

2004

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Recommended Citation

Stern, Gerald (2004) "Judicial Error That Is Subject to Discipline in New York," *Hofstra Law Review*: Vol. 32 : Iss. 4 , Article 19.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol32/iss4/19>

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JUDICIAL ERROR THAT IS SUBJECT TO DISCIPLINE IN NEW YORK

*Gerald Stern**

INTRODUCTION

The strength of the judicial system is based on the independence of individual judges to render decisions on the merits, subject to appellate review. Judges' mistakes and abuses of discretion generally may be corrected within the judicial system, not by a disciplinary system. That is how it should be, notwithstanding that errors of law place a considerable burden and expense on the parties to seek justice in other courts. Although mistakes often are not rectified because appeals are too expensive to pursue for many wronged litigants, judges must be given wide latitude in making decisions within a broad range of discretion without being subjected to disciplinary procedures. Good faith mistakes as a general rule should not—some would argue should never—be the basis for discipline

Judicial conduct commissions, which dismiss the great majority of complaints received, often have to explain to dissatisfied litigants why the commissions cannot discipline judges for being mistaken in the application or interpretation of law. Many complainants seek from commissions only what the courts can provide: new hearings and another judge to hear their cases.

Yet, under certain circumstances, the law authorizes investigations into judicial decision-making. Although improper influence, bias, and corruption have always been recognized as grounds to remove a judge from office, they are not the sole grounds for discipline. When a judge's acts are so obviously contrary to law, it might not matter why the judge acted as he or she did. Within the broad spectrum of judicial error, it is easy to identify many situations that either are or are not subject to

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discipline. Finding the point within that spectrum at which judicial error becomes misconduct can be challenging.

This article will explore judicial disciplinary determinations of the New York Commission on Judicial Conduct and decisions of the New York Court of Appeals that have reviewed Commission determinations that judges' "errors" constituted misconduct. The focus will be to consider whether standards can be identified distinguishing between judicial error that is subject to discipline and judicial error that can only be reviewed and corrected in the courts.

JUDICIAL DISCIPLINE AS A RELATIVELY NEW PHENOMENON IN NEW YORK

Before the New York State Commission on Judicial Conduct began operating in 1975, relatively few judges were disciplined. From the latter part of the 19th century to 1975, sixteen judges were removed from office, seven were publicly censured, and fourteen were mildly rebuked in decisions that either dismissed misconduct charges or otherwise terminated disciplinary proceedings.¹

The formation of the Commission on Judicial Conduct changed the dynamics of the judicial disciplinary process, and it was obvious that the new procedures would generate many more complaints, investigations, and disciplinary sanctions. Of particular relevance to the discussion of whether judicial error could be subject to discipline, more complaints would be made and considered, and judges' alleged "errors" would be more closely scrutinized. Since there has been a lot more attention paid to judicial ethics since 1975 than ever before, it stands to reason that some inroads would be made into the almost-total protection from discipline that had been given to New York judges who committed egregious errors of law.

Although lawyers representing judges in judicial disciplinary proceedings have argued, and continue to argue, that judicial decisions that are not derived from improper influence, bias, or corruption should not lead to discipline, that view is not supported by recent case law. In the past two decades, the New York Court of Appeals has disciplined judges for the violation of fundamental (i.e., well-recognized) rights. In many of these cases, there were no indications that the judges knew that

1. See Gerald Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?* 7 PACE L. REV. 291 (1987).

their conduct was contrary to law, which suggests that “good faith” is not always a defense.

THE DEVELOPMENT OF THE LAW ON
DISCIPLINING JUDGES FOR LEGAL ERROR

At the turn of the twentieth century, the Appellate Division, First and Second Judicial Departments, respectively, commenting on accusations that magistrates had been unduly lenient in dismissing gambling cases, held that legal error, even a series of legal errors, would not justify a judge’s removal from office. The First Department court held that in the absence of proof of corruption or incompetence, no action would be taken.² The Second Department court held that there had been no proof that the judge’s conduct “was prompted by fraud, corruption, a deliberative intent to violate the law, or a conscious and corrupt bias.”³ A few years later, the Appellate Division, First Judicial Department relaxed the standard for a judge’s removal only slightly: When the conduct was based on “unworthy or illegal motives” or the result of “ignorance . . . a perverted character, or . . . a lack of judicial qualities,” the judge should be removed.⁴

Generally, the courts did not consider the deprivation of basic rights to be a basis for removal from office.⁵ In a 1931 case, a judge was charged with a “callous disregard of the rights of defendants.”⁶ Despite evidence that supported the charge, the Appellate Division, First Judicial Department dismissed that charge but removed the judge, Jean Norris, who had the distinction of being the first woman judge in the New York City courts.⁷ Greatly exacerbating the judge’s misconduct in court was the judge’s flamboyant conduct out of court. It seems clear that the appellate court was more upset with Judge Norris’ extolling the virtues

2. See *In re Baker*, 87 N.Y.S. 1022 (App. Div. 1904).

3. *In re Tighe*, 89 N.Y.S. 719, 721 (App. Div. 1904).

