ANNUAL REPORT

1992

New York State Commission on Judicial Conduct

1992 ANNUAL REPORT

OF THE

NEW YORK STATE

COMMISSION ON JUDICIAL CONDUCT

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

Pursuant to Section 42, paragraph 4, of the Judiciary Law of the State of New York, the New York State Commission on Judicial Conduct respectfully submits this annual report of its activities. The report covers the period from January 1, 1991, through December 31, 1991.

Respectfully submitted,

Henry T. Berger, Chair
On Behalf of the Commission

March 1, 1992
New York, New York

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INTRODUCTION

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

The ethics standards that the Commission enforces are found primarily in the Rules Governing Judicial Conduct, a copy of which is annexed as Appendix D, and the Code of Judicial Conduct. The Rules are promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, pursuant to Article 6, Sections 20 and 28 of the New York State Constitution. The Code was adopted in 1972 by the New York State Bar Association.

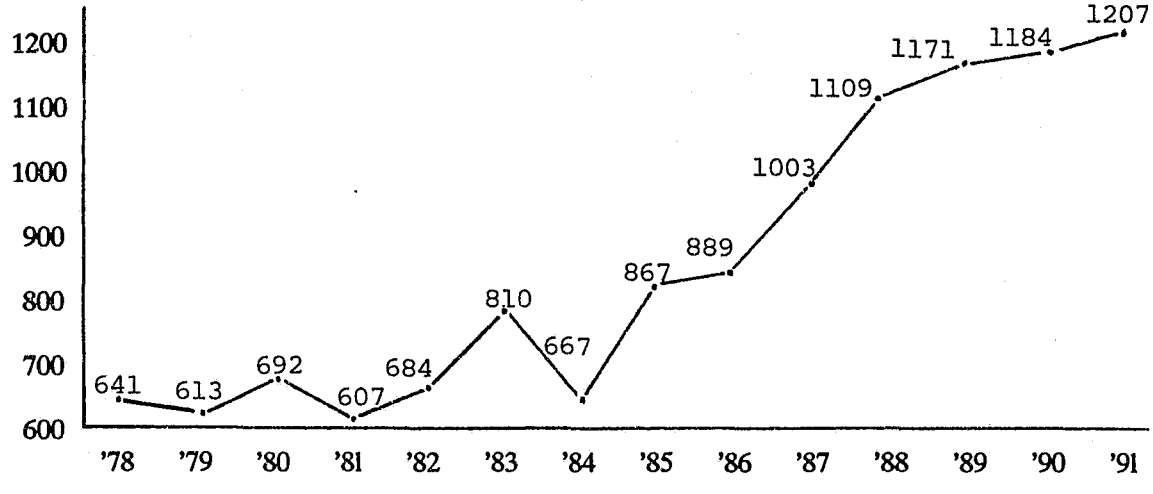
A history of the development of the Commission, beginning with the creation in 1975 of a temporary State Commission on Judicial Conduct, and a description of the Commission's authority and procedures, are annexed to this report as Appendix B.

This 1992 Annual Report covers the Commission's activities during calendar year 1991.

COMPLAINTS AND INVESTIGATIONS IN 1991

In 1991, 1207 new complaints were received, compared with 1184 the year before. Of these, 1010 (83.5%) were dismissed by the Commission upon initial review, and 197 investigations were authorized and commenced.[1] In addition, 157 investigations and proceedings on formal charges were pending from the prior year.

The 1207 new complaints received represents the largest number in the Commission's history:



[1]The statistical period in this report is January 1, 1991, through December 31, 1991. Detailed statistical analysis of the matters considered by the Commission is annexed in chart form as Appendix F.

In 1991, as in previous years, the majority of complaints received were submitted by civil litigants and by 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 45 initiated by the Commission on its own motion. Many of the new complaints dismissed upon initial review were frivolous or outside the Commission's jurisdiction, such as complaints against attorneys or judges not within the state unified court system. Some were from litigants who complained about the merits of a particular ruling or decision made by a judge. Absent any underlying misconduct, such as demonstrated prejudice, intemperate conduct, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate such matters, as they involve questions of law reviewable by appellate courts.

ACTION TAKEN IN 1991

Of the combined total of 354 investigations and proceedings on formal charges conducted by the Commission in 1991 --157 carried over from 1990 and 197 authorized in 1991 -- the Commission made the following dispositions in 173 cases:

- -- 103 matters were dismissed outright.
- -- 33 matters involving 33 different judges were dismissed with letters of dismissal and caution.
- -- 10 matters involving 8 different judges were closed upon resignation of the judge from office.
- -- 12 matters involving 9 different judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- -- 15 matters involving 11 different judges resulted in formal discipline (admonition, censure or removal from office).

One hundred eighty-one matters were pending at the end of 1991.

The Commission's dispositions involved judges in various levels of the unified court system, as indicated in the tables on the following pages and in the chart included in Appendix F.

Table 1: Town and Village Justices (2400*)

1991 Dispositions	Lawyers	Non-Lawyers	Total
Complaints Received	93	270	363
Complaints Investigated	24	100	124
Number of Judges Cautioned After Investigation	4	19	23
Number of Formal Written Complaints Authorized	1	19	20
Number of Judges Cautioned After Formal Complaint	0	0	0
Number of Judges Publicly Disciplined	1	9	10
Number of Formal Complaints Dismissed or Closed	2	2	4

Table 2: City Court Judges (381)

1991 Dispositions	All Lawyers; Part-Time	All Lawyers; Full-Time	Total
Complaints Received	13	150	163
Complaints Investigated	6	20	26
Number of Judges Cautioned After Investigation	2	2	4
Number of Formal Written Complaints Authorized	0	0	0
Number of Judges Cautioned After Formal Complaint	0	0	0
Number of Judges Publicly Disciplined	1	0	1
Number of Formal Complaints Dismissed or Closed	0	0	0

* Refers to the approximate number of such judges among the 3500 judges throughout the state unified court system.

Table 3: County Court Judges (81*)

1991 Dispositions	All Lawyers; All Full-Time
Complaints Received	95
Complaints Investigated	7
Number of Judges Cautioned After Investigation	0
Number of Formal Written Complaints Authorized	3
Number of Judges Cautioned After Formal Complaint	1
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

Table 4: Family Court Judges (127)

1991 Dispositions	All Lawyers; All Full-Time
Complaints Received	110
Complaints Investigated	10
Number of Judges Cautioned After Investigation	0
Number of Formal Written Complaints Authorized	2
Number of Judges Cautioned After Formal Complaint	0
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

* Included in this figure are seven judges who serve concurrently as County Court and Family Court judges.

Table 5: District Court Judges (50)

1991 Dispositions	All Lawyers; All Full-Time
Complaints Received	17
Complaints Investigated	3
Number of Judges Cautioned After Investigation	0
Number of Formal Written Complaints Authorized	0
Number of Judges Cautioned After Formal Complaint	0
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

Table 6: Court of Claims Judges (63*)

1991 Dispositions	All Lawyers; All Full-Time
Complaints Received	4
Complaints Investigated	0
Number of Judges Cautioned After Investigation	0
Number of Formal Written Complaints Authorized	0
Number of Judges Cautioned After Formal Complaint	0
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

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

Table 7: Surrogates (74*)

1991 Dispositions	All Lawyers; All Full-Time
Complaints Received	32
Complaints Investigated	4
Number of Judges Cautioned After Investigation	2
Number of Formal Written Complaints Authorized	0
Number of Judges Cautioned After Formal Complaint	0
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

Table 8: Supreme Court Justices (339)

1991 Dispositions	All Lawyers; All Full-Time
Complaints Received	221
Complaints Investigated	23
Number of Judges Cautioned After Investigation	3
Number of Formal Written Complaints Authorized	0
Number of Judges Cautioned After Formal Complaint	0
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

* Included in this total are ten judges who serve concurrently as Surrogate's Court judges and County Court judges and 30 who serve concurrently as Surrogate's Court judges, Family Court judges and County Court judges.

Table 9: Court of Appeals Judges and Appellate Division Justices (55)

1991 Dispositions	All Lawyers; All Full-Time
Complaints Received	18
Complaints Investigated	0
Number of Judges Cautioned After Investigation	0
Number of Formal Written Complaints Authorized	0
Number of Judges Cautioned After Formal Complaint	0
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

Table 10: Non-Judges

1991 Dispositions	Number
Complaints Received	184

FORMAL PROCEEDINGS

No disciplinary sanction may be imposed by the Commission unless a Formal Written Complaint, containing detailed charges of misconduct, has been served upon the respondent-judge and the respondent has been afforded an opportunity for a formal hearing.

The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibits public disclosure by the Commission of the charges served, hearings commenced or other matters, absent a waiver by the judge, until a case has been concluded and a determination of admonition, censure, removal or retirement has been filed with the Chief Judge of the Court of Appeals and forwarded to the respondent-judge. Following are summaries of those matters which were completed during 1991 and made public pursuant to the applicable provisions of the Judiciary Law. Copies of the determinations are annexed as Appendix E.

DETERMINATIONS OF REMOVAL

The Commission completed five disciplinary proceedings in 1991 in which it determined that the judge involved should be removed from office.

Matter of Lawrence J. LaBelle

The Commission determined that Lawrence J. LaBelle, a judge of the Saratoga Springs City Court, Saratoga County, be removed from office for intentionally disregarding defendants' fundamental rights and conveying the impression of bias in numerous cases. Judge LaBelle is a lawyer.

In its determination of February 6, 1991, the Commission found that Judge LaBelle had "consistently and intentionally" disregarded a statute that required him to order bail or recognizance for defendants charged with misdemeanors or violations.

Judge LaBelle requested review of the Commission's determination by the Court of Appeals, where the matter is pending.

Matter of Lee R. Schwarting

The Commission determined that Lee R. Schwarting, a non-lawyer justice of the Smyrna Town Court, Chenango County, be removed from office for failing to remit court funds promptly to the state comptroller and for failing to cooperate with the Commission.

In its determination of March 15, 1991, the Commission found that, since taking office in 1988, Judge Schwarting consistently failed to turn court money over to the state comptroller as required by law, notwithstanding a Commission warning that he comply with remitting requirements. For an entire year, he did not remit any money at all. The judge also failed to turn over records as requested by a Commission investigator.

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

Matter of Nicholas P. Mossman

The Commission determined that Nicholas P. Mossman, a non-lawyer justice of the Philmont Village Court, Columbia County, be removed from office for failing to disqualify himself in and improperly handling a harassment case, and for giving false testimony about the matter.

In its determination of September 24, 1991, the Commission found that Judge Mossman had improperly arraigned a defendant on the complaint of a witness who had ties to Judge Mossman and his family. The judge conducted the arraignment even though he knew that his father was a witness to the incident and even though he knew that the complaint was deficient. Judge Mossman was found to have testified falsely about the incident before the Commission and to have encouraged another witness to do so.

Judge Mossman requested review by the Court of Appeals. The Court dismissed the requested review for want of prosecution and ordered Judge Mossman's removal on December 17, 1991.

Matter of Gerald Winegard

The Commission determined that Gerald Winegard, a non-lawyer justice of the Seward Town Court, Schoharie County, be removed from office for engaging in a course of conduct prejudicial to the administration of justice.

In its determination of September 26, 1991, the Commission found that Judge Winegard had denied defendants their fundamental constitutional rights concerning counsel and bail, coerced guilty pleas, handled 23 cases over which he had no jurisdiction, failed to disqualify himself in 11 cases in which his son was the arresting officer and disregarded the law in other respects.

Judge Winegard requested review by the Court of Appeals but later withdrew the request. He was removed by the Court of Appeals on November 26, 1991.

Matter of William F. Wray

The Commission determined that William F. Wray, a justice of the Clarkstown Town Court, Rockland County, be removed from office for borrowing and failing to repay money from a client of his private law practice, for causing the alteration of a car registration sticker which was then placed on his car windshield, for operating an unregistered vehicle, and for permitting a judge of his court to appear before him as an attorney.

In its determination of November 6, 1991, the Commission found that Judge Wray had demonstrated a pattern of misconduct in his personal affairs and in his professional roles as lawyer and judge, which prejudiced the fair and proper administration of justice.

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

DETERMINATIONS OF CENSURE

The Commission completed two disciplinary proceedings in 1991 in which it determined that the judges involved should be censured.

Matter of Nathaniel Hall

The Commission determined that Nathaniel Hall, a non-lawyer justice of the Ava Town Court, Oneida County, be censured for holding court funds in his personal possession, unsecured, rather than promptly depositing them in the bank as required by law.

In its determination of June 4, 1991, the Commission found that Judge Hall's careless handling of public money had left it vulnerable to theft and had made it impossible to determine the amount that he had on hand. Because he had attempted to eliminate a deficiency in his accounts and had tried to correct his recordkeeping errors, the Commission determined that Judge Hall's removal was not warranted.

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

Matter of Lester C. Hamel

The Commission determined that Lester C. Hamel, a non-lawyer justice of the Champlain Town Court, Clinton County, be censured for failing to deposit and remit court funds promptly as required by law.

In its determination of November 7, 1991, the Commission found that Judge Hamel had continued to ignore depositing and remitting requirements for seven months after a 1990 censure for similar conduct. Because undeposited money was kept in a locked safe and because the delays in remitting were for relatively brief periods, the Commission determined that Judge Hamel's removal was not warranted.

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

DETERMINATIONS OF ADMONITION

The Commission completed four disciplinary proceedings in 1991 in which it determined that the judges involved should be admonished.

Matter of Carlton M. Chase

The Commission determined that Carlton M. Chase, a non-lawyer justice of the Sullivan Town Court and the Chittenango Village Court, Madison County, be admonished for being rude and creating the appearance of bias in a case before him.

In its determination of March 15, 1991, the Commission found that Judge Chase (i) denied the complaining witness in a sexual abuse case a temporary order of protection without affording her the right to be heard and (ii) asserted before the matter was adjudicated that he saw no merit to her complaint. The Commission noted that a judge should treat the possible victims of sex crimes and abuse with special sensitivity and understanding.

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

Matter of Raymond H. Vosburgh, Jr.

The Commission determined that Raymond H. Vosburgh, Jr., a non-lawyer justice of the Guilford Town Court, Chenango County, be admonished for serving simultaneously as a judge and a school board member, knowing that there were ethics opinions stating that it was improper to do so.

In its determination of September 24, 1991, the Commission held that a judge should not run for or serve on a school board, since the position is incompatible with judicial office. School board members in most jurisdictions are elected officials who may be required to take positions on controversial issues of community interest other than those related to the law, the legal system or the administration of justice.

Judge Vosburgh requested review of the Commission's determination by the Court of Appeals, but the Court dismissed the requested review for want of prosecution.

Matter of David W. Ranke

The Commission determined that David W. Ranke, a non-lawyer justice of the Dayton Town Court and the South Dayton Village Court, Cattaraugus County, be admonished for failing to remit court funds promptly to the state comptroller as required by law.

In its determination of September 30, 1991, the Commission found that Judge Ranke had ignored the law and neglected his administrative duties, even though the comptroller repeatedly took steps to collect the money and the Commission had cautioned the judge to comply with the law.

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

Matter of Dennis R. Freeman

The Commission determined that Dennis R. Freeman, a non-lawyer justice of the Newstead Town Court and the Akron Village Court, Erie County, be admonished for using the prestige of his office on behalf of a customer of his private business.

In its determination of November 8, 1991, the Commission found that Judge Freeman had written to another judge, requesting that the other judge restore the pistol permit of a man to whom Judge Freeman had sold four pistols.

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

DISMISSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of five Formal Written Complaints in 1991 without rendering public discipline.

In one of these cases, the Commission determined that the judge's misconduct had been established but that public discipline was not warranted, dismissed the Formal Written Complaint and issued the judge a confidential letter of dismissal and caution for driving an automobile while under the influence of alcohol and accepting favored treatment by the police.

In two cases last year, the Commission closed the matters because the judges involved resigned from judicial office. In Matter of Harry Waitzman, the judge, a part-time lawyer-justice of the Clarkstown Town Court, signed a stipulation, which he agreed would be made public, acknowledging that he could not successfully defend against the pending Commission charges and pledging not to seek judicial office in the future.

The Commission closed one matter without further action because the judge retired from office.

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

LETTERS OF DISMISSAL AND CAUTION

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

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

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

In 1991, 33 letters of dismissal and caution were issued by the Commission, 32 of which were issued upon conclusion of an investigation and one of which was issued after a Formal Written Complaint was concluded. Twenty-three town or village justices, four of whom are lawyers, were cautioned; two part-time and two full-time City Court Judges were cautioned; and six other full-time judges were cautioned -- two Surrogates, three Supreme Court Justices and one County Court Judge.

The caution letters addressed various types of conduct. For example, three judges were cautioned for engaging in improper political activity, such as attending or contributing funds to political events at times when the judges were not candidates for re-election. Eight judges were cautioned for inappropriate demeanor, such as using repugnant or otherwise intemperate language in court. Two judges were cautioned for issuing "orders" in matters that had not been formally commenced in court to persons who had not been served with papers or otherwise given proper notice. Four judges were cautioned for appearing to coerce guilty pleas from traffic defendants by either setting bail or initiating license suspension proceedings pending a trial or change of plea to guilty, contrary to procedures set forth in the Vehicle & Traffic Law.

MATTERS CLOSED UPON RESIGNATION

Eight judges resigned in 1991 while under investigation or formal charges by the Commission.

By statute, the Commission may retain jurisdiction over a judge for 120 days following resignation. The Commission may proceed within this 120-day period, but no sanction other than removal may be determined by the Commission within such period. When rendered final by the Court of Appeals, the "removal" automatically bars the judge from holding judicial office in the future. Thus, no action may be taken if the Commission decides within that 120-day period following a resignation that removal is not warranted.

REFERRALS TO OTHER AGENCIES

Pursuant to Judiciary Law Section 44(10), the Commission, when appropriate, refers matters to other agencies. For example, complaints received by the Commission against court personnel are referred to the Office of Court Administration, as are complaints that pertain to administrative issues. Indications of criminal activity are referred to appropriate prosecutors' offices. Complaints against lawyers are referred to the appropriate disciplinary committee.

