Annual Report

New York State Commission on Judicial Conduct

January 1978

1978 ANNUAL REPORT
OF THE
NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

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LETTER OF TRANSMITTAL

To the Governor, Legislature and Chief Judge of the Court of Appeals of the State of New York:

Pursuant to Article 2-A, Section 42, subdivision 4, of the Judiciary Law of the State of New York, the State Commission on Judicial Conduct respectfully submits this annual report of its activities. The report covers the period from September 1, 1976, when the Commission formally succeeded its predecessor agency, the Temporary State Commission on Judicial Conduct, through December 31, 1977.

Respectfully submitted,

MRS. GENE ROBB, Chairwoman
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Commission Members.

GERALD STERN, ESQ., Administrator

January 1, 1978
New York, New York

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SUMMARY OF COMMISSION ACTIVITY
(September 1, 1976, through December 31, 1977)

The State Commission on Judicial Conduct was established on September 1, 1976, by virtue of a constitutional amendment overwhelmingly approved by the New York State electorate in November 1975. The Commission is empowered to investigate allegations of misconduct against judges, impose limited disciplinary sanctions* and, when appropriate, initiate removal proceedings (by forwarding appropriate recommendations to the Chief Judge of the Court of Appeals) and present evidence in the Court on the Judiciary.

During the period from September 1, 1976, through December 31, 1977, the Commission considered 1272 complaints (including 523 initiated on its own motion). Of these the Commission voted to dismiss 515 complaints and to commence 757 investigations. It also continued 162 investigations begun by its predecessor agency, the Temporary State Commission on Judicial Conduct. Two hundred seventy-eight complaints were dismissed following full investigations. One hundred seven resulted in disciplinary action taken by the Commission or the resignation of the judge involved. Five hundred thirty-four investigations are pending. Since 1974, when the temporary Commission was created, a total of 1996 complaints of judicial misconduct against 1172

*The sanctions that the Commission may impose upon a judge are: admonition, public censure, suspension without pay up to six months and retirement for physical or mental disability. Censure, suspension and retirement actions are all subject to a new hearing in the Court on the Judiciary at the request of the judge.

different judges has been considered by either the temporary or permanent Commission. (A total of 161 complaints either did not name a judge or alleged misconduct by someone not within the Commission's jurisdiction, such as an attorney, a hearing officer or a federal judge.)

The Commission's investigations during the past 16 months focused on a wide range of judicial conduct including alleged conflicts of interest, political activity, nepotism in appointments and hiring, intemperate courtroom demeanor, special influence in disposing of traffic cases and improper practice of law by part-time attorney-judges permitted to practice law. Seventy-seven judges appeared before Commission members to explain their conduct under oath during the course of Commission investigations. More than 300 judges, from courts at every level of the unified court system, responded in writing to Commission requests for explanations of their conduct.

In addition, 54 hearings on stated charges are pending before the Commission at this time. (A full hearing is required before the Commission may censure, suspend or retire a judge.)

In addition to continuing work on six removal proceedings begun by the temporary Commission, the Commission recommended that 45 judges face removal proceedings during the past 16 months, including 40 related to a statewide Commission inquiry into ticket-fixing. Six of the 40 judges in the ticket-fixing cases have since resigned, and two others allowed their terms to expire.

The following disciplinary sanctions were imposed on

judges in New York State since September 1, 1976, as a result of evidence in removal proceedings presented in the courts by the Commission following stated charges and full hearings*:

-- the removal from office of a city court judge (Matter of MacDowell);

-- the suspension for six months without pay of a Supreme Court justice (Matter of Vaccaro);

-- the public censure of an acting Supreme Court justice (Matter of Mertens);

-- the public censure of a city court judge (Matter of Filipowicz); and

-- the public censure of a city court judge (Matter of Richter).

The Commission also suspended a village court justice for six months without pay for his failure to complete a required training course. The judge gave notice that he would step down from the bench at the end of his current term, which was due to expire on December 31, 1977 (Matter of Tracy).

Since 1974, a total of 53 removal proceedings have been initiated by either the temporary or permanent Commission. Eight of the 53 judges involved resigned before formal charges were served, and two allowed their terms of office to expire. One was suspended by the Commission. In the seven cases which to date have gone to trial, the courts have imposed disciplinary sanctions

*The decisions in the enumerated cases were all rendered after September 1, 1976. In some of these cases, the evidence had been presented prior to that date, at a time when the Appellate Divisions had jurisdiction over judges of the state's "lower" courts.

on all the respondent-judges. (Two were removed, one was suspended and four were publicly censured.) The remaining 35 cases are pending.

During the past 16 months, 30 judges resigned while under investigation or after the initiation of removal proceedings by the Commission. Since the creation of the temporary Commission in 1974, 35 judges have resigned while under investigation or after the initiation of removal proceedings.

Twenty-six judges have been admonished since the creation of the permanent Commission on September 1, 1976, and 51 judges have been admonished by either the temporary or permanent Commission.

In June 1977, the Commission issued a report on widespread ticket-fixing in New York State. The June report is updated in this annual report, which also discusses certain practical problems in completing investigations and hearings and bringing charges against a large number of judges.

Recommendations are offered in this report to the Legislature and the Administrative Board of the Judicial Conference.

On April 1, 1978, a new Commission will be established, following another overwhelming majority vote of the electorate in November 1977 in favor of an amendment to the State Constitution. The work of the present Commission will be continued by the new Commission, which will have eleven instead of nine members and will conduct hearings and make determinations as to all disciplinary sanctions, including removal from office, subject to review by the Court of Appeals.

INTRODUCTION

Commissions on judicial conduct have been established in more than 40 states. The increasing number of commissions over the past decade does not indicate a growing problem of misconduct, but rather, a growing recognition of the need to provide a forum for considering complaints against judges. Whenever a citizen has a conduct-related complaint against a judge, legitimate or not, there should be a place for that citizen to turn. Inevitably, an active commission with the authority and the obligation to initiate investigations on its own motion will identify occasional lapses of proper judicial conduct.

Most jurists do, in fact, conduct themselves with decorum, and misconduct by a few should not impair the reputation of the fair-minded, temperate majority. Nor should issues of judicial misconduct, such as intemperate demeanor, corruption or conflicts of interest, be confused with the judge's discretionary and deliberative responsibilities, such as ruling on motions or rendering decisions. Matters of law are for appellate courts to review and should not be subject to interference by a commission.

The subject of judicial misconduct covers a broad range of behavior. Violations of established ethical codes include some which, if proved, should result in removal from office, and, at the other extreme, some which should invoke a cautionary reminder to a judge without the need for public embarrassment. For this and other reasons, the law requires the work of the New York State Commission on Judicial Conduct to be mostly confidential.

Judicial Discipline in New York: A Brief Review

Prior to 1976, the authority to investigate allegations of misconduct and to discipline judges within the New York State court system had been vested in five judicial bodies. The Appellate Division in each of the state's four judicial departments had jurisdiction to hear cases of misconduct against judges of the state's "lower" courts. A special Court on the Judiciary, created by constitutional amendment in 1948, had jurisdiction over cases involving judges of the state's "higher" courts, thereby supplementing a constitutional provision which authorizes removal for cause of Court of Appeals and Supreme Court judges by a two-thirds vote on a concurrent resolution of the Legislature, and removal for cause of other judges by a two-thirds vote of the State Senate.

Neither the Appellate Divisions nor the Court on the Judiciary had full-time staff exclusively to monitor the judiciary, investigate complaints and commence disciplinary proceedings. The Appellate Divisions used judges or court personnel to investigate complaints. In 1968, the Appellate Division, First Judicial Department, established a judiciary relations committee, which was staffed by the departmental director of administration and was authorized to receive complaints against both higher and lower court judges in the First Judicial Department, conduct investigations, hold hearings and recommend to the Appellate Division appropriate disciplinary action. A similar judiciary relations committee was established by the Appellate Division,

Second Judicial Department, in 1973. In the Third and Fourth Departments, where the investigatory procedures remained less formal, the departmental directors of administration, rather than committees, coordinated the complaint process in addition to meeting their regular administrative responsibilities. The Court on the Judiciary, which had no investigative personnel, was convened only five times between 1948 and 1973. Upon convening, the Court would appoint counsel who would investigate, report, possibly formulate charges and present evidence if the respondent-judge did not resign.

Development of a Commission on Judicial Conduct

As a result of growing dissatisfaction with the disparate system of judicial discipline in New York, legislative leaders, court reform organizations and the Joint Legislative Committee on Court Reorganization began in the early 1970s to develop plans for a more suitable alternative. Their efforts extended the jurisdiction of the Court on the Judiciary to hear disciplinary cases against both lower and higher court judges, thus superseding the disciplinary authority of the Appellate Division. This reform effort also led to the development of a single, independent, statewide agency responsible for investigating complaints of judicial misconduct within the unified court system and for convening the Court on the Judiciary when disciplinary proceedings against individual judges are warranted.

The State Commission on Judicial Conduct was established on September 1, 1976, as the result of a constitutional amendment

overwhelmingly adopted by the New York State electorate in November 1975. It succeeded the Temporary State Commission on Judicial Conduct, which was created by the Legislature in 1974 and commenced operations in January 1975. All matters pending before the temporary Commission were continued before the permanent Commission on September 1, 1976.

The Commission's Authority

The State Commission on Judicial Conduct has the authority to review written complaints of misconduct against incumbent judges, initiate complaints on its own motion, conduct hearings, subpoena witnesses and documents, and make appropriate determinations for the disciplining of judges within the state unified court system.* The Commission does not act as an appellate court, nor does it review judicial decisions or errors of law. It does not give legal advice or represent litigants, though it will refer individuals to other agencies when appropriate. The Commission's jurisdiction is limited to judicial misconduct, as defined primarily by the Rules Governing Judicial Conduct (promulgated by the Administrative Board of the Judicial Conference of the State of New York) and the Code of Judicial Conduct. Such misconduct includes but is not limited to improper demeanor, conflicts of interest, intoxication, bias, prejudice, favoritism,

*The Commission's authority derives from Article VI, Section 22, of the Constitution of the State of New York, and Article 2-A, Sections 40 through 44, of the Judiciary Law of the State of New York. Its jurisdiction over a particular judge terminates when the judge no longer holds judicial office.

corruption and certain prohibited political activity. In addition, the Commission has jurisdiction over the alleged physical or mental disability of judges.

If Commission findings in a particular case warrant disciplinary action, one of several courses may be taken. The Commission may:

-- admonish a judge privately;

-- publicly censure a judge after an adversary hearing, subject to a new hearing in the Court on the Judiciary upon the request of the judge;

-- suspend a judge without pay for up to six months, after an adversary hearing, subject to a new hearing in the Court on the Judiciary upon the request of the judge;

-- retire a judge for physical or mental disability after an adversary hearing, subject to a new hearing in the Court on the Judiciary upon the request of the judge;

-- determine after an investigation or an adversary hearing that a removal proceeding be commenced in the Court on the Judiciary.

The Commission may also make private "suggestions and recommendations" to a judge when it determines that the circumstances warrant comment but not disciplinary sanction. Such action, unlike an admonition, is regarded as a dismissal of the complaint.

Commission Membership and Staff

There are nine members of the State Commission on Judicial Conduct, serving staggered four-year terms. The Governor

appoints three members, the Chief Judge of the Court of Appeals appoints two, and each of the four leaders of the Legislature appoints one. No more than two members may be judges, and at least two must be lay persons. The Commission elects one of its members to be chairperson and appoints an administrator who is responsible for hiring staff and directing staff investigations and other business.*

The chairwoman of the Commission is Mrs. Gene Robb of Latham. The other members are: David Bromberg, Esq., of New Rochelle; Dolores DelBello of Hastings-on-Hudson; Honorable Louis M. Greenblott of Binghamton, Associate Justice of the Appellate Division, Third Judicial Department; Michael M. Kirsch, Esq., of Brooklyn; Victor A. Kovner, Esq., of New York City; William V. Maggipinto, Esq., of Southampton; Honorable Ann T. Mikoll of Buffalo, Associate Justice of the Appellate Division, Third Judicial Department; and Carroll L. Wainwright, Jr., Esq., of New York City. The administrator of the Commission is Gerald Stern, Esq.

The Commission has 58 full-time staff employees, including 10 staff attorneys and seven recent law school graduates. During the summer of 1977, 40 additional investigative aides, including many law students, were hired for a three-month period. Several law students are also employed throughout the year on a part-time basis.

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

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*Biographical sketches of the Commission members are annexed as Appendix A.

The Commission's Procedures

The Commission convenes at least once a month for sessions lasting two or three days. At each meeting, the Commission reviews each new complaint of misconduct individually and makes an initial determination whether to conduct an investigation or to dismiss the complaint. No investigation may be commenced without prior approval by the Commission. It reviews staff reports on ongoing investigations, makes final determinations on completed investigations, and conducts other business. The Commission will occasionally hear testimony at its monthly meetings from judges whose conduct is under investigation. It also designates "panels" of one or more Commission members authorized to take such testimony on behalf of the full Commission in the intervals between meetings. During the past 16 months, 77 judges have appeared to give testimony before the full Commission or designated panels. An analysis of the scope of the complaints considered by the Commission follows.

COMPLAINTS AND INVESTIGATIONS

During the past 16 months, the Commission reviewed 1272 new complaints and commenced 757 investigations.* The new complaints came from a variety of sources: civil litigants, complainants and defendants in criminal cases, attorneys, judges, law enforcement officers, civic organizations and concerned citizens not involved in any particular court action. Among the new complaints were 523 which the Commission initiated on its own motion. (Such complaints evolve in a variety of ways. For example, reports of judicial misconduct might come to the Commission's attention from a newspaper article. In numerous instances, during the course of a Commission-authorized investigation of one judge, information involving another in some form of misconduct comes to light.) The Commission also continued 162 investigations initiated but not concluded by the temporary Commission, which formally terminated on August 31, 1976.

Of the 1272 new complaints considered by the Commission in the last 16 months, 515 were dismissed upon initial review. Most of these were from litigants who were complaining about rulings of law or decisions made by a judge in the course of a proceeding. Absent any underlying misconduct, including demonstrated bias, prejudice, intemperance or conflict of interest, the Commission does not have jurisdiction to investigate such matters, which

*The statistical period in this report for new complaints considered by the Commission is September 1, 1976, through December 31, 1977. Detailed analysis of these statistics is annexed in chart form as Appendix H.

more appropriately belong in the appellate courts. Even when an inquiry concludes that a judge's rulings of law in a case were motivated by misconduct, the Commission may discipline the judge for the misconduct, but it cannot reverse the rulings in question. That power rightfully remains with the courts.

The Commission dismissed 278 complaints in the last 16 months after full investigations were conducted, because either the allegations were not substantiated or the evidence did not justify disciplinary action.

Five hundred thirty-four investigations were pending as of December 31, 1977. Of these, 353 involve allegations of ticket-fixing.

Summary of All Complaints Considered by the Temporary and Permanent Commissions

Since 1974, when the Temporary State Commission on Judicial Conduct was created, a total of 1996 complaints of judicial misconduct against 1172 different judges has been considered by either the temporary or permanent Commission. (A total of 161 complaints either did not name a judge or alleged misconduct by someone not within the Commission's jurisdiction, such as a private attorney, hearing officer or a federal judge.) Nine hundred fifty-six of those were dismissed upon initial review. Three hundred fifty-five were dismissed after investigations were conducted. One hundred fifty-one complaints resulted in disciplinary action by the Commission, such as admonition, suspension or the commencement of removal proceedings, or the resignation of the judge involved.

ACTION TAKEN

Admonitions

Admonitions play an important role in disciplining judges for misconduct not serious enough to warrant public censure, suspension or removal but significant enough to be cause for concern and to constitute a violation of applicable ethical standards. Admonitions, which by specific provision of law are confidential and therefore not made public, are designed to correct and deter violations of applicable rules and ethical standards. They are intended to improve a judge's conduct without affecting his reputation.

In the last 16 months, the Commission admonished 26 judges for various types of misconduct. One judge, for example, was admonished for using vulgar language in court (although not directed at any person) during the course of calendar calls. Another judge was admonished for attending a politically-sponsored fund-raising event, in violation of the Administrative Board Rules, which clearly prohibit such activity. A third judge was admonished for neglecting to reply to Commission letters of inquiry during an investigation into allegations that he had appeared in court while intoxicated. The judge finally did cooperate and testified that he had sought assistance for his problem and was abstaining from drinking alcoholic beverages. Because of the judge's apparent recovery, the Commission decided not to take stronger action. Another judge was admonished for

making injudicious public remarks about the victims of sex crimes. A fifth judge was admonished for making insulting remarks about a particular litigant and attorney.

Since 1974, the temporary and permanent Commissions have issued a total of 51 admonitions. Judges who are admonished are advised that they may choose to challenge the admonitions in a hearing before the Commission. As of December 31, 1977, no such hearing was held.

The Commission's interest in a case does not end with the admonition. The Commission may monitor the court of a judge who has been admonished, to insure that the misconduct has been corrected. If the misconduct persists, the Commission will take further action.

Resignations

Thirty judges resigned in the past 16 months while under investigation by the Commission. This includes eight who resigned after the Commission decided to initiate removal proceedings in the Court on the Judiciary.

Since the Commission's jurisdiction is limited to incumbent judges, its inquiries are terminated when a judge under investigation resigns from office. If the alleged misconduct in such an instance falls properly within the jurisdiction of another agency, such as a district attorney's office, the Commission will communicate its recommendation that the matter be pursued. Often, however, in the absence of criminal conduct, the Commission

concludes that the voluntary withdrawal from office is sufficient, since such an act is nearly tantamount to the severest remedy the Commission itself can pursue, which is involuntary removal from office. Several referrals have been made either to district attorneys' offices or to the appropriate Appellate Division for consideration of disciplinary proceedings against judges who have resigned and who are attorneys.

The 30 resignations in the past 16 months came at various stages in the respective Commission investigations. In one case involving allegations of undue delays in processing cases, the judge resigned on the day he was served with a Commission subpoena for his court records. Another judge who was under investigation on a variety of allegations, including extreme bias, intemperate courtroom conduct and injudicious remarks, resigned the day before he was scheduled to appear at a hearing before the Commission on stated charges. In another case, the judge resigned while under investigation by the Commission for alleged financial misdealings as an attorney.

Two judges investigated for conflicts of interest resigned before formal charges were served after the Commission had submitted reports to the Chief Judge of the Court of Appeals, recommending that removal proceedings be commenced in the Court on the Judiciary. Consequently, the charges were not made public. One of the judges involved had admitted presiding over cases in which members of his family were defendants. The other judge, who served part-time and was also a practicing attorney, had

presided over a traffic case while his law firm represented one of the parties suing the defendant in the traffic case in a related civil action.*

Six judges investigated for ticket-fixing resigned after the Commission submitted reports to the Chief Judge of the Court of Appeals recommending the convening of the Court on the Judiciary to hear removal proceedings.

Since 1974, a total of 35 judges have resigned while under investigation by either the temporary or permanent Commission.

Removal Proceedings

The Temporary State Commission on Judicial Conduct had instituted removal proceedings against eight judges during its tenure. Two of these cases were concluded before the temporary Commission expired.** The remaining six were continued by the permanent Commission. In addition to these matters, during the past 16 months the Commission recommended that removal proceedings be commenced in 45 new cases, 40 of which were related to the statewide inquiry into ticket-fixing. Each removal recommendation was made after an extensive investigation revealed serious judicial improprieties that might render the judge involved as unfit for judicial office. In each instance, the Commission submitted a full report of its findings to the Chief Judge, including, when

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*More detailed discussion on these two cases appears in the subsection of this report entitled "Removal Proceedings."

**The decision removing Suffolk County District Court Judge William M. Perry and the opinion censuring Clinton County Court Judge Robert J. Feinberg were published and discussed in the Final Report of the Temporary State Commission on Judicial Conduct.

appropriate, transcripts of investigatory proceedings at which the testimony of the judge under inquiry was taken.

Upon receiving a Commission report and recommendation for removal, the Chief Judge is required to convene the Court on the Judiciary, which is comprised of five Appellate Division justices appointed on a case-by-case basis by the Chief Judge. The Court then considers the Commission's report and determines whether or not to issue charges against the respondent judge. If charges are approved, the Court formally designates counsel to present evidence. In each case originated by the Commission, the Commission's administrator has been designated counsel to the Court. The Court has appointed Supreme Court justices to serve as referees and to preside over the actual court proceedings. When a hearing is completed, the referee submits a report of his findings to the five-member Court on the Judiciary, which renders a formal decision in the case.

When a removal or retirement proceeding is pending before the Court on the Judiciary, the judge under charges is temporarily relieved of his judicial duties with pay, pursuant to Article VI, Section 22i, of the New York State Constitution.

Following are summaries of nine removal cases which the Commission conducted and which were decided in the last year.

Matter of MacDowell (Removed by the Appellate Division, Second Judicial Department)

The Temporary State Commission on Judicial Conduct assigned its staff to present evidence in a removal proceeding in

1975 before the Appellate Division, Second Department, concerning Albert S. MacDowell, a judge of the City Court of Newburgh in Orange County. (The matter had originated under the auspices of the Judiciary Relations Committee, Second Department.) The judge was charged with administrative incompetence and failure to perform administrative and judicial duties, resulting in a pattern of undue delays in matters pending before his court. Two Commission attorneys presented the evidence against the judge in a public hearing which lasted 24 days and involved hundreds of exhibits and over 60 witnesses.

On April 25, 1977, in a reported decision, Judge MacDowell was removed from office by the Appellate Division, Second Judicial Department.*

The court sustained most of the charges brought against the judge, and its opinion states in part as follows:

> [T]he conduct as evidenced by the charges we have sustained...demonstrates an unwillingness or inability on the part of the respondent to diligently discharge his adjudicative and administrative responsibilities. The resulting impediment to the due and proper administration of justice in the City of Newburgh renders the respondent's retention as the Judge of the City Court improper, despite the absence of any finding of venality.

Matter of Mertens (Censured by the Appellate Division, First Judicial Department)

The Temporary State Commission on Judicial Conduct brought a removal proceeding in the Appellate Division, First

*The court's decision, reported at 57 App. Div.2d 169, 393 N.Y.S.2d 748 (2d Dept. 1977), is annexed as Appendix C.