4. *In re Droege*, 114 N.Y.S. 375, 386-87 (App. Div.), *appeal dismissed*, 90 N.E. 340 (N.Y. 1909).

5. See Stern, *supra* note 1, at 322-26.

6. FINAL REPORT OF SAMUEL SEABURY, REFEREE, IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATES’ COURTS IN THE FIRST JUDICIAL DEPARTMENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS-AT-LAW PRACTICING IN SAID COURTS (March 29, 1932), in 3 NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894-1994, app. 245 (Gabriel J. Chin ed. 1997).

7. *In re Norris*, 252 N.Y.S. 1023 (App. Div. 1931) (mem.). Herbert Mitgang reported that Judge Norris, who violated the rights of men and women, had pledged to treat women with “kindness” and with “gloves of velvet rather than fingers of steel.” HERBERT MITGANG, THE MAN WHO RODE THE TIGER, THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY 192 (1963).

of Fleischmann's Yeast to her digestive system, in ads that ran in numerous national magazines, than with her harsh treatment of defendants. Or, more likely, it was concerned with her harshness toward defendants but did not want to create a precedent for disciplining harsh judges.

There are no other reported cases before the establishment of the Commission on Judicial Conduct of judges being removed from office for violating the rights of defendants. Even as late as 1968, the courts were reluctant to discipline judges for such conduct.⁸

In the 1976 decision of *In re Perry*,⁹ the Appellate Division, Second Judicial Department considered the case of a Suffolk County District Court Judge who had directed two police officers to bring a coffee vendor into court in handcuffs because the judge did not like the taste of coffee he was drinking during a court break. The coffee vendor had no expectation of appearing in court that evening. He testified that he was marched from his coffee truck outside the courthouse, through the halls of the courthouse, and into the courtroom in handcuffs.

The *Perry* case was one of the first brought by the New York Commission on Judicial Conduct, which had been established one year earlier. The Appellate Division, while finding the judge's conduct distasteful, made it clear that the decision to remove him was based on his false testimony during the investigation by the new Commission on Judicial Conduct.¹⁰ As shocking as the judge's underlying conduct was, if he had not testified falsely, he apparently would not have been removed from office.

In 1982, the Commission removed a town justice for a pattern of abusing defendants' rights, including incarcerating defendants for periods beyond what the law authorized, finding defendants guilty because he disliked their lawyer, and denying defendants the right to counsel.¹¹ The judge did not seek review in the Court of Appeals.

8. In 1968, the Appellate Division, Second Judicial Department in considering the record of a disciplinary proceeding on a petition for the removal of a Suffolk County District Court Judge, found an insufficient basis for such action, and made only a passing reference to a procedure that the Appellate Division implicitly criticized. The Court stated: "[I]n cases involving traffic violations and other minor infractions, defendants should not be handcuffed and placed in detention cells either during a recess of the trial or while waiting for complaints to be drawn." *In re Schmidt*, 296 N.Y.S.2d 49, 51 (App. Div. 1968) (per curiam).

9. 385 N.Y.S.2d 589 (App. Div. 1976).

10. *See id.* at 590. At the time, the Appellate Divisions had authority to discipline lower court judges on charges brought by the Commission.

11. *See In re Ellis*, N.Y. COMM'N ON JUDICIAL CONDUCT ANNUAL REPORT 107 (1983) [hereinafter N.Y. COMM'N ANN. REP.]. For a similar case and a similar result, see *In re Jutkofsky*,

In 1983, the Court of Appeals considered the first of the Commission's cases of judges who acted as judicial tyrants. The Court of Appeals removed J. Richard Sardino, a full-time, Syracuse City Court Judge who had "consistently failed (in 62 cases) to inform the accused of the right to counsel and failed to conduct even a minimal inquiry to determine whether they were entitled to assigned counsel,"¹² abused his authority in setting bail, failed to set bail in some misdemeanor cases, expressed disbelief at arraignment as to defendants' claims after questioning the defendants at arraignment about the charges, and, generally, was derisive towards unrepresented defendants.¹³ The Court of Appeals upheld the Commission's determination that the judge's conduct showed "a shocking disregard for due process of law."¹⁴

