



THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT

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**COMMISSION ON JUDICIAL CONDUCT FILES
FORMAL CHARGES AGAINST JUDGE MICHAEL J. LIVINGSTONE**

BOSTON, MA (October 22, 2007) -- Formal Charges have today been filed with the Supreme Judicial Court against Judge Michael J. Livingstone, Associate Justice of the Plymouth County Probate and Family Court, arising from two complaints, Numbers 2005-104 and 2006-97, against him. Judge Livingstone's Response to the Formal Charges has also been filed with the Supreme Judicial Court. Copies of both documents are attached.

The Commission has asked the Supreme Judicial Court to appoint a Hearing Officer to preside at the Public Hearing of this matter. The Commission will then schedule the hearing in accordance with G.L. c.211C, §7 and Commission Rule 8B. The Commission's statute and rules and other information about the Commission are available at our web site: www.mass.gov/cjc.

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BEFORE THE COMMISSION ON JUDICIAL CONDUCT

COMPLAINT NOS. 2005-104 and 2006-97

FORMAL CHARGES

The Commission on Judicial Conduct ("the Commission"), acting pursuant to M.G.L. c. 211C, § 5(14) and Commission Rule 7B(4), hereby notifies the Honorable Michael J. Livingstone ("Judge Livingstone"), Associate Justice of the Plymouth Division of the Probate and Family Court, that it has found sufficient cause to issue Formal Charges in the above-numbered matter.

These charges grew out of the investigation of a complaint filed by the Supreme Judicial Court on November 2, 2005 and a complaint filed by Raymond Hotte on July 18, 2006. At the request of the Commission, on October 31, 2006, the Supreme Judicial Court appointed as Special Counsel John A.D. Gilmore. On May 14, 2007 the Commission issued a Statement of Allegations pursuant to M.G.L. c. 211C, § 5(5). Judge Livingstone received the Statement of Allegations on May 16, 2007. Judge Livingstone's response to the Statement of Allegations was filed with the Commission on June 21, 2007 by his attorney, James R. DeGiacomo. On July 17, 2007 Judge Livingstone appeared before the Commission, pursuant to M.G.L. c. 211C, § 5(7), with his attorney. On September 5, 2007, Michael E. Mone, Sr., succeeded Mr. DeGiacomo as Judge Livingstone's attorney.

The Commission also hereby notifies Judge Livingstone that, pursuant to M.G.L. c. 211C, § 5(14) and Commission Rule 7B(4), he has ten (10) days after service of these Formal Charges in which to file a written response with the Commission. The response should set forth in concise language all denials, affirmative defenses, and any other matters upon which Judge Livingstone intends to rely at the hearing on these charges. Immediately after the filing of Judge Livingstone's response or the expiration of the ten days, a copy of the Formal Charges and of Judge Livingstone's response shall be filed with the Supreme Judicial Court. Upon this filing, the confidentiality of the Formal Charges and the response thereto shall cease.

The Commission alleges that Judge Livingstone engaged in a pattern of misconduct over a period of time which is prejudicial to the administration of justice and unbecoming a judicial officer and which brings the judicial office into disrepute. This pattern of misconduct displays a failure to uphold the integrity of the judiciary in violation of Canon 1 of the Code of Judicial Conduct (Supreme Judicial Court Rule 3:09), as effective both before ("Former Code") and after ("Current Code") October 1, 2003. He also engaged in conduct that violates Canon 2 of the Former Code and Current Code by failing to respect and comply with the law and by failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The Commission also alleges that Judge Livingstone violated Canon 5 of the Former Code by failing to regulate his extra-judicial activities to minimize the risk of conflict with his

judicial duties. By engaging in financial and business dealings that tend to reflect adversely on the judge's impartiality, that may interfere with the proper performance of his judicial position, or that may involve him in frequent transactions with lawyers or person likely to come before the court on which he serves, Judge Livingstone violated Canon 5C(1) of the Former Code. He violated Canon 5C(2) of the Former Code by serving as a manager, officer, and advisor to businesses. He violated Canon 6 of the Former Code by receiving compensation for extra-judicial activities that give the appearance of impropriety and by failing to report compensation for extra-judicial services. He also engaged in the practice of law, in violation of Canon 5F of the Former Code.

The Commission also alleges that Judge Livingstone violated Canon 4 of the Current Code by engaging in financial and business dealings that tend to reflect adversely on the judge's impartiality, that may interfere with the proper performance of his judicial position, and/or that may reasonably be perceived to exploit the judge's judicial position, in violation of Canon 4D(1); served as a manager, general partner, and advisor to businesses, in violation of Canon 4D(2); received compensation and reimbursement of expenses for extrajudicial activities, in violation of Canon 4H(1); failed to report compensation as required by Canon 4H(2); acted in a manner which cast reasonable doubt in his capacity to act impartially as a judge, in violation of Canon 4A(1); and engaged in the practice of law, in violation of Canon 4G. Judge Livingstone also violated Rules 1.17 and 1.5 of the Massachusetts Rules of Professional Conduct (SJC Rule 3:07).

The Commission specifically alleges:

1. **False Affidavit in Violation of Canons 1 and 2A of the Current Code.**

(a) Judge Livingstone and Raymond Hotte ("Mr. Hotte") formed a general partnership called High Low Properties ("High Low") in July 1986. The partnership agreement provides that "each of the partners shall have an equal voice in the management and conduct of the partnership business."

(b) Since 1986, Judge Livingstone and Raymond Hotte have been the sole general partners in High Low.

(c) High Low owns two properties in New Bedford: (i) 101-103 Clark Street; (ii) 154 Eugenia Street. There are six rental units in each property and both properties have had Section 8 units subsidized by the New Bedford Public Housing Authority ("Housing Authority").

(d) In early-2005, Judge Livingstone commenced litigation to dissolve the partnership in Bristol County Probate Court (Docket No. 05E0012-PP1). This litigation is still pending.

(e) When Judge Livingstone was appointed a Judge in December 2002, he remained general partner of High Low but asked Mr. Hotte to assume full managerial responsibilities over the two properties that the partnership owned.

(f) In 2005, Jack Santos ("Mr. Santos") (d/b/a/ Bayside Roofing Company) brought a small claims action against Raymond Hotte, seeking to collect the balance due for work done at

101-103 Clark Street in April 2004. Mr. Santos had done the work at Mr. Hotte's request pursuant to a written agreement signed by Mr. Hotte.

(g) A trial was scheduled for September 2, 2005 in New Bedford District Court. Mr. Hotte caused a subpoena to be served on Judge Livingstone on or around August 23, 2005 requiring Judge Livingstone to appear for the trial on September 2, 2005. Judge Livingstone called the assistant clerk magistrate to ask him questions about the action. On August 25, 2005, Judge Livingstone filed a "Motion to Quash/Motion to Excuse Presence" asking that Mr. Hotte's subpoena be quashed or that Judge Livingstone be excused from appearing at the trial.

(h) In support of his motion, Judge Livingstone filed a notarized affidavit dated August 25, 2005 (the "Affidavit") in which he swore, under penalties of perjury, that (i) he had "not been actively involved in the management of [154 Eugenia Street or 101-103 Clark Street] for many years;" (ii) Mr. Hotte "has acted as property manager for the premises and has been the person who handles all matters pertaining to repair and maintenance of the buildings as well as all tenant related matters, the collection of rent and payment of building-related expenses;" and (iii) "As far as [he] can ascertain, the purpose of the witness summons is simply to annoy or harass me and is not meritorious." Judge Livingstone also stated that he would be on vacation from August 31, 2005 to September 14, 2005, and could not appear on September 2.

(i) On September 2, 2005, both Mr. Hotte and Mr. Santos appeared *pro se* before Judge Bernadette L. Sabra in the New Bedford Division of Bristol District Court. Judge Livingstone did not appear. As a jury trial was requested but was not available that day, Judge Livingstone's motion and the trial were rescheduled for September 26th. Judge Sabra informed Mr. Hotte that he would have to "renotify" Judge Livingstone of the new date. Mr. Hotte did not inform Judge Livingstone of the continuance. The September 26, 2005 hearing was continued to October 17, 2005. Mr. Hotte did not notify Judge Livingstone of this date change.

