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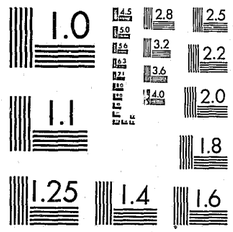

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ANNUAL REPORT

MF-1

New York State Commission on Judicial Conduct March 1979

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1979 ANNUAL REPORT
OF THE
NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

COMMISSION MEMBERS

MRS. GENE ROBB, Chairwoman

DAVID BROMBERG, ESQ.

HONORABLE RICHARD J. CARDAMONE

MRS. DOLORES DEL BELLO

HONORABLE HERBERT B. EVANS

MICHAEL M. KIRSCH, ESQ.

VICTOR A. KOVNER, ESQ.

WILLIAM V. MAGGIPINTO, ESQ.

HONORABLE ISAAC RUBIN
(Appointed December 15, 1978)

HONORABLE FELICE K. SHEA

HONORABLE MORTON B. SILBERMAN
(Served to December 15, 1978)

CARROLL L. WAINWRIGHT, JR., ESQ.

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MAR 23 1982
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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 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 January 1, 1978, through December 31, 1978.

Respectfully submitted,

MRS. GENE ROBB, Chairwoman
DAVID BROMBERG, Esq.
HONORABLE RICHARD J. CARDAMONE
MRS. DOLORES DEL BELLO
HONORABLE HERBERT B. EVANS
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(Served April 1, 1978,
to December 15, 1978)
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Commission Members

GERALD STERN, Esq.

Administrator

March 1, 1979
New York, New York

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INTRODUCTION

Confidence by the public in its judiciary is essential to the rule of law. The arbiters of society's disputes should enjoy the respect of the people they serve. One way of ensuring that respect is by establishing a fair disciplinary system to review complaints of judicial misconduct.

Forty-nine states* and the District of Columbia have established commissions on judicial conduct, to provide a forum for citizens with conduct-related complaints, ensure compliance with established codes of ethical conduct, and promote public confidence in the integrity and honor of the judiciary. Commissions do not act as appellate courts, make judgments as to the correctness of a judicial decision or ruling or investigate complaints that judges are either too lenient or too severe towards defendants accused or convicted of crimes.

New York State first established a commission by legislative enactment in 1974 and expanded its authority by constitutional amendments approved in 1975 and 1977. The commission system supersedes the previously disparate manner of disciplining judges for misconduct. Prior to the constitutional amendments, this responsibility was vested in the Court on the Judiciary (a special disciplinary panel for judges of the Court of Appeals, Supreme Court and Appellate Division, Court of Claims, County Court, Surrogate's Court and Family Court), and in the four

* Each state except Washington has a commission.

judicial departments of the Appellate Division (for judges of all other courts). The New York State Commission on Judicial Conduct, which has a full-time staff and has jurisdiction over the conduct of 3,500 judges in the state, is independent of the court system.

TEMPORARY STATE COMMISSION ON JUDICIAL CONDUCT

In 1974 the New York State Legislature created the Temporary State Commission on Judicial Conduct, which commenced operations in January 1975. The temporary Commission had the authority to investigate allegations of misconduct against judges in the state unified court system, issue private admonitions to judges when appropriate, and, in more serious cases, recommend that disciplinary proceedings be commenced in the Court on the Judiciary or the Appellate Division. All proceedings in the Court on the Judiciary and most proceedings in the Appellate Division were public.

The temporary Commission was composed of two judges, five lawyers and two lay people. It was in operation through August 31, 1976, when it was succeeded by a permanent commission created through an amendment to the State Constitution.

The temporary Commission received 724 complaints and commenced 283 investigations during its tenure. It initiated removal proceedings against eight judges and admonished 19. Five judges resigned while under investigation.*

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

FORMER STATE COMMISSION ON JUDICIAL CONDUCT

The temporary Commission was succeeded on September 1, 1976, by the State Commission on Judicial Conduct, by virtue of a constitutional amendment overwhelmingly approved by the New York State electorate in November 1975. Its tenure lasted through March 31, 1978. (For the purpose of clarity, the Commission which operated from September 1, 1976, through March 31, 1978, will henceforth be referred to as the "former" Commission.)

The former Commission was empowered to investigate allegations of misconduct against judges, impose limited disciplinary sanctions* and, when appropriate, initiate removal proceedings in the Court on the Judiciary, which, by the same constitutional amendment, had been given jurisdiction over all judges in the unified court system.

The former Commission, like the temporary Commission, was comprised of two judges, five lawyers and two lay people, and its jurisdiction extended to judges within the state unified court system. The former Commission was authorized to continue all matters left pending by the temporary Commission.

The former Commission considered 1,418 complaints, authorized 789 investigations and continued 162 investigations left

* The sanctions that could be imposed by the Commission were: private admonition, public censure, suspension without pay up to six months, and retirement for physical or mental disability. Censure, suspension and retirement actions could not be imposed until the judge had been afforded an opportunity for a full adversary hearing; these Commission sanctions were also subject to a de novo hearing in the Court on the Judiciary at the request of the judge.

pending by the temporary Commission. It initiated disciplinary proceedings in the Court on the Judiciary against 45 judges and continued eight proceedings left pending by the temporary Commission. During its tenure, the former Commission admonished 40 judges, publicly censured 15, and issued confidential letters of suggestion and recommendation to 17 judges upon dismissing complaints that nonetheless required comment. Thirty-eight judges resigned while under investigation by the former Commission.*

* The 1978 Annual Report of the State Commission on Judicial Conduct contains details of the former Commission's activity from September 1, 1976, through December 31, 1977. This 1979 Annual Report includes details of the former Commission's activity from January 1, 1978, through its expiration on March 31, 1978. For example, eight of the 40 admonitions noted above occurred between January 1 and March 31, 1978, as did all 15 public censures, eight of the 17 letters of suggestion and recommendation, and eight of the 38 resignations.

STATE COMMISSION ON JUDICIAL CONDUCT

A second amendment to the State Constitution was overwhelmingly approved in November 1977 by the New York State electorate, creating the current Commission and superseding the former Commission effective April 1, 1978. The amendment created an 11-member Commission (replacing the nine-member former Commission), broadened the scope of the Commission's authority and streamlined the procedure for disciplining judges within the state unified court system. Courts on the Judiciary could not be convened after April 1, 1978. All hearings under the new amendment are conducted by the Commission.

Subsequently, the State Legislature amended Article 2-A of the Judiciary Law, the Commission's governing statute, to implement the new provisions of the constitutional amendment. The scope of both the constitutional and legislative amendments is discussed under the subheadings below.

Authority

The State Commission on Judicial Conduct has the authority to review written complaints of misconduct against judges, initiate complaints on its own motion, conduct investigations and formal hearings, subpoena witnesses and documents, and make appropriate determinations for disciplining judges within the state unified court system. This authority is derived from Article VI, Section 22, of the Constitution of the State of New York, and Article 2-A of the Judiciary Law of the State of New

York. The Commission does not act as an appellate court, nor does it review judicial decisions or errors of law. It does not issue advisory opinions, give legal advice or represent litigants, though it will refer complaints to other agencies when appropriate.

The Commission's jurisdiction is limited to judicial misconduct, as outlined primarily by the Rules Governing Judicial Conduct (promulgated by the Administrative Board of the Judicial Conference and adopted by the Chief Administrator of the Courts), and the Code of Judicial Conduct (adopted by the New York State Bar Association). Such misconduct includes but is not limited to improper demeanor, conflicts of interest, intoxication, bias, prejudice, favoritism, corruption and certain prohibited political activity. In addition, the Commission has jurisdiction over matters pertaining to the physical or mental disability of judges.

After conducting a hearing with respect to a particular matter, if it is determined by the Commission that the factual and legal findings warrant disciplinary action, one of several determinations may be rendered by the Commission. The sanctions imposed are final, subject to review by the Court of Appeals upon the timely request of the respondent-judge. The Commission may render determinations to:

-- admonish a judge publicly;
-- censure a judge publicly;
-- remove a judge from office;
-- retire a judge for disability.

In accordance with its rules, the Commission may also issue a non-public, confidential letter of dismissal and caution to a judge, despite a dismissal of the complaint, when it determines that the circumstances warrant comment but not formal action.

Unlike its two predecessors, the current Commission may retain jurisdiction over a judge when he resigns. The Judiciary Law provides that the Commission may continue proceedings against a judge up to 120 days following a resignation, and that it may in such cases file a formal determination of removal when warranted. The effect of removing a judge who has already left office is that a removal determination automatically bars the respondent-judge from holding future judicial office in the state.

The law also provides that the Commission would assume jurisdiction of all matters pending before the former Commission on the effective date of the constitutional amendment.

Procedures

The Commission convenes at least once a month for sessions lasting two days. At each meeting, the Commission reviews each new complaint of misconduct individually and makes an initial decision whether to conduct an investigation or dismiss the complaint. It also reviews staff reports on ongoing matters, makes final determinations on completed proceedings, considers motions pertaining to cases in which judges have been

formally served with charges, entertains oral argument and conducts other business.

No investigation may be commenced by staff without prior authorization by the Commission. Similarly, the filing of charges must be authorized by the Commission.

When a complaint is authorized by the Commission for investigation, the administrator assigns it to a staff attorney, who is responsible for conducting the inquiry, including supervision of investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge may be asked to respond in writing to the allegations.

In some instances the Commission requires the appearance of the judge to testify during the course of the investigation. Such appearances are under oath and are always conducted in the presence of at least one Commission member. Although an investigative appearance is not in the nature of an adversary hearing, the judge is entitled to be represented by counsel.

If the Commission finds after an investigation that the circumstances so warrant, it will direct the administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint then forms the basis for an adversary proceeding. If, after receiving the judge's Answer, the Commission concludes there are no disputed issues of fact, the Commission may grant a motion for summary determination or accept an agreed statement of facts submitted by the administrator and the respondent-judge. When

the Answer disputes the factual allegations and there is no agreed statement of facts, the Commission will appoint an impartial referee to conduct the hearing and report findings of fact to the Commission. Referees are designated by the Commission from among a panel of law professors, attorneys and former judges. Following the referee's report, on a motion to confirm or disaffirm the report, both the administrator and respondent may submit legal memoranda, and the Commission allows both sides to present oral arguments on issues of law and sanctions.

In reaching its determination, the Commission deliberates in executive session, without the presence or assistance of its regular staff, but may have the aid of a per diem law assistant.

When the Commission reaches a judgment of admonition, censure, removal or retirement, its written determination is forwarded to the Chief Judge of the Court of Appeals, who in turn transmits it to the respondent. Upon completion of the transmittal, the Commission's determination and the record of its proceedings become public. Prior to this point, by operation of the strict confidentiality provisions in Article 2-A of the Judiciary Law, all proceedings are private, including: the existence of the complaint, the investigation, the Formal Written Complaint, the Answer, other legal papers and motions, the hearing, legal memoranda, the referee's report, oral arguments and the Commission's deliberations and the determination. The determination may be appealed at the respondent's option, and it becomes effective if no appeal is requested within 30 days.

The Commission may dismiss a complaint at any stage during the investigatory or adjudicative proceedings, prior to rendering its determination.*

Membership and Staff

The Commission is comprised of 11 members serving initial terms from one to four years, after which all appointments will be for four years. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one each by the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and at least two be lay persons. The Commission elects one of its members to be chairperson and appoints an administrator who is responsible for hiring staff and supervising staff activities subject to the Commission's direction and policies.

The chairwoman of the Commission is Mrs. Gene Robb of Newtonville. The other members are: David Bromberg, Esq., of New Rochelle; Honorable Richard J. Cardamone of Utica, Associate Justice of the Appellate Division, Fourth Judicial Department; Dolores DelBello of Hastings-on-Hudson; Honorable Herbert B. Evans of Riverdale, Associate Justice of the Appellate Division, First Judicial Department; Michael M. Kirsch, Esq., of Brooklyn; Victor A. Kovner, Esq., of New York City; William V. Maggipinto, Esq., of Southampton; Honorable Felice K. Shea of New York City, Judge of

* The Commission's Rules and a flow chart depicting the complaint and investigation process are annexed as Appendix B.

the Civil Court of the City of New York; Honorable Morton B. Silberman of West Nyack, Justice of the Supreme Court, Ninth Judicial District (Rockland County) served until December 15, 1978, and was succeeded by the Honorable Isaac Rubin, Justice of the Supreme Court, Ninth Judicial District (Westchester County); and Carroll L. Wainwright, Jr., Esq., of New York City.* The Administrator of the Commission is Gerald Stern, Esq.

From January 1, 1978, through March 31, 1978, before the recent constitutional amendment took effect, the former Commission was comprised of Mrs. Robb, Mr. Bromberg, Mrs. DelBello, Mr. Kirsch, Mr. Kovner, Mr. Maggipinto, Mr. Wainwright, the Honorable Louis M. Greenblott of Binghamton and the Honorable Ann T. Mikoll of Buffalo, Associate Justices of the Appellate Division, Third Judicial Department. The Commission takes this opportunity to recognize the dedicated and distinguished service of Judges Greenblott, Mikoll and Silberman, as well as Judge Evans, who assumed the position of Chief Administrator of the Courts on March 1, 1979.

The Commission has 58 full-time staff employees, including 14 attorneys and six recent law graduates. During the summer of 1978, 11 student interns, mostly 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 principal office is in New York City. Offices are also maintained in Albany and Buffalo.

* Biographies of the members appear in Appendix A.

COMPLAINTS AND INVESTIGATIONS

In 1978, 641 new complaints were reviewed and 170 investigations were authorized and commenced.* As in previous years, the majority of complaints were submitted by civil litigants and complainants and defendants in criminal cases. Other complaints were received from attorneys, judges, law enforcement officers, civic organizations and concerned citizens not involved in any particular court action. Among the new complaints were 60 which the Commission initiated on its own motion. The Commission also continued 534 investigations pending as of December 31, 1977.