In that same year, the Court of Appeals removed from office Paul McGee, a part-time town justice, for coercing guilty pleas, conducting improper *ex parte* conferences with police officers, failing to advise defendants in criminal proceedings of their rights at arraignment, eliciting incriminating statements from defendants in criminal cases, and finding defendants guilty without a trial or a formal guilty plea.¹⁵ The Commission had charged eight cases and established that Judge McGee's conduct in those cases was typical of how he handled cases in his court. It was clear that Judge McGee did not intentionally disregard defendants' rights; he just assumed he could talk to defendants at arraignment, and if, in the course of those discussions, the defendants informally acknowledged their guilt, they were guilty and there was no need for trials.¹⁶

One year later, in *In re Reeves*, the Court of Appeals removed a family court judge from office who had failed to properly advise litigants in family court of their rights, failed to require litigants to submit sworn financial disclosure statements as required by law, and

N.Y. COMM'N ANN. REP. 111 (1986). Judge Jutkofsky did not seek review of the Commission's determination that he be removed from office.

12. *In re Sardino*, 448 N.E.2d 83, 84 (N.Y. 1983) (per curiam).

13. *See id.*

14. *Id.* at 85 (internal quotation marks omitted).

15. *In re McGee*, 452 N.E.2d 1258, 1259 (N.Y. 1983) (mem.).

16. Even after the investigation, the filing of charges, and during the formal hearing, the judge had no clue what he had done wrong. At one point, the judge testified that, since the defendant had the stolen goods, she was guilty: "If she had the cigarettes with her, she certainly would have been guilty, wouldn't she? . . . She had the goods on her. She had to be guilty. Am I right or wrong?" *McGee*, 452 N.E.2d at 1258. There was no doubt that this well-intentioned judge simply had no concept of the judicial role he was obliged to fulfill. This is a classic case of a "good faith" error that had serious consequences.

took jurisdiction of cases notwithstanding that he had no legal basis to do so.¹⁷ In removing the judge from office, the Court of Appeals rejected the conclusions of a distinguished referee, a former Presiding Justice of the Appellate Division, Third Judicial Department, who had been assigned by the Commission on Judicial Conduct to preside over the hearing. The referee had concluded that Judge Reeves' mistakes constituted technical violations of the law because he had acted in good faith and simply misapprehended the legal issues in the cases before him.¹⁸

The Court of Appeals, citing its *Sardino* decision for the principle that a "repeated pattern of failing to advise litigants of their constitutional rights ... is serious misconduct," held that Judge Reeves' actions as a judge warranted removal and could not be excused on the basis that they were errors of law, although, as the Court said, "these were errors of law."¹⁹

So, in the course of two years, 1983 and 1984, the New York Court of Appeals in *Sardino*, *McGee*, and *Reeves* made it crystal clear that a judge's repeated errors of established law, if serious enough, could warrant removal from office. In the intervening years, the court has not wavered from the decisions in these three cases, but judges continue to defend misconduct charges by arguing that because their conduct constitutes "judicial error" at worst, the proper place to challenge a judge's rulings or decisions is in the appellate courts. *McGee* and *Reeves* laid the "good faith" defense to rest. Judge *Sardino*'s caustic, pro-police comments eliminated any defense that he had acted in good faith. He was so outspoken during arraignments in court that his words provided proof of his *mens rea* or intent to be punitive. From a disciplinary counsel's point of view, the easiest cases to establish are those in which the judge acts and speaks harshly.

In 1991, the Court of Appeals removed a family court judge²⁰ for his language conveying the impression that he was biased, and for failing

to inform litigants appearing before him of their constitutional and statutory rights, including their right to counsel . . . and instead exerted undue pressure on these parties to make damning

17. 469 N.E.2d 1321, 1321-22 (N.Y. 1984) (per curiam).

18. *See id.* at 1322.

19. *Id.* at 1323.

20. *In re Esworthy*, 568 N.E.2d 1195, 1197 (N.Y. 1991).

admissions, sometimes by threatening incarceration or other consequences which he had no authority to impose.²¹

The court held that the family court judge's misconduct constituted an abuse of power that "has irredeemably damaged public confidence in the integrity of his court."²²

The New York Court of Appeals has consistently shown that it has no hesitation to treat, as serious misconduct, flagrant errors of fundamental due process violations. But it has been critical of the Commission for finding violations that have not been established either by statute or case law, and has been reluctant to permit the Commission to discipline judges for lengthy, inexcusable delays that suggest neglect of duties.

In 1988, the Court of Appeals "accepted" a Commission determination that an attorney village justice be removed from office for "a persistent and pervasive pattern of neglect of his judicial and administrative duties."²³ But the court criticized the Commission for including, in its determination, references to the judge's failure to deal with cases on his calendar for more than two years. Those Commission findings, said the court, "betray an intrusion into matters of internal court administration and substantive law that may well exceed the Commission's ambit of responsibility."²⁴

Two years later, the Court of Appeals, in a 4-2 decision, dismissed all charges against a Supreme Court Justice who had failed to decide eight motions for up to nine years. Several lawyers over the years had commenced civil proceedings before other judges in the judge's court to compel him to render decisions, and numerous other attorneys had complained about the judge's delays to his administrative judge. Despite a clear provision in the rules governing judicial conduct that requires a judge to dispose promptly of the business of the court, the court held that the failure to promptly dispose of pending matters does not give the Commission authority to act without other indications of misconduct or a demonstrated inability of an administrative judge to resolve the problem.²⁵

21. *Id.* at 1196 (citations omitted).

