

ANNUAL REPORT

2005

NEW YORK STATE



COMMISSION ON JUDICIAL CONDUCT

**NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT**

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March 1, 2005

To the Governor of the State of New York,
The Chief Judge of the State of New York 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, covering the period from January 1 through December 31, 2004.

Respectfully submitted,

Lawrence S. Goldman, Chair
On Behalf of the Commission

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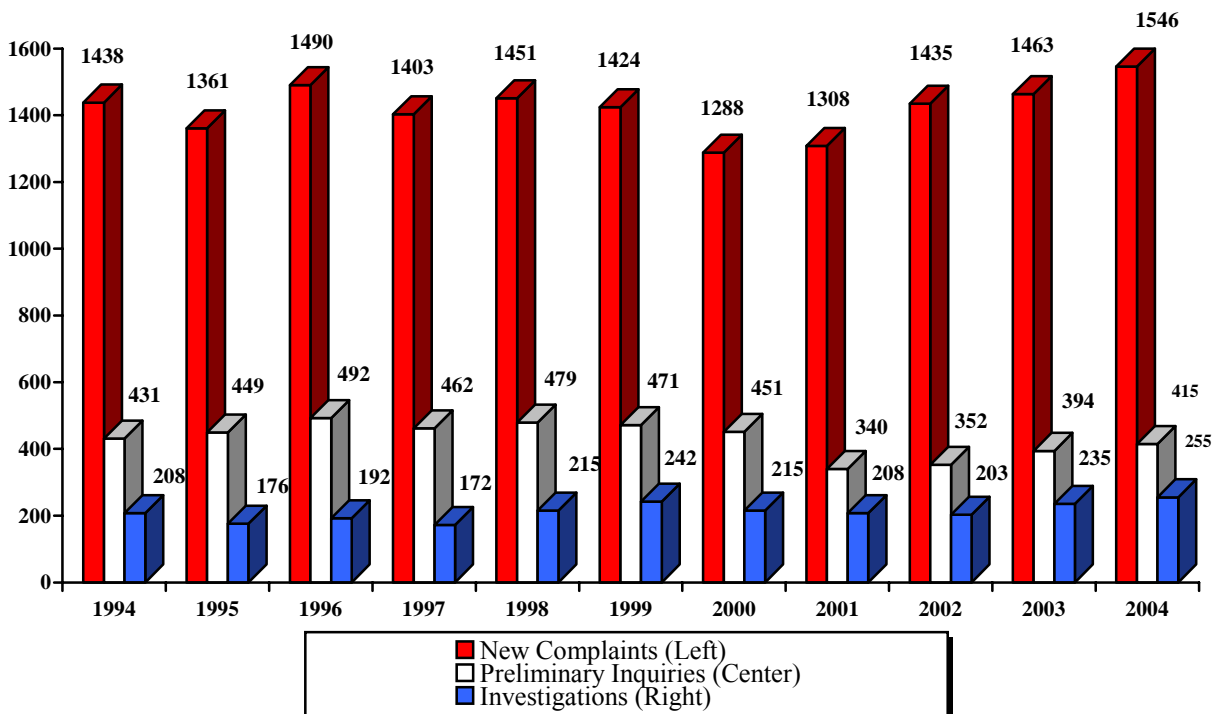
INTRODUCTION TO THE 2005 ANNUAL REPORT

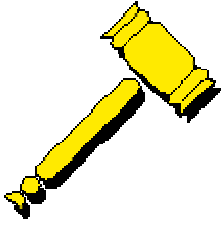
The New York State Commission on Judicial Conduct is the independent agency designated by the State Constitution to review complaints of misconduct against judges of the State Unified Court System, which includes over 3,400 judges and justices. The Commission is not part of the Office of Court Administration. The Commission's objective is to enforce high standards of conduct for judges, who must be free to act independently, on the merits and in good faith, but also must be held accountable by an independent disciplinary system, should they commit misconduct. The text of the Rules Governing Judicial Conduct, promulgated by the Chief Administrator of the Courts with the approval of the Court of Appeals, is annexed.

The number of complaints received by the Commission in the past 13 years has substantially increased compared to the first 17 years of the Commission's existence. Since 1992, the Commission has averaged over 1400 new complaints per year, 400 preliminary inquiries and 200 investigations. In each of the last 13 years, the number of incoming complaints has been more than double the 641 we received in 1978. Yet our budget has not kept pace – indeed, our staff has decreased from 63 in 1978 to 28 last year, when 255 investigations were authorized. (See the budget analysis on pages 35-36.)

This current Annual Report covers the Commission's activities in the year 2004.

Complaints, Inquiries & Investigations Since 1994





Action Taken in 2004

Following are summaries of the Commission’s actions in 2004, including accounts of all public determinations, summaries of non-public decisions, and various numerical breakdowns of complaints, investigations and other dispositions.

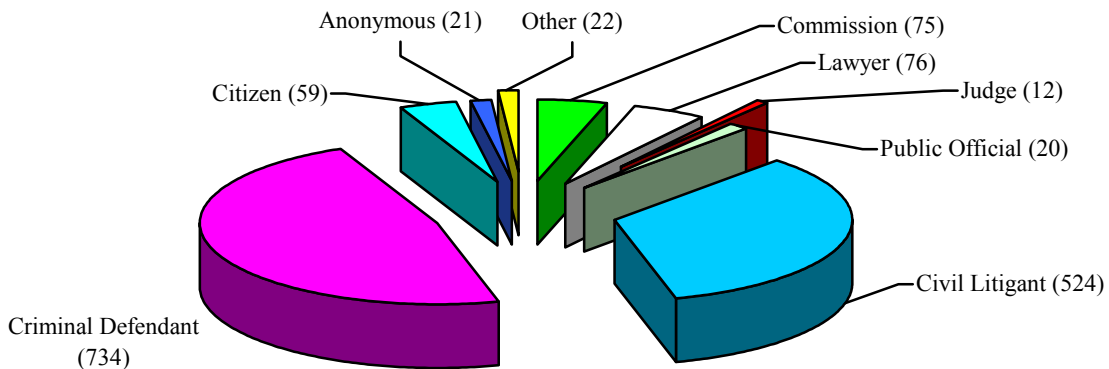
Complaints Received

The Commission received 1546 new complaints in 2004. Preliminary inquiries were conducted in 415 of these, requiring such steps as interviewing the attorneys involved, analyzing court files and reviewing trial transcripts. In 255 matters, the Commission authorized full-fledged investigations. Depending on the nature of the complaint, an investigation may entail interviewing witnesses, subpoenaing witnesses to testify and produce documents, assembling and analyzing various court, financial or other records, making court observations, and writing to or taking testimony from the judge.

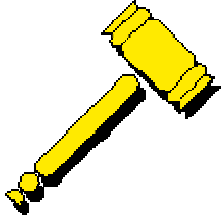
New complaints dismissed upon initial review are those that the Commission deems to be clearly without merit, not

alleging misconduct or outside its jurisdiction, including complaints against judges not within the state unified court system, such as federal judges, administrative law judges and New York City Housing Court judges. Absent any underlying misconduct, such as demonstrated prejudice, conflict of interest or flagrant disregard of fundamental rights, the Commission does not investigate complaints concerning disputed judicial rulings or decisions. The Commission is not an appellate court and cannot reverse or remand trial court decisions.

A breakdown of the sources of complaints received by the Commission in 2004 appears in the following chart.



Complaint Sources in 2004



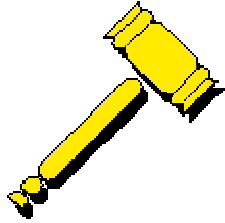
Preliminary Inquiries and Investigations

The Commission's Operating Procedures and Rules authorize "preliminary analysis and clarification" and "preliminary fact-finding activities" by Commission staff upon receipt of new complaints, to aid the Commission in determining whether an investigation is warranted. In 2004, staff conducted 415 such preliminary inquiries, requiring such steps as

interviewing the attorneys involved, analyzing court files and reviewing trial transcripts.

During 2004, the Commission commenced 255 new investigations. In addition, there were 188 investigations pending from the previous year. The Commission disposed of the combined total of 443 investigations as follows:

- 152 complaints were dismissed outright.
- 33 complaints involving 33 different judges were dismissed with letters of dismissal and caution.
- 7 complaints involving 6 different judges were closed upon the judges' resignation.
- 13 complaints involving 11 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.
- 47 complaints involving 38 different judges resulted in formal charges being authorized.
- 191 investigations were pending as of December 31, 2004.



Formal Written Complaints

As of January 1, 2004, there were pending Formal Written Complaints in 25 matters, involving 14 different judges. During 2004, Formal Written

Complaints were authorized in 47 additional matters, involving 38 different judges. Of the combined total of 72 matters involving 52 judges, the Commission made the following dispositions:

- 29 matters involving 20 different judges resulted in formal discipline (admonition, censure or removal from office).
- 2 matters involving 2 judges resulted in a letter of caution after formal disciplinary proceedings that resulted in a finding of misconduct.
- 2 matters involving 2 judges were closed upon the judge's resignation.
- 39 matters involving 28 different judges were pending as of December 31, 2004.

Summary of All 2004 Dispositions

The Commission's investigations, hearings and dispositions in the past year involved judges at various levels of the state unified court system, as indicated in the following ten tables.

TABLE 1: TOWN & VILLAGE JUSTICES – 2,300*, ALL PART-TIME

	<i>Lawyers</i>	<i>Non-Lawyers</i>	<i>Total</i>
Complaints Received	74	258	332
Complaints Investigated	22	109	131
Judges Cautioned After Investigation	3	18	21
Formal Written Complaints Authorized	3	19	22
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	5	9	14
Formal Complaints Dismissed or Closed	0	0	0

Note: Approximately 400 town and village justices are lawyers.