Department, in 1975, concerning Acting Supreme Court Justice William Mertens. One hundred and one charges were filed against the judge, alleging among other things that he:

> -- repeatedly behaved in an injudicious, intemperate and discourteous manner;
>
> -- demeaned and belittled attorneys, litigants and witnesses who appeared in his court by acting irascibly and by shouting at and addressing them in a caustic tone, and by accusing them of falsifying claims, exaggerating injuries and misrepresenting facts;
>
> -- exerted undue pressure on attorneys to settle cases by, among other things, threatening to file complaints against them with prosecutorial, disciplinary or administrative authorities.

The trial was conducted over a period of ten weeks. More than 170 witnesses testified, and approximately 7,000 pages of testimony, exhibits and records were compiled.

On March 25, 1977, in a reported opinion, the Appellate Division, First Department, sustained 49 of the charges, or parts thereof, against Judge Mertens, issuing a "severe" censure rather than removing him from office.*

The court's opinion portrayed the scope of the investigation and the evidence presented at the hearing by Commission attorneys. The court stated:

> In case after case, the Referee has found that Respondent suddenly exploded in angry shouting sometimes described as yelling and screaming

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*The court's decision, reported at 56 App. Div.2d 456, 392 N.Y.S.2d 860 (1st Dept. 1977), is annexed as Appendix D.

at lawyers and witnesses. (See, e.g., Charges 7, 12, 17, 18, 19, 26, 30[b], 43, 51[b], 59[b], 62, 63[b], 66[b], 71[b], 75, 77, 80[b], 81, 83[b], 86, 89[b].) We sustain those charges in this respect.

In one case, an attorney who had just come back to work after having a pace-maker installed in his heart answered a calendar for an office associate who was engaged in another trial and requested an adjournment. Respondent's response in denying the application was so harsh, "like a drill sergeant calling a private to task for one reason or another," that the attorney was visibly shaking, his hands were shaking (Charge 60).

Respondent was frequently rude, sarcastic, disparaging and abusive to lawyers. (Charges 2, 30[b], 46, 54[b], 56, 59[b], 69[c], 71[b], 72, 75, 84.)

Respondent was occasionally inconsiderate of young and inexperienced attorneys. (Charges 8, 23, 81, 83[b].)

On occasions Respondent lectured lawyers not to ask for adjournments in a manner described as "demeaning," as if we were "schoolboys" (Charge 47). Sometimes he made a rather long speech at the opening of court, explaining the Conference and Assignment system, indicating that adjournments were not likely to be granted and saying that lawyers were "lazy," "never prepared," "did not come to negotiate in good faith," that there were "too many phony cases" (Charges 55, 75).

During calendar calls, Respondent "shouted," was "very angry," "sarcastic," "abusive," "hostile" to attorneys who were asking for adjournments (Charges 14[a], 55, 75).

In two cases when, as the Respondent was in the act of excusing the jury, one of the jurors got up before the Respondent had finished, Respondent shouted at the juror, reproving him for starting to leave (Charges 30[b], 77).

Respondent sometimes made statements to juries after cases were disposed of, disparaging the

attorneys and the good faith of the case. (Charges 6, 10, 11.)

In one case where he suspected fraud, Respondent, after deciding the issue for defendant, and believing there was fraud on the plaintiff's part, shouted to have the doors to the courtroom closed and said in an angry manner he would refer the matter to the District Attorney (Charge 18). In that case, the successful attorney "tried to apologize" to the attorney whose case was thus criticized (SM 577).

Respondent used excessive pressure to force settlements.

He told insurance companies, in the course of settlement discussions, that he was keeping a dossier of companies that did not bargain in good faith, which he would refer to the Superintendent of Insurance (Charges 5, 8, 66[a]). He referred to one insurance company as "cheapskates" and "chiselers" (Charge 80[b]).

Respondent was described as arrogant, dictatorial, attempting to frighten parties into a settlement, demeaning, loud, degrading toward attorneys (Charges 12, 14, 39, 54[c]).

He was high-handed, arrogant, and abused his authority in a number of cases. On at least two occasions he required attorneys to remain in court even though one attorney was ill (Charge 1), and another attorney's case had already been adjourned (Charge 15). In a case in which he thought (perhaps justifiably) that injuries were being exaggerated, he demanded that an attorney turn over his entire file to Respondent for his examination (Charge 13).

In another case, after all the evidence was in, Respondent recommended a settlement for $25,000. Plaintiff rejected this. The jury brought in a verdict for $30,341. Respondent granted a motion for a new trial unless plaintiff consented to a reduction to $20,000 (Charge 3).

In one case, in which he thought the papers on an infant settlement case were insufficient, he yelled at the attorney, told the client that the attorney was incompetent and that the client

> should go to a doctor and that the attorney would have an affidavit drawn and the expense would be borne by the attorney (Charge 59[c]).
>
> The extreme degree of Respondent's breaches of judicial temperament has been commented on by persons who appeared before him.
>
> One lawyer said that in the last three years he had not found any judge to be as rude as Respondent (Charge 12). Other comments: "I have never seen a judge act that way" (Charge 17). "Have you ever seen anything like this?" (Charge 62). "He is something, isn't he?" "I never heard a judge address lawyers or myself in the manner [Respondent did]" (Charge 75).

The court concluded:

> Self-evidently, breaches of judicial temperament are of the utmost gravity.
>
> As a matter of humanity and democratic government, the seriousness of a judge, in his position of power and authority, being rude and abusive to persons under his authority -- litigants, witnesses, lawyers -- needs no elaboration.
>
> It impairs the public's image of the dignity and impartiality of courts, which is essential to their fulfilling the court's role in society.

Matter of Filipowicz (Censured by the Appellate Division, Second Judicial Department)

The Temporary State Commission on Judicial Conduct instituted removal proceedings in the Appellate Division, Second Department, in 1975, concerning Edward J. Filipowicz, a part-time lawyer-judge of the City Court of Poughkeepsie in Dutchess County. The judge was charged with appearing at the Poughkeepsie police station and persuading the arresting officers to withdraw criminal charges related to a motor vehicle incident against his campaign manager. Judge Filipowicz was also charged with giving

false testimony before the Commission for testifying that he had no recollection of the matter. The judge was also charged with presiding over several criminal cases in which the defendants were his former law clients. In one such case he dismissed criminal charges following a trial in chambers. The judge testified that when he presided over these cases, he failed to recall that he had previously represented the defendants.

The Appellate Division designated a Supreme Court justice to serve as referee at the hearing in this case. The referee, in his report to the court, found that Judge Filipowicz intentionally testified falsely when he stated that he had no recollection of being at the police station and discussing the case with the police. The referee also found that the judge had not told the truth when he testified that the police negotiated an agreement to withdraw the charges against the campaign manager without the judge's intervention.

On November 27, 1976, in a reported opinion, the Appellate Division, Second Department, dismissed most of the charges against Judge Filipowicz, including the false testimony charges (thereby not accepting its referee's findings), but found that his "conduct was improper," and issued a censure rather than remove the judge from office.* The Appellate Division found that Judge Filipowicz had engaged in improper, ex parte discussions with the police officers who had arrested his former campaign

*The court's decision, reported at 54 App. Div.2d 169, 392 N.Y.S.2d 860 (2d Dept. 1976), is annexed as Appendix E.

manager. The Appellate Division, however, did not sustain a charge that the judge had given false testimony when he testified that he had no recollection of ever appearing at the police station or talking to the police officers.

With respect to the subject of presiding over cases of former clients, the Appellate Division noted in its opinion that:

> [We] cannot countenance the apparently prevailing practice in which such judicial officers sit in judgment in cases in which they formerly had an attorney-client relationship with the litigant. Hereafter, any such conduct by a judicial officer, whether full or part-time, may well be met with removal of the offender from office.

Matter of Vaccaro (Suspended Without Pay for Six Months by the Court on the Judiciary)

The Temporary State Commission on Judicial Conduct commenced an investigation in 1975 concerning Frank Vaccaro, a Supreme Court justice in the Second Department (Kings County). The investigation was continued by the permanent Commission, which instituted removal proceedings against the judge in the Court on the Judiciary. The Commission alleged that the judge registered at a resort hotel under the name and address of an attorney who had not given permission for the judge to do so. It was alleged that a law firm that regularly appeared before the judge paid for the weekend stay at the resort for both the judge and his wife. The Commission further alleged that the judge presided over a small claims trial in which the defendant was one of the partners in the law firm that had paid for the resort

vacation, and that there were several other cases over which the judge presided in which the plaintiff was represented by the law partner of the judge's law secretary. The judge was also charged with giving false testimony before the Commission during investigatory proceedings prior to the issuance of charges.

A public trial was held in March 1977. The judge denied recollecting many of the events at the heart of the allegations, including his registering under an assumed name, his presiding over a small claims case in which his close friend was a litigant, and appearance in his part by his law secretary's law partner, whom he knew well, to settle cases. A Supreme Court justice presided at the hearing as a referee and found that Judge Vaccaro had an "exceedingly poor memory" and "an incredibly poor memory." On September 26, 1977, the Court on the Judiciary imposed a six-month suspension without pay upon Judge Vaccaro.*

The Court did not sustain any of the six false testimony charges. The Court found that the judge improperly accepted as a gift the weekend stay at the resort, registered under an assumed name, presided over his friend's case and failed to disqualify himself when his law secretary's law partner appeared in his court as a lawyer. The Court's opinion stated in part as follows:

> [W]ith respect to the charges sustained and confirmed, respondent's conduct was injudicious and improper and, as such, constituted a serious transgression of the Code of Judicial Conduct and the Canons

*The Court's decision, which is reported at 178 N.Y.L.J. 61, Sept. 27, 1977, p.5, col.1 (Ct. Judiciary, Sept. 26, 1977), is annexed as Appendix F.

> of Judicial Ethics. High standards of conduct must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A judge's official conduct should be free from the appearance of impropriety in his personal behavior on the bench and his conduct in everyday life should be beyond reproach. He may engage in social and recreational activities so long as these do not detract from the dignity of his office or interfere with the performance of his judicial duties. Furthermore, neither a judge nor a member of his family residing in his household should accept a gift or favor from any attorney or from any person having or likely to have any official transaction with the court in which he presides, except for reasonable exchanges incident to family, social or recreational relationships or activities.

Matter of City Court Judge (Resigned After Charges Were Approved in the Court on the Judiciary)

The Temporary State Commission on Judicial Conduct commenced an investigation of a part-time lawyer-judge in 1975, resulting in a formal recommendation in 1976 by the permanent Commission that removal proceedings be instituted in the Court on the Judiciary. Since the judge resigned from office after formal charges were approved by the Court but before they were served, the matter did not become public and the judge cannot be identified.

The Commission concluded that its investigation in this case disclosed a significant conflict of interest. The judge presided over a charge of driving while intoxicated and accepted a guilty plea from the defendant to driving with a bald tire. At the same time, the judge was representing plaintiffs in a civil pro-

ceeding against the same defendant on a suit arising out of the same traffic incident. The judge persuaded the defendant to sign a statement admitting fault in the traffic case and used it to his clients' advantage in the civil matter.

During the course of the inquiry, the judge acknowledged presiding over cases in which his clients appeared before him. It was also revealed that the judge's law firm referred clients to another part-time judge, who then appeared as counsel with these clients before the first judge. The presiding judge's law firm discussed fees with the clients before referring them to the attorney and, actually, either set or recommended specific fees to be paid. The fees were then paid to the attorney who appeared before the judge (whose law firm had referred the clients and set the fees). There was no evidence that the judge who presided shared in the fees.

One of the defendants appeared before the judge under inquiry ("Judge A") while represented by another judge ("Judge B"). (Judge A's law firm had referred the defendant to Judge B.) The defendant later appeared before Judge B while represented by Judge A's law firm. (Judge B also resigned as a result of this investigation, the day before he was scheduled to appear before the Commission on charges.)

The Commission's files were sent to the appropriate Appellate Division, which commenced an inquiry to determine whether disciplinary action is warranted in connection with the former judge's license to practice law.

Matter of Richter (Censured by the Court on the Judiciary)

The Commission instituted a removal proceeding in 1976 concerning Hubert Richter, a judge of the City Court of Kingston in Ulster County. The charges against the judge alleged among other things that he:

-- sentenced three defendants in a proceeding in a private office without having notified either the prosecuting attorney or counsel for the defendants;

-- uttered threatening language to a handcuffed defendant, whom he also challenged to a fight;

-- came off the bench and struck a handcuffed defendant who had been wrestled to the floor by guards;

-- sentenced a youthful defendant to attend church with the provision that he could not attend a particular church;

-- directed defendants to make charitable contributions and issued arrest warrants when some defendants failed to appear to show receipts for charitable contributions.

The judge was also charged with giving false testimony before the Commission during investigatory proceedings. It was alleged by the Commission that the judge's explanation of the confrontation with one of the defendants differed widely from the statements of five witnesses.

The public hearings in this case were conducted in March 1977 by a Supreme Court justice who was designated as referee by the Court on the Judiciary. The referee did not

sustain the false testimony charges but sustained parts of two other charges: that the judge engaged in an angry physical confrontation with a handcuffed defendant, and that the judge compelled defendants to make contributions to charities which he designated. On October 31, 1977, the Court on the Judiciary "severely censured" Judge Richter after sustaining parts of three charges relating to injudicious behavior and improper sentencing practices. The Court noted that, in two cases, the judge

> ...engaged in unseemly verbal confrontations with both defendants...left the bench for the immediate vicinity of each defendant, and there continued the conflict.

The Court found that the judge had not testified falsely.*

Matter of Village Justice (Resigned After Court on the Judiciary Convened)

In May 1977, the Commission initiated a removal proceeding in the Court on the Judiciary concerning a part-time judge (who is not an attorney) who allegedly sought and granted favorable dispositions for defendants who were his relatives or friends. Since the judge resigned from office after formal charges were approved by the Court but before they were served, the matter did not become public and the judge is not identified in this report. The Commission's inquiry had revealed that the judge had presided over several cases in which relatives such as his nephews and brother were defendants or otherwise interested in the litigation. The judge was also found to have used his influence with the

*The Court's decision is annexed as Appendix G.

local police to reduce or withdraw charges in traffic offense cases in which the defendants were friends or acquaintances. Several notes in which such favored treatment was requested of the police, some in the judge's own handwriting, were obtained by the Commission in the course of its investigation.

In testimony before the Commission, the judge readily acknowledged some of the allegations made against him. Shortly after the Commission recommended convening the Court on the Judiciary but before charges could formally be served, the judge resigned from office.

Matter of Surrogate's Court Judge
(Pending in the Court on the Judiciary)

In June 1977, the Commission initiated a removal proceeding in the Court on the Judiciary concerning a Surrogate's Court judge, who allegedly engaged in activities tantamount to the practice of law, although he received no fees, in violation of the New York State Constitution and a directive from the Appellate Division. The Commission's inquiry had revealed that on a number of occasions, the judge had advised litigants who had already retained counsel in matrimonial, property, tax and other matters. The judge is alleged to have openly provided advisory opinions, researched legal issues and assisted in the preparation of agreements, not in his judicial capacity but on behalf of the litigants. The Commission concluded that such activity interfered with attorney-client relationships and violated Article VI,

Section 20(b)(4), of the Constitution, which states that a judge may not "engage in the practice of law" or otherwise engage in inappropriate conduct.

In testimony before the Commission and in correspondence, the judge acknowledged the allegations but said that, since he was not compensated for his activity, he could not be said to be practicing law. The judge, who maintains that it is his obligation to assist people who need his legal assistance, refused to follow an Appellate Division directive that he cease such practices.

The matter is now pending before the Court on the Judiciary.

Matter of Tracy (Suspended Without Pay by the Commission in Lieu of Seeking Removal in View of Judge's Decision Not to Seek Re-Election)

The New York State Constitution requires part-time town and village justices who are not licensed to practice law to complete a course of training and education (Article VI, Section 20[c], of the Constitution). The Office of Court Administration conducts such a program, and the Administrative Board Rules (Section 30.6) require attendance and certification by newly-selected judges within one year of commencing their terms, and attendance for re-certification by incumbent judges within one year after entering upon a new term.

A Commission investigation of a complaint against Spafford Town Justice John W. Tracy, who is not a lawyer, revealed that the judge had failed to attend a re-certification program

more than two years after commencing a new term. When Judge Tracy did not respond to a Commission letter of inquiry into the matter, he was served with a Notice of Hearing and Complaint, advising him to appear before the Commission for a formal hearing. The judge did not attend on the scheduled date. He subsequently attended a re-certification program but did not pass the course.

In August 1977, on the strength of an Appellate Division decision in 1975 that there is cause for removal from office upon the failure of a non-attorney judge to obtain a certificate of completion for a required training program, the Commission recommended convening the Court on the Judiciary. Judge Tracy then gave notice that he had chosen not to seek re-election, whereupon the Commission suspended him without pay for the remainder of his term.

Suggestions and Recommendations

On June 28, 1977, the Commission formally adopted a rule with respect to the issuance of written, confidential suggestions and recommendations to a judge with respect to a complaint, notwithstanding dismissal of the complaint. This permits the Commission to call a judge's attention to circumstances that do not constitute judicial misconduct but require comment. For example, one Commission investigation involved a judge whose courtroom demeanor was alleged to be discourteous to litigants and attorneys in a particular proceeding. The Commission, which determined that the judge had made comments in court indicating

impatience with the course of the proceeding, and that such comments were not usual in the judge's court, did not believe the judge's comments constituted misconduct. The complaint was dismissed, but the judge was reminded of his obligation to be patient.

From June 28, 1977, through December 31, 1977, the Commission issued a total of nine letters advising judges that complaints against them had been dismissed but that caution should be observed in the future.

SPECIAL PROBLEMS IDENTIFIED BY THE COMMISSION

The Practice of Law by Part-Time Judges

Of the approximately 3,500 judges in New York State, more than 2,400 are justices of town or village courts. Their responsibilities are part-time. Many preside in court only one or two days or nights per week. Most town and village justices pursue other, full-time professional or other careers in addition to their judicial duties. Approximately 400 of these judges are attorneys. In addition, many city court judges are permitted to practice law.

Limitations on the practice of law by part-time judges are set forth in the Judiciary Law and in Section 33.5(f) of the Rules of the Administrative Board. They direct that a judge who is permitted to practice law:

-- shall not practice in his own court;

-- shall not practice, within the county in which he presides, in other courts presided over by judges permitted to practice law;

-- shall not participate in his judicial capacity in any matter in which he has represented a party or witness in connection with that matter;

-- shall not become engaged as an attorney in any matter in which he has participated in his judicial capacity;

-- shall not permit his partners or associates to practice in his court;

-- shall not permit practice in his court

> by the partners or associates of another justice of the same court who is permitted to practice law.

The Appellate Division, Third Department, goes a step further, stating in its Miscellaneous Rules that a judge permitted to practice law "shall not appear or act as an attorney in any criminal proceeding within the county of his residence."

The rules limiting law practice are designed in part to preclude the unfair advantage one lawyer-judge may have in appearing before another judge who may some time himself appear in the first lawyer-judge's court. Such a circumstance would be ripe for favoritism, whereby one lawyer-judge views favorably the case presented by another, then receives similar treatment when he himself appears in the other lawyer-judge's court.

Since its inception, the Commission has investigated numerous allegations involving violations of the Administrative Board's prohibitions on the practice of law by part-time lawyer-judges. In some removal proceedings, charges of improper appearances have been included with other allegations of misconduct. In one case (described above in Matter of City Court Judge), the following arrangement was revealed: the firm of one part-time lawyer-judge referred clients to another part-time lawyer-judge, who then appeared in court before the judge whose firm had made the referral. Both judges involved in this practice resigned from judicial office following Commission investigations.

Two judges have been admonished by the Commission for improper court appearances. Some cases have been dismissed

either because the infractions occurred shortly after the applicable rules were adopted, or because there was insufficient evidence to substantiate notations of court records indicating that the lawyer-judge involved had appeared as counsel. Twenty-five cases of this type are pending before the Commission.

The responses of those lawyer-judges allegedly in violation of the rules have varied. Several have claimed ignorance of the relevant section of the rules, which became effective in April 1973. Others have said they were unaware that the lawyer appearing before them was also a judge elsewhere in the same county. Still others have argued that the appearance was brief or pro forma, or that in some other way the attorney-judge's participation in the case was insignificant and therefore inconsequential. In one case, an attorney-judge did not make a court appearance, but he accompanied an associate from his law firm to court. While this conduct is not prohibited by the rule barring the practice of law before other part-time lawyer-judges in the same county, it appeared to one of the litigants (the one not represented by the law firm of a judge) that the part-time lawyer-judge should not have been in or near the courtroom.

In its investigations the Commission has found that many appearances by lawyer-judges before other lawyer-judges in the same county were, in fact, pro forma. In other cases, the lawyer-judge may have prepared or signed court-related papers without making an appearance. Such activity, however de minimus, violates the spirit and letter of the Administrative Board Rules.

The Commission's inquiry determined that most part-time lawyer-judges comply with the letter of the Administrative Board Rules. Unfortunately, the rules do not provide adequate protection to the public. Partners of lawyer-judges, for example, are permitted to practice law and appear before other lawyer-judges. Thus, while lawyer-judge "A" may not practice before fellow lawyer-judge "B" in the same county, lawyer-judge "A's" law partner may do so. Similarly, the stationery of the law firm will, of course, carry the name of the judge who is a partner and will come to the attention of the presiding judge, who himself may be associated with a law firm that may appear before the other lawyer-judge. Often, the presiding judge is aware that the attorney before him is in partnership with another part-time lawyer-judge, and the possibilities of favoritism are just as great as when the judges themselves appear before each other.

Amending the relevant section of the Administrative Board Rules, either to prohibit partners and associates of part-time lawyer-judges from appearing before other part-time lawyer-judges in the same county, or otherwise place restrictions on certain of these practices, may be the best way to correct the problem and deal with the inevitable appearances of impropriety that such practices create.

The problems caused by permitting law partners of judges to appear before other part-time lawyer-judges within the same county is illustrated by the following hypothetical example. (The facts are similar to matters considered by the Commission.)

"Judge Smith" practices law with his son. The law firm is "Smith and Smith." "Judge Jones" practices law with his brother in the law firm of "Jones and Jones." Judge Smith's son appears before Judge Jones, whose court is located only a few miles from Judge Smith's court. Judge Jones' law partner (his brother) appears before Judge Smith, whose son appears before Judge Jones. Even if Judge Smith and Judge Jones are not trading favors or giving special consideration to the law firms of their counterparts, it may appear as though they are. Certainly a member of the public would not feel that he or she was receiving impartial treatment if his or her adversary were represented by Judge Smith's son before Judge Jones or by Judge Jones' brother before Judge Smith. Indeed, given this set of circumstances, Judge Smith and Judge Jones might just as well be practicing before one another.

