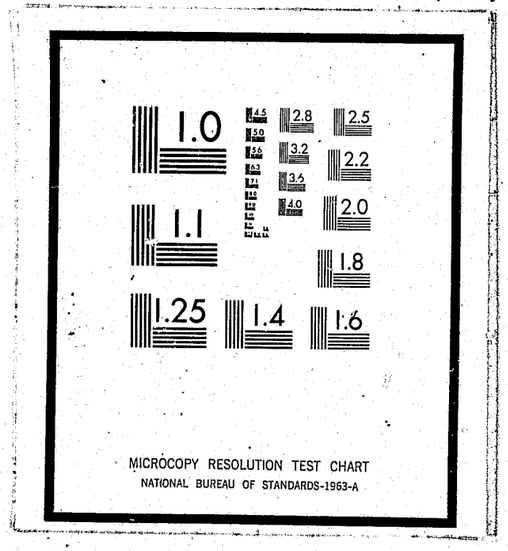

STATE OF NEW YORK
COMMISSION OF INVESTIGATION

REPORT OF THE NEW YORK STATE COMMISSION OF INVESTIGATION CONCERNING DISCIPLINE OF THE JUDICIARY IN THE FIRST AND SECOND JUDICIAL DEPARTMENTS

270 BROADWAY
NEW YORK, N. Y. 10007

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COMMISSIONERS

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Joseph Fisch — Chief Counsel

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Robert H. Straus

Special Counsel

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PRELIMINARY STATEMENT

On September 19, 1972, Governor Nelson A. Rockefeller directed this Commission "to monitor, evaluate and make recommendations as to the conduct of elected and appointed officials entrusted with the enforcement of the laws and the administration of justice in New York City." This report deals with one aspect of this inquiry - the enforcement of standards of conduct for the judiciary.

There is no question but that one of the most important persons in the administration of justice is the judge. It is also well-recognized that not only must justice in fact be done, but that justice must appear to be done. Under the Constitution of the State of New York the responsibility for maintaining proper judicial conduct is given to the judiciary. This Commission, therefore, investigated the extent to which the judiciary, in fact, carried out its Constitutional obligations.

SUMMARY OF FINDINGS

The study of disciplinary procedures within the First and Second Departments revealed that by and large the judiciary, over the past several years, has failed to fulfill its obligation to properly discipline judges. The Commission found that in certain cases where serious allegations were made involving corruption, potential corruption, ulterior motives for decisions and failure

to accord litigants basic rights, the responsible persons in the judicial system either took little action with respect to the allegations or at best investigated them in a most cursory and unprofessional manner. Even where the Appellate Divisions knew of allegations of judicial misconduct, generally these were not investigated, absent a written complaint.

The Commission also found that by and large the judiciary was not called upon by other public officials to handle complaints against judges. For example, no record of any complaint from a district attorney appears in the files of either Appellate Division concerning a judge within these Departments. District attorneys openly expressed the belief to this Commission that a formal complaint against a judge would not result in meaningful action concerning the judge and might jeopardize their efforts in the courts. Their belief that the judiciary might not take meaningful action is supported by some of the cases examined by this Commission where judges were found to have seriously violated the Canons of Judicial Ethics. Despite such findings by those responsible for judicial discipline, the courts would go no further than censuring the subject judges.

The Commission found that certain Canons of Ethics are not observed by members of the judiciary. This appeared to stem from certain long standing practices developed over the years and a feeling by many members of the judiciary that some of the present rules of conduct are either unfair or unworkable.

On the other hand, many judges, particularly those who felt they had been unfairly attacked in the press, thought that a full investigation of the charges would be beneficial, not only to these judges but also to the judiciary as a whole. To leave serious public charges unanswered, these judges felt, might give the public the impression that they were true.

The facts found in the First and Second Departments demonstrated to this Commission that the present practice of allowing the judiciary to police itself has not worked and that a need exists for an independent body to investigate, evaluate and, where necessary, discipline the judiciary.*

*Although the Commission did not examine the functioning of judicial discipline in the Third and Fourth Judicial Departments, it is the Commission's belief that the recommendations made by this report will have salutary effects on a State-wide basis.

PROCEDURE FOLLOWED DURING THE COMMISSION'S INVESTIGATION

Because of the need to maintain complete confidentiality of complaints against judges (except in the rare instances in which formal discipline is imposed), none of the records maintained by the Appellate Divisions on judges has - prior to this Commission's inquiry - ever been inspected by an outside agency for the purpose of evaluating these proceedings. Pursuant to its statutory authority, this Commission requested the Appellate Divisions for the First and Second Departments, and the Appellate Divisions agreed, to allow staff members of the Commission to review all the Appellate Division files regarding complaints against judges.