(j) On October 17, 2005, Mr. Hotte and Mr. Santos appeared. Judge Livingstone did not appear. As Mr. Hotte admitted liability for the debt (claiming he and Judge Livingstone were jointly liable), Judge Sabra ordered a repayment plan of \$100 per month, noting that Mr. Hotte had other legal avenues he could pursue to seek reimbursement from Judge Livingstone.

(k) Judge Livingstone made at least two false statements in the Affidavit. First, he stated that he had "not been actively involved in the management of these premises for many years." Second, he stated that Mr. Hotte "has been the person who handles all matters pertaining to repair and maintenance of the buildings as well as all tenant related matters, the collection of rent and payment of building-related expenses."

(l) When Judge Livingstone made these statements, he knew that they were not true. He had been actively involved in the management of the High Low properties since late November or early December 2004 when he and Mr. Hotte had had a falling out. From December 4, 2004 on, Judge Livingstone had, on behalf of High Low: (i) maintained the check register for High Low; (ii) paid building-related expenses for High Low Properties; (iii) made mortgage payments; (iv) communicated with the Housing Authority about recertification of the

Section 8 units; (v) collected the Section 8 rents at both Clark Street and Eugenia Street from both the tenants and the Housing Authority; and (vi) maintained a partnership bank account.

(m) On August 26, 2005, the day after he filed the affidavit in support of his motion to quash claiming that he had let Mr. Hotte handle all tenant related matters, Judge Livingstone signed contract renewals for two Section 8 tenants in High Low properties and wrote one of them, Adele Leeks ("Ms. Leeks"), the following letter.

Dear Ms. Leeks,

As you know, I am the co-owner of 154 Eugenia Street New Bedford along with Mr. Hotte. Enclosed is a copy of the renewal of your lease with the New Bedford Housing Authority, Section 8 program which I have signed. Also please find copies of your utility bills for your apartment which are in my name and I am paying.

Beginning 9/1/05 in accordance with the terms of your lease agreement, you are to forward to me a check payable to "High Low Properties" in the amount of \$204.00 each month being your share of the utility and rent payment as determined by the Housing Authority. I, in turn will continue to pay your gas and electric bills according to the lease agreement. Do not give your payment to Mr. Hotte as you have done in the past. If I do not receive your monthly payment, I will not pay your utility bills and will have you evicted from your unit for failure to pay your rent as required. If Mr. Hotte should take any action against you for complying with the instructions of this letter, or bring any legal action against you regarding the same, I will provide and pay for your legal defense as long as you continue to send me your monthly check as instructed.

If you have any questions regarding the same, please give me a call or check with the Housing Authority. Your monthly payments should be mailed to the above address so as to reach me by the 1st of the month or your may drop off your check to me at the same address.

Very truly yours,

Michael J. Livingstone

cc: Raymond G. Hotte w/enc.

(n) In making false statements in his affidavit, Judge Livingstone violated Canon 1 of the Current Code ("A judge shall participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards. . .") and Canon 2(A) of the Current Code ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.")

(o) Moreover, Judge Livingstone, as a general partner of High Low, was financially responsible for its debts and had an obligation to see that the legitimate debts of the partnership were paid. His conduct in avoiding his business responsibilities and the legitimate debts of the partnership constitute a further violation of Canons 1 and 2A of the Current Code.

(p) Finally, Judge Livingstone's failure to appear in court on the date called for in the subpoena to present his motion, his failure to follow up to determine whether or not his Motion to Quash had been allowed or not and to ascertain if he needed to comply with any order the court might issue in connection with his motion also violated Canons 1 and 2A of the Current Code.

2. The Leeks Letter/Improper Threat in Violation of Canons 1 and 2A of the Current Code.

(a) In the letter from Judge Livingstone to Adele Leeks, quoted above, the Judge informed Ms. Leeks that if she did not forward her monthly rent payment to him (rather than to Mr. Hotte), he would "not pay your utility bills and will have you evicted from your unit for failure to pay your rent as required." If Judge Livingstone had followed through with this threat, it would have constituted a crime and formed the basis for a civil suit by the tenant.

(b) Under Mass. Gen. Laws c.186, § 14, a landlord who "willfully or intentionally fails to furnish such water, hot water, heat, light, power, gas. . . or any lessor or landlord who directly or indirectly interferes with the furnishing by another of such utilities or services, or who transfers the responsibility for payment for any utility services to the occupant without his knowledge or consent. . . shall be punished by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment for not more than six months." Additionally, under the Consumer Protection regulations, 940 CMR 3.17(6), it is an "unfair and deceptive practice" for an owner to violate willfully any provisions of M.G.L. c.186 s.14 or, when obligated to provide gas or electric service, to "fail to provide such service" or "to expose such occupant to the risk of loss of such service by failing to pay gas or electric bills when they become due. . ."

(c) The fact that Judge Livingstone is a judge makes his improper threat to Ms. Leeks even more serious, given the potentially coercive effect of his letter.

(d) Judge Livingstone's conduct in sending this letter to Ms. Leeks violated Canons 1 and 2A of the Current Code.

3. Judge Livingstone's Agreement with Attorney Jane Warren, His Receipt of Money Pursuant to the Agreement, and His Conduct Related to the Agreement Violated Former Code Canons 1, 2, 5 and 6; Current Code Canons 1, 2 and 4; and Rules 1.5 and 1.17 of the Massachusetts Rules of Professional Conduct.

(a) Judge Livingstone at the time of his appointment to the bench in December 2002 had a solo practice with an office at 261 Union Street in New Bedford, a building he owned through a realty trust. His practice focused on domestic relations and probate.

(b) In December 2002, he entered into an agreement with Attorney Jane Warren ("Attorney Warren"), who also had an office at 261 Union Street, whereby Attorney Warren would pay Judge Livingstone 25% of the net fee that she received from his existing domestic relations clients and 50% of the net fee Attorney Warren received from representing executors of estates where Judge Livingstone had prepared the will of the decedent.

(c) Judge Livingstone sent a letter to his clients notifying his clients that Attorney Warren would be "taking over [his] client files."

(d) Neither Judge Livingstone nor Attorney Warren ever notified his domestic relations clients that Judge Livingstone would be receiving a portion of the fees that Attorney Warren collected. Neither Judge Livingstone nor Attorney Warren ever notified the executors of the estates for which Attorney Warren performed legal services and where Judge Livingstone had prepared the will that Judge Livingstone would be receiving a portion of the fees that Attorney Warren collected.

(e) Beginning in 2003, Judge Livingstone shared profits in Attorney Warren's law practice. Judge Livingstone received payments from Attorney Warren. If Attorney Warren did work for and collected fees from a former divorce client of Judge Livingstone's, she would pay Judge Livingstone 25% of the net fee collected. If she did work for the estate of someone whose will was drafted by Judge Livingstone, she would pay Judge Livingstone 50% of the net fee collected. Under this arrangement, Attorney Warren paid Judge Livingstone approximately \$14,000 in 2003, \$17,000 in 2004, \$6,000 in 2005, and \$12,000 in 2006.

(f) Attorney Warren provided the judge with accountings which accompanied her checks. The accounting listed the client, the fees, the expenses and his percentage of net fees. The checks frequently describe the payments as "referral fees" or "ref."

(g) Attorney Warren checked the obituaries every morning against the will list provided to her by Judge Livingstone. If someone died for whom Judge Livingstone had drafted the will, Attorney Warren would try to get in touch with someone in the family. On occasion, Judge Livingstone called Attorney Warren to inform her that someone that he had previously represented had died.

(h) Judge Livingstone, on the death of some of his former clients, sent flowers to the surviving spouse and executor. In some of these cases, Attorney Warren was retained by the executor to represent the estate. Judge Livingstone claimed the cost of the flowers as a business expense on Schedule C of his tax returns.

(i) Judge Livingstone also has claimed the cost of internet service that he has at 261 Union Street as a business expense on his tax returns since he has been a judge. He uses the internet only to check on obituaries.