TABLE 2: CITY COURT JUDGES – 388, ALL LAWYERS

	<i>Part-Time</i>	<i>Full-Time</i>	<i>Total</i>
Complaints Received	57	143	200
Complaints Investigated	11	28	39
Judges Cautioned After Investigation	1	5	6
Formal Written Complaints Authorized	0	3	3
Judges Cautioned After Formal Complaint	0	1	1
Judges Publicly Disciplined	0	2	2
Formal Complaints Dismissed or Closed	0	1	1

Note: Approximately 100 City Court Judges serve part-time.

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

TABLE 3: COUNTY COURT JUDGES – 127 FULL-TIME, ALL LAWYERS

Complaints Received	205
Complaints Investigated	11
Judges Cautioned After Investigation	2
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	0

TABLE 4: FAMILY COURT JUDGES – 124, FULL-TIME, ALL LAWYERS

Complaints Received	165
Complaints Investigated	24
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	2
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	2
Formal Complaints Dismissed or Closed	0

TABLE 5: DISTRICT COURT JUDGES – 49, FULL-TIME, ALL LAWYERS

Complaints Received	14
Complaints Investigated	1
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 6: COURT OF CLAIMS JUDGES – 59, FULL-TIME, ALL LAWYERS

Complaints Received	38
Complaints Investigated	3
Judges Cautioned After Investigation	0
Formal Written Complaints Authorized	0
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 7: SURROGATES – 63, FULL-TIME, ALL LAWYERS

Complaints Received	33
Complaints Investigated	7
Judges Cautioned After Investigation	1
Formal Written Complaints Authorized	1
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	0
Formal Complaints Dismissed or Closed	0

TABLE 8: SUPREME COURT JUSTICES – 337, FULL-TIME, ALL LAWYERS

Complaints Received	302
Complaints Investigated	51
Judges Cautioned After Investigation	3
Formal Written Complaints Authorized	8
Judges Cautioned After Formal Complaint	0
Judges Publicly Disciplined	1
Formal Complaints Dismissed or Closed	1

**TABLE 9: COURT OF APPEALS JUDGES – 7 FULL-TIME, ALL LAWYERS;
APPELLATE DIVISION JUSTICES – 57 FULL-TIME, ALL LAWYERS**

Complaints Received	33
Complaints Investigated	3
Judges Cautioned After Investigation	1
Formal Written 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	214
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* The Commission reviews such complaints to determine whether to refer them to other agencies.

Note on Jurisdiction

The Commission’s jurisdiction is limited to judges and justices of the state unified court system. The Commission does not have jurisdiction over non-judges, retired judges, judicial hearing officers (JHO’s), administrative law judges (*i.e.* adjudicating officers in government agencies or public authorities such as the New York City Parking Violations Bureau), housing judges of the New York City Civil Court, or federal judges. Legislation that would have given the Commission jurisdiction over New York City housing judges was vetoed in the 1980s.



Formal Proceedings

The Commission may not impose a public disciplinary sanction against a judge 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.

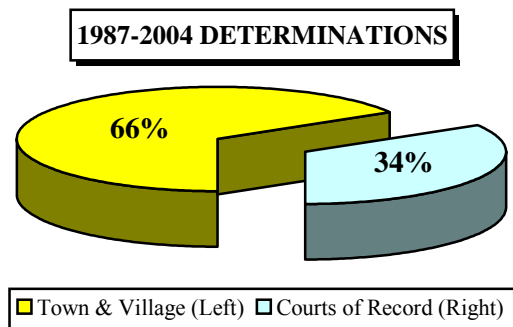
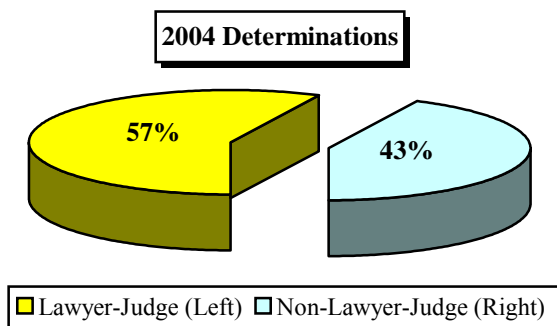
The confidentiality provision of the Judiciary Law (Article 2-A, Sections 44 and 45) prohibits public disclosure by the Commission of the charges, hearings or related matters, absent a waiver by the judge, until the case has been concluded and a determination of admonition, censure, removal or retirement has been rendered.

Following are summaries of those matters that were completed and made public during 2004. The actual texts are appended to this Report.

Overview of 2004 Determinations

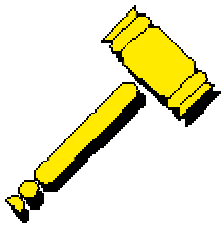
The Commission rendered 20 formal disciplinary determinations in 2004: 2 removals, 10 censures and 8 admonitions. In addition, 1 matter was disposed of by stipulation made public by agreement of the parties. Nine of the 21 respondents were non-lawyer-trained judges, and 12 were lawyers. Fourteen of the respondents were part-time town or village justices, and 7 were judges of higher courts.

To put these numbers and percentages in some context, it should be noted that, of the roughly 3,400 judges in the state unified court system, approximately 67% are part-time town or village justices. About 82% of the town and village justices, *i.e.* 55% of all judges in the court system, are not lawyers. (Town and village justices serve part-time and need not be lawyers. Judges of all other courts must be lawyers.)



Excluding cases from 1978 to 1982 involving ticket-fixing, which was largely a town and village justice court phenomenon – in larger jurisdictions, traffic matters are typically handled by administrative agencies – the overall percentage of town and village justices disciplined since the Commission’s inception (66%) is virtually identical to the percentage of town and village justices in the judiciary as a whole

(67%). Of course, no set of dispositions in a given year will exactly mirror those percentages. However, from 1987 to 2004, the number of public determinations, when categorized by type of court and judge, has roughly approximated the makeup of the judiciary as a whole: 209 (about 66%) have involved town and village justices, and 109 (about 34%) have involved judges of higher courts.



Determinations of Removal

The Commission completed two formal proceedings in 2004 that resulted in determinations of removal. The cases are summarized below, and the texts are appended.

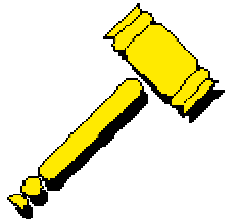
bail, and coerced guilty pleas. Judge Bauer requested review by the Court of Appeals, which accepted the Commission determination and removed the judge from office. 3 NY3d 158 (2004).

Matter of Henry R. Bauer

The Commission determined on March 30, 2004, that Henry R. Bauer, a Judge of the Troy City Court, Rensselaer County, should be removed for engaging over a two-year period “in a pattern of serious misconduct that repeatedly deprived defendants of their liberty without according them fundamental rights.” Judge Bauer *inter alia* failed to advise defendants of their right to counsel, set unreasonably high bail without applying the statutory criteria for

Matter of C. Ernest Brownell

The Commission determined on December 20, 2004, that C. Ernest Brownell, a part-time Justice of the Junius Town Court, Seneca County, should be removed for mishandling a small claims case by taking testimony from the claimant and issuing a decision without notice to the defendant, and misappropriating court funds to pay the judgment he awarded. Judge Brownell, who is not a lawyer, did not request review by the Court of Appeals.



Determinations of Censure

The Commission completed 10 formal proceedings in 2004 that resulted in determinations of censure. The cases are summarized below, and the texts are appended.

Matter of Bruce M. Barnes

The Commission determined on May 18, 2004, that Bruce M. Barnes, a part-time Justice of the Newfane Town Court, Niagara County, should be censured for abusing his judicial power by issuing an order involving disputed property although no case was pending, and for presiding over a dog-control violation case that arose out of his own complaint. Judge Barnes, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Karl T. Bowers

The Commission determined on November 12, 2004, that Karl T. Bowers, a part-time Justice of the Chemung Town Court, Chemung County, should be censured for engaging in “ticket-fixing” by sending a letter to another judge requesting special consideration of behalf of a defendant charged with Speeding. Judge Bowers, who is not a lawyer, did not request review by the Court of Appeals.

Matter of June P. Chapman

The Commission determined on October 6, 2004, that June P. Chapman, a part-time Justice of the Ellicottville Town

Court, Cattaraugus County, should be censured for delays in depositing bail checks, due to poor record-keeping practices, that resulted in significant delays in returning the monies to their rightful owners. Judge Chapman, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Richard T. DiStefano

The Commission determined on November 12, 2004, that Richard T. DiStefano, a part-time Justice of the Colonie Town Court, Albany County, who also practices law, should be censured for neglecting client matters as an attorney and failing to cooperate with the attorney disciplinary committee that was investigating his conduct – conduct as to which he was also censured by the Appellate Division, Third Department. Judge DiStefano did not request review by the Court of Appeals.

Matter of Roy M. Dumar

The Commission determined on May 18, 2004, that Roy M. Dumar, a part-time Justice of the Mohawk Town Court, Montgomery County, should be censured for repeatedly and improperly asserting his judicial office in a dispute with a dealership over payment for snowmobile repairs. Judge Dumar, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Charles E. Dusen

The Commission determined on November 16, 2004, that Charles E.

Dusen, a part-time Justice of the LeRoy Town Court, Genesee County, should be censured for releasing a defendant into the custody of immigration officials in June 2003 by signing an order stating that the defendant had been convicted of Trespass when in fact, the defendant had pled not guilty to the Trespass charge and was being held on bail. Judge Dusen, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Shirley B. Herder

The Commission determined on August 16, 2004, that Shirley B. Herder, a part-time Justice of the Vienna Town Court, Oneida County, should be censured for improperly causing the arrest and incarceration of an individual for declining to disclose the contents of a shopping bag he had brought to court. Judge Herder, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Douglas C. Mills

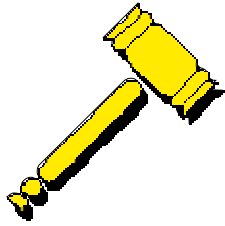
The Commission determined on December 6, 2004, that Douglas C. Mills, a Judge of the Saratoga Springs City Court, Saratoga County, should be censured for abusing his judicial power by depriving two individuals of their liberty, without just cause or due process, by holding a college student in contempt for interrupting him during a post-acquittal lecture, and causing the arrest of a courtroom spectator for using an expletive in the courthouse parking lot on his way to court. Judge Mills, who is a lawyer, did not request review by the Court of Appeals.