The staff of the Commission has reviewed all complaints made between January 1, 1968 and December 31, 1973 (except for matters under active consideration by the Appellate Divisions), as well as a few important proceedings occurring prior to that time. Sixty-nine complaints were reviewed with respect to the First Department. In the Second Department which includes ten counties with many more lower court judges than the First Department, 307 complaints were reviewed. Newspaper articles for this period were also reviewed to determine which judges had charges made against them in the public press. Finally, the Association of the Bar of the City of New York made available to the Commission an unpublished study it conducted concerning certain judges who were attacked in the press.

In conducting this investigation, the Commission or its staff interviewed, among others, Seymour M. Klein from the First Department's

Judiciary Relations Committee; Gerald Stern, the Executive Secretary to the First Department's Judiciary Relations Committee; Solomon Klein, formerly Chief Counsel to a number of Second Department judicial investigations; Judges Frank D. O'Connor and Joseph A. Suozzi, Chairmen of the A and B Judiciary Relations Committees in the Second Department; Frank A. Finnerty, Jr., Counsel to the Second Department's committees; Kings County District Attorney Eugene Gold; then Acting New York County District Attorney Alfred J. Scotti; former Presiding Justices of the Appellate Divisions Harold A. Stevens and Samuel Rabin and former Chief Judge of the Court of Appeals Stanley H. Fuld. In addition, this Commission held private hearings and interviewed other Appellate Division justices as well as members of the staffs of the Appellate Divisions.

JUDICIAL DISCIPLINARY PROCEDURES IN THE FIRST AND SECOND DEPARTMENTS

Responsibility for disciplining the judiciary rests, under New York State law, with the judiciary. The New York State Constitution (Article VI) provides that Supreme Court judges, Family Court judges and Surrogates may be removed only for cause by the Court on the Judiciary (composed of the Chief Judge of the Court of Appeals, the Senior Associate Judge of the Court of Appeals and one justice from each of the four judicial departments designated by a majority of each Appellate Division). Lower court judges (in New York City, Civil Court judges and Criminal Court judges) may be removed by the Appellate Divisions. The Presiding Justice of each Appellate Division may cause the convening of the Court on the Judiciary. Because of the power of the Presiding Judge of each Appellate Division and because the Court on the Judiciary is not a permanent court with offices or staff, complaints against all members of the judiciary have, as a matter or practice, been handled by the Appellate Divisions.

In January, 1968, the First Department, recognizing the need for an improved procedure to discipline judges, established the Judiciary Relations Committee. This was the first such Committee created in this State. Under the rules promulgated by the First Department, this Committee was given the responsibility to investigate complaints against judges sitting or residing within the First Department and recommend action.

This eight-member Committee is composed of two justices of the Supreme Court, one judge each from the Family Court, Criminal Court and Civil Court, two non-judicial members of the bar and a layman residing within the First Department. A wide variety of

procedures and dispositions is available to the Committee, depending on the type and merit of the complaint. These range from outright dismissal of the complaint through the presentation of formal charges. Initially all complaints are screened by the Committee's Executive Secretary. Where, in his judgment, a complaint has any merit, it will be referred by him to the attention of the full Committee. If the Committee agrees that the complaint has some merit, it will generally ask the complainant to explain the complaint under oath before the Committee. Thereafter, it is the practice of the Committee to have the judge involved give his side of the story under oath. Under this informal procedure there is no cross-examination of witnesses by either side.

If, as a result of this informal procedure, the Committee feels that the judge's conduct was improper, the Committee may informally admonish the judge privately. But no public announcement is made of such admonition because of the lack of full adversary proceedings. If the Committee believes the charges involved are sufficiently serious, it may then draw formal charges on which there will be a formal hearing with full cross-examination by all sides. As a result of such formal hearing (or in the appropriate case, even an informal hearing), the Committee may recommend to the Appellate Division that the judge involved be censured or removed if it is a lower court judge. If the case involves a higher court judge, the Committee may recommend to the Presiding Justice that he cause the Court on the Judiciary to be convened. The Committee's Executive Secretary advised the Commission that in all cases the complainant is notified of the result.

In the Second Department complaints have been handled, until fairly recently, in a more ad hoc manner (the counties within the City of New York within the Second Department are Kings, Queens and Richmond). Prior to March, 1973, upon receipt of a complaint either the Appellate Division, a clerk of the Appellate Division or a judge designated by the Appellate Division would investigate the matter and report back to the Appellate Division as to whether further investigation was warranted, whether informal action should be taken or whether the complaint should be dismissed. Further investigation would generally mean that a written statement would be obtained from both the complainant and the judge involved.

During this period, however, serious matters were often referred to the Judicial Inquiry (a body set up primarily to deal with complaints against lawyers), or to a special referee who would be appointed to examine and report back to the Appellate Division. If the Appellate Division determined, as a result of a preliminary investigation, that formal charges were warranted, then, in the case of lower court judges, a counsel would be appointed to prosecute the case either before the Appellate Division or a referee. In the case of higher court judges, the Presiding Justice would request the Chief Judge of the Court of Appeals to convene the Court on the Judiciary for the purpose of prosecuting the charges.

