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CONFIDENTIAL

July 26, 2011

Via email & USPS

Honorable Felice K. Shea
32 Washington Square West
New York, NY 10011

Re: Matter of Lee L. Holzman

Dear Judge Shea:

Pursuant to our conference call of July 13, 2011, this letter is respectfully submitted in opposition to respondent's request for the issuance of subpoenas duces tecum to obtain documents from Surrogate's Courts outside of Bronx County.

Under the Judiciary Law, a subpoena duces tecum may be issued by a referee only if the proponent of the subpoena is able to establish that the documents at issue are relevant to the subject matter of the investigation and/or to the charges contained in the Formal Written Complaint ("Complaint"). *See In re Morgenthau*, 73 AD3d 415 (1st Dept. 2010). "Where the proponent of the subpoena fails to establish a factual basis that shows the relevancy to the subject matter of the investigation, the referee issuing the subpoena has exceeded his or her power under Judiciary Law section 43(2) and section 44(4) and the subpoena must be quashed[.]" 73 AD3d at 419. As respondent has utterly failed to meet this burden, the subpoenas duces tecum for documents from Surrogate's Courts outside of Bronx County should not be issued.

Background

Respondent has been a Judge of the Surrogate's Court, Bronx County, since 1988. He may serve through December 31, 2012, at which time he will be required to retire because he has reached the mandatory retirement age of 70.

On or about January 4, 2011, respondent was served with the Complaint, which contains four charges. The subpoenas at issue relate only to Charge I of the Complaint, which alleges, *inter alia*, that from 1995 to 2009, respondent approved legal fees for Michael Lippman, Counsel to the Bronx Public Administrator's Office, based on boilerplate affidavits of legal services that did not comply with the requirements of section 1108(2) (c) of the Surrogate's Court Procedure Act.

The Documents Respondent Seeks to Subpoena Are Not Relevant

During the July 13 conference call with Your Honor, respondent's counsel represented that he wished to obtain, by way of subpoena duces tecum, affidavits of legal services that were approved by judges of Surrogate's Courts outside of Bronx County. Counsel stated, in sum and substance, that he wished to obtain these documents in order to show that respondent, did not commit misconduct by approving the boilerplate affidavits at issue in Charge I of the Complaint as it is the general practice of judges in other counties to routinely accept such affidavits. This offer of proof is insufficient to meet respondent's burden to show that the requested documents are relevant to the investigation and/or the charges against him. Accordingly, the subpoenas duces tecum should not be issued.

Respondent's claim that the documents he seeks to obtain are relevant because they show that his practice of approving boilerplate affidavits is consistent with the general practice of judges in other boroughs was expressly rejected by the Court of Appeals in *Matter of Sardino v. State Commn. on Jud. Conduct*, 58 NY2d 286, 291 (1983). In *Sardino*, the Court held that the Commission properly refused to allow the judge in that case "to present evidence that his practices were consistent with the general practice of other Judges of the City Court System . . . [as] such evidence would be irrelevant." Indeed, the Court of Appeals explained that:

[e]ach Judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a Judge disregards or fails to meet

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these obligations, the fact that others may be similarly derelict can provide no defense. Indeed one of the obvious reasons for establishing a permanent Commission on Judicial Conduct is to elevate judicial performance by insuring that the practices in the various courts comply with the high standards required of judicial officers.

Id; see *Matter of Duckman*, 92 NY2d 141, 153 (1998) (holding that evidence that other judges engaged in conduct similar to that with which the judge was charged was “irrelevant”); see also *Matter of Spector v. State Commn. on Jud. Conduct*, 47 NY2d 462, 469 (1979).

Since the practice of other judges is not relevant to the issue of whether respondent committed misconduct, respondent has failed to sustain his threshold burden of establishing relevance to justify the issuance of the subpoenas he seeks.

Conclusion

Respondent cannot show that the documents that he seeks to subpoena are relevant to the investigation and the charges against him. *Matter of Duckman*, 92 NY2d at 153; *Matter of Sardino*, 58 N.Y.2d at 291. Accordingly, the subpoenas duces tecum requested by respondent should not be issued. See *In re Morgenthau*, 73 AD3d at 419.

Thank you for your attention to this matter.

Respectfully submitted,



Mark Levine
Deputy Administrator

Encl.

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1998 WL 373392, 1998 N.Y. Slip Op. 06627

In the Matter of Lorin M. Duckman, a Judge of the
Criminal Court of the City of New York, Kings
County, Petitioner. State Commission on Judicial
Conduct, Respondent.
Court of Appeals of New York

Argued April 28, 1998;
Decided July 7, 1998

CITE TITLE AS: Matter of Duckman

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 22 and Judiciary Law § 44, to review a determination of respondent State Commission on Judicial Conduct, dated October 24, 1997, that petitioner should be removed from the office of Judge of the Criminal Court of the City of New York, Kings County.

HEADNOTE

Judges--Removal from Office--Independence of Judiciary

Petitioner, a Judge of the Criminal Court of the City of New York, who willfully disregarded the law, abused the power of his office and engaged in injudicious behavior, is removed from office. Removal is the appropriate sanction in view of the substantial record of petitioner's intentional disregard of the requirements of the law in order to achieve a personal sense of justice in particular cases before him, coupled with the substantial record of improper courtroom conduct and unresponsiveness to concerns flagged for him. While concerns centering on a threat to the independence of the judiciary arise

here (in that the Commission's investigation of petitioner was triggered by a firestorm of public criticism generated by a separate tragedy, as to which, in the end, petitioner's rulings were found to be a proper exercise of judicial discretion), in this particular case removal does not imperil the independence of the judiciary. Wrongdoing in connection with initiating an investigation could not insulate an unfit Judge; any such wrongdoing must be otherwise redressed. On the merits of this case, the judiciary, the Bar and the public are better served when an established course of misconduct is appropriately redressed and an unfit incumbent is removed from the Bench.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Judges, §§ 17-20.

Carmody-Wait 2d, Officers of Court §§ 3:81, 3:92, 3:96-3:98.

NY Jur 2d, Courts and Judges, §§ 306, 341, 342, 348, 352, 440, 441, 443.

ANNOTATION REFERENCES

Power of court to remove or suspend judge. 53 ALR3d 882.*142

POINTS OF COUNSEL

Ronald G. Russo, New York City, and *Richard W. Levitt* for petitioner.

The Referee failed to make findings sufficient to sustain the sanction of removal; the evidence, under any objective analysis, supports no sanction greater than censure. (*Matter of Quinn v State Commn. on Judicial Conduct*, 54 NY2d 386; *Victor Catering Co. v Nasca*, 8 AD2d 5; *Matter of VonderHeide*, 72 NY2d 658; *Matter of Reeves*, 63 NY2d 105; *Matter of Waltemade*, 37 NY2d [a]; *Matter of Roberts*, 91 NY2d 93; *Matter of McGee v State Commn. on Judicial Conduct*, 59 NY2d 870; *Matter of Cunningham*, 57 NY2d 270; *Matter of Kiley*, 74 NY2d 364;

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Matter of Shilling, 51 NY2d 397.)*Gerald Stern*, New York City, *Robert H. Tembeckjian* and *Jean M. Savanyu* for respondent.

I. Petitioner engaged in egregious misconduct in that he intentionally violated provisions of the Criminal Procedure Law, conveyed the appearance that he lacked impartiality, and repeatedly made highly improper statements. (*People v Douglass*, 60 NY2d 194; *Matter of David PP.*, 211 AD2d 995; *Pennsylvania v Mimms*, 434 US 106; *People v Robinson*, 74 NY2d 773.) II. Petitioner should be removed from office. (*Matter of Shilling*, 51 NY2d 397; *Matter of Aldrich v State Commn. on Judicial Conduct*, 58 NY2d 279; *Matter of Sims*, 61 NY2d 349; *Matter of Sardino v State Commn. on Judicial Conduct*, 58 NY2d 286; *Matter of Reeves*, 63 NY2d 105; *Matter of Droege*, 129 App Div 866, 197 NY 44; *Matter of Capshaw*, 258 App Div 470, 1053; *Matter of McGee v State Commn. on Judicial Conduct*, 59 NY2d 870.) III. The dissenting opinions do not provide a basis to impose a lesser sanction than removal from office. (*Matter of LaBelle*, 79 NY2d 350; *Matter of Sardino v State Commn. on Judicial Conduct*, 58 NY2d 286; *Matter of Sims*, 61 NY2d 349; *Matter of VonderHeide*, 72 NY2d 658.) IV. Petitioner's brief repeatedly misconstrues the record and fails to provide a basis to impose a lesser sanction than removal.

Russell M. Gioiella, New York City and *Thomas H. Burt* for New York Criminal Bar Association, *amicus curiae*.

I. A political system founded on the rule of law requires an independent judiciary. (*Matter of "John"*, 61 Misc 2d 347; *United States v Will*, 449 US 200; *Young v United States ex rel. Vuitton et Fils*, 481 US 787; *Supreme Ct. v Consumers Union*, 462 US 1137; *Stump v Sparkman*, 435 US 349; *Welch v State of New York*, 203 AD2d 80; *Mullen v State of New York*, 122 AD2d 300, 68 NY2d*143 609, 480 US 938; *Arteaga v State of New York*, 72 NY2d 212; *Matter of Catanise v Town of Fayette*, 148 AD2d 210.) II. The scope of the Commission's investigation and the Commission's findings and recommended sanction create the appearance of political influence. III. The removal of Judge Duckman will

have a chilling effect on judicial independence.

Scott H. Greenfield, New York City, for New York State Association of Criminal Defense Lawyers, *amicus curiae*.

I. The maintenance of charges for political reasons is contrary to sound public policy. II. The sanction of removal is inappropriate and unduly harsh under the facts and circumstances.

OPINION OF THE COURT

Per Curiam.

The State Commission on Judicial Conduct has determined that petitioner, since April 1991 a Judge of the Criminal Court of the City of New York (Bronx County, 1991-1994; Kings County, 1994-1996), engaged in various acts of misconduct demonstrating a pattern of injudicious behavior that renders him unfit to continue in office. Given petitioner's acknowledgment before us of many of the alleged acts of wrongdoing, the central issue on his appeal to this Court is one of appropriate sanction: should he be removed from office or censured? Like the Commission, we conclude that removal is the appropriate sanction.

I.

In a Formal Written Complaint dated June 5, 1996, the Commission charged that petitioner had willfully disregarded the law, displayed intemperate demeanor, abused the power of his office and exhibited bias against the prosecution. With 363 specifications, the Complaint made two formal charges. Charge I asserted that between October 1991 and February 1996 petitioner

"in the exercise of his judicial duties, willfully disregarded provisions of law that resulted in the improper dismissal of criminal charges, delivered *ad hominem* criticisms and injudicious lectures to assistant district attorneys that unfairly attributed to them improper and harsh values and judgments in their role as prosecutors and made intemperate, derisive and otherwise inappropriate comments to

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*144 assistant district attorneys. ... [B]y reason of the foregoing, [petitioner] abused the power of his office, displayed evident bias against the prosecution, and acted in a manner inconsistent with and prejudicial to the fair and proper administration of justice."

Charge II alleged that between May 1992 and December 1995, petitioner engaged in certain specific acts of "intemperate and injudicious conduct." Petitioner denied all wrongdoing.

On November 6, 1996, Matthew J. Jasen, appointed by the Commission as Referee, commenced hearings that continued over a period of 20 days. The evidence included the testimony of 67 witnesses (29 for petitioner, 38 for the Commission), consuming more than 4,000 transcript pages, and 200 exhibits. In addition, the record before us includes a "Book of Letters," 112 letters largely from practitioners who appeared before petitioner--both as prosecutors and as defense counsel--attesting to his personal and professional qualities.

On May 28, 1997, the Referee filed his Report, a 157-page document summarizing in detail the evidence with respect to each alleged act of misconduct, annotated to the record (for the most part transcripts of court proceedings conducted by petitioner, and petitioner's own testimony).

In his "Findings of Fact" the Referee found that petitioner had committed all but one of the acts of misconduct charged (he sustained all but five specifications; two were withdrawn by the Commission). As "Conclusions of Law" the Referee determined that petitioner had violated the State Constitution, as well as specified provisions of the Code and Rules of Judicial Conduct. He further rejected the notion that it is common practice for Judges of the Criminal Court to engage in the misconduct found, and even if it were, each Judge individually "must abide by the ethical standards required of judges in the unified court system, and neither calendar congestion nor a judge's frustration excuses or mitigates the pattern of misconduct re-

flected in these findings of fact and conclusions of law." Finally, the Referee concluded that petitioner's "expressed belief in the propriety of his undisputed conduct, as set forth in the findings as to Charge [II], demonstrates a failure to recognize that such conduct was improper, and a failure to appreciate the proper roles of a Judge and a prosecutor in the criminal justice system."*145

Commission counsel then moved to confirm the Report and for a determination that petitioner be removed from office. Petitioner opposed the motion.

Petitioner waived confidentiality and on September 11, 1997, the Commission heard oral argument in a public session, at which both petitioner and his counsel appeared. Thereafter, the Commission considered the record of the proceeding and made findings of fact, concluding that petitioner violated several provisions of Canons 1, 2A and 3 of the Code of Judicial Conduct as well as the Rules Governing Judicial Conduct. Charges I and II were sustained insofar as they were consistent with the Commission's findings (several additional specifications of the Commission's complaint were not sustained), petitioner's misconduct was deemed established, and the Commission held that petitioner should be removed from office. A 50-page Appendix to the Commission's Determination describes each of the specifications of misconduct found by the Commission.

All 11 members agreed that petitioner had engaged in serious misconduct by his knowing disregard of the law and by his intemperate, disparaging name-calling of young prosecutors and insensitive remarks. The Commission, however, issued five separate opinions, and it split seven-to-four on the issue of sanction. While the seven members agreed unanimously on the wrongdoing warranting removal, three would have gone further in their findings--two members underscoring petitioner's "consistent and outrageous disregard of the law," and a third underscoring "the gravity of the misconduct found with respect to Charge II" and the fact that petitioner "repeatedly made inappropriate comments con-

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cerning gender and race which are antithetical to the role of a judge.” Of the four Commission members who voted for censure rather than removal, one expressed the view that “a jurist who has sat on over 50,000 cases should not be removed for misconduct in only 19 cases.” The other three, while agreeing that petitioner had committed serious judicial misconduct, asserted that, given all of the facts and circumstances, the appropriate sanction was censure.

