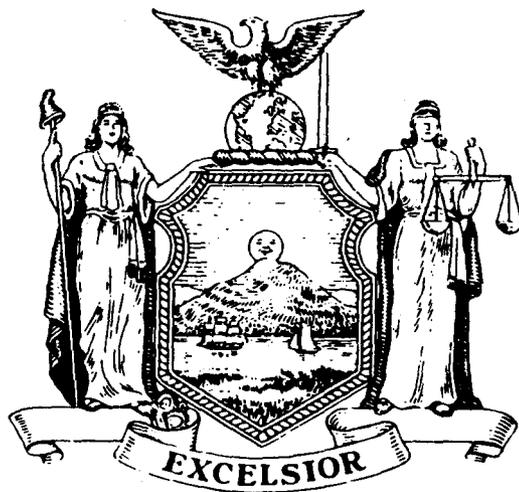


ANNUAL REPORT

1994

New York State Commission on Judicial Conduct



**NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT**

* * *

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**Judges Altman and Ciparick served on the Commission until January 1994.*

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COMMISSION ON JUDICIAL CONDUCT

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

Pursuant to Section 42, paragraph 4, of the Judiciary Law of the State of New York, the New York State Commission on Judicial Conduct respectfully submits this annual report of its activities. The report covers the period from January 1, 1993, through December 31, 1993.

Respectfully submitted,

Henry T. Berger, Chair
On Behalf of the Commission

March 1, 1994
New York, New York

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INTRODUCTION

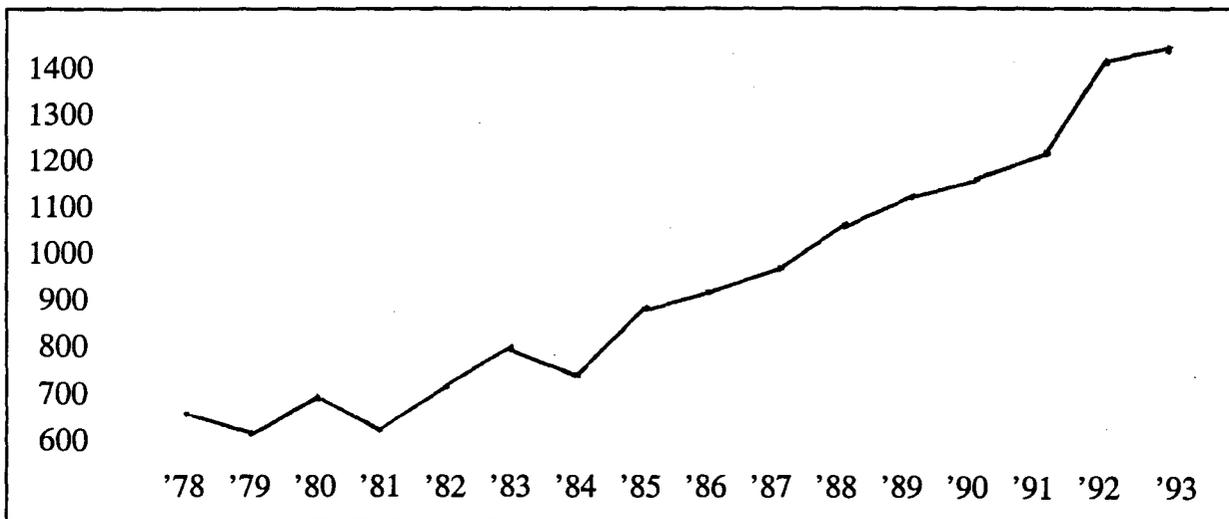
The State Commission on Judicial Conduct is the disciplinary agency constitutionally designated to review complaints of misconduct against judges of the New York State unified court system. The Commission's objective is to enforce the obligation of judges to observe high standards of conduct while safeguarding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

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

A history of the development of the Commission, beginning with the creation in 1975 of a temporary State Commission on Judicial Conduct, and a description of the Commission's authority and procedures, are annexed as Appendix B. This Annual Report covers the Commission's activities during calendar year 1993.

COMPLAINTS AND INVESTIGATIONS IN 1993

In 1993, 1457 new complaints were received, compared with 1452 the year before. Of these, 1275 (87.5%) were dismissed by the Commission upon initial review, and 182 investigations were authorized and commenced. In addition, 141 investigations and proceedings on formal charges were pending from the prior year. The 1457 new complaints represent the largest number in Commission history:



In 1993, as in previous years, the majority of complaints received were submitted by civil litigants and by defendants in criminal cases. Other complaints were received from attorneys, judges, law enforcement officers, civic organizations and concerned citizens not involved in any particular court action. Among the new complaints were 57 initiated by the Commission on its own motion. Many of the new complaints dismissed upon initial review were frivolous or outside the Commission's jurisdiction, such as complaints against attorneys or judges not within the state unified court system. Some were from litigants who complained about the merits of a particular ruling or decision made by a judge. Absent any underlying misconduct, such as demonstrated prejudice, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate such matters, as they involve questions of law reviewable by appellate courts.

ACTION TAKEN IN 1993

Investigations

On January 1, 1993, 111 investigations were pending from the previous year. During 1993, the Commission commenced 182 new investigations. Of the combined total of 293, the Commission made the following dispositions:

- 84 complaints were dismissed outright.
- 42 complaints involving 41 different judges were dismissed with letters of dismissal and caution.
- 13 complaints involving 4 different judges were closed upon the judges' resignation.
- 4 complaints involving 4 different judges were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 40 complaints involving 30 different judges resulted in formal charges being authorized.
- 110 investigations were pending as of 12/31/93.

Formal Written Complaints

On January 1, 1993, Formal Written Complaints from the previous year were pending in 30 matters, involving 21 different judges. During 1993, Formal Written Complaints were authorized in 40 additional matters, involving 30 different judges. Of the combined total of 70 matters, the Commission made the following dispositions.

- 14 matters involving 12 different judges resulted in formal discipline (admonition, censure or removal from office).
- 5 matters involving 5 different judges were dismissed with a letter of dismissal and caution.
- 7 matters involving 4 different judges were closed upon the judges' resignation.
- 0 matters were closed upon vacancy of office due to reasons other than resignation, such as the judge's retirement or failure to win re-election.
- 44 matters involving 30 judges were pending as of 12/31/93.

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

TABLE 1: TOWN & VILLAGE JUSTICES -- 2253,* ALL PART-TIME

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	100	249	349
Complaints Investigated	21	96	117
Judges Cautioned After Investigation	6	19	25
Formal Written Complaints Authorized	4	18	22
Judges Cautioned After Formal Complaint	1	3	4
Judges Publicly Disciplined	0	9	9
Formal Complaints Dismissed or Closed	0	3	3

*Refers to the approximate number of such judges in the state unified court system.

TABLE 2: CITY COURT JUDGES -- 381, ALL LAWYERS

	<i>Part-Time</i>	<i>Full-Time</i>	<i>Total</i>
Complaints Received	50	203	253
Complaints Investigated	4	10	14
Judges Cautioned After Investigation	4	4	8
Formal Complaints Authorized	2	1	3
Judges Cautioned After Formal Complaint	1	0	1
Judges Publicly Disciplined	0	1	1
Formal Complaints Dismissed or Closed	0	0	0

TABLE 3: COUNTY COURT JUDGES -- 81, FULL-TIME, ALL LAWYERS*

Complaints Received	137
Complaints Investigated	7
Judges Cautioned After Investigation	4
Formal Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

*Includes seven judges who serve concurrently on County and Family Court.

TABLE 4: FAMILY COURT JUDGES -- 127, FULL-TIME, ALL LAWYERS

Complaints Received	140
Complaints Investigated	8
Judges Cautioned After Investigation	1
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

TABLE 5: DISTRICT COURT JUDGES -- 50, FULL-TIME, ALL LAWYERS

Complaints Received	13
Complaints Investigated	2
Judges Cautioned After Investigation	1
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 6: COURT OF CLAIMS JUDGES -- 63, FULL-TIME, ALL LAWYERS*

Complaints Received	5
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

*Complaints against Court of Claims judges who serve as Acting Justices of the Supreme Court were recorded on Table 8 if the alleged misconduct occurred in Supreme Court.

TABLE 7: SURROGATES -- 74, FULL-TIME, ALL LAWYERS*

Complaints Received	44
Complaints Investigated	4
Judges Cautioned After Investigation	0
Formal Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

*Includes 10 who serve concurrently as Surrogates and Family Court Judges, and 30 who serve concurrently as Surrogate, Family and County Court judges.

TABLE 8: SUPREME COURT JUSTICES -- 339, FULL-TIME, ALL LAWYERS

Complaints Received	316
Complaints Investigated	26
Judges Cautioned After Investigation	3
Formal Complaints Authorized	3
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	1

**TABLE 9: COURT OF APPEALS JUDGES &
APPELLATE DIVISION JUSTICES -- 55, FULL-TIME, ALL LAWYERS**

Complaints Received	18
Complaints Investigated	3
Judges Cautioned After Investigation	0
Formal Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 10: NON-JUDGES*

Complaints Received	180
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*The Commission's jurisdiction is limited to judges of the state unified court system. It does not have jurisdiction over non-judges, administrative law judges, housing judges of the New York City Civil Court, or federal judges.

FORMAL PROCEEDINGS

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

The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibits public disclosure by the Commission of the charges served, hearings commenced or other matters, absent a waiver by the judge, until a case has been concluded and a determination of admonition, censure, removal or retirement has been filed with the Chief Judge of the Court of Appeals and forwarded to the respondent-judge. Following are summaries of those matters which were completed during 1993 and made public pursuant to the applicable provisions of the Judiciary Law. Copies of the determinations are appended.

DETERMINATIONS OF REMOVAL

The Commission completed six disciplinary proceedings in 1993 in which it determined that the judge involved should be removed from office.

Matter of Kathleen Armbrust

The Commission determined that Kathleen Armbrust, a non-lawyer justice of the Fremont Town Court, Sullivan County, be removed from office for grossly neglecting her administrative responsibilities, mishandling public money and failing to cooperate with the Commission.

In its determination of December 16, 1993, the Commission found that Judge Armbrust, over a period of more than two years, failed to deposit and remit court funds promptly and failed to maintain adequate records of receipt of court funds. The Commission concluded that the judge's failure to cooperate with the Commission's investigation compounded her misconduct, demonstrating indifference to the obligations of judicial office.

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

Matter of Roger W. Gloss

The Commission determined that Roger W. Gloss, a non-lawyer justice of the Sheridan Town Court, Chautauqua County, be removed from office for improper conduct in the course of a personal dispute that led to his conviction on criminal charges.

In its determination of July 27, 1993, the Commission found that over the course of three days, Judge Gloss used a shotgun, physical threats, vulgarities and verbal intimidation in a personal dispute over property rights. The Commission found that such conduct, which led to the judge's conviction on three misdemeanor charges and a violation, "subjects the judiciary as a whole to disrespect" and "undermines his effectiveness as a judge."

Judge Gloss requested review by the Court of Appeals but did not complete the filing requirements. On January 7, 1994, the Court accepted the Commission's determination and ordered Judge Gloss removed from office.

Matter of David B. Heburn

The Commission determined that David B. Heburn, a non-lawyer justice of the Remsen Town and Village Courts, Oneida County, be removed from office for falsely subscribing designating petitions during his campaign for town justice.

In its determination of December 16, 1993, the Commission found that, contrary to the Election Law, Judge Heburn falsely swore that he had witnessed the signatures on his designating petitions for town justice, even though the signatures had been collected by his wife and the town clerk, and filed or caused to be filed the falsely certified petitions. The Commission stated, "a judge who swears falsely is not fit to administer oaths and determine the credibility of witnesses in matters before the court."

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

Matter of Anthony P. LoRusso

The Commission determined that Anthony P. LoRusso, a judge of the Family Court, Erie County, be removed from office for engaging in improper conduct toward female court employees.

In its determination of June 8, 1993, the Commission found that Judge LoRusso had "engaged in a course of offensive, undignified and harassing conduct in which he subjected subordinate women in the court system to uninvited sexual activity, touching and crude and suggestive comments." The Commission noted that although the judge never explicitly told the women who were subjected to his unwelcome conduct that their jobs were at stake, "there was always the implicit threat that a person in his position could impair their job security." The Commission concluded that the judge's actions constituted a gross abuse of his power as a judge and established a pattern of conduct prejudicial to the administration of justice.

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

Matter of Richard W. Murphy

The Commission determined that Richard W. Murphy, a non-lawyer justice of the Shandaken Town Court, Ulster County, be removed from office, *inter alia*, for mishandling court funds and for failing to disqualify himself in cases in which a person from whom he had borrowed money was a party.

In its determination of January 28, 1993, the Commission found that Judge Murphy had failed to deposit \$1,173 in court funds, made no timely effort to notify authorities or rectify the problem, and repeatedly gave a false explanation of its loss. The Commission also found that the judge had presided over nine cases in which a person who had loaned him money was a party, without disclosing the relationship or offering to disqualify himself. The Commission found that the judge's misconduct was compounded by his lack of candor during the trial and investigation of the matter.

Judge Murphy requested review by the Court of Appeals. On December 13, 1993, the Court accepted the Commission's determination and ordered the judge removed

from office.

Matter of David Schiff

The Commission determined that David Schiff, a non-lawyer justice of the Liberty Village Court, Sullivan County, be removed from office for making an improper remark with racial connotations, indicating that he would decide a case based on personal animosity, failing to remit court funds to the state comptroller and poor record-keeping practices.

In its determination of September 15, 1993, the Commission found that Judge Schiff, during a break in court proceedings, remarked that he remembered when it was safe for young women to walk the streets "before the blacks and Puerto Ricans moved here." Such a remark, the Commission found, suggested that certain racial and ethnic groups are responsible for increasing crime rates and undermines public confidence in his ability to judge cases impartially. In another matter, Judge Schiff created the impression that he used his judicial office to retaliate against a judge who had ruled against his interests. The judge's failure to remit court funds promptly and his poor record-keeping were also held to constitute misconduct, even absent any indication of personal gain.

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

DETERMINATIONS OF CENSURE

The Commission completed two disciplinary proceedings in 1993 in which it determined that the judge involved should be censured.

Matter of Carl E. Meacham

The Commission determined that Carl E. Meacham, a non-lawyer justice of the Greene Town and Village Courts, Chenango County, be censured for his mishandling of cases involving three defendants.

In its determination of October 28, 1993, the Commission found that the judge summarily convicted and jailed two men for criminal contempt, without a factual or legal basis and without affording them procedural due process; arraigned an intoxicated defendant and directed his return to court for re-arraignment in 27 days; and accepted a guilty plea from an unrepresented 16-year-old defendant whose mental stability he questioned, refused to set bail as required by law, and refused to allow the defendant to withdraw the plea even though the prosecutor consented. Attributing the judge's conduct to negligence in maintaining professional competence in the law, the Commission concluded that his actions, "though misguided and harmful to the defendants, were not motivated by maliciousness or venality."

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

Matter of Joseph C. Slomba

The Commission determined that Joseph C. Slomba, a non-lawyer justice of the Newfane Town Court, Niagara County, be censured for his mishandling of court funds.

In its determination of December 16, 1993, the Commission found that over a two-year period the judge had failed to deposit court funds promptly and used court funds for personal purposes. The Commission found that the judge had a practice of replacing cash that he had collected in court with personal checks drawn by himself and members of his family; on ten such occasions, the judge did not have sufficient funds in his personal accounts to cover the amount of cash he was taking from the court. In essence, the Commission concluded, the judge was advancing himself short-term, no-interest loans from the court's cash.

The Commission denied a motion for reconsideration by counsel to the Commission, to remove the judge from office.

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

DETERMINATIONS OF ADMONITION

The Commission completed four disciplinary proceedings in 1993 in which it determined that the judges involved should be admonished.

Matter of Bernard Burstein

The Commission determined that Bernard Burstein, a judge of the Civil Court of the City of New York and acting justice of the Supreme Court, 12th Judicial District, Bronx County, be admonished for failing to file a financial disclosure statement in a timely manner and failing to cooperate in the Commission's investigation.

In its determination of July 27, 1993, the Commission found that the judge's failure to open and reply promptly to court-related mail over a period of years resulted in serious administrative failures and ethical breaches, including a ten-month delay in filing a required financial disclosure statement, his delay in remedying omissions in a second financial disclosure statement, and his failure to respond to inquiries about the matter. Noting that financial disclosure by judges serves an important public purpose, the Commission stated, "A judge who is sworn to uphold the law should not fail to comply with its mandates when it is applied to him personally."

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

Matter of John G. Dier

The Commission determined that John G. Dier, a justice of the Supreme Court, 4th Judicial District, Warren County, be admonished for allowing his personal feelings about an attorney to influence his conduct and judgment in a case before him.

In its determination of April 28, 1993, the Commission found that Judge Dier, motivated by personal animosity towards an attorney based on information he had obtained outside the court proceeding, rendered a decision that went beyond the relief requested and beyond his legal authority. Thereafter, Judge Dier misled the attorney by telling him that there was no transcript of the proceeding, although the judge knew that he had directed a court reporter to take notes of the proceeding.

The Commission concluded that Judge Dier had "clearly abused his discretion for personal and partisan reasons."

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

Matter of Lynne D. McCormick

The Commission determined that Lynne D. McCormick, a non-lawyer justice of the Webb Town Court, Herkimer County, be admonished for engaging in *ex parte* communications concerning a matter pending before her and for accepting employment incompatible with her role as a judge.

In its determination of June 9, 1993, the Commission found, *inter alia*, that Judge McCormick met *ex parte* with the complaining witness in a matter and conveyed the impression that she wanted him to withdraw his complaint, then gave the same impression of prejudgment and partiality in *ex parte* conversations with the arresting officers. The Commission also concluded that the judge's employment as a secretary and paralegal for one of the few attorneys in her town was incompatible with her role as a judge.

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

Matter of I. Ronald Siebert

The Commission determined that I. Ronald Siebert, a non-lawyer justice of the Wells Town Court, Hamilton County, be admonished for driving a vehicle while intoxicated and causing a three-car accident.

In its determination of January 27, 1993, the Commission noted the seriousness of driving while under the influence of alcohol and cited numerous cases in which judges had been publicly disciplined for such conduct. In determining that Judge Siebert should be admonished, the Commission noted that the judge had not asserted the influence of his office at the time of his arrest.

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

DISMISSED OR CLOSED FORMAL WRITTEN COMPLAINTS

The Commission disposed of four Formal Written Complaints in 1993 without rendering public discipline. In these four cases, the judges resigned from judicial office before the matters could be completed.

LETTERS OF DISMISSAL AND CAUTION

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

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

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

In 1993, 46 letters of dismissal and caution were issued by the Commission; 41 were issued upon conclusion of an investigation, and five were issued after a Formal Written Complaint proceeding was concluded. Twenty-nine town or village justices, seven of whom are lawyers, were cautioned; four part-time and four full-time City Court Judges were cautioned; and nine other full-time judges were cautioned -- four County Court judges, three Supreme Court Justices, one Family Court judge and one District Court judge.

The caution letters addressed various types of conduct. For example, five judges were cautioned for failing to file mandatory financial disclosure statements in a timely fashion and filing only after the Ethics Commission for the Unified Court System sent additional notices to do so.

Three part-time town or village justices were cautioned for failing to make timely deposits or keep appropriate records of court finances.

Nine part-time town or village justices were cautioned for failing to provide or follow certain fundamental rights or procedures, such as advising a defendant of the right to counsel, giving proper notice to the district attorney before dismissing a charge, or imposing a sentence or bail in excess of the amount permitted by law. Typically, such cautions were issued where there was no indication of a pattern of such conduct. In one of these cases, however, the Commission cautioned a town justice who did not provide counsel for defendants charged with a violation. The local public defender's office had a policy of not representing such defendants, and the judge mistakenly believed that his obligation to assign counsel was thereby vitiated. The Commission advised the judge that his obligation under the law did not depend on the policy of the public defender's office. The judge acknowledged his error, and thereafter the public defender's policy was revised to include representation of indigent defendants charged with violations.

