

ANNUAL REPORT

1991

New York State Commission on Judicial Conduct

132000

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1991 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, 1990, through December 31, 1990.

Respectfully submitted,

Henry T. Berger, Chair
On Behalf of the Commission

March 1, 1991
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 appended, 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 promulgated by the American Bar Association and was adopted in 1972 by the New York State Bar Association. A revised Code was adopted by the ABA in 1990.

This 1991 Annual Report covers the Commission's activities during calendar year 1990.

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

COMPLAINTS AND INVESTIGATIONS IN 1990

In 1990, 1184 new complaints were received, compared with 1171 the year before, representing the largest number in the Commission's history. Of these, 972 (82%) were dismissed upon initial review, and 212 investigations were authorized and commenced.¹ In addition, 123 investigations and proceedings on formal charges were pending from the prior year.

As in previous years, the majority of complaints 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 65 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.

¹The statistical period in this report is January 1, 1990, through December 31, 1990. Detailed statistical analysis of the matters considered by the Commission is appended in chart form.

ACTION TAKEN IN 1990

Of the combined total of 335 investigations and proceedings on formal charges conducted by the Commission in 1990 -- 123 carried over from 1989 and 212 authorized in 1990 -- the Commission made the following dispositions in 178 cases:

- 106 matters were dismissed outright.
- 38 matters involving 38 different judges were dismissed with letters of dismissal and caution.
- 5 matters involving 3 different judges were closed upon resignation of the judge from office.
- 15 matters involving 15 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.
- 14 matters involving 11 different judges resulted in formal discipline (admonition, censure or removal from office).

One hundred fifty-seven matters were pending at the end of 1990.

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

Table 1: Town and Village Justices (2400*)

<u>1990 Dispositions</u>	<u>Lawyers</u>	<u>Non-Lawyers</u>	<u>Total</u>
Complaints Received	109	254	363
Complaints Investigated	33	111	144
Number of Judges Cautioned After Investigation	5	20	25
Number of Formal Written Complaints Authorized	3	10	13
Number of Judges Cautioned After Formal Complaint	0	0	0
Number of Judges Publicly Disciplined	0	7	7
Number of Formal Complaints Dismissed or Closed	2	3	5

Table 2: City Court Judges (381)

<u>1990 Dispositions</u>	<u>All Lawyers; Part-Time</u>	<u>All Lawyers; Full-Time</u>	<u>Total</u>
Complaints Received	20	135	155
Complaints Investigated	2	20	22
Number of Judges Cautioned After Investigation	5	0	5
Number of Formal Written Complaints Authorized	1	1	2
Number of Judges Cautioned After Formal Complaint	0	0	0
Number of Judges Publicly Disciplined	2	0	2
Number of Formal Complaints Dismissed or Closed	2	0	2

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

Table 3: County Court Judges (81)*

<u>1990 Dispositions</u>	<u>All Lawyers; All Full-Time</u>
Complaints Received	96
Complaints Investigated	10
Number of Judges Cautioned After Investigation	1
Number of Formal Written Complaints Authorized	1
Number of Judges Cautioned After Formal Complaint	0
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

Table 4: Family Court Judges (127)

<u>1990 Dispositions</u>	<u>All Lawyers; All Full-Time</u>
Complaints Received	127
Complaints Investigated	8
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	1
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. In addition, there are ten judges who serve concurrently as County Court and Surrogate's Court judges, and 30 who serve concurrently as County Court, Surrogate's Court and Family Court judges.

Table 5: District Court Judges (50)

<u>1990 Dispositions</u>	<u>All Lawyers; All Full-Time</u>
Complaints Received	11
Complaints Investigated	3
Number of Judges Cautioned After Investigation	1
Number of Formal Written Complaints Authorized	1
Number of Judges Cautioned After Formal Complaint	1
Number of Judges Publicly Disciplined	0
Number of Formal Complaints Dismissed or Closed	0

Table 6: Court of Claims Judges (63)*

<u>1990 Dispositions</u>	<u>All Lawyers; All Full-Time</u>
Complaints Received	1
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)*

<u>1990 Dispositions</u>	<u>All Lawyers; All Full-Time</u>
Complaints Received	31
Complaints Investigated	3
Number of Judges Cautioned After Investigation	1
Number of Formal Written Complaints Authorized	1
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)

<u>1990 Dispositions</u>	<u>All Lawyers; All Full-Time</u>
Complaints Received	250
Complaints Investigated	21
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	1
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)**

<u>1990 Dispositions</u>	<u>All Lawyers; All Full-Time</u>
Complaints Received	19
Complaints Investigated	1
Number of Judges Cautioned After Investigation	1
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

<u>1990 Dispositions</u>	<u>Number</u>
Complaints Received	131

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 1990 and made public pursuant to the applicable provisions of the Judiciary Law. Copies of the determinations are appended.

DETERMINATIONS OF REMOVAL

The Commission completed two disciplinary proceedings in 1990 in which it determined that the judge involved be removed from office.

Matter of Joseph W. Esworthy

The Commission determined that Joseph W. Esworthy, a judge of the Family Court, Broome County, be removed from office for abusing the rights of litigants, flouting the law, conveying the impression of bias and making intemperate statements in numerous cases over a four-year period.

In its determination of June 21, 1990, the Commission found that Judge Esworthy had failed to advise parties of their statutory right to counsel, elicited admissions from them, made statements indicating that he presumed unproven allegations to be true and coerced parties to accept settlements and waive their right to a hearing, sometimes by threatening incarceration or other consequences which he had no authority to impose. The Commission concluded that Judge Esworthy's conduct was inconsistent with the fair and proper administration of justice.

Judge Esworthy requested review of the Commission's determination by the Court of Appeals, which removed him from office on February 12, 1991.

Matter of Francis I. Benjamin

The Commission determined that Francis I. Benjamin, a non-lawyer justice of the Jewett Town Court, Greene County, be removed from office for physically abusing a woman.

In its determination of October 5, 1990, the Commission found that Judge Benjamin followed a woman into the parking lot of a bar, pushed her into his truck and sexually abused her. The Commission also commented on a procedural issue, noting that its staff had requested the State Police file in this matter and indicating that staff should "routinely inquire of each police witness whether that witness has made any notes or statements concerning matters about which the witness is to testify."

Judge Benjamin requested review of the Commission's determination by the Court of Appeals, which removed him from office on February 14, 1991.

DETERMINATIONS OF CENSURE

The Commission completed six disciplinary proceedings in 1990 in which it determined that the judges involved be censured.

Matter of Rexford Schneider

The Commission determined that Rexford Schneider, a non-lawyer justice of the New Paltz Town Court, Ulster County, be censured for his conduct in two cases.

In its determination of January 26, 1990, the Commission found that Judge Schneider entered a guilty plea and sentenced a defendant to time served in jail awaiting disposition of his case, even though no guilty plea had been entered and no trial held. In another case, Judge Schneider committed a defendant to jail knowing that he had already served a sentence longer than the maximum allowed by law, then ordered the jailer to change the commitment order to reflect an even longer sentence in excess of the maximum allowed by law.

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

Matter of Robert P. Wylie

The Commission determined that Robert P. Wylie, a judge of the Plattsburgh City Court, Clinton County, be censured for repeatedly denying defendants basic, well-established rights and conveying the impression of bias.

In its determination of February 28, 1990, the Commission found that Judge Wylie compromised his impartiality in cases involving 18 different defendants by referring to defendants who were presumed innocent in disparaging terms, and by eliciting incriminating statements from a defendant at arraignment. Judge Wylie also ignored the law by failing to advise or effectuate defendants' right to assigned counsel and by requiring that bail be posted in cash only.

Judge Wylie 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, the Champlain Village Court and the Rouses Point Village Court, Clinton County, be censured for failing to deposit and remit court funds promptly as required by law.

In its determination of March 30, 1990, the Commission found that Judge Hamel failed to handle court funds properly over an eight-year period.

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

Matter of John J. Wood

The Commission determined that John J. Wood, a non-lawyer justice of the Wilton Town Court, Saratoga County, be censured for denying defendants their due process rights and conveying the impression of bias.

In its determination of June 22, 1990, the Commission found that Judge Wood had convicted defendants in two cases without either a trial or a guilty plea. It also held that he conveyed the impression of bias by giving defendants detailed recitations of police activities and suggesting that a police officer's word carries more weight in court than a defendant's.

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

Matter of J. Michael Bruhn

The Commission determined that J. Michael Bruhn, a judge of the Kingston City Court, Ulster County, be censured for presiding over a criminal case, even though, as an attorney in a related action, he was representing the complaining witness against the defendant.

In its determination of June 26, 1990, the Commission found that Judge Bruhn acted as judge in a criminal case involving a complaining witness whom he was representing in a matrimonial action against the defendant, thereby seriously compromising his impartiality as a judge. The Commission concluded that he permitted the case to languish on his court calendar for more than a year in an attempt to use the pending criminal charge to force a favorable settlement for his client in the civil case.

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

Matter of Roy H. Kristoffersen

The Commission determined that Roy H. Kristoffersen, a non-lawyer justice of the Saranac Lake Village Court, Franklin County, be censured for having *ex parte* conversations with a landlord and then threatening and ordering the eviction of his tenants, even though no court action was pending.

In its determination of October 25, 1990, the Commission found that Judge Kristoffersen used the prestige of his office to advance the interests of one party to a dispute.

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

DETERMINATIONS OF ADMONITION

The Commission completed three disciplinary proceedings in 1990 in which it determined that the judges involved be admonished.

Matter of Joseph Slavin

The Commission determined that Joseph Slavin, a judge of the Civil Court of the City of New York and Acting Justice of the Supreme Court, Kings County, be admonished for making threatening statements in connection with a dispute between his son and a third party.

In its determination of February 28, 1990, the Commission found that Judge Slavin used the prestige of his office to advance the private interests of his son by making threats against persons who knew him to be a judge and by attempting to dissuade the third party from making complaints that he had a legal right to make.

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

Matter of Bruce J. Lomnicki

The Commission determined that Bruce J. Lomnicki, a non-lawyer justice of the Mount Morris Village Court, Livingston County, be admonished for sitting on the bench with another judge and participating in a case pending before her, even though he had disqualified himself from the same case.

In its determination of October 5, 1990, the Commission found that, having disqualified himself from the case, it was improper for Judge Lomnicki to participate in it thereafter and, inter alia, to have demonstrated anger during the proceeding.

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

Matter of Dennis A. Ware

The Commission determined that Dennis A. Ware, a non-lawyer justice of the Mentz Town Court and the Port Byron Village Court, Cayuga County, be admonished for numerous administrative and adjudicative failures.

In its determination of October 25, 1990, the Commission found that Judge Ware had neglected more than 200 motor vehicle cases pending in his court. Judge Ware had failed to use the legal means available to him to compel defendants to answer traffic charges properly lodged in his court and had neglected to collect fines he had imposed in 85 cases.

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

DISMISSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of eight Formal Written Complaints in 1990 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 attending and speaking at a political party's election eve rally at a time that the judge was not a candidate and was prohibited from participating.

In three cases last year, the Commission closed the matter because the judges involved had retired from judicial office. The Commission closed one other matter without making any findings because the judge resigned from office.

In the remaining three cases, the Commission found that misconduct was not established and dismissed the Formal Written Complaints.

LETTERS OF DISMISSAL AND CAUTION

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

Where the Commission determines that the misconduct would not warrant public discipline, the Commission, by issuing a letter of dismissal and caution, can privately call a judge's attention to 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 1990, 38 letters of dismissal and caution were issued by the Commission, 37 of which were issued upon conclusion of an investigation and one of which was issued after a Formal Written Complaint was concluded. Twenty-five town or village justices were cautioned; five part-time city court judges were cautioned; eight full-time judges were cautioned.

The caution letters addressed various types of conduct. For example, three judges were cautioned for improperly participating in charitable fund-raising activities. Two judges were cautioned for improperly participating in political activities during periods in which they were not candidates for judicial office. Several judges were cautioned for isolated instances of failing to disclose previous or existing business relationships with one of the parties in small claims disputes. Several others were cautioned for engaging in improper *ex parte* communications, such as: privately interviewing the complaining witness as to the merits of a pending criminal case; directing the defendant and his parents to leave the courtroom in a misdemeanor case, and then privately interviewing the arresting officer on the merits of a pending bail application; and advising a small claims defendant to produce certain evidence, and predicated dismissal of the claim on that evidence without allowing the plaintiff an opportunity to see it or be heard on it.

MATTERS CLOSED UPON RESIGNATION

Three judges resigned in 1990 while under investigation or under 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 the appropriate prosecutor's office. Complaints against lawyers are referred to the appropriate disciplinary committee.

In 1990, the Commission referred 34 matters, involving complaints against housing court judges, court employees or administrative issues, to either the Office of Court Administration or an administrative judge. Two complaints against lawyers were 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 1990, the Court had before it four requests for review, two of which had been filed in 1989 and two of which were filed in 1990. Of these four matters, the Court decided two, and two were pending as of December 31, 1990.

Matter of Josephine D. Tyler

On May 1, 1989, the Commission determined that Josephine D. Tyler, a Justice of the Caneadea Town Court, Allegany County, be removed from office for numerous acts of misconduct, including presiding over a case in which her husband was the complaining witness and striking a youth in the face with a telephone book. Judge Tyler requested review of the Commission's determination in the Court of Appeals.

In its unanimous decision dated March 27, 1990, the Court accepted the sanction determined by the Commission and ordered the judge's removal from office. Matter of Tyler, 75 NY2d 525 (1990).

The Court upheld the Commission's findings that the judge had improperly issued a warrant of arrest for an individual who had given a dishonored check to the judge's husband, presided over the defendant's arraignment and committed him to jail in lieu of \$5,000 bail and failed to appoint counsel for the defendant at the arraignment. The Court described such conduct as "particularly egregious," indicating "a lack of the basic qualities of fairness, impartiality and self-restraint which are essential for judicial office" (Id. at 528). The Court also upheld the Commission's findings that the judge had acted improperly in striking a youth in court with a telephone book and in using court stationery in certain personal matters. The Court dismissed a charge that the judge had ordered a defendant charged with harassment to pay temporary child support, stating that such conduct "amounts to an error of a legal nature in misperceiving the jurisdiction of the Justice Court" and did not constitute misconduct. (Id.).

Matter of Edward J. Greenfield

On September 28, 1989, the Commission determined that Edward J. Greenfield, a Justice of the Supreme Court, New York County, be censured for delays in disposing of eight matters for periods as long as nine years. Justice Greenfield requested review of the Commission's determination in the Court of Appeals.

In its decision dated June 14, 1990, the Court rejected the Commission's determination of misconduct and dismissed all charges against the judge. Matter of Greenfield, 76 NY2d 293 (1990). The Court held that, absent persistent or deliberate neglect, questions of delay are administrative matters beyond the scope of the Commission's jurisdiction. The Court recognized that the judge's delays indicate "serious administrative failings in [his] handling of the cases in issue" and that litigants "should not be expected to wait years for a decision [or]...be required to commence collateral proceedings to compel the judge to render a decision" (*Id.* at 295). It held, however, that such matters should be handled administratively and that public discipline is not warranted unless there is a defiance of administrative directives or an attempt to subvert the system by, for example, filing false case status reports (*Id.* at 298).

Two judges dissented, voting to accept the determined sanction of censure. Describing the judge's conduct as "inexcusable," the dissenting opinion stated that such egregious delays in disposing of cases "must, under any rational interpretation of our rules, constitute misconduct" (*Id.* at 300).

CHALLENGES TO COMMISSION PROCEDURES

The Commission's staff litigated two matters in 1990 involving important constitutional and statutory issues involving the Commission's jurisdiction and procedures.

Sims v. Wachtler et al.