After careful review of the evidence, we conclude that the Commission's determination sustaining the charges is supported by a preponderance of the evidence and that the sanction of removal is warranted (NY Const. art VI, § 22; Judiciary Law § 44).*146

II.

In our view, the credible evidence--indicating wrongdoing both in connection with case dispositions and in court proceedings generally--was sufficient to support the Commission's findings of misconduct. Given the voluminous record, as well as the extensive factual digests already set forth both in the Commission's Determination and in the Referee's Report,^{FN1} we will not particularize all of the individual incidents but instead will more broadly indicate the categories of misconduct into which they fall.

^{FN1} While petitioner attacks the Referee's Report as insufficient because it does not make explicit credibility findings, we note that the facts supporting the determination were largely established by documentary evidence, such as court transcripts of proceedings (which required no credibility determination) and petitioner's own testimony.

Misconduct in Connection with Case Dispositions: Largely consisting of transcripts of court proceedings before petitioner, the evidence establishes that

petitioner willfully disregarded the law in disposing of the criminal charges in 16 cases: 13 dismissals for facial insufficiency, one purportedly in the interests of justice, and two adjournments in contemplation of dismissal (ACDs). Cases were dismissed without notice or an opportunity for the prosecution to be heard, without allowing an opportunity to redraft charges, without requiring written motions, and in the case of ACDs, without the consent of the prosecutor. What is significant for present purposes is both that petitioner dismissed these cases in knowing disregard of requirements of the law (*see, e.g.*, CPL 140.45, 170.30, 170.35, 170.40, 170.45, 170.55, 210.45), and the abusive, intemperate behavior he manifested in dismissing those cases, at times not permitting the attorney to make a record of an objection either to the disposition or in response to the accusations.

In the overwhelming number of these cases it is clear that petitioner dismissed accusatory instruments for facial insufficiency because the prosecutor refused to agree to petitioner's requests for an ACD or to offer a plea to a violation. In others, petitioner simply believed that the cases should not be prosecuted. Petitioner explained to the Commission that “there were times where [he] did things in the interests of justice, using the guise of facial insufficiency” to dispose of a case when he “thought it was right to do it.” In his words:

“Sometimes in an effort to do justice, I used the vehicle of dismissals for facial insufficiency without *147 making defense attorneys put their motions in writing, without giving the people an opportunity to amend or redraft, and sometimes without giving the people an opportunity to be heard fully.”

Illustratively, in one case where defendant was charged with menacing in the third degree for pointing what appeared to be a gun at children, at arraignment petitioner told the prosecutor “it's an ACD or it's dismissed.” Petitioner refused to allow the prosecutor to present his argument as to why the accusatory instrument was in fact facially suffi-

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cient, denied his request that the dismissal motion be in writing and, after warning him not to “just come up with some nonsense and tell me you want the opportunity to redraft,” petitioner denied the prosecutor's request to rewrite the accusatory instrument. Petitioner also cautioned the prosecutor that he should “ACD and maintain the peace.” When the prosecutor refused, petitioner dismissed the charge on concededly improper grounds. The prosecutor's reply, “Over the People's objection,” evoked the following diatribe:

“THE COURT: Please don't say that. It's not over your objection. My objection is that you can't stand here and act like a lawyer. How are you going to proceed in this case? It's not over your objection. You are supposed to come into court--don't smile, put that down and look at me--I said to look at me, Mr. Petrillo. I am going to tell you what offends me. I tell you fifty times, it's not over your objection, you are given an opportunity to be heard. When you can't make out the charges, the charges are dismissed. These are people's lives. Based on that nonsense, you had a person go to jail. What am I supposed to say to you, about the lack of respect that I have for you prosecuting a person, when you don't have a case? You don't have an objection. You are just mouthing some words that somebody told you, for no reason, and insulting me, and I am insulted and I don't want to hear it again.

“MR. PETRILLO: I did not intend to insult--

“THE COURT: Did I ask you to talk; did I? You told me it was over your objection, and I am telling you what my objection is and I speak last. He does it all the time, and you do it all the time and lawyers *148 don't do that. They stand up here and do what they are supposed to do. You can't come up here, with a facially insufficient complaint, and say 'we are moving to dismiss or we are ACD'ing it.' It's too bad we don't have more who do. The case is over. I am not listening to you. Move away. Next case. Don't do it again. If you smile, you are going to find out what power I really have. Do you understand that? Do you understand that; yes or no?

“MR. PETRILLO: Yes, I do.”

A transcript from another case reflects a similar colloquy between petitioner and two prosecutors:

“THE COURT: You want to ACD? Dismiss or ACD. That is your choice.

“MR. SACK: Judge I am not prepared to do either right now.

“THE COURT: You have a reason for that? Is there something I said--that was wrong?

“MR. SACK: Judge, I am reviewing the write-up.

“THE COURT: I think I gave you five minutes to look at it and--Ms. Rice, you have a problem? Stand up. I didn't ask you to talk.

“MS. RICE: Do I have a problem, your Honor?

“THE COURT: I didn't ask you to talk. Then leave the courtroom and solve your problem.

“MS. RICE: You want me to leave now?

“THE COURT: Don't you shirk and give me weird looks, okay.

“MS. RICE: I apologize, your Honor, if I gave--

“THE COURT: Here we go again. You want to dismiss or ACD the cases, Mr. Sack?

“MR. SACK: Judge, I see that a count is not charged. I therefore, with the Court's permission, move to add that to the Complaint at this time--

“THE COURT: Your application is denied. You charged him with this. ACD or dismiss. If you want to re-arrest *149 him or go, go to their houses and charge them with the Administrative Code violation. Are you ready to do it?

“MR. SACK: With all due respect, your Honor, the factual allegations in the complaint do make out--

“THE COURT: Didn't I just dismiss your applica-

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tion? You want me to--you want to say it five more times? When I ask you and I rule that is it. Go on to the next point.

"MR. SACK: My next point, Judge, is to ask for bail.

"THE COURT: Charges dismissed. Good day."

Apart from knowingly disregarding procedural requirements of the law to reach his desired result, petitioner on his own dismissed a drunk driving prosecution, over the prosecutor's objection, where he thought a conviction would be unlikely,^{FN2} and assumed facts where his own life experience suggested police misconduct. Court transcripts, for example, show petitioner in one case surmising that "defendant had taken a beating for causing two police officers to chase him for three blocks." There having been no prior mention of a beating in the transcript, during the hearing before the Referee petitioner explained that his belief was based on the fact that defendant "looked rather disheveled."

FN2 Defendant had slurred speech, red eyes and a blood alcohol content of .08%. Petitioner admitted before the Referee that he knew that a .07% blood alcohol content constitutes prima facie evidence of driving while impaired (*see*, Vehicle and Traffic Law § 1195), but maintained that "it's not illegal to drink and drive." Explaining further, petitioner testified that there needs to be a "reasonable relationship between the drinking and the driving to show that the alcohol ... somehow affected the individual's ability to operate the motor vehicle. ... Absent some proof that the drinking affected the driving you can't get a conviction." Petitioner therefore dismissed the case.

Again, in another proceeding, petitioner speculated on the record: "Somebody in a car with a gun, police officer goes to the car and they don't move--the cops then try to do something to get them out ...

[w]hat they did to get them out of the car, whether they were abused, grabbed, hit, berated." And in yet another, where defendant was charged with obstructing governmental administration and disorderly conduct based on allegations that he had interfered with his brother's arrest, court transcripts indicate that petitioner insisted that the prosecutor agree to an ACD. When the prosecutor refused, petitioner asked defense counsel for a motion and dismissed *150 the charges. In response to questioning before the Commission, petitioner admitted that he did not give proper notice before dismissing the charges, but it was his opinion that defendant only pushed the officer to protect his brother from injury. He knew his view was the correct one because he had "talk[ed] to a lot of people" and had heard from defense counsel "what was going on here." Petitioner explained: "I read things into cases and I'm not wrong about these things."

In yet another matter, the accusatory instrument charged defendant with assault in the third degree and harassment based on allegations that defendant "struck [the victim] with closed fist in the face, causing swelling and bruising to the face and to suffer substantial pain and to be alarmed." Petitioner argued that the prosecutor did not allege facts to make out an assault and described the alleged punch in the face as a "push": a "push is not an assault ... It's harassment." After defendant pleaded guilty to harassment, petitioner asked defense counsel whether he wanted to move to dismiss the assault charge. Although the prosecutor argued that the victim "received swelling and bruising to the face" and suffered pain, petitioner rejected the prosecutor's argument as a "conclusion," and dismissed the misdemeanor assault for facial insufficiency.

In addition, petitioner knowingly disregarded statutory requirements in dismissing charges in the interest of justice, and twice imposed an ACD without the consent of prosecutors, berating them in the process. For example, the dismissal in the interest of justice involved a charge of theft of services for allegedly entering the New York City sub-

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way, in the Bronx, without paying a fare; defendant at the time had a similar charge pending against him in New York County, and four prior class A misdemeanor convictions. When the prosecutor refused petitioner's request for a plea to disorderly conduct, with time served, petitioner lectured her about the need for jobs and health care, said she was not "doing justice" and was being "unreasonable" and dismissed the case, in knowing disregard of the requirements of a written motion for such relief and reasons for such dismissal set forth on the record (*see*, CPL 210.45, 170.40, 170.45).

Misconduct in Court Proceedings Generally: The 16 cited instances of knowing disregard of the law are not the only credible evidence supporting the charges. Well beyond those proceedings, the Commission documented instances of petitioner's inappropriate behavior in his dealings with persons appearing before him, demonstrating impatience and intolerance, even*151 at times ordering prosecutors who disagreed with him out of the courtroom.

Petitioner, for example, subjected prosecutors to harsh, personal criticisms when they would not accept his view as to the "worth" of a case. Petitioner admitted to the Commission that he chastised prosecutors for their bail recommendations because he did not want to be criticized for setting low bail. As one prosecutor reported in testimony before the Referee, after his bail recommendation petitioner accused him of "making him look bad in front of the audience." Petitioner asked another prosecutor if her bail recommendations were the "result of [her] middle-class background"; another was criticized as "too lofty" to appear in his court; another as having "no guts." Petitioner's lectures about the unfair actions of "your society" or "your government" at times elicited laughter or applause in the courtroom.

Petitioner conceded that on several occasions he made derisive remarks in open court referring to prosecutors' allegiance to their office policies, calling them "good little soldiers," "good little soldier

boys," "mannequins" and "puppets," or commenting that they were "earning another stripe on the arm" or "notch on the belt" every time they put someone in jail. In open court, he called them nicknames, such as "Princess" or "Princess Nancy," "Mr. Nuisance," and "Marshal Dillon" or "the Marshal." As lawyers testified, they felt belittled, degraded and demeaned by petitioner's open-court sarcasm and ridicule.^{FN3}

FN3 The former Chief of the Bronx Criminal Courts Bureau, Chief Assistant District Attorney in the Bronx, First Deputy Bureau Chief of the Criminal Courts Bureau in the Bronx and Bureau Chief of the Criminal Court in Brooklyn all testified that, based on complaints by others and, in some cases, direct observation, they repeatedly spoke with petitioner about the need to moderate his courtroom behavior. Petitioner acknowledges conversations with them, and admits to knowing that prosecutors from time to time ordered transcripts after his outbursts. Petitioner denies, however, having prior notice of the alleged wrongdoing. If in fact none of these indicators was sufficiently pointed to reach petitioner, that would underscore the problem that typified his misconduct.

In the case of one prosecutor who is visually impaired, petitioner heatedly accused him of having broken his lectern by leaning on it. Petitioner, who was admittedly "distracted," "upset," "shocked" and "dismayed" by the damage to the lectern, told the prosecutor that he would "teach" him "how to properly stand up in court." Petitioner concedes that his law clerk "calmed [him] down" by assuring him that the lectern could be fixed. A year later, when petitioner ran into the *152 prosecutor after business hours at a restaurant bar near the courthouse, he said in a manner that was "not kidding" or "jovial"--"he's the one who broke my lectern."

Petitioner told one female prosecutor that she was "too sexy" to wear flat shoes and that she had "nice

legs” (petitioner denied the first comment but acknowledged the second); he admittedly told another that she looked better in shorter skirts. In a case involving two African-American women, court transcripts reveal that petitioner, attempting to explain to a prosecutor why his disposition of the case--an ACD--was appropriate, stated: “At the risk of sounding racist and sexist, [the case] is really just two women, and you know sometimes certain things are just cultural.” While petitioner strongly denies any racist or sexist bias, he admits making “isolated statements” which he characterizes as “aberrational in character,” reflecting a familiarity not appropriate to his position.^{FN4}

FN4 While these comments may not be indicative of a racist or sexist bias harbored by petitioner, they are highly inappropriate and completely antithetical to the role of a Judge. Indeed, even isolated instances of such inappropriate behavior cast doubt on a Judge's ability to be impartial and fair-minded.

Incidents such as these, plainly inappropriate behavior for any Judge, are multiplied throughout the evidence and persuade us that the charges have been sustained.

III.

Having concluded from the proven facts that petitioner willfully disregarded the law, abused the power of his office and engaged in injudicious behavior, we reach the crux of the present appeal: whether removal or public censure is appropriate (see, NY Const. art VI, § 22 [d]). We agree with the Commission that petitioner should be removed.

“[T]he purpose of judicial disciplinary proceedings is 'not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents' ” (*Matter of Reeves*, 63 NY2d 105, 111, quoting *Matter of Waltemade*, 37 NY2d [a], [III]). The actual levels of discipline to be imposed

by the Court for judicial misconduct are, in the end, “institutional and collective judgment calls” (*Matter of Roberts*, 91 NY2d 93, 97). They rest on our assessment of the individual facts of each case, as measured against the Code and Rules of Judicial Conduct and the prior precedents of this Court.*153

Not surprisingly, in the intensely fact-specific inquiry before us the parties differ in their view of the more analogous precedent. Petitioner urges us to look to *Matter of LaBelle* (79 NY2d 350), where the Court concluded that the Commission had overstated both the number and the nature of petitioner's transgressions regarding commitments without bail and then rejected the determined sanction of removal in favor of censure. The Commission, in contrast, considers more pertinent *Matter of Sardino v State Commn. on Judicial Conduct* (58 NY2d 286, 292), where the Court upheld a determination that the individual under review had “'so distorted his role as a judge as to render him unfit to remain in judicial office'.”