In 1991, the Commission referred 34 administrative matters, involving judges of the unified court system, housing court judges, or court employees, to either the Office of Court Administration or an administrative judge. One complaint against a lawyer was referred to the appropriate disciplinary committee. Four others were referred to other agencies for appropriate action.

REVIEW OF COMMISSION DETERMINATIONS BY THE COURT OF APPEALS

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

In 1991, the Court had before it three requests for review, two of which had been filed in 1990 and one of which was filed in 1991. Of these three matters, the Court decided two, and one was pending as of December 31, 1991.

Matter of Joseph W. Esworthy

On June 21, 1990, the Commission determined that Joseph W. Esworthy, a Judge of the Family Court, Broome County, be removed from office for various acts of misconduct, including abusing the rights of litigants, failing to follow the law, and addressing parties and their attorneys in an intemperate manner. Judge Esworthy requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated February 12, 1991, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Esworthy, 77 NY2d 280 (1991).

Upholding the Commission's findings, the Court noted that the judge, inter alia, had on two occasions "used racially charged language that was highly insulting to certain ethnic groups" (Id. at 282). The Court concluded that the judge had engaged in "a pattern of injudicious behavior" which conveyed the impression of partiality and warranted the sanction of removal (Id. at 283).

Matter of Francis Benjamin

On October 5, 1990, the Commission determined that Francis Benjamin, a justice of the Jewett Town Court, Greene County, be removed from office for sexually and physically abusing a woman. Judge Benjamin requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated February 14, 1991, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Benjamin, 77 NY2d 296 (1991).

The Court held that a preponderance of the evidence supported the Commission's conclusion that the judge "physically forced himself on an unwilling victim" (Id. at 298).

The Court rejected the judge's argument that the determination should be overturned because a note made by a State Trooper on the night of the assault was not provided to the judge by Commission staff prior to the hearing. The Court found that there was no support for the claim that Commission staff had possession of the note and deliberately withheld it, and that in any event the judge was not substantially prejudiced since the note was produced at the hearing.

CHALLENGES TO COMMISSION PROCEDURES

The Commission's staff litigated one matter in 1991 involving important constitutional and statutory issues involving the Commission's jurisdiction and procedures.

Pecora v. Newsday, et al.

On July 18, 1990, in a libel proceeding commenced by an Acting Justice of the Supreme Court, the Commission received a subpoena duces tecum from the defendants, directing a Commission representative to testify and give evidence and to produce all documents from the Commission's files related to "any complaints about, investigations of or proceedings concerning" the judge. By order to show cause dated August 14, 1990, in Supreme Court, Suffolk County, the Commission moved to quash the subpoena duces tecum and obtained a stay. The Commission asserted that the purported materials requested by the subpoena duces tecum would, if they existed, be protected by the confidentiality requirements of Section 45 of the Judiciary Law. On May 31, 1991, the subpoena was quashed in a decision by Supreme Court Justice Lester E. Gerard which consolidated several other motions pending in the case.

SPECIFIC PROBLEM AREAS IDENTIFIED BY THE COMMISSION

In the course of its inquiries and other duties, the Commission has identified certain issues and patterns of conduct that require comment and discussion outside the context of a specific disciplinary proceeding. We do this to advise the judiciary so that potential misconduct may be avoided and pursuant to our authority to make administrative and legislative recommendations.

Excessive Pre-Trial Incarceration

In previous annual reports, the Commission has commented on various misapplications of bail provisions by judges who either intentionally deprive defendants of their rights or, by virtue of common practice or inadvertence, do not extend to defendants the full measure of protection afforded by law. In this section, we address another facet of judicial abuse of the bail process.

In addition to speedy trial requirements, Section 30.30 of the Criminal Procedure Law contains provisions designed to prevent defendants from remaining in jail for excessive periods of time while awaiting trial. Subdivision 2 of Section 30.30 provides that a defendant must be released on bail or on his or her own recognizance if the prosecutor is not ready for trial within: (a) 90 days where the defendant is charged with a felony other than a homicide; (b) 30 days where the defendant is charged with a nonfelony crime punishable by more than three months in jail; (c) 15 days where the defendant is charged with a misdemeanor punishable by not more than three months in jail; and (d) 5 days where the defendant is charged with no more than a violation.

The Commission has become aware that this law has been overlooked or ignored in some cases where defendants were charged with violations or misdemeanors. Typically, the problem arises when a judge arraigns a defendant on a violation charge, sets bail which the defendant cannot meet, and then adjourns the case for a week. This may occur not only in courts where the judge presides weekly, but in courts where the judge presides daily. If the defendant is unable to post bail prior to the adjourned date, he or she may then be held in jail for seven days, two more days than permitted by Section 30.30(2)(d). Since the district attorney's office often would not learn of the case until the adjourned date, the prosecutor would clearly not be ready for trial within five days of the defendant's incarceration.

This problem is often compounded when the defendant is unable to afford counsel. In some counties, the assigned counsel program is slow to assign an attorney, or there is poor communication between the courts and the public defender's office. A week may go by before a lawyer contacts the defendant in jail. Thus, defendants who are detained for lengthy periods may have no one to argue for their release under Section 30.30(2)(d).

The problems are even more severe in some small communities where the interval between court sessions may be more than one week. As a result, a defendant charged with only a violation may remain in jail for more than seven days before being returned to court. The maximum jail sentence that a defendant could receive if convicted of a violation is 15 days, which may be reduced to 10 days for good behavior. The Commission has even found instances where defendants have remained in jail awaiting trial for longer than the maximum sentence that they could have received if convicted of the charge. The injustice of such a practice is obvious.

Local judges should be alerted to the problem, but the responsibility is not theirs alone. Criminal justice agencies and court administration should develop a method for the speedier processing of these cases.

Failure To Appoint Counsel

The problem of excessive pre-trial incarceration is related to another problem frequently documented by the Commission: the failure of some judges to assure that defendants are represented by counsel. In our 1989 Annual Report, we commented extensively on the right to assigned counsel and reported on a variety of instances in which that right was not effectuated.

Notwithstanding our previous commentary and the attention devoted to the subject in education programs for judges, problems persist. In the last three years, the Commission has become aware of examples not specifically highlighted in our 1989 Report which illustrate the continuing nature of the problem.

It is a fundamental constitutional principle that no defendant should be sentenced to jail without the opportunity to be represented by counsel. If the defendant is financially unable to obtain counsel, counsel must be assigned by the court on request.[2]

In New York State's larger cities, assigned representation of indigent defendants is usually available as early as the arraignment stage. It would therefore be unusual for a defendant to spend a significant amount of time in jail without having been afforded counsel. In smaller communities around the state, however, indigent defendants may spend long periods of time in jail without representation and sometimes without having been advised properly by the court of their right to assigned counsel.

New York State law requires that all defendants, including those charged with violations, be advised of their right to assigned counsel, except in traffic infraction cases.[3] Section 170.10(4) of the CPL requires a judge to advise the defendant at arraignment of the right to free representation if eligible, and to "take such affirmative action as is necessary to effectuate the defendant's right to assigned counsel." Moreover, Section 722 of the County Law requires that each county have an approved plan to provide legal services to those who cannot afford an attorney and that a judge, in assigning counsel pursuant to Section 170.10 or other sections of the CPL, must do so in accordance with the county plan.

Thus, there is a dual responsibility for providing counsel for the indigent. The judge must effectuate the defendant's rights and there must be a county plan under which the judge can act. Some counties are not providing counsel effectively although the law and their plans require it and judges request it. Judges have advised the Commission that they do not assign counsel to indigent defendants charged with non-traffic violations because their counties do not make counsel available for such cases.

The Commission has learned that some judges simply give defendants a form and instruct them to communicate on their own with the public defender's office for a determination on their eligibility for assigned counsel. In some instances, judges have, at arraignment, committed defendants for psychiatric examinations to determine their competence to stand trial, and at the same time expected them to fill out a form and personally apply to the public defender for counsel. It is incongruous to assume that a defendant, who appears to be suffering from a psychiatric problem so severe as to suggest he or she cannot understand the nature of the pending charges, can understand both the right to assigned counsel and how to effectuate that right by locating and applying to a public defender.

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[2]Criminal Procedure Law Sections 170.10, 180.10; County Law Section 722; People v. Witenski, 15 NY2d 392 (1965); Scott v. Illinois, 440 US 367 (1979).

[3]Section 722-a of the County Law; Section 170.10(3)(c) of the Criminal Procedure Law, and Practice Commentary by Joseph W. Bellacosa; People v. Ross, 67 NY2d 321 (1986); People v. Van Florcke, 467 NYS2d 298 (1983); Davis v. Shepard, 399 NYS2d 836 (1977). Even in motor vehicle violation cases, the U.S. Constitution requires that no indigent defendant be incarcerated without being afforded the opportunity of having assigned counsel. Argersinger v. Hamlin, 407 US 25 (1972); Scott v. Illinois, 440 US 367 (1979). In Scott, the Court stated: "[W]e believe that the central premise of Argersinger -- that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment -- is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel" (Id. at 373).

It is a mistake to assume that only non-lawyer judges engage in this conduct. Some local lawyer-judges are also unaware of their responsibility. For example, a city court judge told the Commission that, although he himself had done a substantial amount of assigned counsel criminal defense work prior to ascending the bench, he had not known that a defendant charged with a violation was entitled to assigned counsel if financially eligible (see, CPL Section 170.10[3][a]; County Law Section 722-a).

The Court of Appeals has held that a pattern of denying constitutional rights, including the right to counsel, is serious misconduct which can warrant removal from office. Matter of Sardino, 58 NY2d 286 (1983); Matter of Reeves, 63 NY2d 105 (1984). A judge may not delegate to others the ultimate responsibility of deciding whether a defendant is entitled to assigned counsel. While a judge may rely on the recommendations of the public defender's office or other plan administrator as to eligibility, the judge may not avoid the basic responsibility to effectuate a defendant's right to counsel.

It is true, of course, that many public defender offices throughout the state are burdened with heavy caseloads. In some cases it takes them up to two weeks to process and respond to requests for assistance. By that time the incarcerated defendant may have already served as much or more jail time than the maximum penalty that could have been imposed upon a guilty plea at arraignment.

The varying practices across the state in advising defendants of the right to counsel and implementing diverse county legal representation plans, reported here and in our 1989 Annual Report, deserve study and joint action by OCA, public defenders, bar associations and other relevant civic groups. Efforts should be made to ensure a system of assigned counsel which is uniformly more effective and responsive to constitutional and statutory mandates.

Cross-Examination By Pro Se Litigants In Small Claims Cases

The opportunity to cross-examine witnesses is a fundamental right of every litigant. In a recent case, after a small claims litigant, who had appeared pro se, complained to the Commission that a judge had denied him such an opportunity, the judge told the Commission that he believes pro se litigants often do not have the ability to ask proper questions and that it is more productive for the judge to handle the questioning. The judge defended his conduct in view of the informal and simplified procedures for small claims court, as well as the pressure to dispose of a large number of cases. Yet small claims court litigants receive literature advising them that they will have an opportunity to cross-examine adverse witnesses.

While the failure to afford this right in a single case does not rise to the level of misconduct, judges should be reminded that, notwithstanding the simplified procedures of small claims court, the fundamental rights of litigants, including the opportunity to be heard, should not be sacrificed in the interests of speed and efficiency. Pro se litigants may waive their right to cross-examine witnesses, but if they do not, they should be given the opportunity to ask questions. The Commission has brought this problem to the attention of OCA officials, who have indicated that they will address the subject in judicial training programs.

Diverting Revenue From The State To Localities In Traffic Cases

When a motorist is found guilty of violating a provision of the State Vehicle & Traffic Law (V&T), such as speeding, the adjudicating court is responsible for collecting the fine and remitting it in a timely manner to the State Comptroller. Most of the funds collected are revenue to the State.

The Commission has recently become aware of a practice by justices in some courts, usually town or village courts, who routinely "reduce" V&T charges to local violations for the purpose of diverting fine monies to the court's locality. Compounding this problem, some of the fines exceed the maximum authorized by law for the reduced charge. OCA should remind town and village justices in training programs, as we remind them here, that such practices are unauthorized and improper.

Failure To Report Misconduct To The Commission

Throughout its history, the Commission has been aware that some individuals with an obligation to report judicial misconduct, including lawyers, court officials and others, do not do so. The reasons vary. Some are unsure whether what they have seen is wrong. Some are afraid to report obvious misconduct for fear of harming their own practices, and some simply do not want to turn in a colleague for obvious reasons. Year after year, those who are often in the best position to observe and report judicial misconduct, including prosecutors, defense lawyers, civil practitioners, and judges, not only fail to report but, when contacted by the Commission in the course of duly authorized investigations, demonstrate reluctance to cooperate. Even where the alleged misconduct is public knowledge in a particular locale, reports to and cooperation with the Commission can be minimal.

This state of affairs reached an alarming level in Matter of William F. Wray, reported in this Annual Report. Misdemeanor charges against Judge Wray were highly publicized in November 1989 in local area newspapers. A special prosecutor was promptly appointed by the area administrative judge when the county's District Attorney withdrew from the case. Yet it was not until the following April that the Commission was made aware of the locally well-known charges, when the local attorney Grievance Committee, itself belatedly notified, informed the Commission of the matter.

The Wray case is only the most recent incident of which we are aware in which a well-publicized or otherwise well-known local matter was not referred to the Commission by the responsible local officials. In the past, the Commission has communicated with OCA and with other court-related organizations about this problem, which nonetheless persists. We cannot expect that habitual indifference or resistance to reporting misconduct will change dramatically, but we again urge officials, including prosecutors, to be mindful of their ethical obligation to report misconduct.

Clarification Of The Obligation Of Town And Village Courts To Prepare Minutes In Cases On Appeal

In last year's annual report, the Commission reminded town and village justices of their obligation to prepare the minutes of proceedings when a party files notice of appeal. Thereafter, we were advised by Deputy Chief Administrative Judge Joseph J. Traficanti, Jr., of some clarification that may be necessary, due to our having discussed different procedures in civil and criminal cases without having distinguished the two.

Judge Traficanti's letter clearly and concisely delineates the different obligations in civil and criminal cases, and so we repeat the relevant portions of it here.

> The excerpt on page 17 of the [Commission's 1991 Annual] Report refers to "appeal by affidavit of errors" in a summary of civil appeal procedures. While the affidavit of errors method is appropriate when no stenographic record is taken, it is relevant only to criminal appeals.

Section 1704 of the Uniform Justice Court Act governs the appeal process for civil cases originating in town and village courts. If testimony was given, but no stenographic minutes were taken, the court must prepare minutes of the proceedings within 30 days after the notice of appeal is filed. The court must notify the appellant when the minutes are completed so the appellant can "procure the case to be settled."

Sections 460.10 and 460.70 of the Criminal Procedure Law govern the appeal process for criminal cases originating in town and village courts. If no stenographic minutes were taken, the appellant must file an affidavit of errors with the court. In response, the court must prepare a "return." Both the "return" and the affidavit of errors must be filed with the appellate court within ten days after the date the affidavit of errors is filed with the town or village court.

THE COMMISSION'S BUDGET

In our 1988 Annual Report, we reported extensively on the Commission's annual budget, including an analysis of its growth over the ten preceding years and a detailed comparative examination of the budgets of New York's and other states' judicial conduct commissions. In view of the current budget crisis being experienced by the state government, it seems appropriate to comment on the Commission's most recent budget and the sacrifices we, like other state agencies, are undertaking.

In 1978-79, the first year of operations under the present system, the Commission's budget was $1.644 million. Thirteen years later, the 1991-92 budget was $1.936 million, which was $326,000 less than the previous year; however, due to the budget crisis, the Commission's spending was capped at $1.826 million, representing an annual budget growth of less than 1%. That percentage is substantially below inflation rates and dramatically lower than growth rates of other government agencies. Six times since 1979, even before the current budget crisis materialized, we requested budgets no greater or even less than the previous year's amount. We were apprised by the Division of the Budget that ours was the only agency to seek less than before in the 1980's, when such sacrifices were not mandated by fiscal emergencies.

The Commission has accomplished the herculean task of maintaining a markedly low-growth budget over more than 13 years. The cuts that state agencies are expected to endure will hit hard, and among those agencies which have demonstrated austerity in pre-crisis times, the cuts will hit even harder. We have been compelled to terminate essential staff and to reduce important services in other ways.

The Executive Budget for fiscal year 1992-93 provides a sum substantially less than $1.826 million for our operations in the fiscal year commencing April 1, 1992. An 8.8 percent reduction, as proposed in the Executive Budget, essentially would give the Commission the same funding it had in 1978-79, when we were receiving half the number of complaints we received in 1991. Although such substantial reductions will adversely affect our operations, we will continue to carry out our assigned responsibilities to the best of our ability.

CONCLUSION

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

Respectfully submitted,

Henry T. Berger, Chair
Myriam J. Altman
Helaine M. Barnett
Herbert L. Bellamy, Sr.
Carmen Beauchamp Ciparick
E. Garrett Cleary
Dolores DelBello
Lawrence S. Goldman
Eugene W. Salisbury
John J. Sheehy
William C. Thompson

APPENDIX A

BIOGRAPHIES OF COMMISSION MEMBERS

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

HELAINE BARNETT, ESQ., is a graduate of Barnard College and New York University School of Law. She is the Deputy Attorney-in-Charge of the Civil Division of The Legal Aid Society. She has spent her entire professional career with The Legal Aid Society in both the Criminal and Civil Divisions. She is a member of the American Law Institute, the House of Delegates of the New York State Bar Association, the Executive Committee of The Association of the Bar of the City of New York, and the ABA Special Coordinating Committee on Professionalism, and immediate past chair of the American Bar Association Standing Committee on Ethics and Professional Responsibility. She is also a fellow of both the New York Bar Foundation and the American Bar Foundation, a member of the Board of Directors of Homes for the Homeless, Inc., and a member of the Board of Directors of the Charles H. Revson Foundation. She is a past President of the Network of Bar Leaders, a former Adjunct Professor of Law of the Benjamin N. Cardozo School of Law, and author of several law review articles. She and her husband have two sons.