Five judges were cautioned for having engaged in unauthorized political activity, such as lending support to other candidates or raising re-election funds outside the strict time limits set forth in the Rules on Judicial Conduct.

Three judges were cautioned for their failure to disqualify themselves in cases where their impartiality might reasonably be questioned. In one such case, for example, the judge presided notwithstanding the fact that he had a financial relationship with one of the attorneys which should at least have been disclosed.

Six judges were cautioned for asserting or appearing to assert the influence of judicial office in furtherance of a private interest, or for similar demeanor. One judge, for example, wrote a letter on judicial stationery on behalf of a relative's insurance claim. Another (who was about to retire) called an out-of-state judge with a request on behalf of a relative whose case was then pending. A third spoke from the bench on a private matter to an attorney who had just argued a motion and had at least one other case pending before the judge; the judge conveyed the appearance of seeking the attorney's help in introducing the judge to a person who could be of assistance in a private venture. Two judges were cautioned for, in effect, recommending particular attorneys to unrepresented defendants, giving rise to at least the appearance that they were steering business toward those attorneys.

Two judges were cautioned for criticizing juries which acquitted defendants. (*See, "Criticism of Jurors" in the "Special Problems" section of this Annual Report.*)

MATTERS CLOSED UPON RESIGNATION

Eight judges resigned in 1993 while under investigation or formal charges by the Commission. The matters pertaining to these judges were closed.

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

REFERRALS TO OTHER AGENCIES

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

In 1993, the Commission referred 39 administrative matters, involving judges of the unified court system, housing court judges, or court employees, to either the Office of Court Administration or administrative judges.

REVIEW OF COMMISSION DETERMINATIONS BY THE COURT OF APPEALS

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

In 1993, the Court decided the two matters summarized below. Two requests for review, *Matter of Heburn* and *Matter of Schiff*, are pending.

Matter of Rudolph L. Mazzei

In its determination of December 23, 1992, the Commission found that Suffolk County District Court Judge Rudolph L. Mazzei, over a seven-month period, "engaged in unlawful and serious acts of deception" by twice signing his deceased mother's name to a credit card application in order to procure a user's card for himself, then using the card to obtain a \$2,000 cash advance and making misrepresentations to bank personnel investigating the matter. Judge Mazzei requested review of the Commission's determination by the Court of Appeals.

In a unanimous decision on July 6, 1993, the Court accepted the Commission's determination and ordered the judge's removal from office. *Matter of Mazzei*, 81 NY2d 568 (1993).

The Court rejected the judge's defenses that his motive was not to defraud the bank but to obtain a line of credit unknown to his spouse, and that his conduct was unrelated to his judicial responsibilities. As stated by the Court, "A society that empowers judges to decide the fate of human beings and the disposition of property has the right to insist upon the highest level of judicial honesty and integrity," and "falsification of documents is inimical to the character required of a judge." *Id.* at 571-72.

With respect to the judge's contention that the Commission had exceeded its jurisdiction in charging a violation of a Disciplinary Rule of the Code of

Professional Responsibility, which governs the conduct of attorneys, the Court agreed that because of the potential prejudice in subsequent attorney disciplinary proceedings it was improper for the Commission to formally charge a violation of the Code. The Court found this to be a "technical error," since the alleged misconduct "is perforce included in the more generally-worded judicial code of conduct," which was clearly violated by Judge Mazzei's actions. *Id.* at 573. "[U]nder any standard," the Court concluded, the judge's conduct "compels a sanction of removal." *Id.* at 572.

Matter of Richard W. Murphy

On April 17, 1992, the Commission determined that Richard W. Murphy, a justice of the Shandaken Town Court, Ulster County, be removed from office, *inter alia*, for mishandling court funds and for failing to disqualify himself in cases in which a person from whom he had borrowed money was a party. Judge Murphy requested review of the Commission's determination by the Court of Appeals.

In its unanimous decision on December 16, 1993, the Court accepted the Commission's determination and ordered the judge's removal from office. *Matter of Murphy*, 82 NY2d 491 (1993).

The Court upheld the Commission's findings and rejected the judge's claims that the Commission had failed to prove that he had received a deposit envelope, containing \$1,173 in court funds, and subsequently mishandled the funds. The Court noted that for over a year the judge made no official notification that the funds were missing, while telling various persons that he might have left the money in his pockets or might have left in the trunk of his car, which he had since given away. The Court concluded that the judge's attitude of "relative indifference" toward the missing funds, and his failure to provide an adequate explanation for the loss of the money, constituted aggravating circumstances warranting his removal. *Id.* at 494.

The Court also found that the judge created the "appearance of partiality" by not recusing himself, or disclosing the relevant facts, in numerous cases involving an acquaintance from whom he had borrowed money. While stating that "a judge is generally the sole arbiter of recusal" and that "charges of misconduct are inappropriate when the circumstances fall in that vast discretionary area over which

reasonable judges can differ," the Court sustained the charge of misconduct, concluding that the judge's assertion that he did not remember the loan was "unworthy of belief." *Id.* at 495.

SPECIFIC PROBLEM AREAS IDENTIFIED BY THE COMMISSION

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

Criticism of Jurors

In past annual reports, most recently in 1990, the Commission has commented on incidents in which some judges have criticized juries for the verdicts they have rendered. Since 1990, we have cautioned several other judges for such behavior, typically in criminal cases where the defendants were acquitted.

Section 100.3(a)(3) of the Rules on Judicial Conduct requires judges to be patient, dignified and courteous to jurors and others who appear before them. The American Bar Association Standards on the Function of the Trial Judge state that a judge may thank jurors for their service but should neither praise nor criticize the verdict.

Even if done in a temperate manner, a judge's criticism of jurors who perform their lawful function in good faith is improper and can undermine public confidence in an essential element of the legal process -- participation by average citizens in the justice system. Jurors who leave jury service, having been told by the judge that they acquitted a guilty person, are apt to remember that message if they are called again for jury service. Similarly, jurors who convict a defendant might be more inclined to convict again if praised by a judge for their action. Though it is rare in our experience for jurors to be praised for an acquittal, such commentary may also leave an impression that might influence their subsequent service.

The Commission recently cautioned a judge who expressed his dissatisfaction so strongly that some jurors were upset to the point of tears. Another judge told a jury that the defendant had a criminal record which could not be brought out at trial because the defendant chose not to testify. The lesson to jurors may be that when a defendant exercises the constitutional right not to testify, he or she has a criminal

record. For that message to be imparted to those who serve and will serve again as jurors is not only inappropriate, it is prejudicial.

The Commission again reminds the judiciary not to praise or criticize jurors for particular verdicts but simply to thank them for their service, consistent with the Rules and ABA Standards noted above.

Improper Public Comments by Judges on Individual Cases

A number of judges have been cautioned recently for making improper public comments in particular cases. For example, one judge was cautioned in 1993 for attempting to justify his dismissal of rape charges by making harsh and otherwise demeaning remarks to the press about the character of the reported victim. Another judge was cautioned for making statements to a landlords group and the press about a certain category of tenants, thereby casting doubt on his ability to hear such cases impartially. A third judge was cautioned after a formal finding of misconduct, for having excoriated two defendants when they appeared before him at an arraignment.

A judge is obliged by the Rules on Judicial Conduct to be and appear independent and impartial, to treat all those who appear in court with courtesy and patience, and to refrain from making public comments on a pending or impending case. (*Sections 100.1, 100.2 and 100.3[a][1] & [6] of the Rules.*) This does not preclude the judge from commenting publicly to explain the law or legal procedures.

Even if motivated by a sincere interest in educating an individual or the public, a judge's public comments on the merits of particular cases can be problematic. For example, it would appear to evince the judge's predisposition of a defendant's guilt to lecture the defendant about violating the law at the arraignment stage, before there had been a finding of guilt. Where there might be some ulterior motive, such as generating publicity for a re-election campaign, the conduct is still more troubling. A judge should make no public statement that reasonably conveys the appearance that the judge has a bias, predisposition or political or other improper motivation in a particular case or category of cases.

The Commission continues to view such comments dimly and will continue to regard them as improper.

The Need for Recording Criminal and Traffic Proceedings in Town and Village Courts

Town and village courts, which account for two-thirds of the New York State judiciary, are not required to make verbatim transcripts or tape recordings of proceedings. Some courts do, but most do not.

Where tape recordings are made, they are not considered to be the official record but rather an assistance to the judge in subsequent proceedings. The practice varies as to making tapes available to parties and their lawyers.

Over the years, the Commission has come across cases in which the recollections of various witnesses and the judge are so disparate as to suggest that someone is not telling the truth, such as whether the defendant pleaded guilty at arraignment, or whether the judge advised the defendant of the right to counsel, or whether the judge used ethnic epithets or other inappropriate language in the course of proceedings. Where a tape or verbatim transcript exists, of course, the Commission can more accurately determine what actually occurred and make an appropriate finding. The absence of a record may give some judges undue license to make prejudicial statements or take prejudicial action against defendants. It may also encourage a complainant to make unsubstantiated misconduct claims against the judge. A record protects everyone, including the judge.

The problem is especially significant in traffic and criminal cases because fundamental liberty interests are at stake and, *inter alia*, the incarceration of the defendant may result.

For the past 19 years, this Commission has identified situations in which judges of local courts have failed to provide the most fundamental rights to defendants in criminal and Vehicle and Traffic Law (V&T) matters. Defendants in some instances have been convicted without trial or pleas of guilty, or have not been properly advised of or afforded their rights, such as the rights to bail and counsel. The absence of a record increases the likelihood that such unfortunate abuses will not be detected. In principle, no defendant should be arraigned, tried or allowed to plead guilty without a record made of the event.

Town and village courts are funded by the municipalities in which they are located, not by the State. The Commission is aware of the financial constraints under which

most town and village courts operate. Nevertheless, the need for recording criminal and V&T proceedings is too important to be avoided for financial reasons. Indeed, with the universal availability of inexpensive, simple tape recording equipment, such as portable cassette players, funding should be made available.

We suggest that the Office of Court Administration work with the Legislature, the State Magistrates Association, the Association of Towns and other relevant organizations to facilitate the goal of recording all criminal and V&T proceedings in town and village courts. OCA might also issue guidelines for using and preserving tapes of proceedings, such as (1) an announcement by the judge that the proceeding is being recorded and (2) preservation for some reasonable period. How such tapes would be maintained and made available to the defendant, the public and, on request, to the appellate court would also be a matter for OCA to consider.

Rigid Procedures That May Deny Justice To Unrepresented Defendants in Town and Village Courts

In the typical civil suit or traffic case in a town or village court, the parties appear *pro se*, that is, on behalf of themselves, without counsel. At least in part for this reason, and because the monetary jurisdiction of these courts is limited to \$3000, the Uniform Justice Court Act (UJCA) not only "establishes that informality is not to be discouraged if all of the parties accede to it," but the UJCA differs from other court acts "in its express invitation to informality contained at several key points." (UJCA, Article 1, *General Practice Commentary on the Uniform Justice Court Act and Its Background*; David D. Siegel, Commentator.)

The invitation to informality, of course, does not exempt town and village justices from the obligation to ensure that certain fundamental standards are met, such as the right to be heard and present evidence and examine witnesses. But town and village justices may grant considerable leeway to those who appear before them, and should do so to ensure that a fair proceeding is held. In a \$200 small claims case, for example, the plaintiff and defendant, who are most likely unfamiliar with the rules of evidence, should not be expected to frame each question to a witness with the same skill as an experienced lawyer.

Most town and village justices -- the vast majority of whom, like the litigants

before them, are not lawyers -- appreciate the flexibility afforded by the UJCA and allow *pro se* litigants reasonable latitude to present their cases. From time to time, however, the Commission becomes aware of certain judges who are so inflexible that they effectively inhibit or blatantly prevent the parties from making a case.

For example, one judge whom the Commission observed on several occasions routinely interrupted *pro se* civil litigants and traffic defendants, apparently because their opening statements and questions to witnesses were not spoken in proper legal form. If a defendant said in an opening statement that he was not speeding, for example, the judge would interrupt and say that was not a proper remark, apparently because it was not prefaced with words such as "the evidence will show...." It was not always clear why the judge was cutting people off in mid-sentence; he did not explain his actions to the parties. The failure to explain appeared to leave litigants frustrated, confused and intimidated. The points they seemed to want to make were often not made at all. In traffic cases before this particular judge, this conduct tended to tip the proceedings toward the prosecution, which was usually represented by an arresting officer who was well-acquainted with the court and the form preferred by the judge.

Often, *pro se* litigants and traffic defendants will make statements rather than pose questions in proper legal form, particularly on cross-examination. When that occurs, an understanding response from the judge explaining the purpose of cross-examination (or, for that matter, an opening statement or any other part of the proceeding) would be far better than harsh, abrupt or impatient criticism.

It is especially important for judges, when they are triers of the facts, to be flexible and permit unrepresented defendants in civil and traffic cases to express themselves. Because the judge can select what is material to the case, and there is no jury to influence, it is unnecessary to prevent the unrepresented civil litigant or traffic defendant to speak. It is certainly unnecessary and improper to mock his or her unfamiliarity with procedure. In 1993, the Commission cautioned a judge for, *inter alia*, repeatedly cutting off an unrepresented traffic defendant, without explanation, as he tried to defend himself, denying him an opportunity to cross-examine the issuing police officer and otherwise turning a relatively simple speeding case into an oppressive experience for the ticketed motorist. A fair reading of the transcript, prepared from the court's tape recording of the trial, conveyed the appearance that the police officer who prosecuted the case had undue influence over the judge.

If a judge's inflexibility prevents a *pro se* litigant or traffic defendant from addressing the court on the merits of a claim, particularly where the judge does not explain why he or she is making such rulings, public confidence in the courts will suffer and the administration of justice will not be well served.

THE COMMISSION'S BUDGET

In our 1988 Annual Report, we reported extensively on the Commission's annual budget, including an analysis of its growth over the ten preceding years and a detailed comparative examination of the budgets of New York's and other states' judicial conduct commissions. In last year's Annual Report, in view of the budget crisis experienced by the state government, we commented on the great financial sacrifices we, like other state agencies, were enduring.

Budgetary constraints continue to affect adversely the Commission's operations. The Commission's budget was reduced again for fiscal year 1993-94, and has been slightly increased for fiscal year 1994-95.

The Commission's total budget for 1993-94 was \$1,645,000, which was almost precisely what it was 15 years ago. (In 1978-79, our budget was \$1,644,000.) For 1994-95, we have been given an additional \$133,400, for a total of \$1,778,400. Six times since 1979, we requested budgets no greater *or even less* than the previous year's amount. We were apprised by the Division of the Budget that ours was the only agency to seek less than we had received before, at a time in the 1980s when such sacrifices were not mandated by fiscal emergencies.

The task of maintaining a markedly low-growth budget over more than 15 years has left no bureaucratic "fat" to be trimmed from our budget. The financial cuts that state agencies have endured continue to hit hard, and among those agencies which have demonstrated austerity in pre-crisis times, such as the Commission, the cuts have had a disproportionately greater impact. We have been compelled to lay off some staff, reduce others from full-time to part-time status, and cut back in other ways. For example, some investigations have been limited in scope because we do not have adequate financial means to permit staff to travel in some cases for witness interviews or to observe court proceedings, particularly where overnight lodging is required. In some instances, limited finances have even affected the Commission's decisions to investigate complaints, initiate Formal Written Complaints or proceed to lengthy hearings.

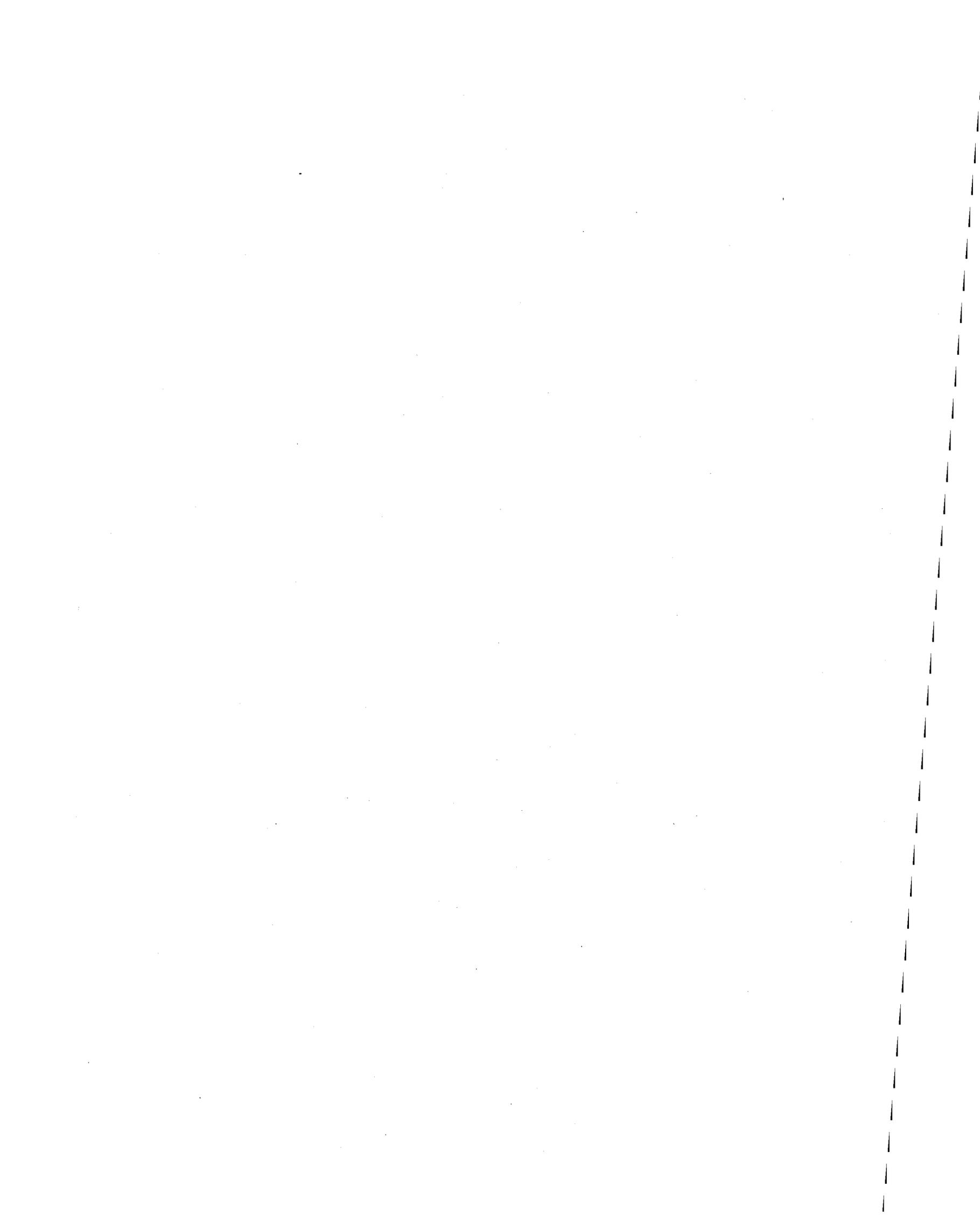
Although we continue to make every effort to manage our funds prudently, it is increasingly difficult to discharge our obligations fully and completely under the tight financial conditions we are required to endure.

CONCLUSION

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

Respectfully submitted,

Henry T. Berger, Chair
Helaine M. Barnett
Herbert L. Bellamy, Sr.
E. Garrett Cleary
Dolores DelBello
Lawrence S. Goldman
Juanita Bing Newton
Eugene W. Salisbury
John J. Sheehy
William C. Thompson



APPENDIX A

BIOGRAPHIES OF COMMISSION MEMBERS

HONORABLE MYRIAM J. ALTMAN is a graduate of Barnard College and the New York University School of Law. She was elected a Justice of the Supreme Court for the First Judicial District in 1987. In January 1994, Justice Altman was appointed as an Associate Justice of the Appellate Division, Second Department, by Governor Cuomo. Prior thereto, from 1978 to 1987, she served a ten-year term as a Judge of the Civil Court of the City of New York, eight and one half of those years as an Acting Justice of the Supreme Court. Justice Altman is a member of the Committee on Litigation of the Association of the Bar of the City of New York. She is a member of the Office of Court Administration's Committee on Civil Law and Procedure and a trustee of the New York State Association of Women Judges. She and her husband are the parents of three children.