While finding no four-square precedent--each judicial misconduct appeal truly stands on its own facts--we note that several of petitioner's arguments are analogous to arguments made by the Judge, and ultimately rejected by this Court, in *Sardino* (see also, *Matter of Reeves*, 63 NY2d at 110-111, *supra*). We underscore, however, that this case is neither *Sardino* nor *LaBelle*.

Like petitioner here, Judge Sardino argued that he in fact felt no bias, nor was he motivated by animosity or self-interest. As this Court observed, however, the perception of impartiality is as important as actual impartiality: Judges must conduct themselves “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 Commn. on Judicial Conduct*, 58 NY2d at 290-291, *supra*; see also, Code of Judicial Conduct Canon 2 [A]; 22 NYCRR 100.2 [a “judge shall avoid impropriety and the appearance of impropriety in all of the judge's activit-

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ies”]; 22 NYCRR 100.2 [A] [a “judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”]).

Similarly, petitioner in *Sardino* argued unsuccessfully that the number of abuses--62 over a two-year period--should not be viewed in isolation from his seven-year career on the Bench. As the Court noted, the number of abuses was not insignificant and, if viewed in the context of Sardino's entire career, would at best “establish that his behavior was erratic, which itself is inconsistent with a Judge's role” (58 NY2d at 291, *supra*). Here, too, petitioner urges that we credit his otherwise unblemished performance in a high-stress, high-volume court. The Court, however, has resisted any numerical yardstick for determining *154 unfitness (see, *Matter of Hamel*, 88 NY2d 317; *Matter of Esworthy*, 77 NY2d 280; *Matter of VonderHeide*, 72 NY2d 658; *Matter of Sims*, 61 NY2d 349). Rather, it must be the nature of the proven wrongdoing as well as the numbers that determine the appropriate sanction.

Moreover, in *Sardino*, as we do here, the Court questioned the veracity of the argument that many other Judges engaged in similar misconduct and concluded that, in any event, such evidence would be irrelevant. “Each Judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a Judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense” (*Matter of Sardino v State Commn. on Judicial Conduct*, 58 NY2d at 291, *supra*; see also, Code of Judicial Conduct Canons 1, 3 [A] [1]; 22 NYCRR 100.1 [a “judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved”]; 22 NYCRR 100.3 [B] [1]). Nor are Judges, in the interest of alleviating regrettable court congestion--or indeed, even in the interest of empathy for defendants-- free to ignore the law in order to weed out cases they personally feel are un-

worthy of prosecution or clogging the system.

Petitioner's contention that his harsh treatment of young prosecutors was simply a consequence of his efforts to educate them to be more just is similarly unavailing. As the Commission noted: “[t]eaching need not involve angry screaming and humiliating invective and is not effective when the lesson is that a judge may abandon the law and abuse judicial authority.”

Of significant concern as well--and particularly relevant to the question of appropriate sanction--is petitioner's refusal, throughout the Commission's initial investigation and the proceeding before the Referee, to acknowledge the impropriety of his behavior in wrongfully dismissing cases (see, *Matter of Aldrich v State Commn. on Judicial Conduct*, 58 NY2d 279, 283; *Matter of Sims*, 61 NY2d 349, 356; *Matter of Shilling*, 51 NY2d 397). As petitioner made clear in his testimony, he believes dispositions made in contravention of CPL requirements are permissible if they serve his definition of justice or conserve court resources by removing unworthy cases from an overburdened calendar. Testifying before the Referee, petitioner explained: “I think about what cases should be in this system *155 and which cases shouldn't be in the system, and I think judges get to make that decision, and ... if somebody comes and brings it to your attention and complains or asks you to do something, you can do something about it.”

When petitioner was questioned before the Commission and the Referee about his handling of a number of cases, he was reluctant to acknowledge that the CPL required him to allow prosecutors to amend facially insufficient accusatory instruments. Even more troubling, however, are the numerous instances when petitioner testified that he had not abided by the CPL's amendment and notice requirements in disposing of a case, but still maintained that he had not been wrong in doing so. For example, petitioner explained before the Referee that although he “may have been wrong in reaching the decision [to dismiss in *People v Shaw*],” he be-

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lieved that he “still did the right thing.” Similarly, when petitioner was questioned during the hearing about *People v Zhao*--a case which he later acknowledged he “should not have dismissed”--petitioner refused to admit that he had not acted in accordance with the law in disposing of the matter. Instead, petitioner insisted that his “legal ruling was correct.” In *People v Samuels*, although he admitted to dismissing the charges “for the wrong reason,” petitioner again refused to acknowledge before the Referee that he had not handled the matter in accordance with the law.^{FN5}

FN5 *Samuels* provides another example of petitioner's contradictory positions when testifying about his misconduct during the proceedings leading up to this appeal. When questioned about *Samuels* during the Commission's initial investigation, petitioner defended his actions in dismissing the case and was reluctant to admit that his intemperate treatment of prosecutors in that matter was inappropriate. During the hearing before the Referee, petitioner testified that his conduct was “a terrible example of [his] judicial demeanor and behavior” and that he was “embarrassed that [he] was the judge that sat on [the] case.” Petitioner also testified that he “dismissed the charges for the wrong reason” and “didn't handle [the case] properly.” In his Post-Hearing Memorandum, which was submitted to the Referee, petitioner stated that he had “properly dismissed the complaint” and had acted “within the proper ambit of his powers and duties.” In his brief to this Court, petitioner referred to *Samuels* as “an example of a dismissal, with its attendant conduct, which [petitioner] agrees was terribly mishandled by him.”

Additionally, with regard to several instances of clearly intemperate behavior, petitioner refused to admit that his comments were inappropriate. For

example, petitioner testified during the hearing that he does not consider his asking a prosecutor whether he got his law license “on the back of an orange juice carton” to have been insulting. Moreover, despite *156 considerable evidence to the contrary, petitioner maintained that his courtroom “was always run with courtesy.”

In making the difficult choice between censure--returning petitioner to the Bench--and removal, we find these examples particularly pertinent when combined with the numerous instances when Bureau Chiefs or Chief Assistant District Attorneys of Bronx and Kings Counties spoke with petitioner about his loss of temper and demeaning treatment of prosecutors who appeared before him. Petitioner sometimes acknowledged the inappropriateness of what he had done and said he would try to calm down, yet the misconduct continued. This evidence--not mentioned by the Commission's dissenters--suggests that the confirmed findings of improper conduct are not isolated, acontextual, subjective instances, and it supports the inference that petitioner lacks the insight and self-control to make fundamental changes in his attitude or judicial temperament.^{FN6}

FN6 Plainly the objective here is not to require contrition, bended knee or forfeiture of spine in return for the privilege of continued service as a member of the judiciary (see, *Bellacosa, J.*, dissenting opn, at 169), but rather to attempt to assess petitioner's fitness based on his prior conduct.

The foregoing leads us to conclude that the Commission has not, as in *LaBelle*, overstated the seriousness of petitioner's wrongdoing. Rather, the substantial record of petitioner's intentional disregard of the requirements of the law in order to achieve a personal sense of justice in particular cases before him, coupled with the substantial record of improper courtroom conduct and unresponsiveness to concerns flagged for him, persuade us that removal is the appropriate sanction.

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Finally, we note several weighty concerns voiced by petitioner, by the dissenters and by *amici* relating to the origin of the Commission's investigation. The investigation was triggered not by appeals or complaints of wronged litigants or lawyers, but by a firestorm of public criticism generated by a separate tragedy, as to which, in the end, petitioner's rulings were found to be a proper exercise of judicial discretion, not a basis for discipline. As petitioner points out, but for that tragedy--as to which he has been fully exonerated--likely no charges would have been lodged against him. There is, moreover, the deeply troubling suggestion--not established on this record--that prosecutors kept a "dossier" on petitioner, microscopically tracking him.

These concerns, which we share, center on a threat to the independence of the judiciary, a cornerstone of our democracy, *157 posed by unwarranted criticism or the targeting of Judges. Judges must remain free to render unpopular decisions that they believe are required by law. Valid and vital though these concerns surely are, the difficult issue that confronts us in this matter is how to sanction the serious misconduct--now fully documented before us--that the firestorm has exposed. Plainly, wrongdoing in connection with initiating an investigation could not insulate an unfit Judge; any such wrongdoing must be otherwise redressed. We are satisfied that in this particular case removal, rather than censure, does not imperil the independence of the judiciary. Indeed, on the merits of this case, the judiciary, the Bar, and the public are better served when an established course of misconduct is appropriately redressed and an unfit incumbent is removed from the Bench.^{FN7}

FN7 This matter does not involve "second-guessing" the adjudicative work of Judges, nor does it open a new avenue for Commission intrusion into that work (see, *Bellacosa, J.*, dissenting opn, at 164, 168). *Matter of Greenfield* (76 NY2d 293) involved a different issue--the time limits within which Judges should dispose of

pending matters, an issue properly left in the first instance for the Judges themselves and secondarily for court administrators. Here the issue is not whether petitioner's decisions were right or wrong on the merits, but rather repeated, knowing disregard of the law to reach a result and courtroom conduct proscribed by the rules governing judicial behavior.

Accordingly, the determined sanction of removal should be accepted, without costs.

Titone, J.

(Dissenting). By accepting without qualification the harsh sanction of removal for Judge Duckman's indiscretions, the majority has sent a message that the State's judicial disciplinary procedures are susceptible to manipulation by public officials and that Judges whose rulings displease those public officials may find themselves singled out for exceptional, and possibly ruinous, scrutiny. Because the outcome in this case strikes at the heart of the notion of judicial independence which is so critical to our tripartite system of government, I feel compelled to express my dissenting views.

The instant disciplinary proceeding did not begin in a vacuum, and its outcome cannot be assessed without reference to the political maelstrom that generated it. It is clear from the public record that petitioner was targeted for investigation and formal discipline because of the publicity he received in connection with a routine bail decision he made in a misdemeanor prosecution involving one Benito Oliver. Some three weeks after his release on bail, Oliver located his former girlfriend, *158 Galina Komar, shooting her and then himself. The following day, the incident was reported by the New York City tabloids in sensational headlines which implied that petitioner was somehow to blame for the tragic incident. One tabloid blared a headline indicating that petitioner had said "[e]ven I beat my wife"--a remark that he never actually made.

The lurid newspaper coverage was followed only a few days later by a letter from the State Senate Ma-

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majority Leader to the State Commission on Judicial Conduct demanding that petitioner's fitness be investigated immediately. At the same time, Governor Pataki initiated his own "investigation" of petitioner. These actions by two of the State's most powerful elected officials were part of a larger political climate in which Judges were increasingly being scapegoated. Beginning around the time of the Komar killing and continuing throughout the spring and fall of 1996, journalists specializing in sensational reportage and politicians anxious to capitalize on public fear combined to lay the blame for urban crime at the feet of "criminal coddling" Judges (*see generally*, Goshko, *Accusations of Coddling Criminals Aimed at Two Judges in New York*, Wash Post, Mar. 14, 1996, at A3; Olch, *Soft on Crime? Not the New York Court of Appeals*, NYLJ, May 6, 1996, at 1, col 1; Reske, *ABA Commission Defines Areas of Judicial Independence*, 82 [Dec. 1996] ABA J, 99; Reske, *Pointed Resignation Judge Blasts Politicization of Judiciary*, 82 [July 1996] ABA J, 40; Seymour, Jr., *Defending the Judiciary--An Open Letter to the Bar*, 38 [No. 2] NY St Bar Assn--St Bar News, at 1, col 2 [Mar./Apr. 1996]; Spencer, *Protection Order Abuse Elevated to Felony*, NYLJ, Aug. 9, 1996, at 1, col 3).

As the onslaught from the media continued, the Governor's office sent representatives to the Kings and Bronx County District Attorneys offices, apparently to obtain additional negative background material on Judge Duckman. These representatives were given access to one or more files containing transcripts of proceedings before Judge Duckman, which appear to have been ordered and preserved for some unspecified future use. Notably, some of these transcripts involving dismissed criminal charges were shown to the Governor's investigators without regard to the confidentiality rules that apply to sealed records (*see*, CPL 160.50). Having collected a list of complaints from trial assistants about petitioner's handling of their cases and his mistreatment of individual prosecutors, the investigators compiled a nine-page report that *159 was ultimately forwarded to the Judicial Conduct Com-

mission.^{FN1}

FN1 The Commission subsequently obtained a judicial order directing these records be unsealed so that they could be used in evidence at the judicial conduct proceeding against Judge Duckman.

On February 28, just two weeks after the Komar killing, the Governor made a highly publicized demand that the Judge who released the killer be suspended and that formal disciplinary proceedings against him be commenced. This demand was accompanied by an ultimatum, announced at a gubernatorial press conference, that the Commission must either remove petitioner from office within 60 days or the Governor would initiate impeachment proceedings before the State Senate (*see*, NY Const, art VI, § 23 [b]).

On April 22nd, just a few days shy of the Governor's deadline, the Commission acted by announcing the filing of formal charges against petitioner. None of the charges were based on petitioner's bail decision in the *Oliver* case. Instead, the charges in question were cobbled together from a handful of incidents selectively drawn from tens of thousands of cases petitioner handled during his five-year tenure on the criminal Bench.

The majority's opinion details the evidence that led to the Commission's determination that petitioner should be removed, and there is no need to repeat the substance of that evidence here. Suffice it to say that, despite the fact that some 10,000 pages of transcripts were subpoenaed and scoured for petitioner's misdeeds, there were no clear "smoking guns"; there was only a list of petty offenses involving petitioner's "bullying" of prosecutors, his intemperate behavior and his improper dispositions of criminal charges in some 16 cases. The latter "misconduct" was evidently motivated by petitioner's view, expressed repeatedly on the record, that the particular prosecutions did not serve the interests of justice. Significantly, none of the 16 dismissed prosecutions in issue was deemed suffi-

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ciently important or meritorious to warrant an appeal, and none of the 19 incidents of intemperance were deemed sufficiently serious to warrant a disciplinary complaint.