HERBERT L. BELLAMY, SR., is President and founder of 1490 Enterprises, Inc., in Buffalo, a not-for-profit community center which houses 32 local, state and federal government agencies and provides meals for 150 senior citizens daily. He is also owner and manager of Bellamy Enterprises. Mr. Bellamy has more than 20 years' experience in community service and fund-raising. He was the first Black Civil Service Commissioner in the City of Buffalo and served as Councilman-at-large for nine years. He was instrumental in completing several city projects, including Pilot Field Baseball Stadium and the waterfront development. The first Black Director and Vice President of the Buffalo Downtown Nursing Home, Mr. Bellamy has also served on the Canisius College Board of Regents, the Police Athletic Board, the Western New York Liquor Retailers Board, the Private Industry Council of Buffalo, the American Hardware Association, Bethel Headstart Program, Red Cross and the N.A.A.C.P. He was Vice President of the Buffalo Chamber of Commerce in 1973. Mr. Bellamy has received more than 150 awards and honors, including an honorary degree from Canisius College, the Canisius College President's Award, the Roberto Clemente Humanitarian Award, the 100 Black Men Award, the Buffalo Urban League Family Life Award, the N.A.A.C.P. Medgar Evers Award and the Congressional Record Award. He is the widower of the late Irene Parham and the father of six children.

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

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

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

DOLORES DEL BELLO received a baccalaureate degree from the College of New Rochelle and a masters degree from Seton Hall University. She was Regional Public Relations Director for Bloomingdale's until 1986 and is presently Partner in Westfair Communications and Publisher of the Westchester County and Fairfield County Business Journals. Mrs. DelBello is a member of Alpha Delta Kappa, the international honorary society for women educators; the National Association of Female Executives; the Westchester Public Relations Association; the Founders Club of the Yonkers YWCA; National Association of Negro Women; the Board of Directors for Greyston Inn; and Chairperson of the Board of Directors of the Northern Westchester Center for the Arts. She is also a member of the Advisory Board of the Association of Women Business Owners; the Westchester Community College Advisory Board on Communications; the Board of Directors of the American Lyme Disease Association; and the Westchester Quincentenary Committee. She was formerly a member of the League of Women Voters; The Hudson River Museum Board of Directors; Lehman College Performing Arts Center; Westchester Women in Communications; Naylor Dana Institute for Disease Prevention; and American Health Foundation.

LAWRENCE S. GOLDMAN, ESQ. is a graduate of Brandeis University and Harvard Law School. Since 1972, he has been a partner in the criminal law firm of Goldman & Hafetz in New York City. From 1966 through 1971, he served as an assistant district attorney in New York County. He has also been a consultant to the Knapp Commission and the New York City Mayor's Criminal Justice Coordinating Council. Mr. Goldman is currently a director of the National Association of Criminal Defense Lawyers and chairperson of its ethics advisory committee, a member of the executive committee of the criminal justice section of the New York State Bar Association, a member of the criminal law committee of the Association of the Bar of the City of New York, and a member of the the judiciary

committee of the Association of the Bar of the City of New York, and a member of the the judiciary committee of the New York County Lawyers Association. He has lectured at numerous bar association and law school programs on various aspects of criminal law and procedure, trial tactics, and ethics. He is an honorary trustee of Congregation Rodeph Sholom in New York City. He and his wife Kathi have two children and live in Manhattan.

HONORABLE EUGENE W. SALISBURY is a graduate of the University of Buffalo and the University of Buffalo Law School. He is Senior Partner in the law firm of Lipsitz, Green, Fahringer, Roll, Schuller & James of Buffalo and New York City. He has also been the Village Justice of Blasdell since 1961. Since 1963, Judge Salisbury has served as a lecturer on New York State Civil and Criminal Procedure, Evidence and Substantive Criminal Law for the State Office of Court Administration. He has served as President of the State Magistrates Association and in various other capacities with the Association, as Village Attorney of Blasdell and as an Instructor in Law at SUNY Buffalo. Judge Salisbury has authored published volumes on forms and procedures for various New York courts, and he is Program Director of the Buffalo Area Magistrates Training Course. He serves or has served on various committees of the American Bar Association, the New York State Bar Association and the Erie County Bar Association, as well as the Erie County Trial Lawyers Association and the World Association of Judges. Judge Salisbury served as a U.S. Army Captain during the Korean Conflict and received numerous Army citations for distinguished and valorous service. Judge Salisbury and his wife reside in Blasdell, New York.

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

HONORABLE WILLIAM C. THOMPSON is a graduate of Brooklyn College and Brooklyn Law School. He was elected to the New York State Senate in 1965, and served until 1968. He was Chairman of the Joint Legislative Committee on Child Care Needs, and over 25 bills sponsored by him were signed into law. He served on the New York City Council from 1969 to 1973. He was elected a Justice of the Supreme Court in 1974 and was designated as an Associate Justice of the Appellate Term, 2nd and 11th Districts (Kings, Richmond and Queens counties) in November 1976. In December 1980 he was appointed Assistant Administrative Judge in charge of Supreme Court for Brooklyn and Staten Island. On December 8, 1980, he was designated by Governor Carey as Associate Justice of the Appellate Division, Second Department. Justice Thompson is one of the founders with the late Robert F. Kennedy of the Bedford Stuyvesant Restoration Corporation, one of the original Directors of the Bedford Stuyvesant Youth-In-Action, and a former Regional Director of the N.A.A.C.P. He is a Director of the Bedford Stuyvesant Restoration Corporation; Daytop Village, Inc.; Brookwood Child Care; Vice-President, Brooklyn Law School Alumni Association; Past President of the New York State Senate Club; and a member of the American Bar Association, Brooklyn Bar Association and the Metropolitan Black Bar Association.

ADMINISTRATOR OF THE COMMISSION

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

DEPUTY ADMINISTRATOR

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

CLERK OF THE COMMISSION

ALBERT B. LAWRENCE, ESQ., holds a B.S. in journalism from Empire State College, an M.A. in criminal justice from Rockefeller College and a J.D. from Antioch University. He joined the Commission's staff in 1980 and has been Clerk of the Commission since 1983. He also teaches legal studies and journalism at Empire State College, State University of New York. A former newspaper reporter, Mr. Lawrence was awarded the New York State Bar Association Certificate of Merit "for constructive journalistic contributions to the administration of justice."

CHIEF ATTORNEY, ALBANY

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

CHIEF ATTORNEY, ROCHESTER

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

APPENDIX B

THE COMMISSION'S POWERS, DUTIES, OPERATIONS AND HISTORY

INTRODUCTION

The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of judicial misconduct in New York State. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding their right to decide cases independently.

By offering a forum for citizens with conduct-related complaints, the Commission seeks to insure compliance with established standards of ethical judicial behavior, thereby promoting public confidence in the integrity and honor of the judiciary. The Commission does not act as an appellate court, does not make judgments as to the merits of judicial decisions or rulings, and does not investigate complaints that judges are either too lenient or too severe in criminal cases.

All 50 states and the District of Columbia have adopted a commission system to meet these goals.

In New York, a temporary commission created by the Legislature in 1974 began operations in January 1975. It was made permanent in September 1976 by a constitutional amendment. A second constitutional amendment, effective on April 1, 1978, created the present Commission with expanded membership and jurisdiction. (For the purpose of clarity, the Commission which operated from September 1, 1976, through March 31, 1978, will henceforth be referred to as the "former" Commission. A description of the temporary and former commissions, their composition and workload is included in this Appendix B.)

STATE COMMISSION ON JUDICIAL CONDUCT

Authority

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

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

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

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

bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.

The types of complaints that may be investigated by the Commission include improper demeanor, conflicts of interest, intoxication, bias, prejudice, favoritism, gross neglect, corruption, certain prohibited political activity and other misconduct on or off the bench.

Standards of conduct are set forth primarily in the Rules Governing Judicial Conduct (originally promulgated by the Administrative Board of the Judicial Conference and subsequently adopted by the Chief Administrator of the Courts with the approval of the Court of Appeals) and the Code of Judicial Conduct (adopted by the New York State Bar Association).

If the Commission determines that disciplinary action is warranted, it may render a determination to impose one of four sanctions, subject to review by the Court of Appeals upon timely request by the respondent-judge. If review is not requested within 30 days of service of the determination upon the judge, the determination becomes final. The Commission may render determinations to:

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

In accordance with its rules, the Commission may also issue a confidential letter of dismissal and caution to a judge, despite a dismissal of the complaint, when it is determined that the circumstances so warrant. In some cases the Commission has issued such a letter after charges of misconduct have been sustained.

Procedures

The Commission meets regularly. At its meetings, the Commission reviews each new complaint of misconduct and makes an initial decision whether to investigate or dismiss the complaint. It also reviews staff reports on ongoing matters, makes final determinations on completed proceedings, considers motions and entertains oral arguments pertaining to cases in which judges have been served with formal charges, and conducts other Commission business.

No investigation may be commenced by staff without authorization by the Commission. The filing of formal charges also must be authorized by the Commission.

After the Commission authorizes an investigation, the complaint is assigned to a staff attorney, who is responsible for conducting the inquiry and supervising the investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge may be asked to respond in writing to the allegations. In some instances, the Commission requires the appearance of the judge to testify during the course of the investigation. The judge's testimony is under oath, and at least one Commission member must be present. Although such an "investigative appearance" is not a formal hearing, the judge is entitled to be represented by counsel. The judge may also submit evidentiary data and materials for the Commission's consideration.

If the Commission finds after an investigation that the circumstances so warrant, it will direct its administrator to serve upon the judge a Formal Written Complaint containing specific charges of misconduct. The Formal Written Complaint institutes the formal disciplinary proceeding. After receiving the judge's answer, the Commission may, if it determines there are no disputed issues of fact, grant a motion for summary determination. It may also accept an agreed statement of facts submitted by the administrator and the respondent-judge. Where there are factual disputes that make summary determination inappropriate or that are not resolved by an agreed statement of facts, the Commission will appoint a referee to conduct a formal hearing and report proposed findings of fact and conclusions of law. Referees are designated by the Commission from a panel of attorneys and former judges. (A list of those who were designated as referees in Commission cases last year is appended.) Following the Commission's receipt of the referee's report, on a motion to confirm or disaffirm the report, both the administrator and the respondent may submit legal memoranda and present oral argument on issues of misconduct and sanction. The respondent-judge (in addition to his or her counsel) may appear and be heard at oral argument.

In deciding motions, considering proposed agreed statements of fact and making determinations with respect to misconduct and sanction, and in considering other matters pertaining to cases in which Formal Written Complaints have been served, the Commission deliberates in executive session, without the presence or assistance of its administrator or regular staff. The clerk of the Commission assists the Commission in executive session, but does not participate in either an investigative or adversarial capacity in any cases pending before the Commission.

The Commission may dismiss a complaint at any stage during the investigative or adjudicative proceedings.

When the Commission determines that a judge should be admonished, censured, removed or retired, its written determination is forwarded to the Chief Judge of the Court of Appeals, who in turn serves it upon the respondent-judge. Upon completion of service, the Commission's determination and the record of its proceedings become public. (Prior to this point, by operation of the strict provisions in Article 2-A of the Judiciary Law, all proceedings and records are confidential.) The respondent-judge has 30 days to request full review of the Commission's determination by the Court of Appeals. The Court may accept or reject the Commission's findings of fact or conclusions of law, make new or different findings of fact or conclusions of law, accept or reject the determined sanction, or make a different determination as to sanction. If no request for review is made within 30 days, the sanction determined by the Commission becomes effective.

Membership and Staff

The Commission is composed of 11 members serving four-year terms. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one each by the four leaders of the Legislature. The Constitution requires that four members be judges, at least one be an attorney, and at least two be lay persons. The Commission elects one of its members to be chairperson and appoints an administrator and a clerk. The administrator is responsible for hiring staff and supervising staff activities subject to the Commission's direction and policies.

Biographies of the Commission members are set forth in Appendix A.

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

Temporary State Commission on Judicial Conduct

The Temporary State Commission on Judicial Conduct commenced operations in January 1975. The temporary Commission had the authority to investigate allegations of misconduct against judges in the state unified court system, make confidential suggestions and recommendations in the nature of admonitions to judges when appropriate and, in more serious cases, recommend that formal disciplinary proceedings be commenced in the appropriate court. All disciplinary proceedings in the Court on the Judiciary and most in the Appellate Division were public.

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

The temporary Commission received 724 complaints, dismissed 441 upon initial review and commenced 283 investigations during its tenure. It admonished 19 judges and initiated formal disciplinary proceedings against eight judges, in either the Appellate Division or the Court on the Judiciary. One of these judges was removed from office and one was censured. The remaining six matters were pending when the temporary Commission was superseded by its successor Commission.

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

Former State Commission on Judicial Conduct

The temporary Commission was succeeded on September 1, 1976, by the State Commission on Judicial Conduct, established by a constitutional amendment overwhelmingly approved by the New York State electorate and supplemented by legislative enactment (Article 2-A of the Judiciary Law). The Commission's tenure lasted through March 31, 1978, when it was replaced by the present Commission.

The former Commission was empowered to investigate allegations of misconduct against judges, impose certain disciplinary sanctions* and, when appropriate, initiate formal disciplinary proceedings in the Court on the Judiciary, which, by the same constitutional amendment, had been given jurisdiction over all 3,500 judges in the unified court system.

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

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

The former Commission considered 1,418 complaints, dismissed 629 upon initial review, authorized 789 investigations and continued 162 investigations left pending by the temporary Commission.

During its tenure, the former Commission took action which resulted in the following:

-- 15 judges were publicly censured;
-- 40 judges were privately admonished;
-- 17 judges were issued confidential letters of suggestion and recommendation.

The former Commission also initiated formal disciplinary proceedings in the Court on the Judiciary against 45 judges and continued six proceedings left pending by the temporary Commission.

Those proceedings resulted in the following:

-- 1 removal;
-- 2 suspensions;
-- 3 censures;
-- 10 cases closed upon resignation of the judge;
-- 2 cases closed upon expiration of the judge's term;
-- 1 proceeding closed without discipline and with instruction by the Court on the Judiciary that the matter be deemed confidential.

The remaining 32 proceedings were pending when the former Commission expired. They were continued by the present Commission.

In addition to the ten judges who resigned after proceedings had been commenced in the Court on the Judiciary, 28 other judges resigned while under investigation by the former Commission.

Continuation in 1978, 1979 and 1980 of Formal Proceedings Commenced by the Temporary and Former Commissions

Thirty-two formal disciplinary proceedings which had been initiated in the Court on the Judiciary by either the temporary or former Commission were pending when the former Commission was superseded on April 1, 1978, and were continued without interruption by the present Commission.

The last five of these 32 proceedings were concluded in 1980, with the following results, reported in greater detail in the Commission's previous annual reports:

-- 4 judges were removed from office;
-- 1 judge was suspended without pay for six months;
-- 2 judges were suspended without pay for four months;
-- 21 judges were censured;
-- 1 judge was directed to reform his conduct consistent with the Court's opinion;
-- 1 judge was barred from holding future judicial office after he resigned; and
-- 2 judges died before the matters were concluded.

The 1978 Constitutional Amendment

The present Commission was created by amendment to the State Constitution, effective April 1, 1978. The amendment created an 11-member Commission (superseding the nine-member former Commission), broadened the scope of the Commission's authority and streamlined the procedure for disciplining judges within the state unified court system. The Court on the Judiciary was abolished, pending completion of those cases which had already been commenced before it. All formal disciplinary hearings under the new amendment are conducted by the Commission.

Subsequently, the State Legislature amended Article 2-A of the Judiciary Law, the Commission's governing statute, to implement the new provisions of the constitutional amendment.

SUMMARY OF COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION

Since January 1975, when the temporary Commission commenced operations, 14,242 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 10,573 (74%) were dismissed upon initial review and 3669 investigations were authorized. Of the 3669 investigations authorized, the following dispositions have been made through December 31, 1991:

-- 1734 were dismissed without action after investigation;

-- 678 were dismissed with letters of caution or suggestions and recommendations to the judge; the actual number of such letters totals 475, 38 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct;*

-- 254 were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings; the actual number of such resignations was 192;

-- 268 were closed upon vacancy of office by the judge other than by resignation;

-- 554 resulted in disciplinary action; and

-- 181 are pending.

*It should be noted that several complaints against a single judge may be disposed of in a single action. This accounts for the apparent discrepancy between the number of complaints and the number of judges acted upon.

Of the 554 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former and present Commission:*

-- 99 judges were removed from office;

-- 1 additional removal determination is pending review in the Court of Appeals;

-- 3 judges were suspended without pay for six months (under previous law);

-- 2 judges were suspended without pay for four months (under previous law);

-- 177 judges were censured publicly;

-- 99 judges were admonished publicly; and

-- 59 judges were admonished confidentially by the temporary or former Commission, which had such authority.

Through December 1991, the Court of Appeals has reviewed 50 Commission determinations, 40 of which were for removal, eight for censure and two for admonition. The Court accepted the sanction determined by the Commission in 39 cases, 34 of which were removals. In two cases, the Court increased the sanction from censure to removal. In eight cases, the Court reduced the sanction that had been determined by the Commission, reducing six removals to censure, and two censures to admonition. In one case the Court of Appeals found that the judge's actions did not constitute misconduct and dismissed the charges against the judge.

APPENDIX C

REFEREES WHO PRESIDED IN COMMISSION PROCEEDINGS IN 1991

REFEREE	CITY	COUNTY
Edward Brodsky, Esq.	New York	New York
Mary C. Daly, Esq.	New York	New York
Paul A. Feigenbaum, Esq.	Albany	Albany
Hon. Bertram A. Harnett	Boca Raton, FL	
Nicholas Scoppetta, Esq.	New York	New York
Michael Whiteman, Esq.	Albany	Albany

APPENDIX D

RULES GOVERNING JUDICIAL CONDUCT

Section 100.1 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 or herself 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.

100.2 Avoiding impropriety and the appearance of impropriety. (a) A judge shall respect and comply with the law and shall conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the Judiciary.