In March, 1973, the Second Department established two Judiciary Relations Committees, largely patterned after that of the First Department. The A Committee covers Kings, Richmond and Queens, while the B Committee covers the remaining counties within the

Second Department.* Essentially the same operations and procedures utilized by the First Department's Committee are being implemented by the Second Department's.

* Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess Counties.

THE FAILURE TO INVESTIGATE SERIOUS PUBLIC CHARGES AGAINST THE JUDICIARY

Because the public's knowledge concerning the conduct of the judiciary is largely based on reports in the press, this Commission examined, as one facet of this investigation, the actions taken by the Appellate Divisions with respect to charges made by the press against judges in the First and Second Departments during the past five years. The Commission's objective in this inquiry was to determine the manner in which the Appellate Divisions responded to and handled these charges and not whether the allegations made in these articles were true or false.

The First Department

The October 31, 1969 issue of Life magazine, in an article entitled "The Murky Men From The Speaker's Office", contained very serious allegations of corruption on the part of former Supreme Court Justice Mitchell D. Schweitzer. The article alleged that Nathan Voloshen had fixed the case of Manuel Bello before Judge Schweitzer, that a woman by the name of Georgette Saffian had paid over $2,500 in order to have her case placed before Judge Schweitzer and that Voloshen and Judge Schweitzer had met with a convict named Eddie Gilbert - at which meeting Schweitzer had suggested a lawyer with alleged organized crime ties to represent Eddie Gilbert. No investigation was undertaken by the First Department Appellate Division with respect to these serious allegations against Judge Schweitzer.

The New York State Joint Legislative Committee on Crime, its Causes, Control and Effect on Society under the late Senator John H. Hughes, however, conducted a full investigation into these and other charges. Transcripts resulting from this investigation were delivered to Judge Harold Stevens (former Presiding Justice of the First Department) in October, 1970. On the basis of these transcripts Judge Stevens, in January, 1971, requested the convocation of the Court on the Judiciary to institute removal proceedings. Subsequently, after formal charges had been prepared by the Court on the Judiciary, Judge Schweitzer resigned in December, 1971.

In the Fall of 1972, a Supreme Court judge sitting in the First Department was accused in two publications of "permissiveness toward [heroin] dealers, mobsters and crooked cops." Specific cases mentioned included the granting of motions (later reversed) made on behalf of persons associated with organized crime by a lawyer who was a close friend of the judge and dismissals of cases which the article implied were done for reasons other than legal ones. None of these charges was ever investigated by the Appellate Division First Department or by the Judiciary Relations Committee for that Department.

With respect to the charge concerning the relationship between the judge and lawyer, an unpublished report by the Association of the Bar of the City of New York, dealing with this and other judges mentioned in these articles, concluded that "it is improper for [this Judge] to hear cases in which [this lawyer] is counsel [and the Judge] should take heed of Canon 33 of the Canons of Judicial Ethics, which provides that a judge...be particularly careful to avoid such action as may reasonably tend to awaken the suspicion

that his social or business relations or friendships constitute an element in influencing his judicial conduct." The Commission was informed that although this report was delivered to this judge's Presiding Justice and the Chief Judge of the Court of Appeals in October, 1973, this admonition from the Bar Association has never been communicated to the judge involved.

Judge Stevens agreed that the allegations described above should have been investigated, but stated to this Commission that the reason that these serious charges were not investigated was due to the lack of sufficient funds for staff. He pointed out that until 1973 the Judiciary Relations Committee had not had any funds and its Executive Secretary also functioned as the Administrator for the First Department. As a result this person did not have the time or facilities to fully pursue such an investigation.

The Commission's investigation disclosed that in similar situations the Second Department had obtained the necessary funds under Section 90 of the Judiciary Law. Under that section the Appellate Division may appoint special attorneys for the purpose of investigating charges against lawyers and may direct that the county involved (here New York City) pay the costs of such a proceeding. Thus, on October 1, 1969, a Long Island newspaper alleged that a judge was involved in zoning improprieties. On October 9, 1969, Presiding Justice George C. Beldock appointed special counsel to investigate. At the conclusion of the investigation (which cleared this judge), Justice Marcus G. Christ, then Presiding Justice, entered an order directing Suffolk County and the Judicial

Conference to share the costs of this investigation.

Similarly, on July 1 and 2, 1970, a Long Island newspaper charged that then Judge D'Auria had used improper influence to obtain zoning changes. On July 15, 1970, a referee and special counsel were appointed by Presiding Justice Christ to investigate these charges. As a result of this inquiry Judge Rabin, who had succeeded Judge Christ as Presiding Justice, requested that the Court on the Judiciary be convened and Judge D'Auria resigned after being served with the charges by the Court on the Judiciary. On April 12, 1971, the Appellate Division, by Judge Rabin, entered an order directing Nassau County (the county which elected Judge D'Auria) to pay the fees of the special counsel.