Matter of Ettore A. Simeone

The Commission determined on October 6, 2004, that Ettore A. Simeone, a Judge of the Family Court, Suffolk County, should be censured for presiding over numerous cases involving a youth services facility at a time when he was having a romantic relationship with the director of the facility. Judge Simeone, who is a lawyer, did not request review by the Court of Appeals.

Matter of Joseph C. Teresi

The Commission determined on December 17, 2004, that Joseph C. Teresi, a Justice of the Supreme Court, Albany County, should be censured for having an improper *ex parte* discussion in chambers with a witness scheduled to testify in a trial before him that day, without disclosing the conversation to the attorneys, causing the witness not to testify. Judge Teresi, who is a lawyer, did not request review by the Court of Appeals.



Determinations of Admonition

The Commission completed eight formal proceedings in 2004 that resulted in determinations of public admonition. The cases are summarized below, and the texts are appended.

Matter of Richard L. Campbell

The Commission determined on November 12, 2004, that Richard L. Campbell, a part-time Justice of the Newstead Town Court and Acting Justice of the Akron Village Court, Erie County, should be admonished for engaging in prohibited political activity by endorsing the nomination of two candidates for the town board. Judge Campbell, who is a lawyer, did not request review by the Court of Appeals.

Matter of Mark G. Farrell

The Commission determined on June 24, 2004, that Mark G. Farrell, a part-time Justice of the Amherst Town Court, Erie County, should be admonished for engaging in prohibited political activity by making a lump sum payment to the County Democratic Committee to cover his re-election expenses, without an itemized bill of the expenditures made on his behalf, and by making telephone calls supporting the re-election of the County Democratic Chairman. Judge Farrell, who is a lawyer, did not request review by the Court of Appeals.

Matter of Thomas C. Kressly

The Commission determined on December 17, 2004, that Thomas C. Kressly, a part-time Justice of the Urbana Town Court and Hammondsport Village Court, Steuben County, should be admonished for mishandling a code violation case by holding a trial and rendering a decision without giving notice to the prosecuting authorities. Judge Kressly, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Donald R. Magill

The Commission determined on October 6, 2004, that Donald R. Magill, a part-time Justice of the Maine Town Court, Broome County, should be admonished for improperly asserting his judicial influence in a case involving his wife by *inter alia* appearing at the court where the case was assigned, leaving his judicial business card with a request for an order of protection, and later calling the court to express displeasure with the court's decision not to issue an order of protection. Judge Magill, who is not a lawyer, did not request review by the Court of Appeals.

Matter of Patrick J. McGrath

The Commission determined on November 12, 2004, that Patrick J. McGrath, a Judge of the County Court, Rensselaer County, should be admonished for making comments about a highly publicized murder case during an interview on a national television

program, “Good Morning America,” in violation of the rule prohibiting judges from making “any public comment about a pending or impending proceeding.” Judge McGrath, who is a lawyer, did not request review by the Court of Appeals.

Matter of David J. Pajak

The Commission determined on October 6, 2004, that David J. Pajak, a part-time Justice of the Pembroke Town Court, Genesee County, should be admonished for being convicted of Driving While Intoxicated, a misdemeanor. Judge Pajak, who is a lawyer, did not request review by the Court of Appeals.

Matter of Scott J. Pautz

The Commission determined on March 30, 2004, that Scott J. Pautz, a part-time

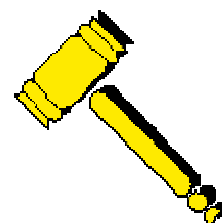
Justice of the Horseheads Town Court, Chemung County, should be admonished for engaging in a series of “annoying acts” towards a woman after the break-up of a personal relationship. Judge Pautz, who is a lawyer, did not request review by the Court of Appeals.

Matter of George J. Pulver, Jr.

The Commission determined on May 18, 2004, that George J. Pulver, Jr., a Judge of the Family, County and Surrogate’s Courts, Greene County, should be admonished for engaging in business dealings with an attorney who appeared in his court and issuing rulings in a custody case involving relatives of an individual with whom the judge had financial dealings. Judge Pulver, who is a lawyer, did not request review by the Court of Appeals.

Other Public Dispositions

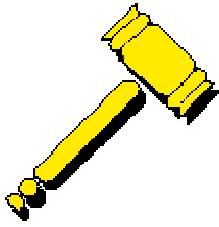
The Commission completed one other proceeding in 2004 that resulted in a public disposition. The case is summarized below, and the text is appended.



Matter of Cheryl Coleman

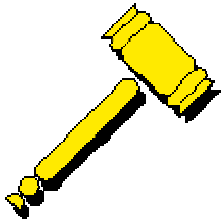
Pursuant to a stipulation, the Commission discontinued a proceeding on June 21, 2004, involving Cheryl Coleman, a Judge of the Albany City Court, Albany County, after serving the judge with formal charges alleging that she improperly asserted the influence of her judicial office during a personal

dispute with four women at a concert, which resulted in their arrest, and that she was discourteous to various litigants and lawyers. The judge resigned from judicial office and affirmed that she would neither seek nor accept judicial office at any time in the future.



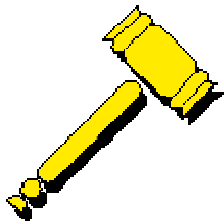
Dismissed or Closed Formal Written Complaints

The Commission disposed of 4 Formal Written Complaints in 2004 without rendering public discipline. Two complaints were closed upon the resignation of the respondent-judge; one of these were closed pursuant to a stipulation in which the judge waived confidentiality and agreed not to seek judicial office in the future. Two complaints were disposed of with a letter of caution, upon a finding by the Commission that judicial misconduct was established but that public discipline was not warranted.



Matters Closed Upon Resignation

Eight judges resigned in 2004 while complaints against them were pending at the Commission. Six of them resigned while under investigation and two resigned while under formal charges by the Commission. The matters pertaining to these judges were closed. By statute, the Commission may continue an inquiry for a period of 120 days following a judge's resignation, but no sanction other than removal from office may be determined 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 that removal is not warranted.



Referrals to Other Agencies

Pursuant to Judiciary Law Section 44(10), the Commission may refer matters to other agencies. In 2004, the Commission referred 18 matters to other agencies. Sixteen matters were referred to the Office of Court Administration, typically dealing with relatively isolated instances of delay, poor record keeping or other administrative issues. Two matters were referred to a District Attorney.



Letters of Dismissal and Caution

A *Letter of Dismissal and Caution* contains confidential suggestions and recommendations to a judge upon conclusion of an investigation, in lieu of commencing formal disciplinary proceedings. A *Letter of Caution* is a similar communication to a judge upon conclusion of a formal disciplinary proceeding and a finding that the judge's misconduct is established.

Cautionary letters are authorized by the Commission's rules, 22 NYCRR 7000.1(l) and (m). They serve as an educational tool and, when warranted, allow the Commission to address a judge's conduct without making the matter public.

In 2004, the Commission issued 33 Letters of Dismissal and Caution and two Letters of Caution. Twenty-two town or village justices were cautioned, including three who are lawyers. Thirteen judges of higher courts – all lawyers – were cautioned. The caution letters addressed various types of conduct, as the examples below indicate.

Improper Ex Parte Communications.

Seven town or village justices were cautioned for engaging in unauthorized *ex parte* communications. For example, in separate matters, two judges visited the scene at issue in a pending case without the knowledge or consent of the parties. Another judge held public office hours for people to come in for advice on potential cases or legal issues.

Political Activity. One judge was cautioned for improper political activity. The Rules Governing Judicial Conduct prohibit judges from attending political gatherings, endorsing other candidates or otherwise participating in political activities except for a certain specifically-defined "window period" when they themselves are candidates for elective judicial office. Judicial candidates are also obliged to campaign in a manner that reflects appropriately on the integrity of judicial office, *inter alia* avoiding pledges or promises of conduct and avoiding misrepresentations of their own or their opponent's qualifications. One full-time judge was cautioned for disseminating campaign literature that inaccurately implied he was the incumbent.

Conflicts of Interest. All judges are required by the Rules to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned. In 2004, five judges were cautioned for relatively isolated conflicts of interest. For example, one full-time judge signed a preliminary conference order in a real estate case, despite having an interest in the property at issue. Even though the case was randomly assigned and the order was not on its face substantive, the judge should not have participated, even in a ministerial manner, because of the direct financial interest in the matter in controversy. A part-time town court lawyer-justice was cautioned for presiding over case in which a client of

his firm was a substantive witness. Two other part-time town justices were cautioned for presiding over matters involving their co-justices, one of whom was party and the other of whom was a witness.

Inappropriate Demeanor. Two judges were cautioned for discourteous, intemperate or otherwise offensive demeanor toward a litigant, in isolated circumstances rather than as part of a discernible pattern.

Failure to Adhere to Statutory and Other Administrative Mandates.

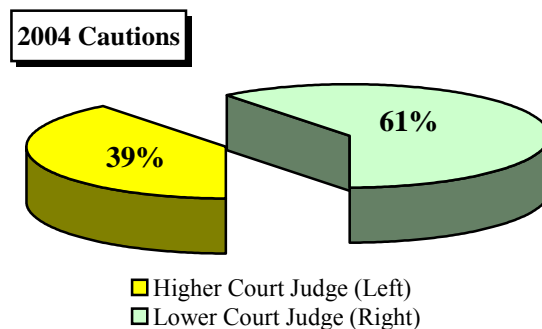
Thirteen judges were cautioned for failing to meet certain mandates of law, either out of ignorance or administrative oversight. For example, four were cautioned for inordinate delays in scheduling or deciding particular cases, typically because of poor records and case management. Another was cautioned for failing to let a litigant have access to public court records in his own case. Another was cautioned for effectuating driver's license suspensions without following appropriate statutory criteria.