(j) As detailed below, Judge Livingstone represented to the Internal Revenue Service in the years 2003, 2004, and 2005 that he was operating an "Attorney at Law" business and took many expenses on his tax returns as business expenses that would only be justified if he was engaged in the active practice of law.

(k) The agreement between Judge Livingstone and Attorney Warren, Judge Livingstone's receipt of income from the arrangement, the failure to disclose that he and Attorney Warren were sharing fees, and his conduct in facilitating estate business for Attorney Warren violates Former Code Canons 1, 2, 5 and 6; Current Code Canons 1, 2 and 4; and Rules 1.5 and 1.17 of the Massachusetts Rules of Professional Conduct.

4. Tax Returns In Violation of Canons 1 and 2 of the Former Code and Canons 1, 2 and 4 and of the Current Code.

(a) Judge Livingstone and his wife filed joint tax returns for 2003, 2004, and 2005.

(b) His tax return for each year in question included a Schedule C, "Profit or loss from business." The business was described as "Attorney at Law" with a business address of 261 Union Street.

(c) On the income portion of the form he included income from two sources:
(a) payments on his accounts receivable from his law practice resulting from time worked prior to his becoming a judge; (b) income from Attorney Warren as a result of the buyout arrangement.

(d) On the expense side, he claimed a variety of expenses. To summarize:

<u>Year</u>	<u>Schedule C Income</u>	<u>Schedule C Expenses</u>
2003	127,036	54,504
2004	84,127	39,283
2005	34,534	19,096

(e) The net in each year was carried forward and reported as "business income" on line 12 of form 1040 so the expenses claimed reduced his taxable income.

(f) Some of the expenses claimed by Judge Livingstone on Schedule C are bona fide business expenses that relate to the wrapping up of his law practice and the collection of accounts receivable from his practice that arose in connection with legal work performed by him prior to his appointment as a judge. However, the majority of the expenses on his tax returns are personal expenses that were improperly taken as business expenses.

(g) In 2004, as an example, Judge Livingstone reported \$39,283 in business expenses broken down as follows:

Advertising	1,307.00
Travel and Car Expense	465.00
Insurance	5,803.00
Legal and Professional	6,108.00
Office Expense	4,675.00
Repairs & Maintenance	500.00

Supplies	3,984.00
Taxes and Liens	167.00
Utilities	11,654.00
Other (postage, recording fees, bar charges, miscellaneous, newspapers)	4, 620

(h) Judge Livingstone testified at his deposition taken on March 2, 2007 that he did not know why there was approximately \$15,500 in "utilities" and "supplies" expenses claimed in 2004.

(i) Examples of checks included in the totals on his tax return form in 2004 which are not bona fide business expenses are the following:

- i) On January 11, he paid \$23.90 ("office expense") on an MBNA credit card. The charge was from AOL for internet access on his computer at 261 Union Street.
- ii) On January 11, 2004, he paid the law firm of Perry, Hicks and Crotty \$120 ("legal and professional fees") to handle a rezoning variance for property he had received as a fee.
- iii) On January 12, 2004, he paid Garlington Florist \$1,182 ("Supplies") for flowers sent to "somebody for their funeral or flowers that I sent to somebody for the holiday."
- iv) MBNA payment of \$145.20 for taking probate court personnel out to lunch at Meza Luna restaurant.
- v) On February 5, 2004 \$100 to Mary Looney, Assistant Register, for "typing or bookkeeping" and on April 6, 2004, \$100 to Kimberly Foley, Judge Livingstone's secretary at the probate court, for personal or business typing. He gave each of them a \$250 cash Christmas gift in December 2004 ("Office Supplies").
- vi) On July 10, 2004, Judge Livingstone paid \$681 ("Advertising") to *Standard Times* for an advertisement in a newspaper in memory of his late parents.

(j) Moreover, the explanations Judge Livingstone supplied at his deposition concerning his expenses confirmed the lack of justification of them as business expenses and were not candid and forthright. Judge Livingstone furnished the following explanation of his AOL internet charge:

Q: And AOL, was this for providing internet access?

A: Yes.

Q: Can you explain to me what use your law practice made in 2004 of internet services?

A: The only thing that I ever looked at on the internet is the obituaries.

Q: Were you looking at obituaries in 2004 on the internet?

A: Yes.

Q: For what purpose?

A: To see who had died.

Q: Why were you wanting to see that?

A: I've looked at obituaries every day of my adult life.

Q: And did you consider looking for obituaries an expense related to your law practice?

A: I did. Some of my former clients who died owed me money, I would tell Attorney Manning to forget about the collection account. Some of my former clients who died who were long-term clients of mine, I would sometimes go pay my respects at their wake or funeral, I think upon my relationship to them.

Q: And some of their deaths resulted in business for Attorney Warren, correct?

A: That's correct.

MLD 114, 115.

(k) Judge Livingstone had the following explanation for his Garlington Florist charges:

Q: What is the next entry?

A: Garlington Florist.

Q: And can you explain to me how a payment to Garlington Florist related to your law business in 2004?

A: I don't know if those were flowers I sent to somebody for their funeral or flowers that I sent to somebody for the holidays, what they would relate to, but obviously it would be flowers to somebody. I can't tell you who those people would be.

Q: Can you explain why that would relate to your law business in 2004?

A: When I practiced law, I often sent people flowers when somebody in the family died, send it to the funeral home.

Q: But you weren't practicing law anymore in 2004, were you?

A: I still send people flowers to the funeral home when people die, people that I knew or people that I represented.

You're correct though, I was not practicing law anymore in 2004. There was no place else to put the income of (sic) the expenses.

MLD 116, 117.

(l) Later in Judge Livingstone's deposition, he sought to explain some of the "office supplies" expenses that he took in response to a question concerning a June 6, 2005 payment to Staples for \$225.65 which he claimed as a Schedule C expense on his 2005 tax returns.

Q: There is a payment to Staples on June 6th for office supplies; is that right?

A: Yes. By the way, I have an idea of what some of those other expenses are now.

Q: Which other expenses?

A: The ones you asked me about the office supplies, what could they be?

When I became a judge there was no dictating equipment, and there was no money to get dictating equipment or find dictating equipment, so I went out and bought my own. I went to Staples, charged it, paid for it: Dictating equipment, cassette recorder, transcriber.

Q: Was that in 2003?

A: Initially and since.

Q: So expenses that you have concurred in connection with your work as a judge you've charged to the law firm account here?

A: In a couple of instances, something would be utilizable in either/or the same dictating cassette that I hold in my hand when I have some question about a bill or an account, it's the same machine that I use when I dictate my pleadings.

Q: I don't understand. You, in 2003, you purchased a dictating machine?

A: Yes.

Q: So that you can dictate opinions,; is that right?

A: Correct.

Q: Opinions that you issue as a judge?

A: Correct.

Q: And those opinions get typed up by a court personnel on court time, right?

A: Yes.

Q: And the expense of that dictating machine, is something that you charge to your law firm expense?

A: Because I use the same dictating machine when I dictate a memo to my secretary, Wendy, and give her the cassette for her to either type something up relative to the accounts receivable or the bills payable or anything in that regard.

Q: Well, did you have a substantial amount of correspondence about your bills payable or receivable?

A: No. Very little.

(m) In claiming expenses that were personal in nature as business expenses, and in his explanations of those expenses to the Commission, Judge Livingstone violated Canon 1 and 2 of the Former Code and Canons 1, 2 and 4 of the Current Code.

5. Financial and Business Dealings in Violation of Former Code Canon 5C(2) and Current Code Canon 4.

(a) In addition to the property owned by High Low and referenced above, at the time Judge Livingstone became a judge, and at all times since, Judge Livingstone has owned or had an interest in the following real estate:

261 Union Street (New Bedford). The Judge owns a 100% beneficial interest in the building. The building has approximately 12 to 13 tenants, many of whom are attorneys practicing in the Probate and Family Court.

222-226 Union Street (New Bedford). This property is owned by Union Street Investors LLC ("LLC"). Judge Livingstone has a 99% interest in the LLC and his wife has a 1% interest. The members of the LLC are Judge Livingstone and his wife. 222 Union Street is a five story building with a restaurant/bar on the first floor. There are 19 offices on the second, third and fourth floors. The building has many vacancies.