Moreover, the unpublished report of the Association of the Bar of the City of New York recommended that its investigation of certain judges, who were attacked in the press, be carried on by a body having the power to subpoena witnesses. The Judiciary Relations Committee has subpoena power. Yet, although funds have been available to the Judiciary Relations Committee since August, 1973, no steps have been taken to implement the Bar Association's recommendations.

The Second Department

The Second Department has likewise not investigated some of the serious charges made in the press. In the Fall of 1972, newspaper articles alleged that four New York City Supreme Court judges in the Second Department had shown undue sympathy for members of organized crime and heroin dealers. No full scale investigation of these

charges was ordered by the Appellate Division. Judge Rabin advised the Commission that he asked a confidential assistant of the Appellate Division to prepare a written report after receiving requests from the judges in question for Appellate Division action on this matter.

The assistant's report, which was never made public, was based solely upon material submitted by the judges involved. As a result, the report fails to reflect many relevant and easily ascertainable facts. For example, no mention is made in the report that the Appellate Division had previously discussed one of the cases with the judge involved prior to the magazine article, which discussion was reflected in the files of the Appellate Division. Nor did the assistant ever learn that the statement by one of the judges concerning a conversation with a Probation Department officer was sharply disputed by that officer, simply because the assistant never even spoke with the probation officer. Likewise since this assistant never discussed this with the district attorney's office, he never learned that another judge's claim that he dismissed a case for lack of prosecution because the district attorney refused to follow the calendar set out by the judge was incorrect. In fact the records showed that this judge had previously agreed with the district attorney's office as to the order of trial and the district attorney kept to this agreement.

This report did, however, criticize one judge for giving an illegal sentence and for being "unduly harsh" in criticizing a police officer. But no action was taken by the Appellate Division with respect to this judge, although Judge Rabin thought he had informed the judge of this criticism.

THE APPELLATE DIVISION FAILED TO ACT ON NON-PUBLIC INFORMATION WITHOUT A WRITTEN COMPLAINT

Not only have the Appellate Divisions failed to investigate all serious charges made in the press, but they have generally failed to take action on information known to them absent a formal written complaint. In short, this Commission found that unless the Appellate Divisions received a complaint, no action would be taken on a matter even though allegations concerning judicial improprieties were known to the Appellate Division.

For example, the testimony submitted to the Appellate Division, First Department and subsequently to the Chief Judge of the Court of Appeals by Senator Hughes on former Judge Schweitzer contained testimony indicating other judges in both the First and Second Departments may have been improperly influenced on some occasions. Yet no investigation was ever conducted.

In another situation, the records at the Appellate Division indicated that a lower court judge (against whom a complaint had been filed) had possibly influenced the result in a particular case through his friendship with a law clerk for a Supreme Court judge. When the lower court judge was not reappointed to the court, the investigation terminated insofar as the judiciary was concerned. No investigation was undertaken to determine if indeed the Supreme Court judge's opinion had been improperly influenced.

Judicial authorities in both Departments stated that they knew which judges in their Departments did not fulfill their duties satisfactorily and which did not conduct themselves with proper judicial

demeanor. Yet these same authorities expressed reluctance to have the Appellate Division commence proceedings on its own without a written complaint. This view was also taken by a leading member of the Judiciary Relations Committee for the First Department even though the Committee, under the rules of the First Department, has the power to initiate investigations without any formal complaint.

Another avenue by which the Appellate Division may gain knowledge that a judge may be acting for reasons other than legal ones is through appeals reaching the Appellate Division. As one district attorney put it, there are certain decisions which can only be explained by "corruption or insanity" and these decisions should be investigated.

Two examples of such cases are People v. Gentile and People v. Ward. In People v. Gentile, 20 A.D. 2d 412 (1st Dept. 1964), the Appellate Division, First Department, in 1964, reversed the dismissal of the indictment by a lower court judge. Although normal procedure on a motion to dismiss an indictment on the ground that the grand jury minutes do not state a crime requires the judge to read the grand jury minutes to determine whether there was sufficient evidence before the grand jury to indict, the judge, in this case, dismissed the indictment without having read the transcript. Indeed, the record before the Appellate Division demonstrated that the judge could not have read the grand jury minutes because the minutes had not been transcribed as of the time of his decision - a fact prominently pointed out in the District Attorney's brief to the Appellate Division. Another lower court judge, in following this order

dismissing the indictment, stated:

> "I assume [the judge] had the grand jury minutes before him and read all the evidence before the grand jury..." (Page 93 of record).

No one from the Appellate Division ever investigated this matter.