22. *Id.*

23. *In re Lenney*, 522 N.E.2d 38, 39 (N.Y. 1988) (per curiam) (internal quotation marks omitted).

24. *Id.* at 39.

25. *Id.*

In 1992, the Court of Appeals considered the case of a lawyer, city-court judge who held unrepresented defendants in jail without bail in misdemeanor cases although he knew that he was obligated by law to set bail. The Commission had sustained numerous charges that the judge violated various sections of the Criminal Procedure Law (“CPL”). The judge had acknowledged that he knowingly committed judicial error. Nevertheless, the court, in a 4-3 decision with Judges Kaye, Simons, and Alexander dissenting and voting for removal, rejected the Commission’s determined sanction and censured the judge.²⁶ In doing so, the court questioned the Commission’s arithmetic in determining the number of times that the judge had violated the CPL. For example, in one case, a defendant was improperly held without bail, but the court disagreed with the Commission that each time that the bail status was continued should count as a separate act of misconduct. The Commission’s “methodology obviously inflates the numbers,”²⁷ said the court. The court also declined to criticize the judge for not setting bail in cases where (according to the judge) the defendants were being held on parole violation warrants that precluded their release. In such cases, said the court, “[d]efendants commonly eschew bail in these circumstances to ensure that they will receive maximum jail time credit.”²⁸ Thus, the judge’s “failure to set bail” was “for the benefit of the defendants” and, therefore, should not constitute misconduct, said the majority.²⁹

The court in *LaBelle* reminded the Commission that it should not get ahead of the courts in interpreting the law; the judge’s decision not to set bail in sixteen misdemeanor or violation cases where he held the defendants for psychiatric examinations could not be regarded as misconduct, said the court, until the law is clarified to show that bail is required in such cases.³⁰

The court agreed with the Commission that Judge LaBelle engaged in misconduct when he failed to set bail in misdemeanor cases when the

26. See *In re LaBelle*, 591 N.E.2d 1156, 1158 (N.Y. 1992) (per curiam).

27. *Id.* at 1160.

28. *Id.* at 1161.

29. *Id.* That view by the majority is misplaced. Since the law required bail to be set, is it reasonable for the Commission, each time a judge knowingly fails to set bail that is required by law, to determine whether it would not be in the defendant’s best interests *to post bail*? A better standard would seem to be that the judge should be obligated to abide by the law, set bail in minor cases, and let the defendant decide whether to post bail where it is in the defendant’s best interests not to post bail. The court’s criticism of the Commission in this regard is curious. In fact, the court rejected the judge’s explanation that in some cases he acted—in not setting bail—in the defendants’ interests because they were homeless and needed food and shelter. See *id.* at 1162.

30. *Id.* at 1161.

defendants had a poor record of returning to court or had been brought to court on bench warrants for their failure to appear in court.³¹ The court also agreed with the Commission that a judge should not refuse to set bail in a misdemeanor or violation case on the grounds that the defendant's identity has not been established to the court's satisfaction.³²

One of the charges against Judge LaBelle was that he wrote the words "no bail" on warrants he issued, which was a message to the judge who would arraign the defendant after the arrest. Recommending "no bail" on a warrant for a defendant who, by law, is entitled to have bail set seems to be improper. Indeed, the court held that Judge LaBelle engaged in misconduct when he failed to set bail when defendants appeared before him after they had been arrested on warrants. The court stated that noting such language on warrants is a common practice and "although it may not be advisable, it is not prohibited by any statute."³³ Although the court added that "[a]s long as these notations do not preclude fair consideration of relevant bail factors when the defendant is brought before the court, we cannot say that their use constitutes misconduct,"³⁴ the purpose of such notations would appear to be an attempt by the judge who makes the "no bail" notation to interfere with the bail-setting responsibility of the judge before whom the arrested person will appear. Moreover, whether or not the "no bail" notations preclude fair consideration of relevant bail factors is within the control of the arraigning judge, not the judge who made the notations. The implication is that the arraigning judge could be disciplined for rigidly following the recommendation of the judge who placed the notation on the warrant, but the judge who made the *ex parte* notation should not be disciplined.

