 (1988).

Matter of Gerald C. Molnar

The Commission determined that Gerald C. Molnar, a justice of the Madrid Town Court, St. Lawrence County, be removed from office for offering money to a defendant in his court in exchange for a sexual act. (Judge Molnar is not a lawyer.)



In its determination of July 18, 1988, the Commission found that Judge Molnar used his judicial office to gain entrance to a defendant's home, then solicited a sexual favor from her in exchange for money. When she refused, he promised her special consideration in future court cases if she did not report the incident and threatened to use his judicial authority to harm her if she did. The Commission held that the judge's behavior was unconscionable, constituted gross misconduct and warranted removal from office.

Judge Molnar did not request review of the Commission's determination, and the Court of Appeals ordered his removal on August 29, 1988.

Matter of William H. Intemann, Jr.

The Commission determined that William H. Intemann, Jr., a judge of the County Court, Family Court and Surrogate's Court, Hamilton County, be removed from office for engaging in improper business activity, for practicing law while a full-time judge and for improperly failing to disqualify himself in certain matters. (Judge Intemann is a lawyer.)

In its determination of October 25, 1988, the Commission found that after taking the bench, Judge Intemann actively participated in three businesses organized for profit and improperly practiced law by continuing to provide legal services for three estates. The Commission also found that Judge Intemann failed to disqualify himself in numerous cases which warranted his recusal, including two matters in which he had performed

legal services, one case in which his law secretary was representing a party, and 21 matters in which parties were represented by an attorney with close business and financial ties to the judge.

The Commission determined that Judge Intemann exacerbated his misconduct in that he attempted to conceal his improper practice of law, paid himself a \$15,000 fee from an estate without the knowledge of the executrix, made a false representation to a client and gave testimony in the Commission proceeding which was lacking in candor.

Judge Intemann requested review of the Commission's determination by the Court of Appeals, where the matter is pending. On November 22, 1988, the Court suspended Judge Intemann pending disposition of his request for review.

#### Matter of Jerome D. Cohen

The Commission determined that Jerome D. Cohen, a justice of the Supreme Court, Kings County (Second Judicial District), be removed from office for receiving personal loans without interest from a particular lending institution and ordering infants' funds deposited in the same lending institution. (Judge Cohen is a lawyer.)

In its determination of October 28, 1988, the Commission found that over a five-year-period, the HYFIN Credit Union granted Judge Cohen the extraordinary privilege of paying no interest on a series of personal loans, which resulted in a savings to him of nearly \$15,000. The Commission found that, at

the same time, Judge Cohen ordered that nearly \$250,000 be deposited with HYFIN. The Commission held that, by such conduct, Judge Cohen created the appearance that his judicial decisions were being influenced by the favorable treatment he was receiving from HYFIN, thereby diminishing public confidence in the integrity of the judiciary and destroying Judge Cohen's usefulness on the bench.

Judge Cohen requested review of the Commission's determination by the Court of Appeals, where the matter is pending. On December 15, 1988, the Court suspended Judge Cohen pending disposition of his request for review.

#### Determinations of Censure

The Commission completed six disciplinary proceedings in 1988 in which it determined that the judges involved be censured.

#### Matter of Thomas A. Robertiello

The Commission determined that Thomas A. Robertiello, a justice of the Rochester Town Court, Ulster County, be censured for improperly presiding over and disposing of a traffic case. (Judge Robertiello is not a lawyer.)

In its determination of February 23, 1988, the Commission found that Judge Robertiello presided over a traffic case that was scheduled before another judge in which the defendant was the employer of Judge Robertiello's wife. The Commission held that Judge Robertiello never notified the prosecutor that

the case was to be heard and improperly dismissed it on a specious ground. The Commission stated that such circumstances lead to the inescapable conclusion that the judge fixed the case as a favor, a practice that has always been wrong and has long been condemned by the courts and the Commission.

Judge Robertiello did not request review by the Court of Appeals.

Matter of Louis D. Laurino

The Commission determined that Louis D. Laurino, the Surrogate of Queens County, be censured for improper business dealings and an improper political contribution. (Judge Laurino is a lawyer.)

In its determination of March 25, 1988, the Commission found that for 14 years, Judge Laurino had rented an office building to attorneys who served as counsel to the Public Administrator of Queens County, a position to which they were appointed by the judge and whose fees were determined by the judge. The Commission found that such an arrangement made rental negotiations inherently coercive and cast a shadow on the public dealings between the judge and attorneys who regularly appeared in his court. The Commission also found that Judge Laurino had suggested to the public administrator and his counsel that they employ the judge's son and nephew, and that he had made a prohibited political contribution in 1985 to the campaign of Queens Borough President Donald R. Manes.

Judge Laurino did not request review by the Court of Appeals.

Matter of Bruce McM. Wright

The Commission determined that Bruce McM. Wright, a justice of the Supreme Court, New York County (First Judicial District) be censured for lending the prestige of his judicial office to advance the private interests of a particular individual and improperly failing to disqualify himself from matters involving that same person. (Judge Wright is a lawyer.)

In its determination of June 20, 1988, the Commission found that Judge Wright had written two letters on behalf of a woman with whom he was acquainted, then presided over an oral argument and decided a motion in a lawsuit brought by the same woman against one of the individuals to whom Judge Wright had written on her behalf. The Commission also found that Judge Wright executed two affidavits on behalf of his acquaintance, knowing that they would be used in pending litigation in his own court. The Commission held that Judge Wright had used the prestige of his judicial office to advance the woman's private interests.

Judge Wright requested review of the Commission's determination by the Court of Appeals. By stipulation of the parties, the request was withdrawn on October 7, 1988.

Matter of Gerald D. Watson

The Commission determined that Gerald D. Watson, a judge of the Lockport City Court, Niagara County, be censured for failing to disqualify himself in a case involving a friend and client. (Judge Watson is a lawyer.)

In its determination dated November 17, 1988, the Commission found that Judge Watson ordered released from custody and personally returned a driver's license to a defendant in a criminal case with whom he had a long-standing personal and professional relationship and who was scheduled to appear before another judge. The Commission held that his intervention constituted abuse of judicial office to gain special treatment for another.

The Commission also sustained part of another charge in which it was alleged that Judge Watson presided over nine cases involving attorneys with whom he shares office facilities and with whom he was once associated in law practice and in the ownership of a building. While the Commission held that it was improper for Judge Watson to preside over the cases in which the attorneys appeared as counsel, it did not base the sanction of censure on that conduct in part because Judge Watson had taken steps to disassociate himself from the law firm.

Judge Watson did not request review by the Court of Appeals.

Matter of Edwin R. Sweetland

The Commission determined that Edwin R. Sweetland, a justice of the Dryden Town Court and Freeville Village Court, Tompkins County, be censured for making improper comments in a criminal case. (Judge Sweetland is not a lawyer.)

In its determination of November 21, 1988, the Commission found that Judge Sweetland conveyed the impression of partiality by suggesting that a particular Hispanic defendant be deported, by making statements to a newspaper reporter while the matter was pending that indicated the defendant was guilty of a serious crime with which he had never been charged, and by asserting that a group of students in a Central American Scholarship Program should be deported. The Commission held that the comments undermined Judge Sweetland's proper role as an impartial judge and indicated distrust and dislike of all those from outside his community.

Judge Sweetland did not request review by the Court of Appeals.

Matter of Roger W. Gloss

The Commission determined that Roger W. Gloss, a justice of the Sheridan Town Court, Chautauqua County, be censured for political activity. (Judge Gloss is not a lawyer.)

In its determination of December 21, 1988, the Commission found that Judge Gloss attended partisan political meetings and fund-raisers for non-judicial candidates, distributed tickets to one fund-raiser and engaged in other fund-raising and campaign

activities on behalf of candidates for county executive and the county legislature. The Commission held that his repeated and notorious violations of the rules restricting political activity by judges were clearly improper.

Judge Gloss did not request review by the Court of Appeals.

#### Determinations of Admonition

The Commission completed three disciplinary proceedings in 1988 in which it determined that the judges involved be admonished.

#### Matter of Joseph Harris

The Commission determined that Joseph Harris, a judge of the County Court, Albany Court, be admonished for engaging in fund-raising activities. (Judge Harris is a lawyer.)

In its determination of January 22, 1988, the Commission found that Judge Harris participated in a "Jail Bail for Heart" program of the American Heart Association in which he acted as a judge in mock court proceedings in his courtroom. Persons who had collected money or pledges for the heart association were brought before Judge Harris and "charged" with such "crimes against the heart" as smoking, overeating or leading overly-stressful lives. Judge Harris set "bail" in the amount that each person had collected, and the money was paid to representatives of the heart association at the rear of the courtroom or in a nearby room. The Commission held that, although he did



not personally solicit funds, Judge Harris participated in and endorsed what was principally a money-making program, in violation of rules prohibiting a judge from fund-raising.

Judge Harris requested review of the Commission's determination by the Court of Appeals, which admonished him on July 6, 1988. Matter of Harris, 72 NY2d 335 (1988).

Matter of Mary Rita Merkel

The Commission determined that Mary Rita Merkel, a justice of the East Bloomfield Town Court, Ontario County, be admonished for improperly presiding over a case in which her court clerk was the complaining witness. (Judge Merkel is not a lawyer.)

In its determination of May 19, 1988, the Commission found that Judge Merkel signed an arrest warrant, arraigned a defendant and disposed of a case without disclosing to the parties that the complaining witness was her court clerk. The Commission held that, since a judge and a clerk in a justice court have a close working relationship, a reasonable person might question whether the judge could handle fairly a matter involving someone with whom she has such frequent contact and a presumed relationship of trust. By not disclosing the relationship, the Commission said, Judge Merkel did not promote public confidence in the integrity and impartiality of the judiciary.

Judge Merkel did not request review by the Court of Appeals.

Matter of Jeffrey P. LaMountain

The Commission determined that Jeffrey P. LaMountain, a justice of the Keeseville Village Court, Essex County, be admonished for conducting an ex parte meeting with one party to a dispute in which he reviewed evidence and later based his decision on that evidence without disclosing to the other party that the meeting had taken place or giving him an opportunity to review and rebut the proof. (Judge LaMountain is not a lawyer.)

In its determination of December 23, 1988, the Commission found that Judge LaMountain had abandoned his proper role as an independent and impartial judge and created the impression that he was biased.

Judge LaMountain did not request review by the Court of Appeals.

Dismissed Formal Written Complaints

The Commission disposed of 11 Formal Written Complaints in 1988 without rendering public discipline.

In five of these cases, the Commission determined that the judge's misconduct had been established but that public discipline was not warranted, dismissed the Formal Written Complaint and issued the judge involved a confidential letter of dismissal and caution.

In five other cases, the Commission closed the matter in view of the fact that the judge had left judicial office because of retirement, resignation or failure to win reelection.

In the remaining case, the Commission found that misconduct was not established and dismissed the Formal Written Complaint.

Letters of Dismissal and Caution

Pursuant to Commission rule, 22 NYCRR 7000.1(1), a "letter of dismissal and caution" constitutes the Commission's written confidential suggestions and recommendations to a judge.

Where the Commission determines that the misconduct would not warrant public discipline, the Commission, by issuing a letter of dismissal and caution, can privately call a judge's attention to de minimis violations of ethical standards which should be avoided in the future. Such a communication is valuable since it is the only method by which the Commission may caution a judge as to his or her conduct without making the matter public.

Should the conduct addressed by the letter of dismissal and caution continue unabated or be repeated, the Commission may authorize an investigation on a new complaint which may lead to a Formal Written Complaint and further disciplinary proceedings.

In 1988, 31 letters of dismissal and caution were issued by the Commission, five of which were issued after formal charges had been sustained and a determination made that the judge involved had engaged in misconduct. (Twenty town or village justices were cautioned; two part-time city court judges were cautioned; nine other full-time judges were cautioned.) The caution letters addressed various types of conduct.

For example, six judges were cautioned for engaging in impermissible political activity, including participating in a joint fund-raiser with a candidate for non-judicial office, making contributions to the campaigns of others, and engaging in political activity during periods when the judges themselves were not candidates for elective judicial office.

Five town justices were cautioned for engaging in improper ex parte communications with police officers, witnesses and others concerning cases pending before them.

Two judges were cautioned for failing to disqualify themselves in cases in which their impartiality might reasonably be questioned, including a town justice who presided over a case involving a client of his real estate business and a part-time city court judge who presided over a case involving a client of his law practice.

Two town justices were cautioned for inordinate delay in disposing of cases and reporting them to the State Comptroller.

Two town justices were cautioned for conducting arraignments of defendants in police cars.

One judge was cautioned for being a speaker at a charitable fund-raising event. Another judge was cautioned for directing a defendant to make a charitable contribution.

Since April 1, 1978, the Commission has issued 386 letters of dismissal and caution, 31 of which were issued after formal charges had been sustained and determinations made that the judges involved had engaged in misconduct.

### Matters Closed Upon Resignation

Six judges resigned in 1988 while under investigation or under formal charges by the Commission.

Since 1975, 168 judges have resigned while under investigation or charges.

The jurisdiction of the temporary and former commissions was limited to incumbent judges. An inquiry was therefore terminated if the judge resigned, and the matter could not be made public. The present Commission may retain jurisdiction over a judge for 120 days following resignation. The Commission may proceed within this 120-day period, but no sanction other than removal may be determined by the Commission within such period. (When rendered final by the Court of Appeals, the "removal" automatically bars the judge from holding judicial office in the future.) Thus, no action may be taken if the Commission decides within that 120-day period following a resignation that removal is not warranted.

### Referrals To Other Agencies

Pursuant to statute (Judiciary Law Section 44[10]), the Commission, when appropriate, refers matters to other agencies. For example, complaints received by the Commission against court personnel are referred to the Office of Court Administration, as are complaints that pertain to administrative issues. Indications of criminal activity are referred to the appropriate prosecutor's office. Complaints against lawyers are referred to the appropriate Appellate Division.

In 1988, the Commission referred 25 matters, involving complaints against court employees or administrative issues, to either the Office of Court Administration or an administrative judge.

SUMMARY OF COMPLAINTS CONSIDERED  
SINCE THE COMMISSION'S INCEPTION

Since January 1975, when the temporary Commission commenced operations, 10,680 complaints of judicial misconduct have been considered by the temporary, former and present Commissions.

Of the 10,680 complaints received since 1975, 7615 were dismissed upon initial review and 3065 investigations were authorized. Of the 3065 investigations authorized, the following dispositions have been made through December 31, 1988:

- 1412 were dismissed without action after investigation;
- 552 were dismissed with caution or suggestions and recommendations to the judge;
- 214 were closed upon resignation of the judge;
- 229 were closed upon vacancy of office by the judge other than by resignation; and
- 497 resulted in disciplinary action.
- 161 are pending.

Of the 497 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission:<sup>3</sup>

- 85 judges were removed from office;

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<sup>3</sup>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 which resulted in action and the number of judges disciplined.

- 2 additional removal determinations are pending review in the Court of Appeals;
- 3 judges were suspended without pay for six months (under previous law);
- 2 judges were suspended without pay for four months (under previous law);
- 161 judges were censured publicly;
- 87 judges were admonished publicly; and
- 59 judges were admonished confidentially by the temporary or former Commission, which had such authority.

In addition, 168 judges resigned during investigation, upon the commencement of disciplinary proceedings or in the course of those proceedings.



REVIEW OF COMMISSION DETERMINATIONS BY THE COURT OF APPEALS

Determinations rendered by the Commission are filed with the Chief Judge of the Court of Appeals and served by the Chief Judge on the respondent-judge, pursuant to statute. The Judiciary Law allows the respondent-judge 30 days to request review of the Commission's determination by the Court of Appeals. If review is waived or not requested within 30 days, the Commission's determination becomes final.

Since 1978, the Court of Appeals has reviewed 42 Commission determinations (33 of these were determinations of removal, seven were determinations of censure and two were determinations of admonition). The Court accepted the sanction determined by the Commission in 33 cases (28 of which were removals). In two cases, the Court increased the sanction from censure to removal. In seven cases, the Court reduced the sanction that had been determined by the Commission (five removals were reduced to censure, and two censures were reduced to admonition). In no case did the Court of Appeals find that the Commission erred in finding misconduct and determining that a public sanction was appropriate.

In 1988, the Court had before it six requests for review, two of which had been filed in 1987 and four of which were filed in 1988. Of these six matters, the Court decided four; two are pending.

Matter of Michael J. Greenfeld

On September 2, 1987, the Commission determined that Michael J. Greenfeld, a justice of the Valley Stream Village Court, Nassau County, be removed from office for improperly delegating his judicial duties and giving false information concerning the matter to an administrative judge. Judge Greenfeld requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated March 17, 1988, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Greenfeld, 71 NY2d 389 (1988).

The Court concluded that the judge had improperly permitted the Deputy Village Attorney to perform judicial duties in certain cases, including accepting guilty pleas, determining the amount of fines to be paid by defendants, and entering dispositions on official court records. The Court also concluded that the judge's deceptive response to the administrative judge's inquiry about the practice prevented the implementation of corrective measures. Accordingly, the Court concluded, the sanction of removal was appropriate.

Matter of James R. Lenney

On June 23, 1987, the Commission determined that James R. Lenney, a justice of the Herkimer Village Court, Herkimer County, be removed from office for neglecting his judicial duties in numerous respects and failing to cooperate with the

Commission. Judge Lenney requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated March 29, 1988, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Lenney, 71 NY2d 456 (1988).

The Court found that the judge had failed to make timely reports and remittances to the State Comptroller over a 26-month period, and failed to dispose of a small claims matter for over six years, notwithstanding that he had previously been cautioned to dispose of court business promptly. As to the charge of failure to cooperate, the Court rejected as "unsatisfactory" the judge's explanation for his failure to respond to the Commission's written inquiries during the investigation.

The Court concluded that since those acts of misconduct supported the sanction of removal, there was no need for the Court to address the Commission's determination regarding alleged delays in 41 other civil and criminal matters. The Court suggested that the judge's handling of those cases concerned "matters of internal court administration and substantive law that may well exceed the Commission's ambit of responsibility." Id. at 459.

Matter of Joseph Harris

On January 22, 1988, the Commission determined that Joseph Harris, a judge of the County Court, Albany County, be admonished for his participation in the "Jail Bail for Heart"

program of the American Heart Association. Judge Harris requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated July 6, 1988, the Court accepted the determined sanction of admonition. Matter of Harris, 72 NY2d 335 (1988).

The Court concluded that "the Commission did not err" in finding that the judge's participation in the "Jail Bail for Heart" program "violated both the letter and the spirit" of Section 100.5(b)(2) of the Rules Governing Judicial Conduct, which prohibits judges from soliciting funds for charitable organizations or using the prestige of their office for that purpose. Id. at 336-37.

While rejecting the judge's contention that a public sanction was inappropriate because the Commission had not first warned him privately that his conduct was improper, the Court stated:

That the Commission might have discharged its own function differently or more effectively, given the circumstances, by acting swiftly and informally to avoid further breach of the rules, rather than by initiating a full-blown adversarial proceeding culminating in public admonition, does not alter the fact that [Judge Harris] violated the rules and is appropriately sanctioned for his conduct.

Id. at 337

Matter of Leroy A. VonderHeide

On June 22, 1988, the Commission determined that Leroy A. VonderHeide, a justice of the Northampton Town Court, Fulton

County, be removed from office for ex parte communications, intemperate behavior, failure to disqualify himself in a case in which he had personal knowledge of the facts, and abuse of authority. Judge VonderHeide requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated December 15, 1988, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of VonderHeide, 72 NY2d 658 (1988).

Upholding the Commission's findings and conclusions, the Court stated that the judge had engaged in "a pattern of injudicious behavior and inappropriate actions which cannot be viewed as acceptable conduct by one holding judicial office." Id. at 660.

## CHALLENGES TO COMMISSION PROCEDURES

The Commission's staff litigated several matters in 1988 involving important constitutional and statutory issues relative to the Commission's jurisdiction and procedures.

### Sims v. Wachtler et al.

On March 16, 1987, former Buffalo City Court Judge Barbara M. Sims, who was removed by the Court of Appeals in 1984 on review of a Commission determination, filed a complaint in Supreme Court, New York County, against the Chief Judge, the Chief Administrative Judge, and the Administrator of the Commission. The complaint sought a declaratory judgment that the defendants' conduct in investigating and removing her from office was discriminatory and unconstitutional, and that various provisions of the Constitution of the State of New York and the Judiciary Law, under which she was removed, are "unlawful, invalid, unconstitutional, void and unenforceable."

The Administrator filed a motion to dismiss dated April 22, 1987, on the grounds of lack of jurisdiction, failure to state a cause of action, collateral estoppel, res judicata and the statute of limitations. The other defendants moved to dismiss, on similar grounds, on May 15, 1987. The plaintiff filed a cross-motion for summary judgment on June 12, 1987, and an amended cross-motion, for partial summary judgment, on July 11, 1987.

On May 4, 1988, Supreme Court Justice Ethel B. Danzig granted the defendants' motions to dismiss on the grounds that

the Court lacked jurisdiction to review determinations of the Court of Appeals and the Commission. The Court also denied the plaintiff's cross-motion for summary judgment.

The plaintiff filed a notice of appeal dated June 1, 1988.

Matter of Joseph Harris (Court of Appeals Review)

The Commission determined in 1988 that Albany County Court Judge Joseph Harris should be admonished for participating in a "Jail Bail for Heart" event of the American Heart Association. A second charge, alleging that the judge engaged in impermissible political activity at the Democratic State Convention, was dismissed by the Commission.

Judge Harris requested review of the Commission's determination by the Court of Appeals. On January 29, 1988, the judge moved to seal or redact the record as to the dismissed charge of improper political activity. Commission counsel opposed the motion, asserting that under the law the entire record of the proceedings before the Commission becomes public when the Commission determines that a public sanction should be imposed. Counsel noted that, as part of the review process, the Court of Appeals is authorized to review the entire record of the proceedings before the Commission, including all of its findings of fact and conclusions of law, and may sustain a charge that was dismissed by the Commission. See Matter of Sims, 61 NY2d 349 (1984). On February 11, 1988, the Court denied the motion to seal the record.

People v. Sarner

In this criminal case in District Court, Nassau County, the defendant's attorney issued a judicial subpoena duces tecum dated January 19, 1988, seeking the Commission's investigative files in Matter of Goldstein, a 1987 case in which the Commission had imposed the sanction of censure. The judge had engaged in certain conduct related to a matter involving a member of the Sarner family. On February 2, 1988, the Commission filed a motion to quash the subpoena duces tecum on the grounds that such files are confidential pursuant to Section 45 of the Judiciary Law.