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

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

On May 4, 1988, Supreme Court Justice Ethel B. Danzig granted the defendants' motions to dismiss on the grounds of lack of jurisdiction and res judicata. The Court also denied the plaintiff's cross-motion for summary judgment.

In a unanimous decision dated December 12, 1989, the Appellate Division, First Department, affirmed the judgment of the Court below and, thereafter, denied the plaintiff's motion for reargument. By order dated June 5, 1990, the Court of Appeals dismissed the plaintiff's appeal. By order dated October 23, 1990, the Court denied the plaintiff's motion for reconsideration.

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 clearly protected by the confidentiality requirements of Section 45 of the Judiciary Law. Memoranda were filed in October 1990. A decision is awaited.

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.

Judges' Obligation To Avoid Lending The Prestige Of Office To Fund-Raising Appeals

Section 100.5(b) of the Rules Governing Judicial Conduct permits judges to participate in civic and charitable activities "that do not reflect adversely on impartiality or interfere with the performance of judicial duties." It also permits judges to serve in various capacities in civic and charitable organizations, such as officer, director, trustee or nonlegal advisor.

Among the restrictions on judges set forth in the Rules is the bar on soliciting funds or permitting the prestige of office to be used for such purposes.

In recent years, the Commission has received numerous complaints alleging that judges have been listed in fund-raising letters and other charitable solicitations. In some instances judges have not given permission for their names to be used for such purposes.

Whenever a judge accepts an invitation to join a civic or charitable organization's board or other governing or advisory body, the judge should apprise and periodically remind the appropriate organization officials of the restrictions on the use of the judge's name. This may be especially appropriate when such an organization changes its key personnel.

Judges Serving As Election Commissioners

The Commission reported on this topic in its 1989 Annual Report, but little appears to have changed in the troublesome practice of permitting judges to serve as local election commissioners.

Section 100.5(h) of the Rules Governing Judicial Conduct permits part-time judges to accept private or public sector employment "provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties."

Section 3-200 of the Election Law specifically permits a town or city judge to serve as a county election commissioner. While authorizing service by town justices, the statute does not mention the virtually synonymous village justices, nor does it distinguish between part-time and full-time city judges. Pursuant to that same statutory section, election commissioners are appointed in equal numbers by the major political parties. Given the various statutory, Rules and Code prohibitions on judges engaging in political activity, including a prohibition on a judge belonging to a political club

(Section 100.7 of the Rules), it seems inappropriate to permit a judge to serve by appointment of a political party to an election commissionership. Such a political appointment may convey the appearance that the judge is beholden to the party that facilitated the appointment.

Moreover, the appointment of a judge as a county election commissioner may convey an appearance that the purpose of the appointment is not so much to protect the public interest as to look after the parties' own partisan concerns. Recent articles in a major urban newspaper, for example, reported on political attacks by a local election commissioner on a candidate for a local judgeship. While the commissioner in question was not himself a judge, the episode illustrates the potentially partisan nature of an election commissionership -- a partisanship which would be incompatible with the judge's fundamental obligation to be and appear to be an impartial arbiter of disputes.

The Commission recommended in 1989 that the Legislature amend Section 3-200 of the Election Law to prohibit judges from serving as election commissioners. We renew that recommendation.

Judges Serving On Certain Other Local Boards

Each year, the Commission investigates various complaints that certain judges are serving on local government boards or committees which involve work incompatible with judicial office or which otherwise reflect adversely upon the judge's impartiality.

For example, a judge who serves on a county traffic safety board which sponsors an anti-drunk-driving program would have a conflict of interest in presiding over DWI cases in which a portion of the fine imposed on the guilty motorist would be directed to the safety board's program. Indeed, in 1988, the Advisory Committee on Judicial Ethics advised a town justice not to serve on a county traffic board because the board controlled expenditures to a "Stop DWI Program," and fines levied by the judge in court were returnable to that particular program (Op. 87-28[b]).

The Commission has confidentially cautioned several judges for participating in such programs which, while worthy, nevertheless put the judge in a conflict of interest which should be avoided.

Judges throughout the state would be well-advised to seek advisory opinions on questionable appointments to local boards and organizations before they accept such appointments. Judges may obtain advisory opinions, which are published without identifying the judges who elicited the advisory opinions, from the Advisory Committee on Judicial Ethics, 270 Broadway, Room 1400, New York, New York 10007. The Advisory Committee publishes its opinions, which are an excellent source of information on a broad range of ethical issues.

Police Car Arraignments

In previous Annual Reports (e.g. 1988, 1989), the Commission has commented extensively on a defendant's right to a public trial and the obligation to provide adequate court facilities to insure that proceedings can be conducted in an appropriate, impartial setting. The Commission has also commented specifically on the impropriety of conducting arraignments in police cars (e.g. 1989 Annual Report).

Despite such commentaries and several confidential cautions, the Commission continues to receive periodic complaints that individual town and village justices are conducting arraignments in police cars.

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

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

Over the last several years, the Office of Court Administration has made special efforts to improve the facilities available to full-time judges around the state. Some small municipalities in this state do not provide court facilities for their town and village justices, thereby requiring judges to use other settings, such as their homes or places of business. At times, arraignments cannot be conducted in open court. In other instances, late-night arrests result in off-hour arraignments. Nevertheless, a judge who presides in a police car fails to promote public confidence in the integrity and impartiality of the judiciary.

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

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

Periodically, the Commission receives complaints that individual town and village justices seem unaware of various procedural provisions of law which, if disregarded, can deprive defendants of certain important legal rights.

Section 1704 of the Uniform Justice Court Act ("UJCA"), for example, provides inter alia that the court (i) must prepare minutes of a proceeding within 30 days after a party files notice of an appeal and (ii) send the minutes to the appellant who "shall then procure the case to be settled." In cases where there was no stenographic record and the method of appeal is by affidavit of errors, a "return" must be prepared and filed within ten days of the filing of the notice of appeal.

In 1990, as in previous years, the Commission received a complaint involving a judge who did not comply with the provisions of UJCA 1704. Upon investigation, it appeared that there was no vindictiveness or other personal consideration motivating the judge; he appeared simply unaware of the court's responsibility under UJCA 1704 to prepare minutes of the proceeding.

While the Commission may discipline or caution a judge after the fact for failing to "be faithful to the law and maintain professional competence in it" (Section 100.3[a][1] of the Rules Governing Judicial Conduct), the problem here is more a matter of education than discipline. Where appropriate, the Commission will continue to act in such cases. To the extent that an already-extensive training program for judges can specifically address such obligations as those set forth in UJCA 1704, we recommend that the subject be emphasized.

Acceptance Of Gifts By Judges From Institutions Doing Business With The Courts

A 1990 State Comptroller's report described an alarming situation in which 50 judges accepted nominal gifts (valued at about \$35 each) from a bank which received approximately \$2 million a year in deposits of court-controlled funds. Records detailing the particular judges who received such gifts and the amounts of money they individually ordered deposited into the bank were, according to the court clerk's office, discarded after the Comptroller's inquiry had begun.

Section 100.5(c)(3) of the Rules Governing Judicial Conduct prohibits a judge from accepting a gift from a donor "whose interests have come or are likely to come before the judge." It also plainly creates an appearance of impropriety, in violation of Section 100.2 of the Rules Governing Judicial Conduct, for a judge to receive a gift or benefit from a financial institution at a time when the judge is ordering court funds to be deposited in the institution. In Matter of Cohen, 74 NY2d 272 (1989), a judge was removed from office for taking low interest loans from an institution into which he was ordering the deposit of court-controlled funds. While receipt of a nominal (\$35) gift may not create the same shocking impression as receiving substantial low-interest benefits over a period of time, the principle is the same.

Public confidence in the integrity and impartiality of the judiciary is compromised whenever a judge receives a financial benefit not available to the general public from an institution doing business with the courts. Such acts are wrong and cannot be tolerated.

Improper Suspensions Of Drivers' Licenses

When a defendant in a motor vehicle case does not respond to the Uniform Traffic Ticket, or fails to appear for a scheduled court proceeding, or fails to pay the fine if found guilty, the court has certain remedies. Section 510, subdivision 4-a, of the Vehicle and Traffic Law empowers the court to initiate steps to have the motorist-defendant's license suspended, by notifying the Department of Motor Vehicles of the motorist-defendant's default.

The Commission has encountered numerous instances in which judges have initiated such license-suspension procedures where the motorist-defendant was not in default. Typically, this situation occurs when the defendant pleads not guilty by mail and requests or awaits notification from the court of a trial date. Most judges routinely set trial dates in such instances and notify the defendant. Some judges, however, do not. Their reasons for declining to do so are not necessarily clear, although from some of the matters reviewed by the Commission, it appears that some judges refrain from scheduling trials because they expect the matters to be disposed of by plea bargaining between the defendant and the officer who issued the ticket. When such plea bargaining does not take place -- it is especially unlikely when the motorist-defendant is from a part of the state that is distant from the place where the alleged violation occurred -- an impasse develops. The original ticket is outstanding, the defendant is awaiting a day in court and the court is declining to schedule a trial.

One judge who initiates license-suspension steps in such circumstances said he did so to "remind" the defendant of his "obligation" to dispose of the matter. Some judges refuse to take steps to reinstate the license, even if the defendant has responded, until the case is finally disposed. Usually, the suspensions are initiated without prior notice to the motorist.

The Commission strongly disapproves of the practice of initiating license suspension against defendants who are not in default. The defendant who pleads not guilty in an appropriate manner within the time limits of the law is not in default. The "obligation" to schedule and dispose of the case is the court's, not the defendant's. The defendant should not be subject to the severe penalty of license suspension, without notice, simply for exercising the right to plead not guilty.

This problem is more a matter of education than discipline. Judges should be reminded that license suspension is not a substitute for the court's responsibility to set a trial date, and that a defendant's license should only be suspended according to law, such as when the defendant has defaulted in an appearance or in the payment of a fine.

The Misuse Of Bail

Among the most fundamental rights in a criminal proceeding are prompt arraignment following arrest and the setting of reasonable bail or other conditions of release. Section 510.30 of the Criminal Procedure Law requires the judge to consider various factors in the setting of bail, including the defendant's previous record, financial resources and ties to the community. Although the Commission has no authority to consider complaints that judges have abused their discretion in setting bail, it may consider complaints that judges have used the bail procedure for other than its intended purpose.

Some judges, in the course of issuing arrest warrants for defendants at large, write either a dollar amount or "no bail" on the arrest warrant itself, which is considered to be a "recommendation." There is no provision in law for one judge to "recommend" bail to another judge. Section 510.30 of the Criminal Procedure Law requires that the defendant and the prosecutor be afforded an opportunity to be heard on bail.

The Commission has identified situations in which bail has been used to coerce guilty pleas in traffic and more serious criminal cases. The purpose of bail, as the Court of Appeals has held, is to try to ensure the defendant's return to court. A judge who uses bail to punish a defendant or coerce a guilty plea engages in misconduct.

The Commission has noted a pattern in which it appears that some courts with jurisdiction over traffic cases seek to discourage not-guilty pleas by requiring excessive amounts of bail from defendants who plead not guilty. In addition, although a judge is permitted to set bail in a traffic case, the law's simplified procedures for handling traffic offenses do not contemplate automatically setting bail whenever a defendant pleads not guilty in a traffic case.

Another inexcusable misuse of the bail process is the failure to set bail or release the defendant on his or her recognizance in non-felony cases. The Criminal Procedure Law requires judges to set bail in misdemeanor and violation cases at arraignment. In Matter of Sardino, 58 NY2d 286 (1983), a City Court judge was disciplined for violating defendants' rights, including setting no bail in three misdemeanor cases.

In felony arraignments, a judge before setting bail must give the prosecutor an opportunity to be heard. Since prosecutors do not routinely appear in all town and village justice courts, some judges in those courts do not set bail in felony cases. Attorneys representing defendants charged with felonies in town and village justice courts must often make application for bail in county court, a process that takes several days. The Commission believes that more streamlined procedures are needed to provide a meaningful right to bail in felony cases and to reduce delays. We call this matter to the attention of the Legislature.

The Commission also recommends that the Office of Court Administration give special attention to the bail process in its various seminars, especially those designed for town and village justices and newly elected judges and justices.

Favoritism In Awarding Appointments

The authority to appoint referees, receivers, conservators and guardians is among a judge's most sensitive powers. The comments that follow are intended to address only the ethical issues that arise out of these appointment powers.

The Code of Judicial Conduct prohibits "nepotism and favoritism" in the making of such appointments. Section 100.3(b)(4) of the Rules Governing Judicial Conduct in New York State specifically directs that a "judge shall not make unnecessary appointments...[and] shall exercise the power of appointment only on the basis of merit, avoiding favoritism." The Rules also prohibit judges from making appointments to a relative within six degrees of relationship to the judge or judge's spouse.

The Court of Appeals and the Commission have taken action in cases involving clear violations of these strictures. In Matter of Spector, 47 NY2d 462 (1979), a Supreme Court justice was admonished for the appearance of impropriety in his awarding appointments to the sons of other judges who were contemporaneously appointing his own son in similar matters. In Matter of Kane, 50 NY2d 360 (1980), a Supreme Court justice was removed from office for inter alia awarding appointments to his own son.

The more difficult issue concerns the award of lucrative fees to appointees who are friends or associates of the appointing judge. Certain awards, while not explicitly proscribed, inevitably create appearances of impropriety. For example, the appointment of the judge's campaign manager or close personal friend raises ethical issues even if the individual appointee is qualified for the job. Indeed, Opinion 89-107 of the Advisory Committee on Judicial Ethics mandated a judge's disqualification in a case in which his campaign manager was an attorney. Moreover, the appearance of impropriety tends to be exacerbated as the size of the appointee's fee increases.

Some judges have sought guidelines for the appointment of fiduciaries, not only to enable them to select the best-qualified people but also to protect the process from the appearance of impropriety. In 1986, new Rules of the Chief Judge promulgated a uniform statewide procedure for awarding and reporting fiduciary appointments. This important development corrected the confusion of disparate practices in the four judicial departments and set certain limits on the awards that any individual fiduciary could receive in any 12-month period. The Rules have been refined further in recent amendments. They do not address an issue that occasionally confronts the Commission -- the award of substantial fees to a fiduciary who is also a close friend of the appointing judge. It is also an issue that has received extensive press coverage adverse to the judiciary.

As the Office of Court Administration, at the Chief Judge's direction, continues to review the rules on fiduciary appointments and fees, the Commission recommends closer supervision over such appointments and fees. We also recommend consideration of an amendment to the Rules Governing Judicial Conduct to refine the definition of "favoritism." Further, a review should be undertaken to determine whether the fiduciaries are necessary in all instances where historically they have been used. Finally, consideration should be given to the creation of a position in the nature of a public guardian to assume many of the responsibilities now discharged by fiduciaries who are individually appointed and often are awarded substantial fees.

Given the considerable news media attention devoted in 1990 to this subject, it would appear to be an appropriate time to consider corrective measures.

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. Twelve years later, the 1990-91 budget is \$2.262 million; and, due to the current state budget crisis, the amount that the Commission was permitted to spend was \$2.051 million, representing an annual budget growth of less than 2%. That percentage is substantially below inflation rates and dramatically lower than growth rates of other government agencies. Five times since 1979, we requested budgets no greater or even less than the previous year's amount, and we were apprised by the Division of the Budget that ours was the only agency to seek less than before.

The herculean task of maintaining a markedly low-growth budget over 13 years has left virtually no bureaucratic "fat" to be trimmed from our budget. 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 lay off some staff and to cut back in other ways.

The Executive Budget seeks the sum of \$1.960 million for our operations in fiscal year 1991-92, commencing April 1, 1991. Although this substantial reduction will adversely affect our operations, we will 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 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 New York University School of Law. She was elected a Justice of the Supreme Court for the First Judicial District in 1987. Prior thereto, from 1978 to 1987, she served a ten-year term as a Judge of the Civil Court of the City of New York, eight and one half of those years as an Acting Justice of the Supreme Court. Justice Altman is a member of the Committee on State Courts of Superior Jurisdiction and 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.