The Office of Court Administration has concluded that the applicable rules permit the law partner of a town justice to appear before a part-time lawyer village justice whose village is located within that town.

These problems require careful analysis by the Administrative Board, which has responsibility for promulgating ethical standards. As long as judges are permitted to practice law, some tighter standards should be imposed. An effort was made by the Appellate Division, Third Department, in attempting to restrict further the practice of law by lawyer-judges (prohibiting a lawyer-judge from practicing criminal law within the county of his residence). The Appellate Division, Second Judicial Depart-

ment, adopted rules designed to restrict the practice of law by lawyer-judges, but the rules were rescinded shortly after their adoption. More should be done and uniform statewide procedures should be adopted.

Improper Administration Constituting Misconduct

In the course of investigating various complaints of misconduct, the Commission often finds it necessary to interview court personnel, study court procedures and review court records and documents relevant to the particular inquiry. As a result of such activity, the Commission has identified some particularly disturbing problems in local courts, involving monetary deficiencies and, in some instances, improprieties in judicial administration.

Record Keeping. In addition to its own observations incidental to inquiries on other matters, the Commission reviewed 28 complaints in the last year dealing specifically with allegations of poor records management. Investigations were authorized in 26 of these cases, often upon information forwarded to the Commission from the Department of Audit and Control.

Among the more common examples of poor record keeping have been the failure to keep dockets or indices of the cases that come before judges, and the failure to keep cashbooks or other reports as required by law. Several judges appear not to issue receipts for fines, and some appear not to have reported certain fines to the state.

Practices such as these do more than make it difficult to assess the status of particular cases. They also lead to suspicions of impropriety or incompetence. Several judges identified by the Commission were found to be keeping improper records and some appeared to be misusing funds. In two cases, for example, judges disregarded their obligations to deposit promptly fines collected, and they retained in their homes large amounts of money for several months at a time. Although they denied under oath that they used these funds, official audits revealed cash shortages and the judges were compelled to compensate the state from their own personal funds. This, certainly, constitutes serious misconduct. To date, the Commission has commenced a removal proceeding against one of these two judges and is nearing completion of its investigation of the other.

On several occasions, Commission investigators have had difficulty in reviewing the court records of some judges. While most justices have been cooperative, a few have appeared to resist Commission efforts to examine their records, which are, for the most part, public and not confidential. Appointments to examine court records have been made and broken, records have been turned over to the Commission in woeful disarray, and attempts have been made to set unreasonable time limits on Commission staff members reviewing records. One judge who was allegedly lax in processing cases was so uncooperative that the Commission found it necessary to issue a subpoena for certain public court records. The judge resigned on the day the subpoena was served.

When it meets unreasonable opposition, the Commission will not hesitate to take the action it deems necessary and proper to pursue its inquiry. Perhaps judges should be better advised in training programs and by court administrators as to the public nature of their court records and their obligation to cooperate with state agencies responsible for investigating allegations of misconduct. It should be noted that non-lawyer-judges are not the only ones who have not cooperated with the Commission or whose court records are in disarray. Several lawyer-judges also fall within this category.

The Commission's difficulty in examining court records often involves more than a judge's lack of cooperation. Records may be inaccessible by virtue of lack of attention or understanding of the importance of good record-keeping practices. Records have been inadequately protected, stored in attics and then lost. One judge routinely collected court records in his briefcase, including information on closed cases as well as some undisposed matters pending for nearly three years. Another judge, for some unexplained reason, had no court records for alternating years, and another haphazardly threw together in a drawer some court-collected funds, disposition cards and hand-written notes.

The problems created by practices such as these are obvious, and disciplinary courts have dealt with them. Poor records management has been held to constitute sufficient grounds for removal of a judge from office. In one New York State case,

the Appellate Division held as follows:

> [The judge was] guilty of gross neglect in his handling of court funds and in his maintenance of court records. Although the referee concluded that he did not misuse public monies for his own profit, the careless manner in which he handled funds entrusted to his care and the disdain he demonstrated, not only for statutory record keeping but also for deposit and remittance requirements constituted a breach of trust...requiring his removal from office. Bartlett v. Flynn, 50 App. Div.2d 401, 378 N.Y.S.2d 145 (4th Dept. 1976).

Regular reports forwarded to the Commission from the Department of Audit and Control indicate that the problems of funds and records management are not limited to any single part of the state. Unfortunately, due to limited resources, and the press of other important work, the Commission has been able to examine only the more serious instances of potential records deficiency. Many minor irregularities are not investigated by the Commission. The magnitude of the problem should not be minimized, however, nor its seriousness mistaken, by the selective nature of inquiry the Commission is compelled to undertake at present. More adequate training programs should be developed to deal with this significant problem. More important, greater efforts should be made by administrative judges to control, supervise and monitor town and village justice courts and city courts throughout the state.

Improper Delegation of Authority. The Commission has become aware of a number of judges who improperly have delegated

judicial duties to their clerks or have failed to supervise adequately court employees who were, in effect, adjudicating matters strictly within the judge's responsibility. Several judges, while appearing in connection with other matters, testified before the Commission as to specific instances of such unauthorized delegation.

In one case, a judge acknowledged that he allows his clerk discretion to grant unconditional discharges or levy fines up to ten dollars in certain traffic cases, such as driving without proof of insurance. The judge said he does not require his clerk to consult him before disposing of a case, and he described the wide latitude his clerk had in such matters as follows:

> She has discretion based on the person's needs for the money and the fine, plus the rapidity with which they clear up the no inspection, plus any previous violations that they may have, those factors are considered and she has discretion.

When asked if he had any authority in law for such delegation of judicial responsibility, the judge replied: "I have not looked." He went on to describe the practice as common among town and village courts. Other judges have acknowledged permitting their clerks to accept guilty pleas by mail and then fine the offenders. One judge suggested that he was more lenient in rendering fines than his clerk.

Another judge testified that his court clerk dismissed a traffic ticket upon the request of the town supervisor, without

the judge's permission, allegedly under the misconception that clerks have the authority to do so. Upon discovering the situation, the judge said he did not discipline his clerk, whom he described as "a very diligent person who was just unknowledgeable." Other clerks have dismissed cases as favors and have used judicial stationery to request favors of other judges. One clerk apparently signed the judge's name on his stationery requesting the dismissal of traffic tickets as a favor. The judge had not given his permission for the use of his name but, when confronted by the Commission, appeared unconcerned that his clerk had taken such liberties.

Delegations of judicial authority and failure to supervise court personnel properly, such as these instances represent, are without authority in law and are contrary to the applicable provisions of the Administrative Board Rules, which require judges to discharge their own responsibilities diligently and to oversee the activities of their staffs and court officials. Court clerks simply do not have the right to adjudicate disputes, and judges have an obligation to insure that any authority that is delegated may properly be delegated and is carefully supervised.

The Right to a Public Trial

Judges in small towns and villages are often compelled to hold court sessions in places other than courthouses, simply because adequate court facilities are not available. As a result, court is held in places such as the judge's house or business

office. When this situation occurs, an individual's right to trial in a public place may be threatened. When court is held in a judge's house or place of business, the public is less likely to be aware of the proceedings and less likely to attend, even if in theory his house is open to the public.

The Uniform Justice Court Act, which imposes certain geographic limits on where court may be held, does not set a standard for the type of facility. The Administrative Board, which has been aware of the problems relevant to the holding of court in virtually non-public places, promulgated a rule (Section 30.2[a]) in 1972, stating that the "public is best served by town and village courts which function in facilities provided by the municipality." The Board also requires court to be held in municipal facilities when such facilities are provided. Thus, a judge has no discretion to refuse municipally-provided court facilities.

Although the Administrative Board does not further qualify the judge's prerogative to hold court where he may, there are further guidelines to be found in case law. One court held in 1971 that a judge may not conduct court in a police barracks, on the grounds that such a proceeding would not satisfy the "constitutional mandate that court sittings be public...."* In 1975, another court held that a court session could not be conducted in a school house, on the following grounds:

*People v. Schoonmaker, 65 Misc.2d 393, 317 N.Y.S.2d 696 (Co. Ct. Greene Co. 1971).

> [T]he right to a public trial is violated thereby....A school building, is not public in the sense that any person may enter therein....Any building to which access is limited, restricted, or prohibited may not be used for any legal proceeding.*

Yet, a number of courts in the state are still conducted in non-public places. A few are held in police stations. In addition to raising questions as to the court's impartiality, this practice appears to run counter to the opinion above in which a police barracks was held improper as a place to convene court. The Commission lacks the power to enforce the standard proposed by these court decisions, because it is principally the obligation of each locality to arrange for proper places where courts are held. Centralized court administration should take a closer look at these problems and attempt to bring about change.

Yonkers City Justice Courts

During the course of an investigation, the Commission became aware of the existence of "city justice courts" in Yonkers. Since most city justice courts have been abolished by the Legislature, the existence of these "holdovers" is somewhat of an anomaly.

With respect to Yonkers, both the Uniform Justice Court Act and the Yonkers City Charter limit the jurisdiction of the city justice court to civil matters with a monetary limitation of $500. In essence, then, the city justice court, unlike either

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*People v. Rose, 82 Misc.2d 429, 368 N.Y.S.2d 387 (Co. Ct. Rockland Co. 1975).

the town or village justice courts, is exclusively a small claims court. This court is totally unfunded. The four judges who sit on this court are practicing attorneys. They are unsalaried and, to the Commission's knowledge, have always served without a salary. The City of Yonkers makes no provision for a court clerk, a courtroom or any judicial necessities, such as jury lists. There is no court security. The judges conduct all court business in their law offices. The judges meet their operating expenses from the issuing and processing of summonses. After payment of court expenses, the judges are allowed by Yonkers to retain the balance of the civil fees as personal income. The practice of retaining fees is in contradiction to the New York Town Law (Section 27[1]) and an opinion by the State Comptroller (No. 277 [1967]). In addition, it simply looks bad. The potential abuse of such a fee system is that operating expenses can be kept to a minimum, thereby increasing the amount a judge can retain for his own income. An example of this has been found with respect to jury trials. Obviously, convening a jury necessitates some expenses. The Commission has observed that it is not uncommon for jury trials to be put off for several years, rather than expend the time and money to convene a jury.

Another inherent abuse in this arrangement is that litigants can actually choose which of the four judges they wish to hear their cases. The right to select one's own judge lends itself to the worst kind of forum-shopping.

The Commission has communicated its concerns on city justice courts to all three branches of government, recommending that a bill be drafted to abolish the remaining city justice courts of this kind and, perhaps, to merge their functions into the existing city courts. City court judges in Yonkers are full-time and well-paid, and it may be that the city courts can readily absorb the additional case load. Volunteer attorneys are used as arbitrators in some courts to handle small claims matters, and a similar program with the City Court of Yonkers might be considered.

Ticket-Fixing

In the course of its inquiries into individual complaints of misconduct, the Commission has been able to identify certain types of misconduct which appear to be widespread. The assertion of influence in traffic cases is an area in which the alleged misconduct by judges is extensive, although there is no evidence that all or even most judges have engaged in it.

Background. The Commission's inquiry evolved from an investigation in early 1976 by the Temporary State Commission on Judicial Conduct of complaints unrelated to ticket-fixing. While reviewing various court records in the course of the earlier investigation, the temporary Commission came upon evidence that particular judges had been granting requests for favorable treatment from other judges on behalf of defendants charged with traffic violations. The temporary Commission, on its own motion, initiated an inquiry into the alleged improper influence. The

permanent State Commission on Judicial Conduct continued the investigation, which has now extended from the original complaint against one or two judges to allegations against hundreds of judges who have either made requests of other judges for special consideration, granted such requests, or done both. Since the publication by the Commission in June 1977 of a report on ticket-fixing, two additional forms of ticket-fixing have emerged in a few instances. One is the failure to report convictions. In one case, a trial involving a driving-while-intoxicated charge was conducted by a judge who had represented the defendant and the business of the defendant's father in prior cases. The judge "convicted" the defendant of the crime, but it was never reported to the Department of Motor Vehicles or the Division of Criminal Justice Services. The other apparent form of ticket-fixing is failure to dispose of the case. Some cases have been pending in this state for as long as ten years. No one seems inclined to complete these matters and, unfortunately, the absence of any monitoring of traffic cases permits some misconduct to go unnoticed.

Scope of Investigation. Thousands of court papers have been examined and catalogued by the Commission. More than 1000 letters have been obtained from court files in which favorable treatment was requested. Forty-four judges have been called before the Commission to give sworn testimony on specific ticket-fixing incidents in which they appeared to be involved. More than 210 others have responded in writing to Commission letters of inquiry on specific ticket-fixing allegations. (All of these

judges have been given copies of the documentary evidence of ticket-fixing prior to being required to respond.) Scores of witnesses have been interviewed, including court personnel from several jurisdictions.

In June 1977, the Commission made public an interim report of its inquiry, which elicited considerable media response. Since that time the Commission has continued to investigate, and considerably more instances of ticket-fixing have been discovered. As of December 31, 1977, the Commission determined that 40 removal proceedings on ticket-fixing charges should be commenced in the Court on the Judiciary, and that 49 formal adversary hearings on stated charges should be conducted before the Commission itself. In the remaining cases, the Commission may decide to convene the Court or conduct formal hearings of its own; it may impose other disciplinary sanctions such as suspension, censure or admonition; or it may dismiss some of the complaints upon finding the evidence does not sustain the complaint.

The Nature of the Misconduct. It is entirely proper for a motorist charged with a traffic offense to plead not guilty and seek a trial. It is also proper for him or his attorney to present mitigating circumstances in an attempt to avoid a conviction on the charge or to seek a lenient sentence.

It is improper for a judge to seek to persuade another judge, on the basis of personal or other special influence, to alter or dismiss a complaint for reasons that have nothing to do with the circumstances of the case. A judge who accedes to such

influence or seeks it himself is in violation of the Rules of the Administrative Board and the Code of Judicial Conduct.

Regrettably, some judges apparently have either misunderstood or ignored the Commission's published description of the misconduct and have complained that the Commission is seeking to interfere in traditional plea bargaining practices. This simply is not the case. "Reductions" or "dismissals" in particular cases may be based on proper reasons. (Although "reductions" to non-lesser included offenses -- such as speeding to illegal parking or faulty muffler -- are not authorized in law, they do not necessarily constitute misconduct.) The essence of the wrongdoing in ticket-fixing is that favorable dispositions are sometimes based on considerations other than the merits or compassion for the drivers involved. Even worse, in some instances favors are being traded.

The types and degrees of influence vary considerably. For example, one judge may write to another asking that a speeding charge against a friend or relative be changed to a less serious offense, such as driving with a faulty muffler. A judge may telephone another judge and ask that a relative or friend be granted an unconditional discharge on a speeding violation. Similar requests to judges have been made by local political leaders, police officers, friends and relatives of errant motorists who are in a special position to assert influence on the judge. Some judges appear to have engaged in the ticket-fixing practice quite frequently, while others appear to have done so rarely or

not at all. The characteristic ticket-fixing request offers no proper basis for the favorable treatment being sought. It is simply based on the influence of the person making the request. It is brief, to the point, and sometimes promises favors in return.

Granting such favors subverts the spirit and the letter of the Vehicle and Traffic Law, which is designed to keep habitually poor drivers off the roads. The Department of Motor Vehicles has assigned various "point" values to specific "moving" violations, such as speeding, which are recorded on a driver's license upon conviction. Accruing certain numbers of points results in various penalties.* There are no points assigned for "non-moving" violations, such as driving with a bald tire or faulty muffler. Thus, when a judge alters a speeding charge to a bald tire charge, he prevents the assignment of points to the license and prevents the Department of Motor Vehicles from keeping accurate records on poor drivers who might otherwise justifiably be taken off the roads. In fact, the Commission discovered that numerous defendants received favorable treatment on more than one occasion. In a few instances, drivers who have had tickets fixed, and have thereby escaped the penalties of law applicable to other

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*Accruing between seven and ten points within 18 months may result in the defendant being required to attend a driver improvement program. Receiving nine points for speeding within 18 months, or eleven points for any series of violations, may lead to suspension or revocation of the license. The Department of Motor Vehicles has the discretion to revoke or suspend a license for three or more moving violations within an "unusually short" period of time.

motorists, have become involved in traffic accidents in which other drivers have been injured.

In most of the ticket-fixing cases identified by the Commission, the summons issued to the offending motorist had been altered by the judge to reflect a change in the charge or a reduction of the speed. These alterations have been made despite the fact that, pursuant to law, the officer issuing the summons had sworn in affidavit form that the speed listed on the summons is accurate. Thus, when a judge alters a summons, he is in fact altering the sworn statement of another individual. There is no authority in law for a judge to alter a summons in this manner.

There are fine distinctions to be drawn between a part-time lawyer-judge, acting as an attorney, seeking the best disposition possible for his client without favorable treatment, and one who seeks a favorable disposition with such treatment. Without tangible, documented proof, obviously, it has been far more difficult to establish misconduct. Thus, the Commission has not included as ticket-fixing the many instances of lawyer-judges who obtain favorable dispositions as lawyers (e.g., writing on their legal stationery without indicating they are also judges and presenting some proper basis for the requested disposition).

The Underlying Motives. The Commission believes that in the overwhelming majority of traffic cases in which special influence was used and favors were granted, there was no direct monetary or other benefit conferred upon the presiding judges. Rather, the practice appears to be rooted in the system itself,

as something some judges will do for one another as a matter of routine "courtesy." The Commission found, for example, that in many instances, the judges who were asking for favors from one another had never met and were not otherwise acquainted.

Though a small number of judges have insisted that there is nothing improper in the practice, most of the judges who testified during the Commission's investigatory proceedings have acknowledged that the assertion of influence in traffic cases is wrong. Many have noted in partial defense that they simply inherited a prevailing custom upon taking office. One judge said:

> I can tell you this. I think it's common practice for one judge to call another judge if he has a friend in trouble. I think it's been done for years, and it probably will always be done. It's done all over the state.

Most of the judges who testified attempted to rationalize their conduct by stating that the police officers who had issued the summonses usually "consented" to changes or reductions in the charges. The Commission believes such "consent" has no effect in law. In any event, whether or not an officer or even a prosecutor "consents," it is highly improper and unethical for a judge to seek or approve a certain disposition on the basis of friendship or politics, or as a favor to another judge.

A Commentary. The ramifications of the ticket-fixing practice go far beyond the sum total of all the individual

"fixes."* Those judicial officers who have engaged in this activity have created two systems of justice in this state, one for the average citizen and another for people with influence. While most people charged with traffic offenses accept the consequences, including the full penalties of the law, points on their records and possible higher insurance costs, others are treated more favorably and evade the appropriate legal consequences, simply because they have the right "connections." Those who have sought to use or have acceded to influence know they have subverted the law, and the disrespect they have bred for our system of justice may be impossible to measure. Moreover, once

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*Ironically, in 1953 the Governor's memorandum in support of the uniform traffic summons form depicted ticket-fixing in the following terms:

> The "fixing" of traffic tickets ranks high in the list of practices which undermine public respect for our laws, destroy police morale and breed lawlessness....
>
> The uniform traffic ticket is intended to provide equality of treatment for traffic law violators. The grim toll of highway accidents and deaths makes no exception for the favored few, and our law enforcement procedures should not either.

The Governor's memorandum also provided the basis on which the new form would result in a "non-fixable" traffic ticket:

> With the support and cooperation of law enforcement agencies the "non-fixable" traffic ticket will provide a firm basis for an effective highway safety program.

(Governor's memorandum, 1953 New York State Legislative Annual 357.)

individual judges or the system as a whole rationalizes ticket-fixing, it may become easier to "fix" more serious cases. It is disturbing that such a potentially damaging process has existed for so long. It is one of the Commission's goals to make certain that it stops and that violators are appropriately disciplined.

In human terms, some fixed tickets have enabled dangerous drivers to remain on the roads, unaffected by the point system, automatic suspensions and revocations of their motor vehicle licenses. The Commission has identified a few instances in which drivers who otherwise would have compiled "points" and possibly lost their driving licenses had their tickets fixed and became involved in automobile accidents in which other people were injured.

The system used in New York State for identifying dangerous drivers is not foolproof, but it is a logical system and the best available. When speeds of over 100 miles per hour are "reduced" because of ticket-fixing, when 5-point violations (i.e., driving in excess of 25 miles per hour over the speed limit) are "reduced" because of ticket-fixing, when recidivists are able to avoid their third conviction within 18 months because of ticket-fixing, the judges who engage in this practice are frustrating the policy of the state and, possibly, contributing to highway accidents.

Practical Considerations. Obviously, the Commission never envisioned an inquiry of this magnitude or the large number of potential proceedings which could be commenced.

Although a widespread pattern of ticket-fixing involving hundreds of judges was clear from the collected evidence of specific requests made and granted, the task of establishing misconduct against individual judges requires charges and hearings in every case if the Commission is to publicly censure or suspend these judges. This is mandated by law. Moreover, the Commission believed it to be the fairer practice to give every judge involved an opportunity to be heard even before charges were considered. The Commission then analyzed these cases and selected the most serious to be considered for removal from judicial office. These cases, which number 40, were sent to the Chief Judge with a recommendation that he convene Courts on the Judiciary. Since then, six of the 40 judges resigned and two allowed their terms of office to expire.

Forty-nine other cases were designated for hearings before the Commission as of December 31, 1977. These are presently being conducted and could result in public censure, suspension from office for up to six months, or removal proceedings in the Court on the Judiciary. Compounding the formidable task of completing the numerous investigatons was the fact that, to the present time, more ticket-fixing has been discovered, in many instances involving the same judges who were already being investigated. In addition, since the Commission's work in this area has generated significant public attention, other procedural problems have been identified. For example, the Commission discovered that, after its interim report on ticket-fixing was

made public, two judges in a particular town court had their traffic-related court files "purged," with letters of request removed and potentially damaging handwritten notations on summonses obliterated.

The press understandably has called for the names of judges to be made public. The law does not permit this to be done by the Commission without the complex procedural steps outlined above. To complicate matters, even after full hearings before the Commission, before a judge can be publicly censured or suspended, he has a right to another hearing in the Court on the Judiciary. Thus, it is no simple process to advise the public which judges have engaged in misconduct. These cumbersome procedures will be alleviated due to the recent passage of a constitutional amendment abolishing duplicate hearings and the Court on the Judiciary as of April 1, 1978. In the interim, though the process to be followed will take time, the Commission will take appropriate action in every case. Within the next few months the Commission hopes to complete most of these disciplinary proceedings, and at that time revised statistics will be issued revealing the total number of judges who have engaged in ticket-fixing.