Of the 641 new complaints considered by the Commission in 1978, 471 were dismissed upon initial review. Some of these were patently frivolous or outside the Commission's jurisdiction (such as complaints against attorneys or federal judges). Many were from litigants who were complaining about a particular ruling or decision made by the judge in the course of a proceeding. Absent any underlying misconduct, including demonstrated prejudice, intemperance or conflict of interest, the Commission does not investigate such matters, which belong in the appellate courts. When an inquiry concludes that a judge's rulings of law in a case resulted from misconduct, the Commission may discipline the judge

* The statistical period in this report is January 1, 1978, through December 31, 1978. The figure 641 represents 146 complaints reviewed by the former Commission (between January 1 and March 31, 1978) and 495 complaints reviewed by the current Commission (from April 1 through December 31, 1978). Unless otherwise noted, matters disposed of by the former Commission have been combined with matters disposed of by the current Commission. Statistical analysis of all the matters considered by the temporary, former and current Commissions is annexed in chart form as Appendix H.

for the misconduct, but it cannot reverse the rulings in question. That power rightfully remains with the courts. Judges must be free to act, in good faith, without the fear of being investigated for their rulings or decisions.

Of the combined total of 704 investigations conducted by the Commission in 1978 (534 continued from 1977 and 170 authorized in 1978), the Commission considered and dismissed outright 129 complaints in 1978 after investigations were completed, generally because the allegations were not substantiated or the evidence of misconduct did not justify disciplinary action. Investigation of 189 complaints resulted in a sanction, a cautionary reminder to the judge or resignation from office.

Summary of Complaints Considered by the Temporary, Former and Current Commissions

Since January 1975, when the temporary Commission commenced operations, a total of 2,739 complaints of judicial misconduct against 1,384 different judges has been considered by the temporary, former and current Commissions. (Two hundred seventeen of the 2,739 complaints either did not name a judge or alleged misconduct against someone not within the Commission's jurisdiction.) One thousand, five hundred twenty-seven of those were dismissed upon initial review. Four hundred seventy were dismissed outright after investigations were conducted. Two hundred twenty-five complaints resulted in the resignation of the judge or in disciplinary action either by the Commission directly or as the result of proceedings commenced by the Commission in the

courts. One hundred twenty-nine complaints were dismissed with letters of caution or suggestions and recommendations sent to the judge. Sixty-four complaints were closed upon the judge's retirement, failure to win re-election, or death. Since 1975 the following actions have been recorded in matters initiated by the temporary, former or current Commission.*

-- 3 judges were removed from office (two by the Appellate Division, one by the Court of Appeals after determination by the current Commission);

-- 2 judges were suspended without pay for six months (one by the former Commission, one by the Court on the Judiciary);

-- 38 judges have been publicly censured or have been the subject of a determination of public censure (15 by the former Commission, 8 by the current Commission, 12 by the Court on the Judiciary, 3 by the Appellate Division);

-- 1 judge was the subject of a determination of public admonition by the Commission;

-- 59 judges have been privately admonished by the temporary or former Commission;

-- 61 judges resigned during an investigation, upon the commencement of disciplinary hearings or during the hearings themselves. The Court on the Judiciary entered an order barring one judge who resigned during a proceeding from holding future judicial office.

* It should be noted that several complaints against a single judge can be disposed of in a single action. Thus, there is a slight discrepancy between the number of complaints which resulted in action and the number of judges disciplined.

In addition, the following dispositions have been made:

-- 17 judges have received letters with suggestions and recommendations (from the former Commission);

-- 109 judges have received letters of dismissal and caution (from the current Commission).

ACTION TAKEN IN 1978

Charges Served; Hearings Commenced

No disciplinary sanction may be imposed by the Commission unless a Formal Written Complaint, containing detailed charges of misconduct, has been served upon the respondent-judge, and unless the respondent has been afforded an opportunity for an adversary hearing. As noted above, these procedures fall within the confidentiality provisions of the Judiciary Law and are not public.

Since April 1, 1978, when the recent amendments to the State Constitution and the Judiciary Law went into effect, the Commission has directed that formal charges be served against 61 judges. In 32 of these cases, upon receipt of the respondent-judge's Answer, the Commission has determined that disputed issues of fact existed, requiring the appointment of a referee to conduct the hearing and report his findings to the Commission. Five respondents resigned from judicial office after formal charges were served, and either the Commission decided to terminate the matter or the matter could not be completed within 120 days of the judge's resignation, after which the Commission's jurisdiction lapsed.

By operation of the confidentiality provisions of the Judiciary Law, no identifying information may be made public by the Commission with respect to charges served, hearings commenced or any other matter until a case has been concluded and a final

determination has been filed with the Chief Judge and forwarded to respondent.

Removal

In November 1978, the Commission concluded one proceeding in which it determined that the respondent-judge should be removed from office.

Matter of Adams

Paul W. Adams was justice of the Town of Phelps in Ontario County. After thorough investigation of a complaint by a litigant who had appeared in his court, Judge Adams was served with a Formal Written Complaint, charging that on six occasions between January and June of 1977, Judge Adams failed to disqualify himself in cases in which his brother appeared either as plaintiff or as an officer of his own company. The Formal Written Complaint also charged Judge Adams with using his judicial office to further the interests of a local corporation by writing on court stationery to a debtor of the corporation, stating that further court action would be taken unless an amount due was paid, at a time when he had no jurisdiction over the dispute.

In his Answer to the Formal Written Complaint, Judge Adams admitted the charges but asserted that he was unaware that such conduct violated the Rules Governing Judicial Conduct, the Code of Judicial Conduct and the Judiciary Law.

In view of the respondent-judge's admissions, a hearing was not required. The Commission entertained oral argument by

its administrator and Judge Adams (who was present and represented by counsel) on October 19, 1978.

After deliberation in executive session, the Commission determined that Judge Adams should be removed from office. Its determination to that effect, dated November 29, 1978, was filed with the Chief Judge of the Court of Appeals on January 9, 1979.

Judge Adams did not appeal the Commission's determination. On February 13, 1979, Judge Adams was removed from office.*

Public Censure

Twenty-three determinations of public censure were issued or completed by the Commission in 1978. Twenty-two involved ticket-fixing and are discussed in a separate section on ticket-fixing in this report. The remaining censure is discussed below.

Matter of Pilato

On March 1, 1978, Joseph T. Pilato, a judge of the Family Court, Monroe County, was censured for "intemperate and injudicious conduct in court." Judge Pilato was held to have exhibited anger at attorneys, used inappropriately coarse language in talking to litigants, and demonstrated lack of concern with legal procedures and rulings; in one case he deliberately made conflicting rulings simultaneously and advised the attorneys that he was not going to consider the merits of their objections.

* The Commission's determination is annexed as Appendix C.

During the investigation which resulted in the censure, Judge Pilato appeared before the Commission to testify under oath in an investigative appearance, but he waived his right to an adversary hearing. The Commission's censure noted that Judge Pilato had been candid in his testimony and that his conduct had improved.*

Admonitions

The former Commission had the authority to issue confidential admonitions to judges as a sanction in matters 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. The former Commission admonished 40 judges. The temporary Commission had issued 19 letters of suggestions and recommendations in the nature of admonitions. Judges who were admonished by the former Commission or who received letters of suggestions and recommendations by the temporary Commission were advised that they had the opportunity to challenge the admonition in a hearing before the Commission. No such hearing was ever requested.

Pursuant to the recent amendments of the State Constitution and the Judiciary Law, admonitions are now public.

Between April 1, 1978, and December 31, 1978, the Commission determined that one judge should be admonished.

* The censure of Judge Pilato is annexed as Appendix D.

Matter of Spector

On December 15, 1978, in accordance with procedures in the Judiciary Law, the Commission delivered to the Chief Judge of the Court of Appeals its determination in the Matter of Morris Spector, for transmittal by the Chief Judge to Judge Spector, whom the Commission had determined to admonish publicly.

The Commission determined that Judge Spector should be admonished for misconduct; three members dissented.* The determination and related file became public, according to law, upon completion of service by the Chief Judge of the Court of Appeals upon Judge Spector and was made public on December 28, 1978. Judge Spector filed a petition on December 28, 1978, seeking review of the determination in the Court of Appeals. The case is pending in the Court of Appeals.

Morris Spector was a justice of the Supreme Court, First Judicial District (New York and Bronx counties). After a thorough investigation, Judge Spector was served with a Formal Written Complaint alleging four charges of misconduct, based upon alleged impropriety and the appearance of impropriety arising from a number of appointments of attorneys as guardians ad litem or as referee.

In his verified Answer to the Formal Written Complaint, Judge Spector admitted most of the factual allegations but denied that his acts constituted misconduct.

* The determination and the dissent are annexed as Appendix E.

On October 13, 1978, a hearing was held before former Supreme Court Justice Bernard S. Meyer, who had been appointed referee in this matter by the Commission. In his report, Judge Meyer concluded that the charges had been sustained in part.

On November 29, 1978, the Commission entertained oral argument by its administrator and Judge Spector's counsel on whether the referee's findings should be confirmed, and on the issue of possible sanctions.

After deliberation in executive session, the Commission made the following findings, as expressed in its determination dated December 14, 1978, with three members dissenting:

-- Between March 1968 and November 1974, Judge Spector appointed Judge Sidney Fine's son on two occasions, yielding aggregate fees of $3,400, while Judge Fine appointed Judge Spector's son on eight occasions, yielding aggregate fees of $9,393.

-- Between March 1968 and November 1974, Judge Spector appointed Judge George Postel's son on 10 occasions, yielding aggregate fees of $11,521, while Judge Postel appointed Judge Spector's son on five occasions, yielding aggregate fees of $6,867.

-- These "cross-appointments" were not made "with a view solely to [the appointees'] character and fitness" and gave "the appearance of impropriety."

-- The closeness in number and timing of several appointments by Judges Spector and Postel "suggest that appointments of each other's son were being made to avoid a charge of nepotism."

Two of the four charges were sustained. A decision is pending in the Court of Appeals.

Suggestions and Recommendations

The former Commission had 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 permitted the former Commission to call a judge's attention to circumstances that did not constitute judicial misconduct but did require comment.

From January 1, 1978, through March 31, 1978, the former Commission issued eight letters of suggestions and recommendations. For example, suggestions were made to one judge concerning better supervision of court personnel. Recommendations were made to another judge with respect to a more efficient means of record keeping. Recommendations were made to a third judge who serves part-time and is also a practicing attorney, concerning a potential appearance of impropriety in the use of his name on papers filed in courts in which he is prohibited from practicing by the Rules Governing Judicial Conduct.

During the former Commission's tenure, a total of 17 letters with suggestions and recommendations were issued.

Letters of Dismissal and Caution

The current Commission formally adopted a procedure similar to the letter with suggestions and recommendations used by the former Commission. In fact, in its Operating Procedures and Rules, the Commission defines a "letter of dismissal and caution" as "written confidential suggestions and recommendations" (22 NYCRR Part 7000.3[1]).

Since April 1, 1978, the Commission has issued 109 letters of dismissal and caution. While constituting the dismissal of a complaint in which the allegations did not rise to the level of sanctionable judicial misconduct, the letter of dismissal and caution allows the Commission to call a judge's attention to technical violations of ethical standards, for example, which should be avoided in the future. The confidential nature of the letter of dismissal and caution is particularly valuable since it is the only method by which the Commission may give a judge suggestions as to his conduct without making the matter public; all Commission-imposed disciplinary sanctions (admonition, censure, removal and retirement), as noted earlier, are public.

Should the conduct addressed by the letter of dismissal and caution continue, the Commission may authorize a Formal Written Complaint and thereby commence formal disciplinary proceedings.

Resignations

Twenty-six judges resigned in the past year while under investigation or charges by the Commission.

The 26 resignations occurred at various stages in the respective Commission investigations. For example, one judge under inquiry with respect to serious allegations of improper demeanor resigned shortly after appearing before the Commission to testify under oath during the investigation. Two judges under

investigation for ticket-fixing resigned after the former Commission moved to convene a disciplinary proceeding in the Court on the Judiciary but before formal charges were served. Another judge charged with financial improprieties and ticket-fixing resigned after formal charges had been served by the Court on the Judiciary; the Court then entered an order barring the judge from holding future judicial office. Matter of Cobb, N.Y.L.J. vol. 179, p.10, col. 1 (May 9, 1978).

Since 1975, a total of 61 judges have resigned while under investigation or charges by the temporary, former or current Commission.

The jurisdiction of both the temporary and former Commissions was limited to incumbent judges. An inquiry was therefore terminated if a judge resigned.

Under provision of the recently-amended Judiciary Law, the current Commission retains jurisdiction over a judge for 120 days following a resignation. Thus, a judge who hopes to terminate a proceeding by resigning his position may no longer do so as a matter of right. The Commission may proceed with the case within this 120-day period, and a determination of removal filed within that period, when final, automatically bars a judge from holding future judicial office.

Allowing the Commission to continue an important investigation or disciplinary hearing notwithstanding resignation is also important in light of the strict confidentiality provisions of law under which the Commission operates. As noted

earlier, investigations and hearings may not be made public until all proceedings have been concluded and the respondent-judge has received the Commission's final determination. Without the 120-day provision, a judge could resign after the lengthy, costly investigative and adjudicative processes but prior to receiving the determination. Thus, neither the existence of the complaint nor the Commission's action would become public, and the respondent-judge effectively will have avoided a public sanction for his misconduct. He would also be able to seek judicial office in the future without having had to account for previous misconduct as a judge.

In seeking legislation authorizing the continuation of an investigation after a judge's resignation, the Commission sought a reasonable period to conclude such matters. The 120 days allotted for continuing investigations and hearings may not be sufficient in many cases to conclude a proceeding.

Court on the Judiciary Proceedings

The recent amendments to the State Constitution and the Judiciary Law, which consolidated within the Commission the authority to discipline judges, phased out the Court on the Judiciary by providing that no new proceedings would commence in the Court on or after April 1, 1978. However, by express provision of the Judiciary Law, all proceedings pending in the Court as of April 1st would continue until concluded.

Thirty-two proceedings had been commenced in the Court by the Commission prior to April 1st. Thirty involved ticket-fixing and are discussed in a separate section on ticket-fixing in this report. The remaining two cases are discussed below.

Matter of Cobb

In December 1977, after a thorough investigation, the Commission moved to convene the Court on the Judiciary for a disciplinary hearing in the matter of George S. Cobb, a justice of the Town of Haverstraw in Rockland County. On January 31, 1978, Judge Cobb was served with formal charges for adjudication before the Court.