After receiving the Commission's motion, the defendant's attorney advised the Court that the subpoena duces tecum was withdrawn. On February 29, 1988, the Court ruled that the matter was moot and granted the motion to quash.



## SPECIFIC PROBLEM AREAS IDENTIFIED BY THE COMMISSION

In the course of its inquiries and other duties, the Commission has identified certain issues and patterns of conduct that require comment and discussion in a forum other than a disciplinary determination in an individual case. In furtherance of both (i) our obligation to advise the judiciary of these matters so that potential misconduct may be avoided and (ii) our authorization in law to make administrative and legislative recommendations, we have commented over the years in this section of our annual report on certain matters which we believe warranted attention.

### Advisory Opinions

In 1987, with authority from the Court of Appeals, the practice of providing advisory opinions to judges was reinstated after a seven-year hiatus. A distinguished group of judges and lawyers was appointed by Chief Judge Sol Wachtler and staffed by the Office of Court Administration with a mandate to receive and respond to requests for advisory opinions on ethics matters from judges throughout the unified state court system.

The Commission believes that the creation of this Advisory Committee on Judicial Ethics addresses an important need. Judges throughout the state again have an authoritative source for advisory opinions on whether certain contemplated conduct not specifically addressed in the Rules Governing Judicial Conduct would be permissible.

The publication of the opinions of the panel constitutes a valuable source of information on a broad spectrum of ethical issues.

Inquiries to the Advisory Committee on Judicial Ethics should be addressed in care of the Office of Court Administration, 270 Broadway, Room 1401, New York, New York 10007; telephone: (212)587-2000.

#### Police Car Arraignments

In 1988 the Commission cautioned two town justices with respect to their repeatedly arraigning criminal defendants in police cars.

With certain specific exceptions, such as in cases involving "youthful offenders," state law requires all court proceedings to be public (Section 4 of the Judiciary Law). Case law has further addressed the issue. A judge may not hold court in a police barracks or schoolhouse. (People v. Schoonmaker, 65 Misc2d 393, 317 NYS2d 696 [Co. Ct. Greene Co. 1971]; People v. Rose, 82 Misc2d 429, 368 NYS2d 387 [Co. Ct. Rockland Co. 1975].)

Absent a controlling exception, arraignments should be conducted in public settings. They should also be conducted in an appropriate place that does not detract from the impartiality, independence and dignity of the court.

Over the last several years, OCA has made special efforts to improve the facilities available to full-time judges around the state. Some small municipalities in this state do not

provide court facilities for their town and village justices, thereby requiring judges to use their homes or other settings. At times, arraignments cannot be conducted in open court. In other instances, late-night arrests result in off-hour arraignments. Nevertheless, a judge who presides in a police car fails to promote public confidence in the integrity and impartiality of the judiciary.

It is the responsibility of local municipalities, not the State, to provide appropriate space to town and village justices. In view of these realities, special emphasis should be given in training and education programs for town and village justices on the subject of proper, public settings for arraignments and other court proceedings.

Commission Access To Sealed Or Other  
Confidential Court Records

In the course of conducting its inquiries, it is often necessary for the Commission to review and analyze court files and records. For example, if a judge is alleged to have made certain intemperate remarks, review of the court transcript is invaluable as a means of assessing the validity of the complaint. Also, for background and evaluative purposes, it is often necessary to review motion papers and other court documents in order to put the alleged misconduct into perspective.

Section 42, subdivision 3, of the Judiciary Law empowers the Commission to "request and receive from any court [and other government agencies] such assistance, information and

data as will enable it properly to carry out its functions, powers and duties."

For the most part, the Commission receives without impediment those records and materials it requires, usually upon request from court officials and other government offices. The Commission also has subpoena power.

With respect to records either under court seal or made confidential by statute, however, the Commission has encountered difficulty in expeditiously obtaining required material. Many judges are reluctant to release such records to the Commission without a court order. This has resulted in certain awkward situations and has created delays in conducting investigations.

For example, it is often the case that the judge with jurisdiction over the required file is also the judge under investigation. Obviously, the Commission should not be in the untenable position of requesting the release of records from the judge it is investigating, in connection with the case file being requested. In one instance, a particular file was not placed under seal until the Commission requested the file.

Several years ago, in an effort to address this problem, the Commission and the (then) Chief Administrative Judge discussed the issue. It was suggested that the Commission apply to the appropriate administrative judge for an unsealing order. Although this procedure has enabled the Commission to obtain closed files, some problems remain. Since a request for a court order gives rise to the exercise of judicial discretion as to whether such relief should be granted, some judges require

specific justifications in the moving papers. Others have expressed concern about issuing such an order without giving the judge who sealed the file an opportunity to be heard. This conflicts with the very strict statutory mandate of confidentiality on the Commission's activities (Section 45 of the Judiciary Law) and improperly requires the Commission to provide specific information about its investigations. Such a procedure in effect would delegate to the administrative judge the power to evaluate the merits of a Commission action. By law, however, that power rests with the Court of Appeals and may only otherwise be exercised subject to recognized practice and procedure, such as a mandamus action pursuant to Article 78 of the CPLR. As the power to unseal a file is not restricted to the judge who sealed it, we recommend adoption of a procedure whereby the appropriate administrative judge unseals the file upon a bare statement by the Commission that the file is required in connection with a Commission investigation.

No judge should be shielded from proper inquiry because the alleged misconduct occurred in a closed proceeding or because evidence of the misconduct is under court seal. Any concern that releasing such files to the Commission might compromise innocent participants of the proceeding should be allayed (i) by the strict confidentiality mandate which would cover such files upon receipt by the Commission and (ii) by the Commission's practice of redacting from its determinations the names of court proceedings which were confidential or under seal.

The Commission appreciates judicial concern about the unsealing of files, but it cannot discharge its own constitutional mandate without expeditious access to such files when circumstances warrant. The Commission's own strict statutory mandate of confidentiality provides an adequate substitute for the prior sealing. Should the Legislature again review the Commission's procedures in 1989, as it did without effecting any amendments in 1987 and 1988, we recommend that the statutory authorization to receive court materials specifically include reference to sealed and other confidential records.

Judge's Spouse Serving As Campaign Treasurer

Section 100.7 of the Rules Governing Judicial Conduct explicitly prohibits all political activity by judges, with certain exceptions connected to the judge's own campaign for elective judicial office. Pursuant to Canon 7 of the Code of Judicial Conduct, a judicial candidate may not solicit or accept campaign funds, but a campaign committee may be established for that purpose. The commentary to Canon 7 of the Code provides that the names of campaign contributors should not be revealed to the judicial candidate, unless the candidate is required by law to file a list of campaign contributors. In New York, such a list must be filed, but it may be signed by an officer of the campaign committee. An advisory opinion of the New York State Bar Association Committee on Professional Ethics concluded that judicial candidates should not see such a list or learn "in any other way" the identity of contributors (Opinion #289, 1973).

There is no Rule or Canon that addresses political activity by a judge's spouse. Yet often the conduct of a spouse (or other family member) will reflect adversely on the judge or on the impartiality of judicial office, particularly when family members are actively engaged in the judge's campaign. For example, in some cases a judge's spouse or other family member has served as the campaign treasurer. The spouse or family member has raised and collected funds and filed the necessary campaign reports. It appears that, in some instances, judges' spouses or family members have managed the campaign's finances from the house as opposed to a campaign office.

In one particular instance in 1988, the Commission learned of political fund-raising invitations that listed the judge's home phone number as the RSVP. The spouse was evidently active in the campaign. It is unrealistic under such circumstances to expect that a spouse would collect and report campaign funds and not advise the judge on how much was collected and from whom it was raised. If the judge's home phone is listed as the RSVP on a fund-raising appeal, the judge can learn the identity of contributors merely by answering the phone. Yet, by virtue of the citations noted above, judges in New York are not supposed to know who gave their campaigns money. It is especially difficult for a judge to remain ignorant of the contributors' identities when fund-raising events themselves are held in the judge's home. In any event, it is unseemly and demeaning to the dignity of judicial office for campaign contributions to be collected in the judge's home.

While the Rules permit a judge to attend his or her own fund-raiser -- and thus de facto become aware of the identity of contributors -- care should be taken to protect the dignity and independence of judicial office in conducting the campaign.

Complainants Who Attempt To Disqualify Judges  
Against Whom They Have Filed Complaints

There are many instances where a litigant or lawyer who has filed a complaint or testified against a judge may properly move to disqualify the judge from presiding over new matters involving him or her. From time to time, however, the Commission will receive a complaint which was apparently filed for the purpose of intimidating the judge, or as an excuse to request the judge's disqualification, in connection with a pending case. On occasion, while making the disqualification application, the complainant misinterprets or misrepresents Commission communications.

In one recent episode, a complainant called to ask about the Commission's procedure for receiving and reviewing complaints, including whether to enclose the judge's decision in the case. The complaint procedure was described, and the complainant was told that the Commission members, not staff, decide whether to investigate. The caller was also told to include relevant material with the complaint, including the decision.

Apparently, while making the application for disqualification, the complainant and his lawyer told the judge that the complainant had called the Commission and that the Commission was



awaiting the judge's decision. This raised the spectre in the judge's mind that the Commission's disposition would be determined by the judge's ruling in the matter. In this particular instance, the Commission decided that the complaint had no merit and did not warrant investigation. The judge's decision on the disqualification motion and his rulings on the merits were irrelevant to the complaint and were not considered.

The Commission is of the view that most complaints are sincerely motivated, and a change in procedures is not warranted. Obviously, the Commission cannot control what a particular complainant might say or do in court, nor can it prevent individuals from making complaints for improper purposes. It should be obvious that only the Commission members and staff -- not complainants, witnesses or others -- can legitimately purport to speak for the Commission. The Commission and its staff make every effort to act with discretion in order to minimize the opportunities for misunderstanding or misrepresentation by complainants. The Commission does not give substantive or procedural legal advice, and it freely distributes its annual reports and informational brochures. The message to complainants should be clear: In every instance, complaints are disposed of on their merits. The Commission should not be used by any person to intimidate the judiciary.

#### Judges Serving As Election Commissioners

Section 100.5(h) of the Rules Governing Judicial Conduct permits part-time judges to accept private or public

sector employment "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."

Section 3-200 of the Election Law specifically permits a town or city judge to serve as a county election commissioner. Pursuant to that same section, election commissioners are appointed in equal numbers by the major political parties. Given the various statutory, Rules and Code prohibitions on judges engaging in political activity, including a prohibition on a judge belonging to a political club (Section 7 of the Rules), it seems inappropriate to permit a judge to serve by appointment of a political party to an election commissionership. There would be at least the unfortunate appearance that the judge is beholden to the party that facilitated the appointment.

Moreover, there is a widely held perception that the political parties appoint election commissioners not so much to protect the public interest but to look after the parties' own partisan concerns. Such a role would be incompatible with the judge's fundamental obligation to be and appear to be an impartial arbiter of disputes.

The Commission recommends that the Legislature amend Section 3-200 of the Election Law to prohibit judges from serving as election commissioners.

#### Delays and Calendar Control Problems

Section 100.3(a)(5) of the Rules Governing Judicial Conduct requires that a judge diligently perform the

administrative duties of office and promptly dispose of matters before the court. Over the years, the Commission has both confidentially cautioned and publicly disciplined judges for failing to perform those duties or for inordinate delays in rendering decisions. (See Matter of Robert Leonard in the 1985 Annual Report.)

In 1988, the Court of Appeals accepted a Commission determination in Matter of James R. Lenney that the judge be removed from office, finding inter alia that the judge failed to discharge certain administrative duties and, in one instance, failed to dispose of a small claims case for six years, notwithstanding an earlier caution by the Commission to dispose of court business promptly. 71 NY2d 456 (1988). As to delays in 41 other cases, the Court did not make a finding, although it did note that certain Commission contentions as to those 41 cases "betray an intrusion into matters of internal court administration and substantive law that may well exceed the Commission's ambit of responsibility." Id. at 459.

The Commission does not intend to intrude into matters that solely concern internal court administration and substantive law. In those cases where delay is attributable to the judge and involves misconduct, the Commission will treat the matter as disciplinary. Where delay is a result of court administration, the Commission will advise OCA as appropriate, recognizing the burdensome volume of cases that the courts are called upon to decide.

Ex Parte Communications With And  
Improper Reliance Upon Prosecutors

In our last two annual reports, we have addressed the problem of judges who improperly discuss the merits of particular cases on an ex parte basis with prosecutors or other law enforcement representatives. In 1988, the Court of Appeals upheld two Commission determinations on the subject, removing from office two town justices inter alia for engaging in such improper ex parte communications and otherwise improperly relying upon or favoring prosecutors. Matter of Greenfeld, 71 NY2d 389 (1988) and Matter of VonderHeide, 72 NY2d 658 (1988). See also Matter of Sardino, 58 NY2d 286 (1983); Matter of McGee, 59 NY2d 870 (1983); and Matter of Rider and Matter of Cooksey in the Commission's 1988 Annual Report.

Ex parte practices in which judges rely for advice on prosecutors or other law enforcement personnel are clearly improper and undermine a fundamental judicial obligation to hear both sides in a dispute fairly in order to render judgment impartially. It distorts the judicial process for the trial judge to discuss the merits of a case with one side in private. At the very least, such communications give rise to an appearance of impropriety. At worst, they offer one side a means of influencing the judge with information that the other side does not know is before the judge and therefore cannot rebut.

Despite the cases reported above and discussion of the subject in our widely-disseminated annual reports, the practice

appears to be continuing in some parts of the state. In 1988, for example, in the course of a Commission investigation, a State Trooper reported that some town justices continue to privately discuss with law enforcement personnel the merits of various cases on the day's calendar prior to convening court.

To underscore the importance of this subject, the Commission will write directly to every District Attorney in the state, to the State Police and to other local law enforcement agencies, calling attention to the problem, the pertinent cases and discussions in this and previous annual reports, and urging that the improper practice cease.

#### The Right To Assigned Counsel

It is a fundamental constitutional principle that no defendant should be committed to jail without the opportunity to be represented by counsel. If the defendant is too poor to afford it, counsel must be assigned by the court. People v. Witerski, 15 NY2d 392 (1965); Scott v. Illinois, 440 US 367 (1979).

In New York State's larger cities, assigned representation of indigent defendants is usually available as early as the arraignment stage of proceedings. It would therefore be unusual for a defendant to spend a significant amount of time in jail without having been afforded counsel. In smaller communities around the state, however, the Commission has found that indigent defendants may spend long periods of time in jail without

representation and often without having been advised by the court of their right to assigned counsel.

In one case, an indigent defendant, charged with "Pedestrian on the Parkway," a traffic matter, was remanded to jail because he was unable to post \$150 bail. He was not advised of his right to assigned counsel and spent 28 days in jail, notwithstanding that the maximum penalty on the charge was 15 days. He was eventually allowed to plead guilty to the charge and was sentenced to time already served in jail. (See Matter of Jutkofsky in the 1986 Annual Report.)

A defendant who is charged with a violation but cannot post bail should be released from jail after five days, if the People are not ready for trial, pursuant to Section 30.30(2)(d) of the CPL. Unfortunately, a few judges routinely violate this section, typically by adjourning cases from week to week, often when there is no attorney assigned to argue for the client's release and no prosecutor is available. A few judges have even suggested in Commission proceedings that they believe they can indefinitely incarcerate a defendant who fails to post bail on minor charges.

Some judges have attempted to justify the practice of incarcerating defendants at arraignment without affording them counsel by claiming that they are not required to assign counsel unless they intend to sentence the defendant to jail. They suggest that since they do not intend to impose a jail sentence, they are not required to appoint counsel simply because some

defendants are unable to post bail and must spend pre-sentence time in jail. This rationale fails for several reasons.

New York State law requires that all defendants, including those charged with violations, be advised of their right to assigned counsel, "except in traffic infraction cases." People v. Ross, 67 NY2d 19 (1982); Section 170.10(3)(c) of the Criminal Procedure Law, and Practice Commentary by Joseph W. Bellacosa; Section 722-a of the County Law; People v. Van Florcke, 467 NY2d 298 (1983); Davis v. Shepard, 399 NYS2d 836 (1977). Even in motor vehicle violation cases, the U.S. Constitution requires that no indigent defendant be incarcerated without being afforded the opportunity of having assigned counsel. Argersinger v. Hamlin, 407 US 25 (1972); Scott v. Illinois, 440 US 367 (1979). In Scott, the Court stated: "We believe that the central premise of Argersinger -- that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment -- is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel..." 440 US at 373.

In the rare instance where a judge decides to set bail on a motor vehicle violation, he or she presumably should know by the end of the arraignment whether there is a substantial likelihood that a defendant will be unable to post bail and, therefore, whether counsel should be assigned. Indeed, Section 510.30(2)(a)(ii) of the CPL requires that, in making the bail decision, a judge consider the defendant's financial resources.

The Commission urges that more attention should be devoted to the prompt appointment of counsel, especially for indigent defendants and in cases where the defendant may spend time in jail. It seems absurd that a defendant charged with nothing more than a violation should spend weeks in jail without benefit of counsel because he or she is poor, whereas the same defendant charged with a more serious crime would have counsel appointed to argue for an early release. The absurdity is underscored in those instances where the judge does not assign counsel at arraignment, the defendant stays in jail on a minor charge, and the eventual sentence does not involve a jail term.

Some town and village justices have expressed the view that they have no obligation to make certain that counsel is assigned to indigent defendants.

Article 18-b of the County Law provides that each county shall establish a system of providing representation for those too poor to afford counsel. The Commission has become aware of varying and often confusing practices around the state as to whose responsibility it is to determine the financial eligibility of a particular defendant for assigned counsel. There are also varying standards as to the eligibility requirements themselves. Because the guidelines are vague, the results may be arbitrary. Different officials of the same county often cite different standards.

Judges without clear guidelines or criteria appear to be resorting to totally inappropriate rules of thumb. The Commission has learned, for example, that some judges set high



bail and tell defendants that, if they are able to post bail, they will be ineligible for assigned counsel. One judge bases his eligibility decisions solely on whether the defendant has a job, regardless of the salary or part-time nature of the employment. Another judge bases his decisions on whether the defendants' parents can afford counsel. In determining who is qualified for such assistance, some officials rely on weekly-wage standards that were formulated twenty years ago. The result is that in some parts of the state, defendants who cannot afford to retain counsel are not being assigned counsel.

Clearly, the fundamental right to counsel is too important to be left to inappropriately varying or even arbitrary standards of eligibility and application. In a period of budgetary cutbacks and increasing costs for a variety of public needs, more funding to safeguard fundamental constitutional rights is not apt to be given a high priority. More attention should be devoted to this problem by the organized bar, civic and professional organizations and concerned citizens. Realistic uniform guidelines are needed. Moreover, OCA training programs should underscore both the importance and meaning of the right to counsel and precisely how the implementation of this indispensable right should be carried out.

CONCLUSION

Public confidence in the integrity and impartiality of the judiciary is essential to the rule of law. The members of the State Commission on Judicial Conduct believe the Commission contributes to that ideal and to the fair and proper administration of justice.

Respectfully submitted,

Mrs. Gene Robb, Chairwoman  
Myriam J. Altman  
Henry T. Berger  
John J. Bower  
Carmen Beauchamp Ciparick  
E. Garrett Cleary  
Dolores DelBello  
Victor A. Kovner  
William J. Ostrowski  
Isaac Rubin  
John J. Sheehy



APPENDIX A

BIOGRAPHIES OF COMMISSION MEMBERS

HONORABLE MYRIAM J. ALTMAN is a graduate of Barnard College and the New York University School of Law. She was elected a Justice of the Supreme Court for the First Judicial District in 1987. Prior thereto, from 1978 to 1987, she served a ten-year term as a Judge of the Civil Court of the City of New York, eight and one half of those years as an Acting Justice of the Supreme Court. Justice Altman is a member of the Committee on State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York and co-chair of the Committee on Continuing Education for the Newly Admitted Lawyer of the New York County Lawyers' Association. She is a member of the Office of Court Administration's Committee on Civil Law and Procedure and a vice president of the New York State Association of Women Judges. She and her husband are the parents of three children.

HENRY T. BERGER, ESQ. is a graduate of Lehigh University and New York University School of Law. He is a partner in the firm of Berger, Poppe, Janiec and Mackasek in New York City. He is a member of the Committee on the Judiciary of the Association of the Bar of the City of New York. Mr. Berger served as a member of the Council of the City of New York in 1977.

JOHN J. BOWER, ESQ., is a graduate of New York University and New York Law School. He is a partner in Bower & Gardner in New York City. He is a Fellow of the American College of Trial Lawyers, a Member of the Federation of Insurance Counsel and a Member of the American Law Institute.

HONORABLE CARMEN BEAUCHAMP CIPARICK is a graduate of Hunter College and St. John's University School of Law. She was elected a Justice of the Supreme Court for the First Judicial District in 1982. Previously she was an appointed Judge of the Criminal Court of the City of New York from 1978 through 1982. Judge Ciparick formerly served as Chief Law Assistant of the New York City Criminal Court, Counsel in the office of the New York City Administrative Judge, Assistant Counsel for the Office of the Judicial Conference and a staff attorney for the Legal Aid Society in New York City. She is a former Vice President, Secretary and Board Member of the Puerto Rican Bar Association. Judge Ciparick is a member of the Mayor's Commission on Hispanic Concerns, the New York City Commission on the Bicentennial of the Constitution, the Board of Directors of the New York Association of Women Judges, and the Board of Trustees of Boricua College.

E. GARRETT CLEARY, ESQ., attended St. Bonaventure University and is a graduate of Albany Law School. He was an Assistant District Attorney in Monroe County from 1961 through 1964. In August of 1964, he resigned as Second Assistant District Attorney to enter private practice. He is now a partner in the law firm of Harris, Beach, Wilcox, Rubin and Levey in Rochester. In January 1969 he was appointed a Special Assistant Attorney General in charge of Grand Jury Investigation ordered by the late Governor Nelson A. Rockefeller to investigate financial irregularities in the Town of Arietta, Hamilton County, New York. In 1970 he was designated as the Special Assistant Attorney General in charge of an investigation ordered by Governor Rockefeller into a student/police confrontation that occurred on the campus of Hobart College, Ontario County, New York, and in 1974 he was appointed a Special Prosecutor in Schoharie County for the purpose of prosecuting the County Sheriff. Mr. Cleary is a member of the Monroe County and New York State Bar Associations, and he has served as a member of the governing body of the Monroe County Bar Association, Oak Hill Country Club, St. John Fisher College, Better Business Bureau of Rochester, Automobile Club of Rochester, Hunt Hollow Ski Club, as a trustee to Holy Sepulchre Cemetery and as a member of the Monroe County Bar Foundation and the Monroe County Advisory Committee for the Title Guarantee Company. He is a former Chairman of the Board of Trustees of St. John Fisher College. He and his wife Patricia are the parents of seven children.