(b) No judge shall allow his or her family, social, or other relationships to influence his judicial conduct or judgment.

(c) No judge shall lend the prestige of his or her 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 or her. No judge shall testify voluntarily as a character witness.

100.3 Impartial and diligent performance of judicial duties. The judicial duties of a judge take precedence over all his other activities. Judicial duties include all the duties of a judicial office prescribed by law. In the performance of these duties, the following standards apply:

(a) Adjudicative responsibilities. (1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge shall maintain order and decorum in proceedings before him or her.

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

(4) A judge shall accord to every person who is legally interested in a matter, or his or her lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending matter. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a matter before him or her if notice by the judge is given to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(5) A judge shall dispose promptly of the business of the court.

(6) A judge shall abstain from public comment about a pending or impending matter in any court, and shall require similar abstention on the part of court personnel subject to his or her direction and control. This subdivision does not prohibit judges from making public statements in the course of their official duties or from explaining for public information in procedures of the court.

(b) Administrative responsibilities. (1) A judge shall diligently discharge his or her administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge shall require his or her staff and court officials subject to his or her direction and control to observe the standards of fidelity and diligence that apply to the judge.

(3) A judge shall take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment only on the basis of merit, avoiding favoritism. A judge shall not appoint or vote for the appointment of any person as a member of his or her staff or that of the court of which the judge is a member, or as an appointee in a judicial proceeding, who is a relative within the sixth degree of relationship of either the judge or the judge's spouse. A judge shall also refrain from recommending a relative for appointment or employment to another judge serving in the same court. A judge shall not approve compensation of appointees beyond the fair value of services rendered. Nothing in this section shall prohibit appointment of the spouse of a town or village justice, or other member of such justice's household, as clerk of the town or village court in which such justice sits, provided that such justice obtains the prior approval of the Chief Administrator of the Courts, which may be given upon a showing of good cause.

(5) A judge shall prohibit members of his or her staff who are the judge's personal appointees from engaging in the following political activity:

(i) holding an elective office in a political party, or a club or organization related to a political party, except for delegate to a judicial nominating convention or member of a county committee other than the executive committee of a county committee;

(ii) contributing, directly or indirectly, money or other valuable consideration in amounts exceeding $300 in the aggregate during any calendar year commencing on January 1, 1976, to any political campaign for any political office or to any partisan political activity including, but not limited to, the purchasing of tickets to a political function, except that this limitation shall not apply to an appointee's contributions to his or her own campaign. Where an appointee is a candidate for judicial office, reference should be made to appropriate sections of the Election Law;

(iii) personally soliciting funds in connection with a partisan political purpose, or personally selling tickets to or promoting a fundraising activity of a political candidate, political party, or partisan political club; or

(iv) political conduct prohibited by section 25.39 of this Title.

(c) Disqualification. (1) A judge shall disqualify himself or herself in a proceeding in which his or her impartiality might reasonably be questioned, including, but not limited to circumstances where:

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

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

(iii) the judge knows that he or she, individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(iv) the judge or the judge's spouse, or a person within the sixth degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(c) is to the judge's knowledge likely to be a material witness in the proceeding;

(v) the judge or the judge's spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(2) A judge shall inform himself or herself about his or her personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(i) the degree of relationship is calculated according to the civil law system;

(ii) fiduciary includes such relationships as executor, administrator, trustee and guardian;

(iii) financial interest means ownership of a legal or equitable interest, however small, or a relationship as director, advisor or other active participant in the affairs of a party, except that:

(a) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(b) an office in an educational, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization;

(c) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome could substantially affect the value of the securities.

(d) Remittal of disqualification. A judge disqualified by the terms of subparagraph (c)(1)(iii) or (iv) of this section, instead of withdrawing from the proceeding, may disclose on the record the basis of the disqualification. If, based on such disclosure, the parties, by their attorneys, independently of the judge's

participation, all agree that the judge's relationship is immaterial or that his or her financial interest is insubstantial, the judge no longer is disqualified, and may participate in the proceeding. The agreement shall be in writing, or shall be made orally in open court upon the record.

100.4 Activities to improve the law, the legal system, and the administration of justice. A judge, subject to the proper performance of his or her judicial duties, may engage in the following quasi-judicial activities, if in doing so the judge does not cause doubt on the capacity to decide impartially any issue that may come before him or her:

(a) A judge may speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice.

(b) A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

(c) A judge may serve as a member, officer or director of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice. He or she may assist such an organization in raising funds and may participate in their management and investment, but shall not personally participate in public fundraising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

100.5 Extra-judicial activities. (a) Avocational activities. A judge may write, lecture, teach and speak on nonlegal subjects, and engage in the arts, sports and other social and recreational activities, if such avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties.

(b) Civic and charitable activities. A judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or nonlegal advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge shall not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or her or will be regularly engaged in adversary proceedings in any court.

(2) No judge shall solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of the office for that purpose, but may be listed as an officer, director or trustee of such an organization; provided, however, that no such listing shall be used in connection with any solicitation of funds. No judge shall be a speaker or the guest of honor at an organization's fund raising events, but he or she may attend such events. Nothing in this Part shall be deemed to prohibit a judge from being a speaker or guest of honor at a bar association or law school function.

(3) A judge shall not give investment advice to such an organization, but he or she may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

(c) **Financial activities.** (1) A judge shall refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which he or she serves.

(2) No judge or justice of the Court of Appeals, Appellate Division, Supreme Court, Court of Claims, County Court, Surrogate's Court, Family Court, District Court, Civil Court of the City of New York, or Criminal Court of the City of New York shall be a managing or active participant in any form of business enterprise organized for profit, nor shall he or she serve as an officer, director, trustee, partner, advisory board member or employee of any corporation, company, partnership or other association organized for profit or engaged in any form of banking or insurance;

(i) provided, however, that this rule shall not be applicable to those judges and justices of the courts herein who assumed judicial office prior to July 1, 1965 and maintained such nonjudicial interests prior to that date; and it is

(ii) further provided, that any person who may be appointed to fill a vacancy in one of the courts enumerated herein on an interim or temporary basis pending an election to fill such vacancy may apply to the Chief Administrator of the Courts for exemption from this rule during the period of such interim or temporary appointment; and it is

(iii) further provided, that nothing in this section shall prohibit a judge or justice of the courts enumerated herein from investing as a limited partner in a limited partnership, as contemplated by article 8 of the Partnership Law, provided that such judge or justice does not take any part in the control of the business of the limited partnership and otherwise complies with this Part.

(3) Neither a judge nor a member or his or her family residing in his or her household shall accept a gift, bequest or loan from anyone, except as follows:

(i) a judge may accept a gift incident to a public testimonial to him or her; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his or her spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(ii) a judge or a member of his or her family residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(iii) a judge or member of his or her family residing in his or her household may accept any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds $100, the judge reports it in the same manner as he or she reports compensation in section 100.6 of this Part.

(4) For the purposes of this section, member of his or her family residing in his or her household means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his or her family, who resides in his or her household.

(5) A judge is not required to disclose his or her income, debts or investments, except as may be required by Part 40 of the Rules of the Chief Judge or by statute and as provided in this section and sections 100.3 and 100.6 of this Part.

(6) Information acquired by a judge in his or her judicial capacity shall not be used or disclosed by him or her in financial dealings or for any other purpose not related to his or her judicial duties.

(d) Fiduciary activities. No judge, except a judge who is permitted to practice law, shall serve as the executor, administrator, trustee, guardian or other fiduciary, designated by an instrument executed after January 1, 1974, except for the estate, trust or person of a member of his or her family, and then, only if such service will not interfere with the proper performance of judicial duties. Members of his or her family include a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(1) A judge shall not serve as a family fiduciary if it is likely that as a fiduciary he or she will be engaged in proceedings that would ordinarily come before him or her, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in his or her personal capacity.

(e) Arbitration. No judge, other than a part-time judge, shall act as an arbitrator or mediator. A part-time judge acting as an arbitrator or mediator shall do so with particular regard to sections 100.1, 100.2 and 100.3 of this Part.

(f) Practice of law. A judge who is permitted to practice law shall, nevertheless, not practice law in the court in which he or she is a judge, whether elected or appointed, nor shall a judge practice law in any other court in the county in which his or her court is located which is presided over by a judge who is permitted to practice law. He shall not participate in a judicial capacity in any matter in which he or she has represented any party or any witness in connection with that matter, and he or she shall not become engaged as an attorney in any court, in any matter in which he or she has participated in a judicial capacity. No judge who is permitted to practice law shall permit his or her partners or associates to practice law in the court in which he or she is a judge. No judge who is permitted to practice law shall permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law. A judge may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law.

(g) Extra-judicial appointments. No judge shall accept an appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his or her country, state or locality on ceremonial occasions or in connection with historical, educational and cultural activities.

(h) Employment of part-time judges. A part-time judge may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties. No judge shall accept employment as a peace officer as that term is defined in section 1.20 of the Criminal Procedure Law.

100.6 Compensation received for extra-judicial activities. A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Part, if the source of such payments does not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety subject to the following restrictions:

(a) Compensation must not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement must be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his or her spouse. Any payment in excess of such an amount is compensation.

(c) A judge must report the date, place and nature of any activity for which he or she received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. Such report must be made annually and must be filed as a public document in the office of the clerk of the court on which he or she serves or other office designated by rule of court. This subdivision shall not apply to any judge who is permitted to practice law.

(d) Except as provided in section 100.5(h) of this Part, no judge shall solicit or receive compensation for extra-judicial activities performed for or on behalf of:

(1) New York State, its political subdivisions or any officer or agency thereof;

(2) a school, college or university that is financially supported, in whole or in part, by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for teaching a regular course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties; or

(3) any private legal aid bureau or society designated to represent indigents in accordance with article 18-B of the County Law.

100.7 Political activity of judges prohibited. No judge during a term of office shall hold any office in a political party or organization or contribute to any political party or political campaign or take part in any political campaign except his or her own campaign for elective judicial office. Political activity prohibited by this section includes:

(a) The purchase, directly or indirectly, of tickets to politically sponsored dinners or other affairs, or attendance at such dinners or other affairs, including dinners or affairs sponsored by a political organization for a nonpolitical purpose, except as follows:

(1) This limitation shall not apply during a period beginning nine months before a primary election, judicial nominating convention, party caucus or other party meeting for nominating a candidate for elective judicial office for which the judge is an announced candidate, or for which a committee or other organization has publicly solicited or supported his or her candidacy, and ending, if the judge is a candidate in the general election for that office, six months after the general election. If the judge is not a candidate in the general election, this period shall end on the date of the primary election, convention, caucus or meeting.

(2) During the period defined in paragraph (1) of this subdivision:

(i) A judge may attend a fundraising dinner or affair on behalf of the judge's own candidacy, but may not personally solicit contributions at such dinner or affair.

(ii) Notwithstanding subdivision (b) of this section, a judge may purchase a ticket to a politically sponsored dinner or other affair even where the regular cost of a ticket to such dinner or affair exceeds the proportionate cost of the dinner or affair.

(iii) Notwithstanding subdivisions (c) and (d) of this section, a judge may attend a politically sponsored dinner or affair in support of a slate of candidates, and may appear on podiums or in photographs on political literature with the candidates who make up that slate, provided that the judge is part of the slate of candidates.

(b) Contributions, directly or indirectly, to any political campaign for any office or for any political activity. Where the judge is a candidate for judicial office, reference should be made to the Election Law.

(c) Participation, either directly or indirectly, in any political campaign for any office, except his or her own campaign for elective judicial office.

(d) Being a member of or serving as an officer or functionary of any political club or organization or being an officer of any political party or permitting his or her name to be used in connection with any activity of such political party, club or organization.

(e) Any other activity of a partisan political nature.

State of New York
Commission on Judicial Conduct

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

CARLTON M. CHASE,

Determination

a Justice of the Sullivan Town Court and the Chittenango Village Court, Madison County.

APPEARANCES:

Gerald Stern for the Commission

Bond, Schoeneck & King (By Francis E. Maloney, Jr.) for Respondent

The respondent, Carlton M. Chase, a justice of the Sullivan Town Court and the Chittenango Village Court, Madison County, was served with a Formal Written Complaint dated October 12, 1990, alleging that he was rude and created the appearance of bias in a case before him. Respondent filed an answer dated October 26, 1990.

On January 15, 1991, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided for by Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On January 31, 1991, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Sullivan Town Court since 1981. He has been a justice of the Chittenango Village Court since 1973.

2. On September 7, 1989, respondent arraigned Carl Hoyt on charges of Sexual Misconduct, Second Degree, and Sexual Abuse, Second Degree. Mr. Hoyt pled not guilty.

3. On September 7, 1989, the complaining witness in the Hoyt case, Martha G., contacted respondent and asked him to issue a temporary order of protection on her behalf against Mr. Hoyt. Respondent told her that she would have to appear in court personally to request such an order. Martha said that she suffered from night blindness and could not drive to court that night.

4. On October 2, 1989, State Trooper Lisa A. Romero contacted respondent at his home. Trooper Romero said that she had been told by Martha that respondent had refused her telephone request to issue a temporary order of protection. Respondent said that he did not issue such orders in response to telephone requests and that a temporary order of protection was unwarranted in this case. Trooper Romero replied that the basis for the request was that Mr. Hoyt had been seen slowly driving his car by Martha's home and "possibly" on her property. Respondent then yelled, "Listen, she goes up to his place and stays all night, and if you ask me, she was asking for trouble." Trooper Romero reminded respondent that the case had not yet been adjudicated and that Martha should be afforded her rights. The trooper said that Martha owned the house where the alleged crime had taken place. Respondent angrily asserted that Martha would use a temporary order of protection to falsely accuse Mr. Hoyt of being on her property in order to "get back" at him. Trooper Romero said that she was requesting the temporary order as a "precaution." Respondent angrily yelled, "Hey, if you could do a better job, trooper, you come in off the road and try to be a judge and live with these people up here."

5. On October 3, 1989, the district attorney, Neal Rose, sent respondent a letter, requesting that he issue a temporary order of protection for Martha against Mr. Hoyt.

6. On October 5, 1989, Mr. Rose appeared before respondent in connection with the Hoyt case and asked that the proceedings be held in camera. Respondent denied the request. Mr. Rose then asked for a temporary order of protection for "the victim." Respondent loudly and angrily objected to Mr. Rose's letter of October 3, 1989, and yelled, "The D.A.'s office doesn't run this court, and I'll decide when and if I'm going to issue an order of protection and under what circumstances." Respondent rudely and harshly accused Mr. Rose of being a "lousy district attorney" and attributed his recent defeat in a primary election to poor lawyering skills. Respondent denied Mr. Rose's request for a temporary order of protection, stating that he believed that the criminal complaint was unfounded and that the matter appeared to involve only a "marital dispute."

7. Respondent denied Mr. Rose's request that he disqualify himself from the proceeding and the prosecutor's second request to proceed in camera. Respondent loudly said that if Martha had wanted an order of protection, she would have appeared in court to request one. Mr. Rose explained that the Criminal Procedure Law does not require the victim's personal appearance. Respondent loudly replied that he would not issue such an order unless Martha appeared in court.

8. Mr. Rose indicated that Martha was in the courtroom. Respondent directed her to approach the bench. Respondent loudly and angrily chastised her for not appearing in court for prior proceedings in the case. Mr. Rose said that no prior proceedings in the case had involved Martha and that she had never been notified to appear in court. Martha said that she had received no notices to appear in the past and had been unable to attend because of night blindness. Respondent sarcastically replied, "That's your problem." Martha explained that she was requesting a temporary order of protection because Mr. Hoyt had slowly driven his car past her home on a number of occasions and she was afraid of him. Respondent repeated that he would not issue a temporary order.

9. Mr. Rose repeated his request that respondent disqualify himself, arguing that his actions and statements created the appearance that respondent had already decided how he would rule. Respondent disqualified himself and transferred the case to another judge.

10. During the proceedings on October 5, 1989, respondent was red-faced and angry when speaking with Mr. Rose and Martha and repeatedly waved his arm, hand and finger at them.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1), 100.3(a)(2) and 100.3(a)(3), and Canons 1, 2A, 3A(1), 3A(2) and 3A(3) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent's hostility to the complaining witness in a criminal case plainly indicated that he had prejudged the matter. He not only summarily denied her a temporary order of protection without affording her full opportunity to be heard, but he also asserted before the matter had been adjudicated that he saw no merit to her complaint against the defendant. He told a trooper that the complaining witness "was asking for trouble" when the incident occurred, and he gave the prosecutor in open court his opinion that the criminal complaint was unfounded.

"The ability to be impartial is an indispensable requirement for a judicial officer. Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property." (Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290-91).

A judge should treat the possible victims of sex crimes and abuse with special sensitivity and understanding. Such actions as respondent's have the effect of discouraging complaints by those who look to the judiciary for protection (Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135, 138).

Respondent humiliated the complaining witness by forcing her to come before him in open court. The law contains no such requirement on an application for a temporary order of protection. (See, CPL 530.12). A judge is permitted to issue a temporary order upon an ex parte application once an accusatory instrument has been filed. (CPL 530.12[3]).

In addition to showing bias, respondent violated his ethical obligations to be patient, dignified and courteous and to maintain order and decorum in his courtroom by his rude, loud and angry statements to the complaining witness and the trooper and the prosecutor who sought to protect her interests (see, Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][2], 100.3[a][3]).

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Cleary and Mr. Sheehy were not present.

Dated: March 15, 1991

State of New York
Commission on Judicial Conduct

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

Determination

DENNIS R. FREEMAN,

a Justice of the Newstead Town Court and the Akron Village Court, Erie County.

APPEARANCES:

Gerald Stern for the Commission

Honorable Dennis R. Freeman, pro se

The respondent, Dennis R. Freeman, a justice of the Newstead Town Court and the Akron Village Court, Erie County, was served with a Formal Written Complaint dated July 3, 1991, alleging that he used the prestige of his office on behalf of a customer of his private business. Respondent filed an answer dated July 26, 1991.

