



## 2023 Annual Conference

*Syracuse, New York*

### **Issues in Judicial Ethics & Discipline**

Date: Monday, October 2, 2023

Instructors:

*Robert H. Tembeckjian, Esq.*

*Daniel M. Killelea, Esq.*

MCLE: 2.0 Ethics & Professionalism

This program has been approved for credit in  
New York State for all attorneys  
including those who are Newly Admitted  
(less than 24 months) and administered by  
the Onondaga County Bar Association



## **Presenters**

**Robert H. Tembeckjian** is a graduate of Syracuse University, the Kennedy School of Government at Harvard University, and the Fordham University School of Law. He is Administrator and Counsel to the New York State Commission on Judicial Conduct, having served previously as the Commission's Deputy Administrator and Clerk. He was Fulbright Scholar to Armenia in 1994, and he served on the Advisory Committee to the American Bar Association's Commission to Evaluate the Model Code of Judicial Conduct. He is an Emeritus Director on the Board of the Association of Judicial Disciplinary Counsel, served on the editorial board of the Justice System Journal and on the Committee to Review Operations and Structure of the California Commission on Judicial Performance, and he has published numerous articles in legal periodicals on judicial ethics and discipline.

**Daniel M. Killelea** is a graduate of Cornell University and the University at Buffalo School of Law. He is a partner at Gilmour & Killelea, with offices in Attica, NY, and Hamburg, NY. He was previously a partner at Mohun & Killelea, an associate at Lipsitz Green Scime Cambria LLP, a Special Assistant United States Attorney for the Western District of New York, and an Assistant District Attorney in Erie County. Mr. Killelea is an active member of numerous bar and community associations, and he has written articles on legal issues for various publications.





# **New York State Commission on Judicial Conduct**

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# *Legal Authorities*

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Constitution: *Art. VI, §22*

Judiciary Law: *§§40-48*

Rules Governing Judicial Conduct:

*22 NYCRR Part 100*

Commission Operating Procedures & Rules:

*22 NYCRR Parts 7000, 7001*

Commission Policy Manual

# *Appointment to the Commission*

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## **11 Commission Members**

**Governor**  
(appoints 4 members)

- 1 must be a judge
- 1 must be a lawyer
- 2 must be non-lawyers

**Chief Judge**  
(appoints 3 judge members)

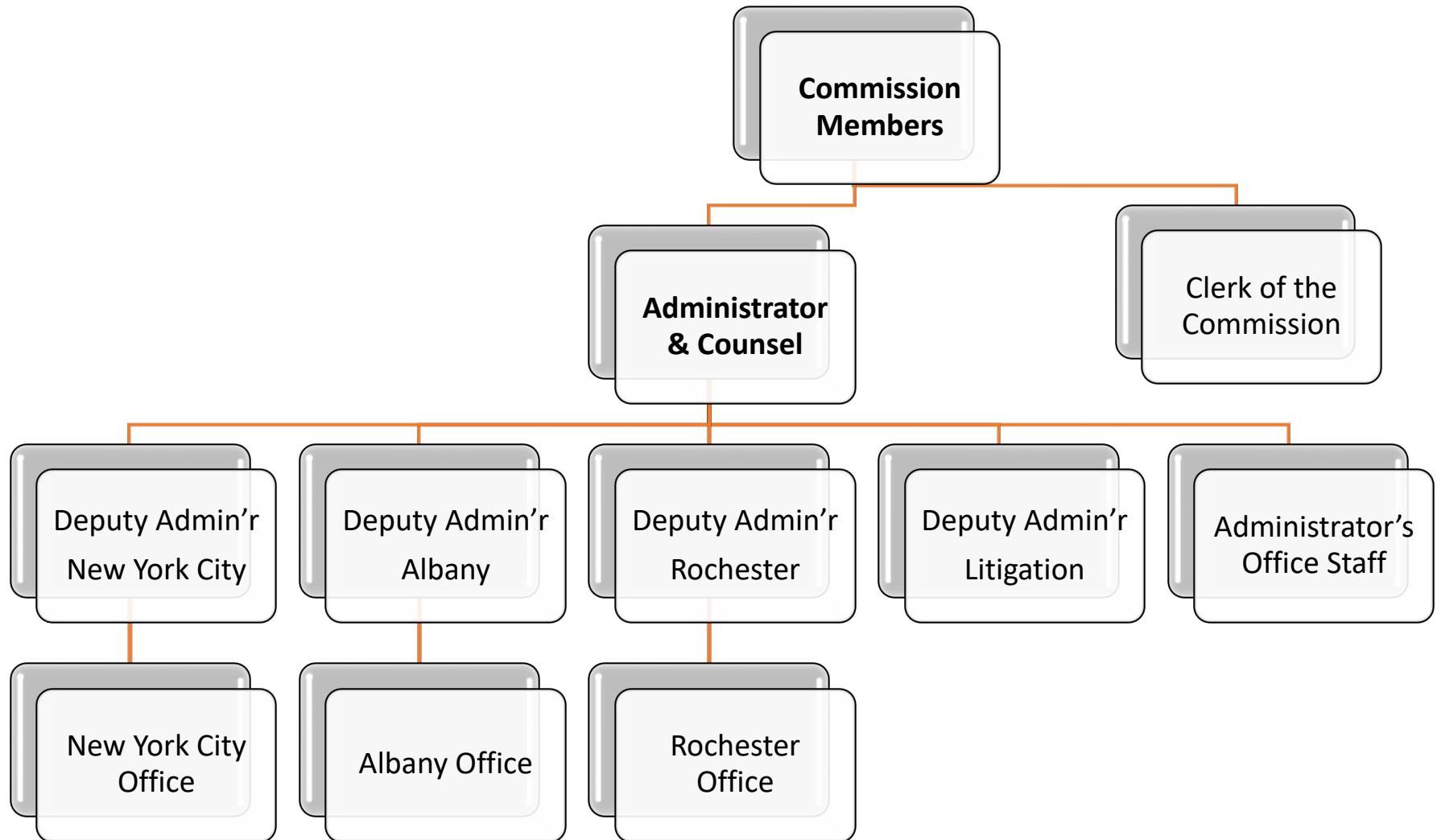
- 1 must be from Appellate Division
- 1 must be a town or village justice