LaBelle's strong message to the Commission is that it must be certain that what it finds to be improper has been determined to be improper either by the clear wording of a statute or by the courts. The point is valid, and is applicable to any claim that a judge's actions violate the law. "What law?" has to be the first question asked; and if there is any doubt that the judge violated or ignored the law, the Commission cannot take action against the judge. Beyond that threshold, it is not every improper act that should generate Commission action. The Commission should address a judge's disregard of fundamental rights,

31. *Id.* at 1161-62.

32. *Id.* at 1162.

33. *Id.*

34. *Id.*

and the action taken should depend on the effect on the party injured by the judge's conduct. When a judge abuses his or her power and the result is that a party surrenders a liberty interest (i.e., to be free), the Commission should take substantial action.

In 1996, the Court of Appeals upheld the removal of a non-lawyer, town court justice, who had been censured twice for improperly jailing two defendants for their failure to pay restitution and fines when, in fact, they had paid—a problem created by the judge's faulty and sloppy record-keeping. He also sentenced defendants to jail for their failure to pay fines without determining whether they were financially able to pay the fines, misused the power of summary contempt, blocked defendants' attempts to exercise the right to counsel, sentenced an individual without a trial or guilty plea, and issued arrest warrants based on *ex parte* conversations out of court.³⁵

One year later, the court removed a judge for making an intemperate statement about abused women, minimizing the importance of protective orders for abused spouses, and sentencing a defendant to jail for her failure to pay fines without ever conducting a hearing to determine whether the defendant was financially able to pay the fine.³⁶ The court held that “the gravity of the [judge's] judicial misdeeds reflects a demonstrable lack of fitness for judicial office.”³⁷ Turning first to a single incident, the court said that the judge

committed a most serious abuse of judicial authority, when considered within the wide range of potent powers of any judicial officer He directed the arrest and summarily ordered an individual to 89 days in jail, without affording even the most minimal, ordinary and fundamental constitutional and procedural safeguards.³⁸

The Court of Appeals in 1997 rejected a Commission determination that a non-lawyer town justice should be removed, but agreed that the judge's errors of law constituted serious misconduct.³⁹ The court censured the judge for two “isolated” acts of misconduct in a forty-year judicial career: the judge, without advising the prosecution, had set an arraignment date for the judge's friend who had been charged with a sexual offense, and, in the absence of the prosecution, heard evidence

35. See *In re Hamel*, 668 N.E.2d 390, 391 (N.Y. 1996) (per curiam).

36. See *In re Roberts*, 689 N.E.2d 911 (N.Y. 1997) (per curiam).

37. *Id.* at 912.

38. *Id.*

39. *In re Skinner*, 690 N.E.2d 484, 485-86 (N.Y. 1997).

and summarily dismissed the charge. The second charge concerned the judge's handling of a bad-check, criminal case. When the eighteen-year-old defendant appeared before the judge, the judge said that the defendant had two weeks to pay the amount on the check, and the judge made no mention of any of the defendant's rights, notably the rights to counsel and to a trial.⁴⁰ When the defendant returned to court with most of the money, the judge summarily sentenced him to jail for not having all of the money.⁴¹

EGREGIOUS ERRORS THAT ARE NOT PART OF A PATTERN

Since the Commission has authority to render determinations of removal, censure, and admonition, all of which are subject to review in the Court of Appeals, the question remained whether judicial decisions and rulings that violated fundamental rights could be subject to lesser sanctions when such conduct did not constitute a pattern by the respective judges. In other words, would a single abuse of authority also justify disciplinary action?

In 1980, the Commission publicly admonished a town justice for threatening to issue an arrest warrant against a person, who had stopped payment on a check given to the owners of a hotel in the judge's town. The alleged debtor, who had not been sued or charged with a crime, paid the bill.⁴²

One year later, the Commission censured a town justice for soliciting and receiving *ex parte* communications about pending cases in his court, and for negligently issuing an arrest warrant for a defendant who did not appear.⁴³ The judge apparently forgot that he had granted an adjournment for the defendant's appearance.⁴⁴

In 1983, the Commission publicly admonished a Supreme Court Justice for holding a prosecutor in contempt of court because he failed to have a witness present in court as directed by the court. The fact that there was no indication that the prosecutor had disregarded the court's directive, and advised the court that he had instructed the witness to be present, did not deter the judge from following through on the contempt

40. *See id.* at 485.

41. *See id.*

42. *See In re Wordon*, N.Y. COMM'N ANN. REP. 145 (1981).

43. *See In re Racicot*, N.Y. COMM'N ANN. REP. 99 (1982).