DOLORES DEL BELLO received a baccalaureate degree from the College of New Rochelle and a masters degree from Seton Hall University. She was Regional Public Relations Director for Bloomingdale's until 1986 and is presently C.E.O. of DelBello and Cohn Communications, Inc. in Armonk, New York. Mrs. DelBello is a member of Alpha Delta Kappa, the international honorary society for women educators; the National Association of Female Executives; the Westchester Public Relations Association; the Founders Club of the Yonkers YWCA; National Association of Negro Women; Co-Chairperson of the St. Cabrini Nursing Home Capital Campaign; member of the Board of Directors for Greyston Inn and the Northern Westchester Center for the Arts. She was formerly a member of the League of Women Voters; The Hudson River Museum Board of Directors; Lehman College Performing Arts Center; Westchester Women in Communications; Naylor Dana Institute for Disease Prevention, American Health Foundation.

VICTOR A. KOVNER, ESQ., is a graduate of Yale College and the Columbia Law School. He is a partner in the firm of Lankenau Kovner & Bickford. Mr. Kovner served as a member of the Mayor's Committee on the Judiciary from 1969 through 1985. Mr. Kovner is Chair of the Committee on the Judiciary of the Association of the Bar of the City of New York, and formerly served as Chair of the Committee on Communications. For many years, Mr. Kovner has served on the board of directors of the Committee for Modern Courts. He is Chair of the Legal Affairs Committee of the Magazine Publishers of America and he serves as a member of the advisory board of the Media Law Reporter. Mr. Kovner formerly served in the House of Delegates of the New York State Bar Association. He formerly served as President of Planned Parenthood of New York City, and he is acting chair of the Board of Trustees of the American Place Theater. In 1988, Mr. Kovner was awarded a Citation of Merit from the American Judicature Society.

HONORABLE WILLIAM J. OSTROWSKI is a graduate of Canisius College and received law degrees from Georgetown and George Washington Universities. He attended the National Judicial College in 1967. Justice Ostrowski is a Justice of the Supreme Court in the Eighth Judicial District and was elected to that office in 1976. During the preceding 16 years he was a judge of the City Court of Buffalo, and from 1956 to 1960 he was a Deputy Corporation Counsel of the City of Buffalo. He served with the 100th Infantry Division in France and Germany during World War II. He has been married to Mary V. Waldron since 1949 and they have six children and six grandchildren. Justice Ostrowski is a member of the American Law Institute, the Fellows of the American Bar Foundation, the American Bar Association and its National Conference of State Trial Judges; American Judicature Society; National Advocates Society; New York State Bar Association and its Judicial Section; Erie County Bar Association; and the Lawyers Club of Buffalo.

MRS. GENE ROBB is a graduate of the University of Nebraska. She is a former President of the Women's Council of the Albany Institute of History and Art and served on its Board. She also served on the Chancellor's Panel of University Purposes under Chancellor Boyer, later serving on the Executive Committee of that Panel. She served on the Temporary Hudson River Valley Commission and later the permanent Hudson River Valley Commission. She is a member of the Board of the Salvation Army Executive Committee for the New York State Plan. She is a former member of the National Advisory Council of the Salvation Army and is now an Honorary Member of the Albany Salvation Army Board. In 1988 the Salvation Army of Albany gave Mrs. Robb the Award for Outstanding Community Service. She is on the Board of the Saratoga Performing Arts Center, the Board of the Albany Medical College, the Board of Trustees of Union College and the Board of Trustees of the New York State Museum. Mrs. Robb is a former member of the Advisory Committee of the Center for Judicial Conduct Organizations of the American Judicature Society. She is a former member of the Executive Committee of the Board of the American Judicature Society and a former member of its Board. She serves on the Visiting Committee for Fellowships and Internships of the Nelson A. Rockefeller Institute of Government. Mrs. Robb was given an award in 1976 by the Albany Area Chamber of Commerce for outstanding contributions on behalf of the Civic and Community Development of the Albany area and its surrounding communities. In 1982 she received an honorary degree of Doctor of Law from Siena College in Loudonville. In 1984 Mrs. Robb was awarded the Regents' Medal of Excellence for her community service to New York State. In 1987 Mrs. Robb received the Samuel J. DuBoff Award given by the Fund for Modern Courts to the layman who contributed most to the improvement of the judicial system in New York State. The University of Nebraska gave to Mrs. Robb their Alumni Achievement Award. Mrs. Robb has been a member of the Commission since its inception. She is the mother of four children and grandmother of eleven.

HONORABLE ISAAC RUBIN is a graduate of New York University, the New York University Law School (J.D.) and St. John's Law School (J.S.D.). He is presently a Justice of the Appellate Division, Second Department, to which he was appointed by Governor Carey in January 1982 and reappointed by Governor Cuomo in January 1984. Prior to this appointment, Justice Rubin sat in the Supreme Court, Ninth Judicial District, where he served as Deputy Administrative Judge of the County Courts and superior criminal courts. Judge Rubin previously served as a County Court Judge in Westchester County, and as a Judge of the City Court of Rye, New York. He is a director and former president of the Westchester County Bar Association. He has also served as a member of the Committee on Character and Fitness of the Second Judicial Department, and as a member of the Nominating Committee and the House of Delegates of the New York State Bar Association.

HONORABLE FELICE K. SHEA is a graduate of Swarthmore College and Columbia Law School. She is a Justice of the Supreme Court, First Judicial District (New York County), and is the Presiding Justice of the Extraordinary Special and Trial Term of the Supreme Court for the City of New York. She served previously as Judge of the Civil Court of the City of New York. Justice Shea is a Director of the Association of Women Judges of the State of New York, a Director of the New York Women's Bar Association, a Fellow of the American Bar Foundation, and a Fellow of the American Academy of Matrimonial Lawyers. She is a member of the Association of the Bar of the City of New York, serving on its Council on Judicial Administration; a member of New York County Lawyers' Association, serving on its Special Committee on the Bicentennial; and a member of the American and New York State Bar Associations. Justice Shea is a former president of the Alumni Association of Columbia Law School and a recipient of the Alumni Federation Medal for Conspicuous Alumni Service to Columbia University. Her term on the Commission ended on March 31, 1988.

JOHN J. SHEEHY, ESQ. is a graduate of the College of the Holy Cross, where he was a Tilden Scholar, and Boston College Law School. He is a partner in the New York office of Rogers & Wells. He is a senior member of the firm's litigation department and a member of the firm's Executive Committee. Mr. Sheehy was an Assistant District Attorney in New York County from 1963 to 1965, when he was appointed Assistant Counsel to the Governor by the late Nelson A. Rockefeller. Mr. Sheehy joined Rogers & Wells in February 1969. He is a member of the bars of the United States Supreme Court, the United States Court of Appeals for the Second and Eighth Circuits, the United States District Court for the Southern, Eastern and Northern Districts of New York, the United States Court of International Trade and the United States Court of Military Appeals. He is a member of the American and New York State Bar Associations and Chairman of the Finance and Administration Committee of Epiphany Church in Manhattan. He is also a Commander in the U.S. Naval Reserve, Judge Advocate General Corps. John and Morna Ford Sheehy live in Manhattan and East Hampton, with their three children.

#### ADMINISTRATOR OF THE COMMISSION

GERALD STERN, ESQ., is a graduate of Brooklyn College, the Syracuse University College of Law and the New York University School of Law, where he received an LL.M. in Criminal Justice. Mr. Stern has been Administrator of the Commission since its inception. He previously served as Director of Administration of the Courts, First Judicial Department, Assistant Corporation Counsel for New York City, Staff Attorney on the President's Commission on Law Enforcement and the Administration of Justice, Legal Director of a legal service unit in Syracuse, and Assistant District Attorney in New York County. He teaches Professional Responsibility at Pace University School of Law as an adjunct Professor of Law.

#### DEPUTY ADMINISTRATOR

ROBERT H. TEMBECKJIAN, ESQ., is a graduate of Syracuse University and Fordham Law School. He previously served as Clerk of the Commission, as publications director for the Council on Municipal Performance in New York, staff director of the Governor's Cabinet Committee on Public Safety in Ohio and special assistant to the Deputy Director of the Ohio Department of Economic and Community Development. Mr. Tembeckjian is a member of the Association of the Bar of the City of New York, serving on its Committee on Professional and Judicial Ethics.

#### CLERK OF THE COMMISSION

ALBERT B. LAWRENCE, ESQ., is a graduate of the State University of New York and Antioch School of Law. He joined the Commission staff in 1980 and has been Clerk of the Commission since 1983. He is a former newspaper reporter who has written on criminal justice and legal topics. Mr. Lawrence is on the adjunct faculty of the State University where he teaches law, criminal justice and journalism in the Empire State College program.

#### CHIEF ATTORNEY, ALBANY

STEPHEN F. DOWNS, ESQ., is a graduate of Amherst College and Cornell Law School. He served in India as a member of the Peace Corps from 1964 to 1966. He was in private practice in New York City from 1969 to 1975, and he joined the Commission's staff in 1975 as a staff attorney. He has been Chief Attorney in charge of the Commission's Albany office since 1978.

#### CHIEF ATTORNEY, ROCHESTER

JOHN J. POSTEL, ESQ., is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission's staff in 1980 as an assistant staff attorney in Albany. He has been Chief Attorney in charge of the Commission's Rochester office since April 1984. Mr. Postel is a member of the Monroe County Bar Association's Committee on Professional Standards.



COMMISSION STAFF

ADMINISTRATOR

Gerald Stern

DEPUTY ADMINISTRATOR

Robert H. Tembeckjian

CLERK OF THE COMMISSION

Albert B. Lawrence

CHIEF ATTORNEYS

Stephen F. Downs

John J. Postel

SENIOR ATTORNEYS

Alan W. Friedberg

Jean M. Savanyu

STAFF ATTORNEYS

Cathleen S. Cenci

\*Henry S. Stewart

BUDGET OFFICERS

Maria D. Falcon

Maureen T. Sheehan

\*Janet F. Whelehan

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Linda C. Hellmann

David M. Herr

Gail Cohen Karo

Grania B. Marcus

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Robert J. Muller

Donald R. Payette

Alice E. Pernick

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Susan C. Weiser

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Bernice E. Brown

Diane B. Eckert

Lee R. Kiklier

Shelley E. Laterza

Jennifer A. Rand

Susan J. Schiano

Ann L. Schlafley

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John W. Corwin, Librarian

\*Carlton Downer

Tyrone I. Grant

\*Keith Jones

Miguel Maisonet

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Flavia V. Bufano

Sharon L. Currier

Georgia A. Damino

Marylyn H. Fearey

Lisa Gray

Linda J. Guilyard

Judi A. LaMountain

\*Brunilda Lopez

Jacqueline Quezada

Susan A. Totten

LEGAL RESEARCH ASSISTANT

Deborah Ronnen

LAW STUDENTS

\*Jane A. Conrad

\*William A. Levine

\* Denotes individuals who left the Commission staff prior to December 1988.

## APPENDIX B

### THE COMMISSION'S POWERS, DUTIES AND OPERATIONS

#### INTRODUCTION

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.

By offering a forum for citizens with conduct-related complaints, 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. The Commission does not act as an appellate court, does not make judgments as to the merits of judicial decisions or rulings, and does not investigate complaints that judges are either too lenient or too severe in criminal cases.

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 the purpose of clarity, the Commission which operated from September 1, 1976, through March 31, 1978, will henceforth be referred to as the "former" Commission. A description of the temporary and former commissions, their composition and workload is included in this Appendix B.)

#### STATE COMMISSION ON JUDICIAL CONDUCT

##### Authority

The State Commission on Judicial Conduct 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 VI, 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.

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

shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system...and may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.

The types of complaints that may be investigated by the Commission include improper demeanor, conflicts of interest, 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 convenes once a month. 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 complaint is assigned to a staff attorney, who is responsible for conducting the inquiry and supervising the 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 at least one Commission member 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. (A list of those who were designated as referees in Commission cases last year is appended.) 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 investigative or adjudicative proceedings.

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.

#### 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 each by 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.

Biographies of the Commission members are set forth in Appendix A. A list of Commission staff members is also appended.

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

#### Temporary State Commission on Judicial Conduct

The Temporary State Commission on Judicial Conduct 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. (A full account of the temporary Commission's activity is available in the Final Report of the Temporary State Commission on Judicial Conduct, dated August 31, 1976.)

#### 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 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 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.

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\*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.

During its tenure, the former Commission took action which 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 by 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 in 1978, 1979 and 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 which 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.





APPENDIX C

REFEREES WHO PRESIDED IN COMMISSION  
PROCEEDINGS IN 1988

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<u>REFEREE</u>	<u>CITY</u>	<u>COUNTY</u>
Ira M. Belfer, Esq.	New York	New York
Michael G. Breslin, Esq.	Albany	Albany
Eugene V. Buczkowski, Esq.	Buffalo	Erie
J. Kenneth Campbell, Esq.	Mineola	Nassau
Michael A. Cardozo, Esq.	New York	New York
Alexander C. Cordes, Esq.	Buffalo	Erie
Frank N. Cuomo, Esq.	Amherst	Erie
Hon. Nanette Dembitz	New York	New York
Hon. Catherine T. England	Centereach	Suffolk
C. Benn Forsyth, Esq.	Rochester	Monroe
Hon. Bertram Harnett	New York	New York
Jacob D. Hyman, Esq.	Buffalo	Erie
H. Wayne Judge, Esq.	Glens Falls	Warren
Marjorie E. Karowe, Esq.	Albany	Albany
Robert M. Kaufman, Esq.	New York	New York
Peter J. Murrett, Jr., Esq.	Buffalo	Erie
Eugene E. Napierski, Esq.	Albany	Albany
Hon. James O'Shea	Rome	Oneida
Peter Preiser, Esq.	Albany	Albany
Shirley Adelson Siegel, Esq.	New York	New York
Joseph J. Tabacco, Jr., Esq.	New York	New York



**State of New York**  
**Commission on Judicial Conduct**

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APPENDIX D

Determinations  
Rendered in 1988

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

**Determination**

JEROME D. COHEN,

a Justice of the Supreme Court,  
2nd Judicial District, Kings County.

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APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the  
Commission

Jerome Karp (Mitchell K. Friedman, Of Counsel) for  
Respondent

The respondent, Jerome D. Cohen, a justice of the Supreme Court, 2d Judicial District, was served with a Formal Written Complaint dated July 3, 1987, alleging that he received personal loans without interest and ordered infants' funds deposited in the same lending institution pursuant to an understanding with the institution. Respondent filed an answer dated July 27, 1987.

By order dated August 6, 1987, the Commission designated the Honorable Donald J. Sullivan as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 7, 8, 9 and 30, November 5, 6 and 13 and December 1, 1987, and the referee filed his report with the Commission on August 10, 1988.

By motion dated August 19, 1988, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report and for a finding that respondent be removed from office. Respondent opposed the motion by cross motion on September 12, 1988. The administrator filed a reply dated September 20, 1988.

On September 23, 1988, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. The charge is not sustained and is, therefore, dismissed.

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

2. Respondent is a justice of the Supreme Court and has been since January 1, 1985. He was a judge of the Civil Court of the City of New York from January 1, 1980, to December 31, 1984.

3. On June 14, 1979, respondent met with Edmund Lee, treasurer and chief executive officer of the HYFIN Credit Union, for the purpose of obtaining a loan to finance his campaign for civil court.

4. Mr. Lee thereafter approved and HYFIN granted the following loans to respondent at the following specified interest rates:

<u>Date</u>	<u>Amount</u>	<u>Specified Rate</u>
June 14, 1979	\$ 5,000	12%
August 8, 1979	10,000	12%
August 31, 1979	10,000	12%
November 18, 1981	5,000	12%
January 26, 1983	7,500	6%
April 16, 1984	15,000	6%
January 30, 1985	25,000	10%
January 30, 1985	50,000	10%

5. During 1979 and after September 30, 1985, respondent paid interest on his loans at the specified rate.

6. Between January 1, 1980, and September 30, 1985, respondent paid no interest on any of the loans. HYFIN waived \$14,889.70 in interest payments on respondent's loans during that period.

7. Respondent took income tax deductions for interest paid on the loans in 1979 and 1985 but not for the period 1980 through 1984.

8. On four of respondent's checks in May and June 1985, he wrote on the face of each check a balance that would match the balance of his loan had each payment been applied exclusively to reduce the principal.

9. In March 1985, after respondent made a payment, he was sent a receipt indicating that the payment had been apportioned to interest only. Respondent wrote on the receipt, "Should be \$12,099.89," next to the statement of the loan balance, indicating the balance had the payment been applied to reduce the principal only.

10. On May 10, 1983, a transfer was made from respondent's HYFIN savings account to make a loan payment of \$1,072.98, of which \$771.91 was apportioned to pay principal on the then-outstanding loan, and \$301.07 was apportioned to interest. On May 26, 1983, an adjustment was made to apply the full amount to principal.

11. Two payments totaling \$789.99 made by respondent on January 10, 1985, were credited in full to interest. On January 18, 1985, an adjustment was made to credit the payments in full to principal rather than interest.

12. Three payments totaling \$1,452.65 on March 6, 1985, were apportioned in part to principal and in part to interest. On April 16, 1985, the interest payment of \$1,409.27 was applied to reduce the principal of the loan.

13. On May 28, 1985, a \$357.66 payment made by respondent was credited to principal in the amount of \$282.59 and to interest in the amount of \$75.07. An adjustment was subsequently made to credit the full amount to reduce the principal of the loan.

14. At least some of the adjustments were made as the result of complaints by respondent that a portion of the payments had been applied to interest.

15. Respondent was aware that he was paying no interest on the loans from January 1, 1980, to September 30, 1985.

16. Respondent was aware that the specified interest rate of 6 percent on the January 26, 1983, and April 16, 1984, loans was substantially below the rates then ranging from 15 to 21 percent for most other borrowers at HYFIN and was lower than the prime interest rate of 11 percent in January 1983 and 12 percent in April 1984.

17. Between February 4, 1980, and May 1, 1984, respondent designated the HYFIN Credit Union as a depository for infants' funds in 56 cases totaling \$244,503.14 in deposits, as denominated in Schedule A appended hereto.

18. Respondent designated HYFIN notwithstanding that: (a) no other judge had previously done so; (b) he never designated any other credit union as a depository; and, (c) he was receiving loans from HYFIN on terms not available to most other borrowers.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.5(c) of the Rules Governing Judicial Conduct and Canons 1, 2 and 5C of the Code of Judicial Conduct. Charges II and III of the Formal Written Complaint are sustained, and respondent's misconduct is established. Charge I is dismissed. Respondent's cross motion is denied.

Over a five-year period, respondent was granted the extraordinary privilege of paying no interest on a series of personal loans, which resulted in a savings to him of nearly \$15,000. At the same time, he ordered that nearly \$250,000 be deposited in the same institution that awarded him those interest-free loans.

Respondent's contention that he was unaware that he was not paying interest was appropriately rejected by the referee.

By knowingly accepting the loan terms, respondent violated the express provisions of Section 100.5(c)(3) of the Rules Governing Judicial Conduct which requires that a judge borrow money on the same terms generally available to others. This was not simply a matter of obtaining reduced interest rates; for five years, no interest was charged at all. He also conveyed the impression that he was engaging in financial dealings that exploited his judicial position, contrary to Sections 100.5(c)(1) and 100.2 of the Rules.

By depositing money subject to the jurisdiction of the court in the same institution that was giving him interest-free loans, respondent created the appearance that his judicial decisions were being influenced by the favorable treatment he was receiving. Such appearance is no less to be condemned than an actual impropriety. Matter of Spector v. State Commission on Judicial Conduct, 47 NY2d 462, 466 (1979). A reasonable person would question whether there was an explicit or tacit understanding between respondent and the lending institution or, at the very least, whether respondent, in selecting HYFIN as a depository, was hoping to continue an arrangement that benefited him personally.

Such an appearance diminishes public confidence in the integrity of the judiciary and destroys respondent's usefulness on the bench. Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465, 469 (1980).

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

Mrs. Robb, Judge Altman, Mr. Berger, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Kovner, Judge Ostrowski and Judge Rubin concur, except that Mrs. Robb, Mr. Berger, Mrs. Del Bello and Mr. Kovner dissent as to Charge I only and vote that the charge be sustained.

Mr. Bower dissents as to sanction only and votes that respondent be censured.

Mr. Sheehy was not present.

Dated: October 28, 1988

APPENDIX A

<u>Date of Order</u>	<u>Name of Case</u>	<u>Amount</u>
2/04/80	Gabbay	\$ 4,334.00
2/06/80	Weinstein	1,400.00
2/20/80	Biviano	1,575.00
5/19/80	Maddalena	4,244.00
5/22/80	Trinagel	6,334.00
5/22/80	Nicastro	4,000.00
5/22/80	Wintner	5,000.00
5/23/80	Barnes	2,617.00
5/23/80	Whyte	2,617.00
5/24/80	Covington	2,783.00
8/14/80	Rene	1,333.00
12/10/80	Salas	1,950.00
12/29/80	DeLiso	1,368.00
1/21/81	Abikzer	2,939.00
1/29/81	Douglas	850.00
3/27/81	Musella	6,333.00
3/27/81	Dietrich	2,334.00
5/8/81	Able	3,334.00
6/3/81	Falkowitz	800.00
6/17/81	O'Connor	6,000.00
6/18/81	Geller	9,667.00
9/21/81	Carmichael	3,000.00
9/28/81	Britton	6,491.67
12/11/81	King	6,667.00
1/08/82	DeLuzio	3,500.00
1/08/82	Mirando	5,910.00
3/31/82	Clark	990.00
5/10/82	Hodge	5,422.00
6/04/82	Deerr	7,333.34
6/08/82	Greene	6,667.00
6/08/82	Cathcart	2,334.00
6/11/82	Larocca	6,670.00
6/24/82	Gelbstein	5,000.00
7/01/82	Duprey	834.00
7/01/82	Duprey	2,500.00
7/08/82	Green	995.00
8/11/82	Fisher	3,965.00
8/16/82	McGinness	1,600.00
8/17/82	Johnson	4,666.67
8/18/82	Weinstein	4,000.00
10/07/82	Kruzhanovska	6,666.67
11/18/82	Simmons	1,900.00
2/24/83	Bilpuh	3,334.00
4/04/83	Lazarowitz	10,000.00
4/07/83	Cohen	4,666.66



<u>Date of Order</u>	<u>Name of Case</u>	<u>Amount</u>
4/08/83	Perez	5,300.00
4/25/83	Duggins	10,000.00
9/83	Dimino	1,333.00
9/16/83	Dimino	4,666.00
11/12/83	Cucksey	2,000.00
11/16/83	Ellis	2,310.13
11/28/83	Vargas	14,150.00
11/28/83	Mandes	3,000.00
11/28/83	Jex	2,135.00
12/16/83	Johnson	500.00
12/19/83	Lovell	2,184.00
5/01/84	Creer	20,000.00
	Total	\$244,503.14

**State of New York**  
**Commission on Judicial Conduct**

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

JEROME D. COHEN,

a Justice of the Supreme Court,  
2nd Judicial District, Kings County.