On September 10, 1991, the administrator of the Commission and respondent entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On September 19, 1991, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Newstead Town Court since January 1, 1990, and a justice of the Akron Village Court since April 1, 1985.

2. Respondent, a part-time judge, owns Freeman's Sport Shop, a sporting goods store where he sells firearms. Respondent sold Richard L. Campbell four pistols on January 4, 1988, May 5, 1989, October 12, 1989, and January 26, 1990.

3. On July 30, 1990, Mr. Campbell was charged with Driving While Intoxicated. On August 27, 1990, his pistol license was suspended by Erie County Court Judge John V. Rogowski, and he was ordered to surrender the four pistols that had been sold to him by respondent.

4. On November 14, 1990, Mr. Campbell was convicted of Driving While Ability Impaired.

5. On November 19, 1990, Mr. Campbell asked respondent to provide him with a letter in support of his attempt to have his pistol permit reinstated.

6. On November 19, 1990, respondent wrote on his town court stationery to Judge Rogowski on behalf of Mr. Campbell. The letter, bearing respondent's name and judicial title, stated:

> I have known the above individual for several years and hope by this conviction of Driving While Impaired (1192.1 V&T Law) that this would not put his pistol permit in jeopardy.
>
> I do believe he has learned his lesson and he has always shown to me by his actions to be careful and conscientious of his duties and responsibilities by being granted the privilege of having a pistol permit in New York State.
>
> I would ask, therefore, knowing the seriousness of his preceding actions, that you allow him to maintain his pistol permit.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.2(a), 100.2(c) and 100.3(a)(4), and Canons 1, 2, 2A, 2B and 3A(4) of the Code of Judicial Conduct. The charge in the Formal Written complaint is sustained, and respondent's misconduct is established.

Respondent used the prestige of his judicial office to advance the private interests of a customer of his business, in violation of the Rules Governing Judicial Conduct, 22 NYCRR 100.2(c). It is wrong for a judge to intervene on behalf of another in a proceeding in another court, whether the communication is verbal (Matter of Kiley v. State Commission on Judicial Conduct, 74 NY2d 364) or written (Matter of Wright, 1989 Ann Report of NY Commn on Jud Conduct, at 147).

"[A]ny communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office" (Matter of Lonschein v. State Commission on Judicial Conduct, 50 NY2d 569, 572).

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Judge Salisbury and Judge Thompson concur.

Mr. Goldman and Mr. Sheehy were not present.

Dated: November 8, 1991

State of New York
Commission on Judicial Conduct

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

Determination

NATHANIEL HALL,

a Justice of the Ava Town Court, Oneida County.

APPEARANCES:

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

Carter, Conboy, Bardwell, Case, Blackmore & Napierski
(By James M. Conboy; Kevin P. Burke and
Susan M. Di Bella, Of Counsel) for Respondent

The respondent, Nathaniel Hall, a justice of the Ava Town Court, Oneida County, was served with a Formal Written Complaint dated April 5, 1990, alleging that he failed to meet certain financial and recordkeeping requirements. Respondent filed an answer dated May 30, 1990.

By order dated June 6, 1990, the Commission designated Eugene C. Gerhart, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 12, 1990, and the referee filed his report with the Commission on January 8, 1991.

On March 11, 1991, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on April 1, 1991. The administrator filed a reply dated April 3, 1991.

On April 11, 1991, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Ava Town Court since January 1, 1988.

2. From February 1988 through December 1989, as set forth in Schedule A* appended hereto, respondent regularly failed to deposit court funds in his official account within 72 hours of receipt, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a). As a result, respondent's account was deficient by $549 by December 1, 1989.

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*Schedules A and B have not been reproduced for this report.

3. Respondent testified that his home was burglarized in October 1988 and that court funds may have been stolen. Respondent reported $210 stolen. He cannot account for the amount of court money he had on hand at the time because he did not keep a cashbook and had not issued proper receipts.

4. Between December 6, 1988, and April 24, 1989, respondent made no deposits at all in his official account, even though he received $917 in court funds during that period. On April 25, 1989, he deposited only $360.

5. Respondent testified that he kept court funds in an unlocked briefcase and in an unlocked desk at his home.

6. As set forth in Schedule B appended hereto, respondent failed to remit fines and surcharges totalling $621 to the state comptroller by the tenth day of the month following collection, as required by Vehicle and Traffic Law §1803, Town Law §27 and UJCA 2020, 2021(1).

7. From April 1988 to October 1989, respondent failed to maintain a cashbook, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.11(a)(3).

8. In 1988 and 1989, respondent failed to issue and maintain proper records of the receipt of court funds, as required by Town Law §31(1)(a).

9. By the date of the hearing in this proceeding on July 12, 1990, respondent had attempted to eliminate the deficiency in his account by depositing personal funds.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1) and 100.3(b)(1), and Canons 1, 2A, 3A(1) and 3B(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent held hundreds of dollars in his personal possession, unsecured, rather than promptly depositing them in the bank as required by law (Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9[a]). This raises the possibility of improper interim use of the money. (Matter of More, 1990 Ann Report of NY Commn on Jud Conduct, at 140, 141). He also failed to remit promptly $621 to the state comptroller. (See, UJCA 2021[1]). His carelessness in handling the money and his failure to keep proper records of receipts left court funds vulnerable to theft. In addition, his carelessness made it impossible for him to determine whether court funds had been taken when his home was burglarized.

The careless handling of public money by a judge is misconduct, even when not done for personal profit. (Bartlett v. Flynn, 50 AD2d 401 [4th Dept]). "The severity of the sanction imposed for this variety of misconduct depends on the presence or absence of mitigating and aggravating circumstances." (Matter of Rater v. State Commission on Judicial Conduct, 69 NY2d 208, 209).

No aggravating circumstances exist here. (Compare, Rater, supra; Matter of Cooley v. State Commission on Judicial Conduct, 53 NY2d 64; Matter of Vincent v. State Commission on Judicial Conduct, 70 NY2d 208; Matter of Hutzky, 1984 Ann Report of NY Commn on Jud Conduct, at 94).

Rather, respondent has made an attempt to eliminate the deficiency in his court account by depositing his own funds. He has also sought assistance in learning how to keep proper records and has made arrangements to facilitate timely deposits of court funds. These factors suggest a willingness to meet the responsibilities of judicial office. (See, Matter of Rogers v. State Commission on Judicial Conduct, 51 NY2d 224, 226). Future audits will indicate whether respondent has, in fact, met these responsibilities.

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury, Mr. Sheehy and Judge Thompson concur.

Judge Ciparick did not participate.

Dated: June 4, 1991

State of New York
Commission on Judicial Conduct

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

Determination

LESTER C. HAMEL,

a Justice of the Champlain Town Court, Clinton County.

APPEARANCES:

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

Honorable Lester C. Hamel, pro se

The respondent, Lester C. Hamel, a justice of the Champlain Town Court, Clinton County, was served with a Formal Written Complaint dated March 6, 1991, alleging certain financial depositing and remitting irregularities. Respondent answered the Formal Written Complaint by letter dated April 19, 1991.

By motion dated May 30, 1991, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be deemed established. Respondent did not file papers in response thereto. By determination and order dated June 28, 1991, the Commission granted the administrator's motion.

The administrator filed a memorandum as to sanction. Respondent did not file any papers and waived oral argument.

On September 19, 1991, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Champlain Town Court during the relevant time herein. Respondent was a justice of the Champlain Village Court and an acting justice of the Rouses Point Village Court during the relevant time herein until his resignation on April 30, 1990.

2. On March 30, 1990, respondent was censured by the Commission for failing to deposit and remit court funds in a timely manner between January 1981 and May 1989.

3. From August 1989 to March 1990, as set forth in Schedule A* appended hereto, respondent failed to remit Champlain Village Court funds to the state comptroller within ten days of the month following collection, as required by UJCA 2020 and 2021(1), Vehicle and Traffic Law §1803 and Village Law §4-410(1)(b). Respondent's reports to the comptroller were between 40 and 153 days late during the period.

4. From August 1989 to March 1990, as set forth in Schedule B appended hereto, respondent failed to remit Rouses Point Village Court funds to the comptroller as required by law. Respondent's reports to the comptroller were between 18 and 170 days late during the period.

5. From August 1989 to October 1990, as set forth in Schedule C appended hereto, respondent failed to remit Champlain Town Court funds to the comptroller as required by UJCA 2020 and 2021(1), Vehicle and Traffic Law §1803 and Town Law §27(1). Respondent's reports to the comptroller were between six and 40 days late during the period.

6. Between August 21, 1989, and June 1, 1990, as set forth in Schedule D appended hereto, respondent failed to deposit Champlain Village Court funds in his official account within 72 hours of receipt, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a). During this time, respondent held court funds in his personal possession for as long as 397 days.

7. Between August 6, 1989, and September 19, 1990, as set forth in Schedule E appended hereto, respondent failed to deposit Champlain Town Court funds in his official account as required by law. Respondent held town court funds in his personal possession for as long as 409 days.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3 and 100.3(b)(1), and Canons 1, 2A, 3 and 3B(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

In 1990, respondent was censured by this Commission for his failure to deposit and remit court funds promptly between 1981 and 1989. (Matter of Hamel, 1991 Ann Report of NY Commn on Jud Conduct, at 61).

This record indicates that his misconduct continued while the previous matter was pending before the Commission and for seven months after the March 30, 1990, censure. The failure to heed a Commission censure is an aggravating factor that has been held to warrant removal. (Matter of Rater v. State Commission on Judicial Conduct, 69 NY2d 208, 209).

After his censure, respondent held checks that should have been deposited within three days for as long as 133 days (see, Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9[a]). The money, however, was kept in a locked safe. Respondent's delays in turning over money to the state after his censure were for relatively brief periods, from six to 40 days.

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*Schedules A-E have not been reproduced for this report.

Therefore, we conclude that removal is not warranted at this time. Future audits will determine whether respondent will comply with the law.

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Judge Salisbury and Judge Thompson concur.

Mr. Goldman and Mr. Sheehy were not present.

Dated: November 7, 1991

State of New York
Commission on Judicial Conduct

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

Determination

LAWRENCE J. LABELLE,

a Judge of the Saratoga Springs City Court, Saratoga County.

APPEARANCES:

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

E. Stewart Jones, Jr. (Peter J. Moschetti, Jr., and Leonard W. Krouner, Of Counsel) for Respondent

The respondent, Lawrence J. LaBelle, a judge of the Saratoga Springs City Court, Saratoga County, was served with a Formal Written Complaint dated March 8, 1990, alleging that he disregarded defendants' fundamental rights and conveyed the impression of bias in numerous cases. Respondent filed an answer dated April 9, 1990.

On September 17, 1990, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided for by Judiciary Law §44(4) and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement by letter dated October 22, 1990.

The administrator and respondent submitted memoranda as to sanction.

On December 13, 1990, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

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

1. Respondent, a lawyer, has been a judge of the Saratoga Springs City Court since 1970. He was acting judge of the court from 1964 to 1969.

2. Between 1986 and 1989, on 96 occasions in 59 cases involving 44 defendants, as denominated in Exhibit A to the agreed statement of facts, respondent committed defendants charged with misdemeanors or violations to jail without bail, in violation of CPL 530.20(1).

3. Respondent was aware at all times during the period that the law requires that bail be set on non-felony charges or that defendants be released on their own recognizance. On several occasions between 1986 and 1989, representatives of the public defender's office and the sheriff's department had advised respondent that such commitments were improper.

4. In testimony before a member of the Commission on August 1 and September 8, 1989, respondent offered several reasons for committing defendants without bail. On September 8, 1989, the following questions were asked, and respondent gave the following answers:

> Q: I suppose it raises the question again: Why did you on other cases set no bail for misdemeanors and violations?
>
> A: As I said before, I believe, in prior testimony, it would have to be some circumstance, either a non-appearance or prior underlying misdemeanor, or there was a problem with identity or there was a psychiatric exam ordered...
>
> In other words, I think you would say it was a judgment call, basically, on my examination and at the time of the arraignment.

Respondent also testified that he held some defendants without bail because they had no place to go, because he felt that they were a danger to themselves or others or because of mistakes or clerical errors. In one case, respondent said, he did not set bail because the defendant was wanted in another jurisdiction. In another case, he did not set bail because the defendant had refused to cooperate with the probation department in connection with its sentencing report.

5. In his testimony, respondent indicated that as a result of the Commission's investigation, he would no longer commit defendants without bail but would "set the bail so high he couldn't get out," in cases in which he would order psychiatric examinations. In non-felony cases where defendants have a history of not appearing in court, respondent indicated he would "set bail again very, very high and make sure that they don't get out until I see them...."

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

6. The allegation is not sustained and is, therefore, dismissed.

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

7. In twelve cases denominated in Exhibit B to the agreed statement of facts, respondent set bail on arrest warrants or ordered defendants held without bail at times when the defendants were not before him and without reviewing those factors that he was required to consider by CPL 510.30(2)(a).

8. On August 1, 1989, the following questions were asked, and respondent gave the following answers:

Q: You don't mean that you set bail...when you issued a warrant? You wrote at the top a suggested amount?

A: I don't suggest. That's the amount of bail I set. That's the bail I set.

***

Q: Are you aware that there are certain circumstances before you set bail you are supposed to consider?

A: Certain circumstances, yes. I look at the complaint. I try to set bail at what I feel is reasonable, and I do the same, that's my theory on non-appearance warrants. I want to know what I am dealing with.

***

Q: You set bail at the time the warrant is issued?

A: Particularly in this situation, absolutely.

Q: Just out of curiosity, why don't you wait until the defendant is before you to set bail?

A: My practice is to set the bail first if he's picked up in some other jurisdiction so he can come in.

As to Charge II of the Formal Written Complaint:

9. On June 6, 1986, respondent arraigned William Charlson on a charge of Criminal Trespass, 3d degree, a misdemeanor. Mr. Charlson was accused of sleeping in a hallway at city hall. Respondent committed Mr. Charlson to jail until June 9, 1986, without bail, in violation of CPL 530.20(1).

10. On June 9, 1986, respondent again committed Mr. Charlson to jail without bail until June 12, 1986.

11. On June 12, 1986, Mr. Charlson appeared before respondent and was represented for the first time by the public defender. Respondent again committed Mr. Charlson to jail without bail until June 26, 1986.

12. On June 26, 1986, respondent committed Mr. Charlson to jail without bail until July 10, 1986.

13. On July 10, 1986, respondent sentenced Mr. Charlson to 35 days time served.

14. Respondent testified on August 1, 1989, that he jailed Mr. Charlson without bail because he had no place to go and wanted to stay in jail.

As to Charge III of the Formal Written Complaint:

15. On October 20, 1986, respondent arraigned Mildred Key on a charge of Criminal Mischief, 2d degree, a misdemeanor. Respondent ordered that Ms. Key undergo a psychiatric examination and committed her to jail until October 27, 1986, without bail, in violation of CPL 530.20(1).

16. On October 25, 1986, respondent issued a new commitment order for Ms. Key, again ordering her held without bail for return to court on November 6, 1986.

17. On October 30, 1986, Ms. Key was examined by two psychiatrists and found to be competent to stand trial.

18. On November 6, 1986, Ms. Key reappeared in court. Respondent again committed her to jail without bail until November 13, 1986.

19. Respondent had informed Ms. Key of her right to counsel and had given her a financial affidavit at arraignment but had not asked her whether she wanted counsel and had taken no steps to effectuate her right to assigned counsel while the case was pending, as required by CPL 170.10(4)(a).

20. On November 13, 1986, Ms. Key appeared before another judge and was recommitted to jail until November 17, 1986.

21. On November 17, 1986, Ms. Key appeared before respondent and was represented for the first time by the public defender. She pled guilty, and respondent gave her a conditional discharge.

22. Ms. Key had served 29 days in jail awaiting disposition of her case.

23. Respondent testified on August 1, 1989, that his practice in ordering psychiatric examinations is to sign a court order and give it to police to be relayed to the jail and then to the mental health clinic. CPL 730.20 and 730.30 require a judge to issue the order directly to the appropriate mental health director.

24. Respondent also testifed that he does not require that the reports, once completed, be forwarded directly to the court but allows the mental health clinic to leave the reports at the jail to be taken to court upon defendants' return date. CPL 730.20(5) provides that the reports be made directly to the court.

As to Charge IV of the Formal Written Complaint:

25. On December 27, 1986, respondent arraigned Gilbert Martin on a charge of Disorderly Conduct, a violation. Respondent ordered a psychiatric examination and committed him to jail without bail, in violation of CPL 530.20(1).

26. On December 29, 1986, Mr. Martin returned to court. He was unrepresented. Respondent recommitted him without bail until January 5, 1987.

27. On December 30, 1986, Mr. Martin was examined by two psychiatrists and found competent to stand trial.

28. On January 5, 1987, Mr. Martin returned to court. Respondent sentenced him to 10 days time served.

29. On January 11, 1987, respondent arraigned Mr. Martin on charges of Criminal Trespass and Resisting Arrest, both misdemeanors. Respondent committed him to jail in lieu of $500 bail.

30. On January 15, 1987, Mr. Martin returned to court without counsel. Respondent ordered him held in jail without bail until January 22, 1987, in violation of CPL 530.20(1). Respondent testified on August 1, 1989, that the commitment without bail was a "clerical error."

31. On January 22, 1987, Mr. Martin again appeared without counsel, and respondent issued another order committing him to jail without bail until January 26, 1987.

32. On January 26, 1987, Mr. Martin appeared, represented for the first time by the public defender. Mr. Martin pled guilty to two violations and was sentenced to 18 days time served.

33. On February 6, 1987, respondent arraigned Mr. Martin on a charge of Disorderly Conduct, a violation. Respondent ordered him held in jail without bail, in violation of CPL 530.20(1).

34. On February 19, 1987, Mr. Martin reappeared without counsel. Respondent again committed him to jail without bail until February 26, 1987.

35. On February 26, 1987, Mr. Martin appeared, represented for the first time on this charge by the public defender. Mr. Martin pled guilty and was sentenced to 18 days time served. The maximum sentence for the violation was 15 days, pursuant to Penal Law §70.15(4).