In the Ward case, 37 A.D. 2d 174 (1st Dept. 1971), the same lower court judge dismissed a perjury indictment against a former New York City policeman on the ground that the defendant's conflicting testimony was a product of "apparent confusion" and "aggressive questioning" by the district attorney. The Appellate Division, in a per curiam opinion, reversed the dismissal stating that any explanation or defense was for the jury and could not be the basis of a motion to dismiss. (Subsequently, Mr. Ward was convicted.) The New York County District Attorney (the late Frank S. Hogan) felt so strongly about the lower court judge's decision that he complained to the press. Nevertheless, an examination of the files showed that no investigation was ever undertaken by the Appellate Division. Indeed, the Appellate Division strongly criticized Mr. Hogan for making the complaint in public.

Another district attorney indicated to the Commission that he had informally complained to an administrative judge about certain judges but to no avail. Further, district attorneys indicated a reluctance to complain formally for fear that little would be accomplished and that some members of the judiciary might make their work more difficult.

Closely related to this problem of not acting upon information available to the Appellate Division is the Appellate Division's

failure to attempt to monitor or evaluate judges against whom there are continuing complaints. For example, in the case of a Civil Court judge, two formal complaints were received and acted upon by the Judiciary Relations Committee of the First Department. As a result of the second complaint, which related to the judge's intemperate and abusive treatment of persons in his courtroom, the judge was warned informally by the Appellate Division in 1972 that another such complaint would result in formal charges against him. In 1973, an anonymous complaint with regard to the judge's courtroom activities was received. Because of the anonymity of the complaint, it was obviously impossible to interview the complainant. No one, however, from the staff of the Appellate Division was asked to investigate the substance of the anonymous complaint or assigned to monitor this judge's activities to see if he was complying with the Appellate Division's informal admonition.

THE HANDLING OF WRITTEN COMPLAINTS BY THE APPELLATE DIVISION

As previously noted, the Appellate Divisions have generally acted only on formal written complaints against judges. In the First Department there was only one exception found by this Commission during the past five years. This involved a situation in which a district attorney complained about a judge's verbal abuse of one of his assistants. In the Second Department the only cases not based on a written complaint were cases originally brought to the attention of the Appellate Division by the press.

Most of the formal complaints to the Appellate Divisions are brought by disgruntled private litigants in civil cases with the result that a great many of these cases are found, and properly so, to have little or no merit. The more serious cases have tended to develop from complaints made by persons familiar with the legal system - a few lawyers, other governmental agencies and the press. Moreover, these groups often have the ability to present to the Appellate Division a package of witnesses and documents indicating the factual basis for the complaint while other complainants usually present little more than their own suspicions to the Appellate Divisions.

Although the types of complaints handled by the Appellate Divisions covered a wide range - everything from fixing of cases to failure to work - most of the complaints appear to fall into three major categories: (1) abuse of judicial discretion, (2) use of injudicial language by the judge and (3) improper and/or unlawful

actions by the judge. With respect to complaints involving the alleged abuse of judicial discretion, the Appellate Divisions have generally dismissed such complaints on their face on the ground that the question of abuse of discretion is cognizable as a matter of appellate review and that generally the Appellate Division or its Judiciary Relations Committee should not interfere with normal appellate practice. Injudicial language generally involved judges who verbally or otherwise abused persons in their courtrooms. The category of improper and/or unlawful actions included charges ranging from the fixing of cases to misuse of trust funds to the refusal to accord litigants basic rights such as a transcript.

The records of the First and Second Departments indicate that action is more often taken on complaints involving injudicial language than on complaints involving more serious charges of improper conduct. That more admonishments should be given for injudicial language than for allegations of improper and/or unlawful conduct is not surprising because in many cases proof of the use of injudicial language is relatively easy - there are either a number of witnesses or the statements are transcribed on the record. Moreover, sporadic bursts of injudicial temper are perhaps best handled by an informal admonishment.

The problem arises, however, with respect to more serious charges - either improper and illegal action on the part of the judge or consistent use of injudicial language in the courtroom. Such allegations are obviously more difficult to handle both because the investigation required to sustain such charges may be

more extensive and informal admonishment may not constitute a sufficient discipline.

A study of the more serious cases handled by the First and Second Departments reveals an unevenness in which complaints were investigated with some cases being handled in a very appropriate manner and others not. Probably the best example of a thorough investigation on behalf of an Appellate Division was the D'Auria case. There the findings resulting from that investigation caused Judge Rabin to convene the Court on the Judiciary which, in turn, led to the resignation of Judge D'Auria.

On the other hand, in a case in which a complainant alleged collusion between a judge and the opposing party, the lack of sufficient staff to make a thorough investigation for the Judiciary Relations Committee in the First Department made such allegations almost impossible to prove. The result in that case was that the complainant testified together with some supporting witnesses in a rather loose manner, leaving the Committee with little choice but to dismiss the complaint. Of course, whether the result would have been the same after a thorough investigation at the time of the complaint cannot be said.