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OPINION BY MRS. DEL BELLO,  
IN WHICH MRS. ROBB,  
MR. BERGER AND MR. KOVNER  
JOIN, CONCURRING IN PART  
AND DISSENTING IN PART

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During a period of five years, respondent borrowed large sums from the HYFIN Credit Union and received from HYFIN a substantial benefit: HYFIN waived almost \$15,000 in interest on these loans. During the same period of time, respondent designated HYFIN in numerous cases as a depository for judicial settlements of infants' claims.

The referee flatly rejected respondent's testimony that he was unaware that he had not been paying interest to HYFIN. As the referee found, such testimony is disproved, inter alia, by: (1) respondent's decision not to deduct interest payments to HYFIN on his tax returns from 1980 through 1984; (2) his own calculations on checks and receipts, which disclose that all his payments to HYFIN reduced the principal only; and, (3) the fact that respondent complained on occasion when he was mistakenly charged interest. The referee also noted that in order for interest to be waived, HYFIN's computer had to be overridden, which is precisely what happened.

Respondent's tax returns clearly indicate that he knew that he was not being charged interest. Respondent deducted interest paid to HYFIN on his income tax returns in 1979 and 1985, the years HYFIN charged him interest, but did not do so during the period from 1980 to 1984, when HYFIN waived interest.

Respondent sent HYFIN messages on four checks and a receipt indicating the account balance to the penny which would only be accurate if the entire payments were allotted to the reduction of principal. By those notations, respondent clearly indicated that he knew he was not being charged interest. Respondent was unable to offer any rational explanation for these highly-incriminating notations.

The referee specifically found that interest rates specified on respondent's 1981, 1983 and 1984 loans were "lower than the rates available to most other borrowers of HYFIN and were below market rates." The referee

further found that at the time of the 1983 and 1984 loans, respondent "was aware that the 6% rate was lower than the prime rate." During the period in which respondent received loans from HYFIN at 6 percent interest, respondent had savings at HYFIN earning a greater interest rate.

While still a candidate for judicial office, respondent was told by Mr. Lee that HYFIN was run "like a Swiss bank," had never been audited by the state and did not report interest to the United States Government. Instead of reporting HYFIN to the appropriate authorities, respondent merely said to Mr. Lee, "I didn't hear this," and then, incredibly, ordered the funds of injured infants to be held in an institution that he had been told by its chief executive officer was violating federal law.

Although the referee expressed serious reservations about the credibility of Mr. Lee, a convicted felon who explicitly testified that there was an agreement with respondent, Mr. Lee's version was substantially corroborated by the testimony of Ian Grossfield, vice president of HYFIN, and by voluminous documentary evidence which strongly suggests that respondent and HYFIN had an "understanding." Every one of the referee's findings of fact is consistent with that conclusion, and, indeed, many of those facts can only be explained by the existence of such an agreement between respondent and HYFIN.

For these reasons, I vote to sustain Charge I, in addition to Charges II and III. I concur with the majority that the appropriate sanction is removal.

Dated: October 28, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

JEROME D. COHEN,

DISSENTING OPINION  
BY MR. BOWER

a Justice of the Supreme Court,  
2nd Judicial District, Kings County.

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I dissent with respect to the sanction of removal.

The more serious charge (Charge I) alleged that respondent entered into an understanding with the HYFIN Credit Union whereby HYFIN agreed to lend him large sums of money and waive interest payments in return for respondent's assurance that he would designate HYFIN as a depository for the proceeds of judicial settlements of infants' claims; and that in furtherance of this understanding, HYFIN made numerous loans to respondent and waived interest payments of approximately \$15,000; respondent, as his part of the bargain, designated HYFIN in numerous cases which resulted in deposits of approximately \$235,000 into HYFIN.

Charge I tracked closely the criminal charge under which respondent was indicted, tried and acquitted. In the present proceeding, the learned referee, a former Justice of the Supreme Court with an enviable reputation for sagacity and fairness, after hearing the proof and evaluating the weight to be given to the testimony of witnesses, reached a similar result and found in favor of respondent. He did, however, find that Charges II and III were proved and that, with respect to these two charges, respondent acted improperly.

The Commission affirmed the referee's findings and conclusions with respect to Charge I, and consequently that charge was dismissed.

In my view, Charges II and III are less serious than Charge I, and they amount to respondent receiving numerous loans from HYFIN at interest rates not available to most eligible borrowers and designating HYFIN as a depository for funds, thereby conveying the appearance of impropriety. Neither the referee nor the administrator of the Commission have suggested that designating HYFIN, a credit union, as a depository, is an illegal act, and the majority of the Commission did not find it to be so. No claim has ever been made that the credit union's funds were not insured by the appropriate governmental agencies and that by virtue of such lack of stability, the designation of such a depository placed the funds in jeopardy. Moreover, there is simply no proof that any infant whose funds

were deposited in HYFIN, sustained a loss by virtue of that credit union being designated by respondent.

What we have then, is that the majority's sanction of removal, which would be quite appropriate had Charge I been sustained, is being administered for respondent's creating the appearance of impropriety. In my view, such appearance of impropriety was created, and I voted with the majority that indeed, with respect to Charges II and III, respondent committed misconduct. Such misconduct is the result of very bad judgment on his part. Yet, the ultimate sanction of removal from judicial office should not be imposed absent truly egregious circumstances. Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74 (1980). The dismissal of Charge I indicates that there was no conspiracy or agreement found by the trier of the facts as affirmed by the Commission. Therefore, the conduct which would be truly egregious, i.e., an agreement motivated by greed and carried out for the mutual venality of the parties, has been found as not proven. Absent such truly egregious conduct, we may find very bad judgment, even foolishness. In my view, neither is cause for removal.

Accordingly, I vote for censure.

Dated: October 28, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

ROGER W. GLOSS,

a Justice of the Sheridan Town  
Court, Chautauqua County.

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**APPEARANCES:**

Gerald Stern (John J. Postel, Of Counsel) for the  
Commission

Smith, Murphy & Schoepperle (By Victor Alan Oliveri)  
for Respondent

The respondent, Roger W. Gloss, a justice of the Sheridan Town Court, Chautauqua County, was served with a Formal Written Complaint dated August 11, 1987, alleging political activity and improper service on a government committee. Respondent filed an answer dated September 9, 1987.

By order dated September 24, 1987, the Commission designated Francis J. Offermann, Jr., Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 14 and 15, 1987, and the referee filed his report with the Commission on September 1, 1988.

By motion dated October 19, 1988, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional conclusions of law and for a finding that respondent be censured. Respondent opposed the motion by cross motion on November 4, 1988. The administrator filed a reply on November 10, 1988. Oral argument was waived.

On November 16, 1988, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Sheridan Town Court since January 1, 1982. He was a candidate for judicial office in 1981 and 1985.

2. In August 1982, respondent attended a fund-raiser for Richard Kimball, Jr., a Republican candidate for state Assembly.

3. On May 12, 1983, respondent attended a Chautauqua County Republican Committee meeting at which John A. Glenzer received the party's endorsement for county executive.

4. From June through November 1983, respondent attended some meetings of the Committee to Elect John Glenzer County Executive and discussed placement of campaign signs.

5. On November 30, 1983, respondent attended a Republican county legislative caucus and distributed several admission tickets for a post-election fund-raiser for Mr. Glenzer, who had been elected county executive.

6. On March 12, 1984, respondent was appointed administrative assistant in the county Department of Public Works. He was interviewed for the position at the suggestion of Mr. Glenzer and hired by the director of the department.

7. In June 1985, respondent distributed some raffle tickets on behalf of the Chautauqua County Republican Legislative Support Committee, an organization that supported Republican candidates for county legislature.

8. On either November 2, 1983, or April 25, 1985, respondent attended a fund-raiser for Mr. Glenzer's campaign for county executive at a restaurant in Dunkirk.

9. From July through November 1985, respondent attended some meetings of the Committee to Re-elect County Executive John Glenzer and discussed the placement of campaign signs.

10. On August 9, 1985, respondent attended a fund-raiser for Mr. Glenzer's campaign at a ski resort at Cherry Creek.

11. On August 10, 1985, respondent picked up 300 campaign signs on behalf of the Committee to Re-elect County Executive John Glenzer.

12. Between August and November 1985, respondent drove a friend along Route 60 between Jamestown and Dunkirk while the friend posted campaign signs on behalf of Mr. Glenzer's campaign.

As to Charge II of the Formal Written Complaint:

13. The charge is not sustained and is, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.7 of the Rules Governing Judicial Conduct and Canons 1, 2 and 7A of the Code of Judicial Conduct. Paragraphs 4(a), 4(c), 4(d), 4(f), 4(h), 4(i), 4(j), 4(k), 4(l), 4(m) and 4(n) of Charge I of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Paragraphs 4(b), 4(e), 4(g) and 4(o) of Charge I and Charge II are dismissed. Respondent's cross motion is denied.

Elected judges obtain their positions through the political process and therefore may engage in political activity only on their own behalf for a prescribed period. The rules and canons of conduct carefully restrict the nature of a judge's political activity. At no time is a judge permitted to support or appear to support other candidates. Section 100.7 of the Rules Governing Judicial Conduct; Canon 7A of the Code of Judicial Conduct.

Respondent substantially violated these restrictions. In 1982 and 1983, when he was not a candidate for judicial office, respondent attended partisan political meetings and fund-raisers for non-judicial candidates. He distributed tickets to one political fund-raiser. In addition, although he was a candidate in 1985, respondent's fund-raising and campaign activities on behalf of candidates for county executive and the county legislature were clearly improper.

"...Judges must hold themselves aloof from and refrain from engaging in political activity, except to the extent necessary to pursue their candidacies during their public election campaigns." Matter of Maney v. State Commission on Judicial Conduct, 70 NY2d 27, 30 (1987). Respondent's repeated and notorious violations of the rules restricting political activity by judges warrant a severe sanction.

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

Mrs. Robb, Mr. Berger, Mr. Bower, Judge Ciparick, Mrs. Del Bello, Mr. Kovner, Judge Ostrowski and Mr. Sheehy concur.

Judge Altman and Mr. Cleary dissent as to sanction only and vote that respondent be admonished.

Judge Rubin was not present.

Dated: December 21, 1988





**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

JOSEPH HARRIS,

a Judge of the County Court,  
Albany County.

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APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the  
Commission

Kohn, Bookstein & Karp, P.C. (By Richard A. Kohn) for  
Respondent

The respondent, Joseph Harris, a judge of the County Court, Albany County, was served with a Formal Written Complaint dated October 31, 1986, alleging that he participated in fund-raising and political activities. Respondent filed an answer dated December 15, 1986.

Respondent also moved on December 15, 1986, to dismiss the Formal Written Complaint. The administrator of the Commission opposed the motion on January 19, 1987. Respondent filed a reply on February 5, 1987. By determination and order dated February 20, 1987, the Commission denied respondent's motion.

By order dated March 9, 1987, the Commission designated Shirley Adelson Siegel, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 21 and 22, 1987, and the referee filed her report with the Commission on October 5, 1987.

By motion dated October 16, 1987, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be admonished. Respondent opposed the motion by cross motion on November 20, 1987. The administrator filed a reply on December 10, 1987.

On December 18, 1987, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent is a judge of the Albany County Court and has been since September 1976.

2. On April 17, 1986, respondent participated in the "Jail Bail for Heart" program of the American Heart Association.

3. Respondent acted as a judge in mock court proceedings in his courtroom. Persons who had collected money or pledges for the heart association were brought before respondent and "charged" with "crimes against the heart," such as smoking, over-eating or leading overly-stressful lives. Respondent lectured them on ways of preventing heart trouble. The district attorney and a defense attorney made "bail applications," and respondent set "bail" in the amount that each "defendant" had collected.

4. Respondent was dressed in his judicial robes and sat on the bench in the courtroom where he usually presides.

5. He engaged in humorous banter with the participants and referred to the heart association as a wonderful organization.

6. After their appearances before respondent, the "defendants" paid the money that they had collected to representatives of the heart association at the rear of the courtroom or in a jurors' room nearby.

7. The purposes of the event were to raise funds for the heart association, to publicize its cause and to educate the public as to ways of preventing heart trouble. About \$18,000 was raised by the event.

8. Respondent's participation in the event was first solicited in early 1985 by Albany County Sheriff George L. Infante. Respondent agreed to participate in the event in 1985 and again in 1986 on the conditions that he would not personally be involved in any fund-raising, that his name would not be used in connection with any fund-raising, that the event be scheduled for a day when it would not conflict with his judicial duties and that the sheriff would make arrangements for use of the courtroom.

9. Respondent had also agreed to participate in the Jail Bail for Heart event on March 8, 1985, but conducted only one "arraignment." He was aware that there was media publicity after the 1985 event.

As to Charge II of the Formal Written Complaint:

10. The charge is not sustained and is, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.5(b)(2) of the Rules Governing Judicial Conduct and Canons 1, 2 and 5B(2) of the

Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings enumerated herein, and respondent's misconduct is established. Charge II is dismissed.

Respondent lent the prestige of his judicial office to assist a charitable fund-raising event, in violation of Section 100.5(b)(2) of the Rules Governing Judicial Conduct. Although he did not personally solicit funds, his participation aided and endorsed what was principally a money-making program. See, Matter of Kaplan, 1984 Annual Report 112 (Com. on Jud. Conduct, May 17, 1983); Matter of Turner, 1988 Annual Report 235 (Com. on Jud. Conduct, Mar. 23, 1987); Matter of Wolfgang, 1988 Annual Report 245 (Com. on Jud. Conduct, Nov. 19, 1987).

Respondent further deviated from the high standards of conduct expected of every judge by mocking a court proceeding. Matter of Turner, supra.

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

Mrs. Robb, Mr. Bower, Mr. Bromberg, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Rubin, Judge Shea and Mr. Sheehy concur, except that Mrs. Robb, Mrs. DelBello, Mr. Kovner and Mr. Sheehy dissent as to Charge II only and vote that the charge be sustained.

Judge Ostrowski was not present.

Dated: January 22, 1988



**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

WILLIAM H. INTEMANN, JR.,

a Judge of the County Court, Family Court  
and Surrogate Court, Hamilton County.

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APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the  
Commission

Ainsworth, Sullivan, Tracy, Knauf, Warner and  
Ruslander (By Robert K. Ruslander; Lisa A.  
Oppedisano, Of Counsel) for Respondent

The respondent, William H. Intemann, Jr., a judge of the County Court, Family Court and Surrogate's Court, Hamilton County, was served with a Formal Written Complaint dated March 9, 1987, alleging that he participated in business activity and practiced law while a full-time judge and that he improperly failed to disqualify himself in certain matters. Respondent filed an answer dated March 25, 1987. A Supplemental Formal Written Complaint dated April 29, 1987, was served, and respondent filed a supplemental answer on May 21, 1987.

By order dated May 19, 1987, the Commission designated Robert E. Helm, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 9, 10 and 11, 1987, and the referee filed his report with the Commission on June 8, 1988.

By motion dated July 1, 1988, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be

removed from office. Respondent opposed the motion by cross motion on August 29, 1988.\* The administrator filed a reply on September 6, 1988.

On September 22, 1988, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent is a judge of the Hamilton County Court, Family Court and Surrogate's Court and has been since January 1, 1984.

2. From January 1, 1984, to January 1986, while a full-time judge, respondent actively participated in three businesses organized for profit: Spemere Partnership, Spemere Enterprises, Inc., and Sacandaga Lake Estates, Inc.

3. As a manager of Spemere Partnership and as an officer of Spemere Enterprises, Inc., and Sacandaga Lake Estates, Inc., during the above period, respondent executed contracts, wrote checks and handled financial affairs for each of the businesses.

4. Respondent lacked candor when he testified in this proceeding on November 11, 1987, that he took steps to reduce his active participation in Spemere Partnership and Spemere Enterprises, Inc., immediately upon assuming the bench in January 1984.

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

5. Before he took the bench on January 1, 1984, respondent had been retained as a private attorney to represent the estates of George W. Marthen, F. Jarvis Steber and George E. Bradt.

6. At the end of December 1983, respondent knew that he would not be able to complete work on the three estates before he took the bench.

7. Before he left his practice, respondent did not turn over case files to the representatives of the estates, and he did not advise them that another law firm was taking over his law office.

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\* With his cross motion, respondent submitted affidavits by two individuals relating facts that go to the merits of the charges. The affidavits are not properly a part of the record of this proceeding and were not considered in rendering this determination.

8. In December 1983, respondent filled out a draft affidavit for the signature of the executrix of the Bradt estate. Respondent inserted as attorney for the estate the name of Andrew S. Kowalczyk, III, the attorney taking over respondent's law office, and dated it January 1984. Respondent gave the affidavit to his secretary, Ellen Alfieri, for typing and instructed her to send the typed affidavit to the executrix.

9. Ms. Alfieri remained in the law office after January 1, 1984, as Mr. Kowalczyk's secretary.

10. Respondent did not inform Mr. Kowalczyk that his name had been used on the affidavit.

11. On January 30, 1984, Ms. Alfieri sent the affidavit to the executrix for signature with a cover letter on respondent's stationery and signed respondent's name and her initials to the letter.

12. On February 15, 1984, pursuant to respondent's instruction, Ms. Alfieri acknowledged the signature of the executrix on the affidavit, which listed Mr. Kowalczyk as attorney for the estate.

13. On February 24, 1984, and February 29, 1984, Ms. Alfieri, pursuant to respondent's instructions, typed letters to the Bradt executrix and signed them with Mr. Kowalczyk's name and her initials. The letters were typed on respondent's law office stationery with respondent's name crossed out and Mr. Kowalczyk's typed in its place.

14. On March 16, 1984, respondent signed and mailed on his own stationery a bill to the executrix of the Bradt estate, charging \$246.50 for professional services rendered on January 27, 1984.

15. Mr. Kowalczyk had no knowledge of the Bradt estate, never performed any services with respect to it and was unaware that his name had been used in connection with it.

16. On January 6, 1984, Ms. Alfieri, at respondent's direction, sent the executrix of the Marthen estate a letter over respondent's signature and her initials. The letter asked the executrix to sign but not date estate tax forms and return them. The letter advised the executrix that the firm taking over respondent's law office would complete the legal work of the estate, notwithstanding that the executrix had never authorized respondent to turn over representation of the estate to another attorney and notwithstanding that respondent had no agreement with Mr. Kowalczyk to work on the Marthen estate. Respondent advised the executrix to call him at his judicial chambers or at home. The letter asked the executrix for \$6,000 for respondent's work on the estate.

17. The executrix, Elsa W. Marthen, did not sign the returns because she was disturbed over the requested fee and the fact that respondent had asked her not to date the returns.



18. On January 26, 1984, respondent sent Ms. Marthen a letter on his law office stationery, with the words "attorney and counselor at law" crossed out, again requesting that she sign and return the tax forms.

19. On February 13, 1984, Ms. Marthen wrote to respondent at his chambers, objecting to the fee and stating that she would not sign and return the tax forms.

20. On March 4, 1984, respondent signed and sent a letter to Ms. Marthen on his law office stationery, with the words "law office" crossed out. The letter discussed the reasons for the requested fee.

21. In April 1984, Ms. Marthen signed the tax forms and sent them to the law office in care of Mr. Kowalczyk. On April 17, 1984, she sent respondent a check for \$1,000.

22. When Mr. Kowalczyk received Ms. Marthen's letter, he advised her that he was unfamiliar with the estate and had performed no services for it. He returned the tax forms to her.

23. On April 22, 1984, respondent again wrote to Ms. Marthen on his law office stationery, with the words "law office" crossed out and the number of his home substituted for the law office number. The letter asked Ms. Marthen for a balance of \$5,336.49 in fees and expenses and threatened to add "interest at the prevailing bank rate" each month after June 1, 1984, if the balance remained unpaid, notwithstanding that respondent had not previously advised her that interest would be imposed or obtained her consent to impose interest on any unpaid legal fees. Respondent stated, "Since I have to allow the attorneys who are completing this matter their fees in advance, I would like the balance as soon as possible," notwithstanding that he had no agreement with any attorneys to pay them fees in advance to complete the estate.

24. Respondent sent a note to Mr. Kowalczyk, which was received on May 2, 1984, and asked him to forward the Marthen tax forms to respondent.

25. When Ms. Marthen received the tax forms from Mr. Kowalczyk, she forwarded them to respondent's court clerk, who placed them on respondent's desk in chambers.

26. Respondent signed the federal tax return as preparer in April 1984 and dated it December 30, 1983. Respondent acknowledged Ms. Marthen's signature on the state tax return as notary public in April 1984 and dated it December 30, 1983, notwithstanding that respondent's notary public commission had expired.

27. Respondent then took the tax forms to his former law office and instructed Ms. Alfieri as to what must be done to complete the estate.

28. By this time, Mr. Kowalczyk's firm had ended its agreement with respondent and had left the law office. Respondent had entered into an agreement with another firm to take over the office. The agreement, dated April 9, 1984, specified that the attorney taking over the law office, Donald A. Campbell, would complete the Marthen estate for respondent at an hourly rate of \$80, notwithstanding that Ms. Marthen had not been advised of this arrangement nor consented to it.

29. Mr. Campbell subsequently prepared state tax documents for the estate and was paid a total of \$180 in July and October 1984 by respondent.

30. Respondent filed or caused to be filed the federal tax return and on June 25, 1984, wrote a check for the \$300 fee to file the estate in his court. As of May 21, 1984, the Surrogate's Court records still listed respondent as attorney for the estate.

31. On December 30, 1983, using a power of attorney granted him by the executrix of the Steber estate, respondent wrote himself a \$15,000 check on the account of the estate as compensation for legal services performed in 1983. Respondent did not notify the executrix, Helen A. Greisen, that he intended to do so or obtain her consent to do so. Ms. Greisen was under the belief that respondent's fee would be paid when the estate was concluded and that the power of attorney would be used during her absence from the state to pay relatively small bills.