Conflicts of Interest in Adjudicating Cases

Among the more frequently alleged types of misconduct are conflicts of interest in the adjudication of cases. While many of these complaints are groundless and appear to reflect the complainants' dissatisfaction with particular rulings and decisions,

others are legitimate and require action by the Commission.

Since September 1, 1976, the Commission considered 128 new complaints alleging conflicts or favoritism, authorizing investigations in 114 of them. It also continued 33 such investigations begun by the temporary Commission. (A number of these, which concerned conflicts related to the practice of law by part-time judges, were discussed earlier in this report. Also, two cases involving judges against whom removal proceedings were initiated on conflicts of interest grounds were outlined in the "Removal Proceedings" section of this report.)

The nature of the misconduct varies. For example, one judge under investigation is alleged to have presided over a case in which his son was the defendant. One part-time lawyer-judge, in his capacity as an attorney, gave legal advice to a friend, then later in his judicial capacity arraigned his friend, who was charged as defendant in a related matter. Another judge allegedly presided over a case involving a defendant in one action who was suing the judge in another action.

The Commission admonished two judges on conflicts of interest grounds. Two judges resigned after removal proceedings were recommended by the Commission, and two others resigned while under investigation. Sixty investigations of this nature are pending.

Favoritism in Awarding Appointments

The Code of Judicial Conduct, promulgated by the New York State and American Bar Associations, prohibits judicial

appointments made on the basis of "nepotism and favoritism." The Administrative Board Rules (Section 33.3[b][4]) more specifically restrict the appointment of relatives, directing that a "judge shall not appoint...any person...as an appointee in a judicial proceeding, who is a relative within the sixth degree of relationship of either the judge or the judge's spouse." The rules (Section 33.3[c][1][iv]) also prohibit a judge from presiding over cases in which "he or his spouse, or a person within the sixth degree of relationship to either of them, or the spouse of such a person," is a party, advocate, material witness or substantially interested person.

The Commission has spent considerable time investigating allegations that a number of Supreme Court and other judges have exhibited favoritism in awarding judicial appointments such as receiverships and guardianships.

In one case, for example, a Supreme Court justice awarded several appointments to his son-in-law and his son-in-law's law partners, for which more than a million dollars in court-approved fees were received. This same judge also awarded four appointments to his sister-in-law and numerous appointments to his former law partner (totalling nearly $400,000) and the relatives of other judges. In another case, a Supreme Court justice awarded appointments to the law partners of his sons.

While the propriety of awarding appointments to the law partners of a relative is not specifically addressed by the Administrative Board Rules, there is a well-established maxim in

New York ethics opinions that a member of a law firm may not accept employment which any partner or associate of the firm may not accept.* Thus, at the very least, these judges should have taken greater care to avoid the appearance of impropriety that such appointments create, particularly since their relatives shared in the profits earned from the appointments.

In the first case, appointments to the law partners of the judge's son-in-law were awarded during the period that his son-in-law's partnership was effective; both prior to the creation of the partnership and after its dissolution, with a single exception, the judge awarded no appointments to the partners in question. It appears from the evidence available to the Commission that this judge also assisted in the formation of a law partnership for his son-in-law and, the day after the partnership was formed, began awarding the partnership lucrative appointments. The Commission also learned that the judge's son-in-law shared in other fees awarded by this judge to other attorneys.

In the midst of the Commission's inquiry, the judge announced early retirement from the bench. Since the Commission's jurisdiction is limited to incumbent judges, the investigation as to this particular judge terminated on the effective date of resignation. Nevertheless, information relating to the practices of other judges was developed during this investigation and is being pursued. Some appointed this judge's son-in-law upon this

*See Opinion No. 426 (1976) of the New York State Bar Committee on Professional Ethics, and the opinions cited therein.

judge's recommendation, and appointments were awarded by this judge to the relatives of several of those other judges who had awarded appointments to his son-in-law. The Commission is pursuing its inquiry into this latter circumstance to determine whether those judges who still hold office were involved in improper reciprocal appointments for their relatives. During the Commission's inquiry of the judge who awarded appointments to his sons' law partners, the judge resigned. (The Commission recommends in this report that the legislature should permit investigations to continue by delaying resignations and retirement for a reasonable period at the Commission's option.)

Perhaps the most significant testimony received during the Commission's investigation was the unfettered discretion exercised in the making of lucrative appointments free of any administrative controls or monitoring by the court system. One judge under investigation described in detail how he made appointments, relying solely on his recollection at the moment and whoever "came to mind." According to his version of the process, important appointments were made without even the benefit of a list of qualified attorneys or any record made of the number of appointments for each attorney. There was no procedure in effect by court administrators to monitor these appointments, although it was well known that judges had been making appointments for many years based on favoritism. Although some reforms have recently been instituted, the court system must make greater efforts to control potential abuses. The pattern of appointments

based on favoritism and nepotism should have been identified by court administrators, and appropriate action should have been taken long before the first half-million dollar fee to this particular judge's son-in-law's firm was exposed in the press. Indeed, those in charge of assigning judges appear to have acceded to this judge's requests to be assigned to the part in which the most lucrative appointments are made (Special Term).

Two other judges in recent years awarded lucrative appointments to particular attorneys, then resigned from office and joined the law firms comprised of those attorneys they had earlier appointed.

The misuse of the appointment power appears not to be limited to any single part of the state. The appointments awarded by two judges of the same county court are currently being investigated by the Commission on allegations of favoritism. One of the judges awarded at least twelve appointments to the brother of the other judge, who in turn awarded approximately the same number of appointments to the son of the first judge. One of these county court judges also favored his son's law partner with a lucrative appointment. The Commission's investigation of one of these two judges was terminated recently when the judge's term expired.

Political Activity

Inevitable questions arise as to the nature and extent of political influences and the effect they are likely to have on

a judge's performance. Candidates are thrust into political life when they seek judicial office, and often their political activities do not cease when they are elected, since many judges have an interest in higher judicial or other public office.

In New York, where the judiciary is by and large elective, there are specific rules governing the political activity in which judges are permitted to engage.* For example, the Administrative Board Rules (Section 33.7) prohibit incumbent judges from holding office in a political party or organization, contributing to any political party or campaign, and taking part in any political campaign except their own for elective judicial office. The New York State Constitution prohibits incumbent judges in most of the state's courts from running for non-judicial office, and the Code of Judicial Conduct states that a judge should resign upon becoming a candidate in a primary or general election for non-judicial office. Two judges recently seeking non-judicial elective office were investigated by the Commission for failing to resign their judicial offices as required. As a

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*The judges of the following courts are elected: the Court of Appeals, Supreme Court, County Court, Surrogate's Court and the New York City Civil Court. As of April 1, 1978, pursuant to a recent constitutional amendment, judges of the Court of Appeals shall be appointed by the Governor with the advice and consent of the State Senate. Family Court judges are elected throughout the state except in New York City, where they are appointed by the Mayor, as are New York City Criminal Court judges. Appellate Division justices are designated by the Governor from among those judges elected to the Supreme Court. Judges for the Court on the Judiciary are designated on a case-by-case basis by the Chief Judge of the Court of Appeals from among Appellate Division justices. Court of Claims judges are appointed by the Governor. The judges of the various district, city, town and village courts are selected by various methods throughout the state, generally by election.

result of the Commission's inquiry, one of the judges did in fact resign before the election.

In the past 16 months, the Commission considered and acted upon a number of complaints involving prohibited political activity. Several complaints were reviewed in which the judges involved were alleged to have attended political functions and made prohibited contributions.

In April 1975, the temporary Commission commenced an investigation of a Court of Claims judge who had allegedly violated the Administrative Board's prohibition against certain political activity by writing the rules of a county political organization. During the course of its inquiry, the Commission conducted an investigatory proceeding at which the judge testified. Subsequently, after the Commission initiated a removal proceeding, the judge was indicted by a grand jury for allegedly perjuring himself before the Commission. The Court on the Judiciary held the disciplinary matter in abeyance pending the outcome of the indictment. In August 1977, the indictment was dismissed on the grounds that the Office of the Special Prosecutor, which had presented evidence to the grand jury, lacked jurisdiction to prosecute the case. The disciplinary matter is pending before the Court on the Judiciary.

Despite the restrictive rules pertaining to political activity, candidates seeking judicial office still face the same campaign-related problems that candidates for all office face: raising funds, organizing staff and volunteers, and attempting to

avoid the potential conflicts of interest that may later arise as a result of electoral activity. Campaign financing is a point of particular vulnerability for judicial candidates, especially in light of the following rules applicable in New York.

The Code of Judicial Conduct (Canon 7[B][2]) specifically allows a judge's campaign committee to accept and solicit contributions for his electoral campaigns from members of the bar. The official commentary to the Code maintains that "[u]nless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate." The New York State Bar Association has endorsed the Code's commentary, noting that "the names of those who contribute to a candidate's campaign should be kept secret from the candidate to the extent legally permissible" (Opinion No. 280 [1973]). At the same time, the New York Election Law (Section 14-102) requires the public filing of the candidate's list of campaign contributors.

The intent behind keeping a judge from knowing his contributors is obvious: to avoid the impression that, if elected, the judge will administer his office with a bias toward those who supported his candidacy. The requirement of public filing practically defeats that intent. So does the fact that a candidate who runs for judicial office chooses his treasurer and those who will be instrumental in raising funds on his behalf. It is unrealistic to expect that a political figure seeking any office would not know the names of at least his most generous contributors. A judge should have access to his list of contributors and should

take steps to insure that he does not violate any of the specific standards or the rule against appearances of impropriety.

Requiring disclosure of campaign funding sources is a progressive step in avoiding conflicts of interest that may later arise. A public record allows a reasonable basis on which to challenge one who may preside over a case involving a significant contributor. One persuasive argument for requiring a judge to know the identities of his contributors is that the judge would thus have an initial opportunity to disqualify himself, or at least notify the parties in a case of the prior contribution, when those contributors appear or are otherwise involved in matters before his court. Raising campaign funds presents other ethical problems, especially in courts in which contributors may be rewarded for their contributions by receiving lucrative appointments. Judges in such situations have a special obligation to avoid the appearance of impropriety.

Difficulties in Identifying Judicial Misconduct and Disability

Because of the important, sensitive positions in our society held by judges, the Commission does not always receive open and complete cooperation from attorneys, judges, administrators, and law enforcement personnel. Attorneys understandably are reluctant in some cases to make complaints or appear voluntarily as witnesses because of fear of reprisal which would injure their practices and their clients' interests.

Few complaints have been made against judges by other judges, although before problems of misconduct and disability surface, judges often become aware of them through personal observations and conversation. Some law enforcement personnel have expressed a reluctance to endanger working relationships with judges, many of whom are influential in their communities.

A case in point might be presented here to demonstrate certain weaknesses in the system and to suggest that agencies of government and attorneys have obligations to identify problems of judicial misconduct and disability.

For several weeks, the Commission faced difficulty obtaining a response from a judge who the Commission believed should explain certain conduct. Finally, the judge's wife wrote to the Commission, on judicial stationery, that her husband was mentally incapacitated and could not supply the requested information. She submitted a physician's letter stating that the judge could not manage his "personal or financial affairs."

It then developed that the judge had been incapacitated for 1 1/2 years, had heard only one case during that time and that his town board (composed of all judges), the town officials and the local and state police all knew of his condition but did not report it. The one time he tried to hear a case, he was unable to complete an arraignment. He was paid his judicial salary during this period and he held the prestigious title of judge. Fortunately, he followed the advice of his family and physician and did not preside. Court administrators apparently

knew nothing about the judge's inactive status and hence could take no action to relieve him of his duties. His wife submitted monthly financial reports indicating that he was ill and the Commission learned of the situation when the judge had seven weeks remaining in his judicial term.

The fact that this could exist for 1 1/2 years without coming to the Commission's attention (or the attention of centralized court administration) is a sad commentary on the entire system. Judges and lawyers have a special obligation to report such disability. Other agencies have similar obligations to report if they know of anything like this and, in some cases, to ascertain what is happening in the courts throughout the state.

In another situation, a group of judges did report to the Commission the existence of several complaints indicating that a judge was suffering from senility. The judge resisted attempts by his friends to persuade him to resign. With the assistance of his attorney, the judge finally did resign after he was charged by the Commission with misconduct and with being disabled. It is hoped that lawyers, judges and other agencies of government, with direct responsibility in dealing with the courts, will be more diligent in calling the Commission's attention to problems of judicial disability and misconduct.

SHARING INFORMATION WITH OTHER AGENCIES

Judicial Screening Committees

Disciplining judges for misconduct is, of course, only one phase of the effort to insure a competent, conscientious judiciary. More thorough procedures in evaluating candidates for election, appointment, re-designation and certification is obviously another.

The Commission believes that the public which elects judges and the officials who appoint judges have a right to know as much about the qualifications of individual candidates as is necessary to make a reasoned decision. Such information is usually assessed by judicial screening committees of bar associations and by agencies specifically responsible for recommending appointive candidates for the bench, such as the Mayor's Committee on the Judiciary in New York City, and the departmental nominating committees in the state's four judicial departments.

The very strict confidentiality provisions of the Judiciary Law (Section 44) prohibit the Commission from disclosing complaints, correspondence, transcripts, data and other records, including letters of admonition, without the written consent of the judge involved. In addition, the Commission has adopted certain guidelines governing the type of material it will release, even with a judge's signed waiver of confidentiality. For example, numerous allegations against a judge, even if disproved, can sometimes make a damaging impression on the reviewer and

needlessly reflect poorly upon the judge's fitness. Even with a waiver, the Commission generally will not disclose information on pending investigations, or completed investigations which were dismissed without action or finding of misconduct. Only in instances in which the Commission took disciplinary action would some of its files be disclosed, and then only with the requisite waiver from the judge.

THE RECENT CONSTITUTIONAL AMENDMENT BROADENING THE COMMISSION'S AUTHORITY

In November 1977, the New York State electorate overwhelmingly approved a new amendment to the State Constitution, broadening the scope of the Commission's authority and streamlining the procedure for disciplining judges within the state unified court system. The Commission's authority to receive complaints, conduct investigations, subpoena documents and witnesses, and conduct formal hearings will be continued under the new procedure. Among the more significant changes mandated by the amendment, which is effective as of April 1, 1978, are the following:

-- The Commission's composition is expanded from the current nine to eleven members. Both new members are required to be judges.

-- The Court on the Judiciary is abolished. No new proceedings may be commenced in the Court on the Judiciary after the effective date of the amendment. The Court will continue its jurisdiction over proceedings commenced prior to the effective date.

-- A determination by the Commission that a judge be admonished, censured, retired or removed from office shall be final, subject to review on the record by the Court of Appeals upon the timely request of the respondent judge. The Legislature is granted the discretion to decide whether disciplinary determinations by the Commission involving town or village justices should be made appealable to the appropriate Appellate Division rather than to the Court of Appeals.

-- The Commission may designate one of its members or "any other person" as a referee to hear and report concerning any matter before the Commission.

New legislation as well as amended Commission operating procedures will be required to conform to the mandate of the recent amendment. The Commission will be particularly careful to devise operating procedures which will protect the integrity of a disciplinary process in which both investigation and adjudication will be conducted by the same agency.

RECOMMENDATIONS

To the Administrative Board

Several problem areas, some of which have been discussed in this report, should be addressed in the Rules of the Administrative Board.

Associates of Part-Time Lawyer-Judges. As discussed earlier, part-time lawyer-judges are prohibited by the Administrative Board from practicing law in their own courts or in any other courts in the same county which are presided over by part-time lawyer-judges. The Administrative Board Rules (Section 33.5[f]) also require part-time lawyer-judges to disallow practice in their own courts by their law partners or the partners of other part-time lawyer-judges sitting in the same court. The rules do not prohibit the partners and associates of a part-time lawyer-judge from practicing in other courts in the same county presided over by part-time lawyer-judges.

The Commission recommends that the Administrative Board's prohibitions on the activities of lawyer-judges be extended, at least under certain circumstances, to their partners and associates. The special influence a judge may enjoy, when practicing before a fellow lawyer-judge who may some time appear before him, is easily transferred to his partners and associates. The rule's intent, which is to preclude such favorable influence where it might tend to appear, should be better safeguarded. Although it is true that such a prohibition will work a hardship

on the private practice of some attorney-judges, being a judge imposes many restrictions on judges, and there is no indication of an insufficient number of qualified attorneys available who could hold such positions without having their law partners and associates practice before other part-time lawyer-judges. The Commission recognizes the hardships that such a change would impose, but they are hardships worth enduring if the public is to have faith in its courts. There is a need for uniform rules restricting the practice of law by part-time judges (as there is in the Appellate Division, Third Judicial Department, barring the practice of criminal law by part-time lawyer-judges within the counties of their residence), and by their law partners and associates.

Financial Disclosure. A sensitive issue relevant to potential conflicts of interest concerns the financial disclosure of personal assets and income. The Administrative Board Rules (Section 33.6[c]) already provide for limited financial disclosure by judges, who are required to report to the clerks of their courts all compensation for extra-judicial activities. This rule does not apply to part-time judges who are permitted to practice law, nor does it clearly compel a judge to file a report if he has not earned extra income. It is therefore difficult to distinguish between those who are unfamiliar with the rule and those who are deliberately ignoring it. In any event, relatively few such reports are filed.

Financial disclosure statements, which are required in other branches of government, would make it possible for the Commission to detect certain conflicts of interest which would be indiscernible any other way. Furthermore, disclosure would serve as a significant deterrent to misconduct and the appearance of impropriety, on the theory that judges would be less likely to participate in activities of potential conflict.

According to the American Judicature Society, at least 22 jurisdictions require some form of financial disclosure by judges. In Arizona, where the requirement is particularly far-reaching, all elected officials, including judges, must file public records with the secretary of state, providing information on outside earnings, the names of creditors to whom more than $1,000 is owed, the names of companies in which the judges have invested, and the places of employment of members of their families. An Ohio statute imposes similar requirements on all candidates for elective office, including judges. In Florida, judges' income tax forms are routinely filed with that state's Commission on Judicial Conduct.

This is the third year that either this Commission or its predecessor made a recommendation to the Administrative Board to require financial disclosure by judges, with adequate standards for the protection of privacy. Neither the Commission nor litigants at present know whether a judge's investments should preclude his sitting in judgment on a particular case. Being a judge brings with it numerous restrictions, and financial disclosure

is, on balance, a necessary and important reform. Conflicts would be identified on a more rational basis, and the public would be better assured that a judge's financial investments would not affect his judicial judgments.

The language of the Administrative Board Rules, which already provide for limited financial disclosure of outside, earned income by certain judges, should be amended to require comprehensive, confidential financial disclosure for part-time as well as full-time judges, whether or not extra-judicial income has been earned. This information should be made available to the Commission to facilitate the detection of conflicts of interest for which there are no other practical means of discovery. The rules as they currently read, as discussed earlier in this report, state that financial disclosure is not required. This rule should be changed to require confidential filing directly with the Commission or with the Office of Court Administration with access by the Commission.

Financial Activites Defined. Section 33.5(c) of the Rules Governing Judicial Conduct prohibits most full-time judges from engaging in certain financial activities including management, active participation and partnership or employment in a business organized for profit. Most full-time judges may not serve as an officer, director, trustee or advisory board member of any corporation or company organized for profit.

These far-reaching prohibitions may be broader than many judges realize, particularly insofar as they involve inactive

partnership status, in real estate ventures or other associations organized for profit. Judges should be on notice that such prohibitions apply to them. The full extent to which these rules are being followed is not known, largely because of the absence of financial disclosure by judges in New York.

The omission of full-time city court judges from the list of judges who are bound by these prohibitions seems illogical. A New York City Civil Court judge, who earns $42,500 per year, is included; a Yonkers City Court judge, who earns $41,000 to $42,000 per year, is not included. It is recommended that all full-time judges be prohibited from engaging in these financial activities.

Moreover, this rule excludes from this prohibition judges who assumed judicial office prior to July 1, 1965, and who maintained their (otherwise prohibited) financial interests since that date. This exception is unsound. If exceptions are warranted, they should be considered on a case-by-case basis with specific approval given by the Administrative Board. There is no justification for distinguishing between the two classes of judges -- those who became judges before and those after a specific date.

Accordingly, it is recommended that the prohibitions apply equally to all full-time judges with individual exceptions granted upon application to the Administrative Board. Moreover, as indicated earlier, only if financial disclosure is required will there be any realistic opportunity to monitor financial activities.

Extra-Judicial Compensation. Section 33.6(d)(1) of the Rules Governing Judicial Conduct prohibits a judge from receiving compensation for extra-judicial activities performed on behalf of New York State or any of its political subdivisions.

Since many part-time judges work for the state and its subdivisions, this rule is either being violated or is in need of clarification. If the rule is intended to bar only full-time judges from receiving such compensation, it should be amended to say so. At present, the rule is unclear with respect to part-time judges.

Contributions to Political Campaigns. A 1976 amendment to Section 33.7 of the Rules Governing Judicial Conduct pertaining to financial contributions may have given the impression that at times it is permissible for a judge to attend a political fund-raising event and make a contribution. The confusion may be caused by an amendment of Section 33.7 (a)(1) which permits judges to attend political functions for a period beginning nine months before an election, convention or caucus relative to a judicial office openly sought by the judge, and ending approximately three months after a general election in which the judge was a candidate. Although a judge in this position may attend a political function, apparently he may not make a contribution -- that is, pay an amount for a lunch or dinner that exceeds its value. The applicable rule states that "where the cost of a ticket to such dinner ... exceeds the proportionate cost of the dinner ... reference should be made to the Election Law." (The Election Law prohibits contributions by judges.)

It is recommended that a caveat be added to the applicable section of the rules to clarify the obligations of judicial candidates and to prohibit any contribution by a candidate to a political party, except to pay for his own pro-rata share of expenses. Also prohibited should be the cost of a ticket that exceeds the cost of the dinner. The reference in the present rule to the Election Law is unclear.