Public Comment in Pending Cases.

Judges are prohibited by the Rules from making public comments on pending or impending cases in any jurisdiction within the United States. In 2004, two judges were cautioned for doing so.

Miscellaneous. One full-time judge was cautioned for awarding an appointment to an out-of-state attorney who did not

meet the legal requirements for practicing law in New York. A part-time town justice was cautioned for accepting more than the statutory \$75 fee to officiate at wedding ceremonies outside the court. Another part-time town justice was cautioned for conducting arraignments in a police station rather than in the nearby courtroom.



Follow Up on Caution Letters. Should the conduct addressed by a cautionary letter continue or be repeated, the Commission may authorize an investigation on a new complaint, which may lead to formal charges and further disciplinary proceedings. In certain instances, the Commission will authorize a follow-up review of the judge's conduct, to assure that promised remedial action was indeed taken. In 1999, the Court of Appeals, in upholding the removal of judge who *inter alia* used the power and prestige of his office to promote a particular private defensive driver program, noted that the judge had persisted in his conduct notwithstanding a prior caution from the Commission that he desist from such conduct. *Matter of Assini v. Commission on Judicial Conduct*, 94 NY2d 26 (1999).



COMMISSION DETERMINATIONS REVIEWED BY THE COURT OF APPEALS

Pursuant to statute, Commission determinations are filed with the Chief Judge of the Court of Appeals, who then serves the respondent-judge. The respondent-judge has 30 days to request review of the Commission's determination by the Court of Appeals, or the determination becomes final. In 2004, the Court decided the two matters summarized below.

Matter of Joseph J. Cerbone

The Commission determined on September 19, 2003, that Joseph J. Cerbone, a part-time Justice of the Mount Kisco Town Court, Westchester County, should be removed for engaging in financial improprieties as an attorney resulting in his suspension from the practice of law for one year, and for using his courtroom as a forum for expressing his personal grievances against the District Attorney.

The Court of Appeals unanimously accepted the determination and removed Judge Cerbone from office in an opinion dated June 3, 2004. 2 NY3d 479 (2004). The Court held that the judge's misconduct and his "extensive prior history" of discipline, including a previous admonition and four letters of

dismissal and caution, warranted the sanction of removal (*Id.* at 485).

The Court noted that the judge did not challenge the Commission's findings of fact. The Court stated that the present case, as well as the judge's previous disciplinary transgressions, "involve a common theme: petitioner seems incapable of understanding, despite repeated warnings, that a judge performing judicial duties must both act and appear to act as an impartial arbiter serving the public interest, not someone with an axe to grind" (*Id.*). Concluding that removal was appropriate, the Court stated: "A judge who does not know this, and is not capable of learning it, should not be on the bench" (*Id.*).

Matter of Henry R. Bauer

The Commission determined on March 30, 2004, that Henry R. Bauer, a Judge of the Troy City Court, Rensselaer County, should be

removed for engaging in a pattern of conduct that violated the rights of defendants over a two-year period.

The Court of Appeals accepted the determination and removed Judge Bauer from office in an opinion dated October 14, 2004. 3 NY3d 158 (2004).

Finding that the “multiple specifications of severe misconduct” as found by the Commission were “fully borne out by the record,” the Court concluded that the record “reveals a pattern of abuse” in that the judge, in numerous cases, not only failed to advise defendants of their right to counsel but “perverted” the statutory requirements, evincing “an intent to defeat, not advance, the right to assigned counsel”; that he set “shockingly high bail,” without regard for the required standards; that he remanded defendants to jail for several days for failure to post bail on charges for which imprisonment was not a legally permitted penalty or upon legally insufficient accusatory instruments; that he coerced guilty pleas, inducing unrepresented defendants to plead guilty without informing them that they were entitled to counsel; that he imposed illegally excessive sentences; and that he twice convicted a defendant without pleas of guilty or findings of guilt (*Id.* at 165, 162, 161).

The Court further noted that the judge’s “apparent lack of contrition” and his “utter failure to recognize and admit wrongdoing” were significant, strongly suggesting “if he is allowed

to continue on the bench, we may expect more of the same” (*Id.* at 165).

In a dissenting opinion in which Judge Graffeo concurred, Judge Read disagreed with the majority in several respects and concluded that the judge’s conduct warranted censure. In particular, as to the finding of misconduct based on excessive bail, the dissent questioned whether the Commission’s authority extends “to this highly discretionary judicial realm” and concluded that such a finding “impinges on [petitioner’s] discretion as a judge and is...outside the Commission’s scope of authority” (*Id.* at 165, 166). The dissent also stated that certain of the judge’s actions constituted “ordinary legal error,” rather than misconduct, and that it could not be concluded that there was a pattern of misconduct (*Id.* at 168).

In a separate dissenting opinion, Judge R. Smith stated that he agreed in substance with Judge Read’s dissent and agreed, “by a narrow margin,” that censure, rather than removal, was appropriate (*Id.* at 171, 173). Judge Smith stated that judge’s misconduct “was somewhat less serious than it appears at first glance,” since there was no indication that the judge’s failure to recite the litany of rights at arraignment caused any defendant to be sent to jail who would otherwise have avoided incarceration (*Id.* at 171, 171-72).



CONSTITUTIONAL CHALLENGES TO THE RULES GOVERNING JUDICIAL CONDUCT AND RELATED CHALLENGES TO THE COMMISSION'S PROCEDURES

In federal proceedings commenced in 2002 and in state proceedings commenced in 2004 by a respondent judge seeking to enjoin the Commission from disciplining him, the Commission litigated significant constitutional and procedural issues into and throughout 2004, pertaining to the political activity constraints imposed on judges by the Rules Governing Judicial Conduct, and the Commission's authority to enforce those Rules. The challenges relied in part on a June 2002 decision of the United States Supreme Court, *Republican Party of Minnesota v. White*, 536 US 765 (2002), which declared unconstitutional a provision of the Minnesota Code of Judicial Conduct that does not exist in the New York Rules. The provision is the so-called "announce clause," which prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues.

Federal Litigation:

Matter of Spargo et al. v. Commission on Judicial Conduct et al.

On October 17, 2002, United States District Court Judge Lawrence E. Kahn, Northern District of New York, signed an Order to Show Cause with a Temporary Restraining Order, enjoining the Commission from taking any action with respect to a pending Formal Written Complaint against New York State Supreme Court Justice Thomas J. Spargo of Albany County. The TRO effectively postponed a hearing that was scheduled to commence the following Monday in Albany before a referee designated by the Commission.

By commencing federal litigation, Judge Spargo made public that Commission proceedings had been initiated against

him. The court papers include descriptions of and documents from the Commission proceedings.

The Formal Written Complaint against Judge Spargo alleged various violations of the political activity restrictions in the Rules Governing Judicial Conduct. Judge Spargo was charged *inter alia* with making \$5,000 payments to two individuals who supported his nomination at their parties' judicial nominating conventions in 2001, with participating in a disruptive protest of the 2000 presidential vote recount in Florida, and with distributing items of value, such as coupons for gasoline, coffee and doughnuts, to potential voters. Judge

Spargo was also charged with failing to disclose to the parties in criminal cases that he had performed election law services for the District Attorney and was owed \$10,000 for such services.

Judge Spargo's federal action was transferred to United States District Court Judge David N. Hurd, who considered the plaintiffs' motion for a preliminary injunction. The essence of Judge Spargo's claim was that the specific provisions of the judicial conduct rules charged against him were unconstitutional, relying in part on the decision of the United States Supreme Court in *Republican Party of Minnesota v. White*, *supra*.

Judge Hurd heard oral argument on the issues of law on November 29, 2002, and issued a decision on February 20, 2003. Judge Hurd held that Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) of the Rules Governing Judicial Conduct are unconstitutional and ordered that the Commission is permanently enjoined and restrained from enforcing those sections. The Commission was not enjoined from proceeding as to the charge involving Judge Spargo's failure to disclose his relationship with the District Attorney, since that charge cited other sections of the Rules.

While Sections 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) all explicitly involve prohibitions on political activity by judges and judicial candidates, Sections 100.1 and 100.2(A) impose ethical mandates that are not limited to political activity. For example, they require a

judge to "respect and comply with the law," and to observe high standards of conduct in furtherance of the independence, integrity and impartiality of the judiciary. The Commission has relied on Sections 100.1 and 100.2(A) over the years to discipline judges for such off-the-bench conduct as driving while intoxicated or, in the case of part-time judges who practice law, misappropriating law firm or client funds.

The Commission appealed Judge Hurd's decision to the United States Court of Appeals for the Second Circuit.

On December 9, 2003, the Second Circuit vacated the judgment of the District Court and remanded the case to Judge Hurd with the instruction that he abstain from exercising jurisdiction. 351 F3d 65 (2003). Thereafter, Judge Hurd issued an order dismissing the case.

The Second Circuit held that, in declining to abstain under the *Younger* abstention doctrine, the District Court mistakenly concluded there was uncertainty as to whether constitutional claims could be addressed in a judicial disciplinary proceeding.¹ In addition, the New York Court of Appeals had subsequently clarified the scope of available review of constitutional challenges to the Rules Governing Judicial Conduct. *Matter of Raab*, 100

¹ The doctrine derives its name from the federal case in which it is articulated: *Younger v. Harris*, 401 US 37 (1971), holding that federal courts should generally refrain from enjoining pending state court proceedings.

NY2d 305 (2003). The Second Circuit held that Judge Spargo had a sufficient opportunity to raise constitutional claims in proceedings before the Commission and thereafter in the New York State Court of Appeals.