**Four Legislative Leaders**  
(each appoint one member)

- May be a lawyer or non-lawyer
- May not be a judge or former judge

# Table of Organization

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# *Jurisdiction*

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The Commission has jurisdiction over 3,400 Judges and Justices of the State Unified Court System

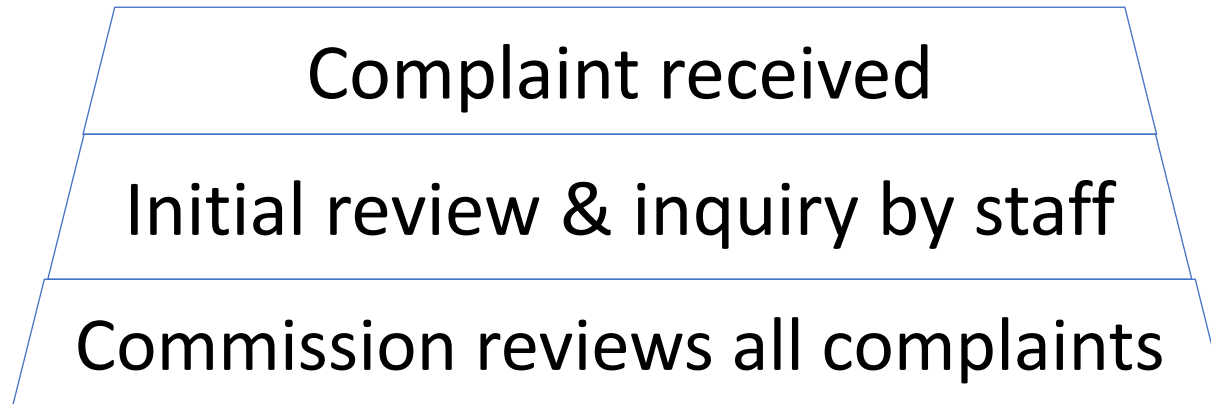
No jurisdiction over:

- Administrative Law Judges
- Judicial Hearing Officers
- NYC Housing Court Judges
- Non-judges
- Federal Judges