Incorporating Within the Administrative Board Rules Those Special Rules of Appellate Divisions Applicable to Judicial Demeanor. The Appellate Divisions, First and Second Judicial Departments, promulgated rules of conduct which are applicable to judges within these departments. At present, the Administrative Board Rules Governing Judicial Conduct contain a simple, concise description of a judge's obligations to be "patient, dignified, and courteous" (Section 33.3[a][3]). While this provision clearly sets forth the policy of the Administrative Board in this regard, the Commission finds the following language of the Special Rules of the Appellate Divisions, First and Second Judicial Departments (Section 604.1[e][5] and [6] and Section 700.5[e] and [f], respectively), to be especially useful:

> The judge should be the exemplar of dignity and impartiality. He shall suppress his personal predilections, control his temper and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testi-

> mony, he shall do so in a firm and polite manner, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues. The judge is not relieved of these obligations by what he may regard as a deficiency in the conduct of any attorney who appears before him; nor is he relieved of these obligations by what he believes to be the moral, political, social, or ideological deficiencies of the cause of any party.

It is recommended that this descriptive language be added to the Rules Governing Judicial Conduct and be made applicable to all judges within the state unified court system. Moreover, it is especially important for the Administrative Board to give its sanction to these provisions, since a series of recent changes in the law may raise some question whether the Appellate Divisions have authority to promulgate ethical standards for judges. Although the Commission recognizes the authority of the Appellate Division to promulgate such rules, it is the prudent course for specific approval to be given by the Administrative Board.

Improved Training Programs. A common factor in many of the problems identified in some of the local courts is the lack of adequate training of judges who preside in those courts. Training programs are required for non-lawyer town and village justices, who must successfully complete the programs to obtain certification to sit as judges. Seven judges this past year were investigated by the Commission for failing to attend the training

programs. Six resigned from office in the midst of the Commission's inquiry. A seventh, against whom the Commission instituted a removal proceeding, was suspended for the duration of his term upon notice to the Commission that he would not be seeking re-election.

Ignorance of the standards and rules of judicial conduct continues to be a problem, and it appears that this problem is not limited to non-lawyer judges. Time and again, judges testifying before the Commission professed unawareness of the promulgated Rules of the Administrative Board. While the Office of Court Administration has made continuing efforts to train non-lawyer town and village justices, many need further guidance. Training seminars should be conducted more frequently and should more comprehensively outline the rules and ethical obligations binding on a judge and the methods by which he may better administer his court. Record-keeping obligations and techniques must be impressed upon the judge, as well as the extent to which he may or may not delegate various responsibilities. Of primary importance is the need to supplement training programs with supervision on a continued basis by court administrators.

Moreover, all judges should be better trained in judicial ethics. Since ethical standards for judges cover a broad range of conduct encompassing the appearance of impropriety, it is important to review with judges the particularly high standards expected of them. Even basic standards are sometimes flagrantly violated. Because ignorance of ethical standards has so often

been offered as an excuse for improper conduct, the Commission suggests that judicial training programs include more intensive review of basic ethics. In any event, professed ignorance of applicable rules cannot preclude the Commission from taking action.

Complaints Against Hearing Officers, Arbitrators and Others Who Are Not Judges. The Commission receives a number of complaints each year involving individuals who are not judges and are therefore not within its jurisdiction, such as full-time hearing officers and referees. Housing court hearing officers in the Civil Court of the City of New York wear judicial robes, are addressed as judges and give the layman every impression that they are judges. In light of these impressions, the large volume of cases these officers hear and the sizeable number of people that appear before them, their performance perhaps naturally reflects upon the judiciary, of which they are not members, and the judicial system.

The Commission recommends that a formal system be developed within the court system to consider complaints and take appropriate action for misconduct by hearing officers, arbitrators and other court personnel who are not judges but who act in the capacity of judges.

Improved Personnel Records System. From time to time, Commission investigations have been delayed because needed, up-to-date personnel information on judges has not been readily available. For example, when investigating an allegation that a

particular judge has appointed his wife as court clerk or his daughter as court bookkeeper, it is useful to be able to determine quickly such information as whether the judge in fact has a daughter, whether the daughter is recorded on the court's payroll, whether the judge has a wife, or whether the judge was married to his wife before or after she was named court clerk.

The Commission recommends that the Office of Court Administration improve its personnel records system to include and retain for easy retrieval such basic information about judges as their ages, terms of office, other family members and other background information that would be useful to expedite both Commission and Office of Court Administration business.

To The Legislature

Abolition of Some City Justice Courts. As noted in the section of this report entitled "Yonkers City Justice Courts," the Commission has expressed its concern about the survival of those courts which permit judges to receive as income amounts taken in as fees in excess of expenses. Because of the abuses inherent in totally unsupervised courts such as these, which operate out of law offices, the Commission recommends a bill to abolish these remaining city justice courts, perhaps merging their functions into existing city courts.

Judges Who Resign While Under Investigation. Thirty judges resigned in the past 16 months while under investigation by the Commission.

Since the Commission's jurisdiction is limited to incumbents, when a particular judge resigns or otherwise leaves the judiciary, the pending inquiry terminates. Furthermore, since the Commission's activity is, by law, confidential up to the point that formal charges are served on a judge in a removal proceeding, or until the judge is publicly censured or suspended, resignation precludes the matter from becoming public. It also denies the Court on the Judiciary an opportunity to hear the case on the merits and, if deemed necessary, exercise its power to bar the judge from ever again holding judicial or other public office.

There are relevant prohibitions on many public employees in this regard, disallowing resignations for a reasonable period until charges of misconduct are heard. By rule of the Administrative Board, for example, non-judicial court employees may not resign without the approval of the Appellate Division, which may disregard the resignation of an employee against whom charges of incompetency or misconduct have been or are about to be filed.

The Commission recommends legislation extending this Administrative Board rule on resignations to judges in the unified state court system so that the Commission's inquiry will not automatically be terminated by a tendered resignation.

CONCLUSION

An honorable judiciary which enjoys the confidence of its people is indispensable to the American concept of justice. The members of the State Commission on Judicial Conduct believe that the Commission's goals and efforts contribute to that aim. We continue to find challenge and satisfaction in this important effort, especially in attempting to the best of our ability to balance the rights of judges and the rights of the public. We trust that the public as well as the judiciary will continue to perceive our work to be as important as we believe it is.

Respectfully submitted,

MRS. GENE ROBB, Chairwoman
DAVID BROMBERG, Esq.
DOLORES DEL BELLO
HON. LOUIS M. GREENBLOTT
MICHAEL M. KIRSCH, Esq.
VICTOR A. KOVNER, Esq.
WILLIAM V. MAGGIPINTO, Esq.
HON. ANN T. MIKOLL
CARROLL L. WAINWRIGHT, JR., Esq.

Commission Members

GERALD STERN, Esq.

Administrator

CONTINUED

1 OF 2

APPENDIX A

BIOGRAPHIES OF COMMISSION MEMBERS

DAVID BROMBERG, ESQ., is a graduate of Townsend Harris High School, City College of New York and Yale Law School. He is a member of the firm of Bromberg, Gloger & Lifshultz. Mr. Bromberg served as counsel to the New York State Committee on Mental Hygiene from 1965 through 1966. He was elected a delegate to the New York State Constitutional Convention of 1967, where he was secretary of the Committee on the Bill of Rights and Suffrage and a member of the Committee on State Finances, Taxation and Expenditures. He is a member of the Association of the Bar of the City of New York and has served on its Committee on Municipal Affairs. He is presently serving on its Committee on the New York State Constitution. He served on the National Panel of Arbitrators of the American Arbitration Association.

DOLORES DEL BELLO received a baccalaureate degree from the College of New Rochelle and a masters degree from Seton Hall University. She is presently Director of External Affairs at Mercy College, host of a daily radio interview program in White Plains, and Volunteer Arts Coordinator for the Westchester County government. Mrs. DelBello is a member of the Arts Review Panel of the New York State Council on the Arts, the Board of Directors for the Mental Health Association, the League of Women Voters, the Board of Directors of the Westchester Council for the Arts, and the National Trust for Historic Preservation at Lyndhurst.

HON. LOUIS M. GREENBLOTT is a graduate of Cornell University and Cornell Law School. He is presently Senior Associate Justice of the Appellate Division, Third Judicial Department. Justice Greenblott previously served as a Justice of the Supreme Court and a County Court Judge in Broome County. He was elected District Attorney of Broome County in 1955 and re-elected in 1958 and 1961. Justice Greenblott is a member of the American Bar Association and serves on its Committee on Implementation of Standards for the Enforcement of Discipline by the Judiciary. He is also a member of the New York State Bar Association, a Guest Lecturer on Criminal Law at Cornell, and was a founder and Chief Instructor at the Broome County Law Enforcement Officers Training School.

MICHAEL M. KIRSCH, ESQ., a graduate of New York University and New York University Law School, is a member of the firm of Goodman & Mabel & Kirsch. He is a trustee and former President of the Brooklyn Bar Association, a member of its Committee on the Judiciary and a former member of its Committee on Grievances. He is a member of the House of Delegates of the New York State Bar Association and a member of the Sub-Committee on the Jury System of the Advisory Committees on Court Administration of the First and Second Judicial Departments, and a former member of the Judiciary Relations Committee for the Second and Eleventh Judicial Districts.

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 and Bickford. Mr. Kovner has been a member of the Mayor's Committee on the Judiciary since 1969. He was a founder of the Committee to Reform Judicial Selection and served as a member of the Governor's Task Force on Judicial Selection and Court Reform. Mr. Kovner is a member of the Association of the Bar of the City of New York and serves on the Special Committee on Communications Law as co-chairman of the Sub-Committee on Privacy Legislation.

WILLIAM V. MAGGIPINTO, ESQ., is a graduate of Columbia College and Columbia Law School. He is a senior partner with Anderson, Maggipinto, Vaughn & O'Brien, Sag Harbor (N.Y.), and a trustee of Sag Harbor Savings Bank. Mr. Maggipinto is President of the Suffolk County Bar Association, and Vice-President and a Director of the Legal Aid Society of Suffolk County. He serves on the Committee on Judicial Selection of the New York State Bar Association, and was, for three years, Chairman of the Suffolk County Bar Association Judiciary Committee. He has also served as a Town Attorney for the Town of Southampton, and as a Village Attorney for the Village of Sag Harbor.

HON. ANN T. MIKOLL is a graduate of the State University of New York at Buffalo, where she received a baccalaureate degree and a Doctor of Jurisprudence. She has an honorary Doctor of Humane Letters from Canisius College. Justice Mikoll is presently an Associate Justice of the Appellate Division, Third Judicial Department, having previously served as a Justice of the Supreme Court in Erie County and as Associate Judge of the City Court of Buffalo. She is a member of the Board of Directors of the Legal Aid Bureau of Buffalo, Inc., the Board of Directors of the Catholic Charities of Buffalo, Board of Directors of the Friends of Shea's Buffalo and Board of Directors of the Chair of Polish History and Culture at Canisius College.

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 serves on the National Advisory Council of the Salvation Army and is a member of the Board of the Salvation Army Executive Committee for the New York State Plan. She is on the Board of the Saratoga Performing Arts Center, the Board of the Albany Medical College and the Board of Trustees of Siena College.

CARROLL L. WAINWRIGHT, JR., ESQ., is a graduate of Yale College and the Harvard Law School and is a member of the firm of Milbank, Tweed, Hadley and McCloy. He served as Assistant Counsel to Governor Rockefeller, 1959-1960, and presently is a Trustee of the American Museum of Natural History, The Boys Club of New York, and The Cooper Union for the Advancement of Science and Art. He is Treasurer of the Church Pension Fund of the Episcopal Church and a member of the Yale University Council. He is a former Vice President of the Association of the Bar of the City of New York and is a member of the American Bar Association, the New York State Bar Association and the American College of Probate Counsel.

COMMISSION ADMINISTRATOR

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 State Commission on Judicial Conduct 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. Mr. Stern is a member of the New York State Bar Association Committee on Revision of the Criminal Law (Criminal Justice Section) and the Association of the Bar of the City of New York Committee on Criminal Courts. He served as Chairman of an American Bar Association Committee on Alcoholism and Drug Reform.

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*Denote individuals who left the Commission staff during 1977.

APPENDIX B

OPERATING PROCEDURES AND RULES OF
THE STATE COMMISSION ON JUDICIAL CONDUCT

Pursuant to Section 42, paragraph 5 of the Judiciary Law, in relation to the establishment of a State Commission on Judicial Conduct (hereinafter the "Commission") the following rules are hereby adopted:

1. Definitions

For the purpose of these rules the following terms have the meanings indicated below:

(a) "Administrator" means the person appointed by the Commission as administrator pursuant to Section 41 of the Judiciary Law.

(b) "Administrator's Complaint" means a complaint signed by the Administrator of the Commission which shall be filed with the Commission as part of its records in accordance with Section 43, subdivision 2 of the Judiciary Law.

(c) "Admonition" means a private reprimand consisting of a reproof or warning against impropriety, the appearance of impropriety, or oversight which caused a violation of an ethical standard or rule.

(d) "Answer" means a verified response in writing to a Formal Written Complaint.

(e) "Censure" means a public reprimand.

(f) "Complaint" means a written communication to the Commission signed by the complainant making allegations against a judge as to his qualifications, conduct, fitness to perform, or the performance of his official duties, or an Administrator's Complaint.

(g) "Commission" means the State Commission on Judicial Conduct.

(h) "Dismissal" means a decision not to initiate an investigation because a complaint on its face lacks merit or is outside the jurisdiction of the Commission, or a decision to terminate an investigation at any stage of the proceedings because no action is warranted.

(i) "Formal Written Complaint" means a writing signed and verified either by the person making the complaint or the Administrator of the Commission alleging specific charges of judicial misconduct against a judge, the validity of which is to be determined at a hearing to be held in accordance with Section 43, subdivision 5 of the Judiciary Law.

(j) "Hearing" means an adversary proceeding under Section 43, subdivision 5 of the Judiciary Law, at which testimony of witnesses is taken and

evidentiary data and material relevant to the complaint are received and at which the respondent judge is entitled to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint.

(k) "Initial Review and Inquiry" means the preliminary analysis and clarification of the matters set forth in a complaint and the preliminary fact-finding activities of Commission staff intended to aid the Commission in determining whether or not to authorize an investigation with respect to such complaint.

(l) "Investigation" means the activities of the Commission or its staff intended to ascertain facts relating to the accuracy, truthfulness or reliability of the matters alleged in a complaint. An investigation includes the examination of witnesses under oath or affirmation, requiring the production of books, records, documents or other evidence that the Commission or its staff may deem relevant or material to an investigation, and the examination under oath or affirmation of the judge involved before the Commission, a panel of its members, or any of its members pursuant to a designation in accordance with Section 42, paragraph 1 of the Judiciary Law.

(m) "Judge" means a judge or justice of any court in the unified court system of the State of New York.

(n) "Retirement" means a retirement for physical or mental disability preventing the proper performance of judicial duties.

(o) "Suggestions and Recommendations" means the written confidential suggestions and recommendations referred to in Section 3, subdivision (c) of these Rules.

(p) "Suspension" means a temporary removal from judicial office without pay for a period not to exceed six months.

2. Complaints

The Commission shall receive any complaint against any judge with respect to his qualifications, conduct, fitness to perform, or the performance of his official duties. The Commission may conduct an investigation with respect to a complaint or an Administrator's Complaint.

3. Investigations, Hearings and Dispositions

(a) When a complaint is received or when an Administrator's Complaint is filed pursuant to Section 43, subdivision 2 of the Judiciary Law, an initial review and inquiry shall be undertaken.

(b) After an initial review and inquiry, the complaint may be dismissed by the Commission or, when authorized by the Commission, an investigation may be undertaken.

(c) During the course of or after an investigation, the Commission may dismiss the complaint, direct further investigation, request a written

response from the judge who is the subject of the complaint, direct the filing of a Formal Written Complaint in accordance with Section 43, subdivision 5 of the Judiciary Law, or take any other action authorized by Article 2-A of the Judiciary Law. Notwithstanding the dismissal of a complaint, the Commission, in connection with such dismissal, may make written, confidential suggestions and recommendations to a judge with respect to the complaint, the Commission's initial review and inquiry, or the Commission's investigation as they pertain to the judge.

(d) Pursuant to Section 42, paragraph 1 of the Judiciary Law, any member of the Commission or the Administrator may administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that may be deemed relevant or material to an investigation. The Commission may, by motion or resolution, delegate to staff attorneys and other employees designated by the Commission the power to administer oaths and take testimony.

(e) In the course of an investigation, the Commission may require the appearance of the judge involved before the Commission, a panel of its members or a member of the Commission, in which event the judge shall be notified in writing of his required appearance either personally at least three (3) days prior to such appearance or by certified mail, return receipt requested, at least five (5) days prior to such appearance. A copy of the complaint shall be served upon the judge at the time of such notification.

(f) The judge shall have the right to be represented by counsel during any and all stages of the investigation at which his appearance is required and to present evidentiary data and material relevant to the complaint. Counsel for the judge shall be permitted to advise him of his rights and otherwise confer with him, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the investigatory proceeding. Counsel for the judge may not personally respond to, or object to, questions addressed to the judge.

(g) If in the course of or after an investigation, the Commission determines that it is appropriate to render an admonition to a judge, it may do so with or without a hearing. A judge may be required to appear before the Commission or a panel of its members at which appearance the Commission may render an admonition to the judge pursuant to Section 43, subdivision 4 of the Judiciary Law. A written statement of the admonition shall be sent to the judge. The Commission may also render an admonition in writing to the judge without requiring his personal appearance. Within ten (10) days of receiving a copy of an admonition, the judge may request a hearing before the Commission, and, in that event, a Formal Written Complaint shall be served upon the judge and a hearing shall be held in accordance with the following paragraph and Section 43, subdivision 5 of the Judiciary Law. Following such hearing, the Commission may render an admonition or take any other action provided by law.

(h) If the Commission determines that a hearing is warranted, the procedures to be followed are those set forth in Section 43, subdivision 5 of

the Judiciary Law. The judge who is subject of a Formal Written Complaint shall have the right to have the Commission subpoena witnesses on his behalf. He shall also have a right to receive before the hearing a copy of any prior testimony of any witness who testified during the investigation and who will be called to testify at the hearing in support of the Formal Written Complaint as well as copies of other sworn statements of such witness or statements subscribed by any such witness.

4. Procedure for Hearings

For a hearing held pursuant to Section 43, subdivision 5 of the Judiciary Law, the following procedure will be followed:

(a) A judge who is served with a Formal Written Complaint pursuant to Section 43, subdivision 5 of the Judiciary Law shall serve his answer to the charges alleged in such complaint within the time specified by the Commission in a notice of hearing served together with the Formal Written Complaint. The answer shall contain denials of those allegations known or believed to be untrue. The answer shall also specify those allegations as to the truth of which the judge lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other allegations in the Formal Written Complaint are deemed admitted. The answer may also contain affirmative and other defenses. Failure to answer or appear at a hearing shall be deemed an admission of the allegations of the Formal Written Complaint.

(b) For the purpose of making a transcript of the hearing, the Commission may use whatever means it deems appropriate, including but not limited to the use of stenographic transcriptions or electronic recording devices.

(c) The judge who is the subject of the hearing shall be afforded a reasonable opportunity to present written argument on issues of law and fact.

(d) Within a reasonable time following a hearing, the Commission shall furnish the judge, at no cost to him, with a copy of the transcript of the hearing.

(e) One of the members of the Commission shall be designated and empowered by the Commission to be the presiding officer at the hearing. A presiding officer is authorized to regulate the course of a hearing, make appropriate rulings, set the time and place for continued hearings, and fix the time for filing briefs and other documents.

(f) The burden of proof shall be on the attorney for the Commission designated to present evidence in support of the charges alleged in the Formal Written Complaint. At the hearing the testimony of witnesses may be taken and evidentiary data and materials relevant to the Formal Written Complaint may be received. Formal rules of evidence need not be followed. Evidentiary data and material that are irrelevant or unduly repetitious may be excluded. For the purpose of expediting hearings, submission of all or part of the evidence in written form may be required or permitted.

(g) A determination favorable to a judge who is the subject of a hearing shall be in writing and transmitted to the judge within a reasonable time after such decision is rendered.

(h) If the Commission determines that a judge who is the subject of a hearing be censured, suspended or retired, the Commission shall transmit its written determination containing the reasons for such determination to the Chief Judge of the Court of Appeals.

5. Recommendation to Convene Court on the Judiciary

After an investigation or hearing, the Commission may determine that the Court on the Judiciary should be convened to hear and determine charges against a judge. If such a determination is made the Commission shall make its recommendation for stated reasons to the Chief Judge of the Court of Appeals.

6. Standards

(a) A judge may be censured, suspended or removed 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 retired for mental or physical disability preventing the proper performance of his judicial duties.

(b) In evaluating the conduct of judges, the Commission shall be guided by (1) the requirement that judges uphold and abide by the Constitution and laws of the State, (2) the requirement that judges abide by the Code of Judicial Conduct, the Rules of the Administrative Board of the Judicial Conference and the Rules of the respective Appellate Divisions governing judicial conduct, (3) the requirement that judges conduct themselves in such a way as to make the courts and the administration of justice just, equitable and efficient and give the appearance of being so, and (4) the requirement that judges abide by standards of honesty, courtesy, dignity and civility expected of all persons in positions of judicial responsibility.

7. Amending Rules

The rules of the Commission may be amended with the concurrence of at least five members.

APPENDIX C

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In the Matter of Albert S. MAC DOWELL, as City Judge, City Court of the City of Newburgh, Orange County.

The JUDICIARY RELATIONS COMMITTEE FOR the NINTH AND TENTH JUDICIAL DISTRICTS of the State of New York, Petitioner,

v.

Albert S. MAC DOWELL, Respondent.
Supreme Court, Appellate Division,
Second Department.
April 25, 1977.

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Gerald Stern, New York City (Frank A. Finnerty, Jr. and Bernard Persky, New York City, of counsel), for petitioner.

Patterson, Belknap & Webb, New York City (Robert P. Patterson, Jr. and W. Peter Burns, New York City, of counsel), for respondent.

Before GULOTTA, P.J., and MARTUSCELLO, LATHAM, COHALAN and MARGETT, JJ.

PER CURIAM.

The respondent, a part-time Judge of the City Court of the City of Newburgh, was appointed to that office in January, 1973, upon the resignation of his predecessor, and was elected to a full six-year term in November of the same year. Respondent has been admitted to the practice of law in New York since 1951.