44. *See id.*

finding and placing the prosecutor in a cell. The defendant, charged with murder, was greatly amused in his adjoining cell.⁴⁵

The Commission publicly admonished a town justice for finding a defendant in a speeding case guilty without a trial or a guilty plea. In rejecting the defendant's not guilty plea, the judge expressed his personal knowledge that drivers tend to speed on the road where the defendant had received a speeding ticket.⁴⁶

The Commission publicly admonished a family court judge for ordering the arrest of a respondent in a support proceeding based on a rumor the judge heard outside of court that the respondent was planning to flee the jurisdiction, and for issuing a second warrant because he was dissatisfied with the \$500 bail set by a town justice on the respondent's arraignment on the first warrant.⁴⁷ Three members dissented on the grounds that issuance of the first warrant did not constitute misconduct. When the Commission's determination was released to the public, numerous judges expressed concern privately that the Commission was interfering with the independence of the judiciary and urged the judge to seek review in the Court of Appeals.⁴⁸ The judge decided not to do so.⁴⁹

The Commission has publicly disciplined judges for ignoring basic legal provisions, notwithstanding the absence of a pattern of misconduct, (i.e., numerous instances of violating the law).

Obviously, the less serious the violation of law is, the less obvious the Commission's authority is. The larger the number of errors of law that can be attributed to the judge, the more obvious it is that the Commission has authority to act. When a single error or two leads to a complaint of misconduct, the Commission has to be careful in determining whether the error constitutes misconduct.⁵⁰ It would seem

45. See *In re Sharpe*, N.Y. COMM'N ANN. REP. 134 (1984).

46. See *In re Maxon*, N.Y. COMM'N ANN. REP. 143 (1986).

47. See *In re Mullen*, N.Y. COMM'N ANN. REP. 129 (1987).

48. This was reported by a judge to the Commission staff.

49. When a judge seeks review in the Court of Appeals, the court may accept or reject the Commission's determination, and if it finds misconduct, the court may impose any discipline it chooses under the law. See N.Y. CONST. art. VI, § 22(d); N.Y. JUD. L. § 44(9) (2002). Two judges who sought review on Commission-imposed censures were removed by the court after review of the record, submission of briefs, and oral argument. See *In re Shilling*, 415 N.E.2d 900, 903 (N.Y. 1980) (per curiam); *In re Sims*, 462 N.E.2d 370, 375 (N.Y. 1984) (per curiam).

50. See Judge Ciardullo's concurring opinion in *In re Cox*, N.Y. COMM'N ANN. REP. 90 (2003), for the views of one member of the Commission on the difficulty of drawing the line between error and misconduct. Judge Cox is a non-lawyer judge who mishandled a complex post-sentence proceeding and failed to provide due process to defendants who had not paid fines on a timely basis. See *In re Cox* (N.Y. State Comm'n on Judicial Conduct, Dec. 30, 2002), available at <http://www.scjc.state.ny.us/Determinations/C/cox.htm>. That failure, including rendering summary

appropriate for the Commission to act only if the legal principle that has been ignored or overlooked by the judge is so fundamental that it raises a serious question about the judge's competence. An "error" that deprives a person of liberty may increase the chances that it would be considered to be misconduct. If a basic constitutional right is infringed, such as the right to counsel or to a trial, the "error," based on established case law in New York, would warrant action by the Commission. When a serious "error" is joined by the judge's biased or hostile remarks, the misconduct is compounded.

UNREVIEWED COMMISSION DETERMINATIONS

The Commission has authority under its rules to issue letters of dismissal and caution, which are confidential, pre-charge warnings, to judges.⁵¹ Such letters are based on the judges' admissions of the facts, and the judge may seek a due process hearing if he or she wishes to challenge the letter. The Commission under its rules may also issue letters of caution after formal due process hearings have been held.⁵² Each year, the Commission cautions judges for substantial mistakes of law. When the mistake has serious consequences, instead of cautioning the judge, the Commission may authorize charges, and if the charges are sustained after a due process hearing, the Commission may publicly admonish or censure the judge.⁵³ Generally, removal from office would be considered for a pattern of such abuses.

At times, town or village justices have precluded litigants from initiating legal action on the mistaken belief that the justices can screen cases they choose to handle. The Commission investigates such matters and takes either public or nonpublic action when the complaints are confirmed.⁵⁴ The failure to provide hearings in civil and criminal cases,

jail terms without ascertaining the defendants' financial ability to pay the previously-imposed fines and without notifying the defendants' counsel, led to discipline. Three months later, the same Commission member questioned, in another concurring opinion, the discipline of a non-lawyer judge who had awarded more than the amount originally claimed, double court costs, and unsubstantiated attorneys' fees in a small claims proceeding. *See In re McCall* (N.Y. Comm'n on Judicial Conduct Mar. 28, 2003) (Ciardullo, J., concurring) (noting that such conduct constitutes mistakes of law and not misconduct, but concurring in the disciplinary sanction because the judge's other decisions, as charged, "deprived the defendant of his fundamental and basic due process rights"), available at <http://www.scjc.state.ny.us/Determinations/M/mccall.htm>.