What emerges from this sequence of events is a very disturbing picture. Given the timing of the investigation and the severity of the sanction imposed, the conclusion is inescapable that the Judicial Conduct Commission bowed to the Governor's political threats and allowed itself to be used to advance the *160 agenda of the Judge baiters who were feeding off the media frenzy.

No one--including petitioner--disputes that some of the specific behavior revealed by the evidence before the Commission constitutes impropriety and may even be worthy of some sanction. The argument here is not that petitioner's performance has been beyond reproach, but rather that he has been subjected to an extraordinary degree of microscopic scrutiny under circumstances that cannot help but serve as an object lesson to other Judges faced with the possibility of making an unpopular decision. While the existence of intemperate conduct by other judicial officers does not justify any of petitioner's excesses, it is also true that few Judges who, like petitioner, have handled tens of thousands of cases--and sometimes as many as 100 to 200 a day--could withstand the kind of intense spotlight that has been aimed at petitioner's record.

The implication of the present disciplinary proceeding is that Judges whose rulings displease the political powers that be may be subjected to a modern-day witch hunt in which their records are combed for indiscretions, their peccadillos strung together to make out a "substantial record" of misconduct and their judicial "sins" punished with the ultimate sanction of removal from office. Indeed, in this case, the inference that petitioner has been removed at least in part because of his interest in protecting individual defendants' rights is reinforced by the Commission's emphasis on his purportedly antiprossecution bias and his statements criticizing the District Attorneys' policies. It is clearly contrary to the

goal of judicial independence to suggest that a Judge may be singled out for discipline because of his or her expressed views on questions affecting the criminal justice system.^{FN2}

FN2 While actual bias or even the appearance of bias is unacceptable in a Judge (see, *Matter of Sardino v State Commn. on Judicial Conduct*, 58 NY2d 286, 290-291; *Matter of Spector v State Commn. on Judicial Conduct*, 47 NY2d 462, 466), it is commonplace for Judges to express their own viewpoints during the course of the proceedings before them. For example, sentencing minutes often contain statements by Judges about the evils of crime and the impact that criminal conduct has on society. Similarly, in pretrial proceedings, Judges frequently interject their own concerns about such policy questions as "overcharging" and prosecutorial delays in processing cases. Although it would clearly be improper for a Judge to bend or stretch the law to advance his or her views on such subjects, it would unrealistic--and probably even undesirable--to require total neutrality in judicial decision-making.

Our system of laws and the public's confidence in the judiciary rest in large measure on the notion that our Judges are *161 free to rule on the issues before them without fear of retaliatory removal. Without that freedom, there is no assurance that the choices Judges make in situations often involving unpopular alternatives have the necessary level of integrity. There are few among us who have the courage and fortitude to take judicial stands at the risk of public humiliation and loss of office. It is for that reason that our State Constitution mandates lengthy terms of office for Judges and permits removal of Judges only after impeachment by the Legislature or for grave cause after a fair adjudicative process administered by the State Commission on Judicial Conduct (NY Const, art VI, §§ 22, 23; see, *Matter of Cunningham*, 57 NY2d 270, 275; *Matter*

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of Steinberg, 51 NY2d 74, 81).

The perception arising from this case that the Commission is itself susceptible to political influences cannot help but undermine the confidence of the State's Judges in these constitutional protections and chill the free exercise of their judicial discretion. A precedent has now been set in which politicians and local prosecutors have demanded the removal of a widely respected sitting Judge for what they perceived as "criminal coddling" and have succeeded in that demand. Now that the Commission has demonstrated its willingness to be hospitable to such machinations, it seems likely, indeed inevitable, that Judges will be intimidated and will frequently be tempted to err on the side of the prosecution in debatable situations rather than risking Judge Duckman's fate. Nothing could be more inimical to the health of our State's system for administering criminal justice.

The record here unquestionably reveals that Judge Duckman was occasionally guilty of intemperate conduct and that he knowingly misused his authority to terminate 16 prosecutions in order to achieve what he believed to be the ends of justice. Accordingly, since these matters were brought to the attention of the disciplinary authorities, some form of sanction should now be imposed. It seems to me, however, that Judge Duckman's record of service as a whole does not indicate any unfitness for judicial office. To the contrary, the hearing testimony and the flood of letters that were made available to the Commission indicates that overall he has been an intelligent, hard-working, knowledgeable and compassionate jurist. Furthermore, to the extent that he demonstrated intolerance or intemperance, he did not do so out of malevolent or venal *162 motives; ^{FN3} rather, his actions were clearly motivated by compassion (see, *Matter of LaBelle*, 79 NY2d 350). Finally, Judge Duckman has apologized for his excesses and has indicated that they will not occur again. Thus, there is no need to invoke the extreme sanction of removal; the lesser sanction of censure will suffice. Since the use of the removal power

here not only deprives the public of a conscientious and hard-working Judge but also signals an unhealthy tolerance on the part of this Court for the heavy-handed tactics of would-be "Judge bashers," I dissent from the Court's acceptance of the Commission's imposed sanction. Dissenting opinion per Bellacosa, J.

FN3 Although Judge Duckman was charged with having made offensive racist and sexist remarks, the majority has wisely eschewed reliance on that aspect of the charges, since it is apparent from the record that Judge Duckman is not a person who harbors such biases. Bellacosa, J.

(Dissenting). I, too, respectfully disagree in this separate dissenting opinion with the Per Curiam determination to remove this Judge from his judicial office. From my personal examination of this entire record, the evidence of sustainable misconduct does not rise to the extreme level of egregiousness, demanded by this Court's precedents, for that ultimate sanction to be imposed. Moreover, the precedential implications of this removal decision are daunting and disturbing (a) insofar as the future scope and operations of the Commission are concerned, and (b) for the future discharge of adjudicative responsibilities, especially by trial level judicial officers who have to maintain actual and perceptual independence from all outside influences.

This Court has consistently and appropriately set the bar of removal very high: it is "an extreme sanction [that] should be imposed only in the event of truly egregious circumstances" (*Matter of Cunningham*, 57 NY2d 270, 275; compare, *Matter of Roberts*, 91 NY2d 93, with *Matter of Skinner*, 91 NY2d 142, 144; see also, *Matter of Kiley*, 74 NY2d 364, 369-370; *Matter of Steinberg*, 51 NY2d 74, 83). Our precedents ordain that "removal should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment" (*Matter of Cunningham*, supra, 57 NY2d, at 275 [emphasis added]).

The heavily relied-on set of specifications in the in-

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stant case boils down to the overarching charge that Judge Duckman improperly handled 16 criminal proceedings: 13 dismissals for facial legal insufficiency, one dismissal in the interests of justice, and two adjournments in contemplation of dismissal. *163 The accusations are that the Judge knowingly and wrongly dismissed these cases, without notice or an opportunity for the prosecution to be heard, without allowing a chance to redraft charges, without requiring written motions, and in the case of ACDs, without the consent of the prosecutor.

These extrapolated rulings were statutorily unauthorized and irregular devices; they constitute improper means to reach debatably correct ends. While they should not be countenanced, they do not equal disciplinary misconduct at the egregious level for removal from office. They absolutely do not represent a pattern of conduct in any realistic context and appraisal of the full record of this Judge's career. Rather, they are qualitatively and quantitatively exceptional, measured by a fair and proportional analysis of the full gamut and docket of any Judge, serving, as this Judge did, in such high volume and high intensity assignments, locales and courts. Thus, these few, never-appealed and disciplinarily resurrected remnants of cases are not so out-of-line as to justify removal of this Judge from his judicial office.

While I agree generally that this Court should resist "any numerical yardstick for determining unfitness" (Per Curiam opn, at 153-154), our precedents provide some measuring guideposts of the over-all judgmental quality and quantity necessary to elevate misconduct to a level of gravity that is required to impose the final and lifetime sanction of removal (compare, *Matter of LaBelle*, 79 NY2d 350 [rejecting removal where the Judge failed to set bail without legal justification in approximately 24 cases], with *Matter of Sardino*, 58 NY2d 286, 289-290 [upholding removal where the Judge (1) "consistently failed (in 62 cases) to inform the accused of the right to counsel and failed to conduct even a minimal inquiry to determine whether they

were entitled to assigned counsel," (2) "regularly abused his authority with respect to setting bail," and (3) "often assumed an adversarial role at arraignments by questioning defendants"]; compare also, *Matter of Skinner*, 91 NY2d 142, *supra* [rejecting removal and imposing censure], with *Matter of Roberts*, 91 NY2d 93, *supra* [accepting removal]).

The record evidence in the instant case comes nowhere near the "distortion of the judicial function" that is reflected in *Matter of Sardino (supra)*. This is especially so when weighed and evaluated within the precedential and judgmental universe of the multitude of other cited cases. To be sure, each disciplinary case with its sanction assessment is unique and different. Yet, the instant case fits closest to *Matter of LaBelle (supra)*, where *164 the majority of this Court rejected the removal recommendation and imposed a serious, public censure. I consider of very high concern and weight, therefore, that the breakthrough precedent established by this case will seriously and widely expand the reasonably balanced guidance that the governing principles have ordained--up to now that is. And let no one make any mistake as to the grave, plenary responsibility invested exclusively in this Court by the State Constitution: the Commission cannot remove a Judge; only this Court can, absent impeachment.

This case also presents an additionally disturbing and distinct precedential concern in this allocation of power--i.e., that the Commission could infer that it has a new obligation and intrusive authorization to poke into the adjudicative work of Judges, legitimized by this Court's ultimate precedential acceptance of a determined sanction recommended by the Commission majority, insofar as it rests on these quintessentially decisional matters of dismissed cases (compare, *Matter of Greenfield*, 76 NY2d 293).

In *Greenfield*, this Court rejected the Commission's sanction, even of censure, where the record disclosed "serious administrative failings in petition-

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er's handling of the cases in issue, but no persistent or deliberate neglect of his judicial duties rising to the level of misconduct" (*id.*, at 295). Although a Judge's failure to promptly dispose of pending matters is generally subject to administrative correction, the Commission pushed the envelope to urge "that at some point a Judge's failure to dispose of pending matters must be viewed as misconduct within its jurisdiction" (*id.*, at 297). This Court emphatically rejected the Commission's misguided incursion, concluding that it "would overlap the jurisdiction clearly granted to those administering the courts" and "would permit the Commission to intervene in the administrative process whenever it believes that a Judge has failed to dispose of pending matters within unspecified time limits in an unspecified number of cases and on a case-by-case basis" (*id.*, at 297). The instant case represents a far deeper incursion, insofar as the 16 now-disciplinarily challenged rulings are concerned, because the overlap and intervention drive into the very heart of the adjudicative administration and delivery of justice by a Trial Judge.

Furthermore, I am unable to accept that removal here may be justified under an exacerbation theory, related to a series of "instances of petitioner's inappropriate behavior in his dealings *165 with persons appearing before him, demonstrating impatience and intolerance, even at times ordering prosecutors who disagreed with him out of the courtroom" (Per Curiam *opn.*, at 150-151). These unfit-to-serve characterizations are associated with and derived from a collection of misdeeds mixed with indecorous and indiscrete comments, admonitions, sarcasm and wisecracks. The utterances made in the rough-and-tumble world of the New York City arraignment and criminal courts are sharply contested, acontextual, selective and subjective. They also do not satisfy, on proportional record analysis, the substantive gravity needed for removal from judicial office (*compare, Matter of Agresta*, 64 NY2d 327 [upholding censure]).

My reading of this record supports a contrary, or at

least reasonably competing, point of view that the substance and credibility concerning many of the specifications of misconduct range from questionable-to-weak, and are subject to significant conflicting evidence favorable to the Judge's conduct and over-all performance of his judicial duties. The record fairly and fully appraised, provides reasonable-to-strong mitigating and countervailing evidence, in substantive detail and in credibility, which contradicts the negative debasings of the Judge's character and the unfounded projection of his permanent unfitness for judicial office.

For example, various witnesses called by the Judge, and even by the Commission, portray the Judge as an unbiased and knowledgeable Judge. A good deal of criticism has been heaped on him for bias against some prosecutors whom he apparently found deficient in performance; indeed, none of them filed any contemporaneous complaints or appeals against him anywhere until he became publicly vilified. They did, however, keep negative material in personal files over the years that was retrieved and projected into his disciplinary proceeding.

Thus, I consider it fair to select some particular competing evidence that I find particularly relevant and cogent on the sanction weighing issue. Barry Kamins, a former prosecutor, Chair of the Grievance Committee for the Second and Eleventh Judicial Districts, past president of the Brooklyn Bar Association, and recent cochair of that Association's Judiciary Committee, testified that he had observed Judge Duckman in court several hundred times over the years and that the Judge "is more knowledgeable about criminal law, in my opinion, than any other judge in the Criminal Court in Kings County" (Transcript, vol XVI, at 3324). He also testified that he never heard the Judge "shout or yell," but at most "heard him speak *166 in a frustrating tone, which is not novel" (*id.*, at 3331). He testified that the Judge "holds both sides accountable" and that there is no "double standard" (*id.*, at 3333).

Former Judge and Acting Justice Alain Bourgeois,

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now a practicing attorney, also testified:

"From what I observed, he dealt with [issues] effectively, and although he was demanding of respective counsel, although he obviously held them to a high standard, I believed that he held them to an appropriate standard and an equivalent standard. I think the frustration that one feels sitting in the Criminal Court is difficult to contain; I didn't see it spill over in any way in Judge Duckman's handling of cases that I observed." (Transcript, vol XVI, at 3354.)

Juda Epstein, a former prosecutor who appeared before the Judge regularly, testified that the Judge "was absolutely down the line fair," that he did not treat the prosecution more harshly or differently from the way he treated the defense (Transcript, vol XVIII, at 3759, 3796). In fact, he testified that in one case, the defense attorney complained that the Judge was "too pro prosecutorial" (*id.*, at 3796).

Gerald Allen, former Kings County prosecutor and former Deputy Bureau Chief of the Criminal Courts Bureau, called by the Commission, testified on cross-examination that the Judge was "definitely ... the best trial judge in the building" (Transcript, vol VII, at 1388), and that he exhibited "almost exclusively good behavior" (*id.*, at 1389).