As to Charge V of the Formal Written Complaint:

36. On December 18, 1986, respondent arraigned Edward Merrills on a charge of Criminal Trespass, 3d degree, a misdemeanor. Mr. Merrills was accused of refusing to leave a hospital emergency room. Respondent ordered Mr. Merrills held without bail until January 8, 1987, in violation of CPL 530.20(1).

37. On January 8, 1987, Mr. Merrills reappeared without counsel. He pled guilty, and respondent sentenced him to 22 days time served.

38. Respondent testified on August 1, 1989, that Mr. Merrills was homeless and "begged" to be sent to jail.

As to Charge VI of the Formal Written Complaint:

39. On August 28, 1986, respondent issued a warrant for the arrest of Larry Nellis on a charge of Issuing a Bad Check, a misdemeanor. Respondent wrote on the arrest warrant that bail was set at $50.

40. On October 17, 1986, respondent arraigned Mr. Nellis on the charge, revoked the bail because of an outstanding warrant in another jurisdiction and ordered him held without bail, in violation of CPL 530.20(1).

41. On October 30, 1986, Mr. Nellis appeared without counsel. Respondent recommitted him without bail until November 6, 1986.

42. On November 6, 1986, Mr. Nellis appeared, represented for the first time by the public defender. Respondent again committed Mr. Nellis to jail without bail until November 13, 1986.

43. On November 13, 1986, Mr. Nellis pled guilty, and respondent sentenced him to 28 days time served.

As to Charge VII of the Formal Written Complaint:

44. On April 2, 1987, respondent arraigned John Pellotte on a charge of Disorderly Conduct, a violation, and ordered him jailed without bail, in violation of CPL 530.20(1). Respondent ordered a psychiatric examination.

45. On April 6 and April 9, 1987, Mr. Pellotte returned to court, and each time respondent recommitted him to jail without bail.

46. On April 16, 1987, Mr. Pellotte appeared without counsel. He pled guilty, and respondent sentenced him to 20 days time served. The maximum sentence for the violation was 15 days, pursuant to Penal Law §70.15(4).

47. Respondent never received the psychiatric report he had ordered.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3(a)(1) and 100.3(a)(4), and Canons 1, 2, 3A(1) and 3A(4) of the Code of Judicial Conduct. Charges I, II, III, IV, V, VI and VII of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. The allegations in paragraph 4(b) of Charge I are dismissed.

Where a defendant is charged with a misdemeanor or offense a court must order "recognizance or bail" (CPL 530.20[1]). Over a four-year period respondent consistently and intentionally disregarded that duty. He acknowledged that his commitments to jail without bail in non-felony cases were contrary to law, terming it a "judgment call." His reasons for ignoring the statute are unauthorized by law and do not exist as exceptions to the mandate of CPL 530.20(1). While a judge is empowered to consider a defendant's past failure to appear in setting bail, there is no authority to refuse bail to defendants accused of violations and misdemeanors. This is not an issue of judgment, "poor judgment, or even extremely poor judgment" (Matter of Shilling v. State Commission on Judicial Conduct, 51 NY2d 397, 403; Matter of Cunningham v. State Commission on Judicial Conduct, 57 NY2d 270, 275). It is a deliberate consistent disregard of the law.

In two cases, Pellotte (Charge VII) and the second Martin disorderly conduct case (Charge IV), respondent held defendants in jail without bail for periods longer than the maximum sentence after conviction. This could rise to misconduct even if bail had been set in an amount defendants could not make (See, Matter of Jutkofsky, 1986 Ann Report of NY Commn on Jud Conduct, at 111, 131).

Respondent's practice of holding non-felony defendants without bail for psychiatric examinations is also without "apparent or express legal or rational justification..." (Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286, 290). His failure to follow statutory procedures (CPL 730.20, 730.30) to ensure that the examinations were promptly performed and reported to the court exacerbated the harm to jailed defendants such as Ms. Key (Charge III) who were held long after the reports were completed.

Even a well-motivated concern for homeless defendants does not justify their incarceration where the law does not allow it (Matter of Schneider, 1991 Ann Report of NY Commn on Jud Conduct, at 71). A civilized society cannot justify a pattern of unauthorized jailings by calling it an act of charity.

Respondent also disregarded the law when he either set bail or ordered defendants held without bail on arrest warrants before the defendants appeared before him.

He repeatedly abused the bail process by improperly using it for punitive purposes (Matter of Sardino, supra, at 289). This is borne out by respondent's testimony that the Commission's inquiry would only prompt him to "set bail again very, very high and make sure that they don't get out..." It also indicates that he will continue to ignore the only legitimate concern of a judge in setting bail, "namely, whether any bail or the amount fixed was necessary to insure the defendant's future appearances in court," (Matter of Sardino, supra).

Despite his legal training and his 26 years on the bench, respondent repeatedly failed to follow the law and promises to continue to subvert its legitimate purposes. "No judge is above the law he is sworn to administer. The legal system cannot accommodate a jurist who thus disregards the law." (Matter of Ellis, 1983 Ann Report of NY Commn on Jud Conduct, at 107, 113). Respondent has revealed his "misunderstanding of the role of a judicial officer," and "is not fit to serve as a judge" (Matter of Ellis, supra).

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Sheehy was not present.

Dated: February 6, 1991

State of New York
Commission on Judicial Conduct

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

Determination

NICHOLAS P. MOSSMAN,

a Justice of the Philmont Village Court, Columbia County.

APPEARANCES:

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

John Connor, Jr., for Respondent

The respondent, Nicholas P. Mossman, a justice of the Philmont Village Court, Columbia County, was served with a Formal Written Complaint dated November 2, 1990, alleging that he failed to disqualify himself and improperly handled a Harassment case. Respondent filed an answer dated November 23, 1990.

By order dated November 30, 1990, the Commission designated Paul A. Feigenbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 30 and 31, 1991, and the referee filed his report with the Commission on April 11, 1991.

By motion dated April 26, 1991, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on May 15, 1991. The administrator filed a reply dated May 20, 1991.

On May 23, 1991, the Commission heard oral argument. Because of recording problems, oral argument was heard de novo on June 27, 1991. Respondent appeared by counsel. Thereafter, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Philmont Village Court since April 1, 1986.

2. Respondent's father, Philip P. Mossman, is the Mayor of Philmont and was in 1989. Henry Casivant has lived in the Philmont area for 23 years and owns rental properties there. He has had an adversarial relationship with respondent's father, of which respondent is aware. Mr. Casivant has been a party in several civil and criminal cases in respondent's court and has regularly appeared as scheduled for court dates.

3. Lewis Craver is a long-time acquaintance of respondent and his family. Mr. Craver was a regular patron in 1989 of Nick's Restaurant, which is owned by respondent's mother and where respondent's father tends bar. Respondent lives above the bar.

4. On May 20, 1989, at about 7:30 P.M., Mr. Craver and Mayor Mossman left Nick's Restaurant and met Mr. Casivant, who was on his own property in the vicinity of the restaurant.

5. Mayor Mossman drove Mr. Craver to his home. Mr. Craver then called the Philmont Village Police. Officers George Hazelton and Scott Taylor came to his home and took a complaint alleging that Mr. Casivant had said to Mr. Craver outside the restaurant, "You better not drive that car if you had to [sic] much to drink." The complaint charged Mr. Casivant with Harassment, a violation of Penal Law §240.25(5). The statute reads, "A person is guilty of harassment when, with intent to harass, annoy or alarm another person...[h]e engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."

6. Officer Hazelton presented the complaint to respondent, who issued a warrant for Mr. Casivant's arrest. Respondent did not disqualify himself, even though the complaint stated that the incident occurred outside of Nick's Restaurant and that Mr. Craver had been in the company of "Mr. Mossman."

7. At about 11 P.M., Officers Hazelton and Taylor arrested Mr. Casivant and brought him before respondent for arraignment.

8. Respondent gave Mr. Casivant a copy of the complaint. Mr. Casivant argued that the complaint was not sufficient to constitute Harassment and asked respondent to disqualify himself.

9. Respondent refused to disqualify himself, arraigned Mr. Casivant, set bail at $250 and adjourned the case for two weeks. Mr. Casivant posted bail and was released.

10. After the arraignment, respondent asked Officer Hazelton to prepare a written statement of Mr. Casivant's remarks. Respondent also told Officer Hazelton that the complaint might not be sufficient and instructed him to obtain a more detailed complaint from Mr. Craver to better support the charge.

11. On June 3, 1989, Officer Hazelton met again with Mr. Craver. The officer wrote a longer, two-page complaint concerning the incident, and Mr. Craver signed it. Respondent was given a copy of the longer complaint.

12. On June 6, 1989, Mr. Casivant again appeared in court. Respondent furnished Mr. Casivant with a copy of the new complaint. Mr. Casivant objected that the second complaint was not sufficient to constitute Harassment. Respondent indicated that he intended to disqualify himself.

13. On June 13, 1989, Mr. Casivant again appeared before respondent in connection with the Harassment charge and earlier charges filed by Mr. Craver against him. Mr. Casivant's lawyer asked respondent to disqualify himself. Respondent indicated that he would disqualify himself from the Harassment case.

14. The case was transferred to the Chatham Town Court, where it was adjourned in contemplation of dismissal on January 22, 1990, and was dismissed in July 1990.

15. Respondent testified at the hearing that he had refused to issue a warrant on the basis of the first complaint, that Officer Hazelton obtained a second complaint on May 20, 1989, and that the warrant was issued and Mr. Casivant was arraigned on the basis of that complaint. Respondent testified that he asked Officer Hazelton to rewrite the second complaint because it was "chicken scratch." He claims that it was the rewritten complaint that was dated June 3, 1989; respondent destroyed the second May 20, 1989, complaint.

16. During the investigation of this matter, respondent answered in writing inquiries from Commission staff on November 22, 1989, and January 24, 1990, and he testified before a member of the Commission on May 23, 1990. At none of those times did he testify that there had been an intervening "chicken scratch" complaint.

17. On May 31, 1990, Mr. Craver gave testimony before Commission Chief Attorney Stephen F. Downs. Mr. Craver did not mention that he had signed two complaints on May 20, 1989.

18. On June 8, 1990, Mr. Downs wrote to respondent, questioning the discrepancy in the dates of the two complaints.

19. In response on July 11, 1990, respondent stated for the first time that there had been a "barely legible," intervening complaint. Respondent testified that he destroyed that complaint.

20. On July 19, 1990, Mr. Downs again interviewed Mr. Craver. He testified that he had spoken with respondent and now recalled that he had signed two complaints on May 20, 1989. Mr. Craver said that Officer Hazelton destroyed the second complaint on June 3. Mr. Craver's daughter, Karen, also testified that her father signed a second complaint on May 20, 1989, and that Officer Hazelton destroyed it.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2, 100.3 and 100.3(c)(1), and Canons 1, 2, 3 and 3C(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained,* and respondent's misconduct is established.

Respondent should have had no part in the Casivant Harassment case. The complaining witness was a long-time acquaintance of respondent and a regular customer of a bar owned by respondent's mother. The complaint made it obvious that the incident occurred outside the bar, where respondent lived, and that respondent's father was a witness to the incident. Mr. Casivant was a political adversary of respondent's father. These factors brought into question respondent's ability to be impartial and mandated his immediate disqualification. (See, Rules Governing Judicial Conduct, 22 NYCRR 100.3(c)(1); Matter of Tyler v. State Commission on Judicial Conduct, 75 NY2d 525; Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349).

*The date of the court appearance in Paragraph 5 of the Formal Written Complaint was amended to read June 6, 1989.

Respondent not only failed to remove himself from the case immediately, but he issued an arrest warrant and arraigned Mr. Casivant on a complaint that was clearly deficient on its face, then attempted after the fact to have a valid complaint drawn. He knew that an allegation that Mr. Casivant told Mr. Craver, "You better not drive that car if you had to [sic] much to drink," could not constitute "a course of conduct or repeated[]... acts which alarm or seriously annoy [an]other person..." (Penal Law §240.25[5]). His knowledge of the deficiency of the complaint is evident from the fact that he told Officer Hazelton after the arraignment to obtain a more detailed complaint. In doing so, respondent abandoned his proper role as a neutral and detached magistrate (see, Matter of Wood, 1991 Ann Report of NY Commn on Jud Conduct, at 82, 86) and gave the appearance that he was assisting in the prosecution of Mr. Casivant.

This conduct alone, while serious, would not ordinarily require removal. However, respondent's false testimony at the hearing and his attempts to obstruct the Commission's discharge of its lawful mandate demonstrate that he is unfit for judicial office.

During the investigation of this matter, respondent was asked twice to recount the events of Mr. Casivant's arrest and arraignment, and he testified on the subject before a member of the Commission. In two written responses and in his sworn testimony, he mentioned only two complaints drawn against Mr. Casivant. Mr. Craver also gave a sworn statement in which he told of signing only two complaints.

Staff counsel then made a new inquiry of respondent, questioning the discrepancy in the dates of the complaints. Respondent and Mr. Craver acknowledge that they then discussed the matter, and respondent thereafter stated for the first time that there had been three complaints. He mentioned a "chicken scratch" complaint which was drawn on May 20, 1989, and had to be rewritten because it was "barely legible." Mr. Craver then altered his earlier testimony and claimed for the first time that he had signed three complaints. This was the version that both respondent and Mr. Craver gave at the hearing.

This chronology alone is ample basis for concluding that the "chicken scratch" defense is a belated attempt by respondent to conceal conduct that he knew was wrong. If there had been three complaints, why did respondent mention only two in earlier, detailed letters and in his investigative testimony?

The are other reasons for disbelieving this version. Officer Hazelton, who wrote the complaints, testified that only two complaints were drawn: one on May 20, 1989, and one on June 3, 1989. Respondent testified that he arraigned Mr. Casivant on the "chicken scratch" complaint, and, although he says it was "barely legible," he read it to Mr. Casivant. Mr. Casivant testified that he was read and was given the original, shorter complaint at arraignment. Although respondent said he ordered the "chicken scratch" complaint redrawn to make it more legible, the June 3, 1989, complaint was also in Officer Hazelton's handwriting.

The fact that the "chicken scratch" complaint cannot be produced further supports our conclusion that it never existed, as does the conflict between the Cravers and respondent as to how it was supposedly destroyed.

As did the referee, we reject the testimony of respondent and the Cravers and conclude that the "only possible inference is that [respondent] changed his story...and got the Cravers to go along by 'refreshing their memories.'" (Referee's report at p. 12).

"Such deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." (Matter of Myers v. State Commission on Judicial Conduct, 67 NY2d 550, 554;

see also, Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 78). Respondent did more than merely refuse to admit a culpable state of mind; he gave patently false testimony despite contrary objective proof (compare, Matter of Kiley v. State Commission on Judicial Conduct, 74 NY2d 364, 370).

A judge who lies under oath in defiance of the law cannot be entrusted to administer oaths and sit in judgment on others whose credibility he must assess. (See, Matter of Intemann v. State Commission on Judicial Conduct, 73 NY2d 580, 582; Matter of Gelfand v. State Commission on Judical Conduct, 70 NY2d 211, 216; Matter of Perry, 53 AD2d 882 [2d Dept]).

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

Mr. Berger, Judge Altman, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mr. Goldman, Judge Salisbury, Mr. Sheehy and Judge Thompson concur.

Ms. Barnett and Mrs. Del Bello were not present.

Dated: September 24, 1991

State of New York
Commission on Judicial Conduct

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

Determination

DAVID W. RANKE,

a Justice of the Dayton Town Court and an Acting Justice of the South Dayton Village Court, Cattaraugus County.

APPEARANCES:

Gerald Stern for the Commission

Honorable David W. Ranke, pro se

The respondent, David W. Ranke, a justice of the Dayton Town Court and the South Dayton Village Court, Cattaraugus County, was served with a Formal Written Complaint dated March 11, 1991, alleging that he failed to remit court funds promptly to the state comptroller. Respondent answered the Formal Written Complaint by letter dated April 20, 1991.

On June 24, 1991, the administrator of the Commission and respondent entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On June 27, 1991, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Dayton Town Court since 1979. He has been acting justice of the South Dayton Village Court since 1982.

2. From January 1985 to December 1988, as set forth in Schedule A* appended hereto, respondent repeatedly failed to remit court funds to the state comptroller by the tenth day of the month following collection, as required by UJCA 2020 and 2021(1), Vehicle and Traffic Law §1803 and Town Law §27(1). All of respondent's reports for April through October 1987 were more than a year late; one was 577 days late. At all times between January 1985 and December 1988, respondent was aware that he was required to remit court funds to the comptroller by the tenth day of the month following collection.

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*Schedules A and B have not been reproduced for this report.

3. On August 8, 1985, August 27, 1985, October 10, 1985, October 29, 1985, July 1, 1986, and August 4, 1986, the comptroller wrote to respondent, advising him that he had not filed reports or remitted money. On May 14, 1985, January 30, 1987, and October 22, 1987, the comptroller asked the Dayton town supervisor to suspend respondent's salary pursuant to law because of his failure to file reports and remit funds.

4. On August 24, 1989, the Commission cautioned respondent to remit funds to the comptroller by the tenth day of the month following collection.

5. From June 1989 to August 1990, as set forth in Schedule B appended hereto, respondent repeatedly failed to remit court funds to the comptroller as provided by law. During this period, respondent's reports to the comptroller were from six to 88 days late.

6. On August 15, 1989, September 15, 1989, October 13, 1989, February 15, 1990, March 15, 1990, and April 13, 1990, the comptroller wrote to respondent, advising him that he had not filed reports or remitted money.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3 and 100.3(b)(1), and Canons 1, 2A, 3 and 3B(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

Respondent failed to comply with the law by keeping court funds in his official account rather than promptly turning them over to the state comptroller. For much of 1987, respondent collected fines and other court fees and held them in the bank for more than a year.

This neglect of his administrative duties persisted, even though the comptroller repeatedly took steps to collect the money and the Commission cautioned respondent to comply with the law. The failure to heed a Commission warning exacerbates the misconduct. (Matter of Rater v. State Commission on Judicial Conduct, 69 NY2d 208, 209; Matter of Lenney v. State Commission on Judicial Conduct, 71 NY2d 456, 458-59).