Vacant Land. Judge Livingstone owns various parcels of vacant land in Mattapoisett and Dartmouth.

69 Katherine Street (New Bedford). Judge Livingstone owns this three-unit building which has a Section 8 unit in it.

(b) From September 15, 2003 through August 12, 2004, Judge Livingstone paid all the bills and maintained the check register for 261 Union Street. He paid the cleaning bills from at least November 2005 through November 2006.

(c) Judge Livingstone maintained an office at 261 Union Street which he used on Saturdays. During the period when he was maintaining the accounts, he collected the rent checks from a box in Attorney Warren's office where the various tenants in the building left them, prepared the deposit tickets, and frequently deposited the rent.

(d) In December 2005, Judge Livingstone was notified that complaint Number 2005-104 had been filed against him with the Commission. In December 2006, Judge Livingstone notified the tenants at 261 Union Street that Arthur DeMello ("Mr. DeMello"), the superintendent at 222 Union Street, would be managing the property. Prior to that time, Attorney Warren, the Judge and his son had all had a part in managing the building. Judge Livingstone acknowledged at his deposition on March 2, 2007 that, prior to December 2006, the management was "ambiguous."

(e) Mr. DeMello was the superintendent of 222 Union Street before Judge Livingstone went on the bench and he continued to be building superintendent of this property after Judge Livingstone went on the bench. Mr. DeMello collects the rents and deposits the rent checks and writes checks for the building payroll.

(f) On or about May 28, 2004, the "Manager" of the LLC which had been Judge Livingstone was changed to the Judge's wife. However there was no change in the LLC operating agreement which provided that the LLC "shall be investor managed." Judge Livingstone continued to hold a 99% interest in the property. Judge Livingstone conceded at his deposition that his wife has never performed any managerial services and that he made the change in connection with his communication to the Committee on Judicial Ethics in the spring of 2004.

(g) Judge Livingstone paid the bills for 222 Union Street other than payroll and maintained the check register from September 15, 2003 to August 2004.

(h) Judge Livingstone has kept the records on 69 Katherine Street continuously since he became a judge in December 2002. He pays the taxes and the bills. He maintains the checking account relating to the property. The Section 8 tenant in the property moved out in the summer of 2006. A new Section 8 tenant moved in in the fall of 2006. Judge Livingstone has communicated with the Housing Authority concerning certification of the Section 8 unit since he became a judge.

(i) Canon 5C(2) of the Former Code provided that a judge “should not serve as an officer, director, manager, advisor or employee of any business.” Id. Judge Livingstone did not comply with Canon 5C(2) of the Former Code.

Canon 4D(2) of the Current Code provides that judges “shall not serve, with or without remuneration, as an officer, director, manager, general partner, advisor or employee of any business.” Judge Livingstone did not comply with Canon 4D(2) of the Current Code.

(j) Judge Livingstone was personally and directly advised of the prohibition and was aware that certain of his activities may have constituted violations of the Current Code. On March 11, 2004, Judge Livingstone requested an advisory opinion from the Committee on Judicial Ethics concerning his real estate activities. The Committee on Judicial Ethics (the “CJE”) issued its advisory opinion (No. 2004-6) to Judge Livingstone on June 23, 2004, which *inter alia* stated that:

- Section 4(D)(2) of the Code of Judicial Conduct prohibits a judge from serving, with or without remuneration, as an officer, director, manager, general partner, adviser, or employee of a business.
- Judge Livingstone’s activities with regard to the residential apartment buildings (the two buildings owned by High Low) “are within the bounds of what is permitted under the Code. You have delegated the managerial labor associated with the apartments to your real estate partner, who handles all interaction with the tenants and the payment of all expenses. Your role is strictly passive. The management tasks are left to your partner.”
- Judge Livingstone’s involvement with the three-family house (69 Katharine Street) “also is within the limits of permissible activity. Your real estate partner is responsible for the rental of the units and for responding to the tenants’ requests for repairs. While the rent is sent to you, and you pay the bills, this activity does not rise to a level of engagement that amounts to managing a business.”
- Judge Livingstone’s involvement in the commercial properties (222 Union Street and 261 Union Street) “does move into the prohibited area of business management.” Citing to In re Imbriani, 139 N.J. 262 (1995), in which the judge “received rent checks from the corporation’s bookkeeper, assisted the bookkeeper in the payment of the corporation’s bills, and assisted the corporation’s accountant in filing tax returns,” the CJE informed Judge Livingstone that “you need to restrict your level of involvement in your commercial real estate investments to that of a passive owner.”
- Specifically, the CJE stated that (amongst other things) the “day to day operation of the buildings, including the accounting and bookkeeping functions, must be handled by others.”

(Emphasis added.)

(k) Judge Livingstone has been a general partner of High Low during his entire tenure as a judge. This is a per se violation of Canon 4D(2) of the Current Code.*

(l) Judge Livingstone is not a passive investor in the LLC because the LLC by its organizational documents is "member managed" and Judge Livingstone has a 99% membership interest. After reviewing the CJE opinion he made his wife "manager" of the LLC which he acknowledged was meaningless. This is a violation of Canon 5C(2) of the Former Code and Canon 4D(2) of the Current Code.

(m) Just a few months following his receipt of the CJE's advisory opinion, in December 2004, when Mr. Hotte gave up any managerial responsibility for High Low, Judge Livingstone simply took over these responsibilities including the accounting and bookkeeping functions for High Low. Judge Livingstone also executed lease recertifications with the New Bedford Housing Authority, collected Section 8 rents, and threatened one tenant with eviction if she did not pay her rent.

(n) Judge Livingstone has during the time periods noted in paragraph 4(b) through 4(i), 4(l) and 4(m) been actively involved in managing real estate business activities at 69 Katherine Street, 22 Union Street, 261 Union Street and the properties owned by High Low which, separately (particularly in the case of High Low) and taken together, constitute a separate violation of Canon 4D(2) of the Current Code.

(o) He also maintained an office at 261 Union Street and was claiming significant law practice business expenses on his tax return.

(p) The activities described above were not passive and Judge Livingstone thereby violated Canon 5C(2) of the Former Code and Canon 4D of the Current Code.

6. False Reporting to the SJC and State Ethics Commission in Violation of Canon 6 of the Former Code and Canon 4 of the Current Code.

Inaccurate reports of financial activities submitted to the SJC and state ethics commission.

(a) Canon 4H(2) of the Code of Judicial Conduct states:**

A judge shall report on or before April 15 of each year, with respect to the previous calendar year, the date, place and nature of any activity for which the judge received compensation, the name of the payor, the amount of compensation so received, and such

* Under the Former Code, effective through September 30th, 2003, Canon 5C(2) stated that "Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity permitted by Canon 4, but should not serve as an officer, director, manager, advisor or employee of any business." Thus, until October 1, 2003, the Code of Judicial Conduct did not include an express reference to a judge serving as a "general partner" of a business.

** Before October 1, 2003 Canon 6C.

other information as is required by the Supreme Judicial Court or by law... The judge's report shall be filed as a public document.

(b) State court judges are also required to file each May 1 for the previous calendar year a financial statement with the State Ethics Commission, commonly described as a Statement of Financial Interests or "SFI."

(c) Under M.G.L. c. 268B, § 7, a person who files a false statement of financial interest with the State Ethics Commission "shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than three years, or in a house of correction for not more than two and one-half years, or both."

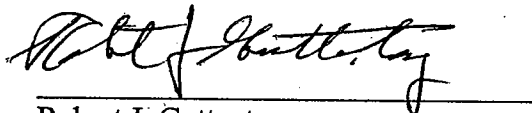
(d) By signing the State Ethics financial filings (SFIs), Judge Livingstone swore that he had made a "reasonably diligent effort to obtain reportable information" and that the information on the form "is true and complete, to the best of my knowledge."

(e) Judge Livingstone violated his reporting obligations by failing to report the income he was receiving from Attorney Warren.

(f) Judge Livingstone also violated his reporting obligations by failing to report that he was a partner in High Low.