The petition contains 12 charges (subparagraphs [1] through [12] of paragraph SEVENTH), one of which (subparagraph [7]) contains 7 subcharges (subdivisions [a] through [g]). The instant hearings commenced before Mr. Justice BUSCHMANN, as Referee, on April 27, 1976 and terminated on June 17, 1976. The transcript of these proceedings occupies some 4,100 pages of the record. Mr. Justice BUSCHMANN rendered his very comprehensive and excellent report on August 2, 1976, in which he sustained in toto the charges contained in subparagraphs (1), (2), (4), (5), (7a), (7c), (7d), (7f) and (9); sustained, in part, the charges contained in subparagraphs (6), (7b) and (8); and concluded that the remainder of the charges contained in the petition had not been substantiated.

On October 26, 1976 the respondent moved to confirm the report insofar as it found that certain charges had not been substantiated, and to disaffirm the report insofar as it found that certain charges had been sustained. On November 24, 1976 the petitioner cross-moved to confirm the report insofar as it

found that certain charges had been sustained, and to disaffirm the report insofar as it found that certain charges had not been substantiated. The submission to this court became complete with the service and filing of the respondent's reply memorandum on December 6, 1976.

With respect to subparagraph (1), the Referee found that during the period from March 1, 1973 to the date he was relieved of his judicial duties (October 29, 1975), respondent neglected and failed to render timely decisions with respect to at least 44 written motions presented to the City Court in criminal proceedings, to the detriment and prejudice of the rights of the parties to said proceedings. In some instances the delay in deciding these motions was one and one-half years.

With respect to subparagraph (2), the Referee found that during the period from January, 1974 to December, 1974, the respondent neglected and failed in at least 89 felony proceedings, to comply with CPL 180.30, which provides, inter alia, that when a defendant has been arraigned in a local criminal court upon a felony complaint and waives a hearing thereon, the court must either (1) order the defendant held for the action of the Grand Jury and promptly transmit a copy of that order, the felony complaint, the supporting depositions and all other pertinent documents to the appropriate superior court, or (2) make inquiry pursuant to CPL 180.50 for the purpose of detemining whether the felony complaint should be dismissed and an information, prosecutor's information or misdemeanor complaint filed in lieu thereof. The delay occasioned as to some of these matters approximated 11 months.

With respect to subparagraph (4), the Referee found that during the years 1974 and 1975, the respondent neglected and failed to grant prompt and timely hearings in connection with numerous criminal complaints pending before the City Court to the detriment and prejudice of the rights of the parties to those proceedings.

With respect to subparagraph (5), the Referee found that during the respondent's tenure as Judge of the City Court, he neglected and failed to hold prompt jury and nonjury trials with respect to numerous criminal, civil and traffic cases pending before the court, to the detriment and prejudice of the rights of respective parties to those proceedings. Some 477 cases were pending before the court as of the date of respondent's suspension, and more than 200 of these were over six months old.

With respect to subparagraph (6), the Referee found that for the first three quarters of 1974, the respondent neglected and refused to comply with section 20.2 of the Rules of the Administrative Board of the Judicial Conference, which requires the filing of a quarterly report indicating all matters which have been pending for more than 60 days after final submission to a court, and ignored, refused and disregarded repeated requests by the Office of the Director of Administration of the Courts for the Second Judicial Department for the timely filing of these reports.

With respect to subparagraph (7), the Referee found that during the respondent's tenure as Judge of the City Court, he failed and neglected to

discharge his administrative responsibilities to said court, and improperly and unnecessarily impeded and delayed the routine, usual and prompt administration of justice in that court by (1) unreasonably restricting court personnel to such an extent that they were not permitted to perform the ordinary ministerial functions required in the administration of court business (subdivision [a]), (2) at times, directing that the mail remain unopened for extended periods, the testimony indicating that such periods were as long as a month (subdivision [b]), (3) failing to promptly endorse numerous orders and decisions (subdivision [c]), (4) failing to provide for the routine and timely docketing of pleadings, as well as the docketing and entry of orders and judgments (subdivision [d]), and (5) directing that the Acting Judge of the City Court be denied access to court records and files requested by him, and, on one occasion, directing court personnel to have the Acting Judge arrested should he attempt to obtain such files (subdivision [f]).

With respect to subparagraph (8), the Referee found that during the respondent's tenure as Judge of the City Court, he neglected and failed to establish, maintain and publish regular and reasonable court calendars.

[1, 2] In our opinion, the Referee's findings with respect to subparagraphs (1), (2), (4), (5), (6) and (8) of paragraphs SEVENTH and to subdivisions (a), (b), (c), (d) and (f) of subparagraph (7) of paragraph SEVENTH of the petition are sustained by the evidence and should be confirmed.

The Referee found that the charges contained in subparagraph (9) had been sustained. In our opinion this charge is not supported by a fair preponderance of the evidence and the Referee's finding in this regard should be disaffirmed.

[3] The Referee also found that subdivision (g) of subparagraph (7), charging the respondent with having failed and neglected to discharge his administrative responsibilities, and having improperly and unnecessarily impeded and delayed the routine, usual and prompt administration of justice in the City Court by establishing and enforcing a schedule of arbitrary, unreasonable and excessive fines for individuals charged with violating the Vehicle and Traffic Law, thereby discouraging guilty pleas and causing unnecessary appearances in court, had not been substantiated. In our opinion, the charge is supported by a fair preponderance of the evidence (notably, the respondent's own testimony), and the Referee's finding in this regard should be disaffirmed and the charge sustained.

The findings of the Referee with respect to the charges contained in the petition are confirmed in all other respects.

Accordingly, the motion and cross motion are granted in part and denied in part to the extent indicated above.

As to the measure of discipline to be imposed, former section 429 of the Judiciary Law authorizes the removal of inferior court Judges "for cause", and, in this context at least, "cause" has been defined to include "general neglect of duty, delinquency affecting general character and fitness for office

* * * oppressive and arbitrary conduct, reckless disregard of litigants' rights, and acts justifying 'the finding that * * * [the] future retention of office [by a Judge] is inconsistent with the fair and proper administration of justice'" (Matter of Kane v. Rudich, 256 App. Div. 586, 587, 10 N.Y.S.2d 929, 930; emphasis supplied; see, also, Friedman v. State of New York, 24 N.Y.2d 528, 539-540, 301 N.Y.S.2d 484, 493-94, 249 N.E.2d 369, 376-377). The guidelines for judicial conduct are codified in part 33 of the Rules of the Administrative Board of the Judicial Conference (22 NYCRR, part 33). Paragraph (5) of subdivision (a) of section 33.3 of the rules provides that a "judge shall dispose promptly of the business of the court." Paragraph (1) of subdivision (b) of the same section further provides: "A judge shall diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials" (22 NYCRR 33.3).

[4] In our opinion, the conduct as evidenced by the charges we have sustained constitutes a violation of the foregoing principles, and demonstrates an unwillingness or inability on the part of the respondent to diligently discharge his adjudicative and administrative responsibilities. The resulting impediment to the due and proper administration of justice in the City of Newburgh renders the respondent's retention as Judge of the City Court improper, despite the absence of any finding of venality.

Accordingly, the respondent is removed from his judicial office.

APPENDIX D

- x
In the Matter of the Proceeding to Remove from Office Judge William MERTENS of the Civil Court of the City of New York.

Supreme Court, Appellate Division,
First Department.
March 25, 1977.
- x

Bernard Persky and Barry M. Vucker, New York City, of counsel (Gerald Stern, New York City, atty.), for petitioner.

Roy L. Reardon and Rolon W. Reed, New York City, of counsel (Simpson Thacher & Bartlett, New York City, attys.), for respondent.

Before STEVENS, P. J., and MARKEWICH, MURPHY, SILVERMAN and LYNCH, JJ.

PER CURIAM.

This is a proceeding for the removal of Honorable William Mertens, a judge of the Civil Court of the City of New York.

On October 3, 1975, after an investigation of complaints of judicial misconduct, in accordance with the then Section 43, Paragraph 6, of the Judiciary Law, the Temporary State Commission on Judicial Conduct (the "Commission") submitted a report to the Appellate Division, First Judicial Department, recommending the commencement of proceedings to remove from office Civil Court Judge William Mertens. The Commission also submitted proposed charges to be served upon Judge Mertens. By order of the Appellate Division, First Judicial Department, dated December 12, 1975, pursuant to Section 429 of the Judiciary Law, the Commission was designated as Petitioner to prepare and serve charges on Judge Mertens, and Supreme Court Justice Joseph DiFede was designated (as Referee) to hear evidence, make appropriate findings, and report to the Appellate Division.

In accordance with the Appellate Division's direction, the Commission served a petition dated December 15, 1975 containing 101 numbered charges. Hearings were held before Justice DiFede from March 15, 1976 to May 25, 1976. Over 6,700 pages of testimony were taken and numerous and voluminous exhibits were received. Thereafter the parties submitted briefs.

With extraordinary diligence and promptness, Justice DiFede on July 30, 1976 prepared and submitted to this Court an exhaustive and painstaking report. In the course of that report, he sustained 50 charges, 36 in full and 14 in part.

Briefs in support and in opposition to the report were then filed in this court, the reply brief being filed November 3, 1976, and the matter now comes before us for decision.

Jurisdiction

This proceeding was instituted pursuant to the provisions of former §22 subd. i of Article 6 of the State Constitution, and former §429 of the Judiciary Law, which read in part as follows:

State Constitution, Art. 6 §22 subd. i:

> A judge of the courts for the city of New York established pursuant to section fifteen of this article, . . . may, in the manner provided by law, be removed for cause or retired for disability after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence.

Judiciary Law, §429:

> A judge of the courts for the city of New York established pursuant to section fifteen of article six of the constitution, . . . may be removed for cause or retired for disability, as provided by the constitution, by the appellate division of the supreme court.

Section 22 of Article 6 of the State Constitution was amended and former subdivision i was eliminated by constitutional amendment, whose effective date was September 1, 1976 (State Constitution, Art. 6, §36-c). The amendment provided for a new procedure for censure, suspension, or removal for cause or compulsory retirement for disability of "any judge or justice of any court in the unified court system." Art. 6, §22, subd. a. In essence, these powers are ultimately vested in a court on the judiciary, subject to permissive appeal to the Court of Appeals; the Appellate Division apparently does not have removal jurisdiction with respect to cases governed by the new procedure. Judiciary law §429 was repealed by L.1976, ch. 691, §2, effective September 1, 1976. However, §3 of the repealer statute made the following provision for pending proceedings:

> (a) All proceedings commenced under or by virtue of section four hundred twenty-nine of the judiciary law and pending immediately prior to the taking effect of the repeal of said statute, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

The present proceeding, having been commenced and pending immediately prior to the taking effect of repeal of §429, is thus to be prosecuted and defended to final effect under the old procedure.

In recognition of the jurisdictional problems, the parties stipulated before the Referee on May 25, 1976 (SM 6723) that they would waive, to the extent that they had the right to do so, any jurisdictional defect that might result should the matter not be resolved by September 1, 1976 in the Appellate Division.

And, indeed, apparently in reliance upon the Appellate Division's continuing to have jurisdiction, the last brief was not submitted in this Court until two months after September 1, 1976.

[1] We think that in implementation of the transition from the old procedure to the new procedure, the Legislature had power to direct that proceedings commenced before the effective date of the constitutional amendment should be governed by the former procedure, and we thus agree with the parties that we have jurisdiction to continue the matter.

Respondent's Judicial Performance as to Matters Not Charged

Petitioner states:

> Petitioner has conceded throughout these proceedings that there is no question as to Respondent's industriousness; nor is there any allegation of corruption.

The Referee has stated:

> All witnesses conceded that Respondent is one of the most conscientious Judges on the bench. He is prompt, he is hard-working, he is a strict disciplinarian, he is a competent and able Judge - by all accounts, he is a "no-nonsense judge," a "tough judge," a judge "who is all business," a "fair judge," a judge who wants cases to be settled or tried promptly without delay, a judge who works and follows the rules of the Administrative Judge, a judge who adheres strictly to the philosophy of the Conference and Assignment system, a judge who brooks no tactical delays, a judge who is devoted to the integrity of the court and a judge who is constantly searching for the truth.
>
> No one ever impugned the integrity, the honesty or the industry of Respondent. The charges against him deal solely with his alleged lack of judicial temperament in violation of the cited canons.

With such an excellent record in all other areas of judicial performance, it is particularly painful that there should be these very serious charges against Respondent in the area of judicial temperament and demeanor.

* * *

[2] As a preliminary to our discussion as to particular complaints here involved, we wish to state our view that it is not improper for a judge to be alert, to participate actively in settlement conferences, jury selection, or trials, to be strict in applying rules of the Conference and Assignment system (referred to below) very chary of granting adjournments, or even ready to refer cases of fraud or improper conduct to the appropriate authorities. A judge need not be passive or timorous. He should control his courtroom. A judge must be courteous, dignified, and impartial. With the overwhelming majority of our judges, the problem simply does not exist. If they do what they think is right, they may occasionally be reversed; differences of opinion are inevitable; but they do not come anywhere near to judicial misconduct.

Previous Complaints

For some years there have from time to time been complaints about Respondent's alleged breaches of judicial decorum, particularly in relation to allegations of rudeness, and insulting, high-handed, and arrogant behavior to litigants and lawyers. These complaints have been, among others, made to the Administrative Judge of the Civil Court of the City of New York who testified in support of Respondent and who said that the complaints were "no more frequent" with respect to Respondent than with many other judges. (SM 5251) However, Respondent testified that the Administrative Judge did suggest to Respondent that "perhaps I just be careful and watch myself as we went along." (SM 6086)

On June 2, 1972, Respondent was called before the Judiciary Relations Committee of the Appellate Division, First Department, and questioned with respect to his conduct in the case of Ruane v. City of New York (which is also the subject of Charge 4 in this proceeding). In that case it was charged that Respondent not only participated in the questioning of Mrs. Ruane, the plaintiff, in a way that departed from his role as an impartial judicial officer, but that after the parties determined to settle their case, Respondent excoriated Mrs. Ruane in open court in the presence of Mrs. Ruane's 15 year old daughter, calling her behavior "disgusting," stating that she had acted out of personal greed, and accusing her of attempting to misrepresent the facts to the court. During this, the daughter was crying. He also accused Mrs. Ruane's attorney, Mr. Gottlieb, of improper conduct. As a result of this complaint, Mr. Justice Hecht, in his capacity as Chairman of the Judiciary Relations Committee gave the following sharp admonition to Respondent on September 27, 1972:

> CHAIRMAN HECHT: . . . It is our opinion that your conduct was highly improper. The Committee was deeply disturbed, first, with the manner in which you conducted the examination of Mrs. Ruane. We feel that anyone viewing such an examination would

reasonably conclude that you did not believe Mrs. Ruane's testimony and that you made a determined effort to convey that to the jury. This is wrong. Even more disturbing were the statements made in open court following settlement, first in the absence, then in the presence of the jury. You took advantage of your position as a judge to excoriate publicly a member of the bar and a litigant. You charged them with criminal conduct and then added that you would seek an investigation by the Coordinating Committee. You were not only a complainant, you were judge and jury over the issue of misconduct which you raised. What is even worse is the complete insensitivity on your part in making your accusations in the absence of Mr. Gottlieb and in the presence of Mr. Ruane's 15-year old daughter. We expect that a person of your experience - indeed any member of the Judiciary - would recognize the importance of a mother-daughter relationship, especially where there is only one living parent. You did not even spare or consider the feelings of Mrs. Ruane's daughter. As to Mr. Gottlieb, as wrong as your statements would have been in his presence in open court, they were far worse in his absence. You failed in your obligation to a member of the Bar to give him notice so that he might appear and be heard, to lend some balance to a record such as this which attacks his professional reputation. . . . You distorted the nature of both the pre-trial conference and trial by jury. We agree that a judge, under appropriate circumstances, is justified in sending to the Bar Association a complaint against an attorney. . . . However, we regard the procedure of open court statements criticizing the ethics of lawyers or special 'hearings' used to level charges against them as wrong. Moreover, Judge, no matter how laudable your aims might be, respect for due process safeguards applies to lawyers and litigants in your courtroom. The robe you wear is a symbol of far more than a person who makes decisions in court. It symbolizes justice and impartiality. Just as any other important and sensitive power, yours, as a member of the bench, must be used with caution and restraint. A transcript has been made of

these comments. The purpose of this is to maintain a full record of these proceedings. We are providing you with a copy of this admonition and trust future conduct will be guided accordingly.

The Present Charges

There were 101 charges annexed to the present petition. These were summarized in the petition as follows:

> I. During calendar calls Judge Mertens acted in an injudicious, intemperate and discourteous manner by, among other things, shouting at and being rude to people appearing before him, behaving in an abusive, demeaning or humiliating manner, or acting impatiently, irascibly or disrespectfully to attorneys making applications . . .
> II. During conferences Judge Mertens acted in an injudicious, intemperate and discourteous manner by, among other things, shouting at or being rude to people appearing before him, cutting attorneys off or being unwilling to listen to people making applications before him, behaving in an abusive, degrading or embarrassing manner, or acting impatiently or irascibly . . .
> III. During the selection of juries Judge Mertens unduly interfered with the right of attorneys to participate in the jury selection process by, among other things, treating attorneys in a rude or demeaning manner, angrily discouraging or intimidating attorneys from questioning prospective jurors, or arbitrarily and unreasonably limiting the scope of the questioning of the panel . . .
> IV. During trials Judge Mertens acted in an injudicious, intemperate and discourteous manner by, among other things, shouting at and being rude to attorneys, litigants, witnesses or jurors appearing before him, addressing them in a sharp, caustic, demeaning or sarcastic tone, acting in an irascible or impatient manner, or treating people disrespectfully or abusively . . .
> V. Judge Mertens was injudicious, intemperate and discourteous in that the Judge publicly attacked the integrity of people appearing before him by, among

other things, accusing attorneys, litigants, witnesses, or doctors of lying, perpetrating frauds, presenting false claims, exaggerating injuries, "building up" medical bills, or misrepresenting facts to the court . . .

VI. Judge Mertens was injudicious and intemperate in that the Judge exerted undue pressure on attorneys to settle cases by, among other things, prejudging or adversely commenting upon the merits of a party's case, unnecessarily disparaging an attorney or litigant, or shouting at counsel and demanding that a case be settled . . .

VII. Judge Mertens was injudicious and intemperate in that the Judge exerted undue pressure on attorneys to settle cases by, among other things, threatening attorneys with the filing of complaints with prosecutorial, disciplinary or administrative authorities, referring to the compiling of "dossiers" on insurance companies' failure to bargain in good faith, or threatening retaliation for a refusal to settle in accordance with his recommendation . . .

VIII. Judge Mertens was injudicious and intemperate in that the Judge exerted undue pressure on attorneys to settle cases by, among other things, improperly refusing to honor attorneys' affidavits of actual engagement or otherwise arbitrarily denying reasonable requests for adjournments . . .

Of the 101 charges, the Referee, as we have said, sustained 50 charges, 36 in full and 14 in part.

Before us Petitioner has not deemed it necessary to ask us to overrule the Referee as to the charges he did not sustain. Accordingly, we confine ourselves to the consideration of the charges that the Referee did sustain.

The Referee heard and saw the witnesses and conscientiously and painstakingly resolved the facts. We accept the Referee's findings on the facts (with one or two exceptions, insignificant in number or effect for our purposes, where the Referee made some inadvertent errors). Accepting the Referee's findings as to the underlying facts, we must consider whether these findings amount to cause for judicial removal or censure.

We note that of the charges sustained, 33 (numbered "23" and up) relate to incidents after September 27, 1972, the date of the Judiciary Relations Committee's admonition.

Denial of Adjournments; The Conference and Assignment System

Respondent has been particularly industrious, vigorous, and effective in the implementation of the Conference and Assignment system in use in the Civil Court and in some parts of the Supreme Court. Under this system, cases are assigned to a group or team of judges. One of the judges has a conference with the parties with a view to settling the case. And if the case is not settled, he promptly assigns the case to one of the other judges for immediate trial, subject only to the trial schedule of the trial judge. The system has been extremely successful in eliminating calender congestion in the Civil Court and greatly reducing it in the Supreme Court. An extremely important element of the system is strictness in refusing adjournments once the case is assigned for trial. In an address by Judge Thompson, the then Administrative Judge of the Civil Court, before an American Judges Association Conference in Portland, Oregon, in October 1974, on "Pre-Trial Settlement Techniques," Judge Thompson describing the Conference and Assignment system concluded with these remarks:

> It is well-nigh impossible to obtain an adjournment once the case has been assigned to the trial judge. Any laxity in the handling of requested adjournments would result in a breakdown of the system because then the Court would lose the momentum and impact afforded by the prospect of immediate trial.

Respondent has been extremely strict in the application of these rules. The petition does not criticize Respondent for this. Nor do we.

[3] If some of us in some cases might have been more flexible in granting adjournments, Respondent's strictness was not improper, and a fortiori, was not misconduct. For the most part, they cannot even be called error, although a couple of cases have been called to our attention in which strictness did indeed legally amount to "abuse of discretion." But even that is not judicial misconduct. In connection with the grant or denial of adjournments, Respondent was merely exercising his judicial function, and that exercise, even though sometimes erroneous, was not misconduct.

In this respect, we disagree with the Referee who sometimes sustained charges on the basis of failure by Respondent to grant adjournments where the Referee deemed a more tolerant and understanding attitude to attorneys and litigants and to their exigencies would have been proper.

To the extent that the Referee sustained charges of misconduct on the basis of failure to grant adjournments, as distinct from the manner of doing so (Charges 1, 14[c], 28, 30[b], 43, 56, 59[b], 60, 71[b], 89[b], 95), we overrule the Referee's report and find such refusals not to amount to judicial misconduct.

Jury Selection

[4] We agree with the Referee and Petitioner that attorneys have a right to paricipate directly in the voir dire on selection of juries. The judge also has a right to participate in it, actively if he sees fit, though of course always impartially. He also has a right to control the attorney's questioning so as to limit questions to their proper function of determining whether the juror will be impartial and will decide on the basis of the law and the evidence, to avoid repetition, and in general to avoid excessively long and time-wasting voir dire or voir dire designed not toward selection of an impartial jury but toward conditioning the jury in favor of a particular side or view of the case. The degree of the judge's participation and control must largely rest in the judge's discretion. Apparently Respondent prefers the federal court method of jury selection, where the judge does substantially all the questioning, to the state court method. It may well be that in several cases Respondent controlled the voir dire too strictly and unduly limited the attorney's participation. These are matters of degree which may constitute an abuse of judicial discretion. In our view they do not constitute judicial misconduct. To the extent that the charges sustained by the Referee rest on the fact of such excessive control (rather than the manner of such control) we do not sustain and we overrule in part Charges 12, 17, 60(c) and 62.