The mishandling of public funds by a judge is misconduct, even when not done for personal profit. (Bartlett v. Flynn, 50 AD2d 401, 404 [4th Dept]). Although respondent failed to promptly remit court funds to the comptroller, he did deposit funds promptly in an official account. As a result, he was able at all times to account for the money that he collected. (See, Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101).

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

Mr. Berger, Judge Altman, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mr. Goldman, Judge Salisbury, Mr. Sheehy and Judge Thompson concur.

Ms. Barnett and Mrs. Del Bello were not present.

Dated: September 30, 1991

State of New York
Commission on Judicial Conduct

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

Determination

LEE R. SCHWARTING,

a Justice of the Smyrna Town Court, Chenango County.

APPEARANCES:

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

The respondent, Lee R. Schwarting, a justice of the Smyrna Town Court, Chenango County, was served with a Formal Written Complaint dated September 18, 1990, alleging that he failed to remit court funds promptly to the state comptroller and that he failed to cooperate with the Commission. Respondent did not answer the Formal Written Complaint.

By motion dated November 8, 1990, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be deemed established. Respondent did not file papers in response thereto. By determination and order dated February 6, 1991, the Commission granted the administrator's motion.

The administrator then filed a memorandum as to sanction. Again, respondent neither filed papers nor requested oral argument. On March 8, 1991, the Commission considered the record of the proceeding and made the following findings of fact.

1. Respondent has been a justice of the Smyrna Town Court since January 1, 1988.

2. Between January 1988 and January 1989, respondent failed to remit court funds and report cases to the state comptroller by the tenth day of the month following collection, as required by Town Law §27, UJCA 2020 and 2021(1) and Vehicle and Traffic Law §1803. Respondent filed his reports between five and 172 days late during this period, as denominated in Schedule A to the Formal Written Complaint. Respondent reported handling between 0 and 13 cases a month during the period.

3. On August 31, 1989, respondent testified before a member of the Commission. He offered no excuse for failing to remit monies in a timely manner. "I've tried to do them up at the end of the month, but, you know. I don't know. I just didn't get them mailed out. I just got behind. I don't know what happened," respondent testified.

4. On November 22, 1989, the Commission cautioned respondent to report and remit to the state comptroller within the time required by law.

5. From September 1989 until at least September 25, 1990, respondent failed to report any cases or to remit any court funds to the state comptroller. Bank statements from respondent's court account indicate that he received at least $1,238.50 during this period.

6. Respondent failed to provide the Commission with case files, dockets, receipts and reports to the state comptroller, notwithstanding requests that he do so from a Commission investigator on April 12, April 25 and May 9, 1990. On April 25 and May 9, 1990, respondent told the investigator that he did not know where to locate the records requested.

7. Respondent failed to respond to letters from a Commission attorney dated May 15, June 1, June 20 and July 24, 1990, requesting that he report the status of numerous cases pending in his court and explain why he had not remitted monies to the state comptroller.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(5) and 100.3(b)(1), and Canons 1, 2A, 3A(5) and 3B(1) of the Code of Judicial Conduct. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Since he took office, respondent has consistently failed to meet legal requirements that he remit court funds promptly to the state comptroller. For at least a year, from September 1989 to September 1990, he failed to remit any money at all, even though his bank statements for the period indicate that he received more than $1,000.

The careless handling of public monies is misconduct, even when not done for personal profit. (Bartlett v. Flynn, 50 AD2d 401 [4th Dept]). The failure to remit court funds, even without additional evidence of failure to deposit, warrants public discipline. (Matter of Rogers v. State Commission on Judicial Conduct, 51 NY2d 224; Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101, 102).

Respondent exacerbated his mishandling of court funds by failing to heed a Commission warning that he comply with remitting requirements (Matter of Rater v. State Commission on Judicial Conduct, 69 NY2d 208, 209; Matter of Lenney v. State Commission on Judicial Conduct, 71 NY2d 456, 458-59). In addition, respondent failed to cooperate with the Commission, to respond to the charges, to present mitigating circumstances or to explain his conduct. Respondent's conduct warrants his removal from office (Matter of Cooley v. State Commission on Judicial Conduct, 53 NY2d 64, 66).

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

All concur.

Dated: March 15, 1991

State of New York
Commission on Judicial Conduct

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

Determination

RAYMOND H. VOSBURGH, JR.,

a Justice of the Guilford Town Court, Chenango County.

APPEARANCES:

Gerald Stern for the Commission

Albert E. Clune for Respondent

The respondent, Raymond H. Vosburgh, Jr., a justice of the Guilford Town Court, Chenango County, was served with a Formal Written Complaint dated February 22, 1991, alleging that he served simultaneously as a judge and a school board member, knowing that there were ethics opinions stating that it was improper to do so. Respondent filed an answer dated April 15, 1991.

On June 20, 1991, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be admonished and waiving further submissions and oral argument.

On June 27, 1991, the Commission approved the agreed statement and made the following determination.

1. In May 1987, respondent was elected to fill an unexpired term on the Sidney school board.

2. In November 1987, respondent was elected a justice of the Guilford Town Court for a term beginning January 1, 1988.

3. In April 1990, respondent attended a training session for judges and became aware of Opinion 88-142 of the Advisory Committee on Judicial Ethics. The opinion holds that a town justice is prohibited by the Rules Governing Judicial Conduct and the Code of Judicial Conduct "from seeking election to the board of education," unless he or she first resigns from judicial office.

4. On May 23, 1990, respondent, who was then standing for re-election to the school board, requested from the advisory committee an opinion on the facts of his specific situation.

5. On June 6, 1990, respondent was re-elected to the school board for a full, five-year term.

6. On September 18, 1990, the advisory committee issued Opinion 90-79, in which it concluded that respondent "cannot both retain his office as a judge and be a candidate for re-election to the school board." The positions are "incompatible," the committee said, and "the judge should immediately resign from the school board."

7. Respondent continued to hold both offices simultaneously until April 9, 1991, when he resigned from the school board, having been served with the Formal Written Complaint in this proceeding on February 25, 1991.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a) and 100.7, and Canons 1, 2A and 7A(3) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established.

A judge should not run for or serve on a school board. Although not openly aligned with major political parties, school board members in most jurisdictions of the state are elected, political officers. Service on a school board often requires a member to take positions on controversial issues of community interest other than those related to the law, the legal system or the administration of justice.

"No judge during a term of office shall hold any office in a political party or organization or contribute to any political party or political campaign or take part in any political campaign except his or her own campaign for elective judicial office." (Rules Governing Judicial Conduct, 22 NYCRR 100.7). "A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office...." (Canon 7A[3] of the Code of Judicial Conduct). These provisions clearly precluded respondent from running for re-election to the school board in 1990 without first resigning his judicial office.

Respondent quite properly sought an opinion from the Committee on Judicial Ethics. However, when the opinion apparently failed to sustain his position, he chose to ignore it and remained on both the school board and the bench. This failure to resign for nearly seven months, and not until the Commission brought this proceeding, is misconduct.

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

Mr. Berger, Judge Altman, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mr. Goldman, Judge Salisbury, Mr. Sheehy and Judge Thompson concur.

Ms. Barnett and Mrs. Del Bello were not present.

Dated: September 24, 1991

State of New York
Commission on Judicial Conduct

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

Determination

GERALD WINEGARD,

a Justice of the Seward Town Court, Schoharie County.

APPEARANCES:

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

Edward Wildove for Respondent

The respondent, Gerald Winegard, a justice of the Seward Town Court, Schoharie County, was served with a Formal Written Complaint dated July 30, 1990, alleging that he engaged in a course of conduct prejudicial to the fair and proper administration of justice. Respondent filed an answer dated October 1, 1990.

By order dated October 18, 1990, the Commission designated Joseph J. Tabacco, Jr., Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 11 and 12, 1990, and the referee filed his report with the Commission on May 15, 1991.

By motion dated May 31, 1991, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings of fact and for a determination that respondent be removed from office. Respondent opposed the motion on June 19, 1991. The administrator filed a reply dated June 20, 1991.

On June 27, 1991, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

Preliminary findings:

1. Respondent has been a justice of the Seward Town Court since 1976. He is not a lawyer.

2. Since becoming a judge, respondent has attended all required training sessions sponsored by the Office of Court Administration for town and village justices.

As to Paragraph 4(a) of Charge I of the Formal Written Complaint:

3. In the five cases denominated in Schedule A* appended hereto, respondent arraigned defendants on charges other than traffic infractions or misdemeanors relating to traffic, even though he did not have jurisdiction to do so, in violation of CPL 100.55 and 140.20.

4. The allegations concerning the cases of Joseph A. Blaser, Richard Dupont, Christina Greeven, Byron W. McCray, Patrick C. Norris and Singh Mahandar are not sustained and are, therefore, dismissed. (CPL 140.20[1][d]).

5. Respondent acknowledges that he had no jurisdiction to arraign defendants on violations or non-traffic-related misdemeanors that arose in towns that do not adjoin the Town of Seward.

6. Respondent testified that approximately 50 percent of the arraignments that he conducted in 1989 involved charges that arose in other jurisdictions.

As to Paragraph 4(b) of Charge I of the Formal Written Complaint:

7. Respondent disposed of the 22 cases denominated in Schedule B appended hereto, even though he did not have jurisdiction to do so, in violation of CPL 170.15(1).

8. The allegations concerning the cases of Michael D. Feldman, Max A. Krulls, Byron W. McCray and Patrick C. Norris are not sustained and are, therefore, dismissed.

9. Respondent acknowledges that he knew that he had no jurisdiction to dispose of matters that arose outside his township unless a defendant in a case arising in an adjoining town wished to plead guilty to the charge immediately after arraignment.

As to Paragraph 4(c) of Charge I of the Formal Written Complaint:

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

As to Paragraph 4(d) of Charge I of the Formal Written Complaint:

11. On May 21, 1988, William Dorn, Jr., appeared before respondent on a charge of Criminal Possession Of A Weapon, 4th Degree, a misdemeanor. Respondent determined that Mr. Dorn was too intoxicated to arraign, adjourned the proceeding and committed Mr. Dorn to jail without setting bail, in violation of CPL 530.20(1).

12. On March 11, 1989, Douglas T. Ryan appeared before respondent on charges of Driving While Intoxicated, a misdemeanor; No Seat Belt and Stopping On The Pavement, both traffic infractions. Respondent committed Mr. Ryan to jail without setting bail, in violation of CPL 530.20(1).

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*Schedules A-D have not been reproduced for this report.

13. On July 8, 1989, Singh Mahandar appeared before respondent on charges of Driving While Intoxicated, a misdemeanor; Consumption Of Alcohol In A Motor Vehicle and Failure To Keep Right, both traffic infractions. Respondent indicated that Mr. Mahandar was too intoxicated to arraign and committed him to jail without setting bail, in violation of CPL 530.20(1).

As to Paragraph 4(e) of Charge I of the Formal Written Complaint:

14. The allegation is not sustained and is, therefore, dismissed.

As to Paragraph 4(f) of Charge I of the Formal Written Complaint:

15. On April 8, 1989, respondent committed Daniel J. Dolan to jail in lieu of bail without considering the factors enumerated in CPL 510.30(2).

16. On August 28, 1989, respondent committed Tracy Lord to jail in lieu of bail without considering the factors enumerated in CPL 510.30(2).

17. On July 30, 1989, respondent committed Kenneth Weaver to jail in lieu of bail without considering the factors enumerated in CPL 510.30(2).

18. Respondent acknowledged in testimony before a member of the Commission on March 28, 1990, that he knows that he is supposed to inquire before setting bail about a defendant's ties to the community and family ties.

19. The allegations concerning the cases of Henry Bender, Jr., Steven Bobick, Daniel Camphausen, Michael Coulter, Paul Gabriel, Karen J. Hotaling, Bruce A. Patterson, Jr., and Larry Schondra are not sustained and are, therefore, dismissed.

As to Paragraph 4(g) of Charge I of the Formal Written Complaint:

20. In the eleven cases denominated in Schedule C appended hereto, respondent allowed his son, a police officer who lived with respondent at the time, to appear before him at the arraignment of defendants.

As to Paragraph 4(h) of Charge I of the Formal Written Complaint:

21. In the six cases involving five different defendants denominated in Schedule D appended hereto, respondent failed to advise defendants of their right to assigned counsel if they could not afford a lawyer, in violation of CPL 170.10(4)(a) and 180.10(4).

22. Respondent testified that it is his practice not to advise a defendant of the right to assigned counsel unless the defendant first says that he or she wants a lawyer. In cases which must be transferred to another jurisdiction for disposition, respondent does not inform defendants at arraignment of their right to assigned counsel, does not determine their eligibility for assigned counsel and does not assign counsel for those eligible; he considers that the responsibility of the judge to whom the case is to be transferred, he testified.

23. The allegation concerning the case of Charles L. Schrom, Jr., is not sustained and is, therefore, dismissed.

As to Paragraph 4(i) of Charge I of the Formal Written Complaint:

24. On August 5, 1988, Lane Proctor appeared before respondent on charges of Driving While Intoxicated, a felony, and Failure To Dim Headlights. Respondent believed that Mr. Proctor was under the influence of alcohol at the time and that he was abusive. Respondent summarily held him in Criminal Contempt and sentenced him to 15 days in jail without setting forth in writing his reasons therefore, as required by Judiciary Law §752. Respondent never conducted an arraignment on the original charges, as required by CPL 170.10(4)(a) and 180.10(4). He transferred the case to another court.

25. On February 26, 1988, Earl L. Tessier appeared before respondent on charges of Driving While Intoxicated and Speeding. Respondent believed that Mr. Tessier was abusive and summarily held him in Criminal Contempt and sentenced him to 15 days in jail without setting forth in writing the reasons therefore, as required by Judiciary Law §752. Respondent did not complete the arraignment of Mr. Tessier, as required by CPL 170.10(4)(a) and 180.10(4). He transferred the case to another court.

26. On August 20, 1988, Carol L. White appeared before respondent on a charge of Harassment. She was intoxicated at arraignment, and respondent believed that she was abusive. He held her in Criminal Contempt and sentenced her to 30 days in jail without setting forth in writing the reasons therefore, as required by Judiciary Law §752. Respondent completed the arraignment of Ms. White on September 8, 1988.

As to Charge II of the Formal Written Complaint:

27. On August 3, 1989, Charles L. Schrom, Jr., was charged in the Village of Cobleskill by respondent's son, Officer Steven Winegard, with Aggravated Unlicensed Operation, 3d Degree, and Loud Exhaust. Mr. Schrom was 18 years old at the time.

28. Officer Winegard took Mr. Schrom to respondent for arraignment. Respondent and his son lived together at the time, and the arraignment took place in their home. Respondent asked Mr. Schrom whether he understood the charges and whether he wanted a lawyer. When Mr. Schrom replied that he wanted a lawyer, respondent told him that he could not have one because the charges against him were only violations.

29. Respondent asked Mr. Schrom whether he had $250. Mr. Schrom said that he did not and asked to call his father, who also said that he did not have the money. Respondent asked the defendant whether he had a job; Mr. Schrom replied that he did not.

30. Respondent then committed Mr. Schrom to jail in lieu of $250 bail and did not set a return date.

31. Mr. Schrom remained in jail for 26 days until the district attorney inquired about his incarceration. He was released by Cobleskill Village Justice Alfred Toohig on August 29, 1989, and was sentenced to 15 days time served.

As to Charge III of the Formal Written Complaint:

32. On August 28, 1989, Tracy Lord was charged in the Village of Cobleskill by respondent's son with Driving While Intoxicated, Driving With More Than .10 Percent Blood Alcohol Content, Failure To Keep Right and Aggravated Unlicensed Operation, 3d Degree. Mr. Lord was 17 years old at the time.

33. Officer Winegard took Mr. Lord before respondent for arraignment. Respondent and his son lived together at the time, and the arraignment took place in their home. Mr. Lord was under the influence of alcohol at the arraignment. Respondent set bail at $1,000 cash or $2,000 bond, committed Mr. Lord to jail in lieu of bail and ordered him to appear in the Cobleskill Village Court on September 19, 1989, 22 days later.

34. Respondent failed to take any steps to effectuate Mr. Lord's right to assigned counsel if he could not afford an attorney, as required by CPL 170.10(4)(a).

As to Charge IV of the Formal Written Complaint:

35. On May 28, 1989, David J. Smith was charged in the Village of Cobleskill with Driving While Intoxicated, Driving With More Than .10 Percent Blood Alcohol Content and Failure To Obey A Traffic Control Device. Respondent's son was one of the arresting officers and administered a breathalyzer test, which indicated a blood alcohol content of .19 percent.

36. Officer Winegard took Mr. Smith before respondent for arraignment. Respondent and Office Winegard lived together at the time, and the arraignment took place in their home. Mr. Smith did not know and was not advised of the relationship.

37. Respondent read the charges and asked for a plea. Mr. Smith said that he wanted a lawyer. Respondent told him that he would have to enter a plea first.

38. Respondent told Mr. Smith that he would have to either plead not guilty and post $1,000 bail or plead guilty and pay a fine of $417.

39. Mr. Smith pleaded guilty. He could not pay the $417, and respondent committed him to jail for 15 days or until the fine was paid. Respondent did not advise Mr. Smith that he had a right to apply for resentencing if he could not pay the fine, as required by CPL 420.10(3).

As to Charge V of the Formal Written Complaint:

40. On July 30, 1989, Kenneth J. Weaver was charged in the Village of Cobleskill with Assault, 2d Degree, a felony; Resisting Arrest, a misdemeanor; Unlawful Possession of Marijuana, a violation, and Speeding, a traffic infraction. The charges included allegations that he had assaulted respondent's son during the arrest. Respondent and his son lived together at the time.

41. Respondent came to the Cobleskill Police Station to arraign Mr. Weaver at the request of the police. Officer Winegard was present for the arraignment. Respondent did not disclose their relationship. Respondent did not advise Mr. Weaver that he had the right to assigned counsel if he could not afford a lawyer and took no steps to determine his eligibility for assigned counsel, as required by CPL 170.10(4)(a) and 180.10(4).