HELAINÉ 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, a member of the House of Delegates of the New York State Bar Association, a member of the Executive Committee of The Association of the Bar of the City of New York, and 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.

JOHN J. BOWER, ESQ., is a graduate of New York University and New York Law School. He is a partner in Bower & Gardner in New York City. He is a Fellow of the American College of Trial Lawyers, a Member of the Federation of Insurance Counsel and a Member of the American Law Institute. Mr. Bower's term on the Commission expired on March 31, 1990.

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

DOLORES DEL BELLO received a baccalaureate degree from the College of New Rochelle and a masters degree from Seton Hall University. She was Regional Public Relations Director for Bloomingdale's until 1986 and is presently Partner in Westfair Communications and Publisher of the Westchester County and Fairfield County Business Journals. Mrs. Del Bello 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 President of the Board of Directors of the the Northern Westchester Center for the Arts. She was formerly a member of the League of Women Voters; The Hudson River Museum Board of Directors; Lehman College Performing Arts Center; Westchester Women in Communications; Naylor Dana Institute for Disease Prevention, American Health Foundation.

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 a past president of the New York State Association of Criminal Defense Lawyers and the New York Criminal Bar Association. He is currently the chairperson of the ethics advisory committee of the National Association of Criminal Defense Lawyers, a member of the executive committee of the criminal justice section of the New York State Bar Association, and a member of the criminal law committee of the Association of the Bar of the City of New York. He is also a trustee of Congregation Rodeph Sholom in New York City. He and his wife Kathi have two children and live in New York City.

HONORABLE ISAAC RUBIN is a graduate of New York University, the New York University Law School (J.D.) and St. John's Law School (J.S.D.). Until his retirement in 1990, he was a Justice of the Appellate Division, Second Department. Previously, Justice Rubin sat in the Supreme Court, Ninth Judicial District, where he served as Deputy Administrative Judge of the County Courts and superior criminal courts. Judge Rubin previously served as a County Court Judge in Westchester County, and as a Judge of the City Court of Rye, New York. Judge Rubin's term on the Commission expired on March 31, 1990.

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 Salisbury & Cambria 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. 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 twenty-five 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 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 an 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 Assn.; Past President of the New York State Senate Club; a member of the American Bar Assn., Brooklyn Bar, and the Metropolitan Black Bar Assns. He and his wife Justice Sybil H. Kooper reside in Brooklyn, New York.

ADMINISTRATOR OF THE COMMISSION

GERALD STERN, ESQ., is a graduate of Brooklyn College, the Syracuse University College of Law and 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 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

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

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

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

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

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

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

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

Membership and Staff

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

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

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

Temporary State Commission on Judicial Conduct

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

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

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

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

Former State Commission on Judicial Conduct

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

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

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

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

*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 de novo hearing in the Court on the Judiciary at the request of the judge.

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

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

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

Those proceedings resulted in the following:

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

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

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

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

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

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

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

The 1978 Constitutional Amendment

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

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

SUMMARY OF COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION

Since January 1975, when the temporary Commission commenced operations, 13,035 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 9563 (73%) were dismissed upon initial review and 3472 investigations were authorized. Of the 3472 investigations authorized, the following dispositions have been made through December 31, 1990*:

- 1631 were dismissed without action after investigation;
- 645 were dismissed with letters of caution or suggestions and recommendations to the judge; the actual number of such letters totals 442;
- 244 were closed upon resignation of the judge;
- 256 were closed upon vacancy of office by the judge other than by resignation; and
- 539 resulted in disciplinary action.
- 157 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 539 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission:

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

In addition, 37 letters of dismissal and caution have been issued after formal charges had been sustained and determinations made that the judges involved had engaged in misconduct.

Also, 184 judges resigned during investigation, upon the commencement of disciplinary proceedings or in the course of those proceedings.

Through December 1990, the Court of Appeals has reviewed 48 Commission determinations, 38 of which were for removal, eight for censure and two for admonition. The Court accepted the sanction determined by the Commission in 37 cases, 32 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 1990**

REFEREE

CITY

COUNTY

Eugene C. Gerhart, Esq.
Bernard H. Goldstein, Esq.
John T. O'Friel, Esq.
Joseph J. Tabacco, Jr., Esq.

Binghamton
New York
Central Valley
New York

Broome
New York
Orange
New York

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.

APPENDIX E: DETERMINATIONS RENDERED IN 1990

**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

FRANCIS I. BENJAMIN,

Determination

a Justice of the Jewett Town Court,
Greene County.

APPEARANCES:

Gerald Stern (Cathleen S. Cenci and Jean M. Savanyu,
Of Counsel) for the Commission

O'Connell and Aronowitz (By Stephen R. Coffey;
Brian D. Premo, Of Counsel) for Respondent

The respondent, Francis I. Benjamin, a justice of the Jewett Town Court, Greene County, was served with a Formal Written Complaint dated September 20, 1989, alleging that he physically abused a woman. Respondent filed an answer dated October 18, 1989.

By order dated October 25, 1989, the Commission designated Bernard H. Goldstein, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on December 11, 1989, and January 9, 1990, and the referee filed his report with the Commission on March 19, 1990.

By motion dated March 23, 1990, 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 by cross motion on April 12, 1990. The administrator filed a reply, supplemented by letter, both dated April 17, 1990.

On April 19, 1990, the Commission heard oral argument by the administrator. Respondent's counsel waived oral argument. The Commission adjourned the matter for further submissions and forwarded the transcript of oral argument to respondent. Respondent and the administrator filed letters, both dated May 8, 1990. On May 18, 1990, the Commission considered the record of the proceeding and, on June 26, 1990, rendered a determination that respondent be removed from office.

On July 9, 1990, the administrator moved to reconsider or amend the determination. Respondent cross-moved for reconsideration on July 27, 1990. The administrator filed a reply to respondent's cross motion on August 3, 1990.

On August 24, 1990, the Commission voted to reconsider the determination and heard oral argument at which the administrator appeared and respondent appeared by counsel. Thereafter, the Commission, sua sponte, reviewed the entire record de novo and issued the following determination.

1. Respondent has been a justice of the Jewett Town Court since 1983.
2. Respondent knew Monna M. as a waitress in a local restaurant. He has patronized the restaurant and installed cable television in her home.
3. On the night of April 13-14, 1988, respondent and Monna were present at the Tannersville Yacht Club, a restaurant and bar. Both were present during an altercation between two other patrons in the parking lot outside the club. After the altercation, respondent and Monna left the parking lot separately.
4. At about 3 A.M. on April 14, 1988, Monna returned to the parking lot. Respondent, driving a pick-up truck, had noticed Monna driving in the opposite direction, made a U-turn and followed her into the parking lot. After Monna left her car, she was told by a man in the parking lot that the club was closed.
5. When respondent arrived in the parking lot, he told the man to leave, took Monna by the arm and pushed her into his truck.
6. He kissed her on the lips, touched her breast, lay on top of her and attempted to remove her clothing.
7. Monna resisted and suffered some scratches and bruises. She eventually pinned respondent's head under the truck's steering wheel and fled into her own car and left the parking lot.
8. Monna then drove to another bar, where she was seen by State Trooper Peter J. Kusminsky and his partner. Sometime later, she filed a complaint against respondent with the police.
9. Respondent was questioned about the incident on May 12, 1988, by State Police Investigator Steven D. Brignoli and made oral statements which Investigator Brignoli reduced to writing. Respondent signed a sworn statement acknowledging that Monna was in his truck and that "...I leaned over and put my hand on her breast." The statement also contains the following questions and answers:

Q: With which hand did you touch her breasts?

A: Left hand on her right breast. I don't know if she had a bra on, I can't remember what she had on. I'm almost positive that she didn't have a bra on. I don't remember if I went under her shirt.

Q: Did you attempt to open and remove her pants?

A: No. As far as I went was to touch her breast, and she said she wanted to go home, and that was it.

Q: Do you swear that what you have told me is the truth?

A: Yes.

At the hearing, respondent disavowed both his oral and written statements, claiming he had not read the written statement. Respondent testified that he had only brushed Monna's breast accidentally.

10. Monna subsequently told the prosecutor that she did not wish to pursue her complaint, and no criminal charges were filed against respondent.

Respondent urges dismissal of the Formal Written Complaint on the ground that staff violated the mandate of Judiciary Law §44(4) and Brady v. Maryland (373 US 83) by failing to disclose in advance a note of Commission witness Trooper Peter J. Kusminsky in which he stated that he saw Monna shortly after the incident and she "appeared calm not frazzled or messy--also intox stated nothing about supposed (sic) incident". The Kusminsky memo was produced by him during cross-examination by respondent's counsel. Until then, staff counsel was unaware of the existence of the document.

Judiciary Law §44(4) requires staff counsel, upon written request of a respondent, to disclose at least five days prior to a hearing "any written statements made by witnesses who will be called to give testimony" and, whether or not the respondent requests it, "any exculpatory evidentiary data and material relevant to the complaint." In this regard, the Commission is of the view that staff should routinely inquire of each police witness whether that witness has made any notes or statements concerning matters about which the witness is to testify. The statute further states, "The failure of the Commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the Commission provided that such failure is not substantially prejudicial to the judge."

Under the circumstances herein, respondent's motion to dismiss must be denied. Staff counsel requested from the State Police their files in this matter. The material provided by the State Police was timely disclosed to respondent. It did not include Trooper Kusminsky's notes, which were undated, unsigned and not on State Police forms. Notice of Trooper Kusminsky's testimony, including his observation of Monna at the bar, was fully provided to respondent.

The trooper's note was given to respondent's counsel by the witness on cross examination and was received in evidence by the referee. Monna testified after the trooper, and the note was, therefore, available to respondent's counsel before she testified. Further, the note was produced before respondent presented his case. After disclosure, the proceeding was adjourned for four weeks, which gave respondent ample opportunity to act upon the information contained in the note. Respondent has offered no evidence of prejudice as a result of the delayed disclosure and has failed to cite authority for the proposition that the failure to disclose the note at an earlier stage in the proceedings should result in a per se entitlement to dismissal of the proceedings. There is also no indication that staff counsel knowingly withheld information. Respondent's application for dismissal on this basis is, therefore, denied.

That branch of respondent's cross motion seeking a rehearing of the entire matter de novo because of bias of the referee or, in the alternative, a hearing on the issue of referee bias and prejudice must also be denied. An examination of the entire record indicates that there was no bias.

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

On or off the bench, a judge remains "cloaked figuratively with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others." (Matter of Kuehnel v. State Commission on Judicial Conduct, 49 NY2d 465, 469.) Any conduct "inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function." (Matter of Kuehnel, supra.)

The Commission credits the testimony of Monna, which is substantially corroborated by that of the police officers and the oral and written statements made by respondent. Further, respondent's incredible disavowal of his statements indicates consciousness of wrongdoing. We, therefore, find that the preponderance of the evidence indicates that respondent physically forced himself on an unwilling victim. Such conduct is reprehensible when committed by any individual. Coming from a judge, it is especially shocking.

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: October 5, 1990

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

J. MICHAEL BRUHN,

a Judge of the Kingston City Court,
Ulster County.

APPEARANCES:

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

Cook, Tucker, Netter & Cloonan, P.C. (By Robert E.
Netter) for Respondent

The respondent, J. Michael Bruhn, a judge of the Kingston City Court, Ulster County, was served with a Formal Written Complaint dated May 5, 1989, alleging that he presided over a criminal case notwithstanding that as an attorney in another action, he was representing the complaining witness against the defendant. Respondent filed an answer dated May 30, 1989.

By order dated June 14, 1989, the Commission designated Daniel G. Collins, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 6, 1989, and the referee filed his report with the Commission on January 26, 1990.

By motion dated February 23, 1990, the administrator of the Commission moved to confirm the referee's report, to adopt additional findings and for a determination that respondent's misconduct be found established. Respondent opposed the motion by cross motion on March 13, 1990. Oral argument was waived.

By determination and order dated April 26, 1990, the Commission made the findings of fact enumerated below and found respondent's misconduct established.

The administrator and respondent submitted memoranda as to sanction. On May 18, 1990, the Commission heard oral argument on the issue of sanction. Respondent and his counsel appeared. Thereafter, the Commission considered the record of the proceeding and made the following determination.

1. Respondent has been a part-time judge of the Kingston City Court since January 1, 1982. He also practices law in Kingston.

2. In the Fall of 1984, respondent was substituted as counsel for Suzanne Gail Burr in a divorce proceeding against her husband, Raymond E. Burr, Jr., pending in Supreme Court, Otsego County. On December 12, 1984, the parties entered into a stipulation in which it was agreed, inter alia, that Mr. Burr would pay all support arrears by the end of January 1985.

3. On January 1, 1985, Mr. Burr was charged in the City of Kingston with Assault, Third Degree, on the complaint of Ms. Burr. Between January 1 and January 7, 1985, respondent spoke to Ms. Burr about the assault charge.

4. On January 7, 1985, respondent wrote to Mr. Burr's attorney in the divorce proceeding, Marvin D. Parshall. The letter said, in part:

My client has advised me that as a result of an incident which occurred at the end of visitation over New Years, it was necessary for her to file an assault three charge against Raymond. Allegedly, he got somewhat violent with her, and as a result, she had to be treated at the emergency room of a local hospital. I believe the criminal charges, eventually, can be resolved if he will reimburse her medical expenses.

5. On January 8, 1985, Mr. Burr appeared in respondent's court without an attorney. Respondent informed Mr. Burr of his rights and advised him of the charge against him. Respondent adjourned the matter to January 25, 1985, so that Mr. Burr could consult an attorney. Thereafter, respondent directed his court clerks to adjourn the matter to February 22, 1985.

6. The divorce decree was entered on January 28, 1985.

7. On February 12, 1985, Mr. Parshall wrote to respondent, "...I understand that the [criminal] matter is going to be indefinitely postponed in hopes of having the matter adjourned in contemplation of dismissal." Mr. Parshall asked respondent to confirm that understanding and asked whether he needed to be in court on the adjourned date.

8. On February 15, 1985, respondent wrote to Mr. Parshall that it would not be necessary for him to appear in court. "I will have the matter adjourned to March 22," respondent said. "If at that time everything is working smoothly, I am sure an A.C.D. can be arranged without the necessity of an appearance by you or your client."

9. Thereafter, respondent caused the case to be adjourned four times.

10. On April 30, 1985, two days before the matter was scheduled on his court calendar, respondent called Mr. Parshall's office and left a message that Ms. Burr would withdraw her complaint if Mr. Burr would pay \$175 in medical expenses that she claimed were a result of the alleged assault.

11. By letter of May 1, 1985, Mr. Parshall refused, on behalf of his client, to make payment.

12. Respondent further caused the matter to be adjourned five times. After September 12, 1985, the matter disappeared from the court calendar until May 13, 1986. On that date, the case came before respondent, and he adjourned the matter in contemplation of dismissal. Neither Mr. Burr nor his attorney was present or consented to the disposition, as required by CPL 170.55(1).

13. The charge was ultimately dismissed on November 13, 1986.

14. Respondent did not disqualify himself or offer to disqualify himself from the Burr assault case. He never informed Mr. Parshall that he was a judge of the Kingston City Court, and Mr. Parshall was not aware that respondent was presiding over the case.

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), 100.3(a)(4) and 100.3(c)(1), and Canons 1, 2, 3A(1), 3A(4) and 3C(1) of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent acted as both judge and attorney in a single case, seriously compromising his impartiality as a judge and the expeditious administration of the matter in his court.

Respondent obtained his client's version of an alleged assault by her estranged husband and proposed a settlement of the dispute to the husband's lawyer. The next day, as judge, respondent arraigned the husband. He then permitted the case to languish on the court calendar for more than an year, causing continual adjournments, in a obvious attempt to use the pending criminal charge to force the settlement that his client wanted. Although he should have disqualified himself from the outset, respondent eventually disposed of the case.