Judge Cobb was accused of nine instances of financial and record-keeping irregularities, including deficiencies in his official court accounts at various times totaling more than $15,000, and keeping large sums of court funds in a box in his home for several months at a time. He was also alleged to have deposited personal checks on several occasions to make up the deficiencies, knowing that his personal bank account held insufficient funds to cover the amounts; four such personal checks did not clear. Judge Cobb was also charged with two incidents of ticket-fixing.

On March 10, 1978, Judge Cobb resigned his office and subsequently filed an affidavit with the Court, declaring that he did not choose to contest the charges. On April 28, 1978, the Court on the Judiciary entered an order disqualifying Judge Cobb

from holding future judicial office in the state.

Matter of Schwerzmann

In June 1977, the Commission initiated a disciplinary proceeding in the Court on the Judiciary concerning Jefferson County Surrogate Leon Schwerzmann. Judge Schwerzmann was charged with engaging in activities tantamount to the practice of law, although he received no fees, in violation of the New York State Constitution and a specific directive to him 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. Judge Schwerzmann was charged with openly providing advisory opinions, researching legal issues and assisting in the preparation of arguments, 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.

The course of the adjudicatory proceeding in the Court on the Judiciary paralleled the investigatory proceedings earlier conducted by the Commission. Judge Schwerzmann admitted the factual allegations contained in the charges but denied that his activities constituted the practice of law, particularly in view of the fact he was not compensated. The judge also argued that

he was obligated to assist people who needed legal advice.

On June 1, 1978, the Court on the Judiciary found that Judge Schwerzmann's conduct did, in fact, constitute the practice of law. The Court directed that Judge Schwerzmann desist from the practice of law, and it cited the judge's statement that he would abide by the Court's decision as precluding the need for any other sanctions.*

Challenges to Commission Procedures

Throughout the course of the Commission's investigation of ticket-fixing matters, and in the course of the adjudicative proceedings in the Court on the Judiciary, numerous legal challenges to the Commission's procedures and authority were brought by the respondent-judges and, in some instances, by other judges who had not been formally charged with misconduct. Motions to dismiss the charges, quash subpoenas, change venue, grant extraordinarily broad discovery and order the Commission's investigations halted (on grounds such as selective prosecution) were brought not only before the Court on the Judiciary but also in Supreme Court and federal district court.** In all a total of 77 challenges have been filed. The Commission's procedures and authority have been sustained in every one.

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

** A description of these challenges is annexed as Appendix G.

SPECIAL PROBLEMS IDENTIFIED BY THE COMMISSION

In the course of its inquiries into individual complaints of misconduct, the Commission has been able to identify certain patterns or types of misconduct which appear to be more than isolated. Ticket-fixing, favoritism in appointments, improper political participation by judges and poor record keeping, for example, are among those activities which have repeatedly come to the Commission's attention and thus have allowed the Commission to make observations, draw conclusions and make recommendations for the improvement of the judiciary.

Ticket-Fixing

In 1976, in the course of unrelated investigations, the Temporary State Commission on Judicial Conduct became aware of a widespread practice which it identified as ticket-fixing, that is, the assertion of influence in traffic cases. While reviewing various court records in the course of the earlier investigations, the temporary Commission learned that some individual judges had been granting requests for favorable treatment from judges and other influential people on behalf of defendants charged with traffic violations. A "typical" favor might involve one judge acceding to another judge's request to change a speeding charge to a parking violation or a driving-while-intoxicated misdemeanor charge to a faulty muffler violation, with no pretense of a legitimate legal reason, solely on the basis of favoritism.

The ticket-fixing inquiry commenced by the temporary Commission and continued by its successor Commissions has been reported upon in the Commission's June 1977 Interim Report and its 1978 Annual Report.

Thousands of relevant court papers have been examined and catalogued by the Commission. More than 1000 letters requesting favors have been obtained from the court files of judges who either requested or granted favorable dispositions. The Commission initiated investigations with respect to 447 individual judges who were alleged to have engaged in the ticket-fixing practice. Of these, 58 have been called before the Commission to give sworn testimony on specific ticket-fixing incidents, and more than 375 others have responded to Commission letters of inquiry on specific ticket-fixing allegations. Scores of witnesses have been interviewed, including court personnel from several jurisdictions.

Proceedings Before the Court on the Judiciary

Disciplinary proceedings against 40 judges were initiated by the Commission in the Court on the Judiciary prior to April 1, 1978. Eight of the 40 resigned before formal charges could be served and the respondents' names revealed. Two allowed their terms to expire without seeking re-election, also before formal charges were served and before their names could be revealed.

In the remaining 30 cases, formal charges of misconduct were filed and made public. Ten of the 30 respondent-judges have been publicly censured by the Court on the Judiciary. One died

before the matter came to a hearing. The remaining 19 cases are pending.

The ten judges censured by the Court were reprimanded on November 8, 1978, in a single opinion which identified them all:

> Morgan Bloodgood, Malta Town Justice, Saratoga County;
>
> Norman Kuehnel, Hamburg Town Justice and Blasdell Village Justice, Erie County;
>
> Edward Lahey, New Windsor Town Justice, Orange County;
>
> Harold Lipton, Rochester Town Justice, Ulster County;
>
> Edward Longo, Rotterdam Town Justice, Schenectady County;
>
> Harry Mills, Montgomery Town Justice, Orange County;
>
> Joseph Polonsky, Wawarsing Town Justice, Ulster County;
>
> Thomas Rosinski, Hamburg Town Justice, Erie County;
>
> Joseph Thomson, Cornwall Town Justice, Orange County; and
>
> Isidore Wittenberg, Crawford Town Justice, Orange County.

The Court found that the practice of favoritism underlying ticket-fixing has been "widespread...of long duration...[and] clearly improper." __N.Y.2d__. A number of favors requested or granted involved misdemeanor or felony charges, such as driving while intoxicated or leaving the scene of an accident.

Among the exhibits considered by the Court were hundreds of letters in which judges readily asked favors of other judges on behalf of defendants in traffic cases, exhibiting no pretense of a valid legal defense and often revealing the reciprocal nature of ticket-fixing requests.

One letter reads as follows:

> Twice within a short period of time is too much but during election time you know what it is. I have to ask for another favor.

Another letter reads:

> Thanks for your help. As you know--its a 2-way street. Let me know if I can help you.

A third letter reads in part:

> This is to be reduced to a no-pointer. (insurance factor) will do the same for you.

Yet another letter reads as follows:

> This young lady and her husband are very personal friends of our County D.A.
>
> She is guilty as charged and since our D.A. does not get involved, he asked me to see if something could be done for her.
>
> I would appreciate a non-moving violation with a good fine, if this meets with your approval....

A fifth judge wrote:

> Can I impose upon you for a U.D. for this driver? He was driving one of my milk trucks.

One judge granted a favorable disposition to the defendant based upon the following letter:

> [M]yself & some of the other guys at the station would appreciate if you could reduce it to an equipment violation ... This guy is our barber & he takes good care of us.

The 19 public proceedings pending in the Court on the Judiciary are with respect to the following judges formally charged with ticket-fixing:

Michael D. Altman, Justice of the Town of Fallsburgh in Sullivan County;

Thomas Byrne, Justice of the Town of Newburgh in Orange County;

George E. Carl, Justice of the Town of Catskill in Greene County;

Charles Crommie, Justice of the Town of Catskill in Greene County;

Murry Gaiman, Justice of the Town of Fallsburgh in Sullivan County;

Joseph Geiger, Justice of the Town of Waterford in Saratoga County;

Richard S. Hering, Justice of the Town of Liberty in Sullivan County;

Edward F. Jones, Justice of the Town of Coeymans in Albany County;

Robert W. Jordan, Justice of the Town of Esopus in Ulster County;

Gionna LaCarrubba, Judge of the District Court in Suffolk County;

Richard Lips, Justice of the Town of Clifton Park in Saratoga County;

Sebastian Lombardi, Justice of the Town of Lewiston in Niagara County;

Robert Maidman, Justice of the Town of Clarkstown in Rockland County;

Patrick Mataraza, Justice of the Town of Clarkstown in Rockland County;

James M. McMahon, Justice of the Town of Wallkill in Orange County;

Joseph Owen, Justice of the Town of Wallkill in Orange County;

Vincent Pickett, Judge of the City Court of Mechanicville in Saratoga County;

Lawrence H. Schultz, Jr., Judge of the City Court of Batavia in Genesee County; and

Wayne Smith, Justice of the Town of Plattekill in Ulster County.

Trials in seven of the above 19 cases have been concluded but the Court had not rendered final judgments when this publication went to press.

Proceedings Before the Commission

The former Commission censured 14 judges for ticket-fixing in 1978 and the present Commission rendered eight determinations of public censure. The 22 judges, all of whom waived their rights to adversary hearings, were cited for requesting favorable treatment from other judges on behalf of defendants in serious traffic cases, granting such improper, ex parte requests from judges and others, or both. The 22 are listed below, followed by the dates of the censure by the former Commission or determination by the current Commission:

Duane Algire, Barker Town Justice, Broome County (Determination, December 13, 1978)

Andrew Aurigemma, Esopus Town Justice, Ulster County (Determination, December 13, 1978)

William J. Bulger, Wappinger Town Justice, Dutchess County (Determination, December 13, 1978)

Helen Burnham, Salina Town Justice, Onondaga County (Determination, December 13, 1978)

Edmund V. Caplicki, Jr., LaGrange Town Justice, Dutchess County (Censure, March 31, 1978)

Michael Cerretto, Gates Town Justice, Monroe County (Censure, March 31, 1978)

Donald L. Chase, New Scotland Town Justice, Albany County (Censure, March 31, 1978)

Vincent A. Clark, Stony Point Town Justice, Rockland County (Censure, March 31, 1978)

James W. Coleman, Greenfield Town Justice, Saratoga County (Censure, March 31, 1978)

Lewis DiStasi, Lloyd Town Justice, Ulster County (Determination, December 13, 1978)

George Dixon, Chatham Village Justice, Columbia County (Determination, December 13, 1978)

Wilfred Doolittle, Rosendale Town Justice, Ulster County (Determination, December 13, 1978)

C.H. DuMond, Hurley Town Justice, Ulster County (Censure, March 31, 1978)

Joseph M. Henderson, Parish Town Justice, Oswego County (Censure, March 31, 1978)

Murrill Henry, Otisco Town Justice, Onondaga County (Censure, March 31, 1978)

Lyle McDowell, Mt. Hope Town Justice and Otisville Village Justice, Orange County (Determination, December 13, 1978)

Kenneth Petzold, Maybrook Village Justice, Orange County (Censure, March 31, 1978)

Edmond S. Quinones, Lockport Town Justice, Niagara County (Censure, December 31, 1977; released January 3, 1978)

Rexford Schneider, New Paltz Town Justice, Ulster County (Censure, March 31, 1978)

Harold Schultz, New Scotland Town Justice, Albany County (Censure, March 31, 1978)

Charles J. Shaughnessy, Chester Town Justice, Orange County (Censure, March 31, 1978)

Robert S. Vines, Moreau Town Justice, Saratoga County (Censure, March 31, 1978)

The censures cited the improper nature of the requests and grants of favorable treatment.

> These judges have improperly sought to influence other judges in the disposition of traffic cases or allowed themselves to be so influenced.... Some of the communications [between judges and others with influence] openly revealed that the defendant is a relative or a friend. Generally, no pretense was made that there was a valid, legally-recognized defense to the charge or some other proper reason for special consideration.... By initiating or entertaining improper ex parte communications, the... judges named in this censure have contributed to the creation of two systems of justice--one for the few with special influence and another for the vast majority of citizens, who have their cases disposed of in accordance with law and pay the full penalty imposed by law. (Public censure by the State Commission on Judicial Conduct [March 31, 1978] pp.3-4.)

The Commission has issued 79 letters of dismissal and caution to judges involved in ticket-fixing,* and the former Commission issued two letters with suggestions and recommendations. Various factors entered into the Commission's decision to dispose

* All 79 were authorized within the statistical period covered in this report, although a number were actually mailed shortly thereafter.

of a number of ticket-fixing complaints in this manner, not the least of which was practicality. Conducting hearings in every case would be a time consuming and expensive process which would adversely affect the Commission's other priorities. The Commission decided that in many of the less serious cases the only realistic solution would be to caution the judges involved. These judges were reminded of their obligation to avoid even the appearance of impropriety.

Thirty-seven complaints were dismissed outright where proof of misconduct did not meet due process standards.

Ninety-one cases were closed upon the judge vacating his office due to retirement, resignation, failure to win re-election or death.

A Commentary. 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 to influence others, is in violation of the

Rules Governing Judicial Conduct and the Code of Judicial Conduct.

In Matter of Byrne, N.Y.L.J., April 20, 1978, vol. 179, p.5, in denying various motions by respondent, including several motions to dismiss the charges on numerous grounds, the Court on the Judiciary stated that the misconduct underlying ticket-fixing is malum in se, "is wrong, and has always been wrong":

> [T]he type of conduct alleged against respondent constitutes "cause" for discipline because it is wrong, and has always been wrong.
>
> * * *
>
> [A] judicial officer who accords or requests special treatment or favoritism to a defendant in his court or another judge's court, is guilty of malum in se misconduct constituting cause for discipline, and this would be so even if the Canons and Rules which might apply to such misconduct had never been promulgated. Matter of Byrne, supra.

The ramifications of ticket-fixing go far beyond the sum total of the individual instances of misconduct. Dangerous drivers, for example, who would otherwise be identified and perhaps taken off the roads, elude the proper consequences of the law when speeding and other charges are reduced to parking violations. Furthermore, judges who have engaged in ticket-fixing have bred disrespect for our system of justice, for they have set one set of standards for those with influence and another for the average citizen. Once ticket-fixing is rationalized and accepted, the "fixing" of other, more serious cases cannot be far behind.

Reports received by the Commission in recent months

indicate that the incidence of ticket-fixing has declined dramatically, no doubt due to the deterrent effects of the statewide attention the Commission's probe has drawn and the public sanctions imposed on a number of judges found guilty of favoritism.