32. Respondent acknowledged in testimony before a member of the Commission on July 14, 1986, that it was not standard procedure to take his fee before the estate proceeding was concluded. "The only reason I was trying to get up-front money here was because I was going out of practice, and I felt I ought to get what I put in before I left," respondent testified.

33. After January 1, 1984, Ms. Greisen was told by Ms. Alfieri that Mr. Kowalczyk had taken over respondent's law office. In January 1984, Ms. Greisen sent stock certificates related to the estate to the law office addressed to Mr. Kowalczyk.

34. On January 16, 1984, respondent went to the post office next door to his former law office and was given the mail for the law office. He received the letter from Ms. Greisen and signed Mr. Kowalczyk's name to the return receipt, which was returned to Ms. Greisen.

35. Mr. Kowalczyk was vacationing in Florida at the time. He had no knowledge that respondent had signed his name to the return receipt and had never authorized him to do so. Mr. Kowalczyk never received the letter.

36. Respondent took the letter to the law office, where he opened and read the letter or otherwise became familiar with its contents.

37. Respondent sent and signed a letter to Ms. Greisen dated January 16, 1984, on his law office stationery, directing her to execute a document and return it to the law office.

38. On January 19, 1984, at respondent's direction, Ms. Alfieri sent a letter regarding the Steber estate to Keystone Custodian Fund. She signed Mr. Kowalczyk's name, although he had no knowledge of the letter.

39. On February 14, 1984, Ms. Alfieri typed a letter to Ms. Greisen concerning the estate based on information provided by respondent. Ms. Alfieri signed Mr. Kowalczyk's name and her initials to the letter, although Mr. Kowalczyk had no knowledge of the letter or the information contained therein.

40. On March 7, 1984, at respondent's direction, Ms. Alfieri typed another letter to Ms. Greisen and signed Mr. Kowalczyk's name. Mr. Kowalczyk was unaware of the letter.

41. Mr. Kowalczyk never performed any services with respect to the Steber estate, was unaware of its existence and had never discussed it with respondent or Ms. Alfieri.

42. Respondent continued to make deposits in the Steber estate bank account and to write checks on the account through July 1984.

43. Respondent lacked candor when he testified in this proceeding on November 11, 1987, that he did no work in connection with the Bradt, Marthen and Steber estates in 1984 and that all the correspondence was dictated by him prior to the end of 1983 and typed and sent by Ms. Alfieri after respondent took the bench. He also lacked candor when he testified that he did not recall why he advised Ms. Marthen not to date the tax returns and that he did not open or cause to be opened the letter from Ms. Greisen on January 16, 1984.

44. Paragraphs 4, 5 and 9 of Charge I and Paragraph 13 of Charge II of the Supplemental Formal Written Complaint are not sustained and are, therefore, dismissed.

As to Charge IV of the Formal Written Complaint:

45. On April 9, 1984, respondent leased his former law office, equipment and law library with an option to buy to Donald A. Campbell of the law firm of Campbell & White. In May 1986, the firm exercised the option and purchased the property for \$37,500.

46. In the April 9, 1984, agreement, respondent also retained Mr. Campbell to complete the Marthen and Steber estates at the hourly fee of \$80. Respondent paid Mr. Campbell a total of \$180 in July and October 1984 for his work on the Marthen estate. In December 1986, Mr. Campbell received

payment of \$6,000 from the Steber estate for legal fees. From this amount, Mr. Campbell paid respondent \$1,000 for his work on the estate.

47. After April 1984, Mr. Campbell also became attorney for the three businesses in which respondent was a manager or officer: Spemere Partnership, Spemere Enterprises, Inc., and Sacandaga Lake Estates, Inc. On December 21, 1984, respondent, as a partner in Spemere Partnership, paid Mr. Campbell \$606.50 in legal fees, and on August 16, 1985, respondent paid an additional \$600. Mr. Campbell handled a number of closings for Sacandaga Lake Estates, Inc., and was paid by respondent as president of the corporation.

48. From 1984 to 1986, respondent also retained Mr. Campbell to represent him in a number of personal legal matters. Since 1984, Mr. Campbell has represented respondent in negotiations with Chimney Mountain Craftsmen, Inc., concerning the proposed repurchase by the corporation of respondent's stock. The matter was still pending at the date of the hearing in this matter in November 1987. In April 1985, Mr. Campbell brought a real property action, Intemann v. Coe, on behalf of respondent. Mr. Campbell brought an action, Intemann v. Blanchard, on behalf of respondent to collect an unpaid legal fee. Mr. Campbell brought another real property action, Intemann v. Scribner, on respondent's behalf. In December 1985, Intemann v. Raquette Falls Land Co. et al., another real property action, was instituted by Mr. Campbell on respondent's behalf. In March 1985, Mr. Campbell represented respondent and Edward Taylor when they purchased land together. Respondent paid Mr. Campbell \$599.78 for his services with respect to the land purchase.

49. Between 1984 and 1986, respondent failed to disqualify himself in 21 matters in which Mr. Campbell appeared in his court, as denominated in Schedule A of the Formal Written Complaint, notwithstanding their financial and business relationship.

As to Charge V of the Formal Written Complaint:

50. In June 1983, as an attorney, respondent obtained an appraisal of property in Hamilton County owned by the Estate of Waldo Morgan Allen pursuant to an agreement with the Illinois attorney for the estate. On July 3, 1984, as judge, respondent signed an order granting ancillary letters of administration in the Allen estate.

51. In January 1983, as an attorney, respondent represented Mary Grant Turner in a support proceeding against John Wesley Turner. On July 14, 1983, respondent filed a petition on her behalf claiming a violation of a court order by Mr. Turner. On January 27, 1984, as judge, respondent signed an order in Turner v. Turner terminating support and visitation on the grounds that both parties had left the state.

52. Paragraphs 12(a) and 12(d) of Charge V of the Formal Written Complaint are not sustained and are, therefore, dismissed.

As to Charge VI of the Formal Written Complaint:

53. On May 11, 1984, respondent signed an order exempting from tax the Estate of Dennis T. Dillon, Jr., notwithstanding that the estate was represented by respondent's part-time law assistant, Andrew Halloran.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(c)(1), 100.5(c)(1), 100.5(c)(2), 100.5(d) and 100.6 of the Rules Governing Judicial Conduct; Canons 1, 2, 3C(1), 5C(1), 5C(2), 5C(3), 5D, 5F and 6 of the Code of Judicial Conduct; Article 6, Section 20(b)(4) of the Constitution; Sections 14 and 16 of the Judiciary Law, and Disciplinary Rules 1-102(A)(4) and 2-106(A) of the Code of Professional Responsibility. Charges I through IV, Paragraphs 12(b) and 12(c) of Charge V and Charge VI of the Formal Written Complaint and Paragraphs 6, 7 and 8 of Charge I and Paragraphs 11 and 12 of Charge II of the Supplemental Formal Written Complaint are sustained, and respondent's misconduct is established. Paragraphs 12(a) and 12(d) of Charge V of the Formal Written Complaint, Paragraphs 4, 5 and 9 of Charge I and Paragraph 13 of Charge II of the Supplemental Formal Written Complaint are dismissed. Respondent's cross motion is denied.

Respondent has engaged in a series of improper acts which clearly violate established ethical standards.

After taking the bench, he actively participated in three businesses organized for profit. See Section 100.5(c)(2) of the Rules Governing Judicial Conduct; Matter of Bayger, 1984 Annual Report 62 (Com. on Jud. Conduct, Jan. 18, 1983); Matter of Feinberg, 39 NY2d(a),(u) (Ct. on the Judiciary 1976). By his participation in these businesses and their representation by an attorney who appeared regularly in respondent's court, respondent engaged in business dealings with a lawyer likely to come before him, in violation of Section 100.5(c)(1) of the Rules. See also Matter of Laurino, unreported (Com. on Jud. Conduct, Mar. 25, 1988); Matter of Orloff, 1988 Annual Report 199 (Com. on Jud. Conduct, May 28, 1987).

Respondent improperly practiced law after taking the bench by continuing to provide legal services for three estates (See Article 6, Section 20[b][4] of the Constitution; Matter of Katz, 1985 Annual Report 157 (Com. on Jud. Conduct, Mar. 30, 1984); Matter of Schwerzmann, 44 NY2d[a],[d] [Ct. on the Judiciary 1978]) and, when his personal performance became unfeasible, by collecting fees for services rendered after he took the bench and paying another lawyer to complete one of the estates.

Respondent failed to disqualify himself in two matters in which he had performed services as a lawyer in the same case (See Section 14 of the Judiciary Law; Matter of Jacon, 1984 Annual Report 99 [Com. on Jud. Conduct, Nov. 28, 1983]), in one case in which his law secretary was representing a party (See Section 100.3[c][1] of the Rules; Matter of Vaccaro, 42 NY2d[a],[e] [Ct. on the Judiciary 1977]) and in 21 matters in which parties

were represented by an attorney with close business and financial ties to respondent (See Matter of Conti v. State Commission on Judicial Conduct, 70 NY2d 416 [1987]; Matter of Roncallo, 1983 Annual Report 169 [Com. on Jud. Conduct, Nov. 12, 1982]).

In determining the proper sanction, we must also consider that the record is riddled with evidence of a pattern of deception which requires respondent's removal.

Respondent attempted to conceal his improper practice of law by backdating documents, by directing that letters and an affidavit be sent over the name of another attorney without permission, by signing another attorney's name to a registered letter and by signing as notary public after his commission had expired and backdating the document. Using a power of attorney, he also paid himself a \$15,000 fee from an estate without the knowledge of the executrix.

Respondent attempted to persuade another client to pay a fee by falsely stating that he had an agreement with other attorneys to complete the case and was required to pay them in advance.

In addition, respondent's testimony in this proceeding lacked candor in several material respects.

Deception is antithetical to the role of a judge who is sworn to uphold the law and seek the truth. Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 554 (1986). Such conduct is not conducive to the efficacy of the judicial process and is destructive to a judge's usefulness on the bench. Matter of Perry, 53 AD2d 882 (2d Dept. 1976).

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Kovner and Judge Ostrowski concur.

Judge Rubin and Mr. Sheehy were not present.

Dated: October 25, 1988



**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

JEFFREY P. LA MOUNTAIN,

a Justice of the Keeseville Village  
Court, Essex County.

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APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the  
Commission

William E. Russell for Respondent

The respondent, Jeffrey P. La Mountain, a justice of the Keeseville Village Court, Essex County, was served with a Formal Written Complaint dated January 19, 1988, alleging that he failed to disqualify himself, engaged in ex parte communications and conveyed the impression of bias in a small claims case. Respondent filed an answer dated January 28, 1988.

By order dated February 25, 1988, the Commission designated Joseph J. Tabacco, Jr., Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on May 4 and 24, 1988, and the referee filed his report with the Commission on September 15, 1988.

By motion dated October 18, 1988, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be censured. Respondent opposed the motion on November 8, 1988. The administrator filed a reply on November 10, 1988. Oral argument was waived.

On November 16, 1988, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a part-time justice of the Keeseville Village Court since March 1, 1986. He has no court clerk. Respondent also works as a delivery driver for the Pepsi-Cola Bottling Company plant in Keeseville.



2. Richard C. Thomas, Jr., is also a driver for the plant. His father, Richard C. Thomas, Sr., is sales manager of the plant and one of respondent's superiors but is not his immediate supervisor.

3. In September 1986, the junior Mr. Thomas had a conversation with respondent at the plant concerning a housing matter. Mr. Thomas complained that his landlord had refused to return a security deposit after Mr. Thomas had vacated the apartment.

4. Respondent advised Mr. Thomas to bring his rent receipts and any other paperwork concerning the apartment to court for respondent to examine.

5. On September 15, 1986, Mr. Thomas brought the paperwork to respondent after an evening session of court. No one else was present. Mr. Thomas also produced a sheet containing calculations of payments which was drawn by him and his wife, Lauri J. Thomas, who had signed the lease for the apartment. The sheet contained a dollar amount which the Thomases claimed was owed them by the landlord, G. Arthur Bailey.

6. Respondent reviewed the lease agreement, bills, receipts and other records furnished by Mr. Thomas in order to substantiate the figures he and his wife had calculated. Respondent put correction fluid on the sheet in several spots where Mr. Thomas had crossed out figures, and respondent made some of his own notations. Based on information provided by Mr. Thomas, respondent wrote: "Plus credit for services rendered by tenant \$35.00," "\$100.00 sec. deposit; tenant to receive [sic] back upon leaving," and "Total owed to tenant \$287.85."

7. Respondent testified in this proceeding on May 24, 1988, that this procedure was necessary "because I'd like to have proof before I go sending out any summons that there's actually a claim that he can bring against him."

8. Respondent kept the original sheet of calculations that he and Mr. Thomas had prepared and the supporting documents.

9. Respondent then issued a notice of small claim to Mr. Bailey on behalf of Ms. Thomas, noting that the claim was in the amount of \$287.85 for "money owed for over-payment of rent." He set a hearing for October 1, 1986.

10. Mr. Bailey replied by letter of September 17, 1986, to respondent. Mr. Bailey questioned the validity of a rent receipt and asserted a counterclaim of \$392.32. Respondent reviewed the letter prior to the hearing and retained it in his file of the case.

11. On October 1, 1986, respondent conducted a hearing in Thomas v. Bailey. Mr. Thomas appeared on his wife's behalf. Mr. Bailey represented himself.

12. Respondent did not disclose to Mr. Bailey that he had met privately with Mr. Thomas to review his records and to assist him in calculating the amount claimed. Respondent did not furnish Mr. Bailey with a copy of the records he had examined or the calculations he had helped prepare.

13. Testimony at the hearing centered on the validity of one rent receipt. Respondent heard no evidence with respect to Mr. Bailey's counterclaim.

14. Respondent found the receipt to be valid and awarded judgment to Ms. Thomas in the amount of \$287.85. He based his decision on the records and calculations he had examined in the ex parte meeting with Mr. Thomas.

15. On December 4, 1986, respondent signed a judgment for \$287.85 in favor of Ms. Thomas.

16. Between January 16 and January 26, 1987, Mr. Bailey sent respondent a letter and documents that he maintained supported his counterclaim against Ms. Thomas. Mr. Bailey asked respondent to transfer the matter to another judge in view of the fact that respondent and Mr. Thomas work together.

17. Respondent replied by letter of January 26, 1987. He told Mr. Bailey that he could only bring an appeal or a counterclaim after the judgment was paid. Respondent also asserted that he would only transfer the matter after the judgment was paid. Respondent also stated in the letter:

I have received numerous complaints from more than one of your tenants on the way you operate as a landlord. Myself and the village are becoming tired of them. If these complaints persist, I will find it necessary to go and inspect your apartmenthouses [sic] myself with [the code enforcement officer] and then turn in a report to the county and my recommendations as to what should be done.

18. There were no other pending matters in respondent's court regarding Mr. Bailey at the time of respondent's letter.

19. On March 23, 1987, Mr. Bailey paid the judgment.

20. On April 29, 1987, Mr. Bailey again wrote to respondent and asked that his counterclaim be transferred to another judge. Respondent typed and signed a note on the bottom of the letter, advising Mr. Bailey to see AuSable Town Justice Kenneth E. Beane.

21. On May 27, 1987, Mr. Bailey's secretary, on his behalf, attempted to file several small claims with respondent. Respondent told the secretary that he and Mr. Bailey "did not see eye to eye," that respondent was "not real crazy about Mr. Bailey" and that he and Mr. Bailey did not "get along." Respondent refused to accept the claims and said that he would speak to another judge about handling them.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1) and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

Respondent conducted an ex parte meeting with one party to a dispute in which he reviewed evidence and helped the party formulate his claim and marshal his proof. Respondent later rendered his decision based on the information he had obtained in that meeting without disclosing to the other party that it had taken place and without allowing the other party to review and rebut the proof. Such conduct clearly violates Section 100.3(a)(4) of the Rules Governing Judicial Conduct.

Since he has no court clerk, it sometimes may be necessary for respondent to assist litigants in formulating claims and preparing notices of claims. In the Thomas case, he went far beyond such ministerial duties, however. Mr. Thomas had already formulated his claim when he came to see respondent and had calculated a dollar amount which he maintained was owed by Mr. Bailey. Nothing was required of respondent beyond filling out a simple notice of claim form. Instead, respondent reviewed Mr. Thomas' documents and determined the accuracy of his calculations on the spot and outside the presence of Mr. Bailey, thereby abandoning his proper role as an independent and impartial judge. Matter of Mullen, 1987 Annual Report 129, 132 (Com. on Jud. Conduct, May 22, 1986). See also Matter of Cooksey, 1988 Annual Report 151 (Com. on Jud. Conduct, Oct. 27, 1987); Matter of Wilkins, 1986 Annual Report 173 (Com. on Jud. Conduct, Dec. 24, 1985).

Respondent exacerbated this misconduct by his actions after the hearing. He told Mr. Bailey that a counterclaim or an appeal could not be brought until the judgment had been paid; he wrote a letter referring to extra-judicial complaints by tenants and threatened action against Mr. Bailey; and, he admitted hostility in a conversation with Mr. Bailey's secretary. In doing so, respondent's actions, taken as a whole, created the impression of bias. The ability to be impartial and appear impartial is an indispensable requirement for a judge. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290 (1983).

We do not find that respondent was required to disqualify himself from the Thomas case because of his working relationship with Mr. Thomas and his father. He was required to disclose the relationship, however. By

failing to disclose the relationship and hear any objections to his presiding, respondent contributed to the appearance of partiality conveyed by his other actions in the case. Matter of Winick, 1988 Annual Report 239 (Com. on Jud. Conduct, Jan. 29, 1987); Matter of Merkel, unreported (Com. on Jud. Conduct, May 19, 1988).

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski and Mr. Sheehy concur.

Judge Rubin was not present.

Dated: December 23, 1988



**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

LOUIS D. LAURINO,

Surrogate, Queens County.

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APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the  
Commission

Nathan R. Sobel for Respondent

The respondent, Louis D. Laurino, judge of the Surrogate's Court, Queens County, was served with a Formal Written Complaint dated March 11, 1987, alleging improper business dealings and improper political contributions. Respondent filed an answer dated March 23, 1987.

By order dated April 8, 1987, the Commission designated the Honorable Matthew J. Jasen as referee to hear and report proposed findings of fact and conclusions of law.

By motion dated June 1, 1987, respondent moved for summary determination and dismissal of the Formal Written Complaint. The administrator of the Commission opposed the motion on June 10, 1987. By determination and order dated June 19, 1987, the Commission denied respondent's motion.

A hearing was held on July 20, 1987, and the referee filed his report with the Commission on October 30, 1987.

By motion dated December 26, 1987, respondent moved to disaffirm the referee's report and dismiss the Formal Written Complaint. The administrator opposed the motion on January 7, 1988, by cross motion to confirm the referee's report and for a finding that respondent be censured.

On February 19, 1988, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to paragraph 4 of Charge I of the Formal Written Complaint:

1. Respondent is judge of the Queens County Surrogate's Court and has been since August 1971.

2. From January 1, 1972, to June 30, 1986, respondent engaged in substantial financial and business dealings with three attorneys who served successively as counsel to the Public Administrator of Queens County, as denominated in Schedule A of the Formal Written Complaint. Respondent rented to each attorney an office building, office equipment, furniture, furnishings and a law library at 150-26 Hillside Avenue, Jamaica.

3. Each of the successive tenants hand-delivered rent checks each month to respondent at his chambers before regular business hours commenced.

4. During the period in which they rented his building, respondent appointed each of the attorneys as counsel to the public administrator, pursuant to statutory authority. Respondent had the authority to fix and approve their legal fees and could terminate their employment at will.

5. From January 1, 1972, to December 31, 1978, each counsel was a month-to-month tenant. On January 9, 1979, respondent and Michael K. Feigenbaum, who was then serving as counsel to the public administrator, entered into a lease at Mr. Feigenbaum's request. The original lease covered the period January 1, 1979, to December 31, 1983. On December 27, 1983, again at Mr. Feigenbaum's request, the lease was extended to December 31, 1985. From January 1 to June 30, 1986, Mr. Feigenbaum was a month-to-month tenant.

6. From January 1, 1981, to March 31, 1986, respondent awarded Mr. Feigenbaum legal fees as counsel to the public administrator of approximately \$450,000 to \$500,000 per year. From these gross legal fees, Mr. Feigenbaum was required to pay staff salaries, rent and office expenses, which amounted to approximately 50 percent of the gross fees. Mr. Feigenbaum also received additional fees set by respondent in probate proceedings and wrongful death actions.

As to paragraph 5 of Charge I of the Formal Written Complaint:

7. In 1979, respondent informed the public administrator, George L. Memmen, that respondent's son, Louis M. Laurino, was seeking summer employment as a law clerk and asked Mr. Memmen if he could employ the son. Mr. Memmen agreed to employ him, but Mr. Feigenbaum later advised respondent that he would put the younger Mr. Laurino on the private payroll of counsel

to the public administrator rather than have his name appear on the public payroll of the public administrator.

8. Mr. Laurino worked exclusively in Mr. Memmen's office during summers and school recesses between 1979 and 1984. He was paid by Mr. Feigenbaum throughout the period in amounts ranging from \$1,376 to \$3,070 annually.

9. Also in 1979, respondent asked Mr. Feigenbaum whether he would be interested in employing respondent's nephew, Arthur Stein, as a paralegal. Mr. Feigenbaum subsequently hired Mr. Stein, who worked in Mr. Feigenbaum's office from 1979 to 1986.

As to Charge II of the Formal Written Complaint:

10. On May 13, 1985, respondent sent a personal check from his own funds for \$2,000 to Citizens for Donald R. Manes. The check was in the amount of a ticket for a fund-raising dinner for Mr. Manes, who was running for Queens Borough President in 1985, although the dinner had been held on April 23, 1985. Respondent had not attended the dinner.

11. Respondent was a candidate for reelection in 1985.

12. As to the other contributions alleged in Charge II, the proof is not sufficient to establish that the amounts paid by respondent were not in aid of his own campaign for elective judicial office. Paragraphs 7(a), (b), (d) and (e) of Charge II of the Formal Written Complaint are, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.5(c)(1) and 100.7 of the Rules Governing Judicial Conduct and Canons 1, 2, 5C(1) and 7A of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

Ethical mandates have long cautioned against personal business practices by judges which would create an appearance of impropriety and impugn the integrity of judicial office. Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 80 (1980). Expressly prohibited are business transactions between a judge and those who appear or are likely to appear before the judge. Section 100.5(c)(1) of the Rules Governing Judicial Conduct; Matter of Orloff, 1988 Annual Report 199 (Com. on Jud. Conduct, May 28, 1987); Matter of Straite, 1988 Annual Report 226, 233 (Com. on Jud. Conduct, Apr. 16, 1987); Matter of Latremore, 1987 Annual Report 97 (Com. on Jud. Conduct, May 30, 1986). A judge must refrain from business dealings that exploit judicial position. Section 100.5(c)(1) of the Rules.