A part-time judge is permitted to practice law, but he is required to distinguish scrupulously between his judicial function and his role as advocate. (Matter of Jacon, 1985 Ann Report of NY Commn on Jud Conduct, at 99, 101.)

Respondent previously has been censured for mingling his roles as lawyer and judge. In that case, this Commission found that respondent, contrary to law, had advised clients or appeared in other courts on behalf of clients whose cases had originated in his court; had made appearances as attorney in other courts after he had taken judicial action in the same cases; had permitted his law partner, contrary to law, to represent parties in another court in cases that had originated in respondent's court; had acted as judge in cases involving clients or former clients, and had handled as judge cases involving close relatives. (Matter of Bruhn, 1938 Ann Report of NY Commn on Jud Conduct, at 133.)

The Burr case came into respondent's court in January 1985, before he had notice of the investigation of the prior Commission proceeding. The record indicates that he appeared before a member of the Commission to give testimony in November 1985 and May 1986. Thus, when he granted the adjournment in contemplation of dismissal in Burr on May 13, 1986, he was on notice that a complaint had been made about the mingling of his roles as lawyer and judge. This exacerbates his failure to remove himself from the disposition of Burr. (See, Matter of Sims v. State Commission on Judicial Conduct, 61 NY2d 349, 356.)

Respondent should have been aware from the outset that his involvement as a judge in Burr was wrong. As a lawyer-judge, he should be especially sensitive to ethical standards. (Matter of Crosbie, 1990 Ann Report of NY Commn on Jud Conduct, at 86, 89.)

We would take a harsher view of his conduct if the Burr case had commenced after the prior sanction or after he was on notice of the prior investigation. Under these circumstances, we find that respondent's removal is unwarranted.

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

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

Mr. Cleary was not present.

Dated: June 26, 1990

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

JOSEPH W. ESWORTHY,

a Judge of the Family Court, Broome County.

APPEARANCES:

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

Jon S. Blechman for Respondent

The respondent, Joseph W. Esworthy, a judge of the Family Court, Broome County, was served with a Formal Written Complaint dated August 8, 1989, alleging, inter alia, that he failed to follow the law, that he conveyed the impression of partiality and that he deprived parties of their rights in numerous cases. Respondent filed an answer dated October 6, 1989.

By order dated October 6, 1989, the Commission designated the Honorable John S. Marsh as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 28, 29 and 30 and December 1, 4, 5, 6 and 7, 1989, and the referee filed his report with the Commission on April 4, 1990.

By motion dated April 24, 1990, 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 May 10, 1990.

On May 18, 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 Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Broome County Family Court since January 1, 1986. He was a judge of the Binghamton City Court from 1961 to 1966.

2. On December 10, 1986, Barbara N. appeared before respondent for a hearing on her petition for an order of protection against her husband, Michael N. Respondent had issued a temporary order of protection on November 20, 1986, and told the wife that if she used the order "frivolously," she would "be doing the [jail] time" of up to six months that he would otherwise give her husband.

3. On December 10, both parties appeared, but neither was sworn. Respondent told the husband that his wife was entitled to an order of protection for one year "without any proof or admission or any hearing," even though no such procedure is authorized by law and Family Court Act §841 permits imposition of an order of protection "at the conclusion of a dispositional hearing."

4. Michael repeatedly denied the allegations in the family offense petition.

5. Respondent asked him, "Do you want to give her an order of protection without a trial? I'm telling you if I have a trial, and if I find you guilty, I'm going to give you six months--six months in jail," notwithstanding that no jail term is authorized by Family Court Act §841 simply upon a petition for an order of protection.

6. When Michael objected to an order of protection, the following exchange took place:

Respondent: ...She's got one person to testify to a bruise, and she brings in the broken chairs, and you're guilty. You're a dead man. Understand what I'm telling you?

Do you want your trial because if I find you guilty, you are going to do six months based on the testimony of the bruise on her and the broken chairs....

Now you want to give her an order of protection against physical and verbal abuse for a period of one year or do you want your trial? What do you want?

Michael: I'm looking for a job right now.

Respondent: Then you don't want your trial, right?

Michael: No.

Respondent: You want to give her an order of protection for a period of one year against physical and verbal abuse, right?

Michael: Compared to the alternatives, that would be very good.

7. Respondent then granted the wife an order of protection for one year.

8. On December 24, 1986, the wife filed a complaint with the police that her husband had violated the order of protection. The complaint form that she signed directed her to appear in court on the next working day, which was December 26, 1986.

9. The husband was arrested and brought to respondent's court shortly after the complaint was made on December 24. Barbara was not present, and respondent issued a warrant for her arrest.

10. That morning, she was arrested and brought to court. Neither party was sworn. Respondent engaged in colloquy with the parties and the assistant county attorney, Lee Hartjen, who was representing the wife. Respondent ordered both parties to return to their home and indicated that he would issue mutual orders of protection. Mr. Hartjen objected and asked for a hearing, which respondent scheduled for December 26, 1986. The husband, who was not represented, said that he had to work on that day.

11. Respondent then said:

I think I can easily resolve this and remand both of them to the Broome County Jail until such time as we can have a hearing. Give me a remand, I'll send them both to jail. I'm not going to screw around with this. Both of you sit in the Broome County Jail and have your Christmas there.

12. Later in the day, Mr. Hartjen appealed to respondent to release Barbara. Respondent attempted to assign Gerard E. O'Connor, an intern in Mr. Hartjen's office who had not yet been admitted to the bar, to represent Michael, but Mr. O'Connor objected.

13. Respondent then released both parties from jail.

14. On December 26, 1986, the parties returned to court. No witnesses were sworn, and no hearing was held, as required by Family Court Act §§835, 841. Michael did not admit to the allegations of the petition.

15. Respondent said that he would "suspend the violation" and continue the order of protection for one year.

As to Charge II of the Formal Written Complaint:

16. On November 30, 1987, Warren C. appeared before respondent on the complaint of his wife, Penny C., who alleged that he had violated an order of protection. The wife was not present and was not represented.

17. Warren told respondent under oath that Penny had not appeared in court because they had been living together for nine months.

18. Without hearing the wife, respondent dismissed the violation petition and revoked the order of protection.

19. On December 14, 1987, respondent received a letter on behalf of the wife from Rose Garrity of the Victim/Witness Assistance Center of Tioga County. She asserted that the wife had not appeared in court on November 30 because she was hospitalized, her jaw broken in two places as the result of an assault by her husband, and that, except for one week in September 1987, the parties had not lived together during the nine-month period.

20. Without a hearing, respondent issued a new, one-year order of protection on behalf of the wife and signed an arrest warrant for the husband for "being found in contempt of Court for having lied in open court."

21. On February 8, 1988, Warren appeared before respondent without an attorney.

22. Respondent did not advise him of his right to assigned counsel, as required by Family Court Act §262(a)(ii).

23. Respondent accused him of lying and of breaking his wife's jaw, which Warren denied. Respondent replied, "You certainly did. You didn't tell me you were arrested for the fact that you broke her jaw in two places, and that's what you did."

24. Respondent then asked Warren whether he wanted an attorney and whether he wanted to admit the allegations of the violation petition. Warren did not admit to the allegations; no witnesses were sworn, and no testimony was taken.

25. Throughout the proceeding, respondent repeated, "It was violated when you broke her jaw in two places," and, "...you certainly didn't benefit her when you broke her jaw in two places."

26. Respondent then told Warren that the minimum disposition he could give was six months in jail, then ordered him to jail "not to exceed six months unless you can prove... that all medical payments have been made and all bills are straightened in connection with that busted jaw." He then signed an order jailing Warren for six months "for wilful violation of an order of this Court," even though respondent had dismissed the violation petition on November 30, 1987.

As to Charge III of the Formal Written Complaint:

27. On April 9, 1987, respondent met alone in chambers with Binghamton Police Chief James T. O'Neil to discuss Lawrence P., a police officer who had matters pending in respondent's court.

28. Chief O'Neil told respondent that Lawrence P. had threatened to shoot a computer in the police station, had threatened suicide and had threatened to kill his wife. Respondent mentioned that there was a hearing coming up involving Lawrence.

29. Later that day, respondent held a scheduled pretrial conference in Kristine P. v. Lawrence P. There were seven pending petitions before him at that time: five had been filed by Lawrence and two by his wife. All the petitions alleged violations or sought modifications of a prior order of February 4, 1987, which provided for mutual orders of protection and for visitation by the husband. The wife resided in the marital residence at the time and had physical custody of the minor children.

30. Respondent began the conference by stating that he was sick of the case, that he had decided what to do and that he was going "to spin the case on its ear." He said that he had decided to allow Lawrence back into the marital residence with mutual orders of protection.

31. The wife's attorney, William K. Maney, vigorously objected and said that respondent was sentencing his client to either an eviction or an execution because he was afraid Lawrence would kill her and she would not stay in the house with him.

32. Respondent then said he would give Kristine two choices: either she was to allow her husband back into the house with mutual orders of protection, or she could stay in the house but the husband would get custody of the children.

33. Mr. Maney reiterated that Lawrence was violent and unstable and that he had threatened to kill his wife. Respondent then said to Mr. Maney, "You haven't got such an angel; it's really not that one-sided." Respondent then produced a handwritten letter he had received from Lawrence which Mr. Maney had not seen before.

34. Referring to the contents of the letter, respondent said that the wife had been unfaithful and uncooperative. He did not distribute copies of the letter but permitted Mr. Maney to take notes from it.

35. Respondent directed Mr. Maney to inform the court by April 13, 1987, as to which option Kristine had chosen.

36. On April 14, 1987, respondent held another pre-trial conference. The husband's attorney, Richard Schwartz, argued that the wife had abandoned the children a day earlier. Mr. Maney argued that she had misunderstood respondent's ultimatum and had left the home because she believed that her husband was returning.

37. Without a hearing, respondent dictated an order awarding custody of the children to Lawrence, even though he had not requested custody. Respondent also issued mutual orders of protection barring the wife from the marital home, cancelled a prior order of protection and dismissed all pending petitions. The order stated that Kristine had "abandoned" the children.

As to Charge IV of the Formal Written Complaint:

38. On November 26, 1986, and April 9, 1987, respondent conducted a trial in Lucie A. v. Timothy A. on issues of child custody, visitation and violation of an order of protection.

39. At the conclusion of the trial, respondent said:

...Both of these people have convinced me that they are both liars. You both have made each other out as unfit. The question of custody it seems to me should be resolved very succinctly and very easily by placing the custody of the child, Amy, in the Broome County Department of Social Services for placement in foster care. You both have indicated you are both pigs....

If you don't want this child to be placed in foster care based on the parents' unfitness, I will permit you to move back into the house and to resume a relationship that is normal, and if you're not going to do it in 30 days and resolve your differences, I'm going to place the child in the custody of the Department of Social Services....

No orders of protection. If you kill each other, fine. The child will be in the custody of social services automatically.

40. Respondent had no authority to place the child in the custody of the Department of Social Services since no petition for the termination of parental rights was before him.

41. After the hearing, respondent signed mutual orders of protection, vacated a prior order of protection on behalf of the wife and gave the parties joint custody.

As to Charge V of the Formal Written Complaint:

42. On March 13, 1987, Dennis M. appeared before respondent on an allegation of juvenile delinquency.

43. Respondent directed him to immediately pay \$190 to reimburse the county for the cost of bringing him from Florida, where he had been arrested, even though the county attorney had not requested reimbursement.

44. Respondent ordered Dennis to give the county attorney an affidavit implicating a young woman with whom he had travelled, even though the county attorney had not requested that either.

45. Respondent then told Dennis:

...The next time you come back to this court, the closest place I'll be shipping you is Buffalo, New York or down city, and maybe you'll get some experience like you had in Florida with all those spics and blacks that you didn't like, that you were scared of. You understand? Because detention in those bigger areas is not just all white detention.

46. On February 17, 1989, Dennis returned to court on a petition for modification of the prior court order.

47. Addressing his mother, respondent said, "The court has reviewed the file in connection with this matter and with full knowledge that I spent six hours and 40 minutes before the judicial commission. One of the complaints was filed by you."

48. The mother denied filing a complaint. Respondent retorted, "I will do the talking. I spent six hours and 40 minutes before the judicial commission. One of the complaints was filed by Joan M[] in that commission. And one of the cases that I had to justify was this one."

49. Respondent then dismissed the petition, conveying to the mother the reasonable impression that it was dismissed because respondent believed she had made a complaint to the Commission.

50. Respondent's order in the matter indicates that the petition was dismissed because Dennis had reached the age of 17.

As to Charge VI of the Formal Written Complaint:

51. On May 7, 1987, Andrew Y. appeared before respondent on a petition alleging juvenile delinquency.

52. After the juvenile admitted the allegations of the petition, his mother objected to the location of her son's placement by the Division For Youth.

53. Respondent replied in a sarcastic tone:

Now, obviously we are trying to keep him upstate, but we could probably find him a bed with Hispanics and blacks and send him downstate if you would prefer that.

As to Charge VII of the Formal Written Complaint:

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

As to Charge VIII of the Formal Written Complaint:

55. On December 30, 1987, Deborah D. appeared before respondent on a complaint that the father of her children, William K., had violated a court order regarding visitation by returning the children to her more than two hours after the appointed time.

56. Respondent issued a warrant for the father's arrest and said, "Hopefully, they will be able to immediately find him, and maybe if he sits in the lockup overnight, he will make some sense."

57. Respondent wrote on the arrest warrant, "No bail."

58. William was arrested the same day and brought before another judge, who set bail at \$1,500.

59. On December 31, 1987, he appeared before respondent. Although he had counsel, counsel was not present. Respondent told William that he had spoken to his attorney by telephone before the proceeding.

60. Respondent asked William what time he had been ordered to return the children from visitation. He replied that he had arranged with Deborah to return the children after he got out of work.

61. Respondent angrily said:

You can either admit to this now and I'll suspend the whole thing as far as any sentence, you understand, and if you want a trial on this violation, I assure you, if you're found guilty, I'm going to give you six months in jail. Now, what do you want to do? Do you want to admit to this violation?

62. William responded, "Yes."

As to Charge IX of the Formal Written Complaint:

63. On February 3, 1987, Debra W. and Joseph W. appeared before respondent on her complaint that Joseph had violated an order of protection.

64. The following exchange took place between respondent and Joseph:

Respondent: ...What's the matter with you? Huh?

Joseph: Nothing, sir.

Respondent: Well, why do you violate the order?

Joseph: I don't see exactly where I violated the order.

Respondent: This morning you had a knife at her, didn't you?

Joseph: That's not true.

Respondent: You didn't have a knife at her?

Joseph: No, sir.

Respondent: It is my understanding this morning you had a knife.... The mere fact that you have been arrested is a violation of the court order....

65. Respondent then remanded Joseph to jail without bail, where he remained for six days.

As to Charge X of the Formal Written Complaint:

66. On February 18, 1987, Susan K. and Edwin F. appeared before respondent on Susan's petition for custody of their son.

67. Edwin was not represented by counsel, and respondent did not advise him of his right to assigned counsel, as required by Family Court Act §262(a)(iii). Respondent signed an order granting custody to the mother and made no provision for visitation by the father.

68. On April 21, 1987, Susan and Edwin appeared before respondent on her petition for an order of protection and his petition for visitation.

69. Again, Edwin was not represented. Respondent failed to advise him of his right to assigned counsel, as required by Family Court Act §262(a)(ii). Respondent granted the order of protection to Susan and provided for visitation by Edwin.

70. On April 27, 1987, Edwin again appeared before respondent on Susan's petition alleging that he had violated the order of protection.