One Answer submitted by a judge in response to a Formal Written Complaint served against him bears reporting with respect to the decline of ticket-fixing. The judge admitted his guilt and stated that his "(i)gnorance of the law is no excuse." The judge went on to report the following to the Commission:

> [A]s a result of your investigation, being a Town Justice has become a dignified position. Suddenly, the constant calls for favors have ceased. The many sundry, so-called friends, and politicians have received the message, that the practice of unethical and illegal acts are not judicially proper.... The citizenry, as a result of these investigations, has ceased flaunting its power of the polls and influential connections and consequently the office has become what it should be and should have been all along.

The Commission will pursue to proper conclusions those investigations and proceedings already commenced, and it will continue to be alert to new forms of ticket-fixing that may appear.

Favoritism in Awarding Appointments

In its 1978 Annual Report, the Commission reported that it had spent considerable time investigating allegations that a number of judges have exhibited favoritism in awarding judicial appointments such as receiverships and guardianships which often resulted in lucrative fees for the appointees.

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 Rules Governing Judicial Conduct, promulgated by the Administrative Board of the Judicial Conference and adopted by the Chief Administrator of the Courts, 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."

A number of proceedings before the Commission with respect to favoritism in appointments have been completed or otherwise closed. A number of investigations and hearings on stated charges of misconduct are pending.

As reported earlier, the Commission filed a determination of public admonition with respect to Supreme Court Justice Morris Spector, which became public in December 1978. The Commission determined there had been an appearance of impropriety in that some of the appointments at issue "were not made 'with a view solely to [the appointees'] character and fitness' within the meaning of...the Canons of Judicial Ethics and...the Rules Governing Judicial Conduct." This case is under appeal.

Appearances of impropriety may be created when judges award lucrative appointments to the relatives of other judges.

Judges who have authority to award appointments should take great care to avoid the appearance of impropriety such appointments may create.

Improper Financial Management and Record Keeping, Constituting Misconduct

During its investigations the Commission often finds it necessary to interview court personnel, study court procedures and review official records and documents relevant to the particular inquiry. In the course of its inquiries, and from regular reports forwarded to the Commission by the State Department of Audit and Control, the Commission has identified some particularly disturbing problems, especially in the local courts, involving monetary deficiencies in official court accounts and poor record-keeping practices with respect not only to finances but other court activities.

Financial Shortages

Monies collected by a court from fines, fees, bail and other sources are required by law to be promptly deposited in official court bank accounts, promptly recorded in court record books and promptly reported to the State Department of Audit and Control. During the past year the Commission has investigated several complaints involving serious deficiencies in the official court accounts maintained by a number of individual judges.

As reported above, the disciplinary proceeding commenced by the Commission in Matter of Cobb (George S. Cobb, Town Justice of Haverstraw) involved formal charges of financial shortages in court accounts at various times totaling more than $15,000 and the judge's attempts on four occasions to make up the deficiencies with checks that did not clear. The proceeding was terminated when Judge Cobb resigned and the Court on the Judiciary entered an order barring him from holding future judicial office.

In another matter, a town court justice's court accounts were found to be more than $11,000 deficient. A report by the Department of Audit and Control, which was made public in a subsequent court proceeding, also revealed that the judge had filed erroneous reports with the Department and was delinquent in his record keeping and remittances of funds.

The district attorney pursued the matter after the judge left office, and the judge pled guilty to charges of second-degree larceny and official misconduct after admitting he had withheld bail money he had collected in his official capacity. The judge was sentenced to probation and to make restitution for the $11,000 deficiency.

Another case involving financial irregularities concerned a town justice whose court accounts were more than $4,200 deficient and who had issued checks drawn from his court

accounts which did not clear. The judge resigned from office before the Judiciary Law was amended to permit Commission proceedings to continue for 120 days following resignation. The Commission formally referred the matter to the appropriate district attorney.

In another case, a town court justice failed to deposit monies received in his official capacity into official court accounts, resulting in a deficit of more than $3,700. A report by the Department of Audit and Control indicated the judge had failed to deposit and remit promptly to the State Comptroller monies received in his judicial capacity for most of the period from mid-1972 through 1975.

Investigation by the Commission revealed that the judge had attempted on two occasions to make partial restitution by writing checks on his court account to the State Comptroller, both of which did not clear. The Commission also learned that, with the apparent intention of reducing the deficit that appeared in his books, the judge had directed his clerk to record financial entries in amounts less than that actually collected from defendants in traffic cases. The judge was served with a Formal Written Complaint by the Commission, charging him with the misconduct described above. Shortly thereafter he resigned from office, and the proceeding was terminated by the Commission.

The Commission has identified other instances of money shortages and related serious record-keeping irregularities.

(Determinations rendered in 1979 by the Commission will be reported in its next annual report.)

Record Keeping

In addition to the problems it has identified with respect to financial improprieties, the Commission has been made aware repeatedly, in its own inquiries and from Audit and Control reports, of poor record keeping in other areas. Among the more common examples are the failure to keep dockets, indices of the cases on the court's calendar and other records required by law.

Practices such as these not only make it difficult to assess the status of particular cases, they inevitably lead to suspicions of impropriety or incompetence. Poor record keeping has been held to constitute sufficient grounds for removal of a judge from office.* Yet time and again, records have been turned over to the Commission in utter disarray, and Commission investigators have reported difficulties in locating information from court records which are poorly indexed and organized. In addition, the Department of Audit and Control has reported numerous instances to the Commission of judges who are persistently delinquent in filing reports or who do not file required reports at all. The situation has grown to such alarming proportions that Audit and Control reported to the Commission that approximately 140 judges have had portions of their salaries withheld to force

* Bartlett v. Flynn, 50 A.D.2d 401, 378 N.Y.S.2d 145 (4th Dept. 1976).

their compliance with mandatory filing of certain reports.

The Commission has authorized investigations into only the more serious instances of record-keeping deficiencies and improprieties. Many minor irregularities are not investigated. As reported in the Commission's 1978 Annual Report, however, the magnitude of the problem should not be minimized, nor its seriousness mistaken, by the selective nature of inquiry the Commission has been compelled to undertake. The problem of poor record keeping is not limited to any single part of the state. Clearly, better training programs should be developed by the Office of Court Administration with respect to this problem. Equally important, administrative judges should make greater efforts to control, supervise and monitor town and village justice courts and city courts throughout the state. In all fairness to these courts, they should also be given sufficient resources to meet strict record-keeping requirements imposed by law. In some instances, such resources simply are not available.

Debt Collecting

A number of cases investigated by the Commission in 1978 involved allegations that some judges were using the prestige of judicial office to enforce the payment of debts owed to the judges themselves or others.

In Matter of Adams, supra, for example, the Commission sustained such a charge in the Formal Written Complaint, finding that the judge, in a matter over which his court did not have

jurisdiction, used his judicial office to further the interests of a local corporation by writing to a debtor of the corporation, stating that further court action would be taken unless an amount due was paid. The Commission determined to remove Judge Adams from office for this and other misconduct.

Section 33.2(c) of the Rules Governing Judicial Conduct clearly identifies such use of office as improper:

> No judge shall lend the prestige of his office to advance the private interests of others; nor shall any judge convey or permit others to convey the impression that they are in a special position to influence him.

In another case considered by the Commission in 1978, a town court justice who also operated a repair business telephoned a customer who owed him money, threatened her with arrest and said he would not help her if she ever appeared in his court. The judge was charged in a Formal Written Complaint with lending the prestige of his office to advance a private interest. He resigned from office.

In another case, shortly after he assumed office, a judge wrote on court stationery to one of his private business debtors, threatening action if the debt were not paid. The Commission cautioned the judge about such conduct after being satisfied that it had only occurred once and that, at the very beginning of his term, the judge had not been sufficiently familiar with the applicable ethical standards.

Part-time judges who operate businesses have a special obligation to avoid the impropriety of using their judicial

office to advance their personal business interests. Judicial office is an honor that carries the obligation of avoiding even the appearance of impropriety. Even writing personal business letters on court stationery, as a number of judges have done, with or without threatening a personal debtor with the court's power, is an unfair use of the prestige of the court and should not be tolerated.

Access to Public Records

The constitutionally guaranteed right to a public trial underlies the fact that most court records -- dockets, memoranda, decisions, records of appointments -- are also public. There are in law several specific exceptions to this tenet, with respect to information on proceedings involving minors, for example, and when appropriate, a court may order certain evidence to be sealed. Absent such provisions, however, the records maintained by a court are available for public inspection.

Despite the public nature of the majority of court records, however, Commission investigators have sometimes had difficulty in reviewing the court records of some judges. While the judiciary in general has been cooperative, some judges have resisted Commission efforts to review their records. Instances have arisen in which judges have denied investigators access to court material on the grounds that the documents were private, personal papers, despite legal precedent to the contrary.

In Matter of Owen (Ct. on the Judiciary, September 18, 1978, unreported), the Court upheld a Commission subpoena duces tecum seeking "all court files, including but not limited to docket books, Simplified Traffic Informations, Uniform Traffic Tickets, correspondence and memoranda, relating to Motor Vehicle cases in [the respondent's] court in 1974 and 1975." The Court rejected the respondent's claim that the subpoenaed materials were personal papers shielded from scrutiny by his Fifth Amendment privilege against self-incrimination. The Court held:

> It is...clear that none of the documents mentioned in the subpoena constitute personal papers of the respondent, and further that these materials must be exhibited for inspection by counsel to this court, or any member of his staff, or any member of the public.... We hold further that correspondence addressed to respondent, in his capacity as a Judge, which requested any matter pending before him to be treated in a particular way, is deemed by this court to be part of the court file in that case. Matter of Owen, supra.

Several other legal authorities support the general proposition that the contents of court files are public records. Section 107 of the Uniform Justice Court Act requires all town, village and city court justices to "keep or cause to be kept legible and suitable books, papers, records and dockets of all civil actions and proceedings and all criminal actions and proceedings." Section 2019-a requires "records and dockets of the court" to be "at reasonable times open for inspection to the public...." Section 2019-a also states:

> Any such justice who shall willfully fail to...exhibit such records and docket when reasonably required...shall be guilty of a misdemeanor and shall, upon conviction, in addition to the punishment provided by law for a misdemeanor, forfeit his office.

A judge who denies investigators access to his court files is thus acting outside the law and, indeed, may be engaging in an independent act of misconduct.*

It should not be necessary, as it has been in the past, for the Commission to subpoena public court records because a judge refused to make them available, or search through a judge's attic to review public documents. Clearly, judges should be on notice that court records are public and must be made available for reasonable review. It is the Commission's policy to consider as misconduct any action by a judge which unreasonably denies access to court records by Commission staff.

The Practice of Law by Part-Time Judges

Approximately 2,400 of the 3,500 judges in New York State are justices of town or village courts whose 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 professions or other careers in addition to their judicial duties. Approximately 400 of these town and village justices are attorneys who may practice law with certain restric-

* See, Matter of Osterman, 13 N.Y.2d (a), (g) (Ct. on the Judiciary 1963) ("[u]nfitness [for office]...is demonstrated by a refusal by a Judge...to cooperate in any investigation of official corruption"); cf., Matter of Friedman, 12 N.Y.2d (a), (d) (Ct. on the Judiciary 1963).

tions outlined in the Rules Governing Judicial Conduct. In addition, many city court judges who serve part-time 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 Governing Judicial Conduct. 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 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.

While most part-time lawyer-judges comply with the letter of the Rules Governing Judical Conduct, the Rules may not provide sufficient protection to the public. For example, the partner of a part-time lawyer-judge may appear in courts in which the judge himself may not. Often, the presiding judge will know that the attorney before him is in partnership with another part-time lawyer-judge, and even if the case is adjudicated on its merits, the appearance of impropriety is apparent.

In its 1978 Annual Report, the Commission noted this problem, which should be considered by the Chief Administrator of the Courts and addressed in the Rules Governing Judicial Conduct.

The Need for Better Training

Ignorance of the standards and rules of judicial conduct has been professed by judges testifying before the Commission, and at times it is difficult to distinguish between those who are truly unfamiliar with the rules and those who are deliberately ignoring them. While the law requires training for all non-lawyer town and village justices, ignorance of judicial ethics is not limited to either lay or part-time judges.

Many of the problems identified by the Commission should be addressed in training programs presently conducted by the Office of Court Administration for non-lawyer judges of local courts, and they should be expanded to include part-time lawyer-judges and the full-time judiciary as well.

Ethics Training. During one investigation in 1978, a judge testified before the Commission that he was unaware of the impropriety of presiding over cases in which his brother was a party or lawyer. Matter of Adams, supra. One need not be a judge to know such conduct is wrong, and no training program will teach what only common sense requires a judge to know. But not all ethical issues are as clear-cut as presiding over matters involving relatives, and training as to judicial ethics is currently inadequate to help meet the issues that more frequently arise.

Many of the judges accused of fixing traffic tickets raised as a defense lack of knowledge that this practice is wrong. Although improved training would include this as well as other subjects, it hardly seems necessary to tell judges that it is improper to give special consideration to friends and relatives of judges and others in positions of influence. Hopefully, the Commission's efforts have helped educate judges as to the improprieties involved in fixing traffic tickets.

Since ethical standards for judges cover a broad range of conduct, including the appearance of impropriety, and since even the most basic standards are sometimes flagrantly violated, it is important to review with judges the particularly high standards expected of them and to familiarize them with sources and interpretations in court opinions and by commentators. While professed ignorance of applicable ethics standards will not deter the Commission from acting in cases involving abuse of these

standards, the Commission again recommends, as it has in previous reports, that judicial training programs include a more intensive review of judicial ethical standards. Even more important is the need for improved ongoing administrative supervision over these courts and regular reminders by court administrators with respect to ethical obligations by judges.

Administrative Training. It cannot be assumed that a judge will be adequately versed in the techniques of record keeping and judicial administration in general. As noted previously, the Commission has been made aware repeatedly of the woeful conditions in which many local judges keep their records, including accounts of money received in their official capacity. Obviously, the training that is offered to meet these important administrative responsibilities has not been completely successful. The part-time judiciary, including both lay and lawyer judges, for the most part, do not enjoy the professional administrative support made available to the full-time judiciary. Training for these judges should be improved and the importance of proper record keeping and administration stressed, including the serious nature of certain inadequate practices, which could result in removal from office. Furthermore, court administrators and administrative judges must strive to supplement improved training programs with supervision on a continuing basis, to ensure that adequate standards are not only taught but observed.