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

HERBERT L. BELLAMY, SR., is President and founder of 1490 Enterprises, Inc., in Buffalo, a not-for-profit community center which houses 32 local, state and federal government agencies and provides meals for 150 senior citizens daily. He is also owner and manager of Bellamy Enterprises. Mr. Bellamy has more than 20

years' experience in community service and fund-raising. He was the first Black Civil Service Commissioner in the City of Buffalo and served as Councilman-at-large for nine years. He was instrumental in completing several city projects, including Pilot Field Baseball Stadium and the waterfront development. The first Black Director and Vice President of the Buffalo Downtown Nursing Home, Mr. Bellamy has also served on the Canisius College Board of Regents, the Police Athletic Board, the Western New York Liquor Retailers Board, the Private Industry Council of Buffalo, the American Hardware Association, Bethel Headstart Program, Red Cross and the N.A.A.C.P. He was Vice President of the Buffalo Chamber of Commerce in 1973. Mr. Bellamy has received more than 150 awards and honors, including an honorary degree from Canisius College, the Canisius College President's Award, the Roberto Clemente Humanitarian Award, the 100 Black Men Award, the Buffalo Urban League Family Life Award, the NAACP Medgar Evers Award, the Congressional Record Award and the 1972 Man of the Year Award of the Buffalo Evening News. He was recently appointed as a member of the US & Fort Erie (Canada) Peace Bridge Commission. He is the widower of the late Irene Parham and the father of six children.

HENRY T. BERGER, ESQ., is a graduate of Lehigh University and New York University School of Law. He is a partner in the firm of Berger, Poppe, Janiec and Mackasek. He is a member of the House of Delegates of the New York State Bar Association, and a member of the Labor and Employment Law Committee and the Special Committee to Encourage Judicial Service of the Association of the Bar of the City of New York. Mr. Berger served as a member of the New York City Council in 1977.

HONORABLE CARMEN BEAUCHAMP CIPARICK is a graduate of Hunter College and St. John's University School of Law. She was nominated by Governor Cuomo and confirmed by the Senate as an Associate Judge of the Court of Appeals in January 1994. She was elected a Justice of the Supreme Court for the First Judicial District in 1982. Previously she was an appointed Judge of the Criminal Court of the City of New York from 1978 through 1982. Judge Ciparick formerly served as Chief Law Assistant of the New York City Criminal Court, Counsel in the office of the New York City Administrative Judge, Assistant Counsel for the Office of the Judicial Conference and a staff attorney for the Legal Aid Society in New York City. Judge Ciparick is a member of the Board of Directors of the New

York Association of Women Judges, the Board of Trustees of Boricua College and the Board of Directors of the Alumni Association of St. John's University School of Law.

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

DOLORES DEL BELLO received a baccalaureate degree from the College of New Rochelle and a masters degree from Seton Hall University. She was Regional Public Relations Director for Bloomingdale's until 1986 and is presently Partner in Westfair Communications and Publisher of the Westchester County and Fairfield County Business Journals. Mrs. DelBello is a member of Alpha Delta Kappa, the international honorary society for women educators; the Business Committee for Historic Hudson Valley; the Founders Club of the Yonkers YWCA; National Association of Negro Women; and the Entrepreneurial Center Council of Advisors. She is also a member of the Advisory Board of the Association of Women Business Owners; the Westchester Community College Advisory Board on Communications; the Board of Directors of the American Lyme Disease Association; and the Board of Directors of the Westchester County Partnership For Elder Care. She was formerly Chairperson of the Board of Directors of the Northern Westchester Center

for the Arts, and a member of the League of Women Voters; The Hudson River Museum Board of Directors; Lehman College Performing Arts Center; the Business Development Board of the Hudson Valley National Bank; Westchester Women in Communications; Naylor Dana Institute for Disease Prevention; and American Health Foundation. She and her husband Alfred live in Waccabuc and have one son, Damon, an orthopaedic surgeon.

LAWRENCE S. GOLDMAN, ESQ. is a graduate of Brandeis University and Harvard Law School. Since 1972, he has been a partner in the criminal law firm of Goldman & Hafetz in New York City. From 1966 through 1971, he served as an assistant district attorney in New York County. He has also been a consultant to the Knapp Commission and the New York City Mayor's Criminal Justice Coordinating Council. Mr. Goldman is currently a director of the National Association of Criminal Defense Lawyers, chairperson of its white-collar committee and former chairperson of its ethics advisory committee, a member of the executive committee of the criminal justice section of the New York State Bar Association and a member of the advisory committee on the Criminal Procedure Law. He has lectured at numerous bar association and law school programs on various aspects of criminal law and procedure, trial tactics, and ethics. He is an honorary trustee of Congregation Rodeph Sholom in New York City. He and his wife Kathi have two children and live in Manhattan.

HONORABLE JUANITA BING NEWTON is a graduate of Northwestern University and the Columbus Law School of The Catholic University of America. She is a Judge of the Court of Claims and an Acting Justice of the Supreme Court. Previously, she served as Executive Assistant to the Deputy Chief Administrative Judge for the New York City Courts, as Executive Director and General Counsel to the New York State Sentencing Guidelines Committee, as an Assistant District Attorney in Bronx County and as a high school social studies teacher. She is a member of the American Bar Association, The Judicial Friends and the Association of Court of Claims Judges, which she serves as Treasurer. Judge Newton serves on numerous New York State judicial committees and programs, including the Judicial Committee on Women in the Courts, the Judicial Commission on Minorities, the Advisory Committee on Criminal Practice and Procedure, the Anti-Bias Committee and Panel of the Supreme Court (New York County) and the Drug Policy Task Force of the New York County Lawyers Association. Judge Newton and her husband Eddie have a son, Jason, and reside in New Rochelle.

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

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

HONORABLE WILLIAM C. THOMPSON is a graduate of Brooklyn College and Brooklyn Law School. He was elected to the New York State Senate in 1965, and served until 1968. He was Chairman of the Joint Legislative Committee on

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

CLERK OF THE COMMISSION

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

ADMINISTRATOR OF THE COMMISSION

GERALD STERN, ESQ., is a graduate of Brooklyn College, the Syracuse University College of Law and the New York University School of Law, where he received an LL.M. in Criminal Justice. Mr. Stern has been Administrator of the Commission since its inception. He previously served as Director of Administration of the Courts, First Judicial Department, Assistant Corporation Counsel for

New York City, Staff Attorney on the President's Commission on Law Enforcement and the Administration of Justice, Legal Director of a legal service unit in Syracuse, and Assistant District Attorney in New York County.

DEPUTY ADMINISTRATOR

ROBERT H. TEMBECKJIAN, ESQ., is a graduate of Syracuse University, the Fordham University School of Law, and Harvard University's John F. Kennedy School of Government. He previously served as Clerk of the Commission, as publications director for the Council on Municipal Performance in New York, staff director of the Governor's Cabinet Committee on Public Safety in Ohio and special assistant to the Deputy Director of the Ohio Department of Economic and Community Development. Mr. Tembeckjian is a member of the Association of the Bar of the City of New York, and has served on its Committees on Professional Discipline and Professional and Judicial Ethics. He received a Fulbright Scholar Award in 1994 to teach courses in Armenia on Constitutional Law and Ethics.

CHIEF ATTORNEY, ALBANY

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

CHIEF ATTORNEY, ROCHESTER

JOHN J. POSTEL, ESQ., is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission's staff in 1980 as an assistant staff attorney in Albany. He has been Chief Attorney in charge of the Commission's Rochester office since 1984. Mr. Postel is the Chairman of the Governing Council of the St. Thomas More Parish. He is an officer of the Pittsford-Mendon Ponds Association and a former President of the Stonybrook Association. Mr. Postel served on the Pittsford School District Redistricting Committee. He is the advisor to the Sutherland High School Mock Trial Team.

APPENDIX B

THE COMMISSION'S POWERS, DUTIES, OPERATIONS AND HISTORY

INTRODUCTION

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

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

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

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

STATE COMMISSION ON JUDICIAL CONDUCT

Authority

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

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

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

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

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

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

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

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

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

Procedures

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

been served with formal charges, and conducts other Commission business. No investigation may be commenced by staff without authorization by the Commission. The filing of formal charges also must be authorized by the Commission.

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

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

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

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

When the Commission determines that a judge should be admonished, censured, removed or retired, its written determination is forwarded to the Chief Judge of the Court of Appeals, who in turn serves it upon the respondent-judge. Upon completion of service, the Commission's determination and the record of its proceedings become public. (Prior to this point, by operation of the strict provisions in Article 2-A of the Judiciary Law, all proceedings and records are confidential.) The respondent-judge has 30 days to request full review of the Commission's

determination by the Court of Appeals. The Court may accept or reject the Commission's findings of fact or conclusions of law, make new or different findings of fact or conclusions of law, accept or reject the determined sanction, or make a different determination as to sanction. If no request for review is made within 30 days, the sanction determined by the Commission becomes effective.

Membership and Staff

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

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

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

Temporary State Commission on Judicial Conduct

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

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

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

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

Former State Commission on Judicial Conduct

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

The former Commission was empowered to investigate allegations of misconduct against judges, impose certain disciplinary sanctions¹ and, when appropriate, initiate formal disciplinary proceedings in the Court on the Judiciary, which, by the same constitutional amendment, had been given jurisdiction over all 3,500 judges in the unified court system.

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

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

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

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

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

Those proceedings resulted in the following:

- 1 removal;

¹The sanctions that could be imposed by the former Commission were private admonition, public censure, suspension without pay for up to six months, and retirement for physical or mental disability. Censure, suspension and retirement actions could not be imposed until the judge had been afforded an opportunity for a full adversary hearing. These Commission sanctions were also subject to a *de novo* hearing in the Court on the Judiciary at the request of the judge.

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

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

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

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

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

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

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

The 1978 Constitutional Amendment

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

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

**SUMMARY OF COMPLAINTS CONSIDERED
SINCE THE COMMISSION'S INCEPTION**

Since January 1975, when the temporary Commission commenced operations, 17,151 complaints of judicial misconduct have been considered by the temporary, former and present Commissions. Of these, 13,120 (76%) were dismissed upon initial review and 4031 investigations were authorized. Of the 4031 investigations authorized, the following dispositions have been made through December 31, 1993:

- 1933 were dismissed without action after investigation;
- 771 were dismissed with letters of caution or suggestions and recommendations to the judge; the actual number of such letters totals 565, 44 of which were issued after formal charges had been sustained and determinations made that the judge had engaged in misconduct;
- 295 were closed upon resignation of the judge during investigation or in the course of disciplinary proceedings; the actual number of such resignations was 210;
- 292 were closed upon vacancy of office by the judge other than by resignation;
- 586 resulted in disciplinary action; and
- 154 are pending.

Of the 586 disciplinary matters noted above, the following actions have been recorded since 1975 in matters initiated by the temporary, former or present Commission:²

²It should be noted that several complaints against a single judge may be disposed of in a single action. This accounts for the apparent discrepancy between the number of complaints and the number of judges acted upon.

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

Through December 1993, the Court of Appeals has reviewed 54 Commission determinations, 44 of which were for removal, eight for censure and two for admonition. The Court accepted the sanction determined by the Commission in 42 cases, 37 of which were removals. In two cases, the Court increased the sanction from censure to removal. In nine cases, the Court reduced the sanction that had been determined by the Commission, reducing seven removals to censure, and two censures to admonition. In one case the Court of Appeals found that the judge's actions did not constitute misconduct and dismissed the charges against the judge.

APPENDIX C

**REFEREES WHO PRESIDED IN COMMISSION
PROCEEDINGS IN 1993**

<u>REFEREE</u>	<u>CITY/COUNTY</u>
William C. Banks, Esq.	Syracuse/Onondaga
Ira M. Belfer, Esq.	New York/New York
Daniel G. Collins, Esq.	New York/New York
John J. Darcy, Esq.	Pittsford/Monroe
Maureen J. M. Ely, Esq.	Albany/Albany
Bernard H. Goldstein, Esq.	New York/New York
H. Wayne Judge, Esq.	Glens Falls/Warren
Nancy D. Peck, Esq.	Rochester/Monroe
Leon B. Polsky, Esq.	New York/New York
Laurie Shanks, Esq.	Albany/Albany
Milton Sherman, Esq.	New York/New York
Samuel B. Vavonese, Esq.	Syracuse/Onondaga
David S. Williams, Esq.	Albany/Albany

APPENDIX D

RULES GOVERNING JUDICIAL CONDUCT

Section 100.1 Upholding the independence of the Judiciary. An independent and honorable Judiciary is indispensable to justice in our society. Every judge shall participate in establishing, maintaining, and enforcing, and shall himself or herself observe, high standards of conduct so that the integrity and independence of the Judiciary may be preserved. The provisions of this Part shall be construed and applied to further that objective.

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

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

(c) No judge shall lend the prestige of his or her office to advance the private interests of others; nor shall any judge convey or permit others to convey the impression that they are in a special position to influence him or her. No judge shall testify voluntarily as a character witness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) political conduct prohibited by section 25.39 of the Rules of the Chief Judge.

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

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

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

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

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

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

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

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

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

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

(3) For the purposes of this section:

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

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

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

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

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

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

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

(d) **Remittal of disqualification.** A judge disqualified by the terms of subparagraph (c)(1)(iii), (iv) or (v) of this section, instead of withdrawing from the proceeding, may disclose on the record the basis of the disqualification. If, based on such disclosure, the parties (who have appeared and not defaulted), by their

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

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

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

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

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

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

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

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

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

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

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

(2) No full-time judge shall be a managing or active participant in any form of business enterprise organized for profit, nor shall he or she serve as an officer, director, trustee, partner, advisory board member or employee of any corporation, company, partnership or other association organized for profit or engaged in any form of banking or insurance;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX E
TEXTS OF 1993 DETERMINATIONS

State of New York
Commission on Judicial Conduct

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

Determination

KATHLEEN ARMBRUST,

a Justice of the Fremont Town Court, Sullivan County.

APPEARANCES:

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

The respondent, Kathleen Armbrust, a justice of the Fremont Town Court, Sullivan County, was served with a Formal Written Complaint dated April 12, 1993, alleging that she failed to deposit and remit court funds promptly and that she failed to cooperate with the Commission. Respondent did not answer the Formal Written Complaint.

On August 11, 1993, the administrator of the Commission moved for summary determination and a finding that respondent's misconduct be deemed established. Respondent did not oppose the motion or file any papers in response thereto. By determination and order dated September 14, 1993, the Commission granted the administrator's motion.

The administrator filed a memorandum as to sanction. Respondent did not file a memorandum or request oral argument.

On October 21, 1993, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Fremont Town Court during the time herein noted.
2. Between August 1990 and February 1993, as denominated in Schedule A*appended hereto, respondent failed to remit court funds and report cases to the state comptroller by the tenth day of the month following collection, as required by UJCA 2020 and 2021(1), Town Law §27(1) and Vehicle and Traffic Law §1803. As of March 15, 1993, respondent had remitted no money at all since the previous September. Prior to that date, she was as many as 238 days late in making her monthly remittals to the state.

As to Charge II of the Formal Written Complaint:

3. Between February 1990 and April 1992, as denominated in Schedule B appended hereto, respondent failed to deposit court funds in her official account within 72 hours of receipt, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a); failed to maintain adequate records of the receipt of court funds, as required by Town Law §31(1)(a) and the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.11(a)(3), and failed to remit to the state comptroller \$550 that she collected.

As to Charge III of the Formal Written Complaint:

4. In connection with a duly-authorized investigation, respondent failed to respond to three written inquiries sent certified mail by staff counsel, dated February 21, April 2 and April 27, 1992.

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

Respondent has handled public money carelessly, failed to comply with the law, grossly neglected her administrative responsibilities and failed to cooperate with the Commission.

Her failure to deposit money promptly raises questions about its interim use. (See, Matter of More, 1990 Ann Report of NY Commn on Jud Conduct, at 140, 141). The failure to remit money in a timely fashion to the state comptroller, standing alone, constitutes judicial misconduct. (Matter of Ranke, 1992 Ann Report of NY Commn on Jud Conduct, at 64). Respondent has offered no excuse or mitigating factor which would moderate the otherwise severe penalty to be imposed for such ethical breaches. (See, Matter of Rater v State Commission on Judicial Conduct, 69 NY2d 208, 209).

Moreover, her failure to cooperate with the Commission compounds this misconduct. (See, Matter of Cooley v State Commission on Judicial Conduct, 53 NY2d 64, 66). She demonstrated a total lack of concern about the allegations of misconduct. In the face of charges of misconduct, her failure to cooperate exhibits flagrant indifference to the obligations of judicial office.

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

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

Judge Salisbury was not present.

Dated: December 16, 1993

State of New York
Commission on Judicial Conduct

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

Determination

BERNARD BURSTEIN,

a Judge of the Civil Court of the City of New York and Acting
Supreme Court Justice, 12th Judicial District, Bronx County.

APPEARANCES:

Gerald Stern (Alan W. Friedberg, Of Counsel) for the Commission

Scoppetta & Seiff (By Eric A. Seiff) for Respondent

The respondent, Bernard Burstein, a judge of the Civil Court of the City of New York, Bronx County, was served with a Formal Written Complaint dated July 2, 1992, alleging that he failed to file in a timely manner a financial disclosure statement and that he failed to cooperate in the Commission's investigation. Respondent did not answer the Formal Written Complaint.

On February 11, 1993, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4) and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement by letter dated March 5, 1993.

Both counsel submitted memoranda as to sanction. On June 3, 1993, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a judge of the Civil Court of the City of New York since February 1980. He also sits by designation in the Supreme Court, Bronx County.

2. Respondent was required to file a financial disclosure statement for 1990 with the Ethics Commission for the Unified Court System by May 15, 1991, pursuant to Judiciary Law §211(4) and the Rules of the Chief Judge, 22 NYCRR 40.2.

3. Respondent did not file his financial disclosure statement until March 10, 1992, even though he received from the Ethics Commission a Notice to Cure, dated July 24, 1991, and a Notice of Delinquency, dated November 14, 1991.

4. Also on March 10, 1992, respondent filed his 1991 financial disclosure statement, which was due on May 15, 1992. By letter dated March 18, 1992, the Ethics Commission advised respondent that certain sections of the 1991 statement had not been completed and requested that he do so within 15 days. Respondent failed to do so, and, on May 26, 1992, the Ethics Commission sent a second notice. The Ethics Commission sent a Notice to Cure, dated July 31, 1992, which respondent failed to accept. A second Notice to Cure, dated September 18, 1992, and a Notice of Delinquency, dated October 26, 1992, were received by respondent.

5. Even though he knew that he was under investigation by the Commission for failing to timely file his 1990 statement and even though the Formal Written Complaint in this matter was served on July 2, 1992, respondent did not respond to the Ethics Commission and did not file a properly completed 1991 statement until November 17, 1992.

As to Charge II of the Formal Written Complaint:

6. In connection with a duly-authorized investigation, Commission staff asked respondent to respond to allegations that he had failed to file his financial disclosure statement for 1990. Respondent received letters from Commission staff dated December 30, 1991, and January 24, 1992, but did not respond.

7. By letter dated February 14, 1992, respondent was asked to appear for the purpose of giving testimony before a member of the Commission in connection with the investigation. Respondent received the letter but did not open it. Consequently, he did not appear as requested on February 27, 1992.

8. After a second request, respondent appeared on March 5 and March 10, 1992, and gave testimony before a member of the Commission concerning his failure to file his 1990 financial disclosure statement.

As to Charge III of the Formal Written Complaint:

9. Between February 5, 1990, and March 10, 1992, respondent failed to open nine letters received in his chambers from attorneys, litigants and witnesses concerning matters pending before him. Respondent also failed to have his staff open the letters.

10. Respondent and members of his staff had had telephone conversations with attorneys concerning these matters. Respondent concedes that the information in the letters should have been considered by him.