These necessarily selective appraisals illustratively and strongly negate the mischaracterization of this Judge by the majority at the Commission on Judicial Conduct level (7 of 11 Commissioners). No matter how many favorable letters are assembled, however, they cannot make the case one way or the other on the appropriate sanction; no more, I respectfully submit, than the necessarily incomplete materials the Commission majority and this Court's Per Curiam opinion focus and rely on, and adopt. The whole record must be evaluated.

It is, nevertheless, quite significant to me that more than 100 attorneys wrote to the Commission in early 1996 to protest the publicized ultimatums for the removal of Judge Duckman--concerning a me-

dia-intensified ruling that proved *not* to be misconduct. This varied array of personal letters and direct appraisals are part of the whole record. They depict an individual *167 significantly different from and somewhat better than the "mean-spirited" and "bullying" Judge, sobriqueted by the Commission as some caricaturized martinet (*see*, Commission majority opn, at 7). The characterizations seem to me neither accurate, nor fair.

At least for some balance, it should be observed that the numerous evidentiary letters in the "Book of Letters" are neither from partisans, nor are they of merely character reference quality. They are from ordinary lawyers, court employees and others representing a wide cross section of people and professionals who worked in and around and observed Judge Duckman in the performance of his judicial duties over long and different periods of time. Surely, their real evidence is worthy of some consideration and greater weight than this material garnered from the Hearing Referee or the Commission itself-- which apparently was naught.

These letters also provide and constitute empirical and directly relevant evidence presented as part of the defense case before the Commission on the sanction weighing issue. The credibility and lack-of-outcome interest of these many letter writers (thus enjoying some reasonable and creditable professional objectivity) are very illuminating for those who would look to the whole picture with its varying hues and textures. They are appropriate to weigh on the sanction mitigation aspects of this particular case, as this Court is exclusively obligated to do.

In sum, removing this Judge on this record represents a disproportionate redress, when examined in the dispassionate reflection of the less-than-egregious level of cobbled misconduct. This is especially so in the balance wheel of these overwhelmingly favorable, on-the-firing-line source appraisals of the Judge's adjudicative work and good character.

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(Cite as: 92 N.Y.2d 141, 699 N.E.2d 872)

The genesis, breadth and nature of the exceedingly pervasive investigation of this Judge by the Commission staff are at least also contextually noteworthy. In my view, these features raise legitimate concerns and reflect an acutely unfair methodology with questionable motivation for the Commission's course of action. The diverse perceptions and evaluations, even among the Commission members, provide an eye opening window into understanding the skewed and distorted process that propelled itself ultimately into this divided Commission recommendation. Seven members voted to recommend the most severe sanction, and they were even divided as to some specifications; four *168 of the 11 Commissioners voted for censure only for differing reasons.

The dissenters at the Commission tendered an array of particulars for this Court to consider in mitigation of the sanction recommendation. They summarized their reasons for public censure as the sufficient level of redress, for example, as follows: (1) none of the acts committed resulted in a deprivation of liberty; (2) none of the acts was motivated by self-interest; (3) all of the improper dismissals involved misdemeanors; (4) on no occasion did prosecutors find Judge Duckman's knowingly erroneous dismissals of cases serious enough to warrant complaints to his judicial administrative superiors or even appeals by them as "aggrieved" litigant parties (though they instead chose to stockpile grievances in personal files for future retrieval to be used in collaboration with a drumbeat to remove a Judge for an unpopular decision); and (5) the instances of misconduct are few compared to the tens of thousands of cases Judge Duckman handled in his five-year career.

My judgment coincides with that of the dissenting Commissioners: the ultimate sanction here is disproportionate to the nature, number and gravity of the proven and acknowledged judicial misdeeds, misspeaks and mishaps. Under the applicable preponderance of the evidence standard, the case for the removal penalty falls short of the extreme egre-

giousness necessary. Since this Court is the only and exclusive guardian of a neutral and independent adjudication of these matters, it should reject the recommended sanction. Up to now I have concentrated essentially on the individual justice aspects of this Court's responsibility to accord to Judge Duckman all his rights of fair procedure and full review since we are his only court of review.

Now I turn to the twin tower of this Court's role-precedential responsibility. Removal here will have an inescapably adverse impact in that quintessential universe, as it affects the vital and vibrant independence of the judicial function and branch of government. The conduct of Judges and the culture of the operation and decision-making in trial courts will be necessarily and materially altered and affected by today's decision. Many of the effects will be hidden from view, buried in the hearts and psyches of Judges as they think, work and worry their way through a myriad of dockets and rulings, peering or at least seeming to peer over their shoulders at severely scrutinizing critics, disappointed lawyers, disgruntled litigants and the second-guessing Commission itself. Other consequences *169 include emboldening critics towards even more deconstructive attacks on Judges and their rulings at every turn, twitch and utterance. These combined visible and invisible consequences cannot help but threaten the independence and damage the integrity of the jewel of this State's judicial process-actually and perceptually. Fortunately, the judiciary and judicial process are strong and will survive, and so I agree with the Per Curiam opinion's observation that this case and circumstance do not create a state of peril. Yet, this does not bode well for the deliberative administration of justice.

Lastly, to the extent made relevant on the sanction determination, this Judge acknowledged on the record the inappropriateness of many of his actions (*compare*, Transcript, at 33, 53, 59, 66-68, 80, 81, 86, 97-98, *with* Per Curiam opn, at 155-156). In fact, in my view, the over-all tenor of the Judge's testimony and positions before the Hearing Officer,

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the Commission and this Court, was apologetic and contrite.

Moreover, this Court's guiding precepts do not demand that Judges who are fighting for their professional lives and reputations must throw in the towel as part of their "defense" (*compare, Matter of Kiley*, 74 NY2d 364, 371, *supra* [removal rejected and censure imposed] [adding this Court's wise caution against using "lack of candor" (something I would deem worse than asserted "lack of contrition") as an aggravating circumstance to pump up a more serious sanction]). Thus, Judges should not have to "kneel penitently in the snows of Canossa" before the Commission; Judge Duckman is not Emperor Henry IV and the Commission is not Pope Gregory VII.

It should suffice that accused Judges should tell the truth, be candid and acknowledge wrongdoing that they are truly guilty of and to the extent necessary and consistent with maintaining a defense against wrongful criticisms and charges. Indeed, even an appropriate measure of remorse and resolve to conform to acceptable judicial behavior and norms are prudent and useful. On the other hand, Judges surely are not obligated to plead guilty, no matter what is thrown at them, nor are they expected to rely merely on the "mercy" of the Commission.

I vote for censure only, because I am unconvinced and unable to pronounce that this Judge is incorrigibly and irredeemably unfit to serve as a Judge ever again.

Chief Judge Kaye and Judges Smith, Levine, Ciparick and Wesley concur in Per Curiam opinion; Judge Titone dissents and votes to reject the determined sanction in a separate *170 opinion; Judge Bellacosa dissents and votes to reject the determined sanction in another dissenting opinion. Determined sanction accepted, without costs, and Lorin M. Duckman is removed from his office of Judge of the Criminal Court of the City of New York, Kings County.*171

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MATTER OF DUCKMAN

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Matter of Sardino v State Commn. on Jud. Conduct
58 N.Y.2d 286, 461 N.Y.S.2d 229
N.Y. 1983.

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In the Matter of J. Richard Sardino, as Judge of the
City Court, Cit of Syracuse, Petitioner,
v.
State Commission on Judicial Conduct, Respondent.
Court of Appeals of New York

Argued February 16, 1983;
decided March 24, 1983

CITE TITLE AS: Matter of Sardino v State
Commn. on Jud. Conduct

SUMMARY.

Proceeding pursuant to article VI (§ 22, subds a, d) of the New York Constitution and section 44 of the Judiciary Law to review a determination of the respondent State Commission on Judicial Conduct, dated September 20, 1982, that petitioner should be removed from office.

In 1981, petitioner, a Judge of the Syracuse City Court, was charged by the State Commission on Judicial Conduct with numerous acts of misconduct committed by him in over 60 cases at which he presided since 1979. Most of the alleged misconduct occurred in open court during arraignments. Petitioner consistently failed to inform the accused of the right to counsel and failed to conduct even a minimal inquiry to determine whether they were entitled to assigned counsel, regularly abused his authority with respect to setting bail, summarily and with no express or apparent legal or rational justification ordered that defendants be held in custody for mental examinations, and assumed an adversarial role at arraignments, stating his views in sarcastic terms and displaying his animosity against

the accused by resort to name-calling and dehumanizing remarks.

The Court of Appeals, in a *Per Curiam* opinion, accepted the determined sanction of removal.

HEADNOTES

Judges--Removal from Office

(1) A determination of the State Commission on Judicial Conduct ordering removal of petitioner City Court Judge from office is accepted, where petitioner was guilty of consistent disregard of judicial obligations, including failure to inform the accused of the right to counsel, abuse of judicial power with respect to setting bail, and intemperate displays of evident bias in 62 cases over a two-year period. Nor did the commission err in refusing to allow petitioner to present evidence that his practices were consistent with other Judges of the City Court system, since such evidence would be irrelevant.

POINTS OF COUNSEL

James L. Sonneborn and Richard D. Grossman for petitioner.

I. Judge Sardino has been denied due process of law. *287 (Matter of Sowa v Looney, 23 NY2d 329; Hannah v Larche, 363 US 420; Matter of Groban, 352 US 330; People v Singer, 44 NY2d 241; People v Staley, 41 NY2d 789; People v Harbo, 103 Misc 2d 454; People v Taranovich, 37 NY2d 442; People v Bryant, 65 AD2d 333; United States v Lovasco, 431 US 783; People v Prosser, 309 NY 353.) II. Notice to defendants of rights and effectuation of those rights is a charge not properly before the commission. (People v Fink, 8 AD2d 859; People v Temple, 19 AD2d 919; People v McLaughlin, 291 NY 480.) III. The Judge did not ignore statements regarding indigency. (United States v Kaufman, 452 F2d 1202; United States v Ellsworth, 547 F2d 1096; United States v Schmitz, 525 F2d 793.) IV. The court can and must delegate certain of its responsibilities. V. The Judge did not have an

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obligation to ascertain indigency. VI. Judge Sardino did not instruct defendants likely to be indigent to retain private counsel. VII. Judge Sardino did not deny defendants the services of the Legal Aid Society and therefore fail to afford defendants their right to counsel. VIII. Judge Sardino did not refuse to assign Legal Aid attorneys when able to do so and when it was in the best interest of defendant. IX. Judge Sardino did not abuse the bail process. X. Judge Sardino did not fix bail in any case where he lacked legal authorization. XI. Judge Sardino did not hold defendants without bail in cases where the fixing of bail is required by law. XII. Judge Sardino did not arbitrarily and improperly hold defendants for mental examinations. XIII. Judge Sardino did not use the bail process in a punitive manner. XIV. Judge Sardino did not make improper inquiry of defendants nor illicit potentially incriminating statements. XV. Judge Sardino did not convey the impression that he believed defendants guilty. XVI. Judge Sardino acted properly. XVII. Judge Sardino did not improperly criticize other Judges nor fail to honor plea bargains negotiated by them. XVIII. Judge Sardino did not improperly fix bail or increase bail. XIX. Judge Sardino did not schedule and adjourn cases in a manner which was likely to deny defendants their rights. XX. Judge Sardino acted properly in *People v Roy*. XXI. There was no misconduct in *People v Cook*. *288

Gerald Stern and *Robert Straus* for respondent.

I. Petitioner's lack of fitness to serve as a Judge is amply demonstrated by his prosecution bias, intentional disregard of basic, fundamental rights, and related misconduct. (*Matter of Kuehnel v State Comm. on Judicial Conduct*, 49 NY2d 465.)II. Petitioner was not deprived of due process, and his numerous denials of misconduct are inconsistent with the record. (*Napolitano v Ward*, 457 F2d 279; *Keiser v Bell*, 332 F Supp 608; *Matter of Richter*, 42 NY2d [aa]; *Matter of Waltemade*, 37 NY2d [nn]; *Matter of Mertens*, 56 AD2d 456; *Matter of MacDowell*, 57 AD2d 169.)III. The conclusions of *amicus* appear to be based on personal views not contained in the record and consider only a small and technical part of petitioner's conduct; accord-

ingly, *amicus'* conclusions should be disregarded.

Joseph E. Fahey, Edward Z. Menkin, Emil M. Rossi, Jack Schultz and *Morrell Southwick* for Onondaga County Bar Association, *amicus curiae*.

I. Commission's conclusions in support of sanction of removal are not legally correct or substantiated by the record. (*People v Letterio*, 16 NY2d 307; *People ex rel. Krohn v Thomas*, 133 Misc 145; *People ex rel. Barna v Malcomb*, 85 AD2d 313.)II. The standard of proof used by the commission is inadequate in light of the penalty exacted. (*Matter of Steinberg*, 51 NY2d 74; *Addington v Texas*, 441 US 418; *Woodby v Immigration Serv.*, 385 US 276; *Chaunt v United States*, 364 US 350.)III. The sanction of removal is too severe and should be modified.

OPINION OF THE COURT

Per Curiam.

The State Commission on Judicial Conduct has determined that petitioner, a Judge of the Syracuse City Court, engaged in various acts of misconduct demonstrating a pattern of injudicious behavior rendering him unfit to remain in judicial office. Pursuant to the State Constitution, petitioner commenced this proceeding to review the commission's findings of fact, legal rulings and determination that he be removed from office (NY Const, art VI, §22, subs a, d; *Matter of Kuehnel v State Comm. on Judicial Conduct*, 49 NY2d 465).*289

In 1973 petitioner was elected as a Judge of the Syracuse City Court. In 1981 the Commission on Judicial Conduct filed a complaint charging him with numerous acts of misconduct committed by him in over 60 cases at which he presided since 1979. The essence of the complaint is that the petitioner's actions and statements in those cases revealed or created the impression that he did not respect the rights of defendants and lacked the temperament and impartiality required of a Judge.

The commission sustained over 20 charges and numerous specifications. The evidence in the record is voluminous and for the purpose of this appeal need

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not be discussed in detail. A summary of the salient points should suffice to illustrate the propriety of the commission's determination.