71. Edwin again was not represented, and respondent failed to advise him of his right to assigned counsel, as required by law. Edwin admitted the violation and respondent imposed and suspended a 30-day jail sentence.

As to Charge XI of the Formal Written Complaint:

72. On June 13, 1988, respondent signed an ex parte order awarding custody to Sandra S., on a petition filed by her that day; the respondent father, Brad S., had not been notified of the proceeding.

73. In 1975 and 1976, respondent had represented Brad as law guardian in juvenile delinquency proceedings in Broome County Family Court.

74. At the June 1988 custody proceeding, respondent had before him the files of the juvenile delinquency proceedings, on the covers of which his name was clearly marked as law guardian.

75. Respondent never held a hearing on the issue of custody.

As to Charge XII of the Formal Written Complaint:

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

As to Charge XIII of the Formal Written Complaint:

77. On October 5, 1987, Allison T. appeared before respondent on a petition by the Department of Social Services to extend for one year the placement of her daughter, who had been previously adjudicated a neglected child.

78. Allison was not represented by counsel, and respondent did not advise her of her right to counsel, her right to an adjournment to confer with counsel and her right to assigned counsel if she could not afford a lawyer, as required by Family Court Act §262(a)(i).

79. Respondent elicited Allison's consent to the extension of placement, even though she indicated that she wished to retract a statement to the Department of Social Services which formed the basis for the petition. Respondent extended the placement to October 5, 1988.

80. On October 17, 1988, Allison again appeared before respondent on a petition to extend placement for another year.

81. She was not represented, and respondent again failed to advise her of her right to counsel, as required by law. When Allison suggested that a lawyer should be present, respondent replied, "If you want to apply for an attorney, you would have to make an application.... You didn't do so."

82. Allison stated that she had just received the notice to appear. Respondent made no response.

83. Respondent elicited Allison's consent to the extended placement. He granted an extension to October 5, 1989.

As to Charge XIV of the Formal Written Complaint:

84. In nine cases involving 15 appearances, as enumerated in Schedule A to the Formal Written Complaint, respondent failed to fully inform litigants of their rights to counsel, as required by Family Court Act §262.

85. In three cases involving five appearances, as enumerated in Schedule A to the Formal Written Complaint, respondent confirmed hearing examiners' findings in support order violation cases without according parties 30 days in which to file objections, as required by Family Court Act §439(e).

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), 100.3(a)(1), 100.3(a)(3) and 100.3(a)(4), and Canons 1, 2A, 3A, 3A(1), 3A(3) and 3A(4) of the Code of Judicial Conduct. Charges I, II, III, IV, V, VI, VIII, IX, X, XI, XIII and XIV of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charges VII and XII are dismissed.

In less than four years on the Family Court bench, respondent amassed an egregious record. He abused the rights of litigants, flouted the law, conveyed the impression of bias, was intemperate and made racist statements.

Respondent, in case after case, failed to advise parties of their statutory right to counsel, elicited admissions from them, made statements indicating that he presumed unproven allegations to be true and coerced parties to accept settlements and waive their right to a hearing, sometimes by threatening incarceration or other consequences which he had no authority to impose. (See, Matter of Reeves v. State Commission on Judicial Conduct, 63 NY2d 105; Matter of Sardino v. State Commission on Judicial Conduct, 58 NY2d 286.) Respondent often made findings on child custody and family offense matters without taking testimony, obtaining admissions or giving notice to all interested parties.

He abused his authority by jailing the petitioner in one case and by sentencing another party to six months in jail without a hearing and based solely on an unsworn, ex parte letter.

In two cases, respondent improperly made racist statements about the population of detention facilities. (See, Matter of Aldrich v. State Commission on Judicial Conduct, 58 NY2d 279, 281; Matter of Abbott, 1990 Ann Report of NY Commn on Jud Conduct, at 69, 71; Matter of Evens, 1986 Ann Report of NY Commn on Jud Conduct, at 103.) In another, he called the litigants "pigs" and "liars," ordered them to resume living together and said, "If you kill each other, fine." (See, Matter of Trost, 1980 Ann Report of NY Commn on Jud Conduct, at 153.)

No judge is above the law he is sworn to administer. Respondent has engaged in a pattern of misconduct that shocks the conscience. (See, Matter of Ellis, 1983 Ann Report of NY Commn on Jud Conduct, at 107, 113; Matter of Jutkofsky, 1986 Ann Report of NY Commn on Jud Conduct, at 111, 132.) His conduct is inconsistent with the fair and proper administration of justice and renders him unfit to remain in office. (Matter of Reeves, supra, at 111.)

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, except that Mrs. Del Bello also votes to sustain Charge XII.

Mr. Sheehy was not present.

Dated: June 21, 1990

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

LESTER C. HAMEL,

Determination

a Justice of the Champlain Town and Village Courts and
an Acting Justice of the Rouses Point Village Court,
Clinton County.

APPEARANCES:

Gerald Stern (Stephen F. Downs, Of Counsel) for the Commission

Honorable Lester C. Hamel, pro se

The respondent, Lester C. Hamel, a justice of the Champlain Town Court, the Champlain Village Court and the Rouses Point Village Court, Clinton County, was served with a Formal Written Complaint dated October 20, 1989, alleging that he failed to promptly deposit and remit court funds as required by law. Respondent replied to the Formal Written Complaint by letter dated December 4, 1989.

By motion dated December 22, 1989, 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 January 19, 1990, the Commission granted the administrator's motion.

The administrator filed a memorandum as to sanction. Respondent neither filed papers nor requested oral argument. On February 16, 1990, 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 and the Champlain Village Court during the time herein noted. He is also acting justice of the Rouses Point Village Court. He has no court clerk in any of the courts.

2. Between January 1981 and May 1984, as denominated in Schedule C appended hereto, respondent failed to remit Champlain Village Court funds to the state comptroller by the tenth day of the month following collection, as required by UJCA 2020, 2021(1), Vehicle and Traffic Law §1803, Village Law §4-410(1)(b).

3. Between September 1983 and June 1984, as denominated in Schedule D appended to the Formal Written Complaint*, respondent failed to deposit Champlain Town Court funds within 72 hours of receipt, as required by UJCA 30.7(a) then in effect.

*The date of receipt on the 13th line of page 1 of Schedule D should read, "1/5/84".

4. By letter dated November 16, 1984, respondent was cautioned by the Commission to deposit and remit court funds in a timely manner.

5. Between December 1986 and May 1989, as denominated in Schedule B appended hereto, respondent failed to deposit Champlain Village Court funds within the time required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a). Between July 13, 1988, and March 1, 1989, respondent made no deposits in his village court account, notwithstanding that he received \$725 during this period.

6. Respondent stated that undeposited court funds were kept in a safe at his home.

7. Between December 1986 and May 1989, as denominated in Schedule A appended hereto, respondent failed to remit Champlain Village Court funds to the state comptroller in a timely manner, as required by law.

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.

During an eight-year period, respondent failed to promptly deposit and remit court funds as required by law.

A judge's "disregard for statutory recordkeeping requirements and his carelessness in handling public moneys is a serious violation of his official responsibilities." (Matter of Petrie v. State Commission on Judicial Conduct, 54 NY2d 807, 808). A judge who keeps court funds in his personal possession rather than depositing them in the bank raises questions about the interim use of the money. (Matter of Rater, 1987 Ann Report of NY Commn Jud Conduct, at 135, 137, accepted, 69 NY2d 208).

The failure to heed a Commission warning to comply with depositing and remitting requirements 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).

Ordinarily, such conduct warrants removal. (Matter of Petrie, supra). However, we find a lesser sanction appropriate in this case because respondent sits in the three courts without the assistance of a clerk; his records were carefully kept, and, for the most part, the misconduct was confined to one of the courts with a small volume of cases. In addition, respondent has announced that he will not seek reelection in that court when his current term ends. (See, Matter of Earl, 1990 Ann Report of NY Commn on Jud Conduct, at 95).

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

Mr. Bower, Judge Altman, Mr. Berger, Judge Ciparick, Mrs. Del Bello, Judge Rubin, Judge Salisbury and Mr. Sheehy concur.

Mr. Cleary was not present.

Ms. Barnett was not a member of the Commission at the time the vote in the proceeding was taken.

Dated: March 30, 1990

Schedule A

<u>Month of Report</u>	<u>Date Received By Audit and Control</u>	<u>Number Of Days Late</u>
12/86	4/14/87	94
1/87	4/14/87	63
2/87	4/14/87	35
3/87	6/29/87	80
4/87	6/29/87	50
5/87	6/29/87	19
6/87	1/14/88	188
7/87	1/14/88	157
8/87	1/14/88	126
9/87	1/14/88	96
10/87	1/14/88	65
11/87	1/14/88	35
12/87	1/14/88	4
1/88	7/18/88	159
2/88	7/19/88	131
3/88	7/18/88	99
4/88	7/18/88	69
5/88	7/18/88	38
6/88	7/19/88	9
7/88	3/20/89	222
8/88	3/20/89	191
9/88	3/22/89	163
10/88	3/22/89	132
11/88	3/20/89	100
12/88	3/22/89	71
1/89	3/22/89	40
2/89	4/4/89	25
3/89	5/9/89	29
4/89	6/1/89	22
5/89	8/7/89	58

Schedule B

<u>Date of Receipts</u>	<u>Total Receipts</u>	<u>Date of Deposit</u>	<u>Total Deposit</u>	<u>Deficiency or Surplus</u>	<u>Total Deficiency or Surplus</u>
12/15/86-4/05/87	\$1,115	4/06/87	\$1,115	\$ 0	\$ 0
4/06/87-6/24/87	350	6/25/87	330	-20	-20
6/25/87-12/1/87	1,580	12/02/87	1,175	-405	-425
12/02/87-1/10/88	260	1/11/88	430	+170	-255
1/11/88-4/25/88	725	4/26/88	745	+20	-235
4/26/88-7/12/88	930	7/13/88	795	-135	-370
7/13/88-2/28/89	725	3/01/89	835	+110	-260
3/01/89-3/14/89	350	3/15/89	315	-35	-295
3/15/89	110	3/16/89	35	-75	-370
3/16/89-5/07/89	185	5/08/89	295	+110	-260

Schedule C

<u>Date of Report</u>	<u>Date Received</u>	<u>Number of Days Late</u>
1/81	3/24/81	42
2/81	6/11/81	93
3/81	6/11/81	62
4/81	6/11/81	32
5/81	6/11/81	1
6/81	9/10/81	62
7/81	9/10/81	31
8/81	11/6/81	57
9/81	11/6/81	27
10/81	11/24/81	14
11/81	4/13/82	124
12/81	4/13/82	93
1/82	4/13/82	62
2/82	4/13/82	34
3/82	date not available	--
4/82	6/29/82	50
5/82	6/29/82	19
6/82	10/4/82	86
7/82	10/4/82	55
8/82	11/29/82	80
9/82	11/29/82	50
10/82	11/29/82	19
11/82	1/20/83	41
12/82	1/20/83	10
1/83	3/30/83	48
2/83	3/30/83	20
3/83	8/3/83	115
4/83	8/3/83	85
5/83	8/3/83	54
6/83	8/3/83	24
7/83	date not available	--
8/83	11/30/83	81
9/83	11/30/83	51
10/83	1/30/84	81
11/83	1/30/84	51
12/83	1/30/84	20
1/84	2/29/84	19
2/84	5/2/84	53
3/84	5/2/84	22
4/84	5/29/84	19
5/84	6/21/84	11

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

ROY H. KRISTOFFERSEN,

Determination

a Justice of the Saranac Lake Village Court,
Franklin County.

APPEARANCES:

Gerald Stern for the Commission

Higgins, Hopkins & Schwartzberg (By Ora Schwartzberg) for Respondent

The respondent, Roy H. Kristoffersen, a justice of the Saranac Lake Village Court, Franklin County, was served with a Formal Written Complaint dated April 30, 1990, alleging that he had ex parte conversations with a landlord, then took action against his tenants even though no court action was pending. Respondent did not answer the Formal Written Complaint.

On August 15, 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), stipulating that the Commission make its determination based on the pleadings and the agreed upon facts, jointly recommending that respondent be censured and waiving further submissions and oral argument.

On September 27, 1990, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Saranac Lake Village Court since 1985.
2. On August 2, 1989, Edward Magedson came to respondent's court and told him that he had fired an employee, Loraine Rahn, because he suspected that she was taking money from a cash register. He also told respondent that he wanted to evict Ms. Rahn from his apartment building. Mr. Magedson said that he would allow her to remain until August 15, 1989.
3. On August 8, 1989, Mr. Magedson again appeared in respondent's court and showed respondent a document signed by Mr. Magedson and Loraine and Robert Rahn in which the Rahns agreed to vacate the apartment by August 15, 1989.
4. Mr. Magedson told respondent that he felt that the Rahns might take from the apartment building items that did not belong to them and might vandalize the apartment.
5. Mr. Magedson asked respondent whether a hearing was necessary.
6. On August 8, 1989, on the basis of his conversations with Mr. Magedson, respondent sent to Mr. and Ms. Rahn a letter in which he:

a) informed the Rahns that they must vacate the premises that they rented from Mr. Magedson by August 15, 1989;
b) stated that no hearing was necessary;
c) warned that failure to vacate the premises by August 15 would result in the issuance of a warrant to dispossess; and,
d) threatened "definitive action" by the court if unspecified and uncharged "incidents of provocation directed against Mr. Magedson" persisted.

7. In the letter, respondent indicated that the agreement to vacate was "not signed under duress and was signed voluntarily." In fact, the Rahns had signed the agreement under duress and had written the words "under duress" in the corner of the original agreement.

8. At the time respondent wrote the letter, no proceeding by Mr. Magedson against the Rahns was pending before him.

9. On August 16, 1989, Mr. Magedson informed respondent ex parte that the Rahns had not left the premises and asked respondent to issue a warrant to dispossess.

10. On the basis of the request, respondent signed a warrant to evict the Rahns. No petition or notice had been filed pursuant to RPAPL 731, 735, and no hearing had been held.

11. On June 14, 1989, based on ex parte communications with Mr. Magedson, respondent wrote two letters to the Franklin County District Attorney's office on behalf of Mr. Magedson concerning charges against him pending in respondent's court. With the consent of the district attorney's office, respondent later dismissed a charge of Harassment against Mr. Magedson and allowed him to plead guilty to one of three vehicle and traffic charges in full satisfaction of the pending charges.

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. 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 interests of one party to a dispute, even though there was no proceeding pending before him and the other party had not been heard. He received improper ex parte communications, violated the law and compromised the impartiality of the judiciary. (Matter of Colf, 1987 Ann Report NY of Commn on Jud Conduct, at 71, 72; Matter of Alessi, 1982 Ann Report of NY Commn on Jud Conduct, at 113. See also, Matter of Mullen, 1987 Ann Report of NY Commn of Jud Conduct, at 129; Matter of LaMountain, 1989 Ann Report of NY Commn on Jud Conduct, at 99.)

Respondent's activities on behalf of Mr. Magedson constituted a gross abuse of his judicial power and created the appearance of favoritism. (Alessi, supra, at 115; Matter of Winick, 1988 Ann Report of NY Commn on Jud Conduct, at 239; Matter of Zapf, 1988 Ann Report of NY Commn on Jud Conduct, at 251.)

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, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Sheehy was not present.

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

BRUCE J. LOMNICKI,

Determination

a Justice of the Mount Morris Village Court,
Livingston County.

APPEARANCES:

Gerald Stern for the Commission

Alfred J. Sciarrino for Respondent

The respondent, Bruce J. Lomnicki, a justice of the Mount Morris Village Court, Livingston County, was served with a Formal Written Complaint dated April 10, 1990, alleging that he sat on the bench with another judge and participated in a case pending before her even though he had disqualified himself from the same case. Respondent filed an answer dated April 30, 1990.