The Second Circuit also held that *Younger* abstention applied to the derivative claims of Judge Spargo's co-

plaintiffs, both of whom are non-judges, since their First Amendment interests were inextricably intertwined with the judge's First Amendment interests.

Judge Spargo filed a petition for *certiorari* in 2003, seeking review by the United States Supreme Court. The Court denied his petition on June 7, 2004, thus ending the *Spargo* federal litigation.

State Litigation:
Spargo v. Commission on Judicial Conduct et al.

On August 3, 2004, Judge Spargo commenced proceedings in state court against the Commission. Supreme Court Justice Louis C. Benza of Albany County signed an Order To Show Cause on that date, enjoining the Commission from proceeding as to certain specifications in pending Formal Written Complaints against Judge Spargo. Thereafter, the matter was assigned to Supreme Court Justice Nicholas Colabella of Westchester County.

Judge Spargo's petition alleged *inter alia* that the political activity limitations of the Rules Governing Judicial Conduct charged against him were facially unconstitutional and unconstitutional as applied. On December 9, 2004, Justice Colabella rendered a decision dismissing the petition. The decision noted *inter alia* that the Court of Appeals had already "specifically addressed these issues in *Matter of Raab*, 100 NY2d 305 (2003)...on the identical constitutional grounds asserted by [Judge Spargo] in this proceeding." The decision went on to note that in *Raab* and a companion case, *Matter of Watson*, 100 NY2d 290

(2003), the Court of Appeals applied a strict scrutiny analysis and held that the challenged rules were narrowly tailored to further a number of compelling state interests, "including the state's interest in preventing political bias or corruption of the appearance of political bias or corruption in its judiciary." Moreover, in *Raab*, the Court addressed and distinguished the *White* case on which both *Raab* and *Spargo* relied.

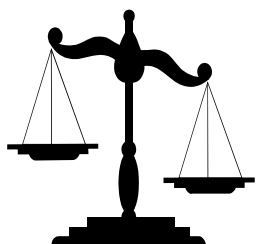
Justice Colabella's decision also cited the Court of Appeals decision in *Matter of Sims*, 61 NY2d 349, 358 (1984), in which the Court noted it had "repeatedly upheld the appearance of impropriety rules and stated that Judges may be held to this admittedly high standard of conduct in performing their duties or even when performing nonjudicial duties."

Justice Colabella also rejected claims by Judge Spargo that the Commission "as a whole is unconstitutional."

Judge Spargo filed an appeal, which is pending.

OBSERVATIONS AND RECOMMENDATIONS

The Commission traditionally devotes a section of its Annual Report to a discussion of various topics of special note or interest that have come to our attention in the course of various investigations. We do this for public education purposes, to advise the judiciary so that potential misconduct may be avoided, and pursuant to our authority to make administrative and legislative recommendations.



PUBLIC HEARINGS

All Commission investigations and formal hearings are confidential by law. Commission activity is only made public at the end of the disciplinary process – when a determination of public admonition, public censure or removal from office is rendered and filed with the Chief Judge pursuant to statute – or when the accused judge requests that the formal disciplinary hearing be public.

The subject of public disciplinary proceedings, for lawyers as well as judges, has been vigorously debated in recent years by bar associations and civic groups, and addressed in newspaper editorials around the state that have supported the concept of public proceedings.

The process of evaluating a complaint, conducting a comprehensive investigation, conducting formal disciplinary proceedings and making a final determination subject to review by

the Court of Appeals, takes considerable time. The process is lengthy in part because of the Commission's painstaking efforts to render a determination that is fair and comports with due process, and the lack of adequate funding and staff. If the charges and hearing portion of a Commission matter were open, the public would have a better understanding of the entire disciplinary process. The very fact that charges had been served and a hearing scheduled would no longer be secret.

As it is, maintaining confidentiality is often beyond the Commission's control. For example, in any formal disciplinary proceeding, subpoenas are issued and witnesses are interviewed and prepared to testify, by both the Commission staff and the respondent-judge. It is not unusual for word to spread around the courthouse, particularly as the hearing date approaches. Respondent-judges themselves often consult with judicial colleagues, staff and others, revealing the details of the charges against them and seeking advice. As more "insiders" learn

of the proceedings, the chances for “leaks” to the press increase, often resulting in published misinformation and suspicious accusations as to the source of the “leaks.” In such situations, both confidentiality and confidence in the integrity of the disciplinary system suffer.

Chief Judge Judith Kaye proposed legislation in 2003, as she had previously, to open the Commission’s proceedings to the public at the point that formal disciplinary charges were filed against a judge. The Legislature did not take action. In the past, such legislation has had support in either the Assembly or the Senate at various times, although never in both houses in the same legislative session.

The Commission itself has long advocated that post-investigation formal proceedings should be made public, as they were in New York State until 1978, and as they are now in 38 other states. The Commission hopes that the issue will be revived in the Legislature and not be diverted by ancillary matters or political disputes. The Commission also hopes that renewed efforts to enact such a public proceedings measure will succeed without encumbrances as have been suggested by various legislators in the past, such as the unnecessary introduction of a statute of limitations or increase in the standard of proof from the present “preponderance of the evidence” standard to “clear and convincing evidence.”



Interim Suspension of Judge Under Certain Circumstances

The State Constitution empowers the Court of Appeals to suspend a judge from office, with or without pay as it may determine, under certain circumstances:

- while there is pending a Commission determination that the judge be removed or retired,
- while the judge is charged in New York State with a felony, whether by indictment or information,
- while the judge is charged with a crime (in any jurisdiction) punishable as a felony in New York State, or
- while the judge is charged with any other crime which involves moral turpitude.

New York State Constitution,
Art.6, §22(e–g)

There is no provision for the suspension of a judge who is charged with a misdemeanor that does not involve “moral turpitude.” Yet there are any number of misdemeanor charges that may not be defined as involving “moral turpitude” but that, when brought against a judge, would seriously undermine public confidence in the integrity of the judiciary. Misdemeanor level DWI or drug charges, for example, would

seem on their face to fall in this category, particularly where the judge served on a local criminal court and presided over cases involving charges similar to those filed against him or her.

Fortunately, it is rare for a judge to be charged with a crime, but it does happen. In early 1999, one part-time judge of a busy local court was arrested and charged with DWI and drug possession. The judge voluntarily suspended himself from office, did not run for re-election and formally vacated office at the end of the year, when he accepted a plea and sentence on the DWI charge that disposed of the drug charge.

There are non-felony and even non-criminal categories of behavior that seriously threaten the administration of justice and arguably should result in the interim suspension of a judge. Such criteria might well include significant evidence of mental illness affecting the judicial function, or conduct that compromises the essence of the judge’s role, such as conversion of court funds or a demonstrated failure to cooperate with the Commission or other disciplinary authorities.

The courts already have discretion to suspend an attorney’s law license on an interim basis under certain circumstances, even where no

criminal charge has been filed against the respondent. All four departments of the Appellate Division have promulgated rules in this regard. Any attorney under investigation or formal disciplinary charges may be suspended pending resolution of the matter based upon one of the following criteria:

(i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Departmental Disciplinary Committee made in connection with any investigation, hearing, or disciplinary proceeding, or

(ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or

(iii) other uncontested evidence of professional misconduct.

Rules of the Appellate Division, First Department, §603.4(e)(1)²

The American Bar Association's Model Rules for Judicial Disciplinary Enforcement suggest a broader definition of the type of conduct that should result in a judge's suspension from office. For example, rather than limit suspension to felony or "moral

turpitude" cases, the Model Rules would authorize suspension by the state's highest court for:

- a "serious crime," which is defined as a "felony" or a lesser crime that "reflects adversely on the judge's honesty, trustworthiness or fitness as a judge in other respects,"

- "any crime a necessary element of which ... involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a 'serious crime'," and

- other misconduct for which there is "sufficient evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice."

It would require an amendment to the State Constitution to expand the criteria on which the Court of Appeals could suspend a judge from office. The Commission believes that the limited existing criteria should be expanded. We recommend that the Legislature consider so empowering the Court.

² See also, Rules of the Appellate Division, Second Department, §691.4(l)(1), Rules of the Appellate Division, Third Department, §806.4(f)(1), and Rules of the Appellate Division, Fourth Department, §1022.19(f)(2).



SUSPENSION FROM JUDICIAL OFFICE AS A FINAL SANCTION

Under current law, the Commission's disciplinary determinations are limited to public admonition, public censure or removal from office for misconduct, and retirement for mental or physical disability.

Prior to 1978, when both the Constitution and the Judiciary Law were amended, the Commission, or the courts in cases brought by the Commission, had the authority to determine that a judge be suspended with or without pay for up to six months. Suspension authority was exercised five times from 1976 to 1978: three judges were suspended without pay for six months, and two were suspended without pay for four months.

Since 1978, neither the Commission nor the courts have had the authority to suspend a judge as a final discipline. While the legislative history of the 1978 amendments is not clear on the reason for eliminating suspension as a

discipline, there was some discussion among political and judicial leaders at the time suggesting that, if a judge committed misconduct serious enough to warrant the already momentous discipline of suspension, public confidence in the integrity of that judge was probably irretrievably compromised, thus requiring removal. Nevertheless, at times the Commission has felt constrained by the lack of suspension power, noting in several censure cases in which censure was imposed as a sanction that it would have suspended the disciplined judge if it had authority to do so.

Some misconduct is more severe than would be appropriately addressed by a censure, yet not egregious to the point of warranting removal from office. As it has done previously, the Commission suggests that the Legislature consider the merits of a constitutional amendment, providing suspension without pay as an alternative sanction available to the Commission.



**JUDICIAL CANDIDATES IMPLYING THAT
THEY ARE INCUMBENTS OF A PARTICULAR COURT**

Political activity by judicial candidates, including incumbent judges seeking elective judicial office, is strictly limited by the Rules Governing Judicial Conduct to a “window period” beginning nine months before the nomination date and ending six months after the nomination or general election date. Sections 100.0(Q) and 100.5. Even within that window period, the Rules proscribe certain political activity and impose various obligations on all judicial candidates, whether incumbent or challenger.