The relationship between respondent and counsel to the public administrator is an unusual one. Respondent has authority to hire and fire and establish fees for an attorney with matters before him. Sections 1108(2)(a) and 1123(2)(j)(v) of the Surrogate's Court Procedure Act. Thus, respondent should have taken great care to avoid improper personal business dealings with counsel.

Because of his control over counsel's position and the substantial fees awarded to him, respondent had a distinct advantage over counsel in the rental negotiations for respondent's private building. It was, as the referee found, inherently coercive for respondent to suggest that counsel rent his building.

In addition, the private business relationship between respondent and counsel cast a shadow on their public dealings. A reasonable person might question whether counsel's appointment or retention in office was based on merit or respondent's self-interest in the rents he would receive. A similar question could be raised as to the fees awarded by respondent to counsel and any decisions made by respondent in disputed matters involving counsel.

Respondent's suggestions to the public administrator and his counsel that they employ respondent's relatives were also inherently coercive. Given their respective positions, it was not necessary for respondent to do more than inquire of Mr. Memmen and Mr. Feigenbaum to ensure jobs for his son and nephew.

Respondent's payment to the Manes campaign, coming after the dinner, was clearly a political contribution to another candidate and, as such, was prohibited by ethical standards now and at the time.

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

Mrs. Robb, Mr. Bower, Judge Ciparick, Mr. Cleary, Mr. Kovner, Judge Ostrowski, Judge Rubin and Judge Shea concur.

Mrs. DelBello dissents as to Charge II and votes to sustain the charge in toto and dissents as to sanction and votes that respondent be removed from office.

Mr. Sheehy did not participate.

Dated: March 25, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

LOUIS D. LAURINO,

Surrogate, Queens County.

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DISSENTING OPINION  
BY MRS. DELBELLO

I find it very difficult to understand how so learned a judge could be so insensitive to the appearance of impropriety conveyed by his conduct. Even if the lawyers who rented his office space were not compelled to do so in order to collect their substantial fees (in recent years totaling one-half million dollars per year), the negative appearance of the arrangement should have signaled grave concern. Any reasonable person--lawyer or non-lawyer--would sense something inherently wrong with such financial transactions.

For many years, respondent engaged in a substantial landlord/tenant relationship while engaging the tenants in lucrative public positions within respondent's judicial jurisdiction and while approving their enormous fees. To compound this activity, his son and nephew were employed by these lawyers when advised by him of their availability.

The arrangement can only be viewed as a cozy quid pro quo, even if the express terms were not discussed. How can such an apparent quid pro quo be condoned?

How can a judge of such a high court be oblivious to the wrongful use of his office and position?

How can a judge then pass judgment on people when his own activity is tainted by such highly improper practices and abuses? In my opinion there is a basic syndrome here, and that is: "Do as I say--not as I do."

I do not believe it is unrealistic to ask that judges, of whom the highest standards of conduct and trust are expected, should be persons of the highest standards. I find respondent's actions insidious and the explanations for his actions disingenuous and unreflective of those high standards and principles. He has demonstrated his lack of fitness for judicial office by his conduct and by his total failure to recognize that his conduct was wrong. Therefore, I believe removal is the appropriate sanction.

Although my vote, standing alone, is nothing more than a symbolic gesture, I feel compelled to vote for removal because there is no better way to express my sense of condemnation for respondent's conduct. The fact that he in no way feels a sense of remorse or contrition confirms my judgment that he lacks fitness to be a judge. The majority's determination of censure does not, in my opinion, reflect the true measure of the judge's misconduct.

Dated: March 25, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

MARY RITA MERKEL,

a Justice of the East Bloomfield  
Town Court, Ontario County.

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APPEARANCES:

Gerald Stern (Henry S. Stewart, Of Counsel) for the  
Commission

Connors, Corcoran, Hall and Meyering (By Charles A.  
Hall) for Respondent

The respondent, Mary Rita Merkel, a justice of the East Bloomfield Town Court, Ontario County, was served with a Formal Written Complaint dated April 2, 1987, alleging that she improperly presided over a case in which her court clerk was the complaining witness. Respondent filed an answer dated April 13, 1987.

By order dated April 28, 1987, the Commission designated Edward C. Cosgrove, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 30, 1987, and the referee filed his report with the Commission on December 30, 1987.

By motion dated February 18, 1988, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional conclusions of law and for a finding that respondent be admonished. Respondent opposed the motion by cross motion on March 11, 1988. The administrator filed a reply on April 4, 1988.

On April 14, 1988, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the East Bloomfield Town Court and was during the time herein noted.

2. Shirley A. Coons has been respondent's court clerk since 1981. Initially, Ms. Coons served as clerk for both judges of the court, but since 1984, Ms. Coons has worked exclusively with respondent. Respondent and Ms. Coons are also neighbors.

3. On April 25, 1986, Ms. Coons signed a criminal information, accusing Barbara J. Young of Issuing a Bad Check.

4. On April 26, 1986, Trooper Joan Sprung, who had taken the information from Ms. Coons, went to respondent's home and asked her to sign a warrant for Ms. Young's arrest.

5. Respondent read the information and was aware that her court clerk was the complaining witness.

6. Respondent did not advise Trooper Sprung that the complaining witness was her court clerk.

7. Respondent understood at the time that she had discretion to refuse to issue the warrant.

8. Respondent signed the warrant.

9. Ms. Young was arrested by Trooper Sprung and brought before respondent for arraignment.

10. Respondent accepted a plea of not guilty, adjourned the matter to May 8, 1986, and released Ms. Young on \$250 bail.

11. Respondent did not disclose to Ms. Young or to Trooper Sprung at arraignment that the complaining witness was the court clerk.

12. Ms. Young's reappearance was subsequently adjourned to May 15, 1986.

13. After the arraignment but prior to the disposition, Ms. Young was told that Ms. Coons was respondent's court clerk.

14. Before the May 15, 1986, court appearance, Ms. Young's attorney, John LaDuca, and the assistant district attorney, William Kocher, discussed disposition of the matter. Mr. LaDuca and Mr. Kocher discussed the fact that the complaining witness was respondent's court clerk.

15. On May 15, 1986, by telephone before the court appearance, Mr. Kocher advised respondent that he would accept an adjournment in contemplation of dismissal as disposition of the charge against Ms. Young with restitution to Ms. Coons. Mr. Kocher did not ask respondent to disqualify herself from the case.

16. In court on May 15, 1986, Ms. Young and Mr. LaDuca appeared. Respondent granted an adjournment in contemplation of dismissal for six

months and ordered Ms. Young to pay \$267 to the court as restitution for Ms. Coons.

17. Mr. LaDuca did not ask respondent to disqualify herself.

18. Respondent did not disclose to Ms. Young or Mr. LaDuca that Ms. Coons was her court clerk, and she did not know whether or not the parties knew that Ms. Coons was the court clerk.

19. Ms. Coons was not present at any of the proceedings before respondent in the matter and had no conversation with respondent concerning it.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1 and 100.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct. Paragraphs 4(a), 4(b) and 4(c) of Charge I of the Formal Written Complaint are sustained, and respondent's misconduct is established. Paragraph 4(d) of the charge is dismissed.

It was improper for respondent to sign a warrant, to arraign the defendant and to dispose of her case without disclosing to the parties that the complaining witness was respondent's court clerk.

The judge and the clerk in a justice court have a close working relationship. A reasonable person might question whether the judge could handle fairly a matter involving someone with whom she has such frequent contact and a presumed relationship of trust. Judicial discretion was required in making determinations regarding the warrant, bail and disposition, and it was imperative that they be made in a manner that appears impartial.

Respondent acknowledges that when she signed the warrant, she had read the criminal information and was aware that the accusation was based on the complaint of her court clerk. While arguing that signing the warrant was an "administrative act," respondent also acknowledges in her sworn testimony that she understood at the time that she had the discretion not to issue a warrant when presented with one by the police. Section 120.20 of the Criminal Procedure Law clearly makes the issuance of a warrant discretionary.

Judges have been sanctioned in the past for signing warrants in circumstances in which their impartiality might be subject to question, either because of their personal knowledge of the facts or their relationship with the complaining witness. See Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349 (1984); Matter of Mullen, 1987 Annual Report 129 (Com. on Jud. Conduct, May 22, 1986); Matter of Tobey, 1986 Annual Report 163 (Com. on Jud. Conduct, Sept. 19, 1985); Matter of Del Pozzo, 1986 Annual Report 77 (Com. on Jud. Conduct, Jan. 25, 1985).

In this case, respondent had alternatives to simply signing the warrant. She could have refused to sign the warrant and had the matter brought before another judge. Even if the other judge of the court, for whom the clerk had previously worked, was unavailable or disqualified, the warrant could have been executed by a judge of an adjoining town. CPL Section 120.30(2). Additionally, respondent could have required service of a summons in lieu of the warrant. Section 120.20(3).

Respondent exacerbated this misconduct by failing to disclose the relationship at arraignment or at the dispositional hearing.

She could easily have dispelled any appearance of impropriety by disclosing the relationship. We do not find that her disqualification was mandated by Section 100.3(c) of the Rules Governing Judicial Conduct, but she should have at least disclosed the relationship and given the parties the opportunity to be heard on the issue before proceeding. By failing to do so, she did not act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

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

Mrs. Robb, Judge Altman, Mr. Berger, Judge Ciparick, Mrs. DelBello, Mr. Kovner and Judge Ostrowski concur, except that Judge Altman dissents as to paragraph 4(a) of Charge I and votes to dismiss that aspect of the charge.

Mr. Cleary dissents as to sanction only and votes that the appropriate disposition would be to issue a confidential letter of dismissal and caution.

Mr. Bower, Judge Rubin and Mr. Sheehy did not participate.

Dated: May 19, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

GERALD C. MOLNAR,

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

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**APPEARANCES:**

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the  
Commission

Duncan S. MacAffer (Peter B. Lekki and Michael C.  
Crowe, Of Counsel) for Respondent

The respondent, Gerald C. Molnar, a justice of the Madrid Town Court, St. Lawrence County, was served with a Formal Written Complaint dated September 3, 1987, alleging that he offered money to a defendant in his court in exchange for a sexual act. Respondent filed an answer dated September 23, 1987.

By order dated September 30, 1987, the Commission designated H. Wayne Judge, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 27, 1988, and the referee filed his report with the Commission on May 11, 1988.

By motion dated May 18, 1988, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be removed from office. By letter dated May 27, 1988, respondent's counsel indicated that he would not submit opposing papers and would not appear for oral argument.

On June 16, 1988, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent was a justice of the Madrid Town Court from January 1987, until his resignation on April 26, 1988.



2. On April 7, 1987, Candace Carr was issued an appearance ticket returnable in respondent's court on a charge of Permitting A Dog To Run At Large.

3. On April 28, 1987, Ms. Carr appeared before respondent in court. She pled guilty to the charge, and respondent fined her \$10. Ms. Carr asked for additional time to pay the fine, and respondent gave her until May 1, 1987.

4. On May 1, 1987, Ms. Carr called respondent by telephone and told him that her baby was ill and that she could not come to court. She asked whether she could send a money order. Respondent rejected the suggestion and asked whether he could come to Ms. Carr's home to collect the fine. She consented.

5. About 15 minutes later, respondent arrived at Ms. Carr's home. She went outside with the fine money to meet him. Respondent asked her whether he could go inside to prepare a receipt. She consented.

6. As respondent was preparing a receipt at Ms. Carr's kitchen table, he asked her when her husband had been sent to jail and when he was scheduled to return. Ms. Carr, who had not previously mentioned to respondent that her husband was in jail, indicated that her husband had been incarcerated since February and would be released at the end of the month.

7. Respondent asked Ms. Carr how much money she received in public assistance, and she replied that she received \$89 biweekly.

8. Respondent suggested to Ms. Carr that it must be hard living without a man and asked whether she wanted to earn \$25. Ms. Carr responded that she would and asked what he wanted her to do.

9. Respondent said that he had a headache and wanted to relieve his frustrations. He asked Ms. Carr to engage in oral sexual activity.

10. Ms. Carr became angry and upset. She refused, threw the \$10 bill at respondent and told him to leave her home.

11. Respondent told Ms. Carr that if she did not report the incident, he would fine her only \$5 for subsequent dog ordinance violations. If she did report it, he told her, her dog would be killed and her son taken from her custody.

12. Respondent left a receipt for the fine on the table and departed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.3(a)(3) of the Rules Governing Judicial Conduct and Canons 1, 2 and 3A(3) of the Code of Judicial Conduct. The charge in the Formal Written Complaint, as

amended at the hearing, is sustained, and respondent's misconduct is established.

Respondent used his judicial office to gain entrance to a defendant's home, then solicited a sexual favor from her in exchange for money. When she refused, he promised her special consideration in future court cases if she did not report the incident and threatened to use his judicial authority to harm her if she did.

Such gross misconduct does not comply with the law and constitutes an abuse of judicial authority of the most serious kind. The public can have no confidence in a judge who commits such unconscionable acts. Respondent is not fit to be a judge and should be barred from future judicial office.

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Kovner, Judge Ostrowski and Mr. Sheehy concur.

Judge Rubin was not present.

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

Dated: July 18, 1988



**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

CLEMENT F. QUARANTELO,

a Justice of the Murray Town  
Court, Orleans County.

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APPEARANCES:

Gerald Stern (Henry S. Stewart, Of Counsel) for the  
Commission

Heath & Martin (By Jeffrey R. Martin) for Respondent

The respondent, Clement F. Quarantello, a justice of the Murray Town Court, Orleans County, was served with a Formal Written Complaint dated June 17, 1987, alleging that he conducted a proceeding without hearing the defendant, that he indicated bias against an attorney and that he was not candid with the Commission. Respondent filed an answer dated July 21, 1987.

On January 26, 1988, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for in Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on February 19, 1988.

The administrator and respondent submitted memoranda as to sanction. Respondent waived oral argument.

On March 18, 1988, the Commission heard oral argument by the administrator and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent is a justice of the Murray Town Court and has been since June 1963.

2. On October 14, 1986, Raymond B. Lissow signed a notice and petition in Lissow Development Corp. v. Donald Rodas, George Hussong and Sheila Cary, a summary proceeding for eviction. The matter was returnable before respondent on October 22, 1986, at 7:00 P.M.

3. Prior to 6:50 P.M. on October 22, 1986, Mr. Lissow appeared in court before respondent. Mr. Lissow presented letters from Mr. Rodas and Mr. Hussong, indicating that they did not contest the proceeding. Mr. Lissow advised respondent that he did not believe that Mr. Rodas and Mr. Hussong intended to appear.

4. Respondent asked Mr. Lissow whether Ms. Cary was present and was told that she was not.

5. Prior to 7:00 P.M., respondent signed a warrant of eviction prepared by Mr. Lissow against Ms. Cary as tenant in possession of the premises. Mr. Lissow left the courtroom.

6. Between 6:50 P.M. and 6:55 P.M., Mr. Rodas and Mr. Hussong appeared in court. Respondent advised them that he had already signed a warrant of eviction.

7. Between 6:55 P.M. and 7:00 P.M., Ms. Cary and her attorney, John Zonitch of Oak Orchard Legal Services, arrived in court.

8. At about 7:00 P.M., respondent called the case. Mr. Zonitch and Ms. Cary approached the bench. Respondent told them that Mr. Lissow had already appeared and that respondent had signed a warrant of eviction against Ms. Cary.

9. Mr. Zonitch objected and asked to be allowed to present his defense on Ms. Cary's behalf. He submitted a written answer to respondent.

10. Respondent asked Mr. Zonitch whether he was associated with "legal aid." Mr. Zonitch replied affirmatively, and respondent said harshly that "legal aid" was not entitled to a trial in his court. "They can throw me off the bench, but you won't get a trial in my court," respondent declared.

11. Mr. Zonitch argued that the petition was invalid. Respondent returned the answer to Mr. Zonitch and told him that he would have to contact Mr. Lissow if Ms. Cary wished to remain on the premises that were the subject of the proceeding.

As to Charge II of the Formal Written Complaint:

12. On December 15, 1986, respondent replied to a duly-authorized inquiry from Commission staff concerning the proceeding against Ms. Cary. In a letter to Commission staff, respondent falsely stated that he had held a hearing in the case and that Mr. Rodas and Mr. Hussong were present, as well as Mr. Lissow.

13. On February 27, 1987, respondent testified before a member of the Commission concerning the case. Respondent falsely testified that he had held a hearing in the matter at or after 7:00 P.M. on October 22, 1986, and that Mr. Lissow, Mr. Rodas and Mr. Hussong had appeared together.

As to Charge III of the Formal Written Complaint:

14. During his testimony before a member of the Commission on February 27, 1987, respondent indicated bias against attorneys and clients of Oak Orchard Legal Services. "Well, I don't like legal aid, I'll tell you right out," respondent said. "I don't care for them. Therefore, the indigent they call it, it seems to me that these--in my estimation, they are better off than the fellow that's got a couple of bucks. They get the free service, and the other fellow has got to pay, even though he can't afford it. But just because he's got a couple of bucks, they won't give him legal aid."

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1) and 100.3(a)(4) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charges I through III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Before the time at which the defendants had been summoned to court, respondent heard the plaintiff and issued ex parte a warrant of eviction. When the defendant arrived, respondent announced the outcome and refused to hear any defense, declaring that "legal aid" was not entitled to a hearing in his court.

Respondent closed the courthouse door to this defendant, denying her the fundamental right to be heard. Such behavior by a judge constitutes serious misconduct. Matter of Mullen, 1987 Annual Report 129 (Com. on Jud. Conduct, May 22, 1986); Matter of Reese, 1985 Annual Report 217 (Com. on Jud. Conduct, Mar. 22, 1984).

When called upon by the Commission to explain his conduct, respondent gave a false version of the events on two occasions. Deception is antithetical to the role of a judge who is sworn to uphold the law and

seek the truth. Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 554 (1986).

Respondent's statements of bias toward legal aid attorneys and their clients further demonstrate his unfitness for judicial office. The ability to be impartial and appear impartial is an indispensable requirement for a judge. Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290 (1983).

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

Mrs. Robb, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. DelBello, Mr. Kovner, Judge Ostrowski, Judge Shea and Mr. Sheehy concur.

Judge Rubin was not present.

Dated: April 15, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

THOMAS A. ROBERTIELLO,

a Justice of the Rochester  
Town Court, Ulster County.

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APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the  
Commission

David H. Greenwald (Susan Shaw, Of Counsel) for  
Respondent

The respondent, Thomas A. Robertiello, a justice of the Rochester Town Court, Ulster County, was served with a Formal Written Complaint dated February 4, 1987, alleging that he improperly presided over and disposed of a traffic case. Respondent filed an answer dated February 12, 1987.

By order dated March 9, 1987, the Commission designated John T. O'Friel, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 23 and 24, 1987, and the referee filed his report with the Commission on September 30, 1987.

By motion dated November 18, 1987, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be removed from office. Respondent opposed the motion on December 10, 1987. The administrator filed a reply on January 4, 1988.

On January 15, 1988, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Rochester Town Court and has been since January 1, 1982.



2. On October 23, 1985, Elizabeth Kawalchuk was issued a ticket in the Town of Rochester for Failure To Yield Right Of Way.

3. Ms. Kawalchuk owns Betty Kawalchuk Realty. Respondent's wife, Barbara, is a sales representative for Betty Kawalchuk Realty and has been since July 7, 1985. Ms. Robertiello is paid commissions by Ms. Kawalchuk for the sales she makes for the realty business.

4. Ms. Kawalchuk's ticket was returnable in respondent's court on November 13, 1985. Respondent was not scheduled to sit on November 13, 1985.

5. After receiving the ticket on October 23, 1985, Ms. Kawalchuk went to respondent's court and told respondent that she could not appear on November 13, 1985. Although the case was scheduled before another judge, respondent accepted a not guilty plea from Ms. Kawalchuk and scheduled a trial for November 6, 1985.

6. The November 6 trial date was subsequently adjourned. However, the arresting officer who was assigned to prosecute the case was never notified of an adjourned date.

7. While the case was pending, respondent's wife discussed the matter with him. She told respondent that Ms. Kawalchuk was upset about receiving the ticket, that she did not feel that she deserved the ticket and that the arresting officer had not properly investigated the incident.

8. Respondent recorded or caused to be recorded in his court records that he dismissed the case for failure to prosecute on December 18, 1985, notwithstanding that the arresting officer was not notified that the case would be heard on that date, that the arresting officer was in respondent's court before another judge on that date and that the case was never called on that date.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(a)(4) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(4) and 3C(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained as amended at the hearing, and respondent's misconduct is established.

Respondent should not have presided over the Kawalchuk case. It was scheduled before another judge. Even if it had been properly before him, respondent should have disqualified himself inasmuch as the defendant was his wife's employer and his impartiality could reasonably be questioned. Section 100.3(c)(1) of the Rules Governing Judicial Conduct.

Instead, respondent reached out for the case, never notified the prosecution that it was to be heard and then improperly dismissed it on the specious ground of failure to prosecute.

These circumstances lead to the inescapable conclusion that respondent fixed the case as a favor to his wife's employer. Such conduct by a judge is wrong and has always been wrong. Matter of Byrne, 47 NY2d (b) (Ct. on the Judiciary 1979). It has long been condemned by the courts and this Commission. Matter of Reedy v. State Commission on Judicial Conduct, 64 NY2d 299 (1985); Matter of La Carrubba, 49 NY2d (p) (Ct. on the Judiciary 1980); "Ticket-Fixing: The Assertion of Influence in Traffic Cases," Interim Report by the State Commission on Judicial Conduct (June 20, 1977).

Although ticket-fixing may warrant removal for even a single transgression, (Reedy, supra at 302), we have considered mitigating factors in respondent's past. See Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153, 155 (1986).

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

Mrs. Robb, Mr. Bower, Judge Ciparick, Mrs. DelBello, Judge Ostrowski, Judge Rubin, Judge Shea and Mr. Sheehy concur.

Mr. Cleary and Mr. Kovner were not present.