Most of the petitioner's misconduct occurred in open court during arraignments. The official records of these proceedings show that petitioner consistently failed (in 62 cases) to inform the accused of the right to counsel and failed to conduct even a minimal inquiry to determine whether they were entitled to assigned counsel. Indeed, even in cases where the accused persons themselves stated that they were unemployed, indigent, or unable to afford an attorney, petitioner did nothing to assist them in obtaining legal assistance. The petitioner admitted to the commission that he deliberately adopted these practices, and in doing so knowingly disregarded his statutory obligations (CPL 170.10, 180.10) because he considered it "counter productive" to read defendants their rights at arraignment.

These court records also demonstrated that the petitioner regularly abused his authority with respect to setting bail. In most of the cases under consideration he arbitrarily required defendants to post bail without inquiry or reference to the statutory standards (CPL 510.30). His conduct and statements at the time show that he was acting punitively with little or no interest in the only matter of legitimate concern, namely, whether any bail or the amount fixed was necessary to insure the defendant's future appearances in court (CPL 510.30, subd 2, par [a]). He often ordered defendants to be held without bail for no *290 apparent reason, even in cases where bail was required as a matter of law or the offense charged was of such a minor nature that the defendant could not ordinarily be held in custody to assure his appearance in court (see, e.g., CPL 150.75; Penal Law, § 221.05). On several occasions where defendants appeared at arraignment without counsel petitioner summarily and with no express or apparent legal or rational justification ordered that they be held in custody for "mental examinations" (CPL art 730).

The record of the court proceedings also shows that

petitioner often assumed an adversarial role at arraignments by questioning defendants about the crime charged, occasionally eliciting incriminating statements and, in other cases, expressing disbelief when the defendants, their attorneys, or family members, maintained their innocence. On these occasions, in addition to treating the accusation as proved, the petitioner stated his views in sarcastic terms and displayed his animosity against the accused by resort to name-calling and dehumanizing remarks. For instance, in open court he commonly referred to those accused as "creatures", called one defendant a "maniac", and said that another should be "exterminated". He informed an attorney representing a defendant charged with traffic violations that it was "[t]oo bad he [the defendant] wasn't destroyed and the car was still here. That would be beneficial to the community". In another case he stated that if he had found his daughter with the defendant "that would be another case of homicide".

The petitioner concedes that these remarks were "excessive" but denies that he felt any bias against the defendants or that his actions at the arraignments were actually motivated by animosity. He also contends that his fitness as a Judge cannot be determined on the existing record because it does not take into account his performance in the more than 5,000 cases at which he presided over the years.

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*291 on legal matters involving their lives, liberty and property (see, e.g., Matter of Steinberg, 51 NY2d 74). If, as petitioner contends, he did not actually harbor any bias his course of conduct and concededly excessive statements could only create the impression in the mind of the public that he was predisposed against those defendants who appeared before him if not defendants generally.

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Although the petitioner may not have been guilty of similar misconduct in all or most of the cases at which he presided, consistent disregard of judicial obligations, abuse of judicial power and intemperate displays of evident bias in 62 cases over a two-year period can hardly be viewed as an isolated incident. At best, the petitioner's argument that his entire judicial career be considered, would establish that his behavior was erratic, which itself is inconsistent with a Judge's role.

The petitioner also contends that the commission erred in refusing to allow him to present evidence that his practices were consistent with the general practice of other Judges of the City Court system. Although we doubt that many Judges follow the practices of this petitioner we agree with the commission that such evidence would be irrelevant.

Each Judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a Judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense. Indeed one of the obvious reasons for establishing a permanent Commission on Judicial Conduct is to elevate judicial performance by insuring that the practices in the various courts comply with the high standards required of judicial officers.

In sum the evidence in the record amply supports the commission's determination that "The totality of [petitioner's] conduct shows a shocking disregard for due process of law. [He] has grossly abused judicial power and process, routinely denied defendants their rights, ignored the mandates of law, disregarded the jurisdiction of other courts, disparaged attorneys, demeaned defendants and otherwise acted in a manner bringing disrepute to the courts and the *292 judiciary. [He] has so distorted his role as a judge as to render him unfit to remain in judicial office."

Accordingly, the determined sanction of removal should be accepted, without costs.

Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg, Meyer and Simons concur in *Per Curiam* opinion.

Determined sanction accepted, without costs, and J. Richard Sardino removed from the office of Judge of the City Court, City of Syracuse. *293

Copr. (c) 2011, Secretary of State, State of New York N.Y. 1983.

In the Matter of J. Richard Sardino, as Judge of the City Court, Cit of Syracuse, Petitioner, v. State Commission on Judicial Conduct, Respondent.

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(Cite as: 47 N.Y.2d 462, 392 N.E.2d 552)

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Matter of Spector v State Commn. on Jud. Conduct
47 N.Y.2d 462, 418 N.Y.S.2d 565
N.Y. 1979.

47 N.Y.2d 462, 392 N.E.2d 552, 418 N.Y.S.2d 565

In the Matter of Morris E. Spector, a Justice of the
Supreme Court of the State of New York, Petition-
er,
v.
State Commission on Judicial Conduct, Respond-
ent.
Court of Appeals of New York

Argued March 29, 1979;
decided June 5, 1979

CITE TITLE AS: Matter of Spector v State
Commn. on Jud. Conduct

SUMMARY

Proceeding pursuant to article VI (§ 22, subd a) of the New York Constitution and subdivision 7 of section 44 of the Judiciary Law to review a determination of the respondent State Commission on Judicial Conduct, dated December 14, 1978, which concluded that petitioner should be admonished.

In June, 1978, petitioner, a Justice of the Supreme Court, New York County, was served by the respondent commission with a formal complaint alleging four charges of misconduct, based upon the appearance of impropriety arising out of petitioner's appointment of certain attorneys as guardians ad litem, receivers, referees and in one instance the committee of an incompetent in judicial proceedings pending before him. After hearings, the Referee appointed to hear and report to the commission found that two of the four charges had not been sustained. As to the other two charges, the Referee concluded that, while there was no basis for other criticism of petitioner's conduct, two of the appointments of the son of Mr. Justice Sidney Fine, and

four of the appointments of the son of Mr. Justice George Postel, were not "free from the appearance of impropriety". The Referee did not, however, find any actual impropriety. The commission found that in the period from March, 1968 to November, 1974 petitioner appointed the son of Justice Fine on 2 occasions while Justice Fine appointed petitioner's son on 8 occasions and appointed the son of Justice Postel on 10 occasions while Justice Postel appointed petitioner's son on 5 occasions. The commission further found that at the time petitioner was making these appointments he was aware of the appointments of his son being made by the other Judges and concluded that, although there was no "quid pro quo" understanding, the cross appointments gave the "appearance of impropriety" in violation of Canon 4 of the Canons of Judicial Ethics and the applicable portion of section 33 of the Rules Governing Judicial Conduct (22 NYCRR Part 33). A majority of the members of the commission determined that the appropriate sanction was that petitioner be admonished.

The Court of Appeals determined, in a *Per Curiam* opinion, that under the circumstances the sanction imposed by the commission should be accepted.

HEADNOTES

Judges--Disciplinary Proceedings--Nepotism

(1) Nepotism in the judiciary is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing; even if it cannot be said that there is proof of the fact of disguised nepotism, an appearance of such impropriety is no less to be condemned than is the impropriety itself; the appointment of his son by any Judge would be both unthinkable and intolerable whatever might be the son's character and fitness or his father's peculiar qualification in the circumstances to assess such character and fitness, and, as such, an arrangement for cross appoint-

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ments would not only offend the antinepotism principle, but it would go a step further, seeking to accomplish the objectives of nepotism while obscuring the fact thereof; accordingly, where petitioner Justice was charged by the State Commission on Judicial Conduct with misconduct arising out of his appointment of certain attorneys as guardians ad litem, receivers, referees and in one instance the committee of an incompetent in judicial proceedings pending before him, such appointments being of the sons of two other Judges during periods when such other Judges were making similar appointments of petitioner's son, it was appropriate that petitioner be admonished for the appearances of impropriety.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

NY Const Art 6 §22; Judiciary L Art 2-A 32 NY Jur, Judges §§ 60.5 et seq.

1 Carm-Wait 2d §§ 3:35.5 et seq.

46 Am Jur 2d, Judges § 50

POINTS OF COUNSEL

Irving Anolik for petitioner. I. This court ought to reject the determinations of the majority opinion of the Commission on Judicial Conduct since there is insufficient evidence justifying the finding of an "appearance of impropriety". The criteria of the commission, which apparently precludes the appointment of a relative of a sitting Judge by another sitting Judge despite overwhelming ability and fitness of the appointee, is arbitrary, capricious, and without any rational basis. (*Matter of Pell v Board of Educ.*, 34 NY2d 222; *Matter of Colton v Berman*, 21 NY2d 322; *United States v Nix*, 501 F2d 516; *Landry v Daley*, 280 F Supp 968.)II. The hearing before the Commission on Judicial Conduct was tainted by extraneous, inflammatory remarks by the administrator, adverting to *464 matters not within the purview of the charges. Thus, a fair hearing was denied. Moreover, the timing of the charges, com-

ing on the eve of mandatory retirement, was also unfair and perhaps unconstitutional (Fourteenth Amendment).(*Matter of Ruffalo*, 390 US 544, 391 US 961; *Erdmann v Stevens*, 458 F2d 1205, 409 US 889; *Goss v Lopez*, 419 US 565; *Morrissey v Brewer*, 408 US 471; *Bell v Burson*, 402 US 535; *Goldberg v Kelly*, 397 US 254; *Willner v Committee on Character*, 373 US 96.)III. Since the proceedings herein were started at a point in time where it was impossible for petitioner to receive 30 days' time within which to file an application to this court to contest the determination against him, coupled with the fact that the charges were brought almost at the eve of Justice Spector's mandatory retirement, the complaint should be dismissed for procedural violations of due process. (*Ker v California*, 374 US 23.)

Gerald Stern for respondent. I. An appearance of impropriety is created when a Judge appoints the sons of other Judges who appoint his son; such an appearance of impropriety is compounded when (a) the appointing Judge knows of the other appointments and (b) friendship with the other Judges is a motivating factor. (*Matter of Suglia*, 36 AD2d 326; *United States v Paramount Pictures*, 334 US 131; *Milgram v Loew's, Inc.*, 94 F Supp 416; *People v Connolly*, 253 NY 330; *Sarisohn v Appellate Div.*, 2d Dept., *Supreme Ct. of State of N. Y.*, 265 F Supp 455; *Matter of Pfingst*, 33 NY2d [a]; *Bartlett v Enea*, 45 AD2d 471; *Bartlett v Flynn*, 50 AD2d 401; *Napolitano v Ward*, 317 F Supp 79, 457 F2d 279, 409 US 1037.)II. Neither the conduct of the administrator nor the timing of the charges resulted in a denial of a fair hearing. III. The imposition of a determination during the last month of a Judge's term does not violate procedural due process or fundamental fairness, and is consistent in every respect with the letter and spirit of the applicable law. IV. The commission's combination of investigative and adjudicative functions is valid under the United States Constitution. (*Withrow v Larkin*, 421 US 35; *Halleck v Berliner*, 427 F Supp 1225; *Hortonville Dist. v Hortonville Educ. Assn.*, 426 US 482; *Trade Comm. v Cement Inst.*, 333 US 683; *Friedman v State of New York*, 24 NY2d 528, 397 US 317; *Matter of Sarisohn*, 21 NY2d 36.)

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(Cite as: 47 N.Y.2d 462, 392 N.E.2d 552)

OPINION OF THE COURT

Per Curiam.

It is appropriate in the circumstances disclosed in this *465 record that petitioner be admonished for the appearances of impropriety stemming from appointments made by him of the sons of two other Judges during periods when such other Judges were making appointments of his son.

In June, 1978 a formal complaint was served on petitioner by the Commission on Judicial Conduct alleging four charges of misconduct arising out of petitioner's appointment of attorneys as guardians ad litem, receivers, referees and in one instance the committee of an incompetent in judicial proceedings pending before him. After hearings, the Referee appointed to hear and report to the commission found that two of the four charges had not been sustained. As to the other two charges, the Referee concluded that, while there was no basis for other criticism of petitioner's conduct, two of the appointments of Burton Fine, the son of Mr. Justice Sidney Fine, and four of the appointments of Sanford Postel, the son of Mr. Justice George Postel, were not "free from the appearance of impropriety". The Referee did not, however, find any *actual* impropriety.

The commission found that in the period from March, 1968 to November, 1974 petitioner appointed the son of Justice Fine on 2 occasions while Justice Fine appointed petitioner's son on 8 occasions and appointed the son of Justice Postel on 10 occasions while Justice Postel appointed petitioner's son on 5 occasions. The commission further found that at the time petitioner was making these appointments he was aware of the appointments of his son being made by the other Judges and concluded that, although there was no "quid pro quo" understanding, the cross appointments gave the "appearance of impropriety" in violation of Canon 4 of the Canons of Judicial Ethics and the applicable portion of section 33 of the Rules Governing Judicial Conduct. A majority of the members of the commission determined that the appropriate sanc-

tion was that petitioner be admonished. Three members of the commission, however, while adopting all the factual findings made by the Referee, concluded that such findings did not warrant the imposition of discipline under subdivision 7 of section 44 of the Judiciary Law.

Preliminary, we note that, undoubtedly because we are the only court vested with power to review the commission's determination, the scope of our review is unusually broad, encompassing as it does authority not only to "review the *466 commission's findings of fact and conclusions of law", but also to "impose a less or more severe sanction *** than the one determined by the commission, or [to] impose no sanction". (NY Const, art VI, §22, subds a, d; Judiciary Law, § 44, subd 9.)^{FN1} Thus, the issues before us include the correctness of the commission's findings of fact and conclusions of law, as well as the appropriateness of the commission's determination that petitioner be admonished, the lowest in the scale of sanctions prescribed for judicial misconduct. As a result of our review we accept the determination made by the commission.