Political Activity

Most judicial offices in New York are filled by election, and there are specific provisions in the Rules Governing Judicial Conduct with respect to the political activity in which judges are permitted to engage. For example, the Rules prohibit incumbent judges from holding office in a political party or organization, contributing to any political party and taking part in any political campaign except their own for elective judicial office. The New York State Constitution prohibits incumbent judges 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.

Questions inevitably arise as to the nature and extent of political influences on judicial performance. Candidates for judicial office are subject to pressures and demands similar to those placed on any political candidate, and often their political activities do not cease upon election, since many judges aspire to higher judicial or other public office. Fund-raising activities, in particular, raise serious problems. A lawyer who contributes a substantial amount to a judge's campaign may be viewed as currying favor, and suspicions will be raised if the lawyer appears before the judge.

During 1978 the Commission considered and acted upon a number of complaints involving prohibited political activity. Two judges were admonished by the former Commission for supporting

candidates for office in violation of specific provisions to the contrary in the Rules Governing Judicial Conduct. Fifteen judges received confidential letters of dismissal and caution with respect to their contributing nominal amounts to a political campaign or attending a fund-raising affair, in violation of the Rules. One judge was cautioned with respect to an improper contribution to his brother's campaign for a non-judicial office.

Despite the restrictive rules pertaining to political activity, the demands of running for office, such as raising funds and assembling a campaign organization, make a judge's obligations to adhere to the Rules particularly difficult. There is in the Rules an implicit obligation upon judges and judicial candidates to attempt to avoid the potential conflicts of interest that may later arise as a result of electoral activity. The intent of the relevant laws, rules, ethical codes and opinions is to avoid the impression that, if elected, a judge will administer his office with a bias toward those who supported his candidacy. There is a particular vulnerability to such appearances with respect to a judicial candidate's more generous financial contributors.

It may be unrealistic to expect any political candidate not to know who his large contributors are, despite ethical codes and commentaries that suggest that the identities of contributors should be withheld from the judge.* On the contrary, in New

* See Canon 7B(2) of the Code of Judicial Conduct, the official commentary to Canon 7B(2), and Opinion No. 280 (1973) of the New York State Bar Association.

York, the Election Law (Section 14-102) virtually defeats this intent by requiring a public filing of contributors.

On balance, the Election Law provision 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 a judge who may preside over a case involving a significant contributor. Allowing a judge to know his contributors, in addition to being a recognition of political reality, also allows the judge the initial opportunity to disqualify himself or declare his relationship on the record in cases when contributors appear before him.

The obligation to avoid impropriety and the appearance of impropriety involves more than presiding over cases involving contributors. Those judges who have the power to award lucrative appointments such as guardianships and receiverships must also avoid the impression that their supporters will be favored with lucrative judicial appointments, not on the merits but based on favoritism. The damage to public confidence in the judiciary may be no less when a judge improperly awards a lucrative appointment to a large contributor than when he makes an award to a son-in-law or to another judge's son. Judges in such situations have a special obligation to avoid even the appearance of impropriety.

CONCLUSION

Public confidence in the integrity of the judiciary is indispensible to the system of justice as it functions in American society. The members of the State Commission on Judicial Conduct believe the Commission contributes to that goal, and its members continue to find their efforts challenging.

Respectfully submitted,

MRS. GENE ROBB, Chairwoman
DAVID BROMBERG, Esq.
HONORABLE RICHARD J. CARDAMONE
MRS. DOLORES DEL BELLO
HONORABLE HERBERT B. EVANS
MICHAEL M. KIRSCH, Esq.
VICTOR A. KOVNER, Esq.
WILLIAM V. MAGGIPINTO, Esq.
HONORABLE ISAAC RUBIN
(Appointed December 15, 1978)
HONORABLE FELICE K. SHEA
HONORABLE MORTON B. SILBERMAN
(Served April 1, 1978
to December 15, 1978)
CARROLL L. WAINWRIGHT, JR., Esq.

Commission Members

GERALD STERN, Esq.,

Administrator

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 & Lifschultz. 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 a member of the New York State Bar Association and is presently serving on its Committee on the New York State Constitution. He serves on the National Panel of Arbitrators of the American Arbitration Association.

HONORABLE RICHARD J. CARDAMONE is a graduate of Harvard College and the Syracuse University School of Law. He was appointed in January 1963 as a Justice of the Supreme Court for the Fifth Judicial District of New York by the late Governor Nelson A. Rockefeller and was elected to that position in November 1963. In January 1971 he was designated to serve on the Appellate Division, Fourth Department. He was later re-designated to a permanent seat on the Appellate Division by Governor Hugh L. Carey and is presently serving as the Senior Associate Justice. Judge Cardamone has served by appointment of the Chief Judge of the Court of Appeals on a number of specially convened Courts on the Judiciary to hear and determine issues regarding judicial conduct. He is immediate past president of the New York State Supreme Court Justices Association and is currently Chairman of its Executive Committee.

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 League of Women Voters, the Board of Directors and Executive Board of the Westchester Council for the Arts, the Board of Directors for Clearview School and a member of Alpha Delta Kappa, international honorary society for women educators.

HONORABLE HERBERT B. EVANS is a graduate of Howard University and St. John's Law School. He is presently Chief Administrator of the Courts, by appointment of Chief Judge Lawrence H. Cooke. Judge Evans has been a Justice of the Supreme Court since 1973 and an Associate Justice of the Appellate Division, First Judicial Department, since 1977, by appointment of Governor Hugh L. Carey. He was a judge of the New York City Civil Court from 1967 to 1973. He previously served as a lawyer for the Legal Aid Society, a partner in the law firm of Weaver, Waters, Evans & Wingate, Assistant Counsel to former Governor Averill Harriman, a member of the New York City Council from 1961 to 1963, a commissioner of the State Division of Parole, counsel to the National Urban League and Director of the New York City Housing and Development Board. Judge Evans was a founder of Freedom National Bank and 100 Black Men.

MICHAEL M. KIRSCH, ESQ., a graduate of Washington Square College of New York University and its law school, is a member of the firm of Goodman & Mabel & Kirsch. He is a member of the Trustees Council and former President of the Brooklyn Bar Association, and was a member of the House of Delegates of the New York State Bar Association. He is a member of the American Bar Association, the American Judicature Society, the International Association of Jewish Lawyers and Jurists. He is also a member of the 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. Mr. Kirsch has been a member of the Commission since its inception.

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 was a member of the Governor's Court Reform Task Force. Mr. Kovner is a member of the Association of the Bar of the City of New York. He formerly served as President of Planned Parenthood of New York City.

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 in Sag Harbor (N.Y.), and a trustee of Sag Harbor Savings Bank. Mr. Maggipinto is past 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. Mr. Maggipinto has been a member of the Commission since its inception.

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. Mrs. Robb has been a member of the Commission since its inception.

HONORABLE ISAAC RUBIN is a graduate of New York University, the New York University Law School (J.D.) and St. John's Law School (J.S.D.). He is presently a Justice of the Supreme Court, Ninth Judicial District, and Deputy Administrative Judge of the County Court, Westchester County, and the Supreme Court, Criminal Parts, of that county. Judge Rubin previously served as a County Court Judge in Westchester County, and as a Judge of the City Court of Rye, New York. He is a director and former president of the Westchester County Bar Association. He has also served as a member of the Committee on Character and Fitness of the Second Judicial Department, and as a member of the Nominating Committee and the House of Delegates of the New York State Bar Association.

HONORABLE FELICE K. SHEA is a graduate of Swarthmore College and Columbia Law School. She is a Judge of the Civil Court of the City of New York, presently serving as an Acting Justice of the Supreme Court, New York County. Judge Shea is a Fellow of the American Bar Foundation, a member of the Special Committee on the Resolution of Minor Disputes of the American Bar Association and a director of the New York Women's Bar Association. She is also a member of the Association of the Bar of the City of New York and serves on its Committee on Sex and the Law and on its Special Committee on Consumer Affairs.

HONORABLE MORTON B. SILBERMAN is a graduate of Bucknell University and Columbia Law School. He is a Justice of the Supreme Court, Ninth Judicial District. Justice Silberman previously served as a Judge of the County Court, Rockland County, and as District Attorney of Rockland County. He was elected District Attorney of Rockland County in 1959, and re-elected in 1962. He was elected County Judge of Rockland County in 1965, and was elected as a Justice of the Supreme Court in 1968. He has also served as an Associate Justice of the Appellate Term, Ninth and Tenth Judicial Districts. He was formerly a member of the Judiciary Relations Committee of the Second Department. (In January 1979 Justice Silberman resigned from his position as a Justice of the Supreme Court, and also resigned from the Commission. He is now counsel to the law firm of Clark, Gagliardi and Miller of White Plains, N.Y.)

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 a member 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. Mr. Wainwright has been a member of the Commission since its inception.

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 Commission since its inception. He previously served as Director of Administration of the Courts, First Judicial Department, Assistant Corporation Counsel for New York City, Staff Attorney on the President's Commission on Law Enforcement and the Administration of Justice, Legal Director of a legal service unit in Syracuse, and Assistant District Attorney in New York County.

APPENDIX B

OPERATING PROCEDURES AND RULES
OF THE STATE COMMISSION ON JUDICIAL CONDUCT

Section 7000.1 Definitions.

For the purpose of this Part, the following terms have the meaning indicated below:

(a) Administrator means the person appointed by the commission as administrator.

(b) Administrator's Complaint means a complaint signed by the administrator at the direction of the commission, which is filed as part of the commission's records.

(c) Answer means a verified response in writing to a formal written complaint.

(d) 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.

(e) Commission means the State Commission on Judicial Conduct.

(f) Dismissal means a decision at any stage not to proceed further.

(g) Formal Written Complaint means a writing, signed and verified by the administrator of the commission, containing allegations of judicial misconduct against a judge for determination at a hearing.

(h) Hearing means an adversary proceeding at which testimony of witnesses may be taken and evidentiary data and material relevant to the Formal Written Complaint may be received and at which the respondent judge is entitled to call and cross-examine witnesses and present evidentiary data and material relevant to the Formal Written Complaint.

(i) 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.

(j) Investigation, which may be undertaken only at the direction of the commission, 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 or any of its members.

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

(l) Letter of Dismissal and Caution means the written confidential suggestions and recommendations referred to in section 7000.3, subdivision (c) of these rules.

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

(n) Referee means any person designated by the commission pursuant to section 43, subdivision 2, of the Judiciary Law to hear and report on any matter in accordance with the provisions of section 44, subdivision 4, of the Judiciary Law.

Section 7000.2 Complaints.

The commission shall receive, initiate, investigate and hear complaints against any judge with respect to his qualifications, conduct, fitness to perform, or the performance of his official duties. Prior to commencing an investigation of a complaint initiated by the commission, the commission shall file as part of its records an administrator's complaint.

Section 7000.3 Investigations and Dispositions.

(a) When a complaint is received or when the administrator's complaint is filed, an initial review and inquiry may be undertaken.

(b) Upon receipt of a complaint, or 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 or take any other action authorized by section 22 of article 6 of the Constitution or article 2-A of the Judiciary Law. Notwithstanding the dismissal of a complaint, the commission, in connection with such dismissal, may issue to the judge a letter of dismissal and caution containing confidential suggestions and recommendations with respect to the complaint, the commission's initial review and inquiry, or the commission's investigation as they pertain to the judge.

(d) 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 resolution, delegate to staff attorneys and other employees designated by the commission the power to administer oaths and take testimony during investigations authorized by the commission. If testimony is taken of a judge under investigation, during the course of an investigation authorized by the commission, at least one member of the commission shall be present.

(e) In the course of the investigation, the commission may require the appearance of the judge involved before the commission, or any of its members, in which event the judge shall be notified in writing of his required appearance either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five 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 by submitting such data and material, including a written statement, or by making an oral statement which shall be transcribed. 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. A transcript of the judge's testimony shall be made available to the judge without cost.

(g) A non-judicial witness required to appear before the commission shall have the right to be represented by his or her counsel who may be present with the witness and may advise the witness, but may not otherwise take any part in the proceeding.

Section 7000.4 Use of Letter of Dismissal and Caution in Subsequent Proceedings.

A letter of dismissal and caution may be used in subsequent proceedings only as follows:

(a) The fact that a judge had received a letter of dismissal and caution may not be used to establish the misconduct alleged in a subsequent proceeding. However, the underlying conduct described in the letter of dismissal and caution may be charged in a subsequent Formal Written Complaint, and evidence in support thereof may be presented at the hearing.

(b) A judge may be questioned with respect to receipt of a prior letter of dismissal and caution where its subject matter is related to the misconduct alleged in a subsequent Formal Written Complaint.

(c) Upon a finding by the commission of a judge's misconduct, a letter of dismissal and caution may be considered by the commission in determining the sanction to be imposed.

Section 7000.5 Use of Letter of Suggestions and Recommendations of Former State Commission on Judicial Conduct and Temporary State Commission on Judicial Conduct.

A letter of suggestions and recommendations sent to a judge by the former State Commission on Judicial Conduct or the Temporary State Commission on Judicial Conduct may be used in the same manner and for the same purposes in subsequent proceedings as a letter of dismissal and caution may be used as indicated in section 7000.4 of these rules.

Section 7000.6 Procedure Upon a Formal Written Complaint.

(a) Applicable Law

If the commission determines that a hearing is warranted, the procedures to be followed are those set forth in section 44, subdivision 4, of the Judiciary Law.

(b) Answer

A judge who is served with a Formal Written Complaint shall serve his answer verified by him within twenty (20) days of service of the Formal Written Complaint. The answer shall contain denials of those factual allegations known or believed to be untrue. The answer shall also specify those factual 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 factual allegations in the charges are deemed admitted. The answer may also contain affirmative and other defenses, and may assert that the specified conduct alleged in the Formal Written Complaint is not improper or unethical. Failure to answer the Formal Written Complaint shall be deemed an admission of its allegations.

(c) Summary Determination

Either party may move before the commission for a summary determination upon all or any part of the issues being adjudicated, if the pleadings, and any supplementary materials, show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law. If a summary determination is granted, the commission shall provide reasonable opportunity for the submission of briefs and oral argument with respect to possible sanctions.

(d) Agreed Statement of Facts

Subject to the approval of the commission, the administrator and the respondent may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission shall make its determination upon the pleadings and the agreed statement of facts.