Dated: February 23, 1988



**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

EDWIN R. SWEETLAND,

a Justice of the Dryden Town Court  
and an Acting Justice of the Freeville  
Village Court, Tompkins County.

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APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the  
Commission

Holmberg, Galbraith, Holmberg, Orkin & Bennett  
(By Dirk A. Galbraith) for Respondent

The respondent, Edwin R. Sweetland, a justice of the Dryden Town Court and the Freeville Village Court, Tompkins County, was served with a Formal Written Complaint dated January 7, 1988, alleging that he made improper comments in a criminal case. Respondent filed an answer dated January 25, 1988.

On July 27, 1988, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Section 44, subdivision 5, of the Judiciary Law, waiving the hearing provided for in Section 44, subdivision 4, of the Judiciary Law and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement on August 22, 1988.

The administrator and respondent submitted memoranda as to sanction. On October 20, 1988, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Dryden Town Court and has been since January 1, 1975. He is also acting justice of the Freeville Village Court and has been since June 1978.

2. On September 17, 1987, respondent signed a warrant for the arrest of Jose Orlando Cordova on charges of Burglary, Second Degree, and Sexual Abuse, Third Degree.

3. Mr. Cordova, a Honduran student attending Tompkins-Cortland Community College as part of Georgetown University's Central American Scholarship Program, surrendered to police and was taken to the Dryden Town Court for arraignment before respondent.

4. Mr. Cordova was represented by Wesley McDermott. Mr. McDermott advised respondent that the district attorney, Benjamin J. Bucko, had agreed that Mr. Cordova be released in his own custody on the condition that he surrender his passport to the court.

5. Respondent raised his voice and stated that he opposed the agreement: "I know nothing about this, and as far as I am concerned, he is going to jail."

6. Respondent then left the bench and went into an adjoining office and called Mr. Bucko by telephone. The doors between the office, the courtroom and an adjoining court clerk's office were left open, and respondent's conversation could be heard from both rooms.

7. Respondent asked Mr. Bucko whether he had recommended Mr. Cordova's release. Mr. Bucko confirmed that he had done so. Respondent became upset and asserted that bail should be imposed because the charges were very serious. Mr. Bucko reiterated that he recommended release without bail.

8. At one point during the conversation, respondent asserted that students in the Central American Scholarship Program should be deported. "You better deport these people," respondent said to Mr. Bucko. "You better get them out."

9. After the conversation, respondent returned to the courtroom. He was red-faced, appeared angry and pounded his fist on a table as he spoke with Mr. McDermott and the arresting officer.

10. Mr. Cordova was arraigned. He pled not guilty and surrendered his passport to respondent. Respondent ordered him released in his own custody.

11. Respondent then advised Mr. Cordova that he intended to issue an order of protection on behalf of the complaining witness in the case. Respondent told Mr. Cordova that he was not to return to the building in which the complaining witness lived and in which Mr. Cordova also lived. Mr. McDermott objected, and respondent reiterated that he wanted Mr. Cordova "out of there."

12. Respondent then left the courtroom and engaged in another telephone conversation with Mr. Bucko.

13. When he returned to the courtroom, respondent said to Mr. McDermott, "Well, it will be on your shoulders if it happens again." He then signed a temporary order of protection requiring Mr. Cordova to stay away from the home of the complaining witness.

14. On September 18, 1987, respondent engaged in a telephone interview with Carol S. Bernreuther, a reporter for the Cortland Standard newspaper, in which he discussed the Cordova case, which was still pending in his court.

15. Respondent told the reporter that he was "against" Mr. Bucko's recommendation to release Mr. Cordova. "These birds come up here and commit rape...and the district attorney wants to turn them loose," respondent said, referring to Mr. Cordova and a co-defendant arrested in connection with the same incident. The co-defendant had been charged with rape, but Mr. Cordova had not. Respondent also maintained that Mr. Bucko was "very liberal" and added, "I doubt he even indicts them."

16. Respondent's comments were published in the Cortland Standard on September 19, 1987.

17. On September 18, 1987, the day before the publication of respondent's comments, Georgetown University decided to relocate to other colleges the 36 participants in the Central American Scholarship Program. After the publication of respondent's remarks, 16 participants in the program told the dean of the community college that they were disturbed by the statements. Influenced by respondent's remarks, Georgetown University decided to expedite the relocation.

18. On April 15, 1988, the district attorney's office moved to dismiss the case against Mr. Cordova.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(a)(3) and 100.3(a)(6) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(3) and 3A(6) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's comments at the arraignment of Mr. Cordova clearly conveyed the impression that he was not impartial. Before hearing arguments on the question of bail, respondent declared, "...[H]e is going to jail." He expressed anger at the prosecutor's recommendation that Mr. Cordova be released without bail and said, "You better deport these people," referring not only to the defendant before him who was presumed by law to be innocent, but to 34 other students who had been charged with no crime at all.

The next day, respondent made comments that he should have known would be published and that further indicated partiality. He declared Mr.

Cordova guilty of a serious crime with which he had not even been charged: "These birds come up here and commit rape...." It would have been improper for respondent to make any public comment, no matter how insignificant, about the merits of a case pending before him. Matter of Fromer, 1985 Annual Report 135 (Com. on Jud. Conduct, Oct. 25, 1984). Respondent's comments were particularly egregious in that they undermined his proper role as a judge.

The ability to be impartial is an indispensable requirement for a judicial officer. Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property.

Matter of Sardino v.  
State Commission on  
Judicial Conduct, 58  
NY2d 286, 290-91 (1983).

A continuous pattern of such conduct would require respondent's removal from office (Sardino, supra), as might conclusive evidence that his remarks reflect racial or ethnic bias. Matter of Bloodgood, 1982 Annual Report 69 (Com. on Jud. Conduct, June 11, 1981). Respondent's comments, however, appear to indicate distrust and dislike of all those from outside his community. Such xenophobia is undesirable and inappropriate, though somewhat less egregious than a racial slur.

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick and Judge Ostrowski concur.

Mrs. Del Bello, Mr. Kovner and Mr. Sheehy dissent as to sanction only and vote that respondent be removed from office.

Mr. Cleary and Judge Rubin were not present.

Dated: November 21, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

EDWIN R. SWEETLAND,

a Justice of the Dryden Town Court  
and an Acting Justice of the Freeville  
Village Court, Tompkins County.

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DISSENTING OPINION  
BY MR. KOVNER,  
IN WHICH MRS. DEL BELLO  
AND MR. SHEEHY JOIN

The law of New York has unequivocally found that expressions of racism or ethnic bias will not be tolerated within the judiciary. Matter of Cerbone, 1984 Annual Report 76 (Com. on Jud. Conduct, Aug. 5, 1983); accepted, 61 NY2d 93 (1984) (references to "niggers" and "black bastards" during barroom confrontation); Matter of Aldrich v. State Commission on Judicial Conduct, 58 NY2d 279 (1983) (use of racial slurs during court proceedings); Matter of Kuehnel, 1980 Annual Report 125 (Com. on Jud. Conduct, Sept. 6, 1979); accepted, 49 NY2d 465 (1980) (statements of "niggers" to youngsters at a police station); Matter of Bloodgood, 1982 Annual Report 69 (Com. on Jud. Conduct, June 11, 1981) (phrase "so long kiki" used in letter to a defendant).

Respondent has argued (p. 8 of his papers and in oral argument at pp. 23, 36-39) and the majority finds that the remarks in question are not racist, but indicate "dislike of all those from outside his community," a view respondent argues is shared by many of his constituents (oral argument at p. 39).

I read the remarks in a different light. "You better deport these people. You better get them out," (emphasis added) plainly referred to all members of The Central American Scholarship Program, not only to the defendant before him. The statements reflected, to a reasonable observer, prejudice against the Hispanic students in the program.

Respondent compounded his intolerable comments, made in court in a proceeding before him, when he thereafter stated to a newspaper reporter, "These birds come up here and commit rape...and the district attorney wants to turn them loose" (emphasis added). In commenting on a matter pending before him in a manner that could be construed to intimidate the prosecutor and by erroneously characterizing the charge against Mr. Cordova (who was charged, not with rape, but with Sexual Abuse, Third Degree, alleging unwanted sexual touching of a neighboring student who had invited him into her apartment), respondent clearly engaged in misconduct. Independent of



these reasons, the remark was grossly improper because it plainly focused on the fact that the defendants were from Central America.

This reading of respondent's published remarks is confirmed by the fact, as stipulated by respondent, that Georgetown University was influenced by the newspaper report to expedite the relocation of all 36 students to universities in the southwestern United States.

Unlike respondent, I do not believe that the residents of Tompkins County shared his hostility to temporary residents from outside the United States. Indeed, I believe respondent has disgraced not only the judiciary and the State of New York, but his own community as well. Though respondent's counsel argues that some social mores change slowly, comments such as these in 1987, in my view, render the speaker unfit for further service on the judiciary.

The proper sanction should be removal from office.

Dated: November 21, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

LEROY A. VONDERHEIDE,

a Justice of the Northampton Town  
Court, Fulton County.

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APPEARANCES:

Gerald Stern (Cathleen S. Cenci, Of Counsel) for the  
Commission

Caputo, Aulisi and Skoda (By Richard T. Aulisi; Robert  
M. Cohen, Of Counsel) for Respondent

The respondent, Leroy A. VonderHeide, a justice of the Northampton Town Court, Fulton County, was served with a Formal Written Complaint dated July 8, 1987, alleging ex parte communications, intemperate behavior, failure to disqualify in a case in which he had personal knowledge of the facts and abuse of his judicial authority. Respondent filed an answer dated July 27, 1987.

By order dated August 4, 1987, the Commission designated Bernard H. Goldstein, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on October 7 and 8, 1987, and the referee filed his report with the Commission on January 5, 1988.

By motion dated April 13, 1988, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be removed from office. Respondent opposed the motion by cross motion on May 6, 1988. The administrator filed a reply on May 10, 1988.

On May 13, 1988, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

Preliminary findings:

1. Respondent is a justice of the Northampton Town Court and has been since 1985.

2. Respondent is not a lawyer. He is a retired carpenter and a former part-time policeman in the Village of Northville and constable in the Town of Northampton.

As to Charge I of the Formal Written Complaint:

3. Between March 6, 1986, and March 28, 1986, in connection with People v. Lewis Buseck, a matter pending before respondent in which the defendant was charged with Petit Larceny, respondent contacted the defendant's father on two occasions and discussed ex parte factual matters pertaining to the case. Respondent also discussed ex parte the facts of the case with the complaining witness and the arresting officer while the case was pending. Based on his ex parte communications, respondent concluded that the charge could not be proved and, with the concurrence of the district attorney, dismissed it on March 28, 1986.

4. Between July 14, 1986, and July 23, 1986, in connection with People v. Lewis H. Buseck, a matter pending before respondent in which the defendant was charged with Criminal Trespass, Second Degree, and Resisting Arrest, respondent spoke ex parte with the defendant's father, who was the complaining witness with respect to the Criminal Trespass charge, concerning the facts of the case. Respondent also spoke ex parte with the arresting officer concerning the merits of the Resisting Arrest charge.

5. On June 18, 1985, in connection with People v. Carol L. Eno, a case pending before respondent in which the defendant was charged with Assault, Third Degree, respondent spoke ex parte with the defendant's mother. Based solely on his conversation with the defendant's mother, respondent arraigned Harvey J. Van Nostrand, Jr., on a charge of Disorderly Conduct, notwithstanding that no accusatory instrument had been filed against him.

6. On February 25, 1987, respondent testified before a member of the Commission in connection with a duly-authorized investigation in this matter. Respondent testified that he often made telephone calls outside of court to determine the facts of matters pending before him. "I talked to all of them. I talked to the arresting officer. I may call your mother, father. I may call your neighbor to find out precisely what happened in many cases," respondent acknowledged. "Now, there's no way in the world that I can find out unless I ask some questions. Nobody is going to come forward and volunteer."

As to Charge II of the Formal Written Complaint:

7. In August 1986, respondent was entering a bar and restaurant where his wife worked as a waitress when he met Frank P. Mills, II, leaving the restaurant with a glass in his hand.

8. Respondent followed Mr. Mills, who was then 16 years old and lived above the bar and restaurant, to a parking lot.

9. Respondent confronted Mr. Mills and loudly and angrily accused him of carrying a glass of alcohol into the street.

10. Respondent referred to Mr. Mills as a "little bastard" and threatened that if he came before respondent in court his "ass will be grass."

11. The confrontation attracted the attention of a passing police officer. Respondent told the officer that he wanted Mr. Mills arrested. The officer refused. He warned respondent that if he continued to speak loudly the officer would arrest him. Respondent apologized to the officer and left the scene.

12. The police officer and Mr. Mills testified in this proceeding that respondent's eyes were red and that they believed that he had been drinking prior to the incident.

As to Charge III of the Formal Written Complaint:

13. On June 18, 1985, Carol L. Eno was arrested on a charge of Assault, Third Degree, in the Village of Northville on the complaint of Harvey J. Van Nostrand, Jr., that she had struck him with a crutch.

14. Ms. Eno was brought before respondent for arraignment. Mr. Van Nostrand, the arresting officers and Ms. Eno's parents were also present in the courtroom.

15. Before the arraignment, Ms. Eno's mother spoke ex parte with respondent and told him that the incident was precipitated by lewd and obscene gestures that Mr. Van Nostrand had made to Ms. Eno and a friend, Donna K. Prevost.

16. Respondent then told one of the arresting officers, Francesco Malagisi, Jr., that Mr. Van Nostrand should be arrested. Officer Malagisi did not arrest Mr. Van Nostrand and lodged no accusatory instrument against him.

17. Respondent arraigned Ms. Eno and told Mr. Van Nostrand that he was being charged with Disorderly Conduct. Respondent indicated that he would give Mr. Van Nostrand a conditional discharge if he agreed to plead

guilty, and Mr. Van Nostrand pled guilty because he "didn't know what to say."

18. Respondent indicated in his court records that Mr. Van Nostrand had been arraigned on a charge of Public Lewdness based on an accusatory instrument sworn to by Officer Malagisi and that Mr. Van Nostrand had pled guilty to a reduced charge of Disorderly Conduct.

As to Charge IV of the Formal Written Complaint:

19. On September 13, 1986, respondent drove Dennis Poulin to the scene of a confrontation between a deputy sheriff and Shaun Emrick and Earl H. Case. Mr. Poulin got out of respondent's car and assisted the deputy in taking Mr. Emrick and Mr. Case into custody.

20. Respondent parked and left his car and remained at the scene for approximately 15 minutes.

21. Respondent spoke with other spectators and watched a struggle between police officers and the men. After Mr. Emrick and Mr. Case had been arrested, respondent told the officers, "Bring them over to the office, and we'll arraign them now."

22. Later that evening, Mr. Emrick appeared before respondent on charges of Criminal Mischief and Resisting Arrest, and Mr. Case appeared on charges of Disorderly Conduct and Resisting Arrest. Respondent set bail and remanded the defendants to jail.

23. On September 16, 1986, respondent disposed of the cases.

As to Charge V of the Formal Written Complaint:

24. On April 28, 1986, respondent issued a warrant for the arrest of Leonard L. Watson on charges of Harassment and Criminal Mischief, Fourth Degree.

25. Mr. Watson, then 17 years old, was arraigned before respondent the same day and was remanded in lieu of \$500 bail.

26. On May 1, 1986, Mr. Watson reappeared in court. His attorney, Polly Hoye, set forth the terms of an agreement with the district attorney whereby Mr. Watson would plead guilty to the charges in exchange for a conditional discharge and a jail sentence of time served.

27. Respondent was acquainted with Mr. Watson's father, Gordon. Respondent had had coffee "many mornings" with the elder Mr. Watson during which he complained to respondent that Vincent Cristiano was providing alcohol to his son.

28. At the younger Mr. Watson's court appearance on May 1, 1986, respondent indicated that he wanted the defendant to sign a statement that he had obtained alcohol from Mr. Cristiano. Respondent indicated that if Mr. Watson signed such a statement, respondent would grant a conditional discharge but that if he did not, respondent would impose a jail sentence.

29. Mr. Watson agreed to sign such a statement. Respondent summoned a deputy sheriff, Geoffrey S. Page, and advised him to obtain a statement from Mr. Watson, indicating from whom he had obtained alcohol.

30. Respondent disposed of the charges against Mr. Watson.

31. Deputy Page and Mr. Watson went into a room adjoining the courtroom where Mr. Watson dictated and signed a statement that he had drunk beer at Mr. Cristiano's apartment.

32. Deputy Page turned the statement over to respondent. Respondent told the deputy that he wanted to "throw the book" at Mr. Cristiano and "stick it up his ass." Respondent asked Deputy Page to arrest Mr. Cristiano, but the deputy refused to do so and turned the matter over to the district attorney's office.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(1), 100.3(a)(4) and 100.3(c)(1)(i) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(1), 3A(4) and 3C(1)(a) of the Code of Judicial Conduct. Charges I through V of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Respondent's cross motion is denied.

Respondent has engaged in a course of misconduct which demonstrates that he misperceives his proper role as a judge.

Admittedly unaware that he was obligated to rule only on evidence produced in court in the presence of both parties, respondent routinely interviewed his own witnesses in private and made judgments based on their unsworn, ex parte conversations. See Section 100.3(a)(4) of the Rules Governing Judicial Conduct; Matter of Orloff, 1988 Annual Report 199 (Com. on Jud. Conduct, May 28, 1987); Matter of Racicot, 1982 Annual Report 99 (Com. on Jud. Conduct, Feb. 6, 1981).

Again abandoning the proper role of a neutral and detached magistrate, respondent failed to disqualify himself in the Emrick and Case matters, notwithstanding that he had witnessed the very arrests that formed the basis for the Disorderly Conduct and Resisting Arrest charges against the defendants. See Section 100.3(c)(1)(i) of the Rules Governing Judicial Conduct; Matter of Straite, 1988 Annual Report 226, 233 (Com. on Jud. Conduct, Apr. 16, 1987); Matter of Edwards, 1987 Annual Report 85 (Com. on

Jud. Conduct, Nov. 21, 1986); Matter of Tobey, 1986 Annual Report 163 (Com. on Jud. Conduct, Sept. 19, 1985).

Respondent took the role of policeman or prosecutor in the Eno and Watson cases by insisting that additional arrests be made and, when rebuffed by the arresting officer in the Eno case, by conducting an arraignment and coercing a guilty plea from someone never charged. This constituted a serious abuse of his judicial authority. Matter of Jutkofsky, 1986 Annual Report 111 (Com. on Jud. Conduct, Dec. 24, 1985).

In addition, by his displays of anger and profanity in connection with the Mills incident and the Watson case, respondent departed from the high standards of conduct expected of judges on and off the bench. Matter of Cerbone v. State Commission on Judicial Conduct, 61 NY2d 93 (1984); Matter of Aldrich v. State Commission on Judicial Conduct, 58 NY2d 279 (1983); Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465 (1980).

By this series of improper acts, respondent has shown that he poses a threat to the proper administration of justice and is not fit to be a judge. Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105 (1984); Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286 (1983).

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

Mrs. Robb, Judge Altman, Mr. Bower, Mrs. Del Bello, Mr. Kovner, Judge Ostrowski and Judge Rubin concur.

Mr. Berger, Judge Ciparick, Mr. Cleary and Mr. Sheehy dissent as to sanction only and vote that respondent be censured.

Dated: June 22, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

GERALD D. WATSON,

a Judge of the Lockport City  
Court, Niagara County.

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**APPEARANCES:**

Gerald Stern (John J. Postel and Henry S. Stewart, Of  
Counsel) for the Commission

William E. Smith for Respondent

The respondent, Gerald D. Watson, a judge of the Lockport City Court, Niagara County, was served with a Formal Written Complaint dated August 6, 1987, alleging that he failed to disqualify himself in a case involving a friend and client, that he practiced law in his own court and that he permitted associates to appear in his court. Respondent filed an answer dated August 31, 1987.

By order dated September 15, 1987, the Commission designated C. Benn Forsyth, Esq., as referee to hear and report proposed findings of fact and conclusions of law.

By motion dated October 19, 1987, respondent moved to dismiss Charges II through V of the Formal Written Complaint. The administrator of the Commission opposed the motion on October 21, 1987. By determination and order dated December 23, 1987, the Commission granted respondent's motion to dismiss Charges II, III and IV of the Formal Written Complaint and reserved decision with respect to Charge V pending further submissions.

Respondent submitted additional papers received on January 4, 1988. Also on January 4, 1988, the administrator moved for leave to renew and reconsider the order as to Charges II, III and IV and for a finding that respondent's motion be dismissed in all respects. In papers dated January 12, 1988, respondent opposed the motion to renew and reconsider. The administrator filed a reply on January 13, 1988. By determination and order



dated January 22, 1988, the Commission granted the motion to reconsider, affirmed its decision to dismiss Charges II, III and IV of the Formal Written Complaint and denied respondent's motion to dismiss Charge V.

A hearing was held on March 22 and 23, 1988, and the referee filed his report with the Commission on June 14, 1988.

By motion dated July 15, 1988, the administrator moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings and conclusions and for a finding that respondent be removed from office. Respondent opposed the motion by cross motion on August 25, 1988. The administrator filed a reply on September 6, 1988. On September 22, 1988, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Lockport City Court since January 1, 1984. He was also a judge of the court from 1962 to 1965 and from 1974 to 1980.

2. Respondent has known Beverly J. Johnston for more than twelve years. Respondent represented Ms. Johnston's parents in a legal matter, and he represented Ms. Johnston in three legal actions. They have been friends and have seen each other socially for more than twelve years.

3. On October 20, 1986, Ms. Johnston was charged with Driving While Intoxicated and Crossing A Double Line. From the police station, Ms. Johnston called respondent for advice as to whether to take a breathalyzer test. Respondent came to the station and drove Ms. Johnston home.

4. Ms. Johnston retained another attorney to represent her. The matter was returnable in respondent's court, but he disqualified himself by telling the chief court clerk to have the other judge of the court, Amelia M. Sommer, handle the case.

5. On November 25, 1986, Ms. Johnston was again charged with Driving While Intoxicated.

6. The matter was placed by the chief clerk, Kathleen A. Chaplin, on Judge Sommer's court calendar for arraignment on December 1, 1986. Ms. Chaplin concluded that since respondent had disqualified himself from the first matter, Judge Sommer should handle the second case.

7. Judge Sommer was not in court on December 1, 1986. A court clerk, Cynthia M. Dershem, called Ms. Johnston's case after respondent's calendar had been completed. Ms. Johnston was not present. Respondent was on the bench. He did not disqualify himself from hearing the matter.