Similarly, a report filed by a referee investigating certain charges against another judge indicated that the referee could not explain an important transaction in the case and noted that he had not been able to interview some of the parties involved in that transaction - one of whom was out of state. In discussing this matter with the referee, the referee indicated that these facts had been developed at a rather late stage in the proceedings and since

he did not operate on a permanent basis, he felt that he did not have the time to follow all of the various leads. Instead he attempted some phone calls to these witnesses which did not get through and concluded his report without interviewing these witnesses.

The Commission feels that it is important for the public to be able to be assured that whenever a charge is made all aspects of that charge are fully and thoroughly investigated so that no one can say at a later date that the investigation was inadequate. Such assurance is equally important to the judiciary so that those members who are unfairly charged may be cleared by a body respected by the public. This requires a full time professional staff which would have the capacity and time to conduct thorough investigations and to make reports on these investigations. The present staffing for the Judiciary Relations Committees in the First and Second Departments (essentially a counsel, executive director and secretaries) does not permit such thorough investigations.

Even where the staff work for some of the investigations is professional and thorough, effective examination of the judge against whom charges are brought is sometimes interfered with. For example, the Judiciary Relations Committee for the First Department held hearings concerning a Supreme Court judge charged with diverting trust funds under his jurisdiction for his own or his family's benefit. In this case the Executive Secretary to the Committee presented the case and examined the witnesses called before the Committee. A review of this record indicates that some Committee members felt it improper to test a judge's recollection in the same manner that

the recollections of other witnesses would be tested. Thus, there was testimony that the judge had suggested the establishment of a charitable institution to which he later directed the payment of trust funds. When this Supreme Court judge was questioned about how this particular charitable institution came into being, one judge on the Committee had the Executive Secretary inform the judge what other prior witnesses had testified to. Thus counsel was prevented from effective questioning of the judge.

After the hearings in this case had been concluded, the Committee found that the charges made against this judge had not been satisfactorily answered. However, in its report to the Appellate Division the Committee made no recommendation as to what action should be taken. (Shortly after this report the judge died and no further action was required by the Appellate Division.)

STANDARDS APPLICABLE TO THE JUDICIARY

One of the most basic rules applicable to the judiciary is the requirement that a judge not only be proper in his conduct but also appear to be proper (Canon 2, Code of Judicial Conduct). The reason for this is self-evident. The public is entitled to a judiciary which not only in fact acts honestly but appears to act honestly.

It must also be recognized that actual dishonesty on the part of the judiciary is exceptionally difficult to prove. Of necessity each judge has broad discretion as well as the power to make findings of facts and legal interpretations. Since it is obviously impossible to know the inner workings of a judge's mind, the rules of ethics, which establish standards of conduct, attempt to insure the integrity of judicial decisions. It is, therefore, vitally important and that these rules of conduct be enforced. If the present rules are not workable, then more appropriate rules should be developed and enforced.

Some of these rules are not observed by the judiciary. For example, Canon 17 of the Canons of Judicial Ethics, as adopted by the New York State Bar Association and in effect prior to March, 1973, provided that "a judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex-parte application." Similarly, Canon 3A(4) of the Code of Judicial Conduct, effective March 3, 1973, provides that a judge should,"except as authorized by law, neither initiate nor consider ex-parte

or other communications concerning a pending or impending proceeding." Yet despite these rules, ex-parte communications are not uncommon. Frequently the district attorney and his assistants have communicated with judges about pending cases. As a result, a number of judges have argued that if it is permissible for a judge to speak ex-parte with a member of the district attorney's office, it is likewise permissible to speak ex-parte with a representative of the defendant. While there are legitimate, unusual circumstances which warrant ex-parte communications, absent such unusual circumstances this rule should be enforced.

Another illustration of the disparity between rules laid down for the judiciary and actual practice lies in the area of political contributions. Canon 7 of the Code of Judicial Conduct prohibits any political contributions other than to a judge's own campaign. For many years Rule 20.4 of the General Rules of the Administrative Board of the Judicial Conference also prohibited political contributions. The new rules of the Administrative Board of the Judicial Conference, promulgated December 10, 1973, continue this prohibition (Section 33.7). Yet several of the judges to whom this Commission talked stated that they contribute to political parties, just as other citizens did, and enjoyed attending political affairs. These judges felt that a reasonable limitation upon the total amount of political contributions which a judge could make in any one year would adequately guard against situations in which the judge, because of substantial contributions, could be accused of buying his judgeship on the installment basis and yet allow judges to participate on a limited basis as citizens in the electoral process.

While this Commission believes that the rule on ex-parte communications is basically a good one, and that perhaps limited amounts of political contributions should be allowed, the point the Commission wishes to emphasize is that rules of conduct should be thoroughly thought through, adopted, widely disseminated and then enforced.*

Critical to any effective code of conduct for the Judiciary is a body able and willing to enforce defined standards. Although a case involving removal is a vital one, it was indicated to the Commission that some Appellate Division judges tried to avoid sitting on such cases. One member of the judiciary stated that a case involving removal of a judge would be handled by whatever Appellate Division panel of judges happened to be sitting on the day the case was called on the calendar - perhaps to prevent the judges from avoiding this unpleasant duty.