11. Respondent has since instituted a procedure whereby his staff will open mail daily and respond within one week of receipt.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Judiciary Law §211(4); the Rules of the Chief Judge, 22 NYCRR 40.2; the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a) and 100.3(b)(1), and Canons 1, 2A and 3B(1) of the Code of Judicial Conduct. Charges I, II and III of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent's failure to open and reply promptly to court-related mail over a period of years resulted in serious administrative failures and ethical breaches.

By his ten-month delay in filing his 1990 financial disclosure statement, he failed to comply with the law. Because he did not open and reply to mail, he failed to respond to staff inquiries and did not appear on one occasion for the purpose of giving testimony before a Commission member. The failure to cooperate in a Commission investigation is a significant factor in determining sanction. (Matter of Cooley v State Commission on Judicial Conduct, 53 NY2d 64, 66). Respondent did not consider information in matters pending before him because of his failure to open nine letters for as long as two years. Neglecting to open mail is "inexcusable". (Matter of Joedicke, 1982 Ann Report of NY Commn on Jud Conduct at 73, 76).

This wrongdoing is compounded by respondent's delay in remedying the omissions in his 1991 financial disclosure statement, even when he knew that his administrative failures were the subject of, first, a Commission investigation and, later, formal charges. (See, Matter of Sims v State Commission on Judicial Conduct, 61 NY2d 349, 357).

We accept respondent's assertions that he was not attempting to conceal information from the Ethics Commission and that there was nothing improper or questionable in the reports that he eventually filed. However, the Legislature and the Chief Judge have determined that financial disclosure by judges serves an important public function, and one of the duties of a judge is to file these reports promptly. A judge who is sworn to uphold the law should not fail to comply with its mandates when it is applied to him personally. (See, Matter of Myers v State Commission on Judicial Conduct, 67 NY2d 550, 554; Matter of Barr, 1981 Ann Report of NY Commn on Jud Conduct, at 139, 142). Although this behavior does not reflect on respondent's performance on the bench, it is misconduct that warrants public sanction.

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

Mr. Berger, Mr. Bellamy, Mr. Cleary, Mrs. Del Bello, Mr. Goldman, Judge Salisbury and Judge Thompson concur.

Judge Altman, Judge Ciparick and Mr. Sheehy dissent as to sanction only and vote that respondent be issued a confidential letter of dismissal and caution.

Ms. Barnett was not present.

Dated: July 27, 1993

State of New York
Commission on Judicial Conduct

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

JOHN G. DIER,

Determination

a Justice of the Supreme Court, Fourth Judicial District,
Warren County.

APPEARANCES:

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

Sise & Sise (By Robert J. Sise) for Respondent

The respondent, John G. Dier, a justice of the Supreme Court, 4th Judicial District, was served with a Formal Written Complaint dated August 20, 1992, alleging that he allowed his personal animosity toward an attorney to influence his conduct and judgment in a case before him. Respondent did not answer the Formal Written Complaint.

On January 13, 1993, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4) and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement by letter dated January 22, 1993.

The administrator submitted a memorandum as to sanction. Respondent did not submit any papers.

On March 4, 1993, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following determination.

1. Respondent has been a justice of the Supreme Court since January 1, 1980. He has been a judge since 1957, first in the Lake George Town Court and later in the Warren County Court.

2. On March 6, 1991, in the Queensbury Town Court, Justice Michael J. Muller held a pretrial conference in People v. Matthew Carpenter. District Attorney William E. Montgomery, III, appeared for the People; Kurt Mausert, Esq., appeared as assigned counsel for the defendant.

3. Mr. Mausert moved for an order directing Mr. Montgomery to remove an American flag pin that he was then wearing should he appear before a jury in the case. Judge Muller granted the motion.

4. On March 8, 1991, Mr. Mausert notified Judge Muller and the district attorney's office that Mr. Carpenter intended to waive his right to a jury trial. Judge Muller scheduled a bench trial for March 14, 1991.

5. On March 13, 1991, by Order to Show Cause, Mr. Montgomery brought an Article 78 proceeding against Judge Muller and Mr. Carpenter in Supreme Court, Warren County. The proceeding challenged Judge Muller's order that Mr. Montgomery remove the American flag pin if the case was tried before a jury. Respondent executed the Order to Show Cause, stayed the trial and ordered that the motion be heard on March 22, 1991. Mr. Mausert was not named as a party but received the papers and the Order to Show Cause as Mr. Carpenter's attorney.

6. After receiving the Order to Show Cause, Mr. Mausert went to Judge Muller's private law office to confirm that the trial would not be held the following day. Judge Muller was not in, but Mr. Mausert spoke to his brother and law partner, Robert Muller. Mr. Muller called Justice Thomas E. Mercure of the Appellate Division, Third Department, and explained that the trial had been stayed, apparently because respondent was unaware that a jury trial would be waived. Mr. Muller told Mr. Mausert that Judge Mercure had suggested calling respondent at home and explaining that it was to be a bench trial.

7. At about 6 P.M. on March 13, 1991, Mr. Mausert called respondent at home. Respondent told Mr. Mausert that he should see him at his office. Mr. Mausert said that he was calling at the suggestion of Judge Mercure. Respondent terminated the conversation.

8. At some point before March 22, 1991, respondent asked Judge Mercure about his conversation with Mr. Mausert and was told that Judge Mercure had spoken to Robert Muller, not Mr. Mausert.

9. Before oral argument on the Article 78 proceeding, respondent prepared a typewritten draft decision. He also instructed his court reporter to take notes of the proceeding for respondent's personal use.

10. Immediately after hearing argument, respondent read from the bench his previously prepared typewritten decision. There were numerous spectators in the courtroom, some of whom were wearing American flag pins. There was applause as respondent left the bench.

11. In the decision, respondent:

a) ordered that Carpenter be transferred to a judge other than Judge Muller for trial, even though no such relief had been requested or argued;

b) criticized Judge Muller's judicial performance by stating, "I have no authority to discipline judges, but I feel the cost to the taxpayers of the Town of Queensbury for just the record in this case should indicate a need for review of the procedures and systems in Justice Muller's court...";

c) ordered that Mr. Mausert be disqualified from representing Mr. Carpenter, even though no such relief had been requested or argued, Mr. Mausert was not a party to the proceeding and had not been afforded notice or an opportunity to be heard on this issue;

d) ordered that the director of the assigned counsel program submit Mr. Mausert's payment voucher directly to respondent for review, even though respondent had no authority to review the voucher since he was not the trial judge, no such relief had been requested or argued, Mr. Mausert was not a party to the proceeding and had not been afforded notice or an opportunity to be heard on this issue; and,

e) ordered that Mr. Mausert be removed from the panel of assigned counsel, even though respondent had no jurisdiction to do so, no such relief had been requested or argued, Mr. Mausert was not a party to the proceeding and had not been afforded notice or an opportunity to be heard on this issue.

12. Respondent did not address the issue of whether the flag-pin dispute was moot inasmuch as a jury trial had been waived, even though that issue had been extensively argued by the parties in their papers and at oral argument.

13. In his decision, respondent said that Mr. Mausert had falsely stated that Judge Mercure had suggested that Mr. Mausert telephone respondent, whereas it was Robert Muller who had spoken to Judge Mercure. Based on comments made by Mr. Mausert at the pre-trial conference before Judge Muller, respondent also accused Mr. Mausert of showing "verified animosity" toward Mr. Montgomery.

14. On March 22, 1991, respondent signed an order embodying the decision that he read from the bench.

15. In his decision, respondent criticized Judge Muller and Mr. Mausert because:

a) he was hostile toward Mr. Mausert because of certain information which he had learned outside of the court proceeding;

b) he believed that Mr. Mausert, who lived outside Warren County, was making too much money from the assigned counsel program and that only Warren County attorneys should share in the program's funds;

c) he believed from statements made to him outside of court that Mr. Mausert and Judge Muller were part of a group that was hostile to Mr. Montgomery and that they were trying to embarrass the district attorney;

d) he was of the opinion that Mr. Mausert had "disgraced" the American flag by his motion to have Mr. Montgomery remove the pin; and,

e) he believed that, by his decision, he could curtail Mr. Mausert's assigned counsel practice and his criticism of Mr. Montgomery.

16. Between April 2, 1991, and April 5, 1991, Mr. Mausert made three written requests of the county clerk, the court reporter and respondent, respectively, for a transcript of the oral argument in the Article 78 proceeding. On May 15, 1991, an attorney for Mr. Mausert requested the transcript from both the court reporter and respondent.

17. On May 19, 1991, the court reporter sent a letter to Mr. Mausert's attorney, David Goldstein, in which the reporter denied that a stenographic record existed. Respondent had discussed the matter with the court reporter and was aware of the general substance of his letter before it was sent.

18. On May 20, 1991, respondent wrote to Mr. Goldstein that no stenographic transcript had been made of the proceeding, even though he knew that the court reporter had taken stenographic notes.

19. On February 13, 1992, the Appellate Division, Third Department, reversed respondent's decision and order in the Article 78 proceeding against Judge Muller and Mr. Carpenter.

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

Motivated by personal animosity that was based on information that he had obtained outside of the court proceedings, respondent rendered a decision that went beyond the relief requested and beyond his legal authority. In doing so, he failed to observe high standards of conduct and preserve the independence and impartiality of the judiciary. (See, Matter of Van Buskirk, 1990 Ann Report of NY Commn on Jud Conduct, at 174, 180; Matter of Mullen, 1987 Ann Report of NY Commn on Jud Conduct, at 129).

A judge has wide discretion in decision making, and a good-faith effort should not result in disciplinary action. (Matter of Slavin, 1990 Ann Report of NY Commn on Jud Conduct, at 158, 163 [Altman, dissenting]), even though it might later be determined on appeal to be erroneous. In some instances, a judge is authorized to go beyond the relief requested by the parties to fashion an appropriate remedy. (See, e.g., CPLR 3212[b] regarding motions for summary judgment). This was not such an instance.

Respondent's decisions to remove Mr. Mausert from representing Mr. Carpenter and from receiving any further assignments as counsel to indigent defendants were not authorized by statute. They denied Mr. Mausert's rights without notice or hearing, and they were based on animus and vindictiveness.

Respondent's personal views concerning Mr. Mausert and his fees as assigned counsel should have played no part in his decision-making process. Nor should respondent's patriotism or his interest in protecting the district attorney from criticism have influenced the outcome of the proceeding. Respondent clearly abused his discretion for personal and partisan reasons.

It was also wrong for respondent to mislead Mr. Mausert and his attorney by telling them that there was no transcript of the argument in respondent's court when he knew that he had directed the court reporter to take notes of the proceeding. He gave misleading information concerning the availability of a transcript and condoned the actions of the court reporter in doing so, as well. (See, Matter of Reeves v State Commission on Judicial Conduct, 63 NY2d 105, 108-09; Matter of Reyome, 1988 Ann Report of NY Commn on Jud Conduct, at 207, 209). The fact that the transcript may not have been part of the record for appeal but rather a record for respondent's personal use is no excuse for misrepresenting that it did not exist.

In mitigation, we note that respondent has been "forthright, cooperative and contrite" in the proceeding before us. (See, Matter of LaBelle v State Commission on Judicial Conduct, 79 NY2d 350, 363).

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

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

Mr. Berger, Judge Altman, Ms. Barnett, Mrs. Del Bello and Mr. Goldman dissent as to sanction only and vote that respondent be censured.

Dated: April 28, 1993

State of New York
Commission on Judicial Conduct

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

JOHN G. DIER,

a Justice of the Supreme Court, Fourth Judicial
District, Warren County.

DISSENTING
OPINION BY
MRS. DEL BELLO

I dissent and vote that respondent be censured.

Admonition, the least severe of the public sanctions available to the Commission, does not adequately redress respondent's conduct. A judge's primary responsibility is to put aside personal feelings and prejudices and decide cases impartially on the merits and within the law. This is precisely what respondent, a Supreme Court justice with 35 years experience on the bench, failed to do.

He further demonstrated his hostility and partisanship--as well as a lack of candor--by his attempt to prevent Mr. Mausert from obtaining a transcript of the argument in the Article 78 proceeding.

In addition, respondent's previous censure for seeking to influence the disposition of cases in other courts (Matter of Dier v State Commission on Judicial Conduct, 48 NY2d 874) is an appropriate consideration in determining sanction in this matter (see, Matter of Maney v State Commission on Judicial Conduct, 70 NY2d 27, 31).

Respondent's serious abuse of his power should be strongly condemned. I vote that he be censured.

Dated: April 28, 1993

State of New York
Commission on Judicial Conduct

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

JOHN G. DIER,

a Justice of the Supreme Court, Fourth Judicial District,
Warren County.

DISSENTING
OPINION BY
MR. GOLDMAN
IN WHICH
MS. BARNETT
JOINS

I dissent from the Commission's determination that respondent be issued an admonition. I believe that the appropriate sanction in this case is a censure.

I find respondent's removal of Mr. Mausert from his representation of Mr. Carpenter, and from the Warren County assigned counsel list, serious misconduct deserving of a severe sanction. Respondent had no legal authority for removing Mr. Mausert from the Carpenter case or the assigned counsel list. No such relief had even been requested. Mr. Mausert was not a party to the proceedings, had not been afforded notice of respondent's intended action, and had no opportunity to be heard on this issue.

Respondent apparently felt that Mr. Mausert, who lived outside the county, was making too much money from the Warren County assigned counsel program and that only Warren County attorneys should share in the program's funds. Respondent also apparently believed that Mr. Mausert's stated animosity toward District Attorney Montgomery in some manner affected his representation in the criminal case. Nonetheless, these beliefs provide no basis for respondent to remove Mr. Mausert from the case and from the assigned counsel panel. Rather, it is apparent that respondent's action was based on his own personal hostility toward Mr. Mausert.

By his actions, respondent deprived Mr. Mausert of a substantial part of his livelihood, and deprived the indigent criminal defendants of Warren County, including Mr. Carpenter, of the services of a zealous defense attorney. His actions in mistreating the attorney constituted an abuse of judicial power (see generally, Matter of Slavin, 1990 Ann Report of NY Comm on Jud Conduct, at 158; Matter of Sharpe, 1984 Ann Report of NY Comm on Jud Conduct, at 134; Matter of Taylor, 1983 Ann Report of NY Comm on Jud Conduct, at 197).

Especially in view of respondent's prior censure by this Commission, also involving an abuse of his power as a judge (Matter of Dier v State Commission on Judicial Conduct, 48 NY2d 874), I believe that a mere admonition is inadequate. Accordingly, I vote that respondent be censured.

Dated: April 28, 1993

State of New York
Commission on Judicial Conduct

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

Determination

ROGER W. GLOSS,

a Justice of the Sheridan Town Court, Chautauqua County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

Subjack, Dorey & Benca (By James P. Subjack) and Denman & Dorn
(By John W. Dorn) for Respondent

The respondent, Roger W. Gloss, a justice of the Sheridan Town Court, Chautauqua County, was served with a Formal Written Complaint dated April 16, 1992, alleging improper conduct in the course of a personal dispute that led to his conviction on criminal charges. Respondent filed an answer dated May 8, 1992.

By order dated June 8, 1992, the Commission designated Jacob D. Hyman, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on November 10, 12 and 17, 1992, and the referee filed his report with the Commission on April 22, 1993.

By motion dated May 6, 1993, the administrator of the Commission moved to confirm the referee's report, to adopt an additional finding of fact and for a determination that respondent be removed from office. Respondent opposed the motion on May 17, 1993. The administrator filed a reply on May 26, 1993. Oral argument was waived.

On June 3, 1993, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Sheridan Town Court for 11 years.
2. Since the 1960s, respondent has farmed land on Route 20 in the Town of Sheridan, including a 75-acre parcel near respondent's home and once owned by his family.

3. In 1970, respondent entered into a land contract with his mother for the 75 acres. The contract was not recorded. It was cancelled in 1973. Respondent testified that it was renewed in 1974, but he produced no evidence of having made payments. The renewed contract was never recorded, and respondent could not produce an original. Respondent was never given a deed granting him title to the property.

4. Respondent's mother died in 1985, leaving her estate to respondent and his brother. Her husband, Theodore Guenther, claimed elective rights in the estate. Respondent and his brother were named co-executors, but they were removed by the Surrogate's Court for commingling their assets with estate property and other violations of their fiduciary duties. Mr. Guenther was named administrator, C.T.A., on July 30, 1990.

5. On September 18, 1990, Mr. Guenther sold the 75-acre parcel to neighboring farmers, Joel and Cathy Hamlet. The Hamlets posted the property on September 24, 1990, after being told by their attorney that their deed to the land had been recorded.

6. On September 25, 1990, respondent drove onto the land and attempted to stop the Hamlets from cultivating it. He angrily ordered Joel Hamlet to leave, repeatedly calling him and his family "assholes" who were "no fucking good" and referring to Mr. Guenther, who had also come to the scene, as "scum".

7. Ms. Hamlet handed her husband a small tape recorder. Respondent grabbed it from Mr. Hamlet, broke it open, tore out the tape, ran his fingernail along the tape, threw the tape to the ground, put the recorder in his pocket, and said, "A lot of fucking good this will do you." A sheriff's deputy who was called to the scene later retrieved the recorder and returned it to Mr. Hamlet.

8. On September 26, 1990, respondent sent a contractor to the land to harvest grapes. Accompanied by a state trooper, respondent met the Hamlets on the land. The Hamlets produced a certificate of title, and all of the parties left.

9. On September 27, 1990, Mr. Hamlet and a work crew were mechanically harvesting grapes on the property when respondent arrived by car. He drove his car in front of Mr. Hamlet's grape picker in order to block it.

10. Grant Perry, who accompanied respondent, served Mr. Hamlet, at respondent's direction, with an Order to Show Cause why respondent should not be declared owner of the property. Attached to the papers was a copy of the 1970 agreement between respondent and his mother. They did not contain the 1973 cancellation of that agreement.

11. Respondent got out of his car carrying an unloaded shotgun. With the butt of the shotgun, he broke Mr. Hamlet's tractor key in the ignition. He climbed the grape picker, pointed the shotgun at Mr. Hamlet and told him that he had 60 seconds to read the papers and leave the property. Respondent then began counting.

12. As he counted down, respondent threw the shotgun to Mr. Perry, grabbed two metal-tipped fiberglass beater rods that were part of the grape-picking equipment and held them in a threatening manner as he told Mr. Hamlet to leave. Mr. Hamlet eventually succeeded in starting his tractor and left the property with his equipment but without seven tons of harvested grapes.

13. On October 15, 1990, in County Court, the Hamlets were declared owners of the property. Respondent's complaint was dismissed, and the Hamlets were given a judgment for \$8,120 for the grapes that respondent had harvested from their property.

As to Charge II of the Formal Written Complaint:

14. On December 2, 1991, after a jury trial in the Ellicott Town Court, respondent was found guilty of two counts of Criminal Mischief, Fourth Degree; Menacing, and Trespass, in connection with his actions toward Joel Hamlet on September 25, 26 and 27, 1990. Respondent was given a Conditional Discharge.

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

Over the course of three days, respondent used a shotgun, physical threats, vulgarities and verbal intimidation to try to win the advantage in a personal dispute over property rights. These unseemly confrontations led to his conviction on three misdemeanor charges and a violation.

Peaceable self-help is a recognized remedy by which a creditor may, in certain circumstances, obtain repossession of goods. (See, 32 ALRFed 431). Respondent's course of action cannot be described as peaceable, however. Whether or not respondent thought that he had a legitimate right to the property, the means he chose to assert it, vulgarities, threats, verbal and physical intimidation and the display of a firearm, violated the law and the high standards of conduct expected of judges.

Respondent's failure off the bench to abide by the laws that he is often called upon to apply in court undermines his effectiveness as a judge (see, Matter of Wray, 1992 Ann Report of NY Commn on Jud Conduct, at 77, 80) and subjects the judiciary as a whole to disrespect (see, Matter of Kuehnel v State Commission on Judicial Conduct, 49 NY2d 465, 469). His improper behavior was not the result of a momentary loss of control; it spanned three days and involved repeated displays of anger and abuse.