The pattern of conduct set forth above, if true, constitutes willful misconduct in office; willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute; conduct prejudicial to the administration of justice and unbecoming a judicial officer that brings the judicial office into disrepute and violates the Code of Judicial Conduct and the Rules of Professional Conduct.

For the Commission,

A handwritten signature in black ink, appearing to read "Robert J. Guttentag", written over a horizontal line.

Robert J. Guttentag
Chairman

Date: October 1, 2007

NOTICE OF DISCOVERY RIGHTS PURSUANT TO FORMAL CHARGES

Complaint Nos. 2005-104 and 2006-97

The Commission hereby notifies Judge Michael J. Livingstone that, pursuant to Commission Rule 9A, the Commission shall, within a reasonable time, make available for inspection upon the written request of the judge all books, papers, records, documents, electronic recordings, and other tangible things within the custody and control of the Commission which are relevant to the issues of the disciplinary hearing, and any written or electronically recorded statements within the custody and control of the Commission which are relevant to the issues of the disciplinary proceeding. The failure of the Commission to furnish timely any such materials provided for herein shall not affect the validity of any proceedings before the Commission, provided that such failure is not substantially prejudicial to the judge.

As specified in Commission Rule 9C, nothing in this Notice of Discovery Rights shall be construed to require the discovery of any report made to the Commission by its staff or Special Counsel. Furthermore, in granting discovery the Commission shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of its staff, Special Counsel, or other representative.

For the Commission,



Robert J. Guttentag
Chairman

Date: October 1, 2007

BEFORE THE COMMISSION ON JUDICIAL CONDUCT
COMPLAINT NOS. 2005-104 AND 2006-97

ANSWER TO FORMAL CHARGES

As a preliminary matter, Judge Livingstone denies so much of the introductory paragraphs of the Commission's Formal Charges that constitute conclusory statements regarding his violations of various canons of the Code of Judicial Conduct or of the Formal Code of Judicial Conduct. Judge Livingstone, at all times, believed that he was acting in accord with the canons and that he was acting in accordance with advice that he had obtained from the Committee on Judicial Ethics of the Supreme Judicial Court and advice he obtained with regard to the reporting of extra judicial income from the Deputy Administrative Assistant of the Supreme Judicial Court and the accountant who prepared his tax returns. Judge Livingstone admits that he may have made errors, particularly when confronted with his former business partner's abandonment of his role in managing and administering real estate in New Bedford that is the subject of this complaint, which required Judge Livingstone's role with regard to said real estate to expand. Although he denies that he at any time acted dishonestly, he understands that some of the circumstances involved in the Formal Charges could raise concerns about his compliance with the Cannons of the Code of Judicial Conduct. In light of his present awareness regarding these events, he recognizes that he could be subject to appropriate and reasonable discipline.

The Respondent answers to the specific allegations of the Formal Complaint.

1. False Affidavit in Violation of Canons 1 and 2A of the Current Code.

(a) Judge Livingstone and Raymond Hotte ("Mr. Hotte") formed a general partnership called High Low Properties ("High Low") in July 1986. The partnership

agreement provides that "each of the partners shall have an equal voice in the management and conduct of the partnership business."

Admitted.

(b) Since 1986, Judge Livingstone and Raymond Hotte have been the sole general partners in High Low.

Admitted.

(c) High Low owns two properties in New Bedford: (i) 101-103 Clark Street; (ii) 154 Eugenia Street. There are six rental units in each property and both properties have had Section 8 units subsidized by the New Bedford Public Housing Authority ("Housing Authority").

As to the relevant times, admitted.

(d) In early-2005, Judge Livingstone commenced litigation to dissolve the partnership in Bristol County Probate Court (Docket No. 05E0012-PP1). This litigation is still pending.

Admitted.

(e) When Judge Livingstone was appointed a Judge in December 2002, he remained general partner of High Low but asked Mr. Hotte to assume full managerial responsibilities over the two properties that the partnership owned.

Admitted.

(f) In 2005, Jack Santos ("Mr. Santos") (*d/b/a*/ Bayside Roofing Company) brought a small claims action against Raymond Hotte, seeking to collect the balance due for work done at 101-103 Clark Street in April 2004. Mr. Santos had done the work at Mr. Hotte's request pursuant to a written agreement signed by Mr. Hotte.

Admitted. And further answering, Judge Livingstone had no knowledge of any agreement between Mr. Hotte and Mr. Santos regarding the roofing work that Mr. Santos was to do at the request of Mr. Hotte.

(g) A trial was scheduled for September 2, 2005 in New Bedford District Court. Mr. Hotte caused a subpoena to be served on Judge Livingstone on or around August 23, 2005 requiring Judge Livingstone to appear for the trial on September 2, 2005. Judge Livingstone called the assistant clerk magistrate to ask him questions about the action. On August 25, 2005, Judge Livingstone filed a "Motion to Quash/Motion to Excuse Presence" asking that Mr. Hotte's subpoena be quashed or that Judge Livingstone

be excused from appearing at the trial.

Admitted. And further answering, in the course of his conversation with the Assistant Clerk Magistrate, he learned that Mr. Santos' claim related entirely to work done when Mr. Hotte was solely managing the building and responsible for repairs.

(h) In support of his motion, Judge Livingstone filed a notarized affidavit dated August 25, 2005 (the "Affidavit") in which he swore, under penalties of perjury, that (i) he had "not been actively involved in the management of [154 Eugenia Street or 101-103 Clark Street] for many years;" (ii) Mr. Hotte "has acted as property manager for the premises and has been the person who handles all matters pertaining to repair and maintenance of the buildings as well as all tenant related matters, the collection of rent and payment of building-related expenses;" and (iii) "As far as [he] can ascertain, the purpose of the witness summons is simply to annoy or harass me and is not meritorious." Judge Livingstone also stated that he would be on vacation from August 31, 2005 to September 14, 2005, and could not appear on September 2.

The Affidavit speaks for itself and the quoted language is part of the Affidavit. And further answering, at the time of the Affidavit, Judge Livingstone intended to communicate that as of the time of the Santos' claim, he was not involved in the management of the subject property and that Mr. Hotte was the sole manager of the property. And further answering, Judge Livingstone had stated that "I acknowledge that I should have been more exact in what I intended to convey by [these statements]. I should have indicated that at all times material and relative to the pending proceedings, I had not been actively involved in the management of the properties. There was never, however, any intent on my part to mislead the court. I have never made a false statement under oath in connection with this or any other matter."

(i) On September 2, 2005, both Mr. Hotte and Mr. Santos appeared pro se before Judge Bernadette L. Sabra in the New Bedford Division of Bristol District Court. Judge Livingstone did not appear. As a jury trial was requested but was not available that day, Judge Livingstone's motion and the trial were rescheduled for September 26th. Judge Sabra informed Mr. Hotte that he would have to "renotify" Judge Livingstone of the new date. Mr. Hotte did not inform Judge Livingstone of the continuance. The September 26, 2005 hearing was continued to October 17, 2005. Mr. Hotte did not notify

Judge Livingstone of this date change.

Judge Livingstone has no personal knowledge of the facts alleged in Paragraph (i), but believes they are true.

(j) On October 17, 2005, Mr. Hotte and Mr. Santos appeared. Judge Livingstone did not appear. As Mr. Hotte admitted liability for the debt (claiming he and Judge Livingstone were jointly liable), Judge Sabra ordered a repayment plan of \$100 per month, noting that Mr. Hotte had other legal avenues he could pursue to seek reimbursement from Judge Livingstone.

Judge Livingstone has no personal knowledge of the facts contained in paragraph (j) other than that he did not appear nor was he notified to appear. As to the remaining facts, he believes they are true.

(k) Judge Livingstone made at least two false statements in the Affidavit. First, he stated that he had "not been actively involved in the management of these premises for many years." Second, he stated that Mr. Hotte "has been the person who handles all matters pertaining to repair and maintenance of the buildings as well as all tenant related matters, the collection of rent and payment of building-related expenses."

Denied.