Section 100.5(A)(4)(d)(iii) of the Rules states that a judge or judicial candidate “shall not ... knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent.”

In *Matter of Shanley*, 98 NY2d 310 (2002), a non-lawyer town justice was admonished for misrepresenting her credentials in campaign literature, in that she appeared to say she was a graduate of three institutions of higher education when in fact she had attended clerk’s training programs that were held at those institutions.

Although we have commented on this subject before, some judicial candidates have phrased campaign literature in such a way as to appear that they already hold the particular office for which they are running. For example, the Commission has seen campaign posters or literature that read as follows –

**John Doe
Family Court Judge
Election Day – November 3rd**

– even though candidate “Doe” may actually be a judge of another (typically lower) court or may not be a judge at all. See *Matter of Mullin*, 2001 Annual Report 117. The Commission has also confidentially cautioned a number of judges for misrepresenting their current position in similar fashion, where there were no other violations of the Rules.

All judicial candidates should take steps to make certain that all of the literature, signs and ads that call for their election do not state or imply that they are incumbents of any office that they do not presently hold.



PERSONAL CHECKS IDENTIFYING THE ACCOUNT HOLDER AS A JUDGE

The Commission has been advised that a number of judges identify themselves as such on the heading of their personal checks, and that some also use the name and address of the courthouse rather than their home addresses on such checks. In one such case in 2004, the Commission cautioned a judge who did so, after determining that the use of such checks had been for routine household and family expenses and that public funds were not involved.

Even where the funds in such an account are entirely personal, using such checks to pay personal bills can create the appearance that court funds are being used for personal purposes. The typical payee who receives such a check may

well conclude that court funds were being used for such purposes as paying rent or a mortgage, utility bills, college tuition or the like. If the judge were in a bill-paying dispute with a service provider who did not otherwise know the customer was a judge, use of such checks would convey the message and inappropriately introduce the prestige of judicial office to a private dispute. Even if no payee ever complains, the judge is obliged to avoid impropriety and the appearance of impropriety, which in judicial disciplinary cases has always been measured by the Court of Appeals as an objective, not subjective standard. Thus, personal checks that identify the account holder as “Judge” in the title, and/or identify the name and address of the courthouse, appear official and should not be used.



AMENDED DEFINITION OF “ECONOMIC INTEREST”

The Rules Governing Judicial Conduct require that a judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where the judge, the judge’s spouse or a minor child residing in the judge’s household has an “economic interest” in the subject matter in controversy or in a party to the proceeding, or has any other interest that could be substantially affected by the proceeding. 22 NYCRR 100.3(E)(1)(c).

On approval of the Court of Appeals, the definition of a judge’s disqualifying “economic interest” was amended in 2004. Section 100.0(D) of the Rules originally defined “economic interest” as follows:

“Economic interest” denotes ownership of a legal or equitable interest, however small, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge’s spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

22 NYCRR 100.0(D) (emphasis added)

The new definition of “economic interest” replaces the words “however small” in Section 100.0(D) with the phrase “more than a de minimis,” as follows:

“Economic interest” denotes ownership of more than a de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party... (emphasis added).

A definition of “de minimis” was also added to the rule, as follows:

(5) “de minimis” denotes an insignificant interest that could not raise reasonable questions as to a judge’s impartiality.

The remainder of the rule is unchanged.

Under the old definition, a judge with even a single share of stock in a company that was party to a lawsuit would be disqualified from presiding, notwithstanding that the judge’s economic interest in the company would not be affected by the litigation.

The new definition adopts the standard proposed by the American Bar Association’s Model Code of Judicial Conduct, which recognizes that it is not unusual for a judge or judge’s spouse to have a varied investment portfolio, and

that it would be onerous to require disqualification for mere ownership of shares in a company that comes before the judge in litigation.

Under either the old or new definition, disqualification would be required in any situation where the judge has an interest that could be “substantially affected by the proceeding,” regardless of the extent of the judge’s holding. For example, while a judge’s ownership of a few shares in a large publicly traded company would not appear to be affected by a small claims or other relatively minor case involving that company, the value of a judge’s shares in a co-operative apartment might well be affected by a contractual or other financial dispute between the building and a commercial tenant of that building.



THE COMMISSION'S BUDGET

In numerous recent Annual Reports, we have called attention in this space to the fact that the Commission has been persistently and acutely underfunded and understaffed, for at least a decade. Our projected 2005-06 fiscal year budget of \$2.6 million supports a staff of 28½ employees, including 10 lawyers and seven investigators, whereas our 1978-79 appropriation of \$1.64 million supported a full-time staff of 63, including 21 lawyers and 18 investigators.

At the same time, the Commission's workload has exploded, from 641 complaints received and 170 investigations commenced in 1978 to 1546 complaints received and 255 investigations commenced in 2004.

The Commission needs at least one additional attorney and one additional investigator in each of its three offices just to keep pace, let alone allocate resources in a way that would enhance our ability to conduct all investigations thoroughly.

Responsible Budget Management

Since its inception 30 years ago, the Commission has managed its finances with extraordinary care. In periods of relative plenty, we kept our budget

small; in previous times of statewide financial crisis, we made difficult sacrifices. Our average annual increase since 1978 has been about 1.5% – a no-growth budget which, when adjusted for inflation, has actually meant a major decline in financial resources.

Our record of fiscal prudence was underscored by an exhaustive audit in 1989 by the State Comptroller, which found that the Commission's finances were in order, that our budget practices were all consistent with state policies and rules, and that no changes in our fiscal practices were recommended.

The State Comptroller conducted a follow-up review over a two-month period in 2002, with the same excellent result. The Commission's finances were examined for cash management and accounting controls, payroll management and review, purchasing policies and procedures, and equipment purchasing and management. Although the Commission is not a revenue-producing agency, the Comptroller reviewed our procedures and remittal practices for such minor financial transactions as fulfilling requests for photocopying public records. In all categories, the Commission received the highest possible rating.

A comparative breakdown of the Commission's budget and staff over the years appears on the following page in chart form.

Budget Figures, 1978 to Present

FISCAL YEAR	ANNUAL BUDGET	COMPLAINTS RECEIVED†	NEW INVESTIGATIONS	STAFF ATTORNEYS*	INVESTIGATORS ON STAFF	TOTAL STAFF
1978-79	\$1,644,000	641	170	21	18 f/t	63
≈	≈	≈	≈	≈	≈	≈
1988-89	\$2,224,000	1109	200	9	12 f/t, 2 p/t	41
≈	≈	≈	≈	≈	≈	≈
1992-93	\$1,666,700	1452	180	8	6 f/t, 1 p/t	26
≈	≈	≈	≈	≈	≈	≈
1996-97	\$1,696,000	1490	192	8	2 f/t, 2 p/t	20
≈	≈	≈	≈	≈	≈	≈
2003-04	\$2,266,000	1463	235	9	6 f/t, 1 p/t	27
2004-05	\$2,397,000	1546	255	10	7 f/t	28
2005-06	\$2,609,000≠	--	--	10	7f/t	28½

* Number includes Clerk of the Commission, who does not investigate or litigate cases.

† Complaint figures are calendar year (Jan 1 – Dec 31); Budget figures are fiscal year (Apr 1 – Mar 31).

≠ Proposed.



CONCLUSION

Public confidence in the independence, integrity, impartiality and high standards of the judiciary, and in an independent disciplinary system that helps keep judges accountable for their conduct, is essential to the rule of law. The members of the New York State Commission on Judicial Conduct are confident that the Commission's work contributes to those ideals, to a heightened awareness of the appropriate standards of ethics incumbent on all judges, and to the fair and proper administration of justice.

Respectfully submitted,

LAWRENCE S. GOLDMAN, CHAIR
FRANCES A. CIARDULLO, VICE CHAIR
STEPHEN R. COFFEY
COLLEEN DIPIRRO
RICHARD D. EMERY
RAOUL L. FELDER
CHRISTINA HERNANDEZ
DANIEL F. LUCIANO
KAREN K. PETERS
ALAN J. POPE
TERRY JANE RUDERMAN

March 1, 2005

APPENDIX



Biographies of Commission Members and Attorneys
Roster of Referees Who Served in 2004
The Commission's Powers, Duties & History
Text of the Rules Governing Judicial Conduct
Text of 2004 Determinations
Statistical Analysis of Complaints



2005 Annual Report
New York State
Commission on Judicial Conduct

BIOGRAPHIES OF COMMISSION MEMBERS

There are 11 members of the Commission on Judicial Conduct. The Governor appoints four members, the Chief Judge of the Court of Appeals appoints three members, and each of the four leaders of the Legislature appoints one. Members serve terms of four years and are eligible for reappointment.

Lawrence S. Goldman, Esq., *Chair of the Commission*, is a graduate of Brandeis University and Harvard Law School. He is in private practice in New York City, concentrating in white-collar criminal defense. He is a past president of the National Association of Criminal Defense Lawyers, co-chair of its white-collar committee and former chair of its ethics advisory committee. He is also a past president of the New York State Association of Criminal Defense Lawyers and the New York City Criminal Bar Association. He is a member of the Executive Committee of the Criminal Justice Section of the New York State Bar Association, the Advisory Committee on the New York Criminal Procedure Law, and the New York State Commission on the Future of Indigent Defense Services. He has received outstanding criminal law practitioner awards from the National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense Lawyers and the New York Criminal Bar Association. He has lectured at numerous bar associations and law school programs on various aspects of criminal law and procedure, trial tactics and ethics. He was an assistant district attorney in New York County and a consultant to the Knapp Commission. He is an honorary trustee of Congregation Rodeph Sholom in New York City. He and his wife Kathi have two adult children and live in Manhattan.