Respondent was previously censured by this Commission for extensive political activity while a judge. (Matter of Gloss, 1989 Ann Report of NY Commn on Jud Conduct, at 81). That prior censure is a relevant consideration in determining sanction in this matter. (See, Matter of Maney v State Commission on Judicial Conduct, 70 NY2d 27, 31).

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

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

Ms. Barnett was not present.

Dated: July 27, 1993

State of New York
Commission on Judicial Conduct

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

Determination

DAVID B. HEBURN,

a Justice of the Remsen Town and Village Courts,
Oneida County.

APPEARANCES:

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

Robert Barry for Respondent

The respondent, David B. Heburn, a justice of the Remsen Town Court and the Remsen Village Court, Oneida County, was served with a Formal Written Complaint dated November 24, 1992, alleging that he falsely subscribed designating petitions during his 1991 election campaign for town justice. Respondent filed an amended answer dated April 28, 1993.

By order dated January 19, 1993, the Commission designated David S. Williams, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 4, 1993, and the referee filed his report with the Commission on August 16, 1993.

By motion dated September 24, 1993, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on October 13, 1993. The administrator filed a reply dated October 14, 1993. Oral argument was waived.

On October 21, 1993, the Commission considered the record of the proceeding and made the following findings of fact:

1. Respondent has been a justice of the Remsen Town Court for twelve years. He ran for re-election in the 1991 general election.

2. In July 1991, respondent caused to be circulated designating petitions as the Republican candidate for town justice on the November ballot.

3. Signatures on the petitions were obtained by and in the presence of either respondent's wife, Priscilla, or by Robert Walter, the Remsen town clerk, at his place of business, Walter's Hardware in Remsen. Respondent was not present when any of the signatories executed the petitions.

4. On July 19, 1991, respondent falsely subscribed on each of the four pages of the designating petitions that the signatories had executed the petitions in his presence, contrary to Election Law §§ 6-132(2) and 17-122(7).

5. On July 19, 1991, respondent filed or caused to be filed with the Oneida County Board of Elections his designating petitions, even though they contained a false material statement, contrary to Penal Law §175.30.

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

The record establishes that respondent falsely swore that he had witnessed the signatures on his 1991 designating petitions for town justice, even though the signatures had been collected by his wife and the town clerk.

A number of the signatories testified that they did not sign in the presence of respondent. Moreover, during the investigation of this matter, staff counsel wrote to respondent at his official address. Respondent received this letter on September 21, 1992. A signed response bearing respondent's name, title and address was received in reply. In it, respondent admitted signing the petitions as witness, even though his wife and Mr. Walter had witnessed the signatures. After service of the Formal Written Complaint, respondent signed a verified amended answer. It was established to the satisfaction of the referee, and we accept, that this pleading bears respondent's genuine signature. This signature may be compared with those on the letter and the petitions in order to determine whether respondent signed the petitions. (See, CPLR 4536; Ibanez v Pfeiffer, 76 Misc2d 363 [Civ Ct Queens Co]).

It is not necessary, as respondent suggests, to have expert testimony by a handwriting analyst who compared the signatures. CPLR 4536 does not so provide (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4536, at 296-97; Ibanez v Pfeiffer, *supra*), nor do the cases cited by respondent. Turnure et al. v Breitung et al. (195 AD 200 [1st Dept]) merely stands for the proposition that one of the signatures must be established by a fair preponderance as genuine before it can be compared with signatures in dispute. Freeman Check Cashing, Inc. v State (97 Misc2d 819 [Ct of Claims]) held that the state had not established a forged endorsement on an unemployment check that it refused to honor because it had not produced any evidence of the genuine handwriting of the endorser and, thus, the Uniform Commercial Code's presumption of genuineness in a negotiated instrument had not been rebutted.

Here, we conclude that staff counsel presented a prima facie case that respondent signed and filed the petitions which, in the absence of any contrary proof by respondent, meets the preponderance standard.

Such an act is contrary to law (Election Law §§ 6-132[2] and 17-122[7]). Respondent also violated the law when he filed or caused to be filed the falsely certified petitions. (Penal Law §175.30).

Such conduct is "antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." (Matter of Myers v State Commission on Judicial Conduct, 67 NY2d 550, 554). "Falsification of documents is inimical to the character required of a Judge." (Matter of Mazzei v State Commission on Judicial Conduct, 81 NY2d 568, 572). A judge who swears falsely is not fit to administer oaths and determine the credibility of witnesses in matters before the court.

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

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

Judge Salisbury was not present.

Dated: December 16, 1993

State of New York
Commission on Judicial Conduct

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

Determination

ANTHONY P. LoRUSSO,

a Judge of the Family Court, Erie County.

APPEARANCES:

Gerald Stern (John J. Postel and Jean M. Savanyu, Of
Counsel) for the Commission

Phillips, Lytle, Hitchcock, Blaine & Huber (By Joseph
V. Sedita; Walter S. Peake, Of Counsel) for
Respondent

The respondent, Anthony P. LoRusso, a judge of the Family Court, Erie County, was served with a Formal Written Complaint dated July 8, 1991, alleging a course of offensive, undignified and harassing conduct toward some female employees in the court system. Respondent filed an answer dated July 31, 1991.

By order dated August 5, 1991, the Commission designated Paul A. Feigenbaum, Esq., as referee to hear and report proposed findings of fact and conclusions of law.

On November 29, 1991, respondent moved to dismiss specification 4(a) of Charge I and Charge II of the Formal Written Complaint. The administrator of the Commission opposed the motion by affirmation dated December 4, 1991. On December 10, 1991, respondent filed a memorandum in support of his motion, and the administrator filed a memorandum of law dated December 12, 1991. By determination and order dated December 19, 1991, the Commission denied respondent's motion.

A hearing was held on February 24 and 25, March 23, 24, 25 and 26 and May 27, 1992, and the referee filed his report with the Commission on December 10, 1992.

By motion dated December 21, 1992, the administrator moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on January 11, 1993. The administrator replied on January 19, 1993.

The parties appeared before the Commission on January 21, 1993, and the Commission * adjourned oral argument. Respondent submitted additional papers on January 26 and February 4, 1993, and the administrator filed a reply to these papers on February 17, 1993.

On March 4, 1993, the Commission heard oral argument, at which respondent and his counsel appeared. Respondent made an additional submission by letter dated April 13, 1993. The administrator replied by letter dated April 19, 1993. Thereafter, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent was a judge of the Erie County Family Court from January 1, 1990, to March 28, 1993. He was a judge of the Buffalo City Court from December 1975 through December 1989.

2. Between February 1978 and July 1989, respondent engaged in a course of offensive, undignified and harassing conduct toward some female employees in the Buffalo City Court, as specified in Paragraphs 3 through 33 herein. The allegation in Paragraph 4(c) of Charge I is not sustained and is, therefore, dismissed.

As to Charge II of the Formal Written Complaint:

3. In January 1976, Ms. A¹ was 19 years old and had recently graduated from stenographic school. On her third assignment for a court reporting service, she was sent to respondent's courtroom on a temporary basis. At the end of the day, respondent offered her a permanent job as his court reporter and secretary.

4. Ms. A, who lived with her parents and was described by respondent as a "young 19-year-old," consulted with her stenography teacher and her father. Her father called respondent and announced, "We'll take the job." Ms. A understood that she served at respondent's pleasure.

5. In January 1978, when Ms. A was 21 years old and respondent was 37, respondent overheard Ms. A complain to other court employees that she felt bloated from overeating during the holidays. After the other employees left, respondent called Ms. A into his chambers and told her that he could check to see whether she was "retaining water." He directed her into his private bathroom in his chambers, told her to remove her pantyhose, lifted her skirt above her knees, pressed his fingers on her thighs, rubbed her legs and told her to get dressed.

6. A few weeks later, respondent suggested rechecking the "problem". He directed her to the bathroom to remove her pantyhose. Respondent touched her thigh, pulled down her underwear and touched her vagina. Ms. A said that she had never been touched there before. As respondent escalated his sexual activity with Ms. A, she was subjected to conduct with which she was totally unfamiliar.

7. About three weeks later, respondent called Ms. A into his chambers. She found him in the bathroom with his penis exposed. Respondent placed her hand on it and said that he would "teach" her.

8. In May or June 1978, respondent called Ms. A into his chambers, told her to take off her pantyhose and sit on a couch. He removed her underwear, rubbed her vagina and performed oral sex.

¹For the purposes of this determination, the female court employees are being identified by letter only.

9. About two weeks later, respondent called Ms. A into his chambers, took her hand and placed it on his clothed crotch. He then exposed his penis and pushed Ms. A's head down toward it and had her perform oral sex.

10. A few weeks later, respondent again called Ms. A into chambers. He told her to sit on his desk. Her underclothes were removed, and respondent performed oral sex. He then told her to lie back on his desk and engaged in sexual intercourse with her.

11. Sometime before August 1978, respondent called Ms. A into chambers. Her underclothes were removed, and respondent administered an enema, rubbing her side and leg as he did so.

12. In July 1978, respondent called Ms. A into chambers and told her to go into the bathroom and remove her underclothes. He then engaged in anal intercourse with her. When she complained that he was hurting her, respondent stopped.

13. No further sexual contact took place between respondent and Ms. A. They continued to work together until November 1989.

14. Each of the sexual encounters took place near the end of the workday after court sessions had concluded. Respondent locked the doors to his chambers before each encounter. There was little, if any, conversation beyond respondent's directions to Ms. A. No romantic words were exchanged. She referred to respondent as "Judge" during the sessions and testified, "I did whatever he told me to do."

15. On several occasions Ms. A cried after leaving respondent and sometimes experienced physical discomfort during the activity and afterward. After each incident, she hoped the contact would end. Asked at the hearing whether she thought she would lose her job if she did not comply, she replied, "I didn't know what he could do. I didn't know if he could arrange for me to lose my job. I did not know."

As to Charge III of the Formal Written Complaint:

16. In April 1984, Ms. B, a Buffalo City Court clerk, attended a party of the Buffalo Police Department at the Peace Bridge Convention Center.

17. While Ms. B was talking with a group of people, respondent touched her buttocks. She turned around and said, "Don't do that." Respondent did not reply.

As to Charge IV of the Formal Written Complaint:

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

As to Charge V of the Formal Written Complaint:

19. During a morning court session in February 1989, Ms. C, a Buffalo City Court clerk, entered respondent's courtroom with some files. Ms. C was wearing leather slacks and a bulky sweater.

20. As she turned to leave the courtroom, respondent said, "Do you know what you do to men on the bus at night when you go home dressed that way? I bet that you're the reason why Jamie Brame did what he did." Ms. C understood Jamie Brame to be a defendant who had been charged with rape.

As to Charge VI of the Formal Written Complaint:

21. Ms. D, a court assistant in the Buffalo City Court, was assigned to respondent's courtroom from January 1988 to August 1989.

22. As respondent left the bench, he routinely passed behind Ms. D and rubbed his hands on her shoulders and back. There was sufficient room for respondent to walk behind Ms. D without touching her. As time went on, Ms. D pulled herself closer to her desk and began wearing extra shoulder pads. Respondent then began to move his hands down her back to the area of her bra when he touched her. Respondent would often put his face in Ms. D's hair and whisper, "Very good job, dear. See you tomorrow."

23. In January 1988, Ms. D was discussing back pain in Ms. A's office outside of respondent's chambers. Respondent came out of his chambers, told Ms. D that he knew about back pain, told her to turn around and placed his hands on her buttocks, using a description of an X-ray procedure as a pretext. Ms. D moved away from him.

24. In February 1988, respondent asked Ms. D whether she was dating someone and told her that, when she was first employed in the court, men lined up to date her.

25. In March 1988, respondent touched Ms. D's buttocks while they were riding in an elevator in the courthouse.

26. In June 1988, respondent told Ms. D that he had eaten some cookies that she had brought for a luncheon in honor of a court employee. Whispering in a sensual tone, respondent said, "I had an orgasm eating your cookies," which he described to Ms. D as "hard and crunchy on the outside, soft and creamy on the inside." Ms. D tried to end the conversation.

27. In June 1988, respondent said to Ms. D in a sensual tone, "Is that your smell? No, I know your smell."

28. On approximately 10 occasions while she worked in his courtroom, respondent called Ms. D into his chambers on a pretext and commented on her appearance, saying that she was "slender looking" and made comments about her black hosiery and leather clothing while looking her up and down.

29. In the summer of 1988, Ms. D was seated in Ms. A's office when respondent emerged from his chambers and whispered in her ear that he had been discussing with lawyers "delicious and delectable blow jobs." He was breathing heavily and kissed the top of Ms. D's head.

30. In May 1989, Ms. D went into respondent's chambers to leave some papers for him to sign. Respondent walked toward her with his arms outstretched, attempting to embrace her. Ms. D asked, "What are you doing?" and ran into Ms. A's adjoining office. Respondent followed her, grabbed her and held her in place by the elbows. No one was in the office at the time. Respondent told Ms. D that she reminded him of a "cute nurse" who had recently given him a blood pressure test. Ms. D was frightened and shaken by the incident.

31. In July 1989, respondent entered the courtroom and again whispered in a sensual tone to Ms. D that he had been discussing "delicious and delectable blow jobs" with attorneys in his chambers.

32. In the summer of 1989, respondent asked Ms. D about the procedures for a CAT scan of her sinuses. When she described lying face down, respondent asked, "Did your boobs hurt?"

33. On August 2, 1989, during a break in courtroom proceedings, respondent placed some envelopes near Ms. D. While stroking the seal of an envelope with his finger, he asked Ms. D to lick the envelopes for him. He said, "I heard you're really good at this. Let me see your tongue." When he repeated the last sentence, Ms. D said, in disbelief, "Excuse me?" Ms. A, several litigants and at least one attorney were in the room at the time.

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

Respondent engaged in a course of offensive, undignified and harassing conduct in which he subjected subordinate women in the court system to uninvited sexual activity, touching and crude and suggestive comments. He also took advantage of his superior position as a judge and employer in a series of sexual encounters with his young court reporter and secretary who was unsophisticated, sexually inexperienced and submissive.

"Sexual harassment in the work place is among the most offensive and demeaning torments an employee can undergo...." (Petties v State Department of Mental Retardation and Developmental Disabilities, 93 AD2d 960, 961). An employer can "implicitly and effectively make the employee's endurance of sexual intimidation a 'condition' of her employment. The woman then faces a 'cruel trilemma.' She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew." (Bundy v Jackson, 641 F2d 934, 946).

A woman who does not protest does not necessarily acquiesce. There is a "power imbalance between employer and employee that often makes a worker in need of her job feel she must swallow such indignities.... The employee suddenly finds herself treated not as a worker, but rather as a sexual being; yet the advances take place in the context of a work interaction, where the employer-employee relationship limits the acceptable responses. She may well become angry and wish to lash out, yet she reasonably fears adverse job consequences if she protests, even though no such overt threat is made." (Rudow v New York City Commission on Human Rights, 123 Misc2d 709, 713, aff'd 109 AD2d 1111, lv denied 66 NY2d 605). Respondent never explicitly told the women who were subjected to his unwelcome conduct that their jobs were at stake but there was always the implicit threat that a person in his position could impair their job security. Ms. D endured such indignities for 19 months. She was repeatedly and persistently touched by respondent as he was leaving the courtroom. He repeatedly leered at her and made suggestive comments about her appearance. He often nuzzled her and whispered in a sensual tone. He made crude comments in the presence of others, and twice he touched her on the buttocks.

By her conduct and words, Ms. D made it clear that respondent's attentions were "unwelcome." (See, Meritor v Vinson, 477 US 57, 68; Rules of the Equal Employment Opportunity Commission, 29 CFR 1604.11[a]). In an effort to avoid his touching, she was forced to adjust her manner of dress and to attempt to move away from him. She tried to end the conversation when he made crude remarks, made clear that she did not want him to embrace her and expressed disbelief when he made crude suggestions about her tongue. Respondent's uninvited touching of Ms. B at a function outside of the courthouse and his comment in the courtroom to Ms. C, implying that her appearance might incite rape, were also inappropriate and undignified. (See, Matter of Doolittle, 1986 Ann Report of NY Commn on Jud Conduct, at 87; Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135). These actions alone establish a pattern of conduct prejudicial to the administration of justice warranting removal from office.

Moreover, under the circumstances of this case, we conclude that respondent's sexual encounters with Ms. A constitute misconduct. By his own admission, Ms. A was an immature 19 year old when he gave her a job as his court reporter and secretary. The record demonstrates that she was still unworldly, docile and submissive two years later when respondent directed her in a series of passionless sexual experiments in his locked chambers over an eight-month period. Ms. A was not a minor; she did not object or complain. But respondent knew that she owed him her job and that she was sexually inexperienced. The first time that he touched her intimate parts, she told him that she had never been touched there before; in their next encounter, he told her that he would "teach" her what to do. As throughout the rest of the workday, respondent gave the orders, and Ms. A complied.

He took advantage of her innocence, her submissive nature and her inferior position in the workplace to subject her to a series of sexual indignities. Once he learned that she would submit without protest, he escalated the nature of the activity in each successive encounter.

Failure to protest or complain at the time does not mean that Ms. A consented to the contact. Respondent was a judge and her boss and had given her a job that was important to her and her family. It is understandable and believable that she summoned the fortitude to come forward only after she was no longer working for respondent, knew that Ms. D had made allegations against him and that the Commission was investigating him. While there is some difference in the details of what happened, respondent does not deny that he was intimate with Ms. A. The record amply supports the referee's finding that Ms. A's version of the events was more credible than respondent's. Sexual activity is by its nature private and therefore lack of corroboration does not require us to disbelieve Ms. A.

We do not hereby make a per se finding that sexual contact between a judge and employee is intimidating and harassing solely because of the disparity in power between the actors. The totality of the circumstances here however, requires a finding of misconduct as to Ms. A. Her situation is not a case of two consenting adults involved in a dalliance. Rather, the chronology of events and activity indicates its one sidedness and oppressiveness.

Respondent used female court employees to satisfy his sexual desires and fantasies. This constituted a gross abuse of his power as a judge and damaged public confidence in the integrity of the judiciary. Female employees were repeatedly subjected to humiliating and unwanted verbal and physical abuse. Even if respondent did not have direct responsibility for hiring and firing, as a judge he was an intimidating figure. Some women nevertheless protested his conduct. Others felt compelled to endure his improper behavior in silence.

"A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function." (Matter of Kuehnel v State Commission on Judicial Conduct, 49 NY2d 465, 469).

This is not respondent's first abuse of his authority as a judge. He was previously censured for seeking to obtain the release of a defendant from jail earlier than scheduled as a favor to the defendant's father. (Matter of LoRusso, 1988 Ann Report of NY Commn on Jud Conduct, at 195).

We have considered respondent's arguments concerning improper investigation methods by staff and bias on the part of the referee and find them without merit.

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

This determination is rendered pursuant to Judiciary Law §47 in view of respondent's resignation from the bench after oral argument before the Commission but prior to decision.

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

Mrs. Del Bello dissents only as to Paragraph 4(c) of Charge I and as to Charge IV and votes that those allegations be sustained.

Mr. Goldman and Judge Salisbury dissent only as to Paragraph 4(a) of Charge I and as to Charge II and vote that those allegations be dismissed.

Judge Thompson dissents as to Paragraph 4(a) of Charge I and as to Charge II and votes that those allegations be dismissed and dissents as to sanction and votes that respondent be censured.

Mr. Bellamy was not present.

Dated: June 8, 1993

State of New York
Commission on Judicial Conduct

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

ANTHONY P. LoRUSSO,

OPINION BY
MRS. DEL BELLO,
DISSENTING IN PART

a Judge of the Family Court, Erie County.

I concur with the majority's findings that respondent engaged in judicial misconduct with respect to Ms. A, Ms. B, Ms. C and Ms. D and that he should be removed from office.

I write separately because I would also sustain the allegations of paragraph 4(c) of Charge I and of Charge IV, both involving Ms. E.