(e) Subpoenas

The judge who is the subject of a Formal Written Complaint may request the referee designated by the commission to issue subpoenas on the judge's behalf. The referee shall grant reasonable requests for subpoenas.

(f) Motions

The referee shall regulate the course of a hearing, make appropriate rulings, set the time and place for adjourned or continued hearings, fix the time for filing briefs and other documents, and shall have such other authority as specified by the commission, not inconsistent with the provisions of article 2-A of the Judiciary Law.

The commission shall decide the following motions:

(1) a motion for summary determination;

(2) a motion to dismiss;

(3) a motion to confirm or disaffirm the findings of the referee;

(4) a motion made prior to the appointment of the referee, except that the commission may refer such motion to the referee when such referral is not inconsistent with the other provisions of this section.

The referee designated by the commission shall decide all other motions.

In deciding a motion, the commission members shall not have the aid or advice of the administrator or commission staff who has been or is engaged in the investigative or prosecutive functions in connection with the case under consideration or a factually related case.

(g) Discovery

Upon the written request of the respondent, the commission shall, at least five days prior to the hearing or any adjourned date thereof, make available to the respondent without cost copies of all documents which the commission intends to present at such hearing and any written statements made by witnesses who will be called to give testimony by the commission. The commission shall, in any case, make available to the respondent at least five days prior to the hearing or any adjourned date thereof any exculpatory

evidentiary data and material relevant to the Formal Written Complaint. The failure of the commission to furnish timely any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such failure is not substantially prejudicial to the judge.

(h) Burden of Proof and Rules of Evidence at Hearing

(1) The attorney for the commission has the burden of proving by a preponderance of the evidence the facts justifying a finding of misconduct.

(2) At the hearing, the testimony of witnesses may be taken and evidentiary data and material relevant to the Formal Written Complaint may be received. The rules of evidence applicable to non-jury trials shall be followed.

(i) Post-Hearing Procedures

Within a reasonable time following a hearing, the commission shall furnish the respondent, at no cost to him or her, a copy of the transcript of the hearing.

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

(k) The referee shall submit a report to the commission with proposed findings of fact. No recommendation shall be made with respect to a sanction to be imposed by the commission. A copy of the referee's report shall be sent to the respondent.

Section 7000.7 Procedure for Consideration of Referee's Report or Agreed Statement of Facts.

(a) The commission shall consider the referee's report or agreed statement of facts and shall provide reasonable opportunity for the submission of briefs and oral argument with respect to such report or agreed statement of facts and with respect to possible sanctions. The respondent judge shall file an original and ten copies of any brief submitted to the commission.

(b) In making a determination following receipt of a referee's report or agreed statement of facts, the commission members shall not have the aid or advice of the administrator or commission staff who has been or is engaged in the investigative or prosecutive functions in connection with the case under consideration or a factually related case.

(c) After a hearing, if the commission determines that no further action is necessary, the Formal Written Complaint shall be dismissed and the complainant and the judge shall be so notified in writing.

(d) If the commission determines that a judge who is the subject of a hearing shall be admonished, censured, removed or retired, the commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which the determination is based, to the Chief Judge of the Court of Appeals.

(e) The commission shall notify the complainant of its disposition of the complaint.

Section 7000.8 Confidentiality of Records.

The confidentiality of the commission's records shall be governed by section 45 of the Judiciary Law. Disciplining staff for breaches of confidentiality shall be governed by procedures set forth in section 46 of the Judiciary Law.

Section 7000.9 Standards of Conduct.

(a) A judge may be admonished, censured 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 United States and the State of New York;

(2) the requirement that judges abide by the Code of Judicial Conduct, the rules of the Chief Administrator and the rules of the respective Appellate Divisions governing judicial conduct.

Section 7000.10 Amending Rules.

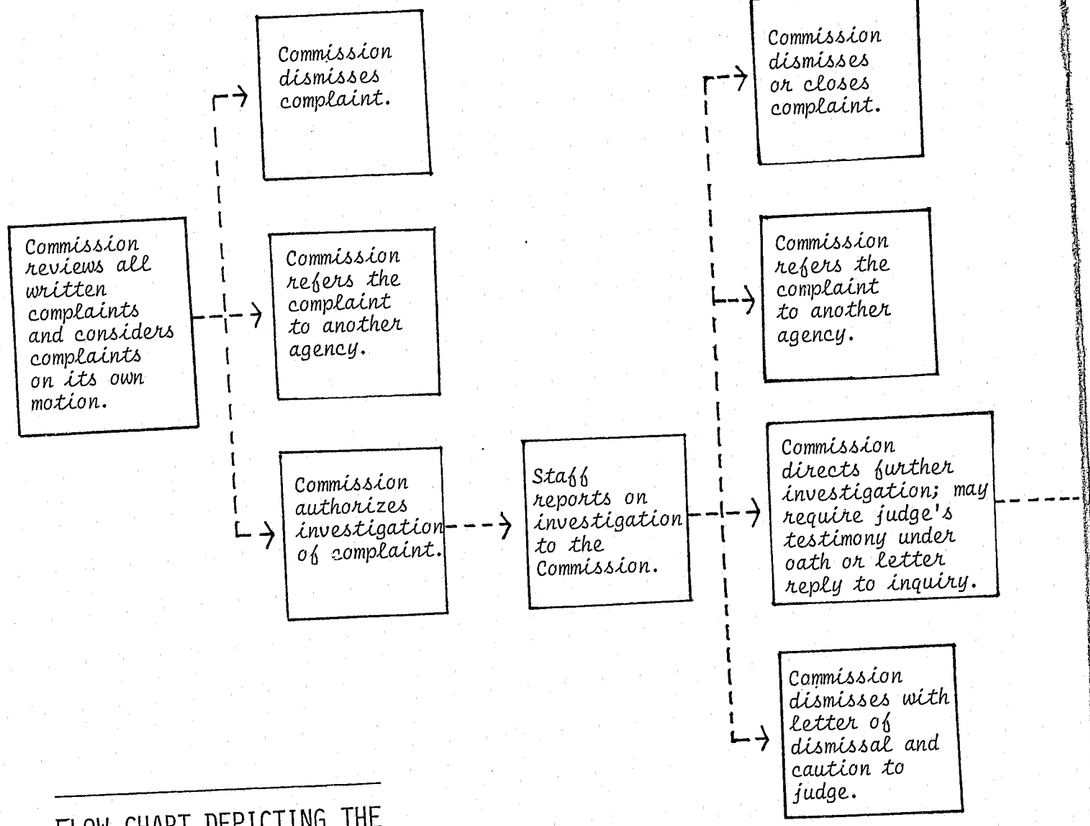
The rules of the commission may be amended with the concurrence of at least six members.

Section 7000.11 Quorum.

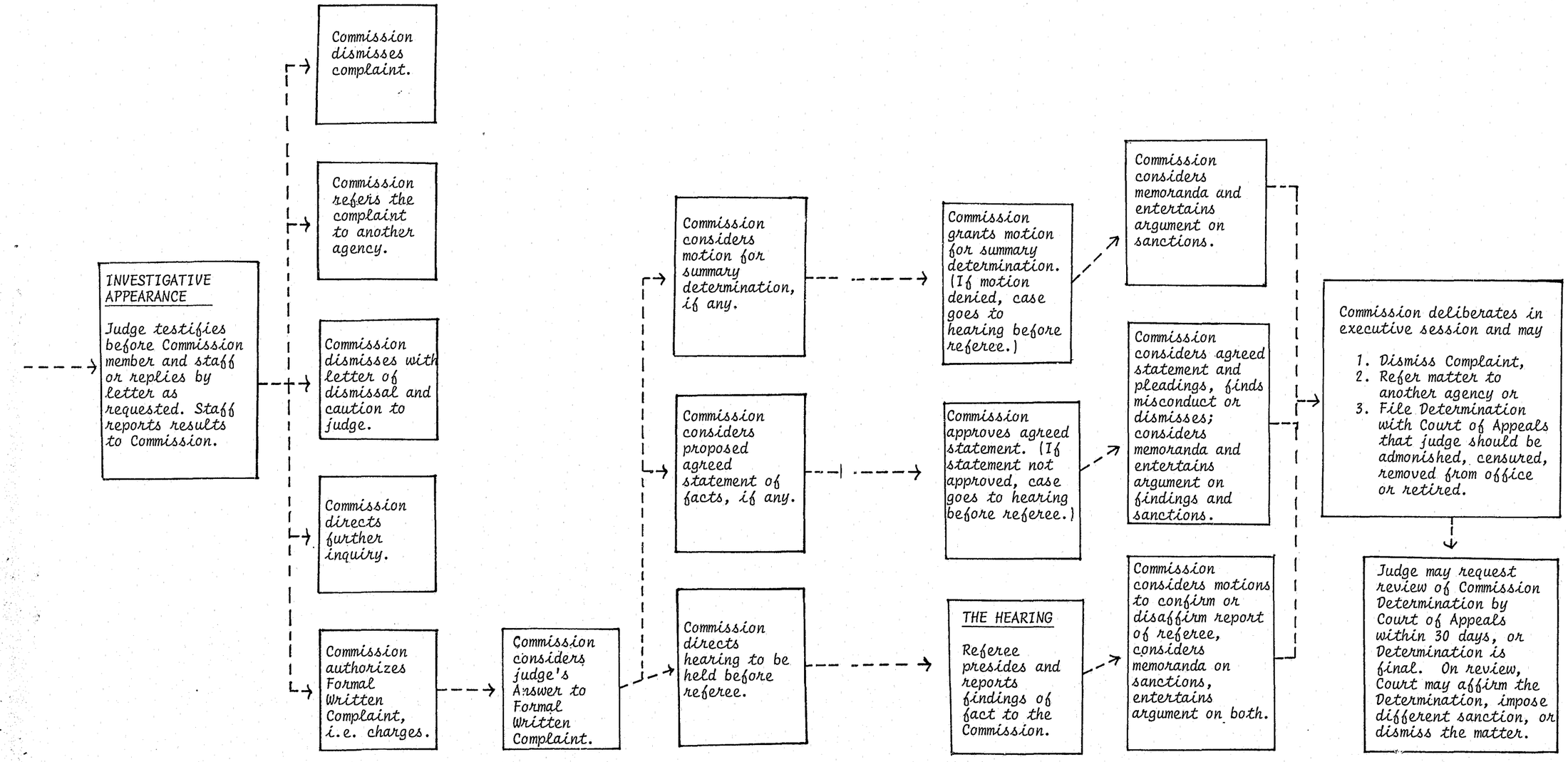
Six members of the commission shall constitute a quorum of the commission except for any action taken pursuant to Section 43, subdivision 2, and section 44, subdivisions 4 through 8, of the Judiciary Law, in which case eight members shall constitute a quorum.

Section 7000.12 Commission's Principal Office.

The Commission's principal office shall be its New York City office.



FLOW CHART DEPICTING THE COMPLAINT, INVESTIGATION, HEARING AND DETERMINATION PROCESS OF THE COMMISSION


INVESTIGATIVE APPEARANCE
Judge testifies before Commission member and staff or replies by letter as requested. Staff reports results to Commission.
Commission dismisses complaint.
Commission refers the complaint to another agency.
Commission dismisses with letter of dismissal and caution to judge.
Commission directs further inquiry.
Commission authorizes Formal Written Complaint, i.e. charges.
Commission considers judge's Answer to Formal Written Complaint.
Commission considers motion for summary determination, if any.
Commission considers proposed agreed statement of facts, if any.
Commission directs hearing to be held before referee.
Commission grants motion for summary determination. (If motion denied, case goes to hearing before referee.)
Commission approves agreed statement. (If statement not approved, case goes to hearing before referee.)
THE HEARING
Referee presides and reports findings of fact to the Commission.
Commission considers memoranda and entertains argument on sanctions.
Commission considers agreed statement and pleadings, finds misconduct or dismisses; considers memoranda and entertains argument on findings and sanctions.
Commission considers motions to confirm or disaffirm report of referee, considers memoranda on sanctions, entertains argument on both.
Commission deliberates in executive session and may
1. Dismiss Complaint,
2. Refer matter to another agency or
3. File Determination with Court of Appeals that judge should be admonished, censured, removed from office or retired.
Judge may request review of Commission Determination by Court of Appeals within 30 days, or Determination is final. On review, Court may affirm the Determination, impose different sanction, or dismiss the matter.

APPENDIX C

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- X

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to	:	COMMISSION PER CURIAM DETERMINATION
PAUL W. ADAMS,	:	
a Justice of the Town Court of Phelps, Ontario County.	:	

- X

PRESENT: Mrs. Gene Robb, Chairwoman
David Bromberg
Hon. Richard J. Cardamone
Dolores DelBello
Hon. Herbert B. Evans
Michael M. Kirsch
Victor A. Kovner
William V. Maggipinto
Hon. Felice K. Shea

The respondent, Paul W. Adams, a Justice of the Phelps Town Court, Ontario County, was served with a Formal Written Complaint dated June 20, 1978, alleging two charges of misconduct. In his verified Answer dated July 14, 1978, respondent admitted the allegations of the complaint, but asserted, in mitigation of his acts, that he was unaware that such conduct violated the Rules Governing Judicial Conduct of the Administrative Board of the Judicial Conference, the Code of Judicial Conduct, and the Judiciary Law.

The Administrator of the Commission on Judicial Conduct moved for judgment on the pleadings on August 7, 1978. Since there was no genuine issue of material fact raised, a hearing on the issue of misconduct was unnecessary. The Commission, therefore, granted judgment on the pleadings on September 14, 1978. Respondent thereafter appeared before the Commission on October 19, 1978, for a hearing on the issue of a sanction.

Upon the record before us the Commission finds that between January 1977 and June 1977 respondent failed to disqualify himself in six cases in which the respondent's brother, either as plaintiff or as an officer of his own company, appeared in respondent's court, and that by reason of

such acts, respondent violated the applicable Rules Governing Judicial Conduct, the Code of Judicial Conduct and the Judiciary Law as cited in Charge I of the Formal Written Complaint.