Honorable Frances A. Ciardullo, *Vice Chair of the Commission*, received her B.A. from Cornell University and her J.D. from Syracuse University College of Law, where she was an Editor on the Law Review. Since 1989 she has served part-time as the Schroepfel Town Justice in Oswego County. She has practiced health law for over 20 years, first as a partner in the law firm of Costello, Cooney & Fearon, LLP and presently as staff counsel with the firm of Fager & Amsler. Justice Ciardullo has served as an Adjunct Professor in Health Law for the Syracuse University College of Law, and has served on the teaching faculty for many educational institutions, including the New School for Social Research, Graduate School of Management in the Master's Degree Program in Health Care Administration, the State University of New York Health Science Center, and the Institute for Health Care Ethics in Syracuse, New York. She is a member of the teaching faculty for the New York State Office of Court Administration certification programs for town and village justices throughout the State. Justice Ciardullo is a past president of the Central New York Women's Bar Association.

Stephen R. Coffey, Esq., is a graduate of Siena College and the Albany Law School at Union University. He is a partner in the law firm of O'Connell and Aronowitz in Albany. He was an Assistant District Attorney in Albany County from 1971-75, serving as Chief Felony Prosecutor in 1974-75. He has also been appointed as a Special Prosecutor in Fulton and Albany Counties. Mr. Coffey is a member of the New York State Bar Association, where he serves on the Criminal Justice Section Executive Committee and lectures on Criminal and Civil Trial Practice, the Albany County Bar Association, the New York State Trial Lawyers Association, the New York State Defenders Association, and the Association of Trial Lawyers of America.

Colleen C. DiPirro is President and CEO of the Amherst Chamber of Commerce, which has over 2,300 members. Prior to joining the Chamber, she worked for the Erie County Legislature and as a retail manager. She was the first President of the Western New York Chamber Alliance, an organization for Chamber Executives serving an eight county region. She was identified as one of the 100 most influential people in Western New York by Business First. In 1998, Ms. DiPirro became the first woman honored as the Executive of the Year by the Buffalo Sales and Marketing Executives. That same year Daeman College named her Citizen of the Year. She received the Governor's Award for Excellence in Business in 1999. She served on the Board of Directors of New York State Chamber of Commerce Executives in 1999. Ms. DiPirro serves as event and sponsorship coordinator and a member of the Advisory Board for the Buffalo Bills Alumni and was selected by Bills owner Ralph Wilson to serve on the Project 21 initiative. She served on a committee for Erie County Executive Joel Giambra's Transition Team. She has served on numerous not for profit and community boards of directors, including Western New York Autism Foundation, Hospice Playhouse Project, Executive Women International and the Williamsville Sweet Home Junior Football Association. Additionally, she served as the first Chairwoman of the University of Buffalo Leadership Development Program. Ms. DiPirro was appointed to serve on the Peace Bridge Authority by Governor Pataki in 2002. Ms. DiPirro is the widowed mother of two sons and the proud grandmother of one. She attended Alfred College where she majored in Marketing.

Richard D. Emery, Esq., is a graduate of Brown University and Columbia Law School (*cum laude*), where he was a Harlan Fiske Stone Scholar. He is a partner in the law firm of Emery Celli Brinckerhoff and Abady in Manhattan. *Professional Affiliations:* Association of the Bar of the City of New York, Committee on Election Law, Civil Rights Committee, Advisory Board of the National Police Accountability Project, Criminal Justice Operations Committee, Criminal Advocacy Committee, Criminal Courts Committee, Association of Trial Lawyers of America, Municipal Arts Society Legal Committee, Governor's Commission on Integrity in Government. *Honors:* Common Cause/NY, October

2000, "I Love an Ethical New York" Award for recognition of successful challenges to New York's unconstitutionally burdensome ballot access laws and overall work to promote a more open democracy; New York Magazine, March 20, 1995, "The Best Lawyers In New York" Award for recognition of successful Civil Rights litigation; Park River Democrats Public Service Award, June 1989; David S. Michaels Memorial Award, January 1987, for Courageous Effort in Promotion of Integrity in the Criminal Justice System from the Criminal Justice Section of the New York State Bar Association.

Raoul Lionel Felder, Esq., was appointed to the Commission in 2003 by Governor Pataki. He is a graduate of New York University and the New York University Law School and attended the University of Berne, College of Medicine. He is in private practice in New York City, heading his own law firm. Mr. Felder served previously as an Assistant United States Attorney for the Eastern District of New York. Over the years, he has served on many professional and civic association boards and committees, such as the New York State Trial Lawyers Association, whose Matrimonial Law Committee he chaired, the Association of the Bar of the City of New York, on whose Matrimonial Law Committee he served, the New York State Commission on Child Abuse, the New York City Economic Development Corporation and the New York City Cultural Affairs Advisory Commission. Mr. Felder has received awards from, and been honored by many civic and charitable organizations including: Recipient of Defender of Jerusalem Medal from the Israeli Prime Minister (1990); Chairman of USA Day, Washington, D.C. (1991); Grand Marshal of The Israeli Day Parade (1991); Citation of Merit presented by The National Arts Club (1992); Exhibit of Photographs at The National Arts Club (1992); Volunteer Service Award presented by The National Kidney Foundation (1992); Award, 'Man of the Year' from The Brooklyn School for Special Children (1990); Award, Guest of Honor at The Metropolitan Jewish Geriatric Center's Annual Dinner (1991); Chairman of Dinner for The Jewish Reclamation Project; Co-Director of food drive for New York City Homeless (1991); Member, Board of Trustees, National Kidney Foundation; Member, Board of Advisors, Cop Care; Member, Board of Directors, Big Apple Greeters; Member, Board of Directors, Kidney & Urology Foundation of America, Inc. (2003); Award, 12th Annual Joint Meeting of Brandeis Association and The Catholic Lawyers Guild (1999); Award, Child Abuse Prevention Services — Child Safety Institute (1998); Award, The Shield Institute for the Mentally Retarded and Developmentally Disabled (1997). He is the author of seven books (including a legal textbook that has been updated 23 times), and numerous articles on the law and public affairs. He appears regularly on television and radio giving commentaries on the law and contemporary events, as well as lecturing at various bar associations.

Christina Hernandez, MSW, is a Board Member of the New York State Crime Victims Board, appointed by Governor George E. Pataki in 1995 and again in 2001. She received a Bachelor of Arts from Buffalo State College, a Masters in Social Work Management from the Rockefeller College School of Social Welfare, State University of New York at Albany and a Certificate of Graduate Study in Women and Public Policy from the Rockefeller College School of Public Affairs and Policy, State University of New York at Albany. Presently she is enrolled in the doctoral program at the School of Social Welfare, pursuing a PhD in Social Work. Ms. Hernandez is a former Fellow of the Center for Women In Government. Currently she serves on the Board of Directors of the National Association of Crime Victim Compensation Boards and is a member of the Capital District Coalition for Crime Victims Rights, the Sex Offender Management Grant Steering Committee, and the New York State Hispanic Heritage Month Committee. A native of New York City, Ms. Hernandez resides in the Capital Region.

Honorable Daniel F. Luciano was educated in the public schools of the City of New York and attended Brooklyn College, from which he received a Bachelor of Arts degree. He thereafter attended Brooklyn Law School, earning a Bachelor of Laws degree in 1954. After serving in the United States Army from August 1954 to July 1956, he entered the practice of law, specializing in tort litigation, real property tax assessment certiorari and general practice. He was engaged as trial counsel to various law firms in litigated matters. Additionally, he served as an Assistant Town Attorney for the Town of Islip, representing the Assessor in real property tax assessment certiorari from 1970 to 1982, and chaired the Suffolk County Board of Public Disclosure from 1980 to 1982. Justice Luciano is one of the founders of the Alexander Hamilton Inn of Court and served as a Director of the Suffolk Academy of Law. He was the Presiding Member of the New York State Bar Association Judicial Section, and served as a Delegate to the House of Delegates of the New York State Bar Association. Justice Luciano served as President and all other elected offices in the Association of Justices of the Supreme Court of the State of New York and is currently a member of the Executive Committee. Justice Luciano was a Director of the Suffolk County Women's Bar Association. Additionally, he is a member of the Dean's Advisory Council of the Touro College, Jacob D. Fuchsberg Law Center. He was elected a Justice of the Supreme Court in 1982 and presided over a general civil caseload. In May 1991 he was appointed to preside over Conservatorship and Incompetency proceedings, later denominated Guardianship Proceedings in Suffolk County. He was appointed as an Associate Justice of the Appellate Term, Ninth and Tenth Judicial Districts, in April of 1993. On May 30, 1996, Justice Luciano was appointed by Governor George E. Pataki as an Additional Justice to the Appellate Division, Second Judicial Department. After he was re-elected to the Supreme Court in November of 1996, Governor Pataki redesignated him as an Additional

Justice to the Appellate Division, Second Judicial Department. Upon reaching the age of 70, Justice Luciano was Certified by the State of New York Administrative Board of the Courts for an additional two year term as a retired Justice of the Supreme Court, and was redesignated by Governor Pataki to serve as an Additional Justice of the Appellate Division, Second Judicial Department, for a two year term commencing January 1, 2001. In 2002, after having been again Certified by the State of New York Administrative Board of the Courts for an additional two year term as a retired Justice of the Supreme Court, Justice Luciano was redesignated by Governor Pataki to serve as an Additional Justice of the Appellate Division, Second Judicial Department, for a second two year term, commencing January 1, 2003. Justice Luciano was appointed to the Commission by Governor Pataki in 1996, reappointed by Governor Pataki to a four year term in 1999, and reappointed in 2003 for a third term expiring March 31, 2007.