In some cases this Commission found that the Appellate Divisions were reluctant to enforce standards of conduct even on lower court judges over whom they have the power of removal. In one instance an Appellate Division refused to remove a judge despite very serious findings of fact against the judge. Moreover, prior admonitions by the Appellate Division against this judge were, apparently, not even considered in deciding whether the judge should be removed.

*See, for example, Illinois Supreme Court Rules 110 Sections 61 through 71. Section 61 provides for general standards and Section 62 provides that consistent violation of the standards will subject the offender to discipline; Sections 63 through 70 provide for certain rules of conduct and Section 71 states that a violation of the rules "shall be the subject of discipline."

Another illustration of this reluctance occurred in a 1971 First Department case. In that case, the Judiciary Relations Committee for the First Department investigated charges brought against a judge of the Criminal Court of the City of New York. After a full hearing, the Committee found that the evidence clearly demonstrated that the judge's conduct violated important provisions of the Canons of Judicial Ethics. There the judge appeared to have exercised his discretion for either the sexual favors or potential sexual favors from the mother of a defendant appearing in his court. The Committee recommended to the Appellate Division, First Department that appropriate disciplinary action be taken.

In spite of a finding by the Committee of a serious violation of the Canons of Ethics, the Appellate Division did not remove this judge but censured him. In so holding the Appellate Division stated:

> "We find it unnecessary to resolve these differences in testimony between complainant and the judge. In the disposition of the matter before him there is absolutely nothing to indicate that respondent in any way deviated from the usual practice in such matters. Nor do we find that, under any version, grounds for removal have been adduced. However, acceptance in toto of respondent's account does not exonerate him. Even though the initial encounter may have been completely innocuous, the continued permission of the respondent to the complainant to remain in his presence and his answering her later calls, is not easily excused. The appearance from which favored treatment can be deduced, even without real foundation, can be very harmful to the administration of justice. Likewise is providing the opportunity from which an implication of impropriety could be drawn. No matter how innocent respondent's conduct may have been, it unnecessarily and unwisely put a burden of explanation and justification not only on himself but on the judiciary of which he is an officer." (In the Matter of Suglia, 36 A.D. 2d 326, 320 N.Y.S. 2d 352, 354 (1st Dept. 1971), Emphasis supplied.)

That the judge's actions were within the bounds of his legal discretion is not relevant for the question is not whether the judge abused his discretion, but whether he exercised it for improper reasons. As the Second Circuit, in the famous case of Judge Manton, stated:

> "Judicial action, whether just or unjust, right or wrong, is not for sale; and if the rule shall ever be accepted that the correctness of judicial action taken for a price removes the stain of corruption and exonerates the judge, the event will mark the first step toward the abandonment of that imperative prerequisite of even-handed justice proclaimed by Chief Judge Marshall more than a century ago, that the judge must be 'perfectly and completely independent with nothing to influence or control him but God and his conscience.'" (107 F 2d 834, at 846)

THE COMMISSION'S RECOMMENDATIONS

The Commission recommends that the grounds for removal be broadened and that an independent commission be established to enforce rules of judicial conduct.

The Grounds for Removal

Under the New York State Constitution, Article VI, judges may be removed for cause or physical incapacity. Cause has traditionally been defined as the exercise of judicial duties for "unworthy or illegal motives," or the commission of acts which "justify the inference that either from ignorance, or from a perverted character, or from lack of judicial qualities, (the judge) has so administered the power conferred on him as to show that he should not be continued in office," (In re Droege, 129 App. Div. 886 114 N.Y. Supp. 375, 386-87 (1st Dept. 1909), appeal dis. 197 N.Y. 44 (1909)). The New York State Courts have removed judges for exercising their powers on the basis of friendship (In re Bolte, 97 App. Div. 551, 90 N.Y. Supp. 499 (1st Dept. 1904)), for failing to cooperate with law enforcement authorities in refusing to waive immunity before a grand jury (Matter of Osterman, 13 N.Y. 2d a (1963))* as well as for corruption.

However, in other states such as California, the grounds for removal are more clearly defined. There, any of the following five grounds is sufficient to warrant removal: (1) misconduct in office, (2) willful and persistent failure to perform duties, (3) habitual intemperance, (4) conduct prejudicial to the administration of justice which brings the judicial office into disrepute, and (5) permanent disability.

*cf. concurring opinion of Judge Breitel, in People v. Avant 33 N.Y. 2d 265 (1973).

Under these standards, a serious violation of the Canons of Ethics without more would clearly be sufficient to warrant removal. These standards have essentially been incorporated in a resolution formulated by the Joint Legislative Committee on Court Reorganization under the Chairmanship of Senator Bernard G. Gordon and Vice-Chairmanship of Assemblyman Gordon W. Burrows. This resolution has passed the Senate during the 1974 session of the New York State Legislature as a proposed Constitutional Amendment (Senate Bill Number 7406-A). The Commission feels that the standards embodied in this proposed Constitutional Amendment represent a substantial improvement over the present Constitution as it has been interpreted by the courts.