The Commission also finds that on May 4, 1977, respondent, in connection with a dispute between Neil Bailey and Phelps Farm Service, Inc., sent a written communication to Mr. Bailey, stating that unless Mr. Bailey paid an amount due to Phelps Farm Service, Inc., further court action would be taken. We conclude that respondent used his judicial office to advance the interests of Phelps Farm Service, Inc., at a time when he had no jurisdiction over the dispute. By reason of this action, respondent violated the applicable Rules Governing Judicial Conduct and the Code of Judicial Conduct.

In determining the sanction to be imposed upon respondent, the Commission has considered the nature of the charges made and found against respondent, memoranda of law, and the oral arguments of the Administrator of the Commission, respondent's counsel and respondent. Respondent's actions were clearly improper and his assertion that he was unaware of the applicable standards of judicial conduct is not persuasive. Respondent's conduct violated not only those guidelines that are published, but also "the general moral and ethical standards expected of judicial officers by the community" (Friedman v. State of New York, 24 N.Y.2d 528, 539-540).

Having found that respondent violated the Rules Governing Judicial Conduct (Sections 33.1, 33.2, 33.3[a][1], 33.3[a][4] and 33.3[c][1][iv][a]), the Code of Judicial Conduct (Canons 1, 2, 3A[1], 3A[4] and 3C[1][d][i]) and the Judiciary Law (Section 14) of New York, the Commission determined that the appropriate sanction is removal.

The foregoing constitutes the findings of fact and conclusions of law required by Judiciary Law, Section 44, subdivision 7.

Dated: New York, New York
November 29, 1978

APPENDIX D

STATE OF NEW YORK
STATE COMMISSION ON JUDICIAL CONDUCT

- X

In the Matter :

- of - :

JOSEPH PILATO, :

a Judge of the Family Court, :
County of Monroe.

- X

PUBLIC CENSURE OF MONROE COUNTY FAMILY COURT
JUDGE JOSEPH T. PILATO

The State Commission on Judicial Conduct has determined that Family Court Judge Joseph T. Pilato should be publicly censured for his intemperate and injudicious conduct in court. The Commission's inquiry has disclosed, and Judge Pilato has acknowledged, that he has exhibited anger at attorneys, used inappropriately coarse language in talking to litigants, and, in an attempt to speed the disposition of cases, demonstrated lack of concern with legal procedures and rulings. In one case he deliberately made conflicting rulings simultaneously and advised the attorneys that he was not going to consider the merits of their objections.

By his conduct in court, he has violated the following Rules Governing Judicial Conduct:

> Section 33.1 Upholding the independence of the judiciary. An independent and honorable judiciary is indispensable to justice in our society. Every judge shall participate in establishing, maintaining, and enforcing, and shall himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Part shall be construed and applied to further that objective.
>
> Section 33.2(a) Avoiding impropriety and the appearance of impropriety. (a) A judge shall respect and comply with the law and shall conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Section 33.3(a)(3) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity...

Because of the reports of marked improvement in Judge Pilato's conduct, his candor in testifying before the Commission, and his assurance that he will strive to improve his conduct, no further action is warranted.

Dated: March 1, 1978
New York, New York

APPENDIX E

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- X

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4 of the Judiciary Law in Relation to	:	COMMISSION PER CURIAM DETERMINATION
MORRIS SPECTOR, a Justice of the Supreme Court, New York County.	:	

- X

PRESENT: Mrs. Gene Robb, Chairwoman
David Bromberg
Hon. Richard J. Cardamone
Dolores DelBello
Hon. Herbert B. Evans
Michael M. Kirsch
Victor A. Kovner
William V. Maggipinto
Hon. Felice K. Shea
Hon. Morton B. Silberman
Carroll L. Wainwright, Jr.

The respondent, Morris Spector, a Justice of the Supreme Court, New York County, was served with a Formal Written Complaint dated June 19, 1978, alleging four charges of misconduct, based upon the appearance of impropriety arising from a number of appointments of attorneys as guardians ad litem or as referee made by respondent of the following persons:

A partner of the law firm in which respondent's son was employed as an associate (Charge I);
The son of Justice Sidney Fine during a period when Justice Fine also appointed respondent's son (Charge II);
The son of Justice George Postel during a period when Justice Postel also appointed respondent's son (Charge III); and
The son-in-law of Justice Abraham Gellinoff during a period when Justice Gellinoff also appointed respondent's son (Charge IV).

In his Verified Answer dated August 15, 1978, respondent admitted all of the factual allegations of the Complaint relating to the appointments, but denied that any of the allegations asserted in the Complaint constituted misconduct or violations of any of the Canons of Judicial Ethics and denied that the motive for the appointments he made related in any way to the employment of respondent's son or to the appointments of respondent's son by the other justices.

On August 30, 1978, the Administrator of the State Commission on Judicial Conduct moved for summary determination of the pleadings and following response from respondent dated September 7, 1978, the Commission denied the motion for judgment on the pleadings on September 15, 1978.

Pursuant to order dated September 26, 1978, Bernard Meyer, Esq., was appointed as Referee to hear and report to the Commission with respect to the above entitled proceeding. After a hearing held on October 13, 1978, the Referee submitted his report dated November 14, 1978, which concluded that Charges I and IV had not been sustained, and that Charges II and III had been sustained in part.

On November 17, 1978, the attorney for the Commission moved to confirm the findings of fact in the Referee's report and on November 22, 1978, the respondent cross-moved to confirm the Referee's report as to Charges I and IV and to disaffirm the Referee's report as to Charges II and III. On November 29, 1978, the attorneys for the Commission and the respondent argued both the motion and the cross-motion, and in addition argued the issue of sanctions, if any, to be imposed by the Commission in the event any of the charges were sustained. The respondent was present during the course of these arguments and was offered the opportunity to make a statement to the Commission.

Upon the record before us the Commission finds that between March of 1968 and November of 1974 respondent appointed the son of Justice Sidney Fine on two occasions, yielding aggregate fees of $3,400, while Justice Fine appointed the son of respondent on eight occasions, yielding aggregate fees of $9,393 (Charge II), and that respondent appointed the son of Justice Postel on ten occasions, yielding aggregate fees of $11,521 while Justice Postel had appointed respondent's son on five occasions, yielding aggregate fees of $6,867 (Charge III).

The Commission further finds that respondent was in fact aware of the appointments by Justices Fine and Postel at the time that he was making the appointments of the sons of said justices. The Commission further finds that these cross-appointments of sons of other Supreme Court justices, made with knowledge of their appointments of respondent's son, were not made "with a view solely to [the appointees'] character and fitness" within the meaning of Canon 13 of the Canons of Judicial Ethics and thus said appointments gave "the appearance of impropriety" within the meaning of Canon 4 of the Canons of Judicial Ethics and the applicable portion of Section 33 of

the Rules Governing Judicial Conduct. With respect to the appointments by respondent of Justice Postel's son, moreover, the Commission finds that, although there was no "quid pro quo" understanding between respondent and Justice Postel, the closeness of the number of appointments (four by respondent, five by Justice Postel) and the closeness in time of appointments by each to appointments of the other, suggest that appointments of each other's son were being made to avoid a charge of nepotism.

Charge I is dismissed.

While the Commission does not find that the appointment of the employer of respondent's son violated the Canons of Judicial Ethics (Charge I), it wishes to express its deep concern that appointments of employers of close relatives of the appointing members of the judiciary may in the future in some circumstances constitute an appearance of impropriety. In such cases, questions will arise as to the economic or professional benefit which may flow to the judge's relative.

Charge IV is dismissed.

In determining the sanctions to be imposed upon respondent, the Commission has considered the respondent's age (76) and imminent retirement, as well as his otherwise unblemished record as a member of the judiciary for 22 years and, in the light thereof, the Commission has determined that the appropriate sanction is that Respondent be admonished. Insofar as they are not inconsistent with the foregoing, the Commission accepts the findings of fact as set forth in the Referee's report.

The foregoing constitutes the findings of fact and conclusions of law required by Judiciary Law, Section 44, subdivision 7.

The following members of the Commission concur: MRS. ROBB, MR. BROMBERG, JUDGE CARDAMONE, MRS. DELBELLO, JUDGE EVANS, MR. KOVNER, MR. MAGGIPINTO and JUDGE SHEA.

MR. KIRSCH, MR. WAINWRIGHT and JUDGE SILBERMAN dissent in a separate opinion.

Dated: New York, New York
December 14, 1978

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- X

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

MORRIS SPECTOR, :

a Justice of the Supreme Court, :
First Judicial District.

- X

OPINION DISSENTING FROM COMMISSION
PER CURIAM DETERMINATION

Respondent is charged with having made judicial appointments on the basis of favoritism, giving the appearance of impropriety, in violation of the Canons of Judicial Ethics, and the later Code of Judicial Conduct, and the Rules Governing Judicial Conduct.

The appointments were conceded by the respondent, but the allegations of impropriety were denied, and the issues were submitted to former justice of the Supreme Court, Hon. Bernard S. Meyer, as referee to hear and report. The referee has reported with his findings and conclusions.

The charges are divided into four parts:

Charge I deals with two appointments made by the respondent of an attorney, as a receiver in 1968 and 1969, at a time when respondent's son, James Spector, was employed by the appointee. As to this the learned referee found that the appointments were made solely on the basis of merit, and that the charge was not sustained.

Charge II alleged that the respondent appointed one, Burton Fine, son of another Supreme Court justice, Sidney Fine, as a guardian ad litem in two cases, one in February 1971, and the other in October 1974, three and one-half years later, whereas during the period March 1968 through October 1974, a period of six and one-half years, Justice Fine had appointed respondent's son, James Spector, as a guardian, referee and conservator in eight cases. The referee found that the respondent had not discussed these appointments with anyone, and was satisfied that the appointee had the character and ability to perform the appointed tasks satisfactorily. He held, however, that while the appointments were made on merit and were not due to favoritism, nor would justify the impression that respondent may have

been influenced by another, it could not be said, in the light of respondent's friendship with Justice Fine, that the appointments were made "solely" or "only" on the basis of character, fitness and merit, so as to be "free from...the appearance of impropriety" within the meaning of Canon 4 of the Canons of Judicial Ethics and free of the "appearance of impropriety" within the meaning of 22 N.Y.C.R.R. 33.2. Except as stated, the referee reported that Charge II was not sustained.

Charge III alleged similar appointments by respondent of one, Sanford Postel, son of a friend and colleague, Supreme Court Justice George Postel, in ten cases between March 1969 and November 1974, while Justice Postel appointed respondent's son, James Spector, in five cases between December 1969 and September 1972. The referee found no relationship between the two; that respondent had never discussed his appointments with any other judge, and no other judge had discussed his appointments with respondent; and that respondent's appointments were made on the basis of character, fitness and merit. He found, however, that they were not "free from...the appearance of impropriety" in view of the friendship between the justices, as a result of which the appointments were not made "solely" and "only" on the basis of character, fitness and merit, within the meaning of Canon 4 of the Canons of Judicial Ethics and 22 N.Y.C.R.R. 33.2. Except as stated, Charge III was not sustained by the referee.

Charge IV alleged similar appointments by respondent of one Frederick Levy, son-in-law of his close personal friend and colleague, Supreme Court Justice Abraham Gellinoff, in seventeen cases (seven of which were without fee) over an eight year period, between December 1968 and December 1974, while Justice Gellinoff appointed respondent's son, James Spector, in five cases over a five and one-half year period, between June 1969 and November 1974. The referee reported that respondent knew Frederick Levy very well, as a very capable attorney of 25 years experience when first appointed, and as a man of integrity and ability; that they never discussed his appointments with this or any other judge, nor did they discuss theirs with him; and that during respondent's judicial service he had made thousands of appointments. He concluded that respondent's appointments were not made on the basis of favoritism, nor would they justify the impression of favor, but that they were made solely on the basis of character and fitness, were "free from... the appearance of impropriety" within the meaning of Canon 4, were "only on the basis of merit" within the meaning of 22 N.Y.C.R.R. 33.3(b)(4), and "free of the appearance of impropriety" under 22 N.Y.C.R.R. 33.2. Charge IV was not sustained by the referee.

The learned referee is a highly experienced and respected former justice, whose findings and conclusions are entitled to great weight. I would adopt all of his findings of fact. However, I do not conclude that these findings constitute misconduct requiring the imposition of discipline.

Unfortunately, the record does not contain evidence of how appointments are customarily made by the judiciary. The ideal, of course, is that set forth in the Rules, that appointments be made only on the basis of

merit. However, the fitness of the appointee is the responsibility of the appointing judge, and he should not be expected to assume that responsibility without knowing more about the prospective appointee. He should not therefore be criticized if such appointments are made from among those whom he knows to be well-qualified. Clearly, he can have more confidence in his judgment when he knows more about the individual, and can more safely rely upon those he believes he can trust. Literal or strict compliance with the Rules is, therefore, rarely attained or attainable.

In this case, among the thousands of appointments made by the respondent during his judicial service, there were two over a three and one-half year period to Burton Fine, son of Justice Sidney Fine (Charge II), and ten over a five and one-half year period to Sanford Postel, son of Justice George Postel. The appointees were found by the referee to be fully qualified, except that they were related to the other justices, friends of the respondent. Such a relationship should not, under the circumstances, penalize an otherwise qualified candidate for appointment, particularly where the appointments were made in relatively rare instances over a long period of time.

There is no question that respondent's personal relationship with the appointees enabled him better to know their character and ability so as to place his trust in them, rather than some stranger. Thus, the referee may have been technically correct in concluding that the appointments were not made "solely" and "wholly" on merit, and that the relationship may have been an influencing factor. However, an equally reasonable interpretation could lead to the conclusion that the relationship was an important factor enabling the respondent to better judge the candidate for appointment.

The respondent has an unblemished record of distinguished public service for over 38 years, as an assistant U.S. Attorney, an assistant District Attorney, as a City Court judge, and for the past 22 years as a Supreme Court justice, and he is due to retire on December 31, 1978, at age 76.

I would not determine that the acts charged and sustained by the learned referee warrant disciplinary action under Section 44, subdivision 7, of the Judiciary Law, and I therefore vote to dismiss the complaint pursuant to Judiciary Law Section 44, subdivision 6.