On June 19, 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), 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 August 24, 1990, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a justice of the Mount Morris Village Court since 1986. Bernice E. Powers has been clerk of the court since 1987 and became acting justice in November 1988.

2. On April 20, 1989, Dr. Jeffrey Hanson filed an information in respondent's court, accusing a neighbor, Donna Jo Carson, of Disorderly Conduct.

3. Ms. Carson worked as a teacher's aide in the school where respondent is a special education teacher. Respondent had talked with Ms. Carson about an on-going dispute with Dr. Hanson which gave rise to the charge, and respondent had advised her to take the dispute to the Community Dispute Resolution Center.

4. On April 24, 1989, respondent disqualified himself from People v. Carson and referred the case to Judge Powers.

5. Judge Powers scheduled a non-jury trial for June 20, 1989.

6. Before the trial, Judge Powers spoke in chambers with respondent. She told him that she was very nervous about presiding over her first trial and questioned him about proper court procedures. Respondent asked Judge Powers whether she would like him to sit with her at the trial as a "friend of the court" and advise her as to trial procedures, and she agreed. Respondent told her that the attorneys in the case would have to consent to the procedure.

7. Respondent entered the courtroom before Judge Powers and asked Assistant District Attorney William A. Mulligan and Ms. Carson's attorney, J. Michael Jones, whether they objected to his sitting at the bench with Judge Powers as a "friend of the court." He did not explain what he meant by this. Neither attorney objected.

8. Respondent took a chair to Judge Powers' left and about a foot behind her. He was wearing his judicial robe; Judge Powers wore no robe.

9. Mr. Mulligan said that he would consent to dismissal of the charge. Mr. Jones began to make a statement that "we've got a lot of disappointed citizens in the Village of Mount Morris...."

10. Respondent interrupted, "As a friend of the court, I'm not going to let you make political statements in this court, Mr. Jones." Mr. Jones again attempted to speak. Respondent declared, "You will say something in this court when and if you are given permission to, but I will not allow you to say whether these citizens are disappointed or not. That's up to them to decide later on."

11. Mr. Jones challenged respondent's jurisdiction to intervene in the case since it was before Judge Powers. Respondent again referred to himself as "a friend of the court" and said, "I am not going to allow you to use a courtroom for your own political statements...."

12. Respondent was angry, spoke in a loud, harsh tone and, at one point, rose from his chair, leaned forward and pointed at Mr. Jones, who also raised his voice during the colloquy.

13. Judge Powers did not request respondent's advice or intervention during the proceeding. She did not ask respondent to speak to Mr. Jones. Respondent did so on his own because he thought that the lawyer's statements were disrespectful and inaccurate.

14. Judge Powers eventually interrupted the colloquy and, thereafter, dismissed the charge.

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)(3) and 100.3(c)(1), and Canons 1, 2, 3A(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.

Having disqualified himself from the Carson case, respondent should have had no participation in it. (See, Matter of Reedy, 1985 Ann Report of NY Commn on Jud Conduct, at 212, 215, accepted, 64 NY2d 299.) Therefore, it was improper for him to sit on the bench with the presiding judge and to intercede in the proceeding by precluding the defendant's attorney from making a statement.

By becoming angry, speaking in a loud, harsh tone and leaning forward and pointing at the attorney, respondent also violated the Rules Governing Judicial Conduct, 22 NYCRR 100.3(a)(3), which requires a judge to be "patient, dignified and courteous."

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

All concur.

Dated: October 5, 1990

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

REXFORD SCHNEIDER,

a Justice of the New Paltz Town Court, Ulster County.

APPEARANCES:

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

John G. Sisti for Respondent

The respondent, Rexford Schneider, a justice of the New Paltz Town Court, Ulster County, was served with a Formal Written Complaint dated October 26, 1988, alleging that he denied defendants basic, well-established rights and conveyed the impression that he was biased against them. Respondent filed an answer dated November 18, 1988.

By order dated December 2, 1988, the Commission designated Carroll J. Mealey, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 30, April 17 and 27 and May 2, 1989, and the referee filed his report with the Commission on August 8, 1989.

By motion dated October 4, 1989, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to adopt additional findings and conclusions and for a determination that respondent be removed from office. Respondent opposed the motion by cross motion on October 27, 1989.

On December 15, 1989, 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 Charge I of the Formal Written Complaint:

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

As to Charge II of the Formal Written Complaint:

2. Respondent has been a justice of the New Paltz Town Court for 24 years.
3. On October 28, 1986, respondent arraigned David Ortiz on a charge of Loitering and remanded him to jail in lieu of \$250 bail.
4. Mr. Ortiz returned to respondent's court on October 31, 1986, and requested an adjournment to obtain an attorney. Respondent granted the adjournment and returned the defendant to jail.
5. On November 7, 1986, Mr. Ortiz again appeared before respondent and pled guilty to the charge. Respondent sentenced him to 15 days in jail.
6. After Mr. Ortiz was returned to the Ulster County Jail, Sgt. Raymond Acevedo of the sheriff's department called respondent and told him that Mr. Ortiz had already served one day more than the maximum of 10 days which would be served on a 15-day sentence with time off for good behavior. Sergeant Acevedo told respondent that Mr. Ortiz should have been released at the court and that he intended to release him.
7. Respondent said that he wanted Mr. Ortiz to remain at the jail until the following Monday because he had no place to go. Respondent told the sergeant to change the sentence on the commitment order to 20 days.
8. Fifteen days was the maximum sentence for the violation of which Mr. Ortiz had been convicted, pursuant to Penal Law § 70.15(4), and Sergeant Acevedo informed respondent that 20 days exceeded the maximum sentence.
9. Respondent was aware that the maximum sentence was 15 days but repeated that he wanted the commitment order changed to 20 days so that the defendant could be held over the weekend.
10. Sergeant Acevedo changed the order to read "20 days, changed by per orders of judge." Mr. Ortiz was released on Monday, November 10, 1986.
11. The remaining allegations of Charge II are not sustained and are, therefore, dismissed.

As to Charge III of the Formal Written Complaint:

12. On November 25, 1986, respondent arraigned John J. Ellingsen on a charge of Harassment and remanded him to jail in lieu of bail.
13. Mr. Ellingsen remained in jail for six days before being released on bail on December 1, 1986.
14. On December 5, 1986, Mr. Ellingsen reappeared before respondent with his mother, Janina. Respondent asked how long Mr. Ellingsen had spent in jail. Ms. Ellingsen informed respondent that her son had been in jail for six days. Respondent replied, "That's his punishment," and released the defendant.

15. Respondent recorded in his court records that Mr. Ellingsen had pled guilty and had been sentenced to time served, even though no plea had been entered by the defendant and no trial had been held.

16. The remaining allegations of Charge III are not sustained and are, therefore, dismissed.

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 II and III of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Charge I is dismissed.

The preponderance of the evidence* establishes that respondent entered a guilty plea and sentenced Mr. Ellingsen to time served in jail awaiting disposition of his case, even though no guilty plea had been entered and no trial held. Both Mr. Ellingsen and his mother testified that the defendant never pled guilty but that respondent declared that the six days served was his "punishment." In his testimony in this proceeding, respondent acknowledged that his memory of the Ellingsen case was unclear. The prosecutor had no recollection of the case. The court clerk, the only other witness to testify who was present, indicated that she only remembered respondent sentencing the defendant to time served.

A judge who convicts a defendant without a knowing and voluntary guilty plea or a trial does not comply with the law and denies the defendant the opportunity to be fully heard. (See, Matter of McGee v. State Commission on Judicial Conduct, 59 NY2d 870, 871.)

Respondent also failed to follow the law when he committed Mr. Ortiz to jail knowing that he had already served a sentence longer than the maximum allowed by law. Respondent exacerbated this misconduct by directing the jailer to change the commitment order to reflect an illegal sentence in order to keep Mr. Ortiz in jail for an additional two days. Even if well-motivated, respondent's acts constituted an abuse of his judicial authority. (See, Matter of Jutkofsky, 1986 Ann Report of NY Commn on Jud Conduct, at 111, 131.)

In imposing sanction, we note respondent's previous censure for requesting or granting special consideration in nine traffic matters. (Matter of Schneider, 1 Commn Determinations, at 335.)

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

Mr. Kovner, Judge Altman, Mr. Berger, Mr. Bower, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Judge Salisbury and Mr. Sheehy concur, except that Mr. Berger and Mrs. Del Bello dissent and vote to sustain, in addition, the allegations in paragraph 4(b) of Charge I, paragraph 6 of Charge II and paragraphs 10(a) and 10(c) of Charge III.

Judge Rubin was not present.

Dated: January 26, 1990

*This is the appropriate standard to be applied in judicial disciplinary proceedings. (Operating Procedures and Rules of the State Commission on Judicial Conduct, 22 NYCRR 7000.6(i)(1); Matter of Seiffert v. State Commission on Judicial Conduct, 65 NY2d 278, 280.)

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

REXFORD SCHNEIDER,

a Justice of the New Paltz Town Court,
Ulster County.

DISSENTING OPINION
BY MR. BERGER,
IN WHICH
MRS. DEL BELLO JOINS

I respectfully dissent from the determination that the allegations in paragraph 4(b) of Charge I, paragraph 6 of Charge II and paragraphs 10(a) and 10(c) of Charge III were not sustained. Those allegations involve respondent's failure to advise various defendants of their right to assigned counsel if they could not afford counsel or, in the case of paragraph 10(c), respondent's failure to advise defendant or his relatives that bail had been set.

Respondent admits that he did not advise the defendants referred to in these allegations of their right to assigned counsel if they could not afford counsel. In at least two of the cases (Donald Paschall in Charge I and David Ortiz in Charge II), respondent acknowledges that he knew that the defendants were impoverished. In none of the cases did he make any inquiry about the defendants' financial situation.

Respondent's defense to these allegations is that it was his understanding that the public defender did not represent defendants charged with violations. While it appears that respondent's understanding was incorrect, even if it were correct, the court's obligation extends beyond the policies established by a particular public defender's office. Defendants are entitled to assigned counsel if they are financially unable to afford counsel except if "the accusatory instrument charges a traffic infraction or infractions only." (CPL 170.10[3][c].) "[T]he court must inform the defendant" of his rights, including the right to assigned counsel. (CPL 170.10[4][a].) (Emphasis added).

Respondent's failure to advise defendants of their right to assigned counsel was not without consequences. In each of the cases referred to in paragraph 4(b) of Charge I and the Ortiz case in Charge II, the defendants were committed to jail for a period that appears to be in excess of that allowed under CPL 30.30(2)(d). Respondent was of the opinion that it was incumbent on the defendants to move for relief if they believed they were being incarcerated for an excessive period. Yet, without the assistance of counsel, which in some cases they were financially unable to obtain, defendants were in no position to seek such relief even if they knew that they were entitled to it.

In paragraphs 10(a) and 10(c) of Charge III, respondent was charged with having failed to advise John Ellingsen of his right to assigned counsel and having failed to advise the defendant that bail had been set. Respondent admitted that he did not advise Mr. Ellingsen of his right to assigned counsel but denies that he did not advise him that bail had been set. It is undisputed, however, that the defendant's mother pleaded with the court to allow her son to be home with her over Thanksgiving so that she would not be alone and that when she learned the following Monday from the court clerk that bail had been set, she posted bail that same day. The only reasonable conclusion one can draw from

these facts is that respondent did not advise Mr. Ellingsen or his mother at the arraignment that bail had been set.

Based on the foregoing, I would find that the allegations set forth in paragraph 4(b) of Charge I, paragraph 6 of Charge II and paragraphs 10(a) and 10(c) of Charge III were sustained.

Dated: January 26, 1990

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

JOSEPH SLAVIN,

Determination

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

APPEARANCES:

Gerald Stern for the Commission

Meissner, Kleinberg & Finkel (By Richard A. Finkel) for Respondent

The respondent, Joseph Slavin, a judge of the Civil Court of the City of New York, Kings County, and acting justice of the Supreme Court, 2d Judicial District, was served with a Formal Written Complaint dated September 26, 1989, alleging that he made threatening statements in connection with a dispute between his son and a third party. Respondent did not answer the Formal Written Complaint.

On January 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 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 January 18, 1990, the Commission approved the agreed statement and made the following determination.

1. Respondent has been a judge of the Civil Court of the City of New York and an acting justice of the Supreme Court during the time herein noted.
2. In June 1986, respondent's son, Zachary, a New York City Housing Authority police officer, and Lee Solomon jointly purchased a boat. Respondent was guarantor of the loan that financed the purchase.
3. During the Spring of 1988, Zachary Slavin and Mr. Solomon had a dispute concerning payments on the boat. Mr. Solomon complained to the New York City Police Department and to Zachary Slavin's employer that Zachary Slavin had "stolen" the boat.
4. Between April 1, 1988, and May 31, 1988, respondent learned that Mr. Solomon had made the complaints or that he intended to make them.

5. Respondent called Martin Solomon by telephone and asked whether he knew what his son, Lee, intended to do. When Martin Solomon answered that he did, respondent said that he would see to it that Lee Solomon went to jail, even if respondent had to give up his judicial position to do so.

6. Respondent subsequently called Lee Solomon's mother, Sydell, and said that if her son reported the boat stolen, respondent would personally see to it that he was put away, even if respondent had to give up his judicial position to do so. Respondent also said that he would tell Lee Solomon the same thing.

7. On a recorded message to Lee Solomon on his telephone answering machine, respondent said:

Lee, this is Mr. Slavin, it's about a quarter to ten. I would highly recommend that you speak to your mother as quickly as possible. I had a long talk with her and this business of you reporting the boat stolen may wind, may wind, get wind up getting you sent to jail for two or three years, so I would suggest that you call your mother forthwith. Thank you.

Zachary Slavin had previously stated on a recorded message to Lee Solomon on his telephone answering machine:

Listen, if you reported that boat stolen, I suggest you cancel it, the report, immediately or we'll have you arrested for filing a false police report and if you take any further action about notifying my job or trying to report that boat stolen again, I will see to it that you are sued from here to eternity. My father's relaying that same message to your mother at this time. Heed the advice. Goodbye.

8. Lee Solomon and his parents had been longtime acquaintances of respondent. During the Spring of 1988 and for years prior thereto, Lee Solomon and his parents knew that respondent was a judge.

9. The purpose of respondent's statements and recorded message was to persuade Lee Solomon not to file complaints, or to withdraw complaints that respondent considered to be false concerning his son with the police department and the housing authority.

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 and 100.2, and Canons 1 and 2 of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

Respondent intervened in a dispute involving his son, making threats against persons who knew him to be a judge. In doing so, respondent used the prestige of his judicial office to advance the private interests of his son, in violation of the Rules Governing Judicial Conduct, 22 NYCRR 100.2.

It was improper for respondent to attempt to dissuade Lee Solomon from pursuing complaints that he had a legal right to make against respondent's son. This is especially so because of the threatening nature of respondent's comments.

Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved (citation omitted).... Thus, any communication from a Judge to an outside agency on behalf of another may be perceived as one backed by the power and prestige of judicial office.

(Matter of Lonschein v. State Commission on Judicial Conduct, 50 NY2d 569, 572.)

Coming from a judge, threats to see to it that one is put away for years are especially intimidating.

In mitigation, we have considered that respondent's judgment may have been somewhat clouded by concern for his son. (See, Matter of Edwards v. State Commission on Judicial Conduct, 67 NY2d 153, 155; Matter of Kiley v. State Commission on Judicial Conduct, 74 NY2d 364, 370.)

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

Mr. Bower, Judge Altman, Mr. Berger, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Judge Rubin and Judge Salisbury concur.

Mr. Sheehy was not present.

Dated: February 28, 1990

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

DENNIS A. WARE,

a Justice of the Mentz Town Court and an
Acting Justice of the Port Byron Village
Court, Cayuga County.