(l) When Judge Livingstone made these statements, he knew that they were not true. He had been actively involved in the management of the High Low properties since late November or early December 2004 when he and Mr. Hotte had had a falling out. From December 4, 2004 on, Judge Livingstone had, on behalf of High Low: (i) maintained the check register for High Low; (ii) paid building-related expenses for High Low Properties; (iii) made mortgage payments; (iv) communicated with the Housing Authority about recertification of the Section 8 units; (v) collected the Section 8 rents at both Clark Street and Eugenia Street from both the tenants and the Housing Authority; and (vi) maintained a partnership bank account.

Denied.

(m) On August 26, 2005, the day after he filed the affidavit in support of his motion to quash claiming that he had let Mr. Hotte handle all tenant related matters, Judge Livingstone signed contract renewals for two Section 8 tenants in High Low properties and wrote one of them, Adele Leeks ("Ms. Leeks"), the following letter.

Dear Ms. Leeks,

As you know, I am the co-owner of 154 Eugenia Street New Bedford

along with Mr. Hotte. Enclosed is a copy of the renewal of your lease with the New Bedford Housing Authority, Section 8 program, which I have signed. Also please find copies of your utility bills for your apartment which are in my name and I am paying.

Beginning 9/1/05 in accordance with the terms of your lease agreement, you are to forward to me a check payable to "High Low Properties" in the amount of \$204.00 each month being your share of the utility and rent payment as determined by the Housing Authority. I, in turn will continue to pay your gas and electric bills according to the lease agreement. Do not give your payment to Mr. Hotte as you have done in the past. If I do not receive your monthly payment, I will not pay your utility bills and will have you evicted from your unit for failure to pay your rent as required. If Mr. Hotte should take any action against you for complying with the instructions of this letter, or bring any legal action against you regarding the same, I will provide and pay for your legal defense as long as you continue to send me your monthly check as instructed.

If you have any questions regarding the same, please give me a call or check with the Housing Authority. Your monthly payments should be mailed to the above address so as to reach me by the 1st of the month or you may drop off your check to me at the same address.

Very truly yours, Michael J. Livingstone cc: Raymond G. Hotte w/enc.

Admitted.

(n) In making false statements in his affidavit, Judge Livingstone violated Canon 1 of the Current Code ("A judge shall participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards. . .") and Canon 2(A) of the Current Code ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.")

Denied.

(o) Moreover, Judge Livingstone, as a general partner of High Low, was financially responsible for its debts and had an obligation to see that the legitimate debts of the partnership were paid. His conduct in avoiding his business responsibilities and the legitimate debts of the partnership constitute a further violation of Canons 1 and 2A of the Current Code.

Denied. And further answering, at no time did Judge Livingstone avoid his business responsibilities and legitimate debts, but in fact, when Mr. Hotte abandoned his role as general partner of High Low,

Judge Livingstone attempted to maintain the High Low properties so that tenants would receive utilities and services that they required and did so only because Mr. Hotte, without notice, had abandoned his duties with regard to the management.

(p) Finally, Judge Livingstone's failure to appear in court on the date called for in the subpoena to present his motion, his failure to follow up to determine whether or not his Motion to Quash had been allowed or not and to ascertain if he needed to comply with any order the court might issue in connection with his motion also violated Canons 1 and 2A of the Current Code.

Denied.

And further answering, Judge Livingstone was to be out of the country between August 31, 2005 and September 14, 2005 as stated in his Motion and the Trial Court asked Mr. Hotte to notify Judge Livingstone of future dates, which he failed to do and there was no obligation upon Judge Livingstone to follow up the status of the case. Nor did he ever violate any Court order that had been issued in connection with the Santos case.

2. The Leeks Letter/Improper Threat in Violation of Canons I and 2A of the Current Code.

(a) In the letter from Judge Livingstone to Adele Leeks, quoted above, the Judge informed Ms. Leeks that if she did not forward her monthly rent payment to him (rather than to Mr. Hotte), he would "not pay your utility bills and will have you evicted from your unit for failure to pay your rent as required." If Judge Livingstone had followed through with this threat, it would have constituted a crime and formed the basis for a civil suit by the tenant.

Denied.

(b) Under Mass. Gen. Laws c.186, § 14, a landlord who "willfully or intentionally fails to furnish such water, hot water, heat, light, power, gas. . . or any lessor or landlord who directly or indirectly interferes with the furnishing by another of such utilities or services, or who transfers the responsibility for payment for any utility services to the occupant without his knowledge or consent.. . shall be punished by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment for not more than six months." Additionally, under the Consumer

Protection regulations, 940 CMR 3.17(6), it is an “unfair and deceptive practice” for an owner to violate willfully any provisions of M.G.L. c.186 s.14 or, when obligated to provide gas or electric service, to “fail to provide such service” or “to expose such occupant to the risk of loss of such service by failing to pay gas or electric bills when they become due.

The Paragraph appears to be a correct statement of the law.

(c) The fact that Judge Livingstone is a judge makes his improper threat to Ms. Leeks even more serious, given the potentially coercive effect of his letter.

Denied. And further answering, Judge Livingstone acknowledges that the wording of the letter may have been inappropriate but was never intended by him to be a threat, but was to deal with the situation that Mr. Leeks had been sending her monthly rental checks to Mr. Hotte, who had not only abandoned the management of the property, but had failed to pay the utilities bills and it was in that context that Judge Livingstone wrote the August 16 letter and in fact paid the bills out of his own pocket in order to prevent any tenants from being harmed. He testified:

Q. You undertook at the end of 2004 to start paying building related expenses?

A. I didn't see I had any choice. I couldn't not pay the water bill and have the water shut off. I couldn't not pay all the utility bills and have the utility shut off.

(d) Judge Livingstone's conduct in sending this letter to Ms. Leeks violated Canons 1 and 2A of the Current Code.

Denied.

3. Judge Livingstone's Agreement with Attorney Jane Warren, His Receipt of Money Pursuant to the Agreement, and His Conduct Related to the Agreement Violated Former Code Canons 1, 2, 5 and 6 - Current Code Canons 1, 2 and 4; and Rules 1.5 and 1.17 of the Massachusetts Rules of Professional Conduct.

(a) Judge Livingstone at the time of his appointment to the bench in December 2002 had a solo practice with an office at 261 Union Street in New Bedford, a

building he owned through a realty trust. His practice focused on domestic relations and probate.

Admitted.

(b) In December 2002, he entered into an agreement with Attorney Jane Warren ("Attorney Warren"), who also had an office at 261 Union Street, whereby Attorney Warren would pay Judge Livingstone 25% of the net fee that she received from his existing domestic relations clients and 50% of the net fee Attorney Warren received from representing executors of estates where Judge Livingstone had prepared the will of the decedent.

Judge Livingstone admitted that he entered into an agreement by which Attorney Warren would buy out Judge Livingstone's practice with an arrangement by which she would make future payments representing payment for work in progress on files in which a client of Judge Livingstone elected to retain Attorney Warren.

(c) Judge Livingstone sent a letter to his clients notifying his clients that Attorney Warren would be "taking over [his] client files."

Denied as an unfair characterization of the letter that Judge Livingstone sent to his clients regarding Attorney Warren. The entire letter is attached as Appendix A to this Answer and clearly states that although Attorney Warren would be "taking over his clients' files," the clients were advised that they may "wish to have other attorney represent their interest" and that he will "cooperate in any way possible regarding to the orderly transition of your file to your new attorney."

(d) Neither Judge Livingstone nor Attorney Warren ever notified his domestic relations clients that Judge Livingstone would be receiving a portion of the fees that Attorney Warren collected. Neither Judge Livingstone nor Attorney Warren ever notified the executors of the estates for which Attorney Warren performed legal services and where Judge Livingstone had prepared the will that Judge Livingstone would be receiving a portion of the fees that Attorney Warren collected.

Judge Livingstone admits he did not notify his clients of the arrangement by which Attorney Warren and he agreed that Attorney Warren would buy out his practice and pay for the work

in progress in the files in which Attorney Warren represented clients of Judge Livingstone. And further answering, Judge Livingstone's understanding that his arrangement with Attorney Warren would not increase any fee charged to his formal clients. Judge Livingstone believed that neither he nor Attorney Warren was obligated to notify clients of the arrangement with Attorney Warren in regard to the buy-out of his practice.