[5-7] However, with respect to Charge 62, we agree with the Referee that it was improper - going far beyond abuse of judicial discretion - for Respondent not to accede to the attorney's request - three times made - to have a reporter present when the judge participated in and allegedly excessively controlled the voir dire. Respondent explains this on the ground that the voir dire was taking place in a jury selection room where there was no reporter present and he would have permitted the parties to record their objections when they returned to the courtroom. That is not sufficient. The parties are entitled to have a simultaneous stenographic record made. If the judge is acting judicially and formally - as he is if he presides at or participates in the voir dire - he is holding court there and the parties are just as much entitled to have a reporter there as in the courtroom. Whenever the judge is exercising his formal powers, he is holding court. We sustain so much of Charge 62 as is based on the failure to accede to the attorney's request to have a stenographic record of the objections and proceedings.

Participation in Trials

Closely related to the question of misconduct based on the judge's excessive participation in the jury selection process is that of his proper role in the conduct of the trial and particularly, the questioning of witnesses. Again, under our system, it is the lawyers who must carry the major burden of adducing the evidence, questioning the witnesses, etc. But even there, there is a proper role for the judge in clarifying matters in focusing the efforts of all parties on the relevant issues, etc. And in a non-jury case where the judge is the trier of the facts, so that it is his responsibility to try to arrive at the truth in his own mind, even greater scope properly exists for the judge's active participation.

[8] In that respect, we do not agree with the Referee as to Charge 85 and we do not find that charge to constitute misconduct. There in a non-jury case involving issues of fraud and study of financial records and transactions, book accounts, alleged diversions of funds, tracing items in books, etc., Respondent took a very active role in the questioning of witnesses. In a non-jury case, particularly of this type, we do not think this was misconduct. After some substantial evidence had been introduced by plaintiff, defendant's attorney said that there was no evidence yet of fraud. Respondent thereupon said that defendant's attorney was under an illusion if he thought there was no evidence yet of fraud although, of course, later evidence might refute that. In a non-jury case, this may be proper as the interests of justice are better served if attorneys know they have a case to meet than if through ignorance or overconfidence, they merely rely on a non-existent failure of their adversary's proof. Although Respondent may have been somewhat over-repetitious, forceful, and even sarcastic in these observations, we do not think they constituted judicial misconduct.

Respondent's Accusations Of Fraud
And Impropriety

Petitioner charges and the Referee has found that in many cases Respondent publicly attacked the integrity of people appearing before him by, among other things, accusing attorneys, litigants, witnesses, or doctors of lying, perpetrating frauds, presenting false claims, exaggerating injuries, building up medical bills, or misrepresenting facts to the court; and by threatening to take action against such persons because of such alleged conduct.

We must say that in a number of such cases Respondent's suspicions appear to have been not unreasonable, and in many, his conduct was not unprovoked. Charges 11, 18.

Again, an alert judge sitting in a busy trial and conference part may come to recognize the names of doctors which recur particularly frequently in support of litigants' claims or defenses, or even of doctors who apparently give affidavits far more frequently than they are willing to appear in court to support those affidavits.

[9] But a judge is a judge; not a prosecutor or an investigator. He may not act on suspicion. He must maintain an atmosphere of impartiality, and be impartial, even though his suspicions have been aroused. Parties must feel that if they have a claim, the judge will listen to it impartially, or let the jury listen to it. And they must be able to do so without fear that the judge has already made up his mind that they are dishonest, or exaggerating, or acting in bad faith and will probably cause them to suffer severe consequences beyond the loss of the particular case if they persist - e.g., prosecution, disciplinary proceedings, complaints to the Insurance Department, etc.

The Referee found that Respondent was far too ready and too hasty in making such threats which could only intimidate parties and counsel; and in this respect, we agree with the Referee in sustaining the portions of Charges 4, 5, 6, 11, 17, 18, 66(a) and 80(b), relating to the making of such charges and threats by Respondent.

[10] This is not to say that a judge should not refer cases of improper conduct to the appropriate authorities; or even in rare cases point out in a dignified way the inevitable suspicions that arise in a particular fact situation. But he must lean over backward and err on the side of making sure that he does not intimidate the parties from pursuing the legitimate claims, or improperly influence the jury.

In this area however, we do not sustain Charges 66(b) and (c) insofar as they relate to threats, as it does not appear to us that Respondent's conduct in those cases amounted to improper threats.

Judicial Temperament

Although the remaining charges are broken down into several categories, they amount in essence to a failure, if not a lack, of judicial temperament manifesting itself by shouting at parties, witnesses, and lawyers, rudeness, sarcasm, abuse and bullying toward them, unwarranted pressures to induce settlement, and some instances of extremely high-handed conduct and abuse of authority.

The Referee sustained a large number of these charges. The charges have been denied; and many witnesses testified to Respondent's proper behavior both on the occasions complained of and other occasions. But this type of improper conduct has been testified to in too many instances by too many lawyers for us to reject the Referee's findings as to these charges.

In case after case, the Referee has found that Respondent suddenly exploded in an angry shouting sometimes described as yelling and screaming at lawyers and witnesses. See, e.g., Charges 7, 12, 17, 18, 19, 26, 30(b), 43, 51(b), 59(b), 62, 63(b), 71(b), 75, 77, 80(b), 81, 83(b), 86, 89(b). We sustain those charges in this respect.

In one case, an attorney who had just come back to work after having a pacemaker installed in his heart answered a calendar for an office associate who was engaged in another trial and requested an adjournment. Respondent's response in denying the application was so harsh, "like a drill sergeant calling a private to task for one reason or another," that the attorney was visibly shaking, his hands were shaking (Charge 60).

Respondent was frequently rude, sarcastic, disparaging and abusive to lawyers. Charges 2, 30(b), 46, 54(b), 56, 59(b), 69(c), 71(b), 72, 75, 84.

Respondent was occasionally inconsiderate of young and inexperienced attorneys. Charges 8, 23, 81, 83(b).

On occasions Respondent lectured lawyers not to ask for adjournments in a manner described as "demeaning," as if we were "schoolboys" (Charge 47). Sometimes he made a rather long speech at the opening of court, explaining the Conference and Assignment system, indicating that adjournments were not likely to be granted and saying that lawyers were "lazy," "never prepared," "did not come to negotiate in good faith," that there were "too many phony cases" (Charges 55, 75).

During calendar calls, Respondent "shouted," was "very angry," "sarcastic," "abusive," "hostile" to attorneys who were asking for adjournments (Charges 14[a], 55, 75).

In two cases when, as the Respondent was in the act of excusing the jury, one of the jurors got up before the Respondent had finished, Respondent shouted at the juror, reproving him for starting to leave (Charges 30[b], 77).

Respondent sometimes made statements to juries after cases were disposed of, disparaging the attorneys and the good faith of the case. Charges 6, 10, 11.

In one case where he suspected fraud, Respondent, after deciding the issue for defendant and believing there was fraud on the plaintiff's part, shouted to have the doors to the courtroom closed and said in an angry manner he would refer the matter to the District Attorney (Charge 18). In that case, the successful attorney "tried to apologize" to the attorney whose case was thus criticized (SM 577).

Respondent used excessive pressure to force settlements.

He told insurance companies, in the course of settlement discussions, that he was keeping a dossier of companies that did not bargain in good faith, which he would refer to the Superintendent of Insurance (Charges 5, 8, 66[a]). He referred to one insurance company as "cheapskates" and "chiselers" (Charge 80[b]).

Respondent was described as arrogant, dictatorial, attempting to frighten parties into a settlement, demeaning, loud, degrading toward attorneys (Charges 12, 14, 39, 54[c]).

He was high-handed, arrogant, and abused his authority in a number of cases. On at least two occasions he required attorneys to remain in court even though one attorney was ill (Charge 1), and another attorney's case had already been adjourned (Charge 15). In a case in which he thought (perhaps justifiably) that injuries were being exaggerated, he demanded that an attorney turn over his entire file to Respondent for his examination (Charge 13).

In another case, after all the evidence was in, Respondent recommended a settlement for $25,000. Plaintiff rejected this. The jury brought in a verdict for $30,341. Respondent granted a motion for a new trial unless plaintiff consented to a reduction to $20,000 (Charge 3).

In one case, in which he thought the papers on an infant settlement case were insufficient, he yelled at the attorney, told the client that the attorney was incompetent and that the client should go to a doctor and that the attorney would have an affidavit drawn and the expense would be borne by the attorney (Charge 59[c]).

The extreme degree of Respondent's breaches of judicial temperament has been commented on by persons who appeared before him.

One lawyer said that in the last three years he had not found any judge to be as rude as Respondent (Charge 12). Other comments: "I have never seen a judge act that way" (Charge 17). "Have you ever seen anything like this?" (Charge 62). "He is something, isn't he"? "I never heard a judge address lawyers or myself in the manner [Respondent did]" (Charge 75).

Self-evidently, breaches of judicial temperament are of the utmost gravity.

As a matter of humanity and democratic government, the seriousness of a judge, in his position of power and authority, being rude and abusive to persons under his authority -litigants, witnesses, lawyers - needs no elaboration.

It impairs the public's image of the dignity and impartiality of courts, which is essential to their fulfilling the court's role in society.

Attorneys and litigants notice and commented on the ambience of "intensity" in the court (Charge 54[b]), and the lack of appearance of justice (Charge 17), and the apparent mistreatment of litigants and lawyers (Charges 33, 37, 59[c], 83[b]).

One of the most important functions of a court is to give litigants confidence that they have had a chance to tell their story to an impartial, open-minded tribunal willing to listen to them. And lawyers must feel free to advance their client's cause - within the usual ethical limitations - without fear of being subjected to unpredictable anger, abuse, or threats. Parties must not be driven to settle cases out of such fear.

Yet there are repeated instances where the attorneys reported such deficiencies - that they felt nervous, frightened and inhibited in the conduct of their cases for fear that Respondent might explode at them (Charges 12, 14, 54[c], 81, 83[b]); they felt "pushed around" (Charge 54[b]. Litigants and lawyers settled cases rather than expose themselves to Respondent's conduct (Charges 59[b], 62, 71[b], 75). Some lawyers said that they would prefer not to appear before Respondent again (Charges 54[c], 71[b]).

[11] The charges above referred to with respect to breaches of judicial temperament and decorum are sustained.

Sanctions

[12] Against these serious breaches of judicial temperament and decorum, with their very serious consequences, we must balance the fact that Respondent is an able, hard-working judge; that there is no suggestion of dishonesty; and that he is an elected judge, with a long and honorable career at the bar, in public service, and on the bench.

Our options as to sanctions are apparently removal, censure, or dismissal of charges.

We do not feel justified in removing Respondent. We think he should be severely censured.

Respondent is Censured.

All concur except MURPHY, J., who dissents in part in an opinion.

MURPHY, Justice (dissenting in part).

I agree with the majority's findings with regard to the charges but I disagree as to the penalty to be imposed upon the respondent. As is emphasized in the majority opinion, the respondent was admonished in 1972 by the Chairman of the Judiciary Relations Committee for the same type of misbehavior as is the subject of this removal proceeding. From the very fact that countless charges are now sustained against him, it is evident that the respondent did not heed the warning that was graciously extended to him in 1972. Instead, he continued his grossly abusive, discourteous, insensitive and insulting behavior as a member of the Bench. At a time when the Judiciary is under attack from many quarters, its critics can again reveal in the meek reproof now accorded the respondent for his "serious breaches of judicial temperament and decorum." The highly injudicious conduct of the respondent warrants his removal from the Bench.

APPENDIX E

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In the Matter of Edward J. FILIPOWICZ,
as City Judge of the City Court of
the City of Poughkeepsie.

TEMPORARY STATE COMMISSION ON
JUDICIAL CONDUCT, Petitioner,

v.

Edward J. FILIPOWICZ, Respondent.

Supreme Court, Appellate Division,
Second Department.
November 22, 1976.

- x

Gerald Stern, New York City (Frank A. Finnerty, Jr., Brooklyn and Bernard Persky, New York City, of counsel), for petitioner.

Bernard Kessler, Hyde Park, for respondent.

Before GULOTTA, P.J., and MARTUSCELLO, LATHAM, COHALAN, and DAMIANI, JJ.

PER CURIAM.

The respondent, a part-time Judge of the City Court of the City of Poughkeepsie, was appointed to that office for a four-year term in January, 1970 and to a further four-year term in January, 1974.

The petition contains 10 charges (subparagraphs A through J of Paragraph Sixth), one of which (subparagraph H) was withdrawn. The Justice of the Supreme Court to whom the issues herein were referred has submitted his report to this court, in which he concluded that a portion of the charges contained in subparagraphs C, F and G had been sustained and that the remainder of the charges contained in the petition had not been sustained. The petitioner moves to confirm the report insofar as it finds that the charges were sustained and to disaffirm the report insofar as it finds that the charges were not sustained. The respondent cross-moves to confirm the report insofar as it finds that the charges were not sustained and to disaffirm the report insofar as it finds that the charges were sustained.

With respect to subparagraph C, the Referee found that, in the course of proceedings to correct the transcript of a trial, the respondent had engaged in an ex parte communication with an attorney representing one of the parties in violation of Section 33.3(subd. [a] par. [4]) of the Rules Governing Judicial Conduct of the Administrative Board (22 NYCRR 33.3[a][4]).

With respect to subparagraph F, the Referee found that the respondent engaged in a private conversation with two police officers in connection with an arrest, thus giving rise to an appearance of impropriety.

In our opinion, the Referee's findings with respect to subparagraphs C and F are sustained by the evidence and should be confirmed.

The Referee found that subparagraph G, which charged the respondent with giving false testimony before the Temporary State Commission on Judicial Conduct, had been sustained in part. In our opinion, the charge contained in subpargraph G, insofar as it was sustained by the Referee, is not supported by a fair preponderance of the evidence and the Referee's finding in that respect should be disaffirmed. The findings of the Referee with respect to the charges contained in the petition are confirmed in all other respects.

Accordingly, the Petitioner's motion is granted to the extent that the Referee's findings sustaining a portion of the charges contained in subparagraphs C and F are confirmed, and the motion is otherwise denied. The respondent's cross motion is denied to the extent that the Referee's findings sustaining a portion of the charges contained in subparagraphs C and F are confirmed, and the cross motion is otherwise granted.

In substance, the foundation for the portion of the charge contained in subparagraph F which we have confirmed commenced with the respondent's appearance at the Poughkeepsie police station in connection with criminal charges made against one Harold Ahrens, his friend or acquaintance. It was alleged that, while driving through an intersection, Mr. Ahrens' automobile brushed against one of the complaining police officers. Thereafter, and pursuant to a telephone call, the respondent appeared at the police station. It is alleged that the charges were withdrawn after he engaged in a conversation with the police officers and that a general release, drawn by the respondent, was executed by Mr. Ahrens, in which he released the City of Poughkeepsie from any claim arising from his arrest.

There is some conflict in the testimony as to whether the respondent negotiated the withdrawal of the charges or whether that was accomplished between the parties themselves. In view of the subjective nature of the testimony we have given the respondent the benefit of doubt on that issue.

Six present or former City Judges or Town Justices testified that they often received telephone calls at their homes summoning them to police stations to arraign defendants and set bail. Some of them testified that in such cases they often arraigned, and thereafter tried, persons who were former clients because there was no alternative to such procedure.

[1] While we realize that in small communities, part-time judges or justices, many of whom are principally engaged in the practice of the law, know many, if not most, of the people in their community, and may, in exigent circumstances, be required to preside over arraignments and bail applications, we cannot countenance the apparently prevailing practice in which such judicial officers sit in judgment in cases in which they formerly had an attorney-client

relationship with the litigant. Hereafter any such conduct by a judicial officer, whether full or part-time, may well be met with removal of the offender from office.

[2] While the charges which have been confirmed do not justify the extreme penalty of removal, we find that the respondent's conduct was improper and he should be, and hereby is, censured therefor.

APPENDIX F

STATE OF NEW YORK
COURT ON THE JUDICIARY
- x
In the Matter of the Proceeding
Pursuant to Section 22 of Article
VI of the Constitution of the State
of New York in Relation to

FRANK VACCARO

Justice of the Supreme Court
Second Judicial Department
- x

Per Curiam:

On May 11, 1976, a proceeding against respondent, a Justice of the Supreme Court in the Second Judicial District, was commenced by order of the Court on the Judiciary. Subsequently, a new Court on the Judiciary was appointed to conform to Section 22 of Article VI of the New York Constitution. The matter was referred to a Referee to conduct a hearing and make findings with respect to the charges against respondent. A hearing was held before the Referee from March 7 through 29, 1977.

Fourteen acts of judicial misconduct, contained in eleven charges, were alleged by the State Commission on Judicial Conduct against respondent. The Referee sustained four of the charges: Charge VIII (a) (the acceptance of a weekend stay at Kutsher's Country Club for respondent and his wife paid by the law firm of respondent's longtime close personal friend); Charge VII (registering under the name and address of a partner of that same law firm without that person's permission, thereby concealing respondent's identity); Charge X (failing to disqualify himself from cases in which his law secretary's law partner appeared in respondent's court on behalf of one of the parties); and Charge XI (failing to disqualify himself from presiding over a non-jury Small Claims trial in which his close friend was a party defendant).

Based upon an examination of both the transcript of testimony and Referee's report, we confirm the Referee's findings which were established by a fair preponderance of the credible evidence. As to the charges reported as not sustained, we agree with the Referee that the evidence presented on each was insufficient. Furthermore, we confirm the Referee's procedural rulings and find that respondent was accorded due process throughout. The affirmative defenses are without merit and are dismissed. The interim procedural rulings of the Referee a e confirmed. The sole question remaining for our consideration is the sanction to be imposed.

In order to determine the appropriate sanction, it is necessary to examine briefly the confirmed charges. In connection with Charge VIII (a) we note that respondent exercised poor judgment and engaged in injudicious conduct. Although there is no evidence that respondent gave either his longtime friend, Gerald Garson, or his law firm special favor or treatment in any matter before him, despite the long-standing intimate and personal social relationship with his longtime friend, the Referee found that it was injudicious of respondent to spend a weekend with his wife at a hotel as a guest of a law firm because such is beyond the permissible ordinary social hospitality permitted by the Code of Judicial Conduct (Canon 5 [c][4][b]). With respect to Charge VII, it is clear that respondent signed Louis Goldberg's name when registering at Kutsher's at the behest of one of Goldberg's partners. The Referee found, however, that although respondent may not have intended to conceal his identity, he did create the objective impression on the records of the hotel that he was Louis Goldberg which was both injudicious and in violation of the Canons of Judicial Ethics (Canons 1, 4 and 13).

Charge X related to conferences or settlements in cases where Robert G. Stern, a law partner of respondent's law secretary, appeared before respondent. The Referee found that respondent participated in only a handful of such cases over a three-year period while he was assigned as one part of a "troika" which handled thousands of cases. It must be observed that the settlement procedures described were carried on virtually publicly and mostly by the same groups of lawyers for both sides, long accustomed to dealing with each other in a mass effort to dispose of great numbers of calendar clogging cases in what might be characterized as a settlement mill. In the circumstances there could have been no opportunity, even assuming such a desire, for anything untoward to have taken place. Nevertheless, it was an exercise of poor judgment for respondent to have presided in these cases. In view of the large number of cases presented daily to respondent, the Referee found respondent's conduct here "excusable". Nevertheless, the Referee did find a technical violation of the Canons, even though no injustice of any kind was shown to have occurred.

Finally, on Charge XI, although it was a judicial impropriety and a violation of the Canons of Judicial Ethics for respondent to sit on a case where his longtime friend appeared as a party-defendant in a non-jury Small Claims Part, the case involved only a $106.81 claim and there were no allegations or evidence that the defendant received any preferential treatment or that injustice was perpetrated. However, the improper act did, as we have said, convey the impression of impropriety, and it is the primary basis for the sanction we impose.

We find no evidence in this record of corruption, general neglect of duty, acts violative of law inspired by self-interest, oppressive and arbitrary conduct, reckless disregard of litigants' rights or any finding that respondent's future retention of office is inconsistent with the fair and proper administration of justice in this State (Friedman v. State, 24 N.Y.2d 528, 540). Nor is there evidence of a "repeated and unrelenting display of unjudicial temperment" (see, Matter of Waltemade, 37 N.Y.2d [a], [hhh]). Thus, we conclude that there is insufficient evidence to indicate that respondent lacks the ability or fitness to perform the duties imposed upon him as a Supreme Court Justice. Accordingly, removal is unwarranted.

Nevertheless, with respect to the charges sustained and confirmed, respondent's conduct was injudicious and improper and, as such, constituted a serious transgression of the Code of Judicial Conduct and the Canons of Judicial Ethics. High standards of conduct must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A judge's official conduct should be free from the appearance of impropriety in his personal behavior on the bench and his conduct in everyday life should be beyond reproach. He may engage in social and recreational activities so long as these do not detract from the dignity of his office or interfere with the performance of his judicial duties. Furthermore, neither a judge nor a member of his family residing in his household should accept a gift or favor from any attorney or from any person having or likely to have any official transaction with the court in which he presides, except for reasonable exchanges incident to family, social or recreational relationships or activities.

We conclude, therefore, that respondent's conduct violated the Code of Judicial Conduct (Canons 1, 2, 3 [C] [1]; 5 [A]; 5 [C] [1], [4], [5]), the Canons of Judicial Ethics (Canons 1, 4, 13, 32) and the Rules Governing Judicial Conduct of the Administrative Board of the Judicial Conference of the State of New York (22 NYCRR 20.6 [now 20.4], 33.5 [c] [3]). Under these circumstances, respondent should be suspended without pay (Matter of Pfingst, 33 N.Y.2d [a]) for a period of six months commencing from the date of the order to be entered on this determination.

Markewich, J.P., Moule, Cardamone, Kane and Main, JJ., concur.