The record amply demonstrates that respondent met Ms. E, a court assistant whom he had known for several years, in an elevator on their way to a ceremony in the courthouse. Respondent attempted to introduce Ms. E to someone but found that he could not remember her name. They met at a reception after the ceremony. Respondent apologized for forgetting her name and, staring directly at her chest, said that he was "just so overwhelmed by your attributes in that dress that I couldn't help myself." Ms. E was shocked, angry and upset and immediately left the party.

These facts were found by the referee and are supported by the proof, and I do not find them de minimus. This is demeaning and undignified conduct for any man in any setting. Women should not be subjected to leering and suggestive remarks about their anatomy. It is especially improper for a judge, and I feel that it is an important part of the pattern of offensive, undignified and harassing conduct displayed by this respondent.

I would sustain the allegations of paragraph 4(c) of Charge I and of Charge IV.

Dated: June 8, 1993

State of New York
Commission on Judicial Conduct

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

ANTHONY P. LoRUSSO,

a Judge of the Family Court, Erie County.

OPINION BY
MR. GOLDMAN,
DISSENTING
IN PART

Like my colleague Justice Thompson, I am troubled by the Commission's reliance in Charge II upon the largely uncorroborated and strongly disputed testimony of a single witness concerning events 14 years earlier in an area of memory susceptible to fallible or distorted retrospection. Since the burden of proof on Commission staff is merely to prove facts "by a preponderance of the evidence" (22 NYCRR 7000.6[i][1]) and not by a greater standard, however, I accept the factual findings in the majority's determination with respect to the sexual activity between respondent and Ms. A (paragraphs 3-15). Nonetheless, I disagree with the majority's conclusion that this sexual activity constituted judicial misconduct and, therefore, concur in the dissenting opinion of Judge Salisbury.

In 1978, over a period of approximately seven months, respondent--then a judge, 37 years old and married--and Ms. A--then his court reporter/secretary, 21 years old and single--at respondent's initiation, engaged in various sexual acts, some unconventional, in respondent's chambers. Respondent never in any way communicated to Ms. A that her court position would be at all affected if she did not consent to sexual activity with him. Conversely, Ms. A never in any way communicated or indicated to respondent that his advances were unwelcome or that she preferred not to engage in sexual activity with him. Rather, the evidence--even accepting in full Ms. A's factual recitation and discrediting respondent's testimony--reveals that she was a willing, albeit passive and inexperienced, participant in the sexual activity initiated by respondent.

The majority finds that respondent "took advantage" of Ms. A's "innocence, her submissive nature and her inferior position in the workplace." However, literature, media and life experience teach us that many sexual relationships occur between partners of different experience, opposite personalities, and unequal station. Whatever my personal feelings about respondent's behavior, absent evidence of coercion or promise of reward, I do not find misconduct from a sexual relationship between two consenting adults in private--regardless of the relative positions, ages or marital status of the participants, the degree of passivity or enthusiasm of one of the partners, or the choice of sexual activity.

I do, however, join in the majority's determination finding misconduct as to Charges III, V and VI and also Charge I, except as it relates to the relationship with Ms. A. Unlike the situation involving Ms. A, who consented to respondent's requests beginning with his initial approach, respondent's actions, particularly in Charge VI, with respect to Ms. D, constitute a continued pattern of unwelcome and deplorable sexual harassment, both physical and verbal.

In view of respondent's resignation from the bench, the Commission is limited either to a determination of removal from office or dismissal of the complaint. (Judiciary Law §47). Given that choice, and in view of respondent's serious misconduct and his prior censure by this Commission, I without hesitation join the majority in voting for removal.

Dated: June 8, 1993

State of New York
Commission on Judicial Conduct

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

ANTHONY P. LoRUSSO,

a Judge of the Family Court, Erie County.

**OPINION BY
JUDGE SALISBURY
IN WHICH
MR. GOLDMAN JOINS,
DISSENTING IN PART**

I find that I cannot agree with the majority of my colleagues with respect to Charge II. The activity involved in that charge persisted over many months. There was no objection, no protestation and no complaints. There were no threats of reprisal of any nature by respondent. Indeed, in her testimony years later, Ms. A gave no indication that she was offended. Her only comment was, "I did whatever he told me to do." While the totality of the conduct may be sordid and reprehensible, the question presented here is judicial misconduct. Having taken the first step without rebuke or even protest, respondent moved to the second step, again, without rebuke or protest. And so it went for months.

Counsel for the Commission conceded on oral argument that there was no coercion, no allegation of criminal conduct and indeed, that the episodes were consensual. This Commission has clearly indicated that a sexual relationship between a judge and a court employee is not, per se, judicial misconduct. (Matter of Gelfand, 1988 Ann Report of NY Commn on Jud Conduct, at 165, 171; accepted, 70 NY2d 211). On the evidence in this case, I am not prepared to alter that perspective.

Again, in her testimony, long after the relationship had ended, Ms. A made no complaint, indicated that her relationship with respondent was friendly and included a number of social events with family. She offered, on questioning about fear of job loss or other reprisal, only that she did not know what respondent could do. While I may have very strong feelings about respondent's conduct, I do not find judicial misconduct with respect to Charge II. This dissent, of course, is applicable to that part of Charge I which embraces the allegations of Charge II.

In all other respects, I concur with the majority opinion, including sanction.

Dated: June 8, 1993

State of New York
Commission on Judicial Conduct

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

ANTHONY P. LoRUSSO,

DISSENTING
OPINION BY
JUDGE THOMPSON

a Judge of the Family Court, Erie County.

I concur in the dissent of Judge Salisbury insofar as it concludes that the relationship between respondent and Ms. A was consensual and, therefore, that Charge II fails to establish judicial misconduct. I write separately, however, to briefly add my own observations to those made by Judge Salisbury and to further indicate my disagreement with the majority's decision to impose the extreme sanction of removal.

The evidence adduced in connection with Charge II establishes a course of voluntary and consensual conduct which first commenced some 11 years before Ms. A terminated her employment with respondent in 1989. During the lengthy period of time which followed the alleged misconduct, Ms. A registered no objection to respondent's behavior and, significantly, continued in his employ for many years without further incident or complaint of sexual harassment or coercive conduct.

Although the clear inference to be drawn from the evidence is that of mutual consent, the majority nevertheless premises its conclusions of impropriety in large part upon the highly subjective characterization that Ms. A was "docile, unworldly and immature." I cannot subscribe to the majority's analysis, especially in light of the extreme staleness of the charges involved.

Allegations whose reliability has been eroded by the passage of over a decade, and further diluted by a subsequent course of conduct which belies the inference of misconduct, should be carefully reviewed and subjected to a particularly heightened degree of scrutiny. When measured against this evidentiary yardstick, the proof adduced falls short of credibly establishing the existence of judicial misconduct. Subjectively fashioned judgments about an individual's purported unworldly or docile personality constitute an unacceptably slender reed upon which to rest the conclusions of serious misconduct reached by the majority in this case. Moreover, the evidence reveals that Ms. A was a 21-year-old adult when the conduct in question took place and that she worked with respondent until she was 30 years of age, circumstances which belie the assertion that the absence of complaints can be reasonably attributed to her alleged immaturity and youth. Accordingly, I vote to dismiss Charge II.

But for respondent's resignation, which removes him from the bench, I feel the appropriate sanction would have been censure.

Dated: June 8, 1993

State of New York
Commission on Judicial Conduct

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

Determination

LYNNE D. McCORMICK,

a Justice of the Webb Town Court, Herkimer County.

APPEARANCES:

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

Arnold A. Dettor for Respondent

The respondent, Lynne D. McCormick, a justice of the Webb Town Court, Herkimer County, was served with a Formal Written Complaint dated August 11, 1992, alleging that she engaged in an ex parte communication concerning a matter pending before her and that she accepted employment incompatible with her role as a judge. Respondent filed an answer dated August 21, 1992.

On February 16, 1993, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided in Judiciary Law §44(4) and stipulating that the Commission make its determination based on the pleadings and the agreed upon facts. The Commission approved the agreed statement by letter dated March 5, 1993.

The administrator and respondent filed memoranda as to sanction. Oral argument was waived.

On April 22, 1993, the Commission considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a part-time justice of the Webb Town Court since January 1990.
2. On July 30, 1991, respondent arraigned Albert Gawehn on charges of Unauthorized Use Of A Motor Vehicle and Aggravated Unlicensed Operation and released him on \$200 bail. Mr. Gawehn was accused of taking without permission a vehicle owned by Nathan Young.

3. Arising from the same incident, Mr. Young was charged with Unattended Motor Vehicle. The case was pending in respondent's court, but Mr. Young had not yet appeared on the charge.

4. Respondent was told, outside of court, that Mr. Gawehn was a diabetic, and she concluded that his medical condition caused him to operate Mr. Young's vehicle without authorization.

5. On August 3, 1991, respondent went to Mr. Young's home. She introduced herself as the Webb town justice who was hearing the Gawehn case and as the daughter of a lawyer. During the conversation, Mr. Young concluded that respondent was stating that he should withdraw his complaint against Mr. Gawehn. Respondent denies specifically making such a request but concedes that her actions conveyed the impression that she was attempting to convince Mr. Young to withdraw his complaint.

6. Within a week or two, respondent spoke on separate occasions with the arresting officers in Gawehn, Police Chief Robert Crofut and State Trooper George Brownsell. If called to testify, they would state that respondent told them that she had visited Mr. Young and had asked him to withdraw his complaint because the charges were unjust.

7. After Mr. Young's attorney complained to the district attorney about respondent's communication with Mr. Young, respondent disqualified herself from the Gawehn case.

8. The charge against Mr. Young was ultimately dismissed by the other judge of the court.

As to Charge II of the Formal Written Complaint:

9. Since becoming a judge, respondent has worked as a legal secretary for Peter Shannon, Esq.

10. Until December 1992, Mr. Shannon was an assistant district attorney in Herkimer County and was assigned to prosecute criminal cases in the Webb Town Court before respondent's fellow judge. Mr. Shannon was initially assigned to prosecute Mr. Young for Unattended Motor Vehicle arising from the incident involving Mr. Gawehn. Mr. Shannon disqualified himself after Mr. Young's attorney complained to the district attorney about respondent's employment by the prosecutor.

11. Respondent works between 12 and 20 hours a week for Mr. Shannon and bills him on an hourly basis. She performs secretarial duties and paralegal services. She prepares wills, correspondence and real estate and matrimonial documents and answers the telephone. She also assists Mr. Shannon in criminal matters that he handles as defense attorney in counties outside Herkimer County.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated the Rules Governing Judicial Conduct, 22 NYCRR 100.1, 100.2(a), 100.2(c), 100.3(a)(4), 100.5(c)(1) and 100.5(h), and Canons 1, 2A, 2B, 3A(4) and 5C(1) of the Code of Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained insofar as they are consistent with the findings herein, and respondent's misconduct is established.

A judge should neither initiate nor consider ex parte communications concerning a pending case. (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][4]; Matter of Loper, 1985 Ann Report of NY Commn on Jud Conduct, at 172; Matter of Racicot, 1982 Ann Report of NY Commn on Jud Conduct, at 99). He or she must be impartial and appear impartial at all times so that public confidence in the judiciary may be preserved. (Matter of Sardino v State Commission on Judicial Conduct, 58 NY2d 286, 290-91). Judges must recognize that "any communication from a Judge...may be

perceived as one backed by the power and prestige of judicial office." (Matter of Lonschein v State Commission on Judicial Conduct, 50 NY2d 569, 572).

Respondent's actions concerning the Gawehn case indicate a lack of sensitivity to these ethical constraints. She considered an ex parte communication concerning a case pending before her and concluded that a defendant's purported diabetic condition was a justification for the criminal conduct alleged. She then initiated an ex parte contact with the complaining witness in which she conveyed the impression that she wanted his complaint withdrawn. In ex parte conversations with the arresting officers, she gave the same impression of prejudgment and partiality. Despite her strong feelings about the case, she did not disqualify herself until she learned that defense counsel had complained about her meeting with the complaining witness.

As to Charge II, a part-time judge may accept private employment that "is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties." (22 NYCRR 100.5[h]). Respondent's employment as a secretary and paralegal for one of the few attorneys in her town is incompatible with her role as a judge. Her duties in assisting the lawyer, Mr. Shannon, in estate, matrimonial, real estate and criminal cases must necessarily place her in contact with attorneys and clients who are likely to appear before her or her court, in violation of 22 NYCRR 100.5(c)(1). The conflict was particularly acute when Mr. Shannon appeared regularly in respondent's court as a prosecutor, even though he did not appear before her. (See, Matter of Moynihan v State Commission on Judicial Conduct, 80 NY2d 322; compare, Matter of Orloff, 1988 Ann Report of NY Commn on Jud Conduct, at 199).

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

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

Mr. Cleary, Mr. Sheehy and Judge Thompson were not present.

Dated: June 9, 1993

State of New York
Commission on Judicial Conduct

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

CARL E. MEACHAM,

Determination

a Justice of the Greene Town and Village Courts,
Chenango County.

APPEARANCES:

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

Hinman, Howard & Kattell (Thomas W. Cusimano, Jr.,
Of Counsel) for Respondent

The respondent, Carl E. Meacham, a justice of the Greene Town Court and the Greene Village Court, Chenango County, was served with a Formal Written Complaint dated August 10, 1992, alleging the mishandling of cases involving three defendants. Respondent filed an answer dated September 15, 1992.

By order dated September 25, 1992, the Commission designated Samuel B. Vavonese, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on March 11, 1993, and the referee filed his report with the Commission on June 2, 1993.

By motion dated August 11, 1993, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on August 31, 1993. The administrator filed a reply dated September 2, 1993. Oral argument was waived.

On September 9, 1993, the Commission considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent, who is not a lawyer, has been a justice of the Greene Village Court since 1985. He has been a justice of the Greene Town Court since 1990.

2. On August 5, 1986, Dale C. Price was arraigned before respondent in the Greene Village Court on charges of Driving While Ability Impaired, Unlicensed Operation and Inadequate Taillight.

3. Even though he intended to sentence Mr. Price to jail, respondent denied his request for assigned counsel and did not give him a financial affidavit to determine eligibility for assigned counsel based only on Mr. Price's representation that he was working and without making any other inquiry concerning his financial status, in violation of CPL 170.10(4)(a).

4. Mr. Price decided to plead guilty to all charges. Respondent fined him \$280 and sentenced him to a weekend in jail.

5. Mr. Price paid \$50 at the court session and served his jail time the following weekend. He paid the balance of the fine by personal checks dated August 17 and September 5, 1986.

6. The court subsequently sent an erroneous notice to Mr. Price, alleging that he had not paid the fine in full. He ignored it.

7. On February 21, 1989, Mr. Price was arrested on respondent's warrant and charged with Criminal Contempt for his alleged failure to pay the fine in full. Respondent issued the warrant after finding paperwork concerning the case in a folder reserved for overdue payments. Respondent checked his docket and found that it had not been marked "paid," but he did not check court receipts to determine whether the fine had been paid in full.

8. Respondent arraigned Mr. Price on the Criminal Contempt charge. Mr. Price produced a check register, carbon copies of his checks and bank statements, all reflecting that payments had been made and that the checks had cleared. The copies of the checks showed only that payments had been made to "Village Justice." Mr. Price did not have the returned checks or court receipts for the payments.

9. Respondent refused to accept Mr. Price's proffered proof of payment. He did not afford the defendant the right to a hearing or the right to assigned counsel.

10. Mr. Price pleaded guilty. Respondent fined him \$50 with a \$10 surcharge on the contempt charge and told him that he must pay a \$100 balance on the original fine. He permitted Mr. Price to go immediately to a bank to obtain the cash under threat of another arrest warrant if he did not return shortly. Mr. Price returned in 15 minutes and paid \$160, including a duplicate partial payment for the original fine.

11. Respondent acknowledged at the hearing that, before he issued the warrant, Mr. Price had, in fact, paid the fine in full and that respondent was "remiss" in failing to check court receipts. He also conceded that he misused his contempt power out of "ignorance" and that he denied Mr. Price a fair hearing.

As to Charge II of the Formal Written Complaint:

12. In 1989, Clifford Soules brought a small claims action in the Greene Village Court against Todd Furman, alleging failure to repay a loan.

13. On November 21, 1989, the parties appeared before respondent. Mr. Furman agreed to repay the money in monthly installments and signed an agreement, which was witnessed by respondent.

14. Respondent was later told outside of court that Mr. Furman was working but had not repaid the loan. On February 20, 1990, at respondent's direction, a police officer stopped Mr. Furman and told him that respondent wanted to speak with him.

15. Mr. Furman accompanied the police officer to respondent's court. Respondent asked him why he had not paid Mr. Soules. Mr. Furman said that he had spoken with Mr. Soules, who had no objection to the delay.

16. Respondent summarily sentenced him to ten days in jail for Criminal Contempt, 2d Degree, even though no such charge had been lodged and Mr. Furman had not been afforded a hearing or advised of any rights by respondent.

17. Mr. Furman's parents retained an attorney, who called respondent and argued that the incarceration was improper. Respondent ordered Mr. Furman, who had spent 24 hours in jail, released from custody.

18. On December 19, 1990, Mr. Furman was arrested on a charge of Driving While Intoxicated. Knowing that the defendant was intoxicated, respondent arraigned him in the Greene Village Court and committed him to jail in lieu of \$1,000 bail. Respondent ordered that he be returned to court on January 15, 1991, 27 days later.

19. Mr. Furman's mother, Judith, called respondent, told him that her son had agreed to plead guilty and would enroll in a 28-day alcohol treatment program. Respondent agreed to release him in her custody, and the defendant was released after spending nine hours in jail.

20. Mr. Furman and his parents appeared before respondent on January 15, 1991. He was re-arraigned. He pleaded not guilty. Respondent had heard outside of court that Mr. Furman was contemplating moving to the Northwest and, he testified, "I had heard the word 'suicide' mentioned." On this basis, he recommitted Mr. Furman to jail in lieu of \$1,000 bail.

21. His parents posted bail the following day and retained counsel. The charge was ultimately dismissed.

As to Charge III of the Formal Written Complaint:

22. On November 30, 1990, respondent arraigned Andrew B. in the Greene Village Court on a charge of Assault, 3d Degree. Andrew, who was 16 years old, was accused of shooting his 12-year-old brother in the neck with a pellet gun.

23. Andrew was accompanied by his mother; he was not represented by counsel. After being advised of the charge and his rights by respondent, Andrew conferred with his mother and pleaded guilty to the charge.

24. Respondent committed him to jail without setting bail, in violation of CPL 530.20(1), and forwarded to the jail a written request for a mental health evaluation.

25. On December 4, 1990, Robert M. Larkin, an assistant public defender who had been assigned to the case, and Assistant District Attorney Aaron Dean appeared before respondent. Mr. Larkin asked that Andrew be allowed to withdraw his plea; the prosecutor did not object. Respondent refused. Mr. Larkin then argued that the law required respondent to set bail since the charge is a misdemeanor. Respondent also refused to set bail.

26. Mr. Larkin said that he would apply to county court to obtain Andrew's release. Respondent replied that he could sentence him to 89 days in jail without the necessity of a pre-sentence report.

27. Mr. Larkin applied to county court, and Andrew was released in his parents' custody on December 7, 1990.

28. By letter dated February 19, 1991, Mr. Larkin requested that respondent vacate the plea. Respondent did not reply. About a month later, Mr. Larkin spoke with respondent about the matter. Respondent asked him to file a written motion.

29. On March 13, 1991, Mr. Larkin filed a motion with respondent. The assistant district attorney consented in writing.

30. On May 14, 1991, respondent left a message with Mr. Larkin's secretary in which he indicated that he would not grant the motion unless Andrew was removed from his home.

31. On May 28, 1991, respondent denied the motion to vacate the plea, and, on June 4, 1991, he sentenced Andrew to three years probation and a conditional discharge.

32. On July 31, 1991, Mr. Larkin appealed. On August 10, 1991, respondent filed a Return in which he stated that Mr. Larkin had never filed a written motion. On April 30, 1992, Judge Kevin M. Dowd of the Chenango County Court ruled that the motion to withdraw the plea should have been granted. He dismissed the charge in the interest of justice.