FN1 We observe that the commission did not discretely identify its findings of fact and conclusions of law as is contemplated by the statute (Judiciary Law, § 44, subd 7). Instead there is but a blanket characterization of the prose paragraphs of the determination--"The foregoing constitutes the findings of fact and conclusions of law required by Judiciary Law, § 44, subdivision 7." Additionally, the cryptic statement, "Insofar as they are not inconsistent with the foregoing, the Commission accepts the findings of fact set forth in the Referee's report"; although suggesting departure to some extent from the findings made by the Referee, is ambiguous and fails to reveal in what respect the commission differed with the Referee. In another case the failure of the commission to follow the procedure contemplated by the

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statute might significantly impair our review of the commission's action.

We also take note that the documents by which petitioner was notified of the determination of the commission and his request for review by the Court of Appeals are a part of the record in this proceeding.

It serves first to identify and to consider the nature of the judicial conduct which is the subject of this disciplinary proceeding. Our analysis recognizes two levels of consideration. The progression may be simply stated. First, nepotism is to be condemned, and disguised nepotism imports an additional component of evil because, implicitly conceding that evident nepotism would be unacceptable, the actor seeks to conceal what he is really accomplishing. Second, and this is peculiar to the judiciary, even if it cannot be said that there is proof of the fact of disguised nepotism, an appearance of such impropriety is no less to be condemned than is the impropriety itself.

Nepotism^{FN2} in the judiciary was outrightly condemned when *467 the first Canons of Judicial Ethics were adopted by the American Bar Association in 1924.^{FN3} Canon 12 as then adopted provided in pertinent part:

FN2 Nepotism was a custom in the Han dynasty (4 Encyclopedia Britannica, 310b) and often respected in the philosophies of the Middle East as reflecting a praiseworthy sense of family loyalty (16 Collier's Encyclopedia, 162 d). In the western world, however, where it came to prominence as a practice of papal authority commencing with Pope Adrian I in the eighth century and reached its zenith during the Renaissance, it was repeatedly condemned (e.g., Dante, *Inferno*, 19.31, 19.52-81, 27.85-129; Petrarch, *Epistulae sine nomine* 11, ed P Piur, *Petrarcas Buch ohne Namen und die päpstliche Kurie* [Halle, 1925]; G. H. *Hist Cardinals II*, 1.116 [1670]--"Ministers that buy the fa-

vour of the Nepotisme, do revive *** a new Neronisme of Tyranny"). The church itself ultimately took steps to impede it through papal bull (Pope Pius V *Admonet nos* [1567] and constitution (*Romanum decet pontificem* [1692])). More generally, it has been regarded as a form of misuse of authority, associated with corruption (11 *International Encyclopedia of Social Sciences*, 275).

FN3 (Forty-Seventh Annual Meeting of the American Bar Association, Philadelphia, Pennsylvania, July 9, 1924 [49 ABA Reports 764].)

"Appointees of the Judiciary and Their Compensation.

"Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments." This unequivocal disapproval has been carried forward, undiminished, into the present Code of Judicial Conduct. Canon 3 (subd B, par [4]) now provides: "A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered."

A similar and more explicit injunction is now to be found in section 33.3 (subd [b], par [4]) of the Rules Governing Judicial Conduct (22 NYCRR 33.3 [b] [4], filed Jan. 21, 1974, effective Jan. 1, 1974): "A judge shall not make unnecessary appointments. He shall exercise his power of appointment only on the basis of merit, avoiding favorit-

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ism. A judge shall not appoint or vote for the appointment of any person as a member of his staff or that of the court of which he 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. He shall not approve compensation of appointees beyond the fair value of services rendered."

Concededly this case does not present an instance of open nepotism. The appointment of his son by any Judge would be both unthinkable and intolerable whatever might be the son's *468 character and fitness or his father's peculiar qualification in the circumstances to assess such character and fitness. The enlarged evil in this instance is that an arrangement for cross appointments would not only offend the antinepotism principle; it would go a step further, seeking to accomplish the objectives of nepotism while obscuring the fact thereof.

We address then the circumstance that both the Referee and the commission have concluded that in this instance there was in fact no *quid pro quo* impropriety in the appointments made by petitioner. Both have also determined, however--and this, of course, is the predicate for the disciplinary action taken--that petitioner's participation in the pattern of cross appointments gave an appearance of impropriety, in effect permitting the inference that each of the Judges involved was by this means securing appointments for his own son. Additionally, the commission observed that petitioner might be perceived as having resorted to this device to avoid a charge of nepotism. Here, too, the articulation of the canons has been clear and undeviating. When first adopted in 1924 the Canons of Judicial Ethics likewise proscribed the appearance of impropriety. Canon 4 provided: "A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench

and in the performance of judicial duties, but also in his everyday life should be beyond reproach." Canon 2 of the present Code of Judicial Conduct states the continuing principle succinctly: "A judge should avoid impropriety and the appearance of impropriety in all his activities." Similarly, section 33.2 of the Rules Governing Judicial Conduct must be read to condemn the appearance as well as the fact of impropriety (22 NYCRR 33.2).

Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct which is all too often popularly attributed to the judiciary. To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a very subjective and often faulty public perception would be to fail to comprehend the principle. The community, and surely the Judges themselves, are entitled to insist on a more demanding standard. As Chief Judge Cardozo wrote in *Meinhard v Salmon* (249 NY 458, 464): "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, *469 is then the standard of behavior". And there is no higher order of fiduciary responsibility than that assumed by a Judge. It would ill befit the courts and the members of the judiciary to suggest that Judges are to be measured against no higher norm of conduct than may at times and in some places unhappily have been perceived as reflecting the mores of a judicial marketplace. Petitioner in this case makes no plea to be measured by any such coarse or mean yardstick. To suggest, as does the dissenter, that there has been a *modus operandi* which has condoned the making of appointments subject to the personal preferences of the appointing Judge (pp 470-471) affords no proper ground on which to excuse the present conduct. To the extent that such a practice may have existed in certain areas, it has been aberrant; certainly it has had the support and approval only of its practitioners.

In the present case the fact that cross appointments

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were knowingly made by petitioner during the period in question is not disputed. Notwithstanding the absence of proof of any actual or intended impropriety there was thereby inescapably created a circumstantial appearance of impropriety.

While petitioner's personal relationship with the appointees may indeed have enabled him better to evaluate their qualifications, we do not subscribe to the view expressed by the dissenting members of the commission that, if the appointee is otherwise fully qualified to receive the appointment, his filial relationship with another member of the judiciary can be ignored. It may be that, in special circumstances where the appointee is uniquely qualified and the appointment is openly made with the consent of the parties or such consent is withheld for mere tactical partisan advantage or other insufficient reason, an otherwise disabling relationship between the appointing Judge and the appointee may not preclude appointment. But this is not that case. Nor do we accept the dissenters' conclusion that the cross appointments here may be overlooked as *de minimis* in view of the "thousands of appointments made by the petitioner during his judicial service" and his extended record of public service. Finally, we perceive no proper basis for giving prospective effect only to condemnation of the appearance of impropriety created by cross appointments as was further suggested by one of the dissenting members of the commission.

It remains to make one additional observation. We think it entirely improper on the part of the administrator, on argument *470 of the motions addressed to the Referee's report in connection with the commission's consideration of the sanction to be imposed, to have introduced evidence of additional, alleged misconduct on the part of petitioner. The subject matter of these supplemental allegations had not been included in the charges or raised before the Referee. It is irrelevant that the administrator claims to have given petitioner's counsel advance notice of his intention to refer to this impertinent material. Unproved charges, for which there

was no basis in the record, had no place in the commission's consideration as to the sanction appropriately to be imposed on the predicate of its findings of fact and conclusions of law drawn from the proof in the record. In all the circumstances we are satisfied, however, that the erroneous references to this extraneous material did not affect the determination made by the commission.

Accordingly, we accept the determination of the commission that petitioner be admonished.

Fuchsberg, J.
(Dissenting).

As were three of the members of the commission, I am of the opinion that the imposition of discipline, even the one lowest in the scale of sanctions, is not warranted in the circumstances of this case.

I accept the proposition that a Judge's appointment of a person who enjoys a filial relationship with a second Judge, particularly where the two Judges are members of the same court,^{FN*} may be perceived as creating an appearance of impropriety. Nor do I doubt that the same proposition may apply when, though innocently intended, appointments made by both Judges have produced a crossover situation. And, of course, I approve the commission's enforcement of such a standard where appropriate.

FN* The Judicial Conference indicates there are well over 3,500 Judges in New York State ranging all the way from Judge of the Court of Appeals to Justice of a Town or Village Court. Many of these, in turn, serve in separate county or city subdivisions of our court system often hundreds of miles from each other. I do not deem it necessary, for the purposes of this case, to speculate as to whether the rule pronounced by the court today is to prohibit a judicial appointment of anyone with a filial relation to any other Judge in the State whatsoever or only to those within certain geographical, jurisdictional or administrative limits. For instance, must a Supreme

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Court Justice in Suffolk County refuse to appoint a lawyer because one of the latter's parents is a local Justice in a town in Erie County? (See 22d Annual Report of the Administrative Board of the Judicial Conference.)

In my view it is not appropriate to do so here. The system governing the selection of referees, guardians ad litem, and *471 other *ad hoc* functionaries essential to the conduct of court business for a long time was one subject to the personal preferences of the appointing Judges. There was no secret about this *modus operandi*. No canon or rule specifically assigned any impropriety or appearance of impropriety to it. To apply a current perception of impropriety retrospectively as the basis for the finding that acts that were once regarded as proper when performed are now to be classified as improper is fundamentally wrong. To do so exacts from the petitioner expiation for the legal community's failure to have articulated and imposed a clearer standard in the past.

Before amplifying my views, a few words about the petitioner are in order. Justice Spector reached the extended retirement age of 76 in 1978. He had then completed 38 years of continuous and unblemished public service, the last 22 as a member of the judiciary with the final 6 the result of three two-year appointments, the maximum granted to Judges where there is a felt need for their continued services after they have reached the regular retirement age of 70. Even when, in mid-December, on the very eve of his departure from office, the commission issued its public recommendation that he be admonished, it raised no question concerning the integrity or competence with which he functioned in his public career.

The operative facts pertaining to the commission's charge are simple. They were fully developed and ultimately presented to us in extensive hearings conducted by the commission and its able and conscientious counsel. And, since Justice Spector gave the inquiry his full co-operation, they are not in dis-

pute. They involve the inclusion of two lawyer-sons of fellow Justices among the thousands of appointments the Justice routinely was called upon to make in the course of facilitating the processing of cases. One of the appointees was chosen on only two occasions over a three and a half year period almost a decade ago. The other averaged about two appointments a year over a five and a half year span. None of these assignments was of major import. All were made publicly. Each fulfilled his responsibilities completely. It is not suggested that any conflict of interest was involved in any way. The appointees received only the modest fees customarily allowed in such cases; in some instances, no charge was made at all.

During the years in which the two appointees undertook *472 these assignments, the petitioner's son, also a lawyer and indisputably qualified, was called upon to discharge similar tasks for the other Justices on a very limited number of occasions. The appointments did not correspond with those made by Justice Spector, nor was there any evidence that there had been either a matching of fees or any attempt at reciprocation. As a result, there is no contention that one was a *quid pro quo* for the other. To the contrary, petitioner testified without any contradiction that his long personal and professional acquaintance with the appointees and their families provided him with an unusually reliable basis for personally judging their suitability for the appointments.

Nevertheless, the commission concluded that the choice of the two appointees runs counter to a broadly worded judicial canon adopted administratively in New York at about the end of the period during which these appointments had issued. The canon enjoins Judges to avoid the appearance of impropriety. However, the commission points to no canon of ethics or other rule of judicial conduct which up to now interdicted the appointment of relatives of other sitting Judges, none automatically disqualifying such individuals from being considered for appointments, and none advising that

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such selections would give rise to an appearance of impropriety. Rather, at the argument of this appeal, the commission's counsel candidly conceded there were none.

The "appearance of impropriety" concept is beset by legal and moral complexity. The concern is with what can be a very subjective and often faulty public perception. It is significant that the official reporter's notes, after characterizing the canon on appearance of impropriety as virtually "hortatory", illustrates its commentary solely with a discussion of problems involving "influence peddling", obviously a form of conduct in which "appearance" is often an integral part of the substantive evil; under *ejusdem generis* principles, this is hardly an indication that the section is to be freely applied, and even less that it is to be extrapolated to circumstances akin to those present here (see Thode, Reporter's Notes to Code of Judicial Conduct, p 49). It would appear to follow that, absent an accompanying substantive breach, a mere appearance of impropriety should not automatically merit condemnation.

We need look no further than to two of the qualities we demand of our Judges-- courage and independence--to see how ready jurists must be, if the need arises, to brook "public *473 clamor, or fear of criticism" (Code of Judicial Conduct, Canon 3, subd A, par [1]). Yet, the appearance provision's general "caution against unidentified wrongs" (McKay, *The Judiciary and Nonjudicial Activities*, 35 Law & Contemp Prob 9, 14) has led respected authority to conclude that it is so "troublesomely vague as a guide to conduct" that "it comes close to being an appeal to conformity for conformity's sake" (Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp Prob 43, 59-60). Since "appearances" are matters of perception rather than fact it is not difficult to appreciate the fear so expressed and the need to invoke the canon with great restraint.

Indeed, lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process im-

plications. Leaving the rules expected to be observed unidentified is bound to burden our Judges with uncertainty as to whether what is acceptable today will be deemed aberrant tomorrow. Putting men and women who have to judge the rights of others under such undeserved stress tends to undermine their own sense of worth. Our legal system should treat those who preside over it with more regard (Fuller, *The Morality of Law* [rev ed, 1969], 26-29, 38-39).

The drawbacks inherent in the uncharted vagueness of the "appearance" canon were also remarked upon by former United States Supreme Court Justice Arthur Goldberg, who, after characterizing the canon as "unbelievably ambiguous", warned that "to avoid the appearance of impropriety, it helps both the public and the judge to know the guidelines". Echoing the sentiments of other leaders of the American legal community, including Professor Philip Kurland, and the late United States Supreme Court Justice Tom Clark, Justice Goldberg went on to say, "Our Judges are men, not gods, and like all of us, they can benefit greatly from having some ground rules against which to measure their conduct *** particularly *** in this area of avoiding even the appearance of impropriety" (*Nonjudicial Activities of Supreme Court Justices: Hearings on S 1097 and S 2109 Before the Subcommittee on Separation of Powers of the Senate Comm on the Judiciary, 91st Cong, 1st Sess [1969], pp 159, 165, 175, 185*).