51. N.Y. COMP. R. & REG. tit. 22, § 7000.1(f).

52. *Id.* at § 7000.1(m).

53. N.Y. CONST. art. VI, § 22(a) (2001).

54. *See, e.g., In re Loper*, N.Y. COMM'N ANN. REP. 172 (1985).

when the law requires hearings, has been the basis for discipline in numerous cases before the Commission.

Threatening criminal process against civil defendants,⁵⁵ entering a judgment of conviction against a defendant without a trial or a guilty plea and in the absence of a criminal charge,⁵⁶ and failing to advise defendants of their right to assigned counsel if they are unable to afford counsel⁵⁷ were the basis of public discipline of several judges.

The Commission publicly rebuked other judges who waived their right to review in the Court of Appeals. Among the “errors” were revoking the Release on Recognizance status of the defendant, setting bail and jailing the defendant because he had asked the court for an adjournment;⁵⁸ issuing a warrant of eviction on an *ex parte* request of a landlord without any notice to the tenant and without conducting a court proceeding;⁵⁹ entering judgment in a small claims case without a trial, based on the defendant-son’s “moral obligation” to pay his mother for expenses she had incurred when he was a child;⁶⁰ revoking bail and jailing a defendant because the defendant’s lawyer failed to appear in court due to a scheduling conflict;⁶¹ ordering a defendant handcuffed for nearly two hours because the defendant’s pager sounded in court as other business was going on;⁶² threatening a small claims court defendant with arrest if he failed to pay a civil settlement notwithstanding the judge knew he could not have the defendant arrested;⁶³ and abusing the contempt power by sentencing a defendant in a civil case to jail, where the defendant remained for forty-five days, without a hearing for conduct that was not in the presence of the judge.⁶⁴

The justification for the Commission’s actions in these cases is that, while an appellate court may change an incorrect decision, the appellate court has no authority to discipline the judge. Moreover, appellate courts do not consider all errors. The errors depicted in these cases are fundamental and should have been avoided, suggesting incompetence, bias, a reckless disregard of the law, or a lack of understanding of the

55. *See In re Mayville*, N.Y. COMM’N ANN. REP. 180 (1985).

56. *See In re Curcio*, N.Y. COMM’N ANN. REP. 80 (1984).

57. *See In re Shannon*, N.Y. COMM’N ANN. REP. 161 (2002).

58. *See In re Hopkins*, N.Y. COMM’N ANN. REP. 93 (1987).

59. *See In re Holmes*, N.Y. COMM’N ANN. REP. 139 (1998).

60. *See In re Degenhardt*, N.Y. COMM’N ANN. REP. 91 (1999).

61. *See In re Slavin*, N.Y. COMM’N ANN. REP. 158 (1990).

62. *See In re Feinman*, N.Y. COMM’N ANN. REP. 105 (2000).

63. *See In re Hamm*, N.Y. COMM’N ANN. REP. 123 (2003).

64. *See In re Teresi*, N.Y. COMM’N ANN. REP. 163 (2002).

proper role of a judge. If no disciplinary action were taken in these matters, it is quite possible that the judges would have continued to act in disregard of law and might have developed, by their actions, a record of a pattern of abuse that could some day have resulted in their removal from office.

STRIKING A BALANCE BETWEEN RESPECTING JUDICIAL INDEPENDENCE AND DISCIPLINING ABUSE OF JUDICIAL POWER

Section 100.3(B)(1) of the rules governing judicial conduct provides that judges “shall be faithful to the law and maintain professional competence in it.”⁶⁵ Obviously, a judge whose decision is reversed by an appellate court for an error of law has not necessarily violated that section of the rules. Simply put, a judge is not unfaithful to the law and does not reveal a failure to maintain professional competence in the law by making mistakes. The language of the applicable rule suggests that to protect the independence of the judiciary, the Commission must meet a high burden before it disciplines a judge for a ruling or decision that is contrary to law.

The decisions of the Court of Appeals, beginning in the early 1980s, clearly support the Commission’s view that egregious errors of law that deprive defendants of due process warrant discipline. The court has removed judges who have either totally disregarded their responsibilities to safeguard the rights of litigants or who lack an understanding of the judicial role.⁶⁶ The removal cases concerned patterns of misconduct. Single-incident cases—those in which judges have not been faithful to the law—usually result in a disciplinary sanction less severe than removal from office. Since judges who have