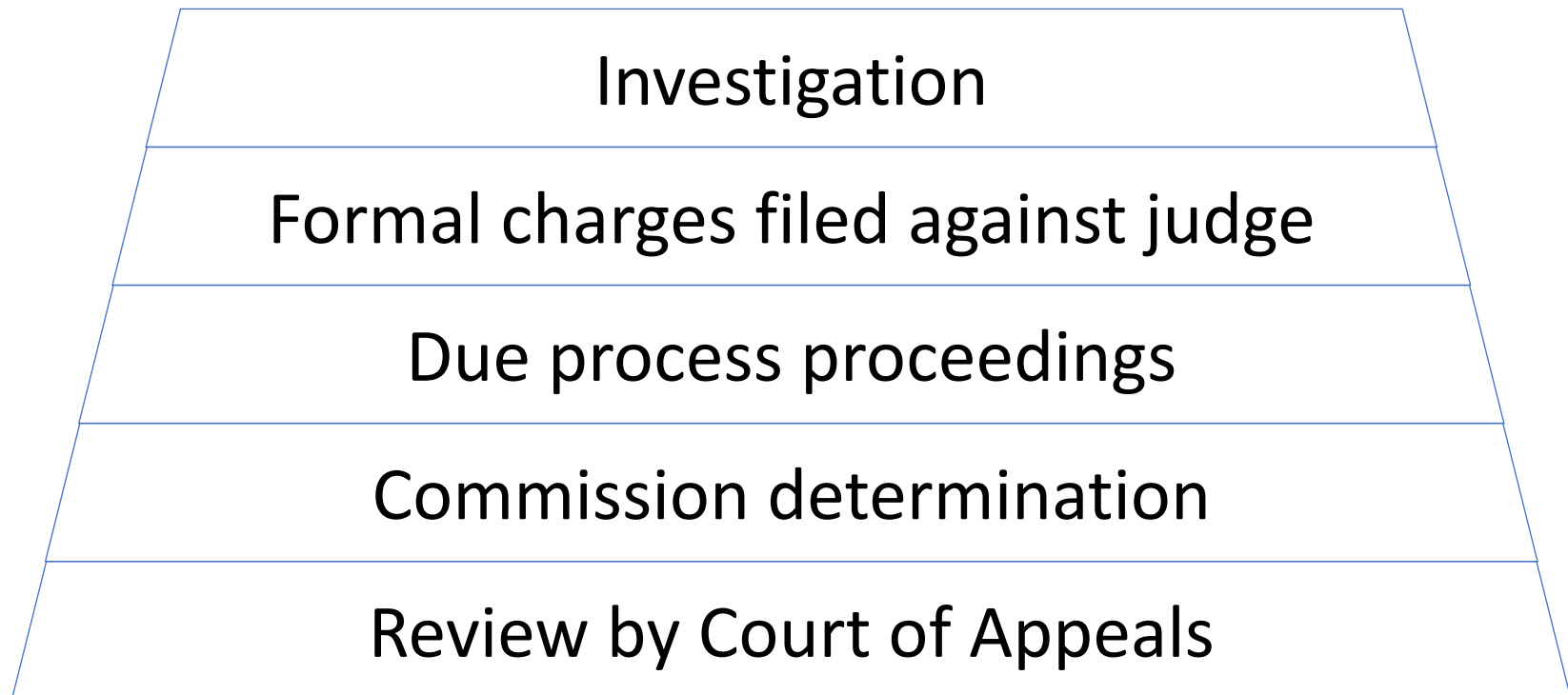


# *Quick Overview of Complaint & Disciplinary Process*

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## **If Warranted:**



# *Confidentiality*

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## Judiciary Law Sections 44 & 45

- All proceedings are confidential unless:
  - Judge waives confidentiality
  - Commission determines to publicly discipline a judge



# *Incoming Complaints*

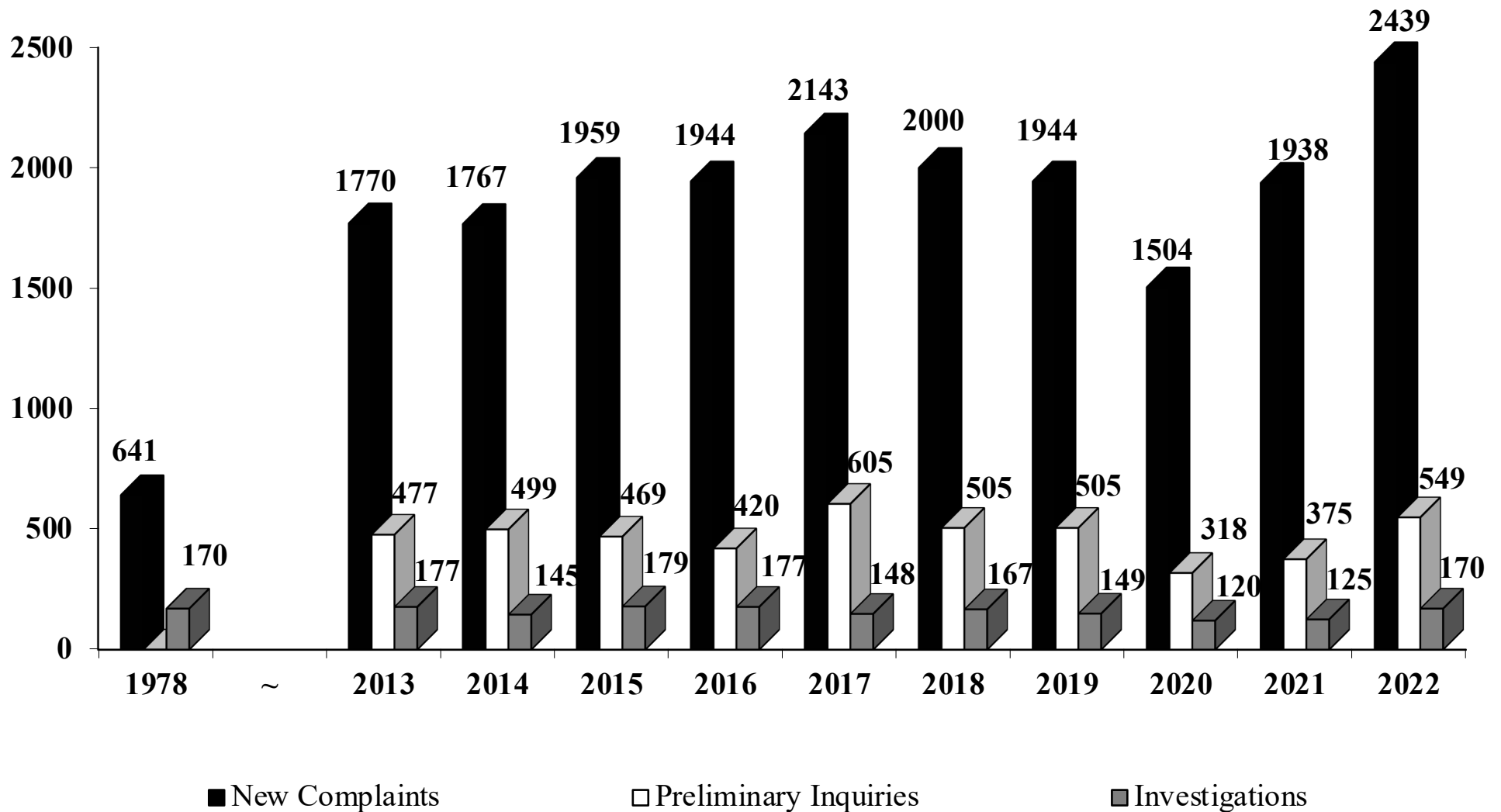
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- Staff analyzes incoming complaints, conducts initial review and inquiry where necessary (e.g. interviews, document review)

**The Commission receives over  
2,000 complaints per year**

# 10-Year Overview of Complaints



# *Commission Review of Complaints*

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- Commission reviews all incoming complaints, including results of initial reviews & inquiries
  - Considers complaints on its own motion and directs Administrator to file complaint