APPENDIX G

STATE OF NEW YORK
COURT ON THE JUDICIARY

PRESENT, HON. Arthur Markewich, Presiding
HON. Joseph A. Suozzi
HON. Milton Mollen
HON. Reid S. Moule
HON. Richard J. Cardamone

- x
In the Matter of the Proceeding pursuant to Section 22 of Article 6 of the Constitution of the State of New York in Relation to HUBERT RICHTER, a Judge of the City Court of Kingston, Third Judicial Department.
- x

PER CURIAM:

Respondent, a Judge of the City Court of Kingston, has pending against him four separate charges, divided into specifications, of judicial misconduct in violation of established standards. We have had the benefit of the Referee's meticulous report of 68 pages, containing his findings and the reasons therefor, and have heard argument by counsel for both sides. Except where specifically stated to the contrary, we confirm the Referee's findings as well as his procedural rulings.

Charge I
The Malanios Confrontation

Malanios and two co-defendants had pled guilty to a Class A misdemeanor before respondent to cover a charge of attempted escape from the Ulster County Jail. All three were second felony offenders, awaiting sentence in County Court for separate felony convictions. The reduced plea before respondent was designed to expedite swift transfer to State Prison, to which it was expected they would be committed by the County Judge. Though sentence by respondent was set for the day following the felony sentence, the Warden, desiring quick riddance of these troublesome guests, dispatched them instead on the very same day to respondent's court for immediate sentence. This occurred on a Thursday which respondent, being a part-time judge, usually devoted to his private office practice. On Thursday his judicial seat was taken as usual by a substitute judge. The latter, unable to impose sentence for respondent, directed return of the prisoners to the County Jail. The Warden called respondent on the telephone, communicating his desire to get the prisoners on their way to Dannemora, and asked him to impose sentence forthwith; respondent agreed, and they were sent, handcuffed, to respondent's law office, without notice of any kind, either to their assigned counsel or to the District Attorney.

Malanios' co-defendants were each given jail sentences of one year, to run concurrently with those imposed in County Court. Malanios was sentenced to the same term, but to be served consecutively to the felony sentence. He complained vociferously and abusively, claiming a prior agreement for the treatment accorded the others. Respondent himself testified that his reaction was to come out from behind his desk and seat himself on the edge, folding his arms, and that he said, "Court is over now, it's Nick and Rick, and any way I can oblige you, I will be happy to do." Malanios responded with continued profane and obscene abuse, whereupon respondent directed his removal, following him to the door "a foot or two foot away from him," and admonished him to be quiet. Apparently the incident ended thus.

Later that day, respondent was called on the phone by Malanios' lawyer and his error in proceeding in the absence of counsel called to his attention. He stated that it had slipped his mind and he forthwith arranged to vacate the sentence, which he followed by re-sentence in proper fashion, to a more lenient term.

The charge specifications will now be taken up. It is charged (specification [a]) that respondent was intemperate, injudicious and abusive and exceeded his authority by conducting the sentencing in the absence of counsel and without giving notice that it was to be held earlier than scheduled. This is literally true. It is hornbook law that, as respondent acknowledged, error was committed which would have been reviewable on appeal had it gone uncorrected. The prisoners' testimony that they had warned respondent of the absence of counsel is not worthy of belief, and, when all the surrounding circumstances are taken into account, it is obvious that respondent's error was one of sheer inadvertence [See Charge II, below]. In terms of prejudice to anyone, the error was harmless. No inference of wilful misconduct may be drawn as to this specification, and we agree with the Referee in not sustaining this charge.

Specification (b) charges injudicious conduct in that respondent carried on the sentencing in a private law office. Again, this is literally true. City Court facilities in Kingston were not exactly commodious. Respondent's regular courtroom, occupied that day by his substitute, was the City Council Chamber. The evidence before the Referee is that use of facilities other than a courtroom for court proceedings in rural and semi-rural areas of the state is not uncommon. We know of no prohibition in law thereof, as long as the facility used is open to the public and otherwise lends itself to the purpose. The court had no choice in these circumstances but to use the office for the described purpose. The community is responsible for providing court facilities, and not respondent. We agree with the Referee in not sustaining the charge.

Specification (c) charges failure to keep a proper record of the proceeding. We are not told wherein this was judicial misconduct. The evidence was to the effect that no provision is made in this type of court for a qualified court reporter to attend at sentences. It is not shown that, in this court not of record, respondent failed to keep his own written record. Again, if respondent should have had a reporter record the sentence, the community should have provided such a service, and it did not. The Referee did not sustain the charge, and we agree.

The next two specifications, (d) and (e), must be read together: They allege that respondent engaged in an angry physical confrontation with Malanios, expressing his intention and willingness to engage in a fight with him. Actually, there was no physical contact between them in the two aspects of confrontation, one at the desk, and the other at the door. The first was calm, and, had it not been followed by the scene at the door, might be deemed injudicious only in that it was silly. In words, it was a challenge, but Malanios was obviously not in a position to pick up the gauntlet. But the provocation--an explanation, not an excuse--continued, and, as respondent acknowleged, he became angry, and continued the verbal conflict. Nevertheless, respondent's conduct was unseemly, injudicious, and intemperate, and we confirm the Referee's report, sustaining this charge to the extent we indicate, i.e., engaging in an angry verbal exchange of words with a defendant and leaving the bench to continue it in the immediate presence of the prisoner.

Charge III
The Schiskie Confrontation

This charge, in two specifications, is reminiscent of the Malanios matter. In specifications (a) and (b), respondent is charged with having been intemperate, injudicious and abusive and having acted in excess of authority by leaving the bench, approaching a defendant, angrily demanding an apology from him, and striking him. Schiskie was on the floor in the custody of three officers. Schiskie, a longtime offender, had been arraigned before respondent on several charges involving appropriation of a truck loaded with television sets. When bail was set at $10,000, after respondent at first forgot to do so, the defendant called respondent several unprintable names. Respondent directed the officers to bring defendant closer to the bench, whereupon, as respondent testified, defendant "violently objected, ki ed, fought them, and prevented it . . . continued to scuffle and . . . was knocked to the floor." Respondent said that "after sometime" while Schiskie was still struggling and "was in serious danger . . . of being hurt," he "went over to Schiskie" bending "over at the waist," and said to him "Is this what you want? Why don't you apologize?" Continuing, he said that defendant attempted three times to spit at him, which was when he "gave him the motion with the back of the left hand," not intending to hit him but "to show . . . contempt for him." Respondent's description of Schiskie's conduct was completely corroborated by a disinterested witness, waiting for disposition of his traffic infraction. (Possibly irrelevant but interesting is the fact that the corroborating witness was later convicted and fined by respondent.) The request for apology met with another stream of Schiskie's obscenities. When defendant fell to the floor, continued the witness, respondent left the bench, stood over him and attempted to restore order, "trying to reason with him," while the defendant tried to swing at him. Schiskie alone said respondent struck him; the witness waiting for disposition of his case said that respondent did no more than block Schiskie's swing; respondent himself indicated that whatever contact there was derived from his contemptuous gesture of dismissal. He described it at one time as that of a king dismissing a subject. Schiskie alone said that respondent kicked him. The evidence against the specification which charged striking is overwhelming, and that specification is not sustained either by the Referee or by us. However, to the extent that respondent "left the bench and . . . demanded an apology from the defendant who was on the floor

in . . . custody," we disagree with the Referee and sustain that specification. We refrain deliberately from characterizing the manner in which this was done as "angrily," but we consider it injudicious and an impropriety for a judge to leave the bench in the circumstances described and to make himself a participant in the action. If the officers present were doing their duty--and apparently they were--it was not for respondent to become involved by his immediate presence at the scene. If there was risk of injury to defendant, the court could have controlled matters by directions from the bench. Neither here, nor in the Malanios situation was it appropriate for respondent to leave the bench and approach the defendant.

Charge II
False Swearing

It is charged that, at a preliminary hearing before the Commission on Judicial Conduct, respondent had sworn falsely in respect of several aspects of the Malanios affair. Specification (a) charges a false denial of his having approached Malanios in angry confrontation. It does not pinpoint a particular moment or precise place of occurrence of respondent's confrontation with Malanios, and adjudication of the charge requires resolution of semantic problems. Even one accustomed to deciding intricate issues of fact almost on a daily basis finds difficulty in understanding precisely what answer was required by the questions asked before the Commission as to the details of this episode. They did not precisely advert respondent as to what was sought by way of answer. Specification (b), concerning alleged threats by Malanios to respondent and his family, leads to an equally inconclusive result. There seems to be no doubt that Malanios, in venting his spleen upon the judge who had just passed judgment upon him, used expressions which, subjectively considered, might be regarded as threats or might not be. A well-seasoned judge would probably not have taken them seriously for a moment. In the context of both (a) and (b), requiring interpretation of language, it cannot be said that respondent's description of what Malanios said was intentionally false, or even false at all. It must also be borne in mind that this specification rests to a great extent upon the evidence of Malanios and his co-defendants, and we have commented elsewhere upon their credibility.

Specification (c) characterizes as false respondent's statement to the Commission that the defendants being sentenced were not handcuffed. There is no doubt that they were. But respondent explains that, in recollection, he thought they were not; it was his custom to have handcuffs removed when defendants were arraigned for sentence. This incident occurred, it must be considered, in circumstances which were unusual and undoubtedly confusing: unexpected production of the prisoners for sentence at an unexpected time in an unusual place for exigent reasons, and for which respondent was completely unprepared. It is understandable that recollection might be faulty against this background. It is at the very least doubtful that the statement was wilfully false. A mistake in testimony does not constitute false swearing.

The last specification, (d), requires a credibility judgment to be made in its determination: whether to credit Malanios and his co-defendants in their claims that respondent had been adverted by them to the absence of counsel

for both sides at the arraignment for sentence. There is a direct conflict between respondent and these witnesses. To begin with, their credibility is less than good. They were contradicted by their own counsel's testimony on an important matter, the circumstances of their plea of guilty, at which, said they, respondent had made a specific promise as to the sentence to be imposed. They had criminal records. In contrast, respondent's reputation for veracity was attested to by character evidence, given by impressive witnesses. The picture given by the hearing record is of a forthright man. His own comment as to proceeding in counsel's absence is typical: "I was stupid on that one." Indeed, the greater part of the evidence against him came from his own lips. Nor does the charge stand up when measured by respondent's own conduct when, on being called on the phone by Malanios' lawyer and having the error called to his attention, he promptly vacated the sentence and scheduled re-sentence with counsel present.

As to Charge II we confirm the report of the Referee to the effect that none of its four specifications was proven by a preponderance of the credible evidence, and the charge is not sustained.

Charge IV
Improper Sentences

It is charged that, during a period of five years, respondent failed to comply with the rules and procedures prescribed by law with respect to defendants appearing before him in that he set conditions, issued directives and imposed sentences which were improper and unauthorized by law, and that he accepted guilty pleas and thereafter improperly dismissed the charges.

Respondent's sentencing procedures were, to say the least, unorthodox, consisting largely of what may be described as "making the punishment fit the crime." Charge IV was broken down at the hearing into six specifications, into each of which were grouped sentences with like irregularities. All these cases involved minor matters.

The first such specification, unlike the others however, involves a single defendant, one Feltham, who was directed by the court, in addition to the conditions stated in a proper probation order, "to attend . . . a church, with instruction that it could be any church other than" a certain named church, and report to the court on the sermons, and also to do certain reading. This was not an enforceable order; indeed, after a certain time, it was no longer observed. The order was made after consultation with and consented to by the defendant's father, and was well motivated. Although the direction to omit a certain church is subject to criticism, we agree with the Referee that this act involved no judicial impropriety.

The second group consists of six sentences, some of which imposed probation for periods of time of insufficient length under CPL 65.00(3)(b). The probation department, without avail, called respondent's attention to the illegality. Respondent took the position that these sentences, though technically incorrect, were harmless error because he was empowered to terminate the probation at any time (CPL 410.90); he just did so in advance. He also imposed both

probation and a brief jail sentence in one case, and in three others illegally sentenced to both probation and a conditional discharge, forbidden by CPL 410.10; one of these was corrected at re-sentence and, as to the others, it appears that the discharges became nullities in the presence of the probation. All the cases in this group constituted rough justice; all could have been appealed, but none was. Errors of law, not impropriety were here involved.

The third and fourth groups consist of thirteen cases in which, having found defendants guilty, he either conditionally discharged or dismissed after the defendants had, on his order, made contributions to various charities. Though well-intentioned, the direction was completely improper. A judge is forbidden to solicit for charity; a fortiori, he may not direct contributions to charities, particularly where the recipient is specified. We, as well as the Referee, agree that the charges are sustained as to this group.

The fifth group represents another species of rough justice in which three defendants were directed to perform certain "voluntary work" for a specified period for a school, a church, and the Police Department, as conditions for discharge. The sixth consists of six cases in which similar work was done in return for dismissal. These directions were illegal. However, they occurred before December 1975 when the Appellate Division, Second Department said so in no uncertain terms. See People v. Mandell, 50 A D 2d 907. While dismissal is permissible in the interest of justice (CPL 170.40 and 170.30), the reasons were insufficient, but, it seems, not knowingly so. And respondent has prestigious company in thinking the work assignments proper; indeed, there is support for the opposite view. See Hon. Caroline K. Simon, "Needed: A New Look at Punishments," 49 N.Y. State Bar Journal 285.

In the entire panoply of specifications found in Charge IV, we have sustained as judicial impropriety only that having to do with the exacting of charitable contributions. The rest are either de minimis or consist of errors of law, not properly cognizable as judicial misconduct.

Conclusion

We have sustained the charges against respondent Hubert Richter of injudicious, abusive and intemperate conduct in the Malanios and Schiskie affairs in that he engaged in unseemly verbal confrontations with both defendants, (I[d], [e]; III[a]) in the course of which he left the bench for the immediate vicinity of each defendant, and there continued the conflict. We have also sustained the charge of judicial impropriety set out in the third and fourth specifications of Charge IV in that respondent improperly required thirteen defendants to make charitable contributions as a condition for dismissal of the criminal charges against them or imposition of a sentence of conditional discharge. There is nothing in the record--indeed, it is not even suggested to us--to the effect that respondent has been guilty of either corrupt or venal conduct. Actually, we are impressed with his openness and frankness, his earnestness, energy, and good intentions. For these reasons, we do not invoke the sanction of removal from the bench. Regarding our function to be educational as well as punitive, we turn to another possible resolution of this case.

"[T]he essence of the sanction imposed is not 'punishment' but a reprimand based on grounds bearing rational relationship to the interest of the State in the fitness of its judicial personnel." In Re Kelly, Fla. 238 So. 2d 565,569. "The function of this court is not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents. That purpose is accomplished in this case by this review and condemnation of respondent's conduct . . ." Matter of Waltemade, 37 N.Y.2d nn, III. We are of the opinion that the charges which we have sustained indicate a pattern of conduct which, if recognized by respondent to the extent that he promptly takes appropriate corrective action, may well result in his becoming a truly valuable member of the judicial community.

To exercise the judicial function properly, a lawyer must understand that, no longer an advocate, he has become a somewhat impersonal being, objective in outlook and action, never involved personally in the ongoing drama before him. Respondent had apparently never learned this before he was elected to the bench, so that, when he encountered a situation in the Malanios case which was beyond his ken, his response was the classic arrogance of the uninformed. He reacted instinctively, and became personally involved, with machismo taking over and good sense in full flight. This violent verbal reaction was unseemly, injudicious, and inexcusable. Further, it was a form of bullying and a misuse of his superior position as a judge. This was compounded two days later in the Schiskie matter where, again, uninstructed instinct took over, and the earlier episode was virtually repeated without change. A judge should not countenance that loss of dignity in his courtroom which demeans the processes of justice. Certainly he should not deal with any such episode by adding fuel to the fire by his own departure from proper conduct. "It is within a judge's power--indeed, it is his obligation--to 'protect the sanctity and dignity of . . . courtroom proceedings . . .' [Citation] A judge's criminal contempt power provides him with the judicial muscle to cope with such situations . . ." Gregory v. Thompson, 500 F. 2d 59, 64.

The sentencing irregularities--even those involved in the charges we have not sustained by a preponderance of credible evidence as judicial improprieties--are part of the same pattern. We find here a judge who apparently did not take the trouble to acquaint himself with the standards of sentencing set out in statute and case law. He rejected professional advice thereafter. The wide discretion enjoyed by a sentencing judge is not boundless. Conditions set in a non-custodial sentence must be condign to the case, and it goes without saying that they must be legal. Respondent displayed his disdain for such limitations. His pattern was that of the traditional country squire, dispensing both largesse and a certain type of justice with equally open hands. His attitude is exemplified by the royal gesture toward Schiskie, characterized by the latter as a blow. To use the expressive and rich argot of the street, respondent, without any attempt to do it right, "played it by ear." It is bad enough that he has been compelled to exercise the judicial function in a makeshift courtroom and without a court reporter; he should not be a makeshift judge but one interested in the appropriate fulfillment of his duties.

If respondent puts his mind to it to learn what is to be expected of a judge, and does so with the energy he has displayed in his rather undirected discharge of judicial duties, this valuable lesson to him will not have been lost.

Respondent should be severely censured.

APPENDIX H

TABLE OF NEW CASES CONSIDERED BY THE COMMISSION FROM SEPTEMBER 1, 1976, TO DECEMBER 31, 1977

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED			TOTALS
		PENDING	DISMISSED	OTHER ACTION*	
INCORRECT RULING	363				363 (28.5%)
COMPLAINTS AGAINST ATTORNEYS, FEDERAL JUDGES, HEARING OFFICERS	21				21 (1.5%)
DEMEANOR	46	46	51	9	152 (12%)
DELAYS	14	2	5		21 (1.5%)
CONFLICTS OF INTEREST	14	51	57	6	128 (10%)
BIAS	23	2	13		38 (3%)
CORRUPTION	7	8	1	1	17 (1.5%)
INTOXICATION		1	2	1	4 (.5%)
INCOMPETENCE	2	2	1	1	6 (.5%)
IMPROPER POLITICAL ACTIVITY	6	7	4	2	19 (1.5%)
RECORDS-KEEPING, TRAINING REQUIREMENTS, POOR ADMINISTRATION	11	25	11	10	57 (4.5%)
TICKET-FIXING	3	351	20	49	423 (33%)
MISCELLANEOUS	5	10	8		23 (2%)
TOTALS	515 (40.5%)	505 (40%)	173 (13.5%)	79 (6%)	1272 (100%)

*"Other Action" includes admonitions, suspensions, removal proceedings initiated by the Commission, and resignations prompted by Commission investigations.

TABLE OF ALL CASES CONSIDERED BY THE COMMISSION
FROM SEPTEMBER 1, 1976, TO DECEMBER 31, 1977,
INCLUDING 1272 NEW COMPLAINTS AND 162 CASES
LEFT PENDING BY THE TEMPORARY COMMISSION

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED			TOTALS
		PENDING	DISMISSED	OTHER ACTION*	
INCORRECT RULING	363				363 (25%)
COMPLAINTS AGAINST ATTORNEYS, FEDERAL JUDGES, HEARING OFFICERS	21				21 (1.5%)
DEMEANOR	46	57	112	23	238 (16.5%)
DELAYS	14	4	8	1	27 (2%)
CONFLICTS OF INTEREST	14	60	79	8	161 (11%)
BIAS	23	2	15		40 (3%)
CORRUPTION	7	11	12	3	33 (2.5%)
INTOXICATION		2	3	2	7 (.5%)
INCOMPETENCE	2	3	4	3	12 (1%)
IMPROPER POLITICAL ACTIVITY	6	7	6	4	23 (1.5%)
RECORDS-KEEPING, TRAINING REQUIREMENTS, POOR ADMINISTRATION	11	25	11	10	57 (4%)
TICKET-FIXING	3	353	20	53	429 (30%)
MISCELLANEOUS	5	10	8		23 (1.5%)
TOTALS	515 (36%)	534 (37%)	278 (19.5%)	107 (7.5%)	1434 (100%)

*"Other Action" includes admonitions, suspensions, removal proceedings initiated by the Commission, and resignations prompted by Commission investigations.

TABLE OF CASES LEFT PENDING BY THE
TEMPORARY COMMISSION AND REVIEWED BY THE COMMISSION
FROM SEPTEMBER 1, 1976, TO DECEMBER 31, 1977

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED			TOTALS
		PENDING	DISMISSED	OTHER ACTION*	
INCORRECT RULING					
COMPLAINTS AGAINST ATTORNEYS, FEDERAL JUDGES, HEARING OFFICERS					
DEMEANOR		11	61	14	86 (53%)
DELAYS		2	3	1	6 (4%)
CONFLICTS OF INTEREST		9	22	2	33 (20%)
BIAS			2		2 (1%)
CORRUPTION		3	11	2	16 (10%)
INTOXICATION		1	1	1	3 (2%)
INCOMPETENCE		1	3	2	6 (4%)
IMPROPER POLITICAL ACTIVITY			2	2	4 (2%)
RECORDS-KEEPING, TRAINING REQUIREMENTS, POOR ADMINISTRATION					
TICKET-FIXING		1		5	6 (4%)
MISCELLANEOUS					
TOTALS		28 (17%)	105 (65%)	29 (18%)	162 (100%)

*"Other Action" includes admonitions, suspensions, removal proceedings initiated by the Commission, and resignations prompted by Commission investigations.

TABLE OF ALL CASES CONSIDERED
SINCE THE INCEPTION OF THE TEMPORARY COMMISSION
(JANUARY 1, 1975, TO DECEMBER 31, 1977)

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED			TOTALS
		PENDING	DISMISSED	OTHER ACTION*	
INCORRECT RULING	640				640 (32%)
COMPLAINTS AGAINST ATTORNEYS, FEDERAL JUDGES, HEARING OFFICERS	84				84 (4%)
DEMEANOR	69	57	154	45	325 (16%)
DELAYS	34	4	15	8	61 (3%)
CONFLICTS OF INTEREST	20	60	92	15	187 (9.5%)
BIAS	41	2	19	3	65 (3.5%)
CORRUPTION	17	11	17	5	50 (2.5%)
INTOXICATION	3	2	3	2	10 (.5%)
INCOMPETENCE	5	3	5	4	17 (1%)
IMPROPER POLITICAL ACTIVITY	8	7	11	6	32 (1.5%)
RECORDS-KEEPING, TRAINING REQUIREMENTS, POOR ADMINISTRATION	11	25	11	10	57 (2.5%)
TICKET-FIXING	3	353	20	53	429 (21.5%)
MISCELLANEOUS	21	10	8		39 (2%)
TOTALS	956 (48%)	534 (27%)	355 (17.5%)	151 (7.5%)	1996 (100%)

*"Other Action" includes admonitions, suspensions, removal proceedings initiated by the Commission, and resignations prompted by Commission investigations.

END