42. Without considering the factors enumerated in CPL 510.30(2), respondent set bail, committed Mr. Weaver to jail in lieu of bail and ordered him to appear in the Cobleskill Village Court on August 15, 1989.

43. Respondent acknowledges that he has no jurisdiction in the Village of Cobleskill.

As to Charge VI of the Formal Written Complaint:

44. On April 20, 1989, Brian M. Lipes appeared before respondent on a charge of Harassment. Mr. Lipes was 19 years old at the time.

45. Respondent informed Mr. Lipes of the charge and asked him how he wished to plead. Respondent told Mr. Lipes that if he pleaded not guilty, he would spend a longer time in jail because he would have to wait for another hearing.

46. Respondent did not advise Mr. Lipes of his right to counsel, his right to an adjournment to obtain counsel or his right to assigned counsel if he could not afford a lawyer, as required by CPL 170.10(4)(a).

47. Mr. Lipes pleaded guilty, and respondent sentenced him to ten days in jail.

48. Mr. Lipes served the sentence with time off for good behavior. Two days after his release, in a college disciplinary proceeding, he was barred from the dormitories of the State University at Cobleskill, where he was a student and where the Harassment incident had taken place.

49. On May 10, 1989, Mr. Lipes was charged with Criminal Trespass, 2d Degree, based on an allegation that he had been in one of the college dormitories.

50. Mr. Lipes was again taken to respondent for arraignment. Respondent told him that if he pleaded not guilty, he might be sent to jail again. Respondent said that Mr. Lipes was guilty.

51. Respondent did not advise him of his right to counsel, his right to an adjournment to obtain counsel or his right to assigned counsel if he could not afford a lawyer, as required by CPL 170.10(4)(a).

52. Mr. Lipes pleaded guilty. Respondent imposed a $250 fine and a $62 surcharge and gave Mr. Lipes three weeks to pay.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.3(a)(1), 100.3(a)(4) and 100.3(c)(1), and Canons 1, 2A, 3A(1), 3A(4) and 3C(1) of the Code of Judicial Conduct. Charges I, II, III, IV, V and VI of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

A judge has an obligation at the arraignment of a criminal defendant to inform the defendant of his or her rights and to take steps to safeguard those rights. (CPL 170.10[4][a], 180.10[4]). Respondent repeatedly failed to fulfill that obligation and violated the rights of criminal defendants appearing before him.

He denied defendants fundamental constitutional rights concerning counsel and bail. He coerced guilty pleas in three cases, two of them involving the same unrepresented, 19-year-old defendant. He left an 18-year-old defendant charged with traffic infractions in jail for 26 days in lieu of bail by failing to set a date for his return to court. He held three defendants in Criminal Contempt without following proper statutory procedures and sentenced them to jail for their behavior at arraignment on other charges and never completed the arraignments.

Respondent also handled 23 cases over which he had no jurisdiction and failed to disqualify himself in 11 cases in which his son was the arresting officer, complaining witness and representative of the prosecution.

Such a pattern of conduct is prejudicial to the fair and proper administration of justice. Respondent has "abused the power of his office in a manner that has brought disrepute to the judiciary and has irredeemably damaged public confidence in the integrity of his court" (Matter of McGee v. State Commission on Judicial Conduct, 59 NY2d 870, 871).

Respondent's own testimony indicates that he was aware of his jurisdictional limitations and that he understood the proper criteria for assigning counsel and setting bail. Such a pattern of deliberate disregard of the law demonstrates insensitivity to the legal and ethical obligations of a judge. (See, Matter of Maney v. State Commission on Judicial Conduct, 70 NY2d 27, 30; Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105, 111).

"No judge is above the law he is sworn to administer. The legal system cannot accommodate a jurist who thus disregards law." (Matter of Ellis, 1983 Ann Report of NY Commn on Jud Conduct, at 107, 113).

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

Mr. Berger, Judge Altman, Mr. Bellamy, Judge Ciparick, Mr. Goldman and Judge Thompson concur.

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

Ms. Barnett and Mrs. Del Bello were not present.

Dated: September 26, 1991

State of New York
Commission on Judicial Conduct

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

Determination

WILLIAM F. WRAY,

a Justice of the Clarkstown Town Court, Rockland County.

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission

Birbrower, Montalbano, Condon & Frank, P.C. (By William Frank) for Respondent

The respondent, William F. Wray, a justice of the Clarkstown Town Court, Rockland County, was served with a Formal Written Complaint dated October 9, 1990, alleging that he borrowed money from a client of his law practice and that he caused his secretary to alter a car registration and drove an unregistered car. On November 19, 1990, respondent was served with a second Formal Written Complaint alleging that he permitted a judge of his court to practice law before him. Respondent filed an answer dated January 7, 1991, to both Formal Written Complaints.

By order dated January 16, 1991, the Commission designated Edward Brodsky, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 26 and 27, 1991, and the referee filed his report with the Commission on July 11, 1991.

By motion dated August 8, 1991, the administrator of the Commission moved to confirm the referee's report and for a finding that respondent be removed from office. Respondent opposed the motion on August 23, 1991. Oral argument was waived.

On September 19, 1991, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint dated October 9, 1990:

1. Respondent was a justice of the Clarkstown Town Court from January 1, 1977, until he notified the Chief Administrator of the Courts of his resignation on September 2, 1991. He was a part-time judge and has practiced law in Orange and Rockland counties since 1965.

2. In 1984, respondent represented Felicia Pesce in connection with a workers' compensation claim.

3. On October 25, 1984, Ms. Pesce was awarded $18,200 in a lump sum in settlement of her claim. Respondent drove Ms. Pesce to and from an appearance before the Workers' Compensation Board on that date.

4. In the car, they discussed what Ms. Pesce might do with the money. Respondent proposed that she loan some of it to him because he knew that he could get a lower interest rate than he could from a bank or through a credit card.

5. On December 1, 1984, after Ms. Pesce received the award from the Workers' Compensation Board, respondent executed a promissory note, stating that he owed Ms. Pesce $12,000 at 14 percent interest, that interest would be paid weekly at $32.30 and that the principal would be paid by December 1, 1989. Ms. Pesce endorsed her check to respondent, who kept $12,000 and returned the balance.

6. Respondent did not advise Ms. Pesce to seek the advice of independent counsel concerning this transaction, nor did he disclose any actual or potential conflicts of interest, in violation of the Code of Professional Responsibility, DR1-102(A)(4), DR1-102(A)(5) and DR1-102(A)(6) then in effect and DR5-104(A).

7. From December 1984 to December 1989, respondent paid interest on the loan as agreed and repaid $5,200 of the principal.

8. From December 1, 1989, when the note became due, until March 14, 1991, respondent did not repay the remaining $6,800 principal on the loan or the interest thereon, in violation of the Code of Professional Responsibility, DR9-102(B)(4) then in effect. Respondent testified that he could not raise the $6,800 and was angry with Ms. Pesce for complaining to the Commission that he had failed to repay the loan.

9. On March 14, 1991, less than two weeks before the hearing in this proceeding, respondent repaid Ms. Pesce $6,000 and obtained a release from her as to all remaining claims pertaining to the loan.

As to Charge II of the Formal Written Complaint dated October 9, 1990:

10. In 1986, respondent owned and was the principal driver of a 1980 Ford, which was registered with the Department of Motor Vehicles as bearing license plate "86 SMA." The "SMA" designation indicated that the owner was a member of the State Magistrates Association and, therefore, was an incumbent or former judge.

11. In 1987, respondent took the Ford to a shop for engine repairs. At approximately the same time, he bought a 1986 Mercury and had his "SMA" license plates re-registered and transferred from the Ford to the Mercury. Respondent did not apply for new license plates for the Ford, which was now unregistered and remained in the repair shop without license plates. In late 1987, the Ford was towed to a second repair shop, where it remained until August 1988.

12. In May 1988, respondent transferred ownership of the Mercury to his daughter, who properly had the car registered in her name and had new license plates issued for it. The "SMA" plates were taken off the Mercury.

13. In August 1988, when respondent retrieved the repaired Ford from the shop, it bore the "SMA" license plates. Respondent had not taken any steps to renew the registration on the Ford or to notify the Department of Motor Vehicles that the "SMA" plates would be placed on the Ford. Respondent did not arrange for the Ford to be inspected.

14. From August 1988 to November 1989, respondent operated the Ford, even though he knew that the car had not been registered and that he was driving a vehicle with plates that had been taken from another car and had not been re-registered to the Ford.

15. In September 1989, respondent handed to Amy Nead, a typist in his law office, a vehicle registration sticker issued to a Buick. Respondent directed Ms. Nead to delete the word "Buick" and type the word "Ford" in its place. She did so. Respondent examined the sticker, indicated that the alteration was not neat and asked Ms. Nead to do it again. After she retyped the word "Ford" on the sticker, respondent took it and left the office.

16. On November 12, 1989, respondent was driving the Ford with the "SMA" plates in the Village of Grand-View-on-Hudson. He was stopped by a police sergeant and charged with Improper Plates, Operating Out of Restriction, Unregistered Motor Vehicle and Operation While Registration Suspended or Revoked.

17. On April 30, 1990, respondent pleaded guilty before Village Justice Deborah Sexter to Operation While Registration Suspended or Revoked, a misdemeanor, in satisfaction of all charges.

18. On June 25, 1990, Judge Sexter imposed a $100 fine with a $17 surcharge.

As to Charge I of the Formal Written Complaint dated November 19, 1990:

19. On September 14, 1990, Harry Waitzman was a part-time justice of respondent's court and was also engaged in the private practice of law in Rockland County.

20. On September 14, 1990, Judge Waitzman appeared before respondent and asked him to sign a subpoena duces tecum. The caption on the subpoena indicated that it pertained to a federal proceeding in the Southern District of New York. The subpoena directed the Clarkstown Police Department to turn over records to Judge Waitzman as attorney for two of the parties to the proceeding.

21. Respondent signed the subpoena, even though he knew that he did not have jurisdiction in a federal proceeding.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a) and 100.5(f), and Canons 1 and 2A of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint dated October 9, 1990, and Charge I of the Formal Written Complaint dated November 19, 1990, are sustained, and respondent's misconduct is established.

Respondent has demonstrated a pattern of misconduct in his personal affairs and in his professional roles as lawyer and judge.

Motivated by his own need for money, respondent borrowed $12,000 from a client who relied upon him for advice. Even though he signed a promissory note, he ignored the best interests of the client and did not ensure that she was protected by independent, disinterested counsel. When the note came due, he did not repay it. A judge's misconduct as a lawyer brings disrepute to the judiciary. (Matter of Boulanger v. State Commission on Judicial Conduct, 61 NY2d 89, 92).

Respondent ordered the alteration of a car registration sticker and operated an unregistered car for 15 months. His failure off the bench to abide by the laws that he is often called upon to apply in court undermines his effectiveness as a judge. (See, Matter of Steinberg v. State Commission on Judicial Conduct, 51 NY2d 74, 81; Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465, 469).

As a judge, respondent permitted another lawyer-judge of his own court to appear before him, in clear violation of the Rules of Governing Judicial Conduct, 22 NYCRR 100.5(f). At the request of the other judge, respondent signed a subpoena in a proceeding over which he had no jurisdiction.

Respondent's course of conduct prejudices the fair and proper administration of justice and demonstrates a disregard for the law and for the ethical considerations attendant to the holding of judicial office. Respondent's failure to recognize the legal and ethical obligations imposed upon him as an attorney and a judge renders him unfit to hold judicial office. Respondent should, therefore, be barred from judicial office in the future.

This determination is rendered pursuant to Judiciary Law §47.

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Judge Salisbury and Judge Thompson concur.

Mr. Goldman and Mr. Sheehy were not present.

Dated: November 6, 1991

1991 MATTERS ACCORDING TO COURT

Number of Judges in Court System (Approximate) --- 3570 (100%)	Town & Village Court -- 2400 (67%)	City Court -- 381 (10.5%)	County Court -- 81 (2.5%)	Family Court -- 127 (3.5%)	District Court -- 50 (1.5%)	Court of Claims -- 63 (2%)	Surrogate Court -- 74 (2%)	Supreme Court -- 339 (9.5%)	Court of Appeals; App. Div. -- 55 (1.5%)
COMPLAINTS RECEIVED (1207; includes 184, (15%), re: Non-Judges)	363 (30%)	163 (13.5%)	95 (8%)	110 (9%)	17 (1.5%)	4 (.33%)	32 (2.67%)	221 (18.5%)	18 (1.5%)
COMPLAINTS INVESTIGATED (197)	124 (63%)	26 (13%)	7 (3.5%)	10 (5%)	3 (1.5%)	0	4 (2%)	23 (12%)	0
NUMBER OF JUDGES CAUTIONED AFTER INVESTIGATION (32)	23 (72%)	4 (12.5%)	0	0	0	0	2 (6%)	3 (9.5%)	0
NUMBER OF FORMAL WRITTEN COMPLAINTS AUTHORIZED (25)	20 (80%)	0	3 (12%)	2 (8%)	0	0	0	0	0
NUMBER OF JUDGES CAUTIONED AFTER FORMAL WRITTEN COMPLAINT (1)	0	0	1 (100%)	0	0	0	0	0	0
NUMBER OF JUDGES PUBLICLY DISCIPLINED (11)	10 (91%)	1 (9%)	0	0	0	0	0	0	0
NUMBER OF FORMAL WRITTEN COMPLAINTS DISMISSED OR CLOSED (4)	4 (100%)	0	0	0	0	0	0	0	0

NOTE: All town & village justices serve part-time; about 400 are lawyers. All city court judges are lawyers and serve either part-time or full-time. All other judges are lawyers and serve full-time.

TABLE OF CASES PENDING AS OF DECEMBER 31, 1990.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED[1]	ACTION[2]	TOTALS
Incorrect Ruling								
Non-Judges								
Demeanor		5	11	5	1	2	2	26
Delays		1						1
Confl/Interest		7	6	3	2	2	3	23
Bias		4	5	1				10
Corruption		1	2	2			1	6
Intoxication		1		1				2
Disable/Qualif						1		1
Political Activ			6	2				8
Finan/Recrds/Trng		6	1		3	1	4	15
Ticket-Fixing		1		1				2
Asser'n of Infl[3]		3	2				1	6
Viol'n of Rights[4]		5	7	6	2		2	22
Miscellaneous		23	6	1		4	1	35
TOTALS		57	46	22	8	10	14	157

1. Investigations closed upon vacancy of office other than by resignation.
2. Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.
3. This category was created in 1985. Such matters were previously recorded in other categories.
4. This category was created in 1989. Such matters were previously recorded in other categories.

TABLE OF NEW CASES CONSIDERED BY THE COMMISSION IN 1991.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED[1]	ACTION[2]	TOTALS
Incorrect Ruling	396							396
Non-Judges	184							184
Demeanor	105	27	15	3		1		151
Delays	52	2	2					56
Confl/Interest	25	9	5					39
Bias	64	7	4					75
Corruption	10	6			1			17
Intoxication	5	3	3					11
Disable/Qualif	1				1			2
Political Activ	10	9	6	1				26
Finan/Recrds/Trng	7	12	1	1				21
Ticket-Fixing		2						2
Asser'n of Infl[3]	8	10	1	2			1	22
Viol'n of Rights[4]	106	34	14	3		1		158
Miscellaneous	37	3	6	1				47
TOTALS	1010	124	57	11	2	2	1	1207

1. Investigations closed upon vacancy of office other than by resignation.
2. Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.
3. This category was created in 1985. Such matters were previously recorded in other categories.
4. This category was created in 1989. Such matters were previously recorded in other categories.

ALL CASES CONSIDERED BY THE COMMISSION IN 1991: 1207 NEW COMPLAINTS AND 157 PENDING FROM 1990.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED[1]	ACTION[2]	TOTALS
Incorrect Ruling	396							396
Non-Judges	184							184
Demeanor	105	32	26	8	1	3	2	177
Delays	52	3	2					57
Confl/Interest	25	16	11	3	2	2	3	62
Bias	64	11	9	1				85
Corruption	10	7	2	2	1		1	23
Intoxication	5	4	3	1				13
Disable/Qualif	1				1	1		3
Political Activ	10	9	12	3				34
Finan/Recrds/Trng	7	18	2	1	3	1	4	36
Ticket-Fixing		3		1				4
Asser'n of Infl[3]	8	13	3	2			2	28
Viol'n of Rights[4]	106	39	21	9	2	1	2	180
Miscellaneous	37	26	12	2		4	1	82
TOTALS	1010	181	103	33	10	12	15	1364

1. Investigations closed upon vacancy of office other than by resignation.
2. Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.
3. This category was created in 1985. Such matters were previously recorded in other categories.
4. This category was created in 1989. Such matters were previously recorded in other categories.

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

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED[1]	ACTION[2]	TOTALS
Incorrect Ruling	5679							5679
Non-Judges	1161							1161
Demeanor	953	32	589	122	42	46	119	1903
Delays	513	3	60	37	7	10	15	645
Confl/Interest	248	16	270	83	29	15	87	748
Bias	720	11	149	26	15	11	11	943
Corruption	115	7	55	3	14	9	10	213
Intoxication	22	4	26	5	3	2	12	74
Disable/Qualif	29	0	21	2	13	7	6	78
Political Activ	117	9	88	89	4	12	10	329
Finan/Recrds/Trng	129	18	96	50	66	59	61	479
Ticket-Fixing	19	3	63	150	33	59	158	485
Asser'n of Infl[3]	73	13	69	25	6	4	21	211
Viol'n of Rights[4]	243	39	59	23	5	3	2	374
Miscellaneous	552	26	189	63	17	31	42	920
TOTALS	10,573	181	1734	678	254	268	554	14,242

1. Investigations closed upon vacancy of office other than by resignation.
2. Includes determinations of admonition, censure and removal by the current Commission, as well as suspensions and disciplinary proceedings commenced in the courts by the former and temporary Commissions.
3. This category was created in 1985. Such matters were previously recorded in other categories.
4. This category was created in 1989. Such matters were previously recorded in other categories.