# *Disposition of New Complaints*

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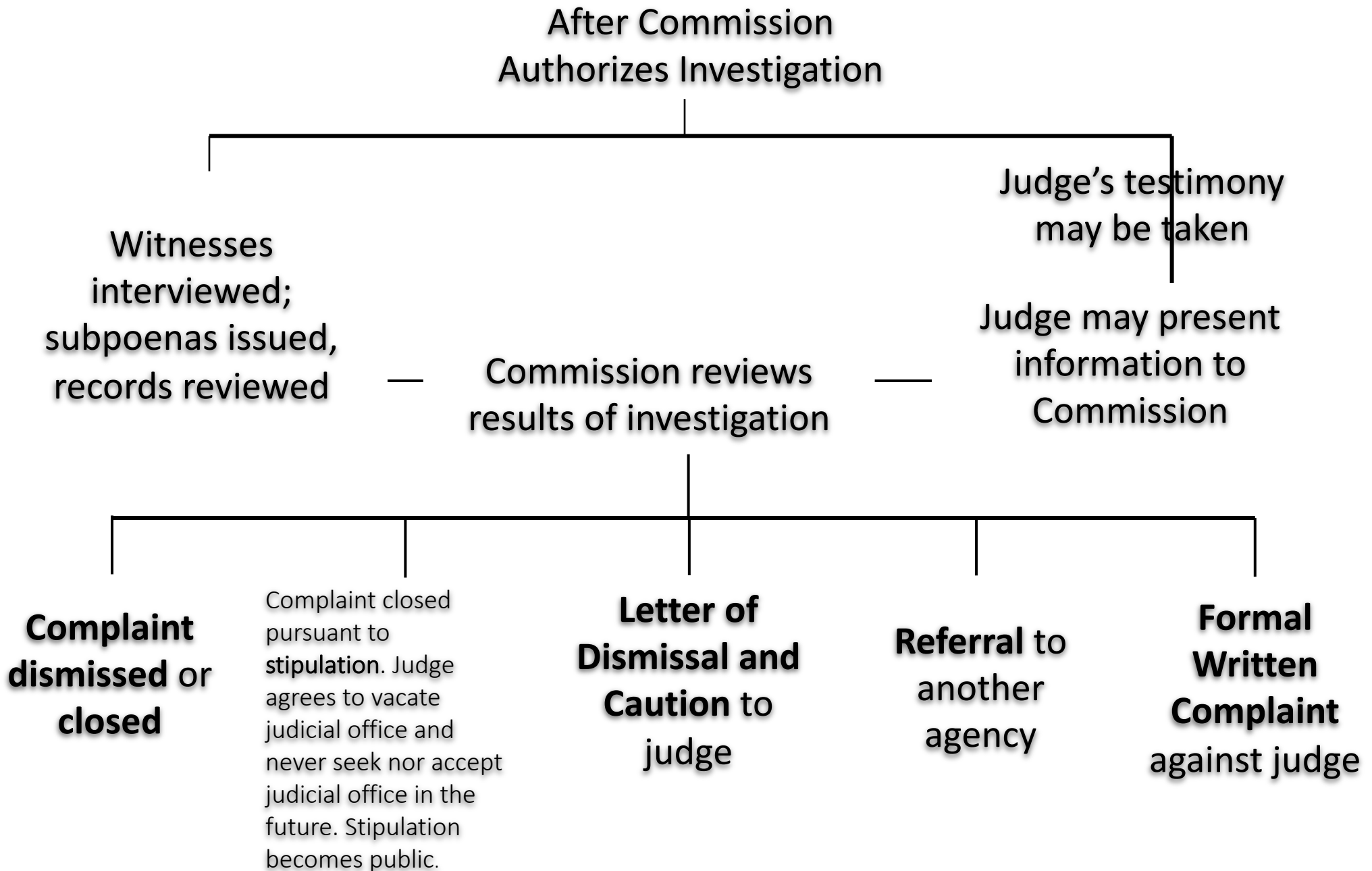


Commission may:

- ✓ Dismiss complaint
- ✓ Refer to another agency (e.g. attorney grievance committee, District Attorney)
  - ✓ Authorize investigation, including testimony from the judge

# The Investigation

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# *Three Stages of a Formal Disciplinary Proceeding*

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The following three charts depict the various stages involved in resolving a Formal Written Complaint:

- pleadings and motions
- evidentiary hearing or stipulated agreement
- oral argument and Commission determination
  - Court of Appeals review

# Formal Written Complaints

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Commission authorizes Formal Written Complaint  
(i.e. Charges)

Charges drawn & verified by Administrator; served on  
judge

Judge may move to  
dismiss charges

Judge files Answer

Administrator &  
judge may  
**stipulate to close**  
**case if judge**  
**resigns;**  
Commission must  
approve

Administrator &  
judge submit  
**Agreed**  
**Statement of**  
**Facts** for  
Commission  
approval

Administrator  
or judge move  
for **summary**  
**determination;**  
Commission  
decides

Commission  
appoints a  
referee to  
preside at  
**hearing**

# Formal Written Complaints

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## Stipulation

- Judge agrees to vacate office and never seek nor accept judicial office in the future.
- The stipulation, and decision and order closing the matter, become public

## Agreed

### Statement of Facts

- Stipulates as to facts, misconduct, and may include sanction
- If no sanction in Agreed Statement, Commission entertains written and oral argument as to sanction

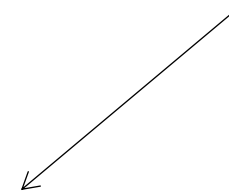
## Summary

### Determination

- If granted, Commission entertains written and oral argument as to sanction

## The Hearing

- Referee presides
- Rules of evidence
- Post-hearing briefs to referee
- Referee files report w/ Commission
  - Findings of fact
  - Conclusions of law
- Commission entertains written and oral argument on referee's report, sanction