Honorable Karen K. Peters received her B.A. from George Washington University (*cum laude*) and her J.D. from New York University (*cum laude*; Order of the Coif). From 1973 to 1979 she was engaged in the private practice of law in Ulster County, served as an Assistant District Attorney in Dutchess County and was an Assistant Professor at the State University of New York at New Paltz, where she developed curricula and taught courses in the area of criminal law, gender discrimination and the law, and civil rights and civil liberties. In 1979 she was selected as the first counsel to the newly created New York State Division on Alcoholism and Alcohol Abuse and remained counsel until 1983. In 1983 she was the Director of the State Assembly Government Operations Committee. Elected to the bench in 1983, she remained Family Court Judge for the County of Ulster until 1992, when she became the first woman elected to the Supreme Court in the Third Department. Justice Peters was appointed to the Appellate Division, Third Department, by Governor Mario M. Cuomo on February 3, 1994. Justice Peters has served as Chairperson of the Gender Bias Committee of the Third Judicial District, and on numerous State Bar Committees, including the New York State Bar Association Special Committee on Alcoholism and Drug Abuse, and the New York State Bar Association Special Committee on Procedures for Judicial Discipline. Throughout her career, Justice Peters has taught and lectured extensively in the areas of Family Law, Judicial Education and Administration, Criminal Law, Appellate Practice and Alcohol and the Law.

Alan J. Pope, Esq. is a graduate of the Clarkson College of Technology (*cum laude*) and the Albany Law School. He is a member of the Broome County Bar Association, where he co-chairs the Environmental Law Committee; the New York State Bar Association, where he serves on the Insurance, Negligence and Compensation Law Section, the Construction and Surety Division, and the Environmental Law Section; and the American Bar Association, where he serves on the Tort & Insurance Practice Section and the Construction Industry Forum

Committee. Mr. Pope is also an Associate Member of the American Society of Civil Engineers, a member of the New York Chapter of the General Contractors Association of America, and a past member of the Broome County Environmental Management Council.

Honorable Terry Jane Ruderman graduated *cum laude* from Pace University School of Law, holds a Ph.D. in History from the Graduate Center of the City University of New York and Masters Degrees from City College and Cornell University. In 1995, Judge Ruderman was appointed to the Court of Claims and is assigned to the White Plains district. At the time she was the Principal Law Clerk to a Justice of the Supreme Court. Previously, she served as an Assistant District Attorney and Deputy County Attorney in Westchester County, and later she was in the private practice of law. Judge Ruderman is a member of the New York State Committee on Women in the Courts and Chair of the Gender Fairness Committee for the Ninth Judicial District, and she has served on the Ninth Judicial District Task Force on Reducing Civil Litigation and Delay. She is also Vice President of the New York State Association of Women Judges, Assistant Presiding Member of the New York State Bar Association Judicial Section, President of the White Plains Bar Association, a board member and former Vice President of the Westchester Women's Bar Association and a former State Director of the Women's Bar Association of the State of New York. Judge Ruderman also sits on the Alumni Board of Pace University School of Law and the Cornell University President's Council of Cornell Women.

* * *

Henry T. Berger, Esq., was a member of the Commission for 16 years and served as Chair for 13 of those years. His term ended on March 31, 2004. Mr. Berger is a graduate of Lehigh University and New York University School of Law. He is in private practice in New York City, concentrating in labor law and election law. He is a member of the New York State Bar Association and the Association of the Bar of the City of New York, where he chairs the Special Committee on Election Law. Mr. Berger served as a member of the New York City Council in 1977.

BIOGRAPHIES OF COMMISSION ATTORNEYS

Robert H. Tembeckjian, *Administrator and Counsel*, is a graduate of Syracuse University, the Fordham University School of Law and Harvard University's Kennedy School of Government, where he earned a Masters in Public Administration. He was a Fulbright Scholar to Armenia in 1994, teaching graduate courses and lecturing on constitutional law and ethics at the American University of Armenia and Yerevan State University. Mr. Tembeckjian serves on the Advisory Committee to the American Bar Association Commission to Evaluate the Model Code of Judicial Conduct. He also serves on the Government Ethics Committee of the Association of the Bar of the City of New York and on the Board of Directors of the Association of Judicial Disciplinary Counsel. He was previously a Trustee of the Westwood Mutual Funds and the United Nations International School, and on the Board of Directors of the Civic Education Project.

Alan W. Friedberg, *Chief Attorney (New York)*, is a graduate of Brooklyn College, the Brooklyn Law School and the New York University Law School, where he earned an LL.M. in Criminal Justice. He previously served as a staff attorney in the Law Office of the New York City Board of Education, as an adjunct assistant professor of business law at Brooklyn College, and as a junior high school teacher in the New York City public school system.

Cathleen S. Cenci, *Chief Attorney (Albany)*, graduated *summa cum laude* from Potsdam College in 1980. In 1979, she completed the course superior at the Institute of Touraine, Tours, France. Ms. Cenci received her JD from Albany Law School in 1984 and joined the Commission as an assistant staff attorney in 1985. Ms. Cenci has been a judge of the Albany Law School moot court competitions and a member of Albany County Big Brothers/Big Sisters.

John J. Postel, *Chief Attorney (Rochester)*, is a graduate of the University of Albany and the Albany Law School of Union University. He joined the Commission's staff in 1980 as an assistant staff attorney in Albany. He has been Chief Attorney in charge of the Commission's Rochester office since 1984. Mr. Postel is a past president of the Governing Council of St. Thomas More R.C. Parish. He is a former officer of the Pittsford-Mendon Ponds Association and a former President of the Stonybrook Association. He served as the advisor to the Sutherland High School Mock Trial Team for eight years. He is the Vice President and a past Treasurer of the Pittsford Golden Lions Football Club, Inc. He is an assistant director and coach for Pittsford Community Lacrosse. He is an active member of the Pittsford Mustangs Soccer Club, Inc.

Vickie Ma, *Staff Attorney*, is a graduate of the University of Wisconsin at Madison and Albany Law School, where she was Associate Editor of the Law Review. Prior to joining the Commission staff, she served as an Assistant District Attorney in Kings County.

Leena D. Mankad, *Staff Attorney*, is a *cum laude* graduate of Union College and the Syracuse University College of Law, where she was the Associate Director of the Moot Court Honor Society, a Teaching Assistant for first-year students, and Student Prosecutor for the College of Law. Prior to joining the Commission staff, she was in private practice as a civil litigation defense attorney. She is a member of the Order of Barristers and the New York State Bar Association.

Kathryn J. Blake, *Staff Attorney*, is a graduate of Lafayette College and Cornell Law School, where she was a Note Editor for the *Cornell Journal of Law and Public Policy* and a member of the Moot Court Board. Prior to joining the Commission staff, she served as an Assistant Attorney General for the State of New York and was in private practice in New York, California and New Jersey.

Jennifer Tsai, *Staff Attorney*, is a graduate of Columbia University and Cornell Law School, where she was an Editor of the Law Review and a member of the Moot Court Board. Prior to joining the Commission's staff, she practiced as a criminal defense attorney at The Legal Aid Society (Appeals Bureau) and the Neighborhood Defender Service of Harlem.

Melissa R. DiPalo, *Staff Attorney*, is a graduate of the University of Richmond and Brooklyn Law School, where she was a Lisle Scholar and a Dean's Merit Scholar. Prior to joining the Commission's staff, she was an Assistant District Attorney (Appeals Bureau) in Bronx County.

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Jean M. Savanyu, *Clerk of the Commission*, is a graduate of Smith College and the Fordham University School of Law (*cum laude*). She joined the Commission's staff in 1977 and served as Senior Attorney until being appointed Clerk of the Commission in 2000. Prior to joining the Commission, she worked as an editor and writer. Since 1990, Ms. Savanyu has taught in the paralegal program at Marymount Manhattan College.

REFEREES WHO SERVED IN 2004

REFEREES WHO SERVED IN 2004

Referee	City	County
Eleanor Breitel Alter, Esq.	New York	New York
Hon. Herbert I. Altman	New York	New York
Mark S. Arisohn, Esq.	New York	New York
William I. Aronwald, Esq.	White Plains	Westchester
G. Michael Bellinger, Esq.	New York	New York
Peter Bienstock, Esq.	New York	New York
A. Vincent Buzard, Esq.	Rochester	Monroe
Jay C. Carlisle, Esq.	White Plains	Westchester
Robert L. Ellis, Esq.	Scarsdale	Westchester
David M. Garber, Esq.	Syracuse	Onondaga
Douglas S. Gates, Esq.	Rochester	Monroe
Thomas F. Gleason, Esq.	Albany	Albany
Ronald Goldstock, Esq.	Larchmont	Westchester
Victor J. Hershdorfer, Esq.	Syracuse	Onondaga
Michael J. Hutter, Esq.	Albany	Albany
H. Wayne Judge, Esq.	Glens Falls	Warren
Gerard LaRusso, Esq.	Rochester	Monroe
C. Bruce Lawrence, Esq.	Rochester	Monroe
Hon. Herbert J. Lipp		Kings/Nassau
Stanford G. Lotwin, Esq.	New York	New York
Richard M. Maltz, Esq.	New York	New York
Hon. John A. Monteleone	Brooklyn	Kings
James C. Moore, Esq.	Rochester	Monroe
Philip C. Pinsky, Esq.	Syracuse	Onondaga
John J. Poklemba, Esq.	Albany	Albany
Hon. Leon B. Polsky	New York	New York
Hon. Ernst H. Rosenberger	New York	New York
Hon. Eugene M. Salisbury	Buffalo	Erie
Laurie Shanks, Esq.	Albany	Albany
Hon. Felice K. Shea	New York	New York
Shirley A. Siegel, Esq.	New York	New York
Hon. Richard D. Simons	Rome	Oneida
Robert J. Smith, Esq.	Binghamton	Broome
Robert H. Straus, Esq.	New York	Kings
Earl S. Ward, Esq.	New York	New York
Nancy F. Wechsler, Esq.	New York	New York
Steven Wechsler, Esq.	Syracuse	Onondaga
Michael Whiteman, Esq.	Albany	Albany