Inflexible enforcement of a vague standard of conduct brings untoward results. Regard the nature of the criticized appointments which were the subject matter of this proceeding. They *474 did not go to the quality of justice the petitioner was dispensing. They were not part of the Judge's decisional function at all. Rather, they were made incidental to an administrative chore that could as well, if court organization had provided for it, have been handled by a nonjudicial functionary operating on a management level pursuant to well-defined procedures. But that was not the pattern of court administration

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which prevailed throughout the State when the petitioner first came on the Bench, nor when he made the appointments in question, nor, for that matter, when he retired.

Furthermore, it is agreed that here there was no finding of nepotism, overt or concealed. Nor, tracking the canons, code and rules set out in the majority opinion, is there any question of the "probity and impartiality" or "character and fitness" of the Justice's appointees. It is also not claimed that he permitted "his appointments to be controlled by others than himself", that they were "unnecessary", that he approved compensation "beyond the fair value of services rendered" or that he had "recommended" the appointment of his son "to another judge serving in the same court". I respectfully suggest, therefore, that the history of nepotism from the Han dynasty to the present, while interesting and useful as background, does not go to the heart of the issue in this case. And the language quoted by the majority from *Meinhard v Salmon* is hardly apropos; the words there were spoken in a context in which, to paraphrase Cardozo rhetoric, a private interest actually collided with that of a fiduciary and not one in which it only appeared or was imagined to have done so (Cardozo, *The Growth of the Law*, Yale U Press, 96).

True, "new times and new manners may call for new standards and new rules" (Cardozo, *The Nature of the Judicial Process* [1921 ed], p 88), but with their adoption should come fair notice and an opportunity to accommodate to the change, not precipitous implementation of a heretofore uncharted standard in an unexpected context. So, when the seminal model for our State's Code of Judicial Conduct was first approved by the American Bar Association in 1972, it was thought wise and fair to create a special committee to promote awareness of its existence (Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 Utah L Rev 410, 417-418; see, also, Bray, *The Problems of Sanctions*, U of Chi Law School Conference on Judicial Ethics, Conference Series, No. 19 [1965], p. 42). In con-

trast, to apply standards of today to *475 judge the conduct of yesterday is of a kind with ex post facto statutes (see, generally, *Marks v United States*, 430 US 188; *Bouie v City of Columbia*, 378 US 347).

Understandably, no Judge can respond with less than pride to the flattering proposition that more may be expected of Judges than of ordinary mortals. It would be regrettable in the extreme, however, if we were driven to prove this by stripping members of our judiciary of the right they share with all people to be judged fairly. And it would be unfortunate to mistake an unwillingness to accede to a denial of this right as a tolerance of judicial misconduct whenever it truly exists.

Finally, it seems to me that appearance alone, in the main because it is so vague and unmapped, should not be permitted to reach out in disregard of all other considerations. Appearance, of course, is of moment only as suspicion attaches to an act. We like to think that no longer is condemnation to be meted out on mere suspicion. But "When we deal with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct" (*International Electronics Corp. v Flanzer*, 527 F2d 1288, 1294 [2d Cir]).

For all these reasons, I would vote no sanction.

Chief Judge Cooke and Judges Jasen, Gabrielli, Jones and Wachtler concur in *Per Curiam* opinion; Judge Fuchsberg dissents and votes to reject the determined sanction and impose no sanction, in a separate opinion; Judge Meyer taking no part.

Determined sanction accepted, without costs. *476

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In the Matter of Robert M. Morgenthau, District Attorney, New York County, Respondent. New York State Commission on Judicial Conduct, Respondent, and Honorable W., Appellant. Robert H. Tembeckjian, as Administrator of the New York State Commission on Judicial Conduct, Intervenor-Respondent.

Supreme Court, Appellate Division, First Department, New York

May 4, 2010

CITE TITLE AS: Matter of Morgenthau

HEADNOTE

Judges

Commission on Judicial Conduct
Subpoena Power—Quashing of Subpoena

Court properly granted petitioner District Attorney's (DA) motion to quash administrative subpoena issued to him by Commission on Judicial Conduct and relating to Commission's investigation of judicial misconduct by certain Justice; respondent Justice failed to show that DA's testimony would be relevant or material to subject matter of charges, Justice's alleged misconduct; DA's involvement was limited to permitting Administrator of Commission to conduct interviews with certain members of his staff who might have had information pertinent to investigation; DA was neither complainant nor source of information leading to investigation; at best, that DA allowed Commission to approach possible witnesses on his staff and then kept himself informed as to developments in investigation; there was no indication that DA witnessed any alleged misconduct nor had any factual inform-

ation other than that provided by his staff.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Kevin J. Plunkett of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellesse of counsel), for District Attorney, respondent.

Edward Lindner, New York, for Robert H. Tembeckjian respondent.

Order Supreme Court, New York County (Nicholas Figueroa, J.), entered on or about October 10, 2008, which, inter alia, granted the petitioner's motion to quash the administrative subpoena signed by Referee James C. Moore, unanimously affirmed, without costs.

This action arises out of an order issued pursuant CPLR 2304 quashing the administrative subpoena issued by the New York State Commission on Judicial Conduct to then New York County District Attorney, Robert M. Morgenthau.

The undisputed facts are that on September 30, 2005, the Commission, on its own motion and own complaint pursuant to Judiciary Law § 44 (2), initiated an investigation of Justice W. and notified him of the allegations by a letter dated December 6, 2005. The complaint alleged certain improprieties with regard to various statements made by Justice W. outside of the courtroom. Between October 20, 2006 and September 19, 2007, the Commission authorized investigations of four additional complaints against Justice W., one of which was the result of a letter submitted by then Chief Assistant District Attorney, James M. Kindler, and three which arose from the already existing investigation. According to intervenor-respondent Robert H. Tembeckjian, Administrator of the Commission and prosecutor of the case, "[a]ll of the new complaints alleged misconduct by [Justice W.] toward the Office of the District Attorney or individual Assistant **2 District Attorneys or in cases being prosecuted

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by the District Attorney's Office."

The investigations led to three formal written complaints, pursuant to Judiciary Law § 44 (4), which consisted of five charges: (1) that Justice W. made inappropriate personal and political comments from the bench; (2) that Justice W. failed to *417 report misconduct of another judge; (3) that Justice W. improperly interfered with an application for a judicial appointment; (4) that Justice W. improperly failed to recuse himself from cases where his impartiality may be questioned; and (5) that Justice W. improperly accepted a jury verdict in the prosecutor's absence. In answers to the complaints, Justice W. asserted that Tembeckjian's conduct in proceeding against him was "politically motivated."

The Commission appointed James C. Moore as a Referee to conduct a hearing on the complaints. On or about January 28, 2008, Justice W.'s counsel presented a prospective witness list which included, among others, Tembeckjian himself, Tembeckjian's wife, the District Attorney and Kindler. By letter dated February 12, 2008, Tembeckjian informed the Referee that he objected to these witnesses, and asked the Referee to deny the subpoenas or require Justice W. to make an offer of proof. A hearing was held on February 14, 2008. As to the District Attorney's testimony, Justice W. argued that the District Attorney had personally caused the charges to be brought against him for "purely political reasons" because he had supported former Justice Leslie Crocker Snyder's candidacy for New York County District Attorney. The Referee issued a subpoena for Kindler, and following Kindler's testimony issued a subpoena for the District Attorney.

By letter dated July 2, 2008, Chief Assistant District Attorney Daniel J. Castleman asked the Referee to withdraw the subpoena, pursuant to CPLR 2304. He noted that the District Attorney was not a witness to any of the alleged misconduct, and had no relevant testimony to offer. The Referee declined to withdraw the subpoena.

On or about July 15, 2008, the District Attorney

commenced the instant proceeding pursuant to CPLR 2304, applicable to petitions for quashing a subpoena where a referee rather than a judge signs the subpoena. He submitted a verified petition in which he asserted that he did not refer the investigation of Justice W. to the Commission; that he was not the complainant in the case; that he had never appeared before Justice W., and that he had "no first-hand knowledge of any of the matters that appear to be under review." The court signed an order to show cause whereby the District Attorney sought to seal the proceedings and quash the subpoena.

Subsequently, following argument, the court quashed the subpoena. The court found,

"Aside from the referee's conjecture, there is nothing to support the notion that petitioner was a witness to the alleged *418 misconduct, or that his testimony would assist the Commission in deciding the alleged misconduct or that he possessed knowledge 'relevant to the complaint' under investigation. Judiciary Law § 44 (4). The issuance of subpoenas is further restricted to persons possessing knowledge or evidence 'relevant or material to the subject of the hearing.' Judiciary Law § 43 (2).

"At most, the evidence before the Commission permits the inference that petitioner, through members of his staff, who were actual witnesses, lent his support to the reporting of the misconduct to the Commission. This conclusion is buttressed by respondent's [Justice W.'s] offer during the instant motion of four exhibits . . . , which consist of internal memos to petitioner from prosecutors in his **3 office, detailing instances of alleged misconduct.

"In each of the four exhibits the source and purported witness is a prosecutor in petitioner's office. The content of the allegations set forth in these exhibits establishes that petitioner, although informed, did not witness the alleged misconduct. Consequently, his testimony, if called, would not be relevant or material to the Commission's determinations of misconduct. Moreover, the testimony of each of the complainants is available to the Com-

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mission.

“Respondent’s counsel suggests that petitioner’s testimony would establish his bias and hostile motives. But such impeachment presumes a witness with relevant or material testimony on which he could be cross examined. Here there is none. Therefore, bias, of a non-witness, is immaterial to the adjudication of the alleged misconduct.”

On appeal, Justice W. argues that the court erred in quashing the subpoena because the Referee found Kindler’s testimony persuasive as to the likelihood that the District Attorney had relevant information. Further, he asserts that the Referee’s decision should not be disturbed absent a showing that it was arbitrary and capricious, and that the issue of relevance could be resolved “in a matter of minutes” in testimony under oath.

For the reasons set forth below, we disagree, and affirm Supreme Court’s order. As a threshold matter, the cases cited by Justice W. for the proposition that a referee’s determination may only be overturned if it is arbitrary and capricious do not stand for that proposition, and do not involve subpoenas, but simply set forth the standard for certain CPLR article 78 proceedings (see e.g., *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]).

The standard for determining the validity of a subpoena is *419 relevancy and materiality of potential testimony: Judiciary Law § 42 (1) gives the Commission the power to conduct hearings and subpoena witnesses to be examined under oath concerning “evidence that it may deem relevant or material.”

Judiciary Law § 43 (2) authorizes a referee to subpoena witnesses for examination under oath, but it too must be regarding evidence that the referee deems “relevant or material to the subject of the hearing.” Pursuant to 22 NYCRR 7000.6 (e), the referee is charged with granting “reasonable re-

quests for subpoenas,” but 22 NYCRR 7000.6 (i) (2) states that “[a]t the hearing, the testimony of witnesses may be taken . . . relevant to the formal written complaint.” Consistent with these provisions, Judiciary Law § 44 (4) provides that the Commission “may take the testimony of witnesses . . . relevant to the complaint.”

The Court of Appeals has recognized that the “materiality and relevancy requirements were included in section 42 of the Judiciary Law to prevent investigatory fishing expeditions” (*Matter of New York State Comm. on Jud. Conduct v Doe*, 61 NY2d 56, 60 [1984]). Where a subpoena is challenged in a motion to quash asserting lack of relevancy, it is incumbent upon the issuer to come forward with a factual basis establishing the relevancy to the subject matter of the investigation (see *Matter of New York City Dept. of Investigation v Passannante*, 148 AD2d 101, 104 [1989]). It is simply not enough that the proponent merely hopes or suspects that relevant information will develop (**4 *Matter of Temporary Comm. of Investigation of State of N.Y. v French*, 68 AD2d 681, 691 [1979]; see also *People v Gissendanner*, 48 NY2d 543, 551 [1979] [a subpoena duces tecum should not be issued “to ascertain the existence of evidence”]). The relevancy question turns on whether the expected evidence will help to prove or disprove the subject matter of the investigation or inquiry.

Where the proponent of the subpoena fails to establish a factual basis that shows the relevancy to the subject matter of the investigation, the referee issuing the subpoena has exceeded his or her power under Judiciary Law § 43 (2) and § 44 (4), and the subpoena must be quashed (see *Sonsini v Memorial Hosp. for Cancer & Diseases*, 262 AD2d 185, 187 [1999] [subpoena properly quashed where defendant was “unable to show that the nonparty’s testimony was necessary”]).

Here, respondent has failed show that any testimony that the District Attorney could offer would be relevant or material to the subject matter of the charges, that is, Justice W.’s alleged misconduct.

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On the contrary, the record clearly indicates that *420 the District Attorney's involvement was limited to permitting the Administrator to conduct interviews with certain members of his staff who might have information pertinent to an investigation of alleged judicial misconduct. The District Attorney asserts, and the Administrator concurs, that the District Attorney was neither the complainant nor the source of the information leading to the investigation.

The subject of the investigation demonstrates, at best, that the District Attorney allowed the Commission to approach possible witnesses on his staff and then kept himself informed as to the developments in the investigation. There is absolutely no indication in the record that the District Attorney witnessed any alleged misconduct nor had any factual information other than that provided by his staff.

Even were we to accept as true Justice W.'s contentions that the District Attorney had a political bias against him, and that he referred the complaints to the Commission himself, neither of these are relevant to the issue of Justice W.'s guilt or innocence of the misconduct charged. Even the amount and type of support the District Attorney may have provided to his staff in the matter has no bearing on the issue of Justice W.'s guilt or innocence. Hence, we find that the Referee applied an entirely erroneous standard when he stated he found a subpoena should issue because Kindler's testimony was "enough to raise some question as to whether the District Attorney was involved in this *in any fashion*" (emphasis added). Subpoenaing the District Attorney with the mere hope of developing relevant testimony once on the stand is precisely the kind of investigatory fishing expedition that the law forbids (see *Matter of New York State Commn. on Jud. Conduct v Doe*, 61 NY2d at 60). Concur—Tom, J.P., Catterson, Freedman and Manzanet-Daniels, JJ.

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