65. N.Y. COMP. R. & REG. tit. 22, § 100.3(B)(1).

66. A judge’s lack of recognition that undisputed acts constituted misconduct recently led the Court of Appeals to believe that the judge may repeat the misconduct. *In re Bauer*, No. 125, 2004 N.Y. LEXIS 2411, at *1 (N.Y., Oct.14, 2004). Although the Court was divided as to whether the setting of extraordinarily high bail in numerous cases constituted misconduct, all seven judges of the court agreed that failure to advise defendants of the right to counsel and of assigned counsel for those who are unable to afford representation is serious misconduct. The four judges who voted to remove Judge Bauer refused to separate the denial of counsel from the setting of bail in amounts of between \$10,000 and \$50,000 for violations that carried either minimal incarceration upon conviction or none at all. After the unrepresented defendants served a few days in jail on exorbitant bail they could not meet, they accepted the judge’s offer to sentence them to “time served” if they pleaded guilty. The majority held that the imposition of punitive bail, when combined with the failure to advise the defendants of their right to assigned counsel, “all but guaranteed that the defendants would be coerced into pleading guilty: it was the only way to get out of jail.” *In re Bauer*, 2004 N.Y. LEXIS 2411, at *8.

been publicly admonished or censured by the Commission were generally content to accept the Commission's determination, the Court of Appeals usually does not review single-incident cases.⁶⁷ It is hard to imagine that the court would not have upheld the Commission's decisions to admonish or censure judges for the single-incident abuses that prompted the Commission to impose discipline. Revoking a defendant's bail for the failure of the defendant's lawyer to appear in court,⁶⁸ jailing a lawyer for the failure of a witness to appear on time,⁶⁹ and handcuffing a defendant for nearly two hours because his pager rang in court⁷⁰ are inexcusable abuses of power and should not be ignored.

For many decades, the courts excused egregious errors by asserting the principle that the judges' acts were made in "good faith." If good faith were a defense to a charge of misconduct, the Commission would be hamstrung in bringing charges against judges who should be disciplined no matter what the reasons were for their conduct. Proving bad faith would be an insurmountable burden, especially when the judge does not express animosity for the person whose rights are being disregarded. Furthermore, incompetence should not be protected. Good-faith mistakes can have terrible consequences, and regardless of the motives of a judge who acts contrary to law, there are times when disciplinary action must be taken. Good faith, of course, could be a mitigating factor as to an appropriate sanction.⁷¹

Disciplining judges for errors of law is controversial, especially when it is not limited to egregious due process violations of established law. And not all Commission members have been in agreement, over the past three decades, that judges should be disciplined for flagrant errors of law. For a lengthy period, for example, the Commission would not act

67. Under the law, only a judge who is the subject of a Commission determination for removal, censure, or admonition may request review of the Commission's determination by the New York State Court of Appeals. N.Y. JUD. L. § 44(7), (9) (2002). So, if a judge does not seek review, the Commission's determination takes effect. When a judge seeks review of a Commission determination, the Court of Appeals, after hearing the matter on the record before the Commission, may take any disciplinary action provided by law. See *In re Shilling*, 415 N.E.2d 900, 903 (N.Y. 1980) (judge facing censure sought review and was removed from office by the Court of Appeals).

68. See *In re Slavin*, N.Y. COMM'N ANN. REP. 158 (1990).

69. See *In re Sharpe*, N.Y. COMM'N ANN. REP. 134 (1984).

70. See *In re Feinman*, N.Y. COMM'N ANN. REP. 105 (2000).

71. In *In re Skinner*, the Court of Appeals, in censuring the judge for misconduct in two cases, listed mitigating factors that warranted the judge's retention as a judge, including that "there is no indication that petitioner was motivated by personal profit, vindictiveness or ill will." *In re Skinner*, 690 N.E.2d 484, 486 (N.Y. 1997) (per curiam). The judge had served as a Town Court Justice for nearly forty years.

against a judge who abused the contempt power. It took some time to forge the principle that, while most judicial “errors” do not constitute judicial misconduct, judicial error and judicial misconduct are not mutually exclusive.⁷²

Arguably, the most important contribution made by the Commission over the past three decades was to bring disciplinary cases against judges who abused the power of their offices by violating the rights of litigants or others in court. That is particularly so in light of the court decisions in the early part of the twentieth century that made it difficult to impose discipline for serious judicial errors. The New York Court of Appeals was the key factor in the progress made over the past two decades. In the exercise of its authority to review Commission determinations on request of the judges who faced public discipline, the court consistently refused to tolerate the abuse of judicial power.

72. The Commission’s confidential cautions play an important role in educating judges. Since about sixty percent of the State’s judiciary are non-lawyers, the Commission can instruct non-lawyer town and village justices before their isolated errors become a pattern of errors. Consequently, the Commission privately cautions judges for errors that are neither egregious nor have profound consequences. Perhaps surprisingly, lawyer-judges also have to be instructed about their blatant errors of law. The judges who abused their power in holding a lawyer responsible for the lateness of a witness, a defendant responsible for the absence of his lawyer, and a defendant in handcuffs for his failure to turn off his pager were all full-time lawyer judges. *See supra* notes 68-70.