Determination

APPEARANCES:

Gerald Stern for the Commission

Honorable Dennis A. Ware, pro se

The respondent, Dennis A. Ware, a justice of the Mentz Town Court and the Port Byron Village Court, Cayuga County, was served with a Formal Written Complaint dated June 8, 1990, alleging numerous administrative and adjudicative failures. Respondent answered the Formal Written Complaint by letter dated June 28, 1990.

On September 21, 1990, the administrator of the Commission and respondent 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 September 27, 1990, the Commission approved the agreed statement and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Mentz Town Court since 1980. He has been acting justice of the Port Byron Village Court since 1980. He has attended all of the required training sessions offered by the Office of Court Administration.

2. From March 28, 1983, to June 8, 1990, in violation of Vehicle and Traffic Law §1806-a, respondent failed to take any action to dispose of 228 motor vehicle cases pending in his court in which the defendants had failed to appear or answer the charges, as set forth in Exhibit 1 to the agreed statement of facts.

3. From March 28, 1983, to June 8, 1990, in violation of Vehicle and Traffic Law §514(3), respondent failed to notify the Department of Motor Vehicles of the defendants' failure to appear in court or to answer the charges in 225 of the motor vehicle cases pending in his court, as set forth in Exhibit 1 to the agreed statement of facts.

4. From March 28, 1983, to June 8, 1990, in violation of UJCA 107, 2019 and 2019-a, respondent failed to make docket entries for 228 motor vehicle cases pending in his court, as set forth in Exhibit 1 to the agreed statement of facts.

As to Charge II of the Formal Written Complaint:

5. From June 18, 1983, to June 8, 1990, in violation of Vehicle and Traffic Law §514(3) and UJCA 107, 2019 and 2019-a, respondent failed to notify the Department of Motor Vehicles of the defendants' failure to pay a total of \$7,385 in fines in 85 motor vehicle cases pending in his court, as set forth in Exhibit 2 to the agreed statement of facts.

As to Charge III of the Formal Written Complaint:

6. On December 4, 1987, William D. Phelps was charged with a violation of Vehicle and Traffic Law §1122(a). On January 11, 1988, Mr. Phelps pled guilty in respondent's court to a violation of Vehicle and Traffic Law §1163(a) as part of a plea agreement. Respondent did not notify Mr. Phelps of the fine imposed until July 19, 1988, even though the defendant's attorney had requested notification at least twice during this period.

7. On July 27, 1988, Mr. Phelps sent respondent \$35 in payment of the fine. In violation of the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a), respondent delayed depositing the money until November 8, 1988, even though the defendant's attorney had asked him on September 13, 1988, to deposit the funds.

8. Respondent has failed to return Mr. Phelps' driver's license record of convictions which was submitted to him on July 27, 1988, even though the defendant's attorney requested that he return the record by letters dated September 13 and November 10, 1988.

9. Respondent failed to maintain a case file or correspondence in the Phelps case, in violation of the Uniform Rules for the Courts Exercising Criminal Jurisdiction, 22 NYCRR 200.23.

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. Charges I through III of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

Over a period of seven years, respondent neglected more than 200 motor vehicle cases pending in his court. He, therefore, violated the law he is sworn to uphold and failed to meet his ethical obligations to diligently discharge his duties as a judge. (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][5], 100.3[b][1]).

Respondent failed to use the legal means available to him to compel defendants to answer traffic charges properly lodged in his court and, in 85 cases, neglected to collect fines he had imposed. Thus, he permitted defendants to avoid legal process by simply ignoring the summonses they

were issued or the fines levied against them. Such neglect promotes disrespect for the law and the judiciary.

In the Phelps case, respondent, despite continual prompting by the defendant's lawyer, failed to complete the simple tasks required to promptly conclude the matter after the defendant had pled guilty.

Public sanction is appropriate for such misconduct. (See Matter of Dougherty, 1985 Ann Report of NY Commn on Jud Conduct, at 123, 125.)

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, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Mr. Sheehy was not present.

Dated: October 25, 1990

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

JOHN J. WOOD,

a Justice of the Wilton Town Court,
Saratoga County.-----

APPEARANCES:

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

Ferrara, Jones & Sipperly (By Matthew J. Jones) for
Respondent

The respondent, John J. Wood, a justice of the Wilton Town Court, Saratoga County, was served with a Formal Written Complaint dated September 1, 1988, alleging that he engaged in a course of conduct prejudicial to the administration of justice by denying defendants basic well-established rights and conveying the impression of bias. Respondent filed an answer dated September 19, 1988.

By motion dated November 1, 1988, respondent moved for an order directing the administrator of the Commission to comply with respondent's discovery demands or for dismissal of the Formal Written Complaint for failure to comply. The administrator opposed the motion by affirmation dated November 10, 1988. By determination and order dated November 17, 1988, the Commission denied the motion.

By order dated November 4, 1988, the Commission designated Michael Whiteman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 17, 18, 19 and 21, 1989, and the referee filed his report with the Commission on March 13, 1990.

By motion dated March 22, 1990, the administrator 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 10, 1990. The administrator filed a reply on April 12, 1990.

On April 19, 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 has been a justice of the Wilton Town Court since January 1983. He was a state trooper for 20 years before his retirement in 1977.

2. On September 1, 1987, Jefferson Bell appeared before respondent on charges of Driving While Intoxicated and Speeding. It was Mr. Bell's third court appearance in connection with the same case. No representative of the prosecution was present.

3. Respondent informed Mr. Bell of the charges and said that the case had been adjourned so that he could obtain an attorney. Mr. Bell said that he wanted assigned counsel but was having difficulty completing an application for the public defender because he could not read or write.

4. Respondent replied by telling the defendant that the arresting officer had consented to a reduction in the charge to Driving While Ability Impaired.

5. Respondent said that he did not think an attorney would do Mr. Bell "any good."

6. Respondent adjourned the matter to October 6, 1987. Although there was an intervening court date at which the public defender was scheduled to appear, respondent did not adjourn the Bell case to that date.

7. On the adjourned date, Mr. Bell appeared without representation, pled guilty to Driving While Ability Impaired and was fined.

8. On October 2, 1987, respondent arraigned Randy Ferrara, then age 18, immediately after his arrest on charges of Driving While Intoxicated, Failure To Reduce Speed and Uninspected Motor Vehicle. Respondent described Mr. Ferrara's behavior at arraignment as "completely and totally irrational," and respondent believed him to be intoxicated at the time of arraignment.

9. Respondent adjourned the matter for eleven days and committed Mr. Ferrara to jail in lieu of bail until October 13, 1987. Even though there was a regularly-scheduled court session in the interim, respondent did not re-arraign Mr. Ferrara.

10. At Mr. Ferrara's October 13, 1987, appearance, respondent told the defendant to get an attorney, ordered a psychiatric evaluation and recommitted him in lieu of bail until October 28, 1987.

11. At the jail, Mr. Ferrara obtained an application for representation by the public defender.

12. On October 28, 1987, Mr. Ferrara met an assistant public defender in court for the first time. He pled guilty to Driving While Ability Impaired, Failure To Reduce Speed and Uninspected Motor Vehicle, was fined and sentenced to 26 days time served in jail.

13. On April 22, 1987, Paul LaCross, then age 20, learned that there was a warrant for his arrest, called the state police and was instructed to appear in respondent's court.

14. Mr. LaCross appeared before respondent and was informed that he was charged with Unlawfully Dealing With A Child. No representative of the prosecution was present. Respondent advised Mr. LaCross that he had a right to an attorney but did not tell him that he had the right to assigned counsel if he could not afford a lawyer, as required by CPL 170.10(3)(c); 170.10(4)(a).

15. Respondent offered to reduce the charge to Disorderly Conduct.

16. Mr. LaCross suggested that perhaps he should get a lawyer. Respondent said that if the defendant got a lawyer, respondent would "push" for the original charge and that there was a "good chance" that Mr. LaCross would not win.

17. Mr. LaCross agreed to plead guilty to the reduced charge and was fined.

18. On February 3, 1987, Scott Taylor, then age 18, appeared before respondent on a charge of Petit Larceny.

19. Respondent informed Mr. Taylor of the charge against him and asked him how he wished to plead. Mr. Taylor pled guilty.

20. Respondent did not inform the defendant of his right to assigned counsel, as required by CPL 170.10(3)(c); 170.10(4)(a).

21. The allegations as to Christopher Berger, Heather Cole and Larry Upton are not sustained and are, therefore, dismissed.

As to Paragraphs 4(b) and 4(c) of Charge I of the Formal Written Complaint:

22. The allegations are not sustained and are, therefore, dismissed.

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

23. On December 22, 1987, John Barber appeared before respondent on a charge of Speeding.

24. Respondent informed Mr. Barber of the charge and advised him that he could have an attorney.

25. Mr. Barber denied that he had been speeding.

26. Respondent told him that many drivers do not realize that their speedometers are inaccurate. He said that many drivers put oversized tires on their cars which cause inaccurate speedometer readings. He said troopers are given extensive training in detecting speed and are considered experts in determining speed. Therefore, it is not simply a defendant's word against a trooper's word in court because troopers are considered experts, respondent told Mr. Barber.

27. Respondent offered to reduce the alleged speed from 60 to 55 miles per hour and said the fine would be \$20 with a \$10 surcharge. He asked Mr. Barber whether he could pay the fine. Mr. Barber indicated that he could but left without pleading guilty. Respondent entered a plea of guilty in his court records.

28. On November 24, 1987, Louis Forte appeared before respondent on a charge of Speeding.

29. Respondent informed Mr. Forte of the charge, told him that he had the right to an attorney and asked him for an explanation of what had happened.

30. Mr. Forte contended that the arresting officer had made a mistake.

31. Respondent then spent about five minutes discussing the training that a trooper has in the visual and radar detection of speed. He asked Mr. Forte whether he had had his speedometer calibrated or whether he had deviation sheets for his speedometer.

32. Mr. Forte said that it seemed that an average person did not stand a chance in court.

33. Respondent offered a reduction to a non-moving violation. Mr. Forte rejected the reduction and asked for a hearing. Respondent adjourned the matter.

34. Mr. Forte retained an attorney and negotiated a plea bargain with the prosecutor's office.

35. On November 24, 1987, Robin L. Greene appeared before respondent on charges of No Seat Belt and Dirty License Plates.

36. Respondent informed Ms. Greene of the charges, advised her of her right to an attorney and asked her for an explanation.

37. Ms. Greene said that she had not been wearing a seat belt but that she did not have dirty license plates. She said that the arresting trooper told her that he ticketed her because she had been warning other drivers of his presence on the road.

38. Respondent told Ms. Greene that she could have been charged with Obstructing Governmental Administration and that the trooper had given her a "break" by not doing so. Respondent also told Ms. Greene that she had been speeding and that the trooper had noted on top of one of the ticket copies to respondent that the defendant's speed was 63.4 miles per hour. Respondent said the trooper had also given Ms. Greene a "break" by not charging her with speeding.

39. Respondent said that he would give Ms. Greene a "break" by granting a conditional discharge and a \$10 surcharge on both charges. Although Ms. Greene never pled guilty to Dirty License Plates, respondent entered that disposition in his court records.

40. The allegations as to David Fisher, Gene Park, Richard Ruopp and Larry Upton are not sustained and are, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

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

As to Charge III of the Formal Written Complaint:

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

As to Charge IV of the Formal Written Complaint:

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

As to Charge V of the Formal Written Complaint:

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

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated 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. Charge I of the Formal Written Complaint is sustained insofar as it is consistent with the findings herein, and respondent's misconduct is established. Charges II, III, IV and V are dismissed.

By his actions, respondent has denied defendants their most fundamental due process rights and has conveyed the impression of bias. Defendants have been deprived of trials and the right to assigned counsel and have been coerced into entering guilty pleas.

The most egregious misconduct involved the conviction of defendants in two cases without either a trial or a guilty plea. (See, Matter of McGee v. State Commission on Judicial Conduct, 59 NY2d 870; Matter of Masner, 1990 Ann Report of NY Commn on Jud Conduct, at 133.) Respondent attempted to justify his actions by explaining that in each of those cases the defendants in some manner admitted wrongdoing.

In these cases and one other, respondent compounded his misconduct by conveying a clear impression of bias. He gave defendants detailed recitations of police training and expertise and suggested that a police officer's word carries more weight than that of a defendant. While the effect of police training on issues of credibility and admissibility are for a judge and not the Commission to decide, here respondent effectively informed defendants that he was prejudging both the credibility of witnesses and the merits of cases before him. He thereby abandoned his proper role as a neutral and detached magistrate and gave the unmistakable impression that, as one defendant observed, "the average person doesn't stand a chance" in his court.

A judge must be impartial and must act 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.)

In four cases, respondent ignored a clear statutory mandate regarding a defendant's right to counsel. CPL 170.10(3)(c) provides that a defendant in a criminal case has a right to counsel at arraignment and at every subsequent stage of the proceedings and the right to assigned counsel if the defendant cannot afford a lawyer. A judge must inform a defendant of these rights, give the defendant an opportunity to exercise them and must "take such affirmative action as is necessary to effectuate them" (CPL 170.10[4][a]).

In one case, a defendant told respondent he could not apply for assigned counsel because he could neither read nor write. Not only did respondent fail to take steps to protect the defendant's right to counsel, he affirmatively discouraged the defendant from exercising his right by telling him that a lawyer would not do him "any good". In another case, when a defendant suggested that he should have counsel, respondent threatened to withdraw a plea offer and "push" for prosecution on the original charge. In a third case, respondent arraigned a young defendant he knew was intoxicated and committed him to jail in lieu of bail for eleven days without re-arraigning him to ensure that the defendant understood his rights. That defendant remained in jail for 26 days without seeing a lawyer. Such prolonged incarceration under these circumstances constitutes a gross disregard of a defendant's rights and is clearly inappropriate. (Matter of Ellis, 1983 Ann Report of NY Commn on

Jud Conduct, at 107, 113; Matter of Jutkofsky, 1986 Ann Report of NY Commn on Jud Conduct, at 111, 131-32.)

In imposing a sanction, the Commission has taken into consideration that respondent has changed his procedures with respect to informing defendants of their right to counsel and has eliminated the practice of holding informal hearings at which the defendant was asked to give his or her defense and after which the respondent made a "finding" and imposed a sentence in lieu of conducting actual trials. The Commission notes that, in each of the cases considered by the Commission involving these informal and clearly unauthorized "hearings", respondent offered a reduction to a lesser charge or a conditional discharge and, in one case, when the defendant refused to accept the proffered reduction, adjourned the matter without a finding. Respondent's actions constituted an improper form of plea bargaining. The procedure used was not sanctioned or authorized by law and appears to have been inherently coercive. We express our strong disapproval of such a procedure.

As to misconduct, the Commission records the following dissents:

Mr. Berger votes to sustain, in addition, the allegations in Paragraph 4(b) of Charge I as to Peter Splain and in Paragraphs 10 and 12 of Charge III.

Ms. Barnett votes to sustain, in addition, the allegations in Paragraph 4(a) of Charge I as to Christopher Berger.

Mr. Bellamy votes to sustain, in addition, the allegations in Paragraph 4(a) of Charge I as to Christopher Berger and in Paragraphs 8(c) and 8(d) of Charge II and votes to dismiss, in addition, the allegations in Paragraph 4(a) of Charge I as to Scott Taylor.

Mrs. Del Bello votes to sustain, in addition, the allegations in Paragraph 4(a) of Charge I as to Christopher Berger and Larry Upton; in Paragraph 4(b) of Charge I as to Bruce MacWhinnie, Peter Splain and Larry Upton; in Paragraphs 6, 8(a), 8(b), 8(c) and 8(d) of Charge II; in Paragraph 10 of Charge III, and in Charge IV.

Mr. Sheehy votes to dismiss, in addition, the allegations in Paragraph 4(a) of Charge I as to Randy Ferrara, Paul LaCross and Scott Taylor and votes to dismiss in toto the allegations in Paragraph 4(d) of Charge I.