33. Respondent testified that he had refused to set bail because he was concerned about the safety of Andrew's family. He would "rather lose sleep over keeping him in jail a few days too long rather than letting him out and having to arraign him on a murder charge," he said. He also testified that his statement to the county court that Mr. Larkin had never filed a motion was a mistake and that he did not intend to deceive the superior court.

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

Respondent's lack of training and proficiency in the law and legal procedures triggered a series of abuses of his powers as a judge. However, his actions, though misguided and harmful to the defendants, were not motivated by maliciousness or venality.

Misapprehending the contempt powers of a judge, respondent summarily convicted and jailed two men for Criminal Contempt for what he perceived as threats to the integrity of the court process. He did this without affording them procedural due process and without a factual or legal basis.

He arraigned an intoxicated defendant and incarcerated him for return to court for re-arraignment 27 days later. (See, Matter of Winegard, 1992 Ann Report of NY Commn on Jud Conduct, at 70, 73). After he agreed to release the defendant and the defendant had returned to court as scheduled, respondent re-committed him based on ex parte information. (See, Matter of Mullen, 1987 Ann Report of NY Commn on Jud Conduct, at 129).

Immediately after arraignment, respondent accepted a guilty plea from a 16-year-old unrepresented defendant whose mental stability he questioned, then refused to set bail as required by law (see, Matter of LaBelle v State Commission on Judicial Conduct, 79 NY2d 350, 356-8). He then denied repeated requests to allow the defendant to withdraw the plea and go to trial, even though the prosecutor consented.

It is a judge's responsibility to maintain professional competence in the law (Rules Governing Judicial Conduct, 22 NYCRR 100.3[a][1]), and a non-lawyer judge has an obligation to learn about and obey ethical rules (Matter of VonderHeide v State Commission on Judicial Conduct, 72 NY2d 658, 660). Respondent was negligent and perhaps even reckless in this regard. However, we consider in mitigation the fact that he lacks legal training (see, Matter of Kuehnel et al., 45 NY2d [y][Ct on the Judiciary]) and that, in the Andrew B. matter, his intentions were not selfish but that he was motivated by concern for the safety of the defendant's family (see, LaBelle, supra, at 363). Furthermore, respondent now recognizes the impropriety of his conduct, and he has been candid and contrite in this proceeding. (See, Matter of Rath, 1990 Ann Report of NY Commn on Jud Conduct, at 150, 152).

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

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

Mr. Cleary and Mrs. Del Bello were not present.

Dated: October 28, 1993

State of New York
Commission on Judicial Conduct

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

RICHARD W. MURPHY,

Determination

a Justice of the Shandaken Town Court, Ulster County.

APPEARANCES:

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

Rusk, Wadlin, Heppner & Martuscello (By Daniel G.
Heppner) for Respondent

The respondent, Richard W. Murphy, a justice of the Shandaken Town Court, Ulster County, was served with a Formal Written Complaint dated December 16, 1991, alleging, *inter alia*, that he failed to deposit \$1,173 in court funds and gave false reports of what happened to the money. Respondent filed an answer dated January 4, 1992.

By order dated February 5, 1992, the Commission designated Gerald Harris, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on June 22 and 23, 1992, and the referee filed his report with the Commission on November 6, 1992.

By motion dated November 19, 1992, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be removed from office. Respondent opposed the motion on December 9, 1992. The administrator filed a reply dated December 11, 1992.

On December 18, 1992, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Shandaken Town Court for 20 years.
2. On November 28, 1989, respondent took an envelope with \$1,173 in cash, checks and money orders for fines and surcharges paid to the court. The cash in the envelope totalled \$454.
3. Respondent failed to deposit the money in his official court account, in violation of the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a).

4. About a month later, after speaking with a bank official, respondent's court clerk, Susan McGrath, told respondent that the money had never been deposited. Respondent told Ms. McGrath that he would check his suit jackets to see whether he had left the envelope in them.

5. In the ensuing weeks, Ms. McGrath repeatedly reminded respondent about the missing deposit. Respondent told her that he was still looking for it and that it was possible that he had left the money in the trunk of his car.

6. In September 1990, Gary Holgate, an independent accountant hired to examine the town's finances, reported to the Shandaken Town Board that respondent's official bank account was short because a deposit had never been made.

7. The town board summoned respondent to explain the deficit. Respondent falsely told the board that he had put the deposit envelope in the trunk of his car and had later transferred ownership of the car.

8. In December 1990, respondent gave the same explanation to his fellow justice, Charles Smith, and to members of the Republican town committee attending a Christmas party. The same month, respondent also gave this account of the deposit to Mr. Holgate.

9. Respondent made no timely efforts to recoup the money or rectify the problem. In February 1991, respondent directed Ms. McGrath to advise the defendants who had paid fines and surcharges on November 28, 1989, of the problem and to ask them to submit proof that their checks or money orders had been negotiated or to resubmit payment.

10. Also in 1991, respondent contacted Roy D. Tyson, the man to whom he had given the car that he drove in November 1989, and asked Mr. Tyson for any possessions that might have been left in the trunk. Mr. Tyson located a box of papers and turned it over to respondent.

As to Charge II of the Formal Written Complaint:

11. On June 13, 1991, in connection with a duly-authorized investigation, respondent testified before a member of the Commission. Respondent said, under oath, that, in the summer of 1990, he had stayed with a friend and had not spent any portion of the \$500 advanced to him by the town for lodging while attending a judicial training seminar at St. Lawrence University in Canton.

12. At the hearing in this proceeding on June 23, 1992, respondent testified that he had stayed at two or three motels during the conference but could not identify them by name or location.

13. The substantive allegations of Charge II are not sustained and are, therefore, dismissed.

As to Charge III of the Formal Written Complaint:

14. Between 1983 and 1986, respondent borrowed between \$400 and \$700 from David A. Warfield. The short-term loan was repaid without interest.

15. Between May 12, 1987, and January 9, 1990, respondent presided over and disposed of nine cases in which Mr. Warfield was a party, as set forth in Schedule A appended hereto.

16. Respondent did not disclose to Mr. Warfield's adversaries that respondent had borrowed money from Mr. Warfield.

17. In each of the nine cases, respondent disposed of the matter in favor of Mr. Warfield. In one, Warfield v. Maxim, he also granted a counterclaim to the defendant.

18. Respondent falsely testified that he did not remember the loan at the time that he presided over the nine cases.

19. On June 13, 1991, respondent testified before a member of the Commission that he "absolutely" had not borrowed money from Mr. Warfield.

20. On October 21, 1991, respondent wrote to Commission staff that he "may have" borrowed money from Mr. Warfield but did not have an "unequivocal recollection."

As to Charge IV of the Formal Written Complaint:

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

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

Whether by carelessness or calculation (as the referee noted), respondent mishandled \$1,173 in public money and made no timely effort to notify authorities or rectify the problem. When confronted with the issue of the missing deposit by town officials after an audit had disclosed it, respondent repeatedly gave a false explanation of its loss.

In handling court funds, a judge holds a public trust, much like the duty a lawyer owes a client whose money the lawyer holds. A lawyer commits serious misconduct when he or she withholds clients' funds without placing them in an identifiable bank account (see, Matter of Weisberg, 149 AD2d 58 [1st Dept]) or fails to turn them over to the client on demand (see, Schutrum v. Grievance Committee for the Eighth Judicial District, 70 AD2d 143 [4th Dept]). This is true even when the lawyer did not intend to deprive the client of the money (Weisberg, supra), when the attorney did not use client money to enrich himself (Matter of Harp, 173 AD2d 957 [3d Dept]) or when the failure to safeguard funds was inadvertent (Matter of Rogers, 94 AD2d 121 [1st Dept]) or unintentional (Matter of Harris, 124 AD2d 126 [2d Dept]).

The mishandling of public money by a judge is similarly serious misconduct, even when not done for personal profit. (Bartlett v. Flynn, 50 AD2d 401 [4th Dept]). A judge's failure to deposit court funds in the bank as required by law raises the possibility of improper use of the money. (Matter of Hall, 1992 Ann Report of NY Commn on Jud Conduct, at 46, 47). One of the primary responsibilities of a town or village justice is the depositing and remitting of court funds. A significant amount of money from respondent's court is missing. He took no prompt steps to remedy the situation and has never adequately explained its loss.

It is also wrong for a judge to preside over a case in which his or her impartiality might reasonably be questioned (Rules Governing Judicial Conduct, 22 NYCRR 100.3[c][1]), particularly one in which the judge has had financial dealings with a party (22 NYCRR 100.3[c][1][iii]). Since respondent had borrowed and repaid a loan from Mr. Warfield before presiding over nine cases in which he was a party, respondent should have disclosed the relationship and offered to disqualify himself (see, Matter of Merkel, 1989 Ann Report of NY Commn on Jud Conduct, at 111, 114).

Respondent compounded this misconduct by his repeated lack of candor during the investigation and trial of this matter. He gave varying accounts of his relationship with Mr. Warfield, at first denying the loan unequivocally, later conceding that he "may have" borrowed the money and finally claiming that he didn't remember any loan. His testimony is unbelievable in view of "contrary objective proof" by Mr. Warfield that the loan had been made and the unlikelihood that respondent would forget borrowing such a substantial amount on such favorable terms. (See, Matter of Kiley v. State Commission on Judicial Conduct, 74 NY2d 364, 370; Matter of Mossman, 1992 Ann Report of NY Commn on Jud Conduct, at 59, 63).

Although we have concluded that Charge II is not sustained, it is clear that respondent's testimony concerning the allegations is contradictory. He said during the investigation that he had stayed with a friend while attending a judicial conference and had not spent any portion of the money advanced him by the town for lodging. A year later, at the hearing, he testified that he had used a portion of the town's \$500 for his housing in two or three different motels during the trip. Obviously, one of the versions must have been false. Since the town apparently had no established procedures to require officials to account for their business expenses on such trips, however, Charge II must be dismissed, but this does not excuse respondent's patently false testimony.

Deception is "inimical to his role as a judge" (Matter of Gelfand v. State Commission on Judicial Conduct, 70 NY2d 211, 216) and "cannot be condoned," (Matter of Intemann v. State Commission on Judicial Conduct, 73 NY2d 580, 582).

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

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

Mr. Goldman dissents as to Charge III only and votes that the charge be dismissed.

Mr. Bellamy, Mrs. Del Bello and Judge Thompson dissent as to Charge IV only and vote that the charge be sustained.

Mr. Cleary and Mr. Sheehy were not present.

Dated: January 28, 1993

Schedule A

<u>Case</u>	<u>Dated Filed</u>	<u>Date of Disposition</u>
<u>Dave Warfield v.</u> <u>Danny Volpe</u>	5/12/87	1/8/88
<u>Dave Warfield v.</u> <u>Debra Dutcher</u>	5/12/87	1/8/88
<u>David Warfield v.</u> <u>Debbie Dutcher</u>	10/17/89	11/9/89
<u>Dave Warfield v.</u> <u>John Scofield</u>	8/18/87	2/8/88
<u>David Warfield v.</u> <u>Pat Maxim</u>	7/5/88	2/14/89
<u>Dave Warfield v.</u> <u>Dean Carr</u>	1/10/89	2/8/89
<u>David Warfield v.</u> <u>Mary Anders</u>	10/17/89	1/9/90
<u>David Warfield v.</u> <u>Grace Braughman</u>	10/17/89	11/8/89
<u>Town of Shandaken v.</u> <u>Dave Warfield</u>	July 1988	Fall 1989

State of New York
Commission on Judicial Conduct

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

Determination

DAVID SCHIFF,

a Justice of the Liberty Village Court, Sullivan County.

APPEARANCES:

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

Alfred H. Beck and Appelbaum, Eisenberg, Bauman & Appelbaum
(By Bertram W. Eisenberg) for Respondent

The respondent, David Schiff, a justice of the Liberty Village Court, Sullivan County, was served with a Formal Written Complaint dated October 30, 1992, alleging that he made an improper remark with racial connotations, that he indicated that he would decide a case based on personal animosity and that he failed to remit court funds to the state comptroller because of poor recordkeeping practices. Respondent filed an answer dated December 10, 1992.

By order dated December 17, 1992, the Commission designated Ira M. Belfer, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on February 17 and 26, 1993, and the referee filed his report with the Commission on April 23, 1993.

By motion dated May 6, 1993, the administrator of the Commission moved to confirm in part and disaffirm in part the referee's report, to make additional findings and conclusions and for a determination that respondent be removed from office. Respondent opposed the motion on May 25, 1993. The administrator filed a reply dated July 8, 1993.

On July 22, 1993, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Liberty Village Court since August 1988.

2. On August 1, 1989, John Ferrara, a Sullivan County Legal Aid Society attorney, appeared in respondent's court. He was accompanied by Lisa Saltzman, a law student intern, and Stacy Zulkin, a college intern.

3. During a break in the proceedings, respondent remarked about changes in the community. He said that he recalled a time when it was safe for young women to walk the streets "before the blacks and Puerto Ricans moved here." Ms. Saltzman was so offended by the statement that she walked out of the room.

4. At the time, respondent was aware of a controversy between Mr. Ferrara and another judge who was a "good friend" of respondent. Respondent believed that Mr. Ferrara was Hispanic because, he testified, Mr. Ferrara "looks or acts" like "a normal Hispanic person."

5. Assistant District Attorney Eric Adler was in the courtroom and overheard respondent's remark. He later told respondent privately that the comment was not the right thing to say to Mr. Ferrara and that the controversy with the other judge had taken a serious emotional and financial toll on Mr. Ferrara. Respondent replied, "I know. That's why I said it."

As to Charge II of the Formal Written Complaint:

6. On December 1, 1989, a motion for summary judgment was submitted to respondent in Mountain Pontiac-Cadillac-Buick v Sachs by the plaintiff's attorney, Carl P. Goldstein.

7. On March 30, 1990, respondent was involved in a car accident with Terrence S. Rogers, who was charged with Failure To Yield Right Of Way and Failure To Produce Valid Insurance. The case was tried in the Thompson Town Court before Judge Perry E. Meltzer. Judge Meltzer's law firm, Oppenheim & Meltzer, was representing the defendant in the Sachs case, which was pending before respondent.

8. On September 6, 1990, Judge Meltzer found Mr. Rogers not guilty of Failure To Yield Right Of Way and dismissed the other charge.

9. When told of the outcome by the arresting officer, respondent said, "It's a wheel. It goes around, and maybe someday I can do the same for him." He testified that, by this remark, he meant that "I can do him a favor of the same type, the way he handled my case."

10. Respondent's court clerk overheard him remark to an attorney that he was angry with another judge because of the decision in Rogers and that he intended to grant the summary judgment motion in Sachs because the defendant was represented by the other judge's law firm.

11. Respondent also commented to Mr. Adler that he was angry with Judge Meltzer because of the decision. "That goddamn fucking Meltzer. I'm hung heavier politically than Meltzer," respondent told the prosecutor.

12. On April 4, 1991, respondent granted summary judgment to the plaintiff in Sachs, ruling against the client of Judge Meltzer's law firm.

As to Charge III of the Formal Written Complaint:

13. From the time that he took the bench in August 1988 through August 1992, respondent failed to keep adequate records and dockets of the dispositions of more than 600 criminal cases, contrary to UJCA 107.

14. Because of his inconsistent records of the dispositions of criminal cases, respondent's court clerk was unable to report the dispositions and remit related court funds to the state comptroller in a timely manner, as required by UJCA 2020 and 2021(1), Village Law §4-410 and Vehicle and Traffic Law §1803. As a result, by April 1991, respondent's court account had accumulated a balance of \$22,004, which he remitted on April 10, 1991.

15. Respondent did not take prompt action to remedy the inadequate records or remit the surplus money despite repeated requests to do so from his court clerk, Barbara Hamlin, and two letters from the police chief, Edward A. Easley, requesting the disposition of cases handled in respondent's court.

16. Asked at the hearing to explain why he had marked an arraignment sheet in People v Stanley Miller to indicate that the case had been dismissed and that the defendant had paid a \$200 fine, respondent testified:

[H]e had a fight with a third person, I found him guilty as such, and I'm not going to send him to jail since he's a businessman. I fined him \$200 and told him to 'Cool it, next time.' And that's it as far as I was concerned. It was dismissed. The case is over. Finished.

17. In connection with People v Warren McCummins, respondent testified that he considered the defendant "convicted" when he sent him to jail in lieu of bail and that the case was "dismissed" when it was concluded. This accounts for his notations that the case was dismissed and that the defendant was sentenced to time served, respondent said.

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

By his statements and actions, respondent has undermined public confidence in his ability to impartially adjudicate cases, to understand rudimentary principles of jurisprudence and to properly administer his court. He has demonstrated that he is unfit to continue as a judge and should be removed from office.

Respondent's suggestion that certain racial and ethnic groups are responsible for increasing crime rates casts doubt on his ability to fairly judge all cases before him. (See, Matter of Bloodgood, 1982 Ann Report of NY Commn on Jud Conduct, at 69, 71; see also, Matter of Ain, 1993 Ann Report of NY Commn on Jud Conduct, at 51). This was exacerbated by respondent's later admission to an attorney that he made the remark to hurt Mr. Ferrara because of his involvement in a controversy with another judge who was a friend of respondent.

Respondent created the impression that he used his judicial office to retaliate against Judge Meltzer by ruling against the position of the Oppenheim & Meltzer law firm. Respondent's comment to an attorney in the presence of the court clerk clearly indicated that he was deciding the Sachs motion because of his displeasure with Judge Meltzer. Whether or not he actually decided the case on the merits, the harm was done by respondent's statement indicating that he would use his powers as a judge to satisfy a personal vendetta. (See, Matter of Cunningham v State Commission on Judicial Conduct, 57 NY2d 270). "[A]n appearance of such impropriety is no less to be condemned than is the impropriety itself." (Matter of Spector v State Commission on Judicial Conduct, 47 NY2d 462, 466).

Respondent's poor recordkeeping and his failure to remit court funds promptly to the comptroller is misconduct, even absent evidence of personal gain. (See, Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101, 102). Perhaps more serious is the underlying cause of his mismanaged court accounts: that respondent, as exhibited by his testimony, is unable to understand the difference between a dismissal and a conviction or between holding a criminal defendant in jail in lieu of bail and sentencing a defendant to a jail term.

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

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

Judge Salisbury dissents as to Charge III and votes that the charge be dismissed and dissents as to sanction and votes that respondent be censured.

Mr. Goldman and Mr. Sheehy dissent as to sanction only and vote that respondent be censured.

Mr. Cleary and Judge Thompson were not present.

Dated: September 15, 1993

State of New York
Commission on Judicial Conduct

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

DAVID SCHIFF,

DISSENTING OPINION
BY MR. GOLDMAN

a Justice of the Liberty Village Court, Sullivan County.

Although I concur in the majority's finding of misconduct as to all three charges, I respectfully dissent from the extreme sanction of removal.

Respondent, during a break in court proceedings, made an extremely foolish and clearly inappropriate remark with racial connotations, apparently to get under the skin of an attorney involved in a dispute with a fellow judge. Such behavior is serious misconduct. However, it falls short of the misconduct in Matter of Ain (1993 Ann Report of NY Commn on Jud Conduct, at 51) which this Commission found merited only a censure, and not removal. There, the judge, during a pretrial conference, made a barrage of derisive remarks against the ethnic group of an attorney about to start a non-jury trial before him. I do not believe that a single, off-the-record remark of the type made by respondent merits removal.

Respondent also made inappropriate remarks to the effect that he would retaliate against the law firm of a town court judge who, in a traffic case, had acquitted the person with whom respondent was involved in an automobile accident. Respondent said he would retaliate by granting summary judgment in favor of the party opposing the client of the judge's law firm. While respondent, some seven months after the acquittal, did rule against the client of the law firm in the summary judgment motion, there is no indication that the ruling, which was not appealed, was improper. Had there been evidence that respondent's determination was improper or even questionable, I would agree that removal is mandated. There is no proof, however, that the apparent bias expressed by respondent was a factor in his decision or constituted other than inappropriate and foolishly improper remarks. In this connection, I note that contrary to the statement made by the majority (determination, p. 7), in my view the appearance of impropriety, while serious, is not equivalent to actual impropriety and, therefore, is less to be condemned than is the impropriety itself.