8. On December 2, 1986, Judge Sommer signed a bench warrant for the arrest of Ms. Johnston on the grounds that she had not appeared in court. Ms. Johnston was arrested and brought to police headquarters the same day.

9. From the police station, Ms. Johnston called respondent.

10. Respondent then spoke by telephone to Police Captain Henry Newman. Respondent was upset. He told the captain that Ms. Johnston's arrest was "a lot of crap," that a bench warrant should not have been issued and that Ms. Johnston should not have been arrested. He ordered Captain Newman to release her.

11. Captain Newman then went to the court clerk's office and told Ms. Chaplin that respondent had ordered Ms. Johnston released. Ms. Chaplin called Judge Sommer, who then spoke to the captain and told him to hold Ms. Johnston for arraignment.

12. Judge Sommer then came to court and arraigned Ms. Johnston. Ms. Johnston claimed that she had not appeared because the traffic ticket that she was issued contained no return date. The matter was adjourned. Ms. Johnston was released in her own recognizance, but Judge Sommer suspended and seized her driver's license.

13. Ms. Johnston subsequently notified respondent of the events of her arraignment.

14. On December 3, 1986, respondent came into court and demanded that Ms. Dershem and Ms. Chaplin tell him who had issued the warrant for Ms. Johnston. He maintained that the bench warrant should not have been issued, that Ms. Johnston's license should not have been taken and that he should have been notified of the warrant. Respondent was angry and upset during this encounter; his voice was loud, and his face was red.

15. Respondent asked for the court file of the case, removed Ms. Johnston's driver's license and told the clerks that he was returning it to her. Respondent then went to Ms. Johnston's home and personally returned her driver's license.

16. On January 6, 1987, respondent formally disqualified himself from the case, and both Driving While Intoxicated charges against Ms. Johnston were transferred on January 7, 1987, to another court for disposition.

As to Charges II, III and IV of the Formal Written Complaint:

17. The charges were dismissed by determination and order dated December 23, 1987. The matter was reconsidered and the dismissal affirmed by determination and order dated January 22, 1988.

As to Charge V of the Formal Written Complaint:

18. Respondent is a part-time judge who also practices law in Lockport.

19. Before January 1, 1984, respondent was associated in the practice of law with Anthony C. Ben and Charles P. Ben. From 1972 to 1986, respondent and Anthony Ben also owned the building in which their offices are located.

20. When respondent took the bench on January 1, 1984, he and the Bens ended their joint law practice, but he continued to share office space in the building with the firm of Ben, Lerch and Ben. Respondent and the Ben firm continued to share library and storage facilities and, occasionally, secretarial services. They maintained a joint bank account to which each contributed funds for rent, copy machine, cleaning, utilities and library expenses. Respondent used a separate account for his supplies, stationery and other expenses related to his law practice.

21. Respondent and Anthony Ben also maintained a joint bank account as landlords from which expenses of the building were paid until Mr. Ben relinquished his interest in 1986.

22. In 1984, respondent permitted Anthony or Charles Ben to practice before him in nine civil cases, as denominated in Schedule A appended hereto.

23. On March 18, 1986, respondent was ordered by Acting Supreme Court Justice Charles J. Hannigan to hear and dispose of matters brought by Anthony Ben in respondent's court.

24. Paragraph 16 of Charge V of the Formal Written Complaint is not sustained and is, therefore, dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(a)(3), 100.3(a)(4) and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 3A(3), 3A(4), and 3C(1) of the Code of Judicial Conduct. Charge I and Paragraph 17 of Charge V of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charges II, III and IV and Paragraph 16 of Charge V are dismissed. Respondent's cross motion is denied.

Respondent had a long-standing personal and professional relationship with Beverly Johnston. He properly disqualified himself from handling her first case and should have had no part in the second matter, as well. Although he is permitted to practice law, respondent could not

represent her as an attorney in his own court (Section 16 of the Judiciary Law) and, in any event, Ms. Johnston had retained another attorney.

It was highly improper for respondent to order her release from custody and to take her driver's license from the court file and personally return it to her. Regardless of the validity of the ticket, the jurisdiction of Judge Sommer, the propriety of the bench warrant and the taking of Ms. Johnston's license, respondent should have refrained from any action. Section 100.3(c)(1) of the Rules Governing Judicial Conduct; Matter of Wright, unreported (Com. on Jud. Conduct, June 20, 1988); Matter of Feeney, 1988 Annual Report 159 (Com. on Jud. Conduct, Dec. 24, 1987). These issues should have been litigated in the proper forum by the parties without respondent's intervention. We reject his contention that it was his proper role as the elected, senior or administrative judge of the court to correct errors in the case, especially in the manner in which he did so. His intervention constituted abuse of his judicial office to gain special treatment for a friend and sometime client. Such misconduct is malum in se. Matter of Byrne, 47 NY2d (b) (Ct. on the Judiciary 1979).

With respect to Charge V, we conclude that it was improper for respondent to preside over cases involving attorneys with whom he shares office facilities and with whom he was once associated in law practice and the ownership of a building.

Before respondent took the bench in 1984, it was established that the divisions of the Lockport City Court constituted a single court and that a judge could not practice in either division or permit his law partners to do so. Matter of Harris v. State Commission on Judicial Conduct, 56 NY2d 365 (1982). Under the circumstances of this case, the relationship of respondent and the attorneys with whom he shares offices is sufficiently close so as to require his disqualification from any matters in which they appear as counsel.

However, because respondent was ordered to hear their cases by Judge Hannigan on March 18, 1986, we find misconduct only with respect to the nine cases respondent handled before that date. Although the Commission is not bound by Judge Hannigan's interpretations of the facts and law, respondent was, and it cannot be concluded that it was misconduct for him to follow the directions of a higher court.

As to his presiding over the nine earlier cases, we note two mitigating factors: respondent had taken some steps to disassociate himself from the Bens; and the law was unsettled as to whether he could preside. Therefore, the sanction we impose is not based on his involvement in those nine cases.

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

Mrs. Robb, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mr. Kovner and Judge Ostrowski concur.

Mrs. Del Bello dissents as to sanction only and votes that respondent be removed from office.

Judge Rubin and Mr. Sheehy were not present.

Dated: November 17, 1988

Schedule A

<u>Case</u>	<u>Date of Judgment</u>	<u>Attorney</u>
<u>MacFarlane v. Bull</u>	5/09/84	Charles P. Ben
<u>Garlock v. Hopkins</u>	3/08/84	Anthony C. Ben
<u>Hess v. Torres</u>	4/23/84	Charles P. Ben
<u>Cooke v. Knowles</u>	3/23/84	Charles P. Ben
<u>Hammond v. McDonough</u>	4/30/84	Charles P. Ben
<u>MacFarlane v. Farrell</u>	5/24/84	Charles P. Ben
<u>MacFarlane v. Miller</u>	9/06/84	Charles P. Ben
<u>D&amp;J Automotive v. McKernan</u>	6/26/84	Charles P. Ben
<u>D'Agostino v. Henning</u>	7/25/84	Charles P. Ben



**State of New York**  
**Commission on Judicial Conduct**

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

**Determination**

BRUCE McM. WRIGHT,

a Justice of the Supreme Court,  
New York County.

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**APPEARANCES:**

For the Commission:

Gerald Stern (Robert H. Tembeckjian, Of Counsel)

For the Respondent:

Center for Constitutional Rights (Morton Stavis  
and Stephanie Y. Moore, Of Counsel)

Rabinowitz, Boudin, Standard, Krinsky &  
Lieberman, P.C. (By Judith Levin)

Mayerson, Zorn, Perez & Kandel, P.C. (By Harold  
A. Mayerson)

Victor M. Goode

The respondent, Bruce McM. Wright, a justice of the Supreme Court, 1st Judicial District, was served with a Formal Written Complaint dated July 28, 1987, alleging that he lent the prestige of his office to advance private interests and improperly failed to disqualify himself. Respondent filed an answer dated October 20, 1987.

By order dated October 19, 1987, the Commission designated the Honorable Morton B. Silberman as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 21 and 22, 1987, and the referee filed his report with the Commission on March 7, 1988.



By motion dated April 6, 1988, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report and for a finding that respondent be censured. Respondent opposed the motion by cross motion on May 2, 1988. The administrator filed a reply on May 4, 1988.

On May 13, 1988, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

Preliminary findings:

1. Respondent is a justice of the Supreme Court and has been since January 1, 1983. He was a judge of Civil Court of the City of New York from 1980 to 1982 and was a judge of the Criminal Court of the City of New York from 1970 to 1979.

2. In 1975, Mia Lancaster appeared before respondent in a small claims proceeding. Thereafter, respondent spoke with Ms. Lancaster on occasion in the halls of the courthouse or in his chambers. On one occasion in 1979, Ms. Lancaster invited respondent and his wife to dinner at her home, and they accepted.

As to paragraphs 4(a) and 4(b) of Charge I of the Formal Written Complaint:

3. On August 22, 1975, Ms. Lancaster came to respondent and complained that she had lost a modeling job after she had been arrested on a charge brought by a former boyfriend. Ms. Lancaster presented respondent with court documents that indicated that the case had been adjourned in contemplation of dismissal.

4. Respondent drafted and typed on stationery of the criminal court two letters to a modeling agency and a fur company, beseeching them to reinstate Ms. Lancaster as a model.

5. In the letter to the modeling agency, respondent said the charges against Ms. Lancaster "had no basis in fact and constituted an act of vindictiveness" on the part of the boyfriend. Respondent said that Ms. Lancaster was "blameless."

6. In the letter to the fur company, respondent indicated that it appeared that Ms. Lancaster "was falsely and unjustifiably charged" and that the charges arose from "personal bias and vindictiveness." He referred to the boyfriend's "unpraiseworthy conduct."

7. Respondent had not presided over the case against Ms. Lancaster and had no knowledge of the facts of the case other than her representations and the court records that she supplied.

As to paragraphs 4(c), 4(d) and 4(g) of Charge I of the Formal Written Complaint:

8. On December 29, 1980, respondent granted Ms. Lancaster leave to prosecute as a poor person in Mia Lancaster v. R&D Realty et al., based on an affidavit sworn to by Ms. Lancaster.

9. On May 9, 1983, and September 19, 1983, respondent decided motions in Mia Lancaster v. R&D Realty et al.

As to paragraphs 4(e) and 4(f) of Charge I of the Formal Written Complaint:

10. In 1981, Ms. Lancaster brought a suit against the modeling agency that she alleged had terminated her employment in 1975 because of her arrest.

11. On June 3, 1983, motions in the case, Lancaster v. McGill, came before respondent for oral argument.

12. Ms. Lancaster appeared on her own behalf. The defendants were represented by Victor Machcinski. Ms. Lancaster and respondent engaged in friendly conversation at the bench for two or three minutes before the motions were argued. Mr. Machcinski felt "uncomfortable" about the conversation and knew that respondent had written a letter on behalf of Ms. Lancaster to his client. He did not ask respondent to disqualify himself.

13. Respondent did not disclose that he had written letters to Mr. Machcinski's client on behalf of Ms. Lancaster and did not offer to disqualify himself.

14. On August 10, 1983, respondent issued a written order, granting the defendants' motion in part and granting Ms. Lancaster's cross motion in part.

As to paragraphs 4(h) and 4(i) of Charge I of the Formal Written Complaint:

15. On November 20, 1985, Ms. Lancaster came to respondent's chambers and requested that he give her an affidavit to be used in a court case pending before another judge in which her credibility was at issue.

16. Respondent composed, typed and signed an affidavit bearing the caption Mia Lancaster v. Tyrone Kindor and turned it over to Ms. Lancaster. He placed no limits on its use.

17. The affidavit stated:

I have known the plaintiff for upwards of seven years. She has appeared before me in litigation representing herself. I know her as a young woman of impressive competence and legal knowledge. She is also known to me as a person of honor who has great respect for and pays allegiance to truth. She is a person who shows unswerving attention to and care for candor and the solemnity of her oath.

With respect to her reputation for truth and honesty, I vouch for those characteristics without any reservation whatsoever.

18. On August 15, 1986, Ms. Lancaster again came to respondent's chambers and indicated that she intended to make a motion to exonerate bail in a pending criminal case against her before another judge. She asked respondent to prepare an affidavit that she could use in support of her motion.

19. Respondent prepared and signed an affidavit with the caption People v. Mia Lancaster. He placed no limits on its use.

20. In the affidavit, respondent recounted that he had been called by Ms. Lancaster after her arrest on January 16, 1986, and that he went to the Manhattan District Attorney's Office and took possession of her valuables "[a]s she had been unable to reach my son, Geoffrey Wright, who has been her attorney on occasion...." Respondent attested to Ms. Lancaster's "long and constant residence" in New York, her "firm roots in the Manhattan community," and her "dedication to founding a museum for cats here in Manhattan." Respondent concluded, "She has also conducted litigation in the Manhattan courts, representing her own causes and I vouch for her as an acceptable risk for release without bond or bail of any kind."

21. Respondent made the statements in support of Ms. Lancaster in each affidavit based solely on his conversations with her, without any independent knowledge of her reputation or her roots in the community.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2 and 100.3(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2 and 3C(1) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established. Respondent's cross motion is denied.

In four written documents, respondent lent the prestige of his judicial office to advance the private interests of Mia Lancaster. He also decided a number of motions in cases in which Ms. Lancaster was a party.

By his own testimony, respondent knew Ms. Lancaster only from a brief court appearance when she appealed to him to write letters on her behalf in 1975. Although he knew of the circumstances only from his conversations with Ms. Lancaster, respondent prepared the letters on his judicial stationery without explaining to the addressees that he had had no official involvement in or knowledge of the case. The letters exonerated Ms. Lancaster and vilified the man who had brought the charges against her. These letters were not job references, recommendations to law school or character references. They were attempts to influence employers to rehire Ms. Lancaster, backed by the prestige of judicial office.

Eight years later, respondent presided over an oral argument and decided a motion in a lawsuit brought by Ms. Lancaster against one of the employers to whom respondent had written on her behalf. The issue in the lawsuit was whether Ms. Lancaster was wrongfully discharged in 1975. Since respondent had implored the employer to take her back, his impartiality in the matter might reasonably be questioned, and he should have disqualified himself. Section 100.3(c)(1) of the Rules Governing Judicial Conduct.

Respondent also decided motions in a housing dispute brought by Ms. Lancaster against another party. Although this was less serious than his involvement in the employer's case, the majority of the Commission concludes that respondent should have disqualified himself in this matter as well, because of the nature of his earlier contacts with Ms. Lancaster.

Respondent seriously exacerbated this misconduct by his execution of the affidavits in 1985 and 1986. Knowing that they would be used in his own court in pending litigation on Ms. Lancaster's behalf, respondent encouraged a judge to believe her in one instance and urged a judge to release her without bail in another. Respondent had no assurances as to how these affidavits would be used. That he did not know to whom they would be given and that he did not present them directly is not mitigating. He clearly attempted to use the prestige of his office to advance Ms. Lancaster's interests in pending litigation before other judges, in violation of Section 100.2(c) of the Rules Governing Judicial Conduct.

Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved [citation omitted]. There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the

judiciary. Thus, any communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office.

Matter of Lonschein v.  
State Commission on  
Judicial Conduct,  
50 NY2d 569, 572 (1980).

A judge who used court stationery for the business of his private law practice has been found to have employed judicial office "to further wholly private ends." Matter of Vasser, 75 NJ 357, 382 A2d 1114, 1117 (N.J. 1978). See also Matter of Anastasi, 76 NJ 510, 388 A2d 620 (N.J. 1978). It follows that the same is true for a judge who used his judicial office and title to further another's interests in employment and in pending litigation.

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

Mrs. Robb, Mr. Bower, Mrs. Del Bello, Judge Ostrowski, Judge Rubin and Mr. Sheehy concur.

Judge Altman, Judge Ciparick, Mr. Cleary and Mr. Kovner dissent as to Charge I and vote that misconduct is established as to paragraphs 4(h) and 4(i) only and dissent as to sanction and vote that respondent be admonished.

Mr. Berger did not participate.

Dated: June 20, 1988

**State of New York**  
**Commission on Judicial Conduct**

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

BRUCE McM. WRIGHT,

a Justice of the Supreme Court,  
New York County.

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DISSENTING OPINION  
BY MR. KOVNER IN  
WHICH JUDGE ALTMAN,  
JUDGE CIPARICK AND  
MR. CLEARY JOIN

Consistent with the thorough report of the distinguished referee, one does not have to approve the judgment reflected in the decision to write the 1975 letters to find that they do not rise to the level of misconduct. The letters are thirteen years old and the circumstances sufficiently private that, standing alone, they do not constitute an abuse of judicial office. Nor is the relationship of these letters to the subsequent events sufficiently substantial to support the imposition of public discipline however unfortunate the use of judicial stationery and some of the language may now be viewed.

Nor do the discovery motions decided in 1983 warrant public discipline. The motion in Lancaster v. R&D Realty preceded the adoption of the individual assignment system and was routine at most. Though the better practice would have been for respondent to disqualify himself in Lancaster v. McGill, such action would have unnecessarily prolonged the case over minor issues and inevitably would have been determined in defendant's favor. The failure to recuse does not rise to the level of misconduct. The two matters involving a motion to correct an index number and a motion to sue as a poor person are plainly de minimis.

None of these mitigating factors nor the absence of a venal motive excuses respondent's decision to execute the affidavits in 1985 and 1986. I agree with the majority in finding a clear violation of Section 100.2(c) of the Rules Governing Judicial Conduct.

Based on the foregoing, and in view of respondent's fine judicial record, I believe that admonition is the appropriate sanction.

Dated: June 20, 1988



1988 MATTERS ACCORDING TO COURT (See Tables on Pages 4-8)

1988 DISPOSITIONS	Town & Village Court	City Court	County Court	Family Court	District Court	Court of Claims	Surrogate Court	Supreme Court	Court of Appeals; App. Div.
	Lawyer Non-Lawyer	Part-time Full-time							
COMPLAINTS RECEIVED	72 252	45 145	91	111	9	9	33	220	13
COMPLAINTS INVESTIGATED	28 93	8 16	6	12	2	2	3	30	0
NUMBER OF JUDGES CAUTIONED AFTER INVESTIGATION	5 14	0 3	1	1	0	0	0	2	0
NUMBER OF FORMAL WRITTEN COMPLAINTS AUTHORIZED	3 8	1 3	2	0	1	0	0	4	0
NUMBER OF JUDGES CAUTIONED AFTER FORMAL WRITTEN COMPLAINT	0 1	2 0	0	1	0	0	0	1	0
NUMBER OF JUDGES PUBLICLY DISCIPLINED	0 8	1 0	2	0	0	0	1	2	0
NUMBER OF FORMAL WRITTEN COMPLAINTS DISMISSED OR CLOSED	1 4	0 0	0	0	0	0	0	1	0

APPENDIX E: STATISTICAL ANALYSIS OF COMPLAINTS

NOTE: All town & village justices serve part-time and may be lawyers. All city court judges are lawyers and serve either part-time or full-time. All other judges are lawyers and serve full-time.



TABLE OF CASES PENDING AS OF DECEMBER 31, 1987.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling								
Non-Judges								
Demeanor		5	5	3		2	2	17
Delays		2	3	2				7
Confl./Interest		1	6	2	1	1	4	15
Bias		1	2	2		1	2	8
Corruption		2	2				2	6
Intoxication			1				1	2
Disable/Qualif.								
Political Activ.		2	4	5			1	12
Finances, Records, Training		2			1	2		5
Ticket-Fixing								
Assertion of Influence		9		3			2	14
Miscellaneous		14	20	3	1	2	7	47
<b>TOTALS</b>		<b>38</b>	<b>43</b>	<b>20</b>	<b>3</b>	<b>8</b>	<b>21</b>	<b>133</b>

\* Investigations closed upon vacancy of office other than by resignation.

\*\* Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.

TABLE OF NEW CASES CONSIDERED BY THE COMMISSION IN 1988.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling	429							429
Non-Judges	113							113
Demeanor	80	22	18	2				122
Delays	42	9	2	2				55
Confl./Interest	8	8	1					17
Bias	73	6	6					85
Corruption	12	4				1		17
Intoxication	1	1	2					4
Disable/Qualif.								0
Political Activ.	6	7	4	1				18
Finances, Records, Training		17	2	1	1			21
Ticket-Fixing			1					1
Assertion of Influence	15	14	8	1	1			39
Miscellaneous	130	35	17	5	1			188
TOTALS	909	123	61	12	3	1		1109

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\* Investigations closed upon vacancy of office other than by resignation.

\*\* Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.

ALL CASES CONSIDERED BY THE COMMISSION IN 1988: 1109 NEW COMPLAINTS AND 133 PENDING FROM 1987

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling	429							429
Non-Judges	113							113
Demeanor	80	27	23	5		2	2	139
Delays	42	11	5	4				62
Confl./Interest	8	9	7	2	1	1	4	32
Bias	73	7	8	2		1	2	93
Corruption	12	6	2			1	2	23
Intoxication	1	1	3				1	6
Disable/Qualif.								
Political Activ.	6	9	8	6			1	30
Finances, Records, Training		19	2	1	2	2		26
Ticket-Fixing			1					1
Assertion of Influence	15	23	8	4	1		2	53
Miscellaneous	130	49	37	8	2	2	7	235
<b>TOTALS</b>	<b>909</b>	<b>161</b>	<b>104</b>	<b>32</b>	<b>6</b>	<b>9</b>	<b>21</b>	<b>1242</b>

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\* Investigations closed upon vacancy of office other than by resignation.

\*\* Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.

ALL CASES SINCE THE INCEPTION OF THE TEMPORARY COMMISSION (JANUARY 1975).

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling	4458							4458
Non-Judges	736							736
Demeanor	659	27	497	96	40	41	109	1469
Delays	359	11	53	29	4	6	11	473
Confl./Interest	185	9	249	69	26	12	80	630
Bias	490	7	124	21	14	11	10	677
Corruption	84	6	51		11	6	9	167
Intoxication	12	1	21	3	2	2	12	53
Disable/Qualif.	24		19	2	12	6	6	69
Political Activ.	90	9	68	76	3	8	9	263
Finances, Records, Training	118	19	84	42	54	52	50	419
Ticket-Fixing	18		60	149	33	59	158	477
Assertion of Influence	36	23	37	16	4		10	126
Miscellaneous	346	49	149	49	11	26	33	663
<b>TOTALS</b>	<b>7615</b>	<b>161</b>	<b>1412</b>	<b>552</b>	<b>214</b>	<b>229</b>	<b>497</b>	<b>10,680</b>

\* Investigations closed upon vacancy of office other than by resignation.

\*\* Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.