(e) Beginning in 2003, Judge Livingstone shared profits in Attorney Warren's law practice. Judge Livingstone received payments from Attorney Warren. If Attorney Warren did work for and collected fees from a former divorce client of Judge Livingstone's, she would pay Judge Livingstone 25% of the net fee collected. If she did work for the estate of someone whose will was drafted by Judge Livingstone, she would pay Judge Livingstone 50% of the net fee collected. Under this arrangement, Attorney Warren paid Judge Livingstone approximately \$14,000 in 2003, \$17,000 in 2004, \$6,000 in 2005, and \$12,000 in 2006.

Denied that Judge Livingstone shared profits in Attorney Warren's law practice. And further answering, any payments he received represented a buy-out of Judge Livingstone's practice by Attorney Warren and were in no regards in a fee-sharing arrangement between practicing attorneys.

(f) Attorney Warren provided the judge with accountings which accompanied her checks. The accounting listed the client, the fees, the expenses and his percentage of net fees. The checks frequently describe the payments as "referral fees" or "ref."

Admitted. However, in further answering, Judge Livingstone believed that he was receiving payments for the sale of his law practice and Attorney Warren's reference to referral fees does not change Judge Livingstone's understanding of the underlying transaction which was the sale of a law practice.

(g) Attorney Warren checked the obituaries every morning against the will list provided to her by Judge Livingstone. If someone died for whom Judge Livingstone had drafted the will, Attorney Warren would try to get in touch with someone in the family. On occasion, Judge Livingstone called Attorney Warren to inform her that someone that he had previously represented had died.

Admitted.

(h) Judge Livingstone, on the death of some of his former clients, sent flowers to the surviving spouse and executor. In some of these cases, Attorney Warren was retained by the executor to represent the estate. Judge Livingstone claimed the cost of the flowers as a business expense on Schedule C of his tax returns.

Denied.

(i) Judge Livingstone also has claimed the cost of internet service that he has at 261 Union Street as a business expense on his tax returns since he has been a judge. He uses the internet only to check on obituaries.

Admitted.

(j) As detailed below, Judge Livingstone represented to the Internal Revenue Service in the years 2003, 2004, and 2005 that he was operating an "Attorney at Law" business and took many expenses on his tax returns as business expenses that would only be justified if he was engaged in the active practice of law.

Admitted, but further answering, Judge Livingstone was still collecting accounts receivables of the time that he went on the bench and the only appropriate way to account for those in his tax returns was that he was continuing to receive payments as an "attorney at law" and that he had justifiable expenses in regard to those collections.

(k) The agreement between Judge Livingstone and Attorney Warren, Judge Livingstone's receipt of income from the arrangement, the failure to disclose that he and Attorney Warren were sharing fees, and his conduct in facilitating estate business for Attorney Warren violates Former Code Canons 1, 2, 5 and 6; Current Code Canons 1, 2, and 4; and Rules 1.5 and 1.17 of the Massachusetts Rules of Professional Conduct.

Denied. And further answering, the Respondent says that once he was appointed as a judge, he never undertook to secure business for Attorney Warren.

4. Tax Returns In Violation of Canons 1 and 2 of the Former Code and Canons 1,2 and 4 and of the Current Code.

(a) Judge Livingstone. and his wife filed joint tax returns for 2003, 2004, and 2005.

Admitted.

(b) His tax return for each year in question included a Schedule C, "Profit or loss from business." The business was described as "Attorney at Law" with a business address of 261 Union Street.

Admitted.

(c) On the income portion of the form he included income from two sources: (a) payments on his accounts receivable from his law practice resulting from time worked prior to his becoming a judge; (b) income from Attorney Warren as a result of the buyout arrangement.

Admitted.

(d) On the expense side, he claimed a variety of expenses. To summarize:

Year	<u>Schedule C Income</u>	<u>Schedule C Expenses</u>
2003	127,036	54,504
2004	84,127	39,283
2005	34,534	19,096

Admitted.

(e) The net in each year was carried forward and reported as "business income" on line 12 of form 1040 so the expenses claimed reduced his taxable income.

Admitted.

(f) Some of the expenses claimed by Judge Livingstone on Schedule C are bona fide business expenses that relate to the wrapping up of his law practice and the collection of accounts receivable from his practice that arose in connection with legal work performed by him prior to his appointment as a judge. However, the majority of the expenses on his tax returns are personal expenses that were improperly taken as business expenses.

**First sentence admitted. Second sentence denied.
However, Judge Livingstone admits that some of
the expenses that were taken as business
expenses may have raised legitimate questions
but were not done with any dishonesty or intent
to deceive.**

(g) In 2004, as an example, Judge Livingstone reported \$39,283 in business expenses broken down as follows:

Advertising	1,307.00
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Travel and Car Expense	465.00
Insurance	5,803.00
Legal and Professional	6,108.00
Office Expense	4,675.00
Repairs & Maintenance	500.00
Supplies	3,984.00
Taxes and Liens	167.00
Utilities	11,654.00
Other (postage, recording fees, bar charges, miscellaneous, newspapers)	4,620

Admitted.

(h) Judge Livingstone testified at his deposition taken on March 2, 2007 that he did not know why there was approximately \$15,500 in "utilities" and "supplies" expenses claimed in 2004.

Admitted.

(i) Examples of checks included in the totals on his tax return form in 2004 which are not bona fide business expenses are the following:

- i) On January 11, he paid \$23.90 ("office expense") on an MBNA credit card. The charge was from AOL for internet access on his computer at 261 Union Street.

Admitted.

- ii) On January 11, 2004, he paid the law firm of Perry, Hicks and Crotty \$120 ("legal and professional fees") to handle a rezoning variance for property he had received as a fee.

Admitted.

- iii) On January 12, 2004, he paid Garlington Florist \$1,182 ("Supplies") for flowers sent to "somebody for their funeral or flowers that I sent to somebody for the holiday."

Admitted.

- iv) MBNA payment of \$145.20 for taking probate court personnel out to lunch at Meza Luna restaurant.

Denied.

- v) On February 5, 2004 \$100 to Mary Looney, Assistant Register, for "typing or bookkeeping" and on April 6, 2004, \$100 to Kimberly Foley, Judge Livingstone's secretary at the probate court, for personal or business typing. He gave each of them a \$250 cash Christmas gift in December 2004 ("Office Supplies").

Admitted.

- vi) On July 10, 2004, Judge Livingstone paid \$681 ("Advertising") to *Standard Times* for an advertisement in a newspaper in memory of his late parents.

Admitted.

(j) Moreover, the explanations Judge Livingstone supplied at his deposition concerning his expenses confirmed the lack of justification of them as business expenses and were not candid and forthright. Judge Livingstone furnished the following explanation of his AOL internet charge:

Q: And AOL, was this for providing internet access?

A: Yes.

Q: Can you explain to me what use your law practice made in 2004 of internet services?

A: The only thing that I ever looked at on the internet is the obituaries.

Q: Were you looking at obituaries in 2004 on the internet?

A: Yes.

Q: For what purpose?

A: To see who had died.

Q: Why were you wanting to see that?

A: I've looked at obituaries every day of my adult life.

Q: And did you consider looking for obituaries an expense related to your law practice?

A. I did. Some of my former clients who died owed me money, I

would tell Attorney Manning to forget about the collection account. Some of my former clients who died who were long-term clients of mine, I would sometimes go pay my respects at their wake or funeral, I think upon my relationship to them.

Q: And some of their deaths resulted in business for Attorney Warren, correct?

A: That's correct.

MLD 114, 115.

Denied insofar as it characterizes Judge Livingstone's answers at his deposition. The quoted transcript lines are admitted.

(k) Judge Livingstone had the following explanation for his Garlington Florist charges:

Q: What is the next entry?

A: Garlington Florist.

Q: And can you explain to me how a payment to Garlington Florist related to your law business in 2004?

A: I don't know if those were flowers I sent to somebody for their funeral or flowers that I sent to somebody for the holidays, what they would relate to, but obviously it would be flowers to somebody. I can't tell you who those people would be.