The Need for an Independent Commission on Judicial Conduct

The instances cited in this report demonstrate the reluctance of the judiciary to discipline their brother judges and the need for an independent commission to perform this function.

This need was also recognized by the President of the Association of the Bar of the City of New York, Orville H. Schell, Jr., who, in explaining the background for the Association's investigation into the charges made in certain publications, stated:

> "The fact that a Bar Association felt obligated to conduct this investigation underscores the vital need (one of the two which we felt of paramount importance in our court reform program) for an ongoing, well-staffed and financed Commission created by statute to investigate charges against members of the courts and take disciplinary action where needed. Our sister state of California, which has had such a Commission for some years, is miles ahead of us." (Report of the President, 1973, page 248)

The study of this Commission indicates that there is a valid basis for the public to be concerned with the judiciary's ability to discipline itself. This Commission also understands the difficulty inherent in a system whereby judges are called upon to sit in judgment of their brethren. It is in light of this study that the Commission recommends that the responsibility for judicial discipline be entrusted to an independent commission -- one which would enjoy the confidence of the public, the legal fraternity and the judiciary.

The Commission, therefore, advocates the establishment of a Commission on Judicial Conduct which would not only have the power to investigate judges but the power to discipline judges, including removal, censure and retirement. By allowing a direct right of appeal to the Court of Appeals for the purpose of appellate review, the judge involved would be assured that the commission's actions were fairly taken. The Court on the Judiciary would be eliminated under this proposal.

Because of the power which would be given to the Commission on Judicial Conduct to discipline the judiciary under the Commission's proposal, it is important that membership on the Commission on Judicial Conduct be balanced. The Commission, therefore, recommends that there be thirteen members consisting of four judges, four lawyers and four laymen plus a full-time chairman. The judges would be Supreme Court and Appellate Division judges appointed by the Chief Judge of the Court of Appeals, with one from each judicial department. The Chief Judge would also appoint the chairman. The Governor would appoint two laymen and two lawyers, and two laymen and two

lawyers would be appointed by the majority and minority leaders of the Legislature. Under the proposal not more than seven members would be of the same political party. It is essential, however, for the success of this proposed Commission that members be selected solely on their qualifications and on a non-partisan basis.

The provisions embodied in the proposed amendment to the New York State Constitution (Senate Bill Number 7406-A) as passed this year in the Senate, while representing a major step forward in the area of judicial discipline, differ from the Commission's proposal principally in that the power to discipline the judiciary still resides exclusively with the judiciary. Under the proposal in Senate Bill Number 7406-A, the Commission on Judicial Conduct* would not have the power to remove but only to recommend removal to a Court on the Judiciary - composed entirely of judges. While this Commission would have the power to censure, suspend or retire a judge, a judge so sanctioned could request the Court on the Judiciary to hear the matter, thereby taking the case away from the Commission. Thus, the Court on the Judiciary, which would be composed of five judges from the Appellate Divisions, would have the ultimate power to determine standards and sanctions. In addition, the proposal embodied in the Senate bill would add an additional layer to the judicial discipline process by allowing an appeal from the Court on the Judiciary to the

*The Commission would consist of two judges appointed by the Chief Judge of the Court of Appeals, one lawyer and two laymen appointed by the Governor, and four persons (either lawyers or laymen) appointed by the majority and minority leaders of the Legislature.

Court of Appeals. This would increase not only the number of judges involved but also the time and resources required to process a case.

The Commission believes that its proposal, which places responsibility for imposing sanctions in the hands of an independent commission and which is similar to one proposed by the National Advisory Commission on Criminal Justice Standards and Goals (Chapter 7.4, page 153), represents a more desirable approach than that embodied in Senate Bill Number 7406-A. It should be noted that both the Commission's proposal and the proposal in Senate Bill Number 7406-A have sufficient members to allow it to operate through subcommittees. This is necessary if the Judicial Conduct Commission is to effectively handle complaints throughout a state as large and diverse as New York.

Until the necessary Constitutional Amendments have been passed establishing a Commission on Judicial Conduct on a permanent basis, this Commission supports the establishment of a temporary commission similar to that embodied in Senate Bill Number 6438-B with the power to investigate and make recommendations. Such a commission must, of course, have an adequate,full-time staff and sufficient funding.

CONCLUSION

The Commission's study was undertaken in the furtherance of the administration of justice. It is hoped that its efforts fulfill that objective. It is the Commission's further hope that this report will serve to promote the highest standards of judicial conduct and strengthen public confidence in the judiciary.

Respectfully submitted,

Howard Shapiro, Chairman
Earl W. Brydges, Jr.
Ferdinand J. Mondello
Edward S. Silver
Commissioners

April 8, 1974

END