While I agree that respondent's recordkeeping and failure to remit court funds also constitutes misconduct, absent personal gain by respondent, such misconduct generally results in an admonition or censure (see, e.g., Matter of Ranke, 1992 Ann Report of NY Commn on Jud Conduct, at 64; Matter of Goebel, 1990 Ann Report of NY Commn on Jud Conduct, at 101), or even in a dismissal and caution (see, 1993 Ann Report of NY Commn Jud Conduct, at 12). I believe that respondent's misconduct, even when considered cumulatively, does not justify removal.

I am, however, troubled by respondent's apparent lack of comprehension of rudimentary principles of the law he has been elected to administer, as evidenced by his apparent misunderstanding of such basic notions as that a defendant whose case is dismissed cannot be fined or otherwise punished (see determination, par. 16). Had respondent been served with a complaint alleging specifically as one of the charges that he failed to understand basic notions of law, been allowed to prepare for and defend himself

against such a specific charge, and had such a charge sustained against him, I would have voted for removal. It may well be that respondent, an 81-year-old non-lawyer who did not become a judge until the age of 76, is not fit to be a judge. In the absence of charges specifically addressed to his lack of knowledge of basic concepts of law, however, I do not believe that, consistent with due process and fairness, this Commission can sanction respondent for his failings in this area.

For these reasons, I believe that censure is the appropriate sanction in this case.

Dated: September 15, 1993

State of New York
Commission on Judicial Conduct

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

Determination

I. RONALD SIEBERT,

a Justice of the Wells Town Court, Hamilton County.

APPEARANCES:

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

**Caputo, Aulisi and Skoda (By Richard T. Aulisi; Robert M. Cohen, Of Counsel)
for Respondent**

The respondent, I. Ronald Siebert, a justice of the Wells Town Court, Hamilton County, was served with a Formal Written Complaint dated January 2, 1992, alleging that he drove while intoxicated and caused a three-car accident. Respondent answered the Formal Written Complaint by letter dated January 17, 1992.

By order dated February 7, 1992, the Commission designated John T. O'Friel, Esq., as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on April 28, 1992, and the referee filed his report with the Commission on September 28, 1992.

By motion dated October 2, 1992, the administrator of the Commission moved to confirm the referee's report and for a determination that respondent be censured. Respondent opposed the motion by cross motion dated November 23, 1992. The administrator filed a reply on December 2, 1992.

On December 18, 1992, the Commission heard oral argument, at which respondent appeared by counsel, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent is a justice of the Wells Town Court and was during the time herein noted.
2. On October 4, 1990, at about 7:25 P.M., respondent drove his pick-up truck while in an intoxicated condition at Route 28 and Golf Course Road in the Town of Warrensburg, Warren County.
3. Respondent's truck left Route 28 and struck a station wagon driven by Susan Boggia. Ms. Boggia's car in turn struck a truck driven by Patricia Ryan. Ms. Boggia and Ms. Ryan were stopped at a stop sign on Golf Course Road, waiting for respondent's vehicle to pass before making a left turn onto Route 28.

4. Respondent, Ms. Ryan, Ms. Boggia and a passenger, Ms. Boggia's nine-year-old daughter, were injured in the crash. Ms. Boggia was hospitalized for two days. The vehicles of Ms. Boggia and Ms. Ryan were extensively damaged.

5. After the accident, respondent told Deputy Sheriff Victor J. Grant that he had "had a few" at a bar. The deputy saw three or four empty beer cans on the floor of respondent's truck.

6. After administering a breath test, Deputy Grant told respondent that he was being charged with Driving While Intoxicated. Respondent replied, "I thought so."

7. Respondent was also charged with Driving With Blood Alcohol Content of More Than .10 Percent and No Seat Belt.

8. Respondent was cooperative during his arrest and did not mention to Deputy Grant that he was a judge in another county.

9. Respondent was given a blood test at 9:04 P.M. at Glens Falls Hospital. His blood showed an alcohol content of .19 percent. Driving with a blood alcohol content of more than .10 percent is a misdemeanor, pursuant to Vehicle and Traffic Law §§1192(2), 1193.

10. On July 29, 1991, respondent pleaded guilty in the Warrensburg Town Court to Driving While Ability Impaired in satisfaction of all of the charges against him.

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

A judge who drives while his ability to do so is impaired by alcohol consumption violates the law and endangers public welfare. (Matter of Innes, 1985 Ann Report of NY Commn on Jud Conduct, at 152, 154). Respondent drove while highly intoxicated and caused an accident in which he and others were injured and which damaged the property of innocent bystanders.

In the past, the Commission has, in some instances, dismissed complaints and privately cautioned judges who acknowledged driving while under the influence of alcohol. In one such case, the judge admitted having three or four drinks before driving. In another, the judge had eight drinks in the course of an evening. In none of these cases was there any finding of assertion of influence or abuse of the police. However, the Commission has always considered mitigating and/or aggravating circumstances in reaching its determinations. In Innes (*supra*), the judge was found to have driven with a blood alcohol content of .18 percent and to have crashed into the patrol car of the policeman who stopped him. Although he was cooperative during the arrest, the Commission admonished Judge Innes. In Matter of Kremenick (1986 Ann Report of NY Commn on Jud Conduct, at 133), the Commission admonished a judge who, while intoxicated, drove off the road. There, the judge did assert his judicial office and abused the police. On the other hand, he was given credit for seeking treatment for an acknowledged drinking problem. Similarly, the judge was admonished in Matter of Winkworth (1993 Ann Report of NY Commn on Jud Conduct, at 106), although he was found only to have been impaired by alcohol.

Two judges were censured who drove while intoxicated after having had prior drinking-and-driving incidents and who were extremely abusive during their arrests. (Matter of Quinn v State Commission on Judicial Conduct, 54 NY2d 386; Matter of Barr, 1981 Ann Report of NY Commn on Jud Conduct, at 139).

We find that our past dispositions--both public and private--have adequately taken into account distinctions in the level of intoxication, the conduct of the judge after arrest and the need and willingness of the judge to seek treatment. Because he was highly intoxicated but did not assert the influence of his office or abuse the arresting officer, we conclude that respondent, like Judge Innes, is deserving of "a reminder...that his conduct was substandard and to refrain from a repetition," (see, Matter of Fromer, 1985 Ann Report of NY Commn on Jud Conduct, at 135, 140 [Bower, dissenting]).

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

Mr. Berger, Judge Altman, Ms. Barnett, Mr. Bellamy, Judge Ciparick, Mr. Goldman and Judge Salisbury concur.

Mrs. Del Bello dissents as to sanction only and votes that respondent be censured.

Judge Thompson dissents as to sanction only and votes that respondent be issued a confidential letter of dismissal and caution.

Mr. Cleary and Mr. Sheehy were not present.

Dated: January 27, 1993

State of New York
Commission on Judicial Conduct

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

Determination

JOSEPH C. SLOMBA,

a Justice of the Newfane Town Court, Niagara County.

APPEARANCES:

Gerald Stern (John J. Postel, Of Counsel) for the Commission

William E. Smith for Respondent

The respondent, Joseph C. Slomba, a justice of the Newfane Town Court, Niagara County, was served with a Formal Written Complaint dated August 6, 1992, alleging that he failed to deposit court funds promptly and that he used court funds for personal purposes. Respondent filed an answer dated October 13, 1992.

On September 1, 1993, the administrator of the Commission, respondent and respondent's counsel entered into an agreed statement of facts pursuant to Judiciary Law §44(5), waiving the hearing provided by Judiciary Law §44(4) and stipulating that the Commission make its determination on the Formal Written Complaint and the agreed upon facts. The Commission approved the agreed statement by letter dated September 10, 1993.

Counsel submitted memoranda as to sanction. Oral argument was waived.

On October 21, 1993, the Commission considered the record of the proceeding and made the following determination.

As to Charge I of the Formal Written Complaint:

1. Respondent has been a justice of the Newfane Town Court since 1976.
2. From January 1988 through December 1989, as denominated in Schedule A appended hereto, respondent failed to deposit court funds in his official account within 72 hours of receipt, as required by the Uniform Civil Rules for the Justice Courts, 22 NYCRR 214.9(a). By the end of the period, respondent's court account was deficient by \$3,458.

As to Charge II of the Formal Written Complaint:

3. On 27 occasions between February 17, 1988, and February 4, 1991, as denominated in Schedule B appended hereto, respondent cashed personal checks of his and his relatives from cash that he had collected in court. He then used the cash for personal purposes. Twenty of these checks were written by respondent.

4. Each of the 27 personal checks was subsequently deposited into respondent's court account. There were insufficient funds in respondent's accounts to cover ten of the checks written by him at the time they were drawn. With respect to four of the ten checks, there were still insufficient funds in the accounts at the time that the checks were deposited. Nonetheless, nine of the checks were honored in their entirety when the amounts were deposited.

5. The tenth check was on respondent's personal account at Unit No. 1 Federal Credit Union. Respondent drew check #430 for \$312 on October 30, 1989, and took that amount in cash from court funds. On that date, the balance in his account was \$108.90.

6. On October 31, 1989, respondent attempted to deposit in his personal account sufficient funds to cover check #430. He was told at the bank that his account had been involuntarily closed because he had filed for bankruptcy relief on September 18, 1989.

7. On October 31, 1989, respondent deposited \$312 in cash into his court account to replace check #430.

Supplemental Findings:

8. After being advised by town auditors in January 1990 that his failure to make deposits promptly was improper, respondent delegated the task of depositing funds to his court clerk.

9. Respondent has abandoned the practice of cashing personal checks from court funds.

10. Three audits by the town and one by the state comptroller since January 1990 have found no irregularities in respondent's official account.

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

For 16 of the 24 months in 1988 and 1989, respondent's deposits in his official account were significantly less than his receipts for those months. In 15 of those months, his deposits were short by hundreds of dollars. This raises questions about the interim use of the money. (Matter of More, 1990 Ann Report of NY Commn on Jud Conduct, at 140, 141).

Over this period and an additional year, respondent had a practice of replacing cash that he had collected in court with personal checks drawn by himself and members of his family. On one occasion, he allowed a relative to cash a \$1,000 check from his court receipts. Respondent withdrew as much as \$956.25.

Standing alone, this constitutes an unsound fiscal practice. What makes it especially inappropriate is that, at the time that he wrote ten of these checks, respondent did not have sufficient funds in his personal accounts to cover the amount of cash that he was taking from the court and, with respect to four of the checks, there were insufficient funds in the accounts when respondent deposited them into his

court account. In essence, he was advancing himself short-term, no-interest loans from the court's cash. The improper handling of public money is serious misconduct which warrants public sanction. (Matter of Hall, 1992 Ann Report of NY Commn on Jud Conduct, at 46, 47).

"The severity of the sanction imposed for this variety of misconduct depends upon the presence or absence of mitigating and aggravating circumstances." (Matter of Rater v State Commission on Judicial Conduct, 69 NY2d 208, 209). In mitigation, we have considered that respondent recognized his mistakes and has taken corrective action. (See, Hall, supra, at 48; Matter of Rath, 1990 Ann Report of NY Commn on Jud Conduct, at 150, 152). This suggests a willingness to meet the responsibilities of judicial office. (See, Matter of Rogers v State Commission on Judicial Conduct, 51 NY2d 224, 226).

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

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

Judge Salisbury was not present.

Dated: December 16, 1993

Schedule A

<u>Month</u>	<u>Funds Collected</u>	<u>Amounts Deposited</u>	<u>Surplus/ Deficiency</u>	<u>Cumulative</u>
1/88	\$1,859	\$1,839	-\$ 20	-\$ 20
2/88	2,315.89	2,711.89	+ 396	+ 376
3/88	3,686.78	2,936.78	- 750	- 374
4/88	4,238.25	4,089	- 149.25	- 523.25
5/88	4,417	3,901.25	- 515.75	- 1,039
6/88	4,682.50	6,097.50	+ 1,415	+ 376
7/88	3,368	3,365	- 3	+ 373
8/88	4,276	3,941.25	- 334.75	+ 38.25
9/88	3,229.25	2,654.25	- 575	- 536.75
10/88	2,378.50	2,859.25	+ 480.75	- 56
11/88	3,688.50	2,957.75	- 730.75	- 786.75
12/88	4,248.75	3,541.75	- 707	- 1,493.75
1/89	2,912.50	3,113.25	+ 200.75	- 1,293
2/89	1,655	1,156.25	- 498.75	- 1,791.75
3/89	5,944.25	4,560	- 1,384.25	- 3,176
4/89	4,759.25	7,148.50	+ 2,389.25	- 786.75
5/89	5,484.25	4,825.25	- 659	- 1,445.75
6/89	3,657.50	4,826.50	+ 1,169	- 276.75
7/89	3,955.75	4,079.75	+ 124	- 152.75
8/89	4,354.75	3,502.50	- 852.25	- 1,005
9/89	5,821	5,488.25	- 332.75	- 1,337.75
10/89	4,803.50	4,150	- 653.50	- 1,991.25
11/89	6,832	6,085.50	- 746.50	- 2,737.75
12/89	2,889.25	2,169	- 720.25	- 3,458

Schedule B

<u>Date</u>	<u>Cash Withdrawn</u>
2/17/88	\$688
2/22/88	75
2/22/88	50
2/22/88	10
5/29/88	440
6/10/88	956.25
6/14/88	30
6/28/88	55
7/12/88	95
7/16/88	40
8/7/88	120
8/9/88	1,000
8/11/88	240
10/13/88	450
11/88	150
11/28/88	334
2/4/89	10
5/22/89	4
6/12/89	220
6/14/89	567
6/20/89	159.50
6/28/89	330
7/28/89	410
9/27/89	567
10/30/89	312
6/25/90	25
2/4/91	51

ACTION TAKEN IN 1993 INVOLVED JUDGES OF THE FOLLOWING COURTS

<i>Approximate Number of Judges in Court System:</i>	<i>Town & Village</i>	<i>City Court</i>	<i>County Court</i>	<i>Family Court</i>	<i>District Court</i>	<i>Court of Claims</i>	<i>Surrogates Court</i>	<i>Supreme Court</i>	<i>Ct/App Ap/Div</i>
3423 ¹	2253	381	81	127	50	63	74	339	55
Complaints Received ²	349	253	137	140	13	5	44	316	18
Complaints Investigated	117	14	7	8	2	1	4	26	3
Judges Cautioned After Investigation	25	8	4	1	1	0	0	3	0
Formal Written Complaints Authorized	22	3	1	0	0	0	1	3	0
Judges Cautioned After Formal Complaint	4	1	0	0	0	0	0	0	0
Judges Publicly Disciplined	9	1	0	1	0	0	0	1	0
Formal Complaints Dismissed or Closed	3	0	0	0	0	0	0	1	0

¹All town and village justices serve part-time; about 400 are lawyers. All city court judges are lawyers and serve either part-time or full-time. All other judges are lawyers and serve full-time.

²180 complaints against non-judges are not reflected in this chart.

TABLE OF COMPLAINTS PENDING AS OF DECEMBER 31, 1992

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED ¹	ACTION ²	
<i>INCORRECT RULING</i>								
<i>NON-JUDGES</i>								
<i>DEMEANOR</i>		4	12	5			4	25
<i>DELAYS</i>			2	2				4
<i>CONFLICT OF INTEREST</i>		1	4	4	2			11
<i>BIAS</i>		2	5	4				11
<i>CORRUPTION</i>		2	1	3	2			8
<i>INTOXICATION</i>		1						1
<i>DISABILITY/QUALIF'NS</i>								
<i>POLITICAL ACTIVITY</i>		4	1	4	1		1	11
<i>FIN'L/REC'DS/TRNG</i>		9	3	4	6	1	5	28
<i>TICKET-FIXING</i>		1		2				3
<i>ASSER'N OF INFLUENCE</i>			1	2			1	4
<i>VIOL'N OF RIGHTS</i>		5	11	7	4		3	30
<i>MISCELLANEOUS</i>		2	1	1	1			5
TOTALS		31	41	38	16	1	14	141

¹Matters closed upon vacancy of office other than by resignation.

²Includes determinations of admonition, censure and removal since the current Commission's inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by forerunner commissions from 1975-78.

ALL COMPLAINTS CONSIDERED IN 1993: 1457 NEW & 141 PENDING FROM 1992

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED ¹	ACTION ²	
INCORRECT RULING	518							518
NON-JUDGES	180							180
DEMEANOR	145	34	26	7	1		4	217
DELAYS	57	4	2	2				65
CONFLICT OF INTEREST	27	12	8	6	3	1		57
BIAS	57	4	7	4		1		73
CORRUPTION	24	4	2	3	2			35
INTOXICATION	6	2						8
DISABILITY/QUALIF'NS	2							2
POLITICAL ACTIVITY	12	11	7	5	1		1	37
FIN'L/REC'DS/TRNG	4	17	6	5	8	1	5	46
TICKET-FIXING		4	1	2				7
ASSER'N OF INFLUENCE	8	6	4	3			1	22
VIOL'N OF RIGHTS	219	35	20	9	4	1	3	291
MISCELLANEOUS	16	21	1	1	1			40
TOTALS	1275	154	84	47	20	4	14	1598

¹Matters closed upon vacancy of office other than by resignation.

²Includes determinations of admonition, censure and removal since the current Commission's inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by forerunner commissions from 1975-78.

ALL COMPLAINTS CONSIDERED SINCE THE COMMISSION'S INCEPTION IN 1975

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED ¹	ACTION ²	
<i>INCORRECT RULING</i>	5564							6654
<i>NON-JUDGES</i>	1679							1679
<i>DEMEANOR</i>	1194	34	649	138	48	51	123	2237
<i>DELAYS</i>	630	4	65	40	7	11	15	772
<i>CONFLICT OF INTEREST</i>	294	12	288	92	35	16	887	824
<i>BIAS</i>	860	4	163	30	17	13	13	1100
<i>CORRUPTION</i>	149	4	59	6	19	10	11	258
<i>INTOXICATION</i>	29	2	27	6	4	3	12	83
<i>DISABILITY/QUALIF'NS</i>	33		21	2	13	7	6	82
<i>POLITICAL ACTIVITY</i>	138	11	101	96	5	13	11	375
<i>FIN'L/REC'DS/TRNG</i>	135	17	115	61	75	63	66	532
<i>TICKET-FIXING</i>	19	4	67	152	33	60	158	493
<i>ASSER'N OF INFLUENCE</i>	87	6	79	30	8	5	25	240
<i>VIOL'N OF RIGHTS</i>	624	35	104	48	11	7	6	835
<i>MISCELLANEOUS</i>	595	21	195	70	20	33	53	987
TOTALS	13,120	154	1933	771	295	292	586	17,151

¹Matters closed upon vacancy of office other than by resignation.

²Includes determinations of admonition, censure and removal since the current Commission's inception in 1978, as well as suspensions and disciplinary proceedings commenced in the courts by forerunner commissions from 1975-78.

TABLE OF NEW COMPLAINTS CONSIDERED BY THE COMMISSION IN 1993

SUBJECT OF COMPLAINT	DISMISSED ON FIRST REVIEW	STATUS OF INVESTIGATED COMPLAINTS						TOTALS
		PENDING	DISMISSED	DISMISSAL & CAUTION	RESIGNED	CLOSED ¹	ACTION ²	
INCORRECT RULING	518							518
NON-JUDGES	180							180
DEMEANOR	145	30	14	2	1			192
DELAYS	57	4						61
CONFLICT OF INTEREST	27	11	4	2	1	1		46
BIAS	57	2	2			1		62
CORRUPTION	24	2	1					27
INTOXICATION	6	1						7
DISABILITY/QUALIF'NS	2							2
POLITICAL ACTIVITY	12	7	6	1				26
FIN'L/REC'DS/TRNG	4	8	3	1	2			18
TICKET-FIXING		3	1					4
ASSER'N OF INFLUENCE	8	6	3	1				18
VIOL'N OF RIGHTS	219	30	9	2		1		261
MISCELLANEOUS	16	19						35
TOTALS	1275	123	43	9	4	3		1457

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