MICHAEL M. KIRSCH
Member, Commission on Judicial Conduct

CARROLL L. WAINWRIGHT, JR., CONCURRING
Member, Commission on Judicial Conduct

I concur in the dissent of Commission Member Kirsch. I would only add that until now there has been no prohibition against a judge making an appointment of a relative of another judge. If this is to constitute judicial misconduct, then it would seem to me that such sanction should apply prospectively, and not to appointments made by the respondent judge some four to ten years ago.

To admonish a judge who has served for 22 years for what the majority characterizes as an "appearance of impropriety" seems to me unfair. This is particularly so when this public sanction is imposed during the very last month of respondent's lengthy judicial career.

MORTON B. SILBERMAN
Member, Commission on Judicial Conduct

Dated: New York, New York
December 14, 1978

APPENDIX F

STATE OF NEW YORK
COURT ON THE JUDICIARY

- X

In the Matter of the Proceedings Pursuant to Section 22 of Article VI of the Constitution of the State of New York in Relation to

LEON SCHWERZMANN, JR.

a Judge of the Surrogate's Court, County of Jefferson, Fourth Judicial Department.

- X

Per Curiam

Before: Markewich, P.J., Mollen, Suozzi, Kane and Main, JJ.

Pursuant to Article VI, Section 22, of the New York State Constitution, the Chief Judge of the Court of Appeals convened this Court, by order dated June 29, 1977, to hear and determine charges concerning the respondent Leon Schwerzmann, Jr., Surrogate of the County of Jefferson.

Respondent has served continuously in his present judicial post for over 24 years. During at least 20 of those years, it has been and continues to be his policy to assist individual members of the public with their legal or personal problems upon request. While such conduct has gained for him the gratitude and support of his community, in some instances it has also created serious problems for litigants and their attorneys. Two complaints involving the activities of Judge Schwerzmann in this regard were brought to the attention of the Appellate Division, Fourth Department. In answer to these allegations, Judge Schwerzmann admitted that he did provide free legal advice to the public and further informed that Court in writing that "the instances you mention are only two of literally hundreds in which I have volunteered to assist the public with their legal or personal problems." Additional inquiry and communication with Judge Schwerzmann culminated in a directive by the Appellate Division, Fourth Department, that he terminate the rendition of such advice and assistance to the general public. Respondent declined to comply and requested permission to submit the issues presented to the then Temporary Commission on Judicial Conduct. Parenthetically, that body was then conducting its own independent investigation of Judge Schwerzmann based on another yet similar complaint made to it. Thereafter, respondent appeared and testified before the full Commission and, in accordance with its subsequent report and recommendation, this Court ultimately authorized the service of charges upon him alleging judicial misconduct in violation of provisions

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1 OF 2

of actively using one's judicial position to influence the outcome of a case in controversy, or becoming an active advocate of the one making the solicitation, no blanket condemnation of a response by a Judge to such unsolicited inquiries can be formulated, nor is such intended by this determination.

In this case, the respondent's admitted broad policy and practice of rendering individualized advice and assistance to particular community members in a variety of legal matters goes far beyond the appropriate boundaries of an isolated response to a specific and unsolicited request for some information, advice or guidance. The good faith and high purpose of Judge Schwerzmann's motives are not in doubt, nor is his personal character and integrity subject to question. It is undisputed that Judge Schwerzmann's advice and assistance were rendered without compensation and personal financial benefit to him. Nevertheless, restraints imposed against a practice of law by a Judge apply throughout the State to all Judges and they must be followed. The practice of a judicial officer making himself available on a regular and continuing basis to provide information, advice or guidance in legal matters and holding himself out as being so available is one that is neither appropriate nor proper for a judicial officer to engage in.

Inasmuch as the respondent has stated in open court that he will abide by our decision, we do not perceive the necessity of imposing any other sanctions. Accordingly, the proceeding should be terminated with a direction that the respondent desist from this practice, and particularly the type of activity herein described.

Markewich, P.J., Mollen, Suozzi, Kane and Main, JJ., concur.

APPENDIX G

CHALLENGES TO COMMISSION PROCEDURES

Forty-two town justices attempted to restrain further proceedings in ticket-fixing cases in Polansky v. Commission (Supreme Ct. Sullivan Cty. 1977). Supported by the Dutchess, Orange and Ulster County Magistrates Associations, the justices requested a Writ of Prohibition on the grounds that the Commission had no jurisdiction over town justices. Supreme Court Justice Edward S. Conway held that town justices come within the Unified Court System, and upheld the Commission's jurisdiction. He also held that a Commission hearing is not necessary to convene the Court on the Judiciary, or to relieve a judge of his duties without pay.

Wawayanda Town Justice John O'Connor requested a Writ of Prohibition on the grounds that the Commission has no jurisdiction over town justices, and that combining investigative and judicial functions in one agency violates due process (O'Connor v. Commission, Sup. Ct. Albany Cty. 1978). Albany County Supreme Court Justice Con G. Cholakis dismissed the proceeding. During the course of Court on the Judiciary proceedings, four town justices similarly claimed they were denied due process either because the Commission combined prosecutorial and investigative functions, or combined prosecutorial and adjudicative functions. The Court on the Judiciary similarly denied these motions in Matter of Lahey, Matter of Lombardi, Matter of Mills and Matter of Thomson.

More recently, in An Anonymous Town Justice v. State Commission on Judicial Conduct (Sup. Ct. Erie Cty. 1978) and Cunningham ex. rel. Unnamed Town and Village Justices v. Stern (Sup. Ct. Niagara Cty. 1978), two Supreme Court Justices have held that Article 78 proceedings requesting review of Commission actions cannot be brought in Supreme Court. Commission actions and determinations are non-final administrative activities which are properly reviewed by the Court of Appeals.

A complainant brought an Article 78 proceeding in Muka v. Temporary State Commission (New York Cty. 1975) requesting a court order that the Commission investigate her complaint. Supreme Court Justice Nathaniel Helman held that the Commission has discretionary authority to dismiss complaints at the investigative stage.

In Matter of Vaccaro, Surpeme Court Justice Frank Vaccaro made a broad discovery motion, prior to a hearing before a referee, requesting oral depositions of non-party witnesses before the hearing, the names of all witnesses who testified before the Temporary State Commission on Judicial Conduct, copies of all of their testimony and statements, copies of various checks and records which had come into the possession of the Commission in the course of its investigation, copies of all internal memoranda, documents, records, reports, letters and/or papers of the Commission dealing directly or indirectly with the proceeding, copies of all internal memoranda, documents, records, reports, letters and/or papers of the Court on the Judiciary dealing with the proceeding, and all exculpatory evidence in the possession

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of the Commission. The Commission's Administrator, who had been designated Counsel to the Court on the Judiciary, offered to provide documents and testimony he intended to offer at respondent Vaccaro's hearing. The Court on the Judiciary ordered that Counsel provide the documents and transcripts he had offered to provide, and otherwise denied respondent Vaccaro's motion.

Numerous challenges to the Commission's ticket-fixing investigations and disciplinary proceedings have arisen before the Court on the Judiciary. Fifteen town justices made motions to dismiss on the grounds that the Commission had engaged in selective prosecution because not all of the justices the Commission's investigation of justice courts found to have engaged in ticket-fixing had charges preferred against them. The Court on the Judiciary denied these motions because of the failure to show intentional or invidious discrimination. Matter of Altman, Matter of Byrne, Matter of Carl, Matter of Crommie, Matter of Jones, Matter of Jordan, Matter of Lahey, Matter of LaMalfa, Matter of Lips, Matter of Lombardi, Matter of Longo, Matter of Mataraza, Matter of McMahon, Matter of Mills, Matter of Owen.

Eleven town justices charged with ticket-fixing made motions to dismiss on the grounds that their actions fell within the ambit of judicial discretion. The Court on the Judiciary denied the motions, finding ticket-fixing to be malum in se conduct that had always been wrong. Matter of Altman, Matter of Byrne, Matter of Carl, Matter of Crommie, Matter of Jordan, Matter of Lahey, Matter of Maidman, Matter of Mills, Matter of Owen, Matter of Schultz, Matter of Thomson.

Judges have raised and lost claims that the Commission's actions were void because they disturbed the separation of powers concept. Matter of Schwerzmann, Matter of Lipton, Matter of Pickett, Matter of Polonsky. Four judges charged with ticket-fixing raised unsuccessful claims that the constitutional amendments establishing the Commission were illegally adopted. Matter of Jordan, Matter of Mataraza, Matter of McMahon, Matter of Owen. Three judges claimed unsuccessfully that the Commission had either exceeded its authority by establishing its own new standards of judicial conduct, or that the Commission had to inform judges that ticket-fixing was wrong before they could be held accountable for their actions. Matter of Altman, Matter of Byrne, Matter of Jordan. Five judges charged with ticket-fixing alleged that the judges of the Court on the Judiciary were disqualified from sitting because the judges on the Court were subject to the Commission's jurisdiction. The Court denied these motions, and commented that the respondents' contention would disqualify every judge in the State from sitting on the Court, and consequently, no judicial discipline would be possible. Matter of Jordan, Matter of Mataraza, Matter of McMahon, Matter of Owen, Matter of Smith.

Ticket-fixing proceedings were unsuccessfully challenged on the ground that the publicity given by the Commission to outline the scope of its ticket-fixing investigation made it impossible for them to have a fair trial. Matter of Carl, Matter of Crommie, Matter of Lahey, Matter of Lombardi, Matter of Mataraza, Matter of McMahon, Matter of Mills, Matter of Polonsky, Matter of Thomson.

Four judges charged with ticket-fixing argued, unsuccessfully, that Commission investigators illegally searched their records. Matter of Lahey, Matter of Lombardi, Matter of Mills, Matter of Thomson. Three made unsuccessful attempts to suppress evidence obtained against them at their investigative appearances (Matter of Carl, Matter of Crommie, Matter of Mataraza) and two claimed that the right against self-incrimination had been violated (Matter of LaMalfa, Matter of Longo). The Court on the Judiciary denied these motions.

Four judges unsuccessfully claimed that the conduct for which they were charged was time barred by the doctrine of laches. Matter of Mataraza, Matter of Pickett, Matter of Schultz, Matter of Filipowicz. Three claimed that the Commission could not investigate or try offenses when the underlying misconduct arose prior to the establishment of the agency or the promulgation of Administrative Board Rules. The Court on the Judiciary and the Appellate Division denied these claims. Matter of Richter, Matter of Maidman, Matter of Smith.

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TABLE OF CASES PENDING AS OF DECEMBER 31, 1977.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL AND CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling								
Attorneys, Federal Judges, Others								
Demeanor		21	21	4	6	1	4	57
Delays			2	2				4
Conflicts of Interest		18	21	7	8		6	60
Bias		1	1					2
Corruption		2	5		2	2		11
Intoxication							2	2
Disability, Qualifications			1		1	1		3
Political Activity		2	3				2	7
Finance Management, Records, Training		9	8	1	1	5	1	25
Ticket-Fixing		172	17	79	14	48	23	353
Miscellaneous		1	6	1	1		1	10
TOTALS		226	85	94	33	57	39	534

* Investigations closed upon vacancy of office due to voluntary retirement, failure to be re-elected, or death.
** Includes determinations of admonition, censure, removal and involuntary retirement, as well as suspensions and disciplinary proceedings commenced in the Court on the Judiciary by the former and temporary Commissions.

TABLE OF NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 1978.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL AND CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling	304							304
Attorneys, Federal Judges, Others	26							26
Demeanor	34	25	14	2		2		77
Delays	16	3	3					22
Conflicts of Interest	16	40	9				2	67
Bias	23		2					25
Corruption	9		1					10
Intoxication								
Disability, Qualifications	2	7	4					13
Political Activity	6	8	4	17				35
Finance Management, Records, Training	14	2	3		1	2		22
Ticket-Fixing	8	12	2					22
Miscellaneous	13	1	2		1	1		18
TOTALS	471	98	44	19	2	5	2	641

* Investigations closed upon vacancy of office due to voluntary retirement, failure to be re-elected, or death.
** Includes determinations of admonition, censure, removal and involuntary retirement, as well as suspensions and disciplinary proceedings commenced in the Court on the Judiciary by the former and temporary Commissions.

ALL CASES CONSIDERED BY THE COMMISSION IN 1978: 641 NEW COMPLAINTS AND 534 PENDING FROM 1977.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL AND CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling	304							304
Attorneys, Federal Judges, Others	26							26
Demeanor	34	46	35	6	6	3	4	134
Delays	16	3	5	2				26
Conflicts of Interest	16	58	30	7	8		8	127
Bias	23	1	3					27
Corruption	9	2	6		2	2		21
Intoxication							2	2
Disability, Qualifications	2	7	5		1	1		16
Political Activity	6	10	7	17			2	42
Finance Management, Records, Training	14	11	11	1	2	7	1	47
Ticket-Fixing	8	184	19	79	14	48	23	375
Miscellaneous	13	2	8	1	2	1	1	28
TOTALS	471	324	129	113	35	62	41	1175

* Investigations closed upon vacancy of office due to voluntary retirement, failure to be re-elected, or death.
** Includes determinations of admonition, censure, removal and involuntary retirement, as well as suspensions and disciplinary proceedings commenced in the Court on the Judiciary by the former and temporary Commissions.

ALL CASES CONSIDERED SINCE THE INCEPTION OF THE TEMPORARY COMMISSION (JANUARY 1, 1975).

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL AND CAUTION	RESIGNED	CLOSED*	ACTION**	
Incorrect Ruling	1044							1044
Attorneys, Federal Judges, Others	110							110
Demeanor	103	46	186	9	11	3	44	402
Delays	50	3	19	3	3		5	83
Conflicts of Interest	36	58	112	17	11		20	254
Bias	64	1	22		3			90
Corruption	26	2	23		4	2	3	60
Intoxication	3		3				4	10
Disability, Qualifications	7	7	10		2	1	3	30
Political Activity	14	10	18	17	1	2	5	67
Finance Management, Records, Training	25	11	22	1	9	7	4	79
Ticket-Fixing	11	184	39	81	26	48	64	453
Miscellaneous	34	2	16	1	2	1	1	57
TOTALS	1527	324	470	129	72	64	153	2739

* Investigations closed upon vacancy of office due to voluntary retirement, failure to be re-elected, or death.
** Includes determinations of admonition, censure, removal and involuntary retirement, as well as suspensions and disciplinary proceedings commenced in the Court on the Judiciary by the former and temporary Commissions.

END