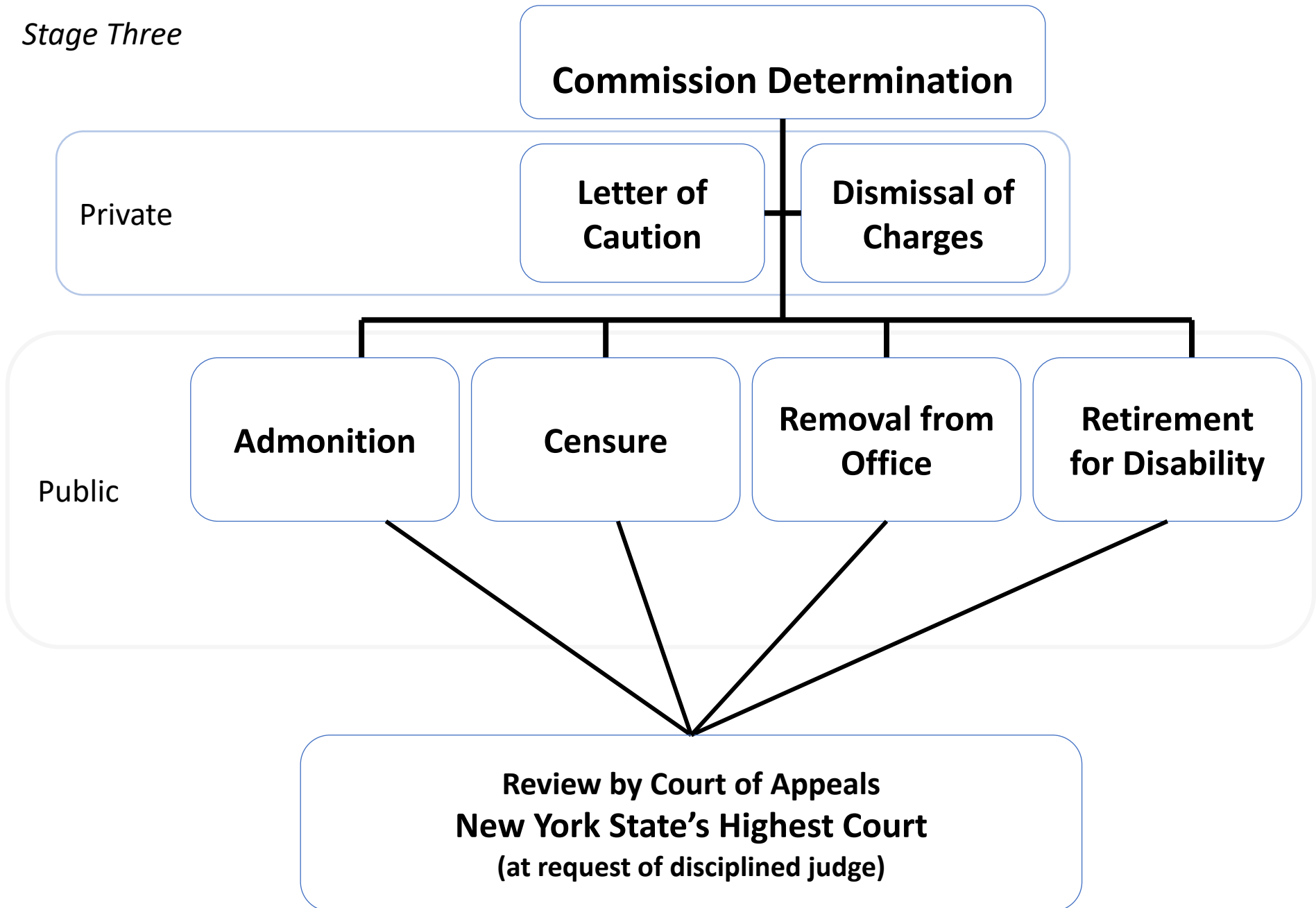
Commission Renders Determination

Stage Two

# Formal Written Complaints

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Stage Three



# Substantive Areas



# Failure to Cooperate

Cooperation with a Commission inquiry or proceeding is mandatory, not optional. Such conduct as failing to respond to letters of inquiry, failing to produce documents, court audio recordings or other materials when requested, and failing to appear for testimony when summoned, subject a judge to disciplinary consequences without regard to the nature of the complaint that gave rise to the inquiry. A judge who refuses to cooperate risks removal from office even if the facts of the underlying complaint would not necessarily warrant such a severe result.

[Matter of O'Connor](#), accepted, 32 NY3d 121 (2018). New York City Civil Court judge removed for persistent intemperance and for his willful failure to cooperate with the Commission's inquiry, *i.e.* the judge did not respond to written Commission inquiries, refused to take an oath to tell the truth when he appeared at the Commission for testimony during the investigation, and refused to participate in the disciplinary hearing when formal charges of misconduct were filed against him.

The Court *inter alia* stated:

In short, willingness to cooperate with the Commission's investigations and proceedings is not only required – it is essential. Here, in addition to a sustained pattern of inappropriate behavior in the courtroom, petitioner repeatedly failed to appear before the Commission, and engaged in other conduct demonstrating his unwillingness to cooperate fully with the investigation. Under all of the relevant circumstances, and considering petitioner's conduct as a whole, we conclude that the determined sanction of removal is warranted. 32 NY3d at 129... Indeed, it is well settled that, when a judge fails to cooperate with an investigation of the Commission – which is vested with the statutory authority to 'require the appearance of the judge involved before it' [statutes omitted] – that dereliction can be a significant aggravating factor in determining the appropriate sanction for misconduct (*see Matter of Mason*, 100 NY2d at 60; *see Matter of Cooley*, 53 NY2d at 66). 32 NY3d at 129.