Judge Thompson votes to dismiss, in addition, the allegations in Paragraph 4(a) of Charge I as to Paul LaCross and votes to dismiss in toto the allegations in Paragraph 4(d) of Charge I.

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

Mr. Berger, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury, Mr. Sheehy and Judge Thompson concur as to sanction.

Judge Altman, Ms. Barnett and Mr. Bellamy dissent as to sanction and vote that respondent be removed from office.

Dated: June 22, 1990

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

JOHN J. WOOD,

a Justice of the Wilton Town Court,
Saratoga County.

DISSENTING OPINION
BY JUDGE ALTMAN,
IN WHICH
MS. BARNETT AND
MR. BELLAMY JOIN

I dissent on sanction and vote removal of Judge Wood. The right to a trial is so fundamental to our system of justice that deprivation of that right cannot be countenanced. Judge Wood systematically conducted hearings in a non-trial setting during which he asked defendants to account for themselves. Then without either a trial or a guilty plea, he entered a conviction. Historically this Commission has removed judges entering convictions without trial or plea. (See, Matter of Masner, 1990 Ann Report of NY Commn on Jud Conduct, at 133; Matter of Cook, 1987 Ann Report of NY Commn on Jud Conduct, at 75.) Only in Matter of Curcio (1984 Ann Report of NY Commn on Jud Conduct, at 80) was there no removal. The conduct in this case is quite similar to the conduct which resulted in the removal of Judge Masner.

The jailing of a defendant for 26 days without arranging for counsel also indicates a fundamental disregard of due process rights. It is difficult to understand how a judge so indifferent to the fact that a person is jailed for 26 days without the opportunity to consult with counsel can be permitted to pass judgment on a person's right to remain at liberty.

Respondent also coerced pleas. Viewing the acts of misconduct as a whole, this judge is unfit for judicial office. The fact that he has now changed his procedures does not excuse the past misconduct. Such a gross lack of understanding of due process rights and the judge's role does not instill confidence in the capacity of this judge to deal with the next issue of fairness which may come before him.

Dated: June 22, 1990

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

ROBERT P. WYLIE,

Determination

a Judge of the Plattsburgh City Court,
Clinton County.

APPEARANCES:

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

E. Stewart Jones, Jr. (Leonard W. Krouner, Of Counsel)
for Respondent

The respondent, Robert P. Wylie, a judge of the Plattsburgh City Court, Clinton County, was served with a Formal Written Complaint dated January 12, 1988, alleging that he engaged in a course of conduct prejudicial to the administration of justice by denying defendants basic, well-established rights and conveying the impression of bias. Respondent filed an answer dated January 19, 1988.

By order dated May 3, 1988, the Commission designated Marjorie E. Karowe, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on September 26 and 27, October 26 and December 12, 1988, and the referee filed her report with the Commission on May 3, 1989.

By motion dated November 15, 1989, the administrator of the Commission moved to disaffirm the referee's report, to adopt alternative findings and conclusions and for a determination that respondent be removed from office. Respondent opposed the motion by cross motion on December 29, 1989. The administrator replied on January 10, 1990. Respondent filed a sur-reply dated February 7, 1990. Oral argument was waived.

On January 18 and February 16, 1990, the Commission 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 Plattsburgh City Court since 1975.
2. On May 9, 1984, respondent arraigned James J. LaTour on a charge of Driving While Intoxicated. Respondent advised Mr. LaTour that he had the right to counsel and that an attorney would be appointed for him if he could not afford one. Mr. LaTour asked whether he could have counsel assigned. Respondent replied, "No," told Mr. LaTour that he would get an "appearance" and released him on his own recognizance.
3. On May 6, 1986, respondent arraigned Alberta Rabatoy on a charge of Harassment. Respondent advised Ms. Rabatoy of her right to counsel and her right to an adjournment to obtain counsel but did not advise her of her right to assigned counsel if she could not afford an attorney.
4. On June 29, 1984, respondent arraigned Randy K. Watson on a charge of Criminal Mischief, Fourth Degree. Respondent advised Mr. Watson of the charge against him and asked him how he wished to plead. Mr. Watson pled guilty. Respondent then asked Mr. Watson whether he wanted a lawyer. The defendant declined since he had already pled guilty.
5. The allegations as to Daniel P. Breed, Kevin Corson and Nancy Manor are not sustained and are, therefore, dismissed.

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

6. The allegations are not sustained and are, therefore, dismissed.

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

7. On October 16, 1986, respondent arraigned Mike Brown on a charge of Disorderly Conduct. Respondent set bail. The defendant then used language which respondent considered abusive. Respondent revoked bail and committed Mr. Brown to jail. When Mr. Brown was produced in court the next day, he pled guilty and was sentenced to time served.
8. The allegations as to Alton Long and Shawn Young are not sustained and are, therefore, dismissed.

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

9. The allegations are not sustained and are, therefore, dismissed.

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

10. The allegations are not sustained and are, therefore, dismissed.

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

11. On March 28, 1986, respondent arraigned Leonard T. Butler on a charge of Attempted Petit Larceny. During the arraignment, respondent told the defendant that he was a "thief."

12. On August 14, 1986, respondent arraigned Joseph Cartier on a charge of Aggravated Harassment alleging that he had made a threat of physical harm. At arraignment, respondent said to the defendant, "Eventually, you are going to kill someone."

13. On January 31, 1986, respondent arraigned Kevin Corson on a charge of Disorderly Conduct. Mr. Corson pled not guilty. Respondent asked Mr. Corson whether he was drunk at the time of the incident. Mr. Corson replied that he didn't know exactly what had happened. Respondent then said, "Who do you expect me to believe at trial, you, who say you were drunk at the time, or a police officer?"

14. On January 31, 1986, Linda Dergham appeared before respondent on a charge of Assault, Third Degree. During the proceeding, respondent told Ms. Dergham that she was "sick, sick, sick." After a conference between the attorneys in the case, Ms. Dergham pled guilty to the charge.

15. On May 9, 1984, respondent arraigned James J. LaTour on a charge of Driving While Intoxicated. During the arraignment, respondent told Mr. LaTour, "You're a bum."

16. On May 6, 1986, respondent arraigned Alberta Rabatoy on a charge of Harassment. During the arraignment, respondent said to the defendant, "You're not going to plead not guilty to this, are you?" When Ms. Rabatoy responded that she did wish to plead not guilty, respondent remarked that he hated "this type of case" and called it "a waste of everyone's time."

17. On January 27, 1987, Brian H. Trombley appeared before respondent on a charge of Harassment brought by his wife. The defendant's wife stated that she wished to withdraw her complaint. Respondent dismissed the charge but referred to Mr. Trombley as "scum."

18. The allegations as to Frederick Giguere, Randy Watson and Daniel Ducharme are not sustained and are, therefore, dismissed.

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

19. In 16 cases involving 13 defendants, as denominated in Schedule A to the Formal Written Complaint, respondent required that bail be posted in cash form only, in violation of CPL 520.10(2).

As to Charge II of the Formal Written Complaint:

20. As set forth in Paragraph 15 herein, respondent referred to the defendant in People v. James LaTour as "a bum."

21. The remaining allegations in Charge II are not sustained and are, therefore, dismissed.

As to Charge III of the Formal Written Complaint:

22. As set forth in Paragraph 14 herein, respondent referred to Linda Dergham as "sick, sick, sick."

23. The remaining allegation in Charge III is not sustained and is, therefore, dismissed.

As to Charge IV of the Formal Written Complaint:

24. As set forth in Paragraph 13 herein, respondent elicited a statement from Kevin Corson and stated, "Who do you expect me to believe at trial, you, who say you were drunk at the time, or a police officer?"

25. The remaining allegations of Charge IV are not sustained and are, therefore, dismissed.

As to Charge V of the Formal Written Complaint:

26. As set forth in Paragraph 17 herein, respondent referred to Brian Trombley as "scum."

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), 100.3(a)(2), 100.3(a)(3) and 100.3(a)(4), and Canons 1, 2, 3A(1), 3A(2), 3A(3) and 3A(4) of the Code of Judicial Conduct. Charges I through V of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established. Respondent's motion to dismiss for lack of jurisdiction and insufficient notice of the allegations is denied.

Respondent has engaged in a course of conduct prejudicial to the administration of justice by repeatedly denying defendants basic, well-established rights and conveying the impression of bias.

By his actions in cases involving 18 different defendants, respondent compromised his impartiality. He referred to defendants who had not been convicted of any crime and were presumed innocent as "scum," "a bum," "a thief" and "sick, sick, sick." He suggested to two defendants that they should not enter a not guilty plea and predicted at arraignment that another would eventually "kill someone." Such comments are inconsistent with the dignity and patience required of judges, and they convey through the judge's own words that defendants are presumed guilty.

In addition, respondent elicited incriminating statements from a defendant at arraignment and failed to advise or effectuate defendants' right to assigned counsel in three cases. (See CPL 170.10[4][a]). In more than a dozen cases, respondent ignored a clear statutory requirement that he set at least two forms in which bail might be posted. (CPL 520.10[2]). In one case, as punishment for making remarks he considered abusive, respondent summarily committed a defendant without bail, although he was entitled to bail or release. (See CPL 530.20[1]).

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, 291-92.

While the totality of respondent's conduct represents a serious departure from the proper role of a judge, we are not prepared to say that public confidence in his ability to do his job fairly is irreparably damaged.

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

Mr. Bower, Judge Altman, Mr. Berger, Judge Ciparick, Mr. Cleary, Mrs. Del Bello, Judge Rubin and Judge Salisbury concur, except that Mr. Berger votes to sustain in toto the allegations in paragraph 4(c) of Charge I and Mrs. Del Bello votes to sustain in toto the allegations in Paragraphs 4(b), 4(c), 4(d) and 4(f) of Charge I and in Charges II, III and IV.

Mr. Sheehy was not present.

Dated: February 28, 1990

1990 MATTERS ACCORDING TO COURT

Number of Judges in Court System	Town & Village Court	City Court	County Court	Family Court	District Court	Court of Claims	Surrogate Court	Supreme Court	Court of Appeals App. Div.
--- 3570 (100%)	-- 2400 (67%)	-- 381 (10.5%)	-- 81 (2.5%)	-- 127 (3.5%)	-- 50 (1.5%)	-- 63 (2%)	-- 74 (2%)	-- 339 (9.5%)	-- 55 (1.5%)
COMPLAINTS RECEIVED (1184; in- cludes 131, 11.1%, re: Non-Judges)	363 (30.6%)	155 (13.1%)	96 (8.1%)	127 (10.7%)	11 (1%)	1 (.1%)	31 (2.6%)	250 (21.1%)	19 (1.6%)
COMPLAINTS INVESTIGATED (212)	144 (68%)	22 (10.5%)	10 (4.5%)	8 (3.5%)	3 (1.5%)	0 (0%)	3 (1.5%)	21 (10%)	1 (.5%)
NUMBER OF JUDGES CAUTIONED AFTER INVESTIGATION (37)	25 (68%)	5 (14%)	1 (2.5%)	0 (0%)	1 (2.5%)	0 (0%)	1 (2.5%)	3 (8%)	1 (2.5%)
NUMBER OF FORMAL WRITTEN COMPLAINTS AUTHORIZED (18)	13 (72.2%)	2 (11%)	1 (5.6%)	0 (0%)	1 (5.6%)	0 (0%)	1 (5.6%)	0 (0%)	0 (0%)
NUMBER OF JUDGES CAUTIONED AFTER FORMAL WRITTEN COMPLAINT (1)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	1 (100%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
NUMBER OF JUDGES PUBLICLY DISCIPLINED (11)	7 (64%)	2 (18%)	0 (0%)	1 (9%)	0 (0%)	0 (0%)	0 (0%)	1 (9%)	0 (0%)
NUMBER OF FORMAL WRITTEN COMPLAINTS DISMISSED OR CLOSED (7)	5 (71%)	2 (29%)	0 (0%)	0 (0%)	0 (0%)	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, 1989.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED ¹	ACTION ²	
Incorrect Ruling								
Non-Judges								
Demeanor		2	17	4	0	1	2	26
Delays		0	2	2	1	2	2	9
Confl/Interest		4	1	3	1	1	1	11
Bias		2	2	2	0	0	1	7
Corruption		0	1	0	0	2	0	3
Intoxication		0	2	0	0	0	0	2
Disable/Qualif		1	0	0	0	0	0	1
Political Activ		0	3	1	0	1	0	5
Finan/Recrds/Trng		1	2	3	1	2	2	11
Ticket-Fixing		0	3	0	0	0	0	3
Asser'n of Infl ³		2	11	2	1	2	1	19
Viol'n of Rights ⁴		3	7	3	0	2	0	15
Miscellaneous		1	0	4	1	0	5	11
TOTALS		16	51	24	5	13	14	123

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 1990.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED ¹	ACTION ²	
Incorrect Ruling	393							393
Non-Judges	131							131
Demeanor	91	24	18	4	0	1	0	138
Delays	44	1	0	0	0	0	0	45
Confl/Interest	22	19	2	5	0	0	0	48
Bias	93	8	3	0	0	0	0	104
Corruption	10	6	0	0	0	0	0	16
Intoxication	2	2	0	0	0	0	0	4
Disable/Qualif	3	0	2	0	0	0	0	5
Political Activ	7	8	4	1	0	0	0	20
Finan/Recrds/Trng	1	14	1	0	0	1	0	17
Ticket-Fixing	1	2	0	0	0	0	0	3
Asser'n of Infl ³	8	4	1	1	0	0	0	14
Viol'n of Rights ⁴	98	19	17	2	0	0	0	136
Miscellaneous	68	34	7	1	0	0	0	110
TOTALS	972	141	55	14	0	2	0	1184

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 1990: 1184 NEW COMPLAINTS AND 123 PENDING FROM 1989.

SUBJECT OF COMPLAINT	DISMISSED UPON INITIAL REVIEW	STATUS OF CASES INVESTIGATED						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED ¹	ACTION ²	
Incorrect Ruling	393							393
Non-Judges	131							131
Demeanor	91	26	35	8	0	2	2	164
Delays	44	1	2	2	1	2	2	54
Confl/Interest	22	23	3	8	1	1	1	59
Bias	93	10	5	2	0	0	1	111
Corruption	10	6	1	0	0	2	0	19
Intoxication	2	2	2	0	0	0	0	6
Disable/Qualif	3	1	2	0	0	0	0	6
Political Activ	7	8	7	2	0	1	0	25
Finan/Recrds/Trng	1	15	3	3	1	3	2	28
Ticket-Fixing	1	2	3	0	0	0	0	6
Asser'n of Infl ³	8	6	12	3	1	2	1	33
Viol'n of Rights ⁴	98	22	24	5	0	2	0	151
Miscellaneous	68	35	7	5	1	0	5	121
TOTALS	972	157	106	38	5	15	14	1307

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						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED ¹	ACTION ²	
Incorrect Ruling	5283							5283
Non-Judges	977							977
Demeanor	848	26	563	114	41	43	117	1752
Delays	461	1	58	37	7	10	15	589
Confl/Interest	223	23	259	80	27	13	84	709
Bias	656	10	140	25	15	11	11	868
Corruption	105	6	53	1	13	9	9	196
Intoxication	17	2	23	4	3	2	12	63
Disable/Qualif	28	1	21	2	12	6	6	76
Political Activ	107	8	76	86	4	12	10	303
Finan/Recrds/Trng	122	15	94	49	63	58	57	458
Ticket-Fixing	19	2	63	149	33	59	158	483
Asser'n of Infl ³	65	6	66	23	6	4	19	189
Viol'n of Rights ⁴	137	22	38	14	3	2	0	216
Miscellaneous	515	35	177	61	17	27	41	873
TOTALS	9563	157	1631	645	244	256	539	13,035

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.