# Social Media, p1

The proliferation of social media poses special concerns for judges and others who are bound by codes of ethics, particularly in an era where so little is truly private, and electronic pages are easily “captured” by third parties, preserved and recirculated. The hasty or improvident post that is quickly withdrawn may endure and be seen far longer and wider than the creator intended or imagined.

Both the Commission and the Advisory Committee on Judicial Ethics have addressed judicial interactions on such internet platforms as Facebook and personal or professional websites, and they have articulated a common standard. Regardless of the forum – whether in person, writing or electronic media – a judge is bound by the Rules Governing Judicial Conduct to observe high standards of conduct and act at all times in a manner that promotes public confidence in judicial independence, integrity and impartiality. In Formal Opinion 462 (2013), “Judge’s Use of Electronic Social Networking Media,” the American Bar Association cautioned judges who use electronic social media to “assume that comments posted [on such forums] will not remain within the circle of the judge’s connections.” In Opinion 08-176 (2008), the New York Advisory Committee on Judicial Ethics stated that if a judge otherwise complies with the Rules Governing Judicial Conduct, he or she may join or make use of an internet-based social network but should exercise an appropriate degree of discretion in doing so. A judge should also stay abreast of changes to the features of any such network because new developments may have an impact upon the judge’s ethical obligations under the Rules. Opinion 11-125 (2011) delineates various categories of relationship – acquaintance, close social relationship, and close personal relationship – and the different tests to apply in determining the appropriate category and whether, based on the nature of the relationship, disclosure and/or recusal is required. It should be required reading for all judges.

# Social Media, p2

In Opinion 13-39 (2013), citing Opinions 08-176 and 11-125, the Advisory Committee specifically addressed whether a judge must recuse from a case involving his or her “Facebook friends.” The Committee stated that “the mere status of being a ‘Facebook friend,’ without more, is an insufficient basis to require recusal,” and that there is no appearance of impropriety “based solely on having previously ‘friended’ certain individuals who are now involved in some manner in a pending action.” However, the Committee noted that “interpersonal relationships are varied, fact dependent, and unique to the individuals involved.” Decisions to recuse would therefore be based on the “the nature of [the judges’] specific relationships with particular individuals and their ethical obligations resulting from those relationships.” A “mere ‘acquaintance[ship]’” would not require recusal. A “close social relationship,” however would require a judge to, “at the very least, disclose the relationship either in writing or on the record, even if the judge believes he/she can be fair and impartial.” See Opinion 11-125. Disqualification is required if a judge has a “close personal relationship” with a Facebook friend. Id.

In Opinion 14-05 (2014), the Advisory Committee addressed whether it is permissible to host a court website on a social network, specifically responding to an inquiry about the court establishing a Facebook page. The opinion noted that “many aspects of a social network could prove problematic for a court website,” and particularly highlighted the fact that Facebook and other social networks sell and display third-party advertisements without consulting the user. It also noted that such “advertisements are typically dynamic, in that they may change to reflect a particular user’s browsing history, and interactive, in that they invite users to navigate away from the visited page and explore other goods and services.” This would create at least an appearance that the court was endorsing or directing visitors to commercial products and services, and that would undermine the independence, impartiality and dignity of the judiciary and the courts.



# Social Media, p3

Opinion 20-58 warns part-time judges who also practice law against publishing their decisions and opinions on a social media website, which would inevitably invite public comment and at least appear to be intertwining the judges' law practices with their judicial roles.

Opinion 21-31 warns against even inadvertently promoting a civic, charitable or other organization's fundraising activities in a social media campaign run by the organization.

In 2016, the Commission publicly admonished a judge who, inter alia, made comments on her Facebook page that were critical of the prosecution in a case against a local town council candidate. *Matter of Whitmarsh*. The judge violated the rule that prohibits public comments about any proceeding pending or impending in any court within the United States or its territories, and in doing so referred to her judicial position, thus violating a separate rule prohibiting the use of the prestige of office to advance a private interest. Sections 100.3(B)(8), 100.2(C) of the Rules Governing Judicial Conduct

In 2018, the Commission publicly admonished a judge who entered a property without permission and took photos that he posted on Facebook with disparaging comments about the occupant, then failed to remove the Facebook posts promptly after assuring the Commission he would do so. [\*Matter of Fisher\*](#).

# Social Media, p3

In 2020, the Commission censured one judge for inter alia commenting on a pending lawsuit via social media, and admonished another judge for promoting the campaign of a candidate for nonjudicial office and for promoting controversial political causes. [\*Matter of Panepinto\*](#); [\*Matter of Schmidt\*](#).

In 2021, the Commission accepted the stipulated resignation of a judge who posted anti-LGBTQ messages on social media. *Matter of Knutsen*. It also publicly admonished a judge whose social media account posted photos and statements that aligned the judge with law enforcement, thereby undermining the appearance of impartiality. [\*Matter of Peck\*](#).

A judge must be wary of inviting or engaging in social media dialogue with lawyers, litigants, witnesses or others who may be involved in pending litigation. Particularly where pseudonyms are used, the judge may not know that a person who responds to his/her posting may be involved in a case before the judge or a judicial colleague. At the very least, the appearance of impropriety may be created in such a circumstance, particularly if others who access the social media page are aware that the judge's correspondent is also involved in a matter pending before the judge.

As social media proliferates throughout society, the number of social-media-related complaints submitted to the Commission is growing. Every such complaint will be individually evaluated, and as it did in *Whitmarsh and Fisher*, the Commission will determine whether the judge's conduct complied with or violated judicial ethics, regardless of the social forum or platform in which it occurred. It is not a defense to claim that the judge was merely reposting or commenting on someone else's problematic message.

# Social Media, p4

The Commission strongly encourages judges to remember that social media posts are fraught with potential ethical concerns. Think carefully *before* posting, especially when engaged in a heated discussion, and consider that a moment of reflection and restraint now may avert aggravation and disciplinary consequences later.

# Court Finances, p1

Throughout the state, in all but the town and village courts, funds collected by the court are handled by professional administrative personnel or other non-judicial staff. In the town and village courts, however, that responsibility rests with the individual justices.

Money collected by town or village court justices from fines, fees, bail and other sources must by law be deposited promptly into official court bank accounts, recorded promptly in court record books, and reported and remitted promptly to the State Comptroller. While improper financial management and record keeping most often result from honest mistakes, inadvertent oversight or insufficient clerical assistance, they sometimes indicate serious misconduct, either by the judge or by the court staff in whom the judge has reposed significant responsibility to track the court's finances.

The Commission has publicly disciplined approximately 125 town and village justices for significant violations of the various rules regarding the handling of court funds. Approximately 250 other judges have been cautioned for relatively minor violations of the applicable standards.

When a judge fails to deposit court funds for long periods of time, or deposits less money than he or she had collected since the previous deposit, the suspicion inevitably arises that the money is being used by the judge for personal purposes. Serious misconduct may also be indicated by such financial irregularities as lengthy delays in remitting court funds to the State Comptroller, large deficiencies (or surpluses) in the court account, negligence in failing to safeguard such funds, and failing to keep adequate records of court finances.

# Court Finances, p2

"Carelessness in handling public moneys is a serious violation of [the judge's] official responsibilities" and a "breach of the public's trust" which may warrant removal from office. *Matter of Petrie*, 54 NY2d 807 808 (1981); *see also Matter of Rater*, 69 NY2d208 (1987); *Matter of Vincent*, 70 NY2d 208 (1987). In *Matter of Cooley*, 53 NY2d 64 (1981), the Court of Appeals also noted that the willful failure to make appropriate entries in court records, such as a docket book and cashbook, is a serious violation of the judge's administrative responsibilities, and may be punishable as a misdemeanor.

Even where venality is not an issue, negligence sometimes is. The Commission has disciplined town or village justices who kept court funds at home, in such inappropriate places as a shoebox or a freezer. In *Matter of Murphy*, 82 NY2d 491 (1993), a removal case, the judge claimed that he placed court funds in the trunk of his car, forgot about the money, then sold the car; the Court of Appeals stated that whether such conduct resulted from carelessness or calculation, "the mishandling of public money by a judge is serious misconduct even when not done for personal profit." *Id.* at 494.

In recent years, the Commission has become aware of several jurisdictions in which court clerks were prosecuted and convicted for the theft of court funds. While increased reliance on computers, accounting software, electronic banking and wire transfers has tended to increase the ability to perform audits and reconciliations on the one hand, it has also made it easier for computer-savvy employees to evade oversight by a computer-challenged judge.

# Court Finances, p3

The Commission reminds town and village justices that it is their responsibility to account for court funds and to certify compliance with applicable financial mandates in reports to the State Comptroller. Where a judge does not perform the financial responsibilities personally, he or she must exercise rigorous oversight of the court staff to whom such responsibilities have been assigned. That means reviewing the work of staff, performing spot checks to correlate the bail or fine assessed in a particular case with the amount actually collected, or periodically initiating an independent audit.

Where court staff have been convicted of theft of court funds, the local judges may not be publicly disciplined if they had made reasonable efforts at oversight but were deceived by an employee who cleverly hid the evidence of theft. But where the pertinent judges exercised little to no effort at oversight, they may be subject to public discipline for the failure to supervise that led to theft, notwithstanding their own innocence as to the theft itself.

The Commission urges town and village court justices to take their fiduciary responsibilities seriously and, when they need help, to consult with their local Supervising Judge, the court system's City, Town and Village Court Resource Center, and/or the State Magistrates Association.

# Recusal/Disclosure, p1

## 22 NYCRR 100.3(E) -- **Disqualification**

- (1) 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:
- (a) (i) the judge has a personal bias or prejudice concerning a party or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (b) the judge knows that (i) the judge served as a lawyer in the matter in controversy, or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or (iii) the judge has been a material witness concerning it;
  - (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or 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;
  - (d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:
    - (i) is a party to the proceeding;
    - (ii) is an officer, director or trustee of a party;
    - (iii) has an interest that could be substantially affected by the proceeding;

# Recusal/Disclosure, p2

- e) The judge knows that the judge or the judge's spouse, or a person known by the judge to be 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 or is likely to be a material witness in the proceeding. Where the judge knows the relationship to be within the second degree, (i) the judge must disqualify him/herself without the possibility of remittal if such person personally appears in the courtroom during the proceeding or is likely to do so, but (ii) may permit remittal of disqualification provided such person remains permanently absent from the courtroom.
- (f) the judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to
- (i) an issue in the proceeding; or
  - (ii) the parties or controversy in the proceeding.
- (g) notwithstanding the provisions of subparagraphs (c) and (d) above, if a judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as fiduciary, the judge's spouse, or a minor child residing in his or her household has an economic interest in a party to the proceeding, disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.



# Recusal/Disclosure, p3

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

(F) Remittal of Disqualification. A judge disqualified by the terms of subdivision (E), except subparagraph (1)(a)(i), subparagraph (1)(b)(i) or (iii), or subparagraph (1)(d)(i) or subparagraph (1)(e)(i) of this section, may disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

# Assertion of Influence, p1

The Rules Governing Judicial Conduct prohibit judges from lending the prestige of their office to advance the private interests of others and from otherwise allowing personal relationships to influence their judicial conduct and judgment. 22 NYCRR 100.2. It is a fundamental principle of the American system of justice that judicial office is a high public trust which may not be traded upon for private gain. This subject is a focal point of virtually every presentation made by representatives of the Commission at judicial ethics and education programs organized for judges and judicial associations around the state. Nevertheless, a significant number of judges have been disciplined in recent years for engaging in such behavior and violating that trust. In the last 20 years, approximately 50 judges have been disciplined in whole or in part for inappropriately asserting the influence of judicial office to benefit themselves or to benefit or harm others.

In *Matter of Ayres*, 30 NY3d 59 (2017), the Court of Appeals upheld the removal of a town justice who attempted (1) to obtain a favorable disposition from another judge and then from a prosecutor as to a traffic ticket issued to his daughter and (2) to influence an appellate judge on a pending matter by repeatedly communicating with the appellate judge, ex parte, on the merits of the case. The Court noted: “When a judge intervenes in another judge’s courtroom, it compromises the court system as a whole. Thus, ‘as a general rule, intervention in a proceeding in another court should result in removal.’” *Id* at 64.

# Assertion of Influence, p2

Also in 2017, the Commission admonished an Acting Supreme Court Justice for twice invoking her judicial office in communications with other courts on behalf of litigants who had pending applications in those courts. See *Matter of Ramirez* in this annual report.

Any communication by a judge seeking some benefit or advantage on behalf of a friend, relative, former client or anyone else may constitute an improper request for special consideration and should assiduously be avoided.

In *Matter of Smith*, an appellate judge was admonished for sending an unsolicited letter to the parole board in support of an inmate's application for release, notwithstanding her limited knowledge of the case and her having played no role in the prior adjudication of it. 2014 Annual Report 208.

In *Matter of Dixon*, a city court judge was censured for using her position to initiate improper substantive ex parte communications with the judge presiding over her own personal injury lawsuit against an insurance company. 2017 Annual Report 100. In *Matter of LaBombard*, a town court justice was removed from office for a variety of misconduct, including identifying himself as a judge after a traffic accident in order to get favorable treatment, and seeking favorable treatment from another judge on behalf of a relative who was a defendant before that judge. 11 NY3d 294 (2008).

# Assertion of Influence, p3

A judge's desire to assist a friend or relative may be understandable, and it may sometimes be difficult to say no when asked for assistance, but as the Court of Appeals said 38 years ago, in the earliest days of the Commission's existence:

Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved. *Matter of Lonschein*, 50 NY2d 569, 572 (1980)

In *Lonschein*, a Supreme Court justice was admonished for inquiring of a municipal agency about the reasons for the delay in a friend's application for a business license. The Court of Appeals held that even a simple inquiry by a judge may be improper because of the perception that the judge is implicitly (if not explicitly) asserting the influence of judicial office to obtain some benefit. The request need not be specific for the assertion of influence to be obvious – and avoided. The standard articulated in *Lonschein* is as applicable today as it was in 1980. The Commission urges judges to be sensitive to it and thereby avoid the disciplinary consequences of ignoring it.

# Alcohol-Related Conduct

The Commission has commented extensively on this subject, most recently in its 2020 Annual Report, and on its website:

## **Alcohol-Related Conduct and Driving Offenses**

Examples:

In *Matter of Astacio*, 32 NY3d 131 (2018), a city court judge was removed from office for a series of events that began with her arrest and conviction of DWI and included her assertion of judicial office during the arrest and violations of court-ordered conditions of her sentence.

In *Matter of Quinn*, 54 NY2d 386 (1981), the Commission determined to remove from office a Supreme Court Justice who had two alcohol-related convictions and other alcohol-related incidents, was uncooperative, belligerent and abusive to the arresting officers and repeatedly referred to his judicial position. On review, the Court of Appeals reduced the removal to censure in view of the fact that the judge had retired between issuance of the Commission determination and adjudication of the review by the Court.

# Prohibited Political Activity

## 22 NYCRR 100.5

- Judge may not endorse other candidates for political office
- “Resign to Run” – Judge running for *non-judicial* office must resign from the bench
- Judge may vote in a primary, and may attend a party nominating caucus to vote if that is the equivalent of a primary, but the judge may not nominate or publicly support a candidate at the caucus
- Judge cannot act as a leader or hold office in a political organization
- Judge may not attend political events, except during the “Window Period” while a candidate for elected judicial office – 22 NYCRR 100.0(Q)
- Judge or judicial candidate may not make “pledges or promises” or “commitments” on cases or issues likely to come before the court – 22 NYCRR 100.5(A)(4)(d)
- Judge or judicial candidate may not “knowingly make any false statement or misrepresent the identity, qualifications, current position or other fact concerning the candidate or an opponent” – 22 NYCRR 100.5(A)(4)(d)(iii)



For More Information  
Please Visit the Commission's  
Website:  
[www.cjc.ny.gov](http://www.cjc.ny.gov)