Q: Can you explain why that would relate to your law business in 2004?

A: When I practiced law, I often sent people flowers when somebody in the family died, send it to the funeral home.

Q: But you weren't practicing law anymore in 2004, were you?

A: I still send people flowers to the funeral home when people die, people that I knew or people that I represented.

You're correct though, I was not practicing law anymore in 2004. There was no place else to put the income of (sic) the expenses.

MLD 116, 117.

Admit the accuracy of the transcript.

(1) Later in Judge Livingstone's deposition, he sought to explain some of the "office supplies" expenses that he took in response to a question concerning a June 6, 2005 payment to Staples for \$225.65 which he claimed as a Schedule C expense on his 2005 tax returns.

Q: There is a payment to Staples on June 6th for office supplies; is that right?

A: Yes. By the way, I have an idea of what some of those other expenses are now.

Q: Which other expenses?

A: The ones you asked me about the office supplies, what could they be?

When I became a judge there was no dictating equipment, and there was no money to get dictating equipment or find dictating equipment, so I went out and bought my own. I went to Staples, charged it, paid for it:
Dictating equipment, cassette recorder, transcriber.

Q: Was that in 2003?

A: Initially and since.

Q: So expenses that you have concurred in connection with your work as a judge you've charged to the law firm account here?

A: In a couple of instances, something would be utilizable in either/or the same dictating cassette that I hold in my hand when I have some question about a bill or an account, it's the same machine that I use when I dictate my pleadings.

Q: I don't understand. You, in 2003, you purchased a dictating machine?

A: Yes.

Q: So that you can dictate opinions,; is that right?

A: Correct.

Q: Opinions that you issue as a judge?

A: Correct.

Q: And those opinions get typed up by a court personnel on court time, right?

A: Yes.

Q: And the expense of that dictating machine, is something that you charge to your law firm expense?

A: Because I use the same dictating machine when I dictate a memo to my secretary, Wendy, and give her the cassette for her to either type something up relative to the accounts receivable or the bills payable or anything in that regard.

Q: Well, did you have a substantial amount of correspondence about your bills payable or receivable?

A: No. Very little.

Admit the accuracy of the transcript.

(m) In claiming expenses that were personal in nature as business expenses, and in his explanations of those expenses to the Commission, Judge Livingstone violated Canon 1 and 2 of the Former Code and Canons 1, 2 and 4 of the Current Code.

Denies. And further answering, the Respondent was audited by the Internal Revenue Service for his 2003 Return, which included the deductions now questioned by the Commission and following a full audit the only adjustment was the payment of an additional tax of \$171 related to an automobile mileage miscalculation. Further answering, in the audit, Judge Livingstone was represented by his certified public accountant of over 15 years and who was the tax preparer for the 2003, 2004, and 2005 returns. And further answering, with regard to the quoted sections of his March 2, 2007 deposition in which his Schedule C were reviewed, Judge Livingstone was not able to explain particular expenses because he did not have the back-up information and was told not

to speculate. He was not evasive, but was attempting to answer the questions as best he could, given the information then available to him. And further answering, Judge Livingstone is obtaining a second opinion with regard to the tax returns for calendar years 2004 and 2005 to the extent that he is advised to file an amended return, he will promptly do so.

5. Financial and Business Dealings in Violation of Former Code Canon SC(2) and Current Code Canon 4.

(a) In addition to the property owned by High Low and referenced above, at the time Judge Livingstone became a judge, and at all times since, Judge Livingstone has owned or had an interest in the following real estate:

Admitted that Judge Livingstone owns certain properties

261 Union Street (New Bedford). The Judge owns a 100% beneficial interest in the building. The building has approximately 12 to 13 tenants, many of whom are attorneys practicing in the Probate and Family Court.

Admitted that Judge Livingstone and his wife own a 100% beneficial interest in the building. And further answering, that although some of the tenants of the building, which is in Bristol County, are attorneys, and may handle divorce matters in the probate and family court, none of them have ever appeared before him in the Plymouth Division of the Probate and Family Court. He has never had to recuse himself in any case involving a tenant and would promptly do so if a tenant appeared before him.

222-226 Union Street (New Bedford). This property is owned by Union Street Investors LLC ("LLC"). Judge Livingstone has a 99% interest in the LLC and his wife has a 1% interest. The members of the LLC are Judge Livingstone and his wife. 222 Union Street is a five story building with a restaurant/bar on the first floor. There are 19 offices on the second, third and fourth floors. The building has many vacancies.

Admitted.

Vacant Land. Judge Livingstone owns various parcels of vacant land in Mattapoisett and Dartmouth.

Admitted.

69 Katherine Street (New Bedford). Judge Livingstone owns this three-unit building which has a Section 8 unit in it.

Admitted.

(b) From September 15, 2003 through August 12, 2004, Judge Livingstone paid all the bills and maintained the check register for 261 Union Street. He paid the cleaning bills from at least November 2005 through November 2006.

Admitted in part and denied in part.
When Judge Livingstone was appointed to the bench, his legal secretary of nine years, Wendy Andre, was his bookkeeper and paid all of the bills related to the properties. However, in 2003, she became a full-time law student and Judge Livingstone took over those responsibilities. And further answering, in February of 2004, Judge Livingstone wrote to the Legal Counsel of the Supreme Judicial Court asking whether his real estate activities, which he described, were appropriate, and it was suggested that he should seek an advisory opinion. After receiving from the Committee on Judicial Ethics its response to his inquiry, which is attached as Tab B, Judge Livingstone asked Ms. Andre to resume her duties as bookkeeper, which she agreed to do and took over as of August 2004 and continues to perform those bookkeeping duties up to the time of the filing of this Complaint. And further answering, Judge Livingstone has not been involved in the negotiations of any leases or tenancies and his son, Michael Livingstone, and Jane Warren have assumed the role of managing the buildings. And further answering, in 2006, Judge Livingstone hired Arthur DeMello to manage 222 Union Street.

(c) Judge Livingstone maintained an office at 261 Union Street which he used on Saturdays. During the period when he was maintaining the accounts, he collected the rent checks from a box in Attorney Warren's office where the various tenants in the building left them, prepared the deposit tickets, and frequently deposited the rent.

Admitted.

(d) In December 2005, Judge Livingstone was notified that complaint Number 2005-104 had been filed against him with the Commission. In December 2006, Judge Livingstone notified the tenants at 261 Union Street that Arthur DeMello ("Mr. DeMello"), the superintendent at 222 Union Street, would be managing the property. Prior to that time, Attorney Warren, the Judge and his son had all had a part in managing the building. Judge Livingstone acknowledged at his deposition on March 2, 2007 that, prior to December 2006, the management was "ambiguous."

Admitted the facts contained in 5D and further answering, it was the Special Counsel for the Commission who suggested that the management of the building was "ambiguous."

(e) Mr. DeMello was the superintendent of 222 Union Street before Judge Livingstone went on the bench and he continued to be building superintendent of this property after Judge Livingstone went on the bench. Mr. DeMello collects the rents and deposits the rent checks and writes checks for the building payroll.

Admitted.

(f) On or about May 28, 2004, the "Manager" of the LLC which had been Judge Livingstone was changed to the Judge's wife. However there was no change in the LLC operating agreement which provided that the LLC "shall be investor managed." Judge Livingstone continued to hold a 99% interest in the property. Judge Livingstone conceded at his deposition that his wife has never performed any managerial services and that he made the change in connection with his communication to the Committee on Judicial Ethics in the spring of 2004.

Admitted.

(g) Judge Livingstone paid the bills for 222 Union Street other than payroll and maintained the check register from September 15, 2003 to August 2004.

Judge Livingstone admits that he did pay bills other than payroll and he did maintain the check register until he received the advice from the Committee

on Judicial Ethics, which lead him to ask his former bookkeeper to return to perform those functions.

(h) Judge Livingstone has kept the records on 69 Katherine Street continuously since he became a judge in December 2002. He pays the taxes and the bills. He maintains the checking account relating to the property. The Section 8 tenant in the property moved out in the summer of 2006. A new Section 8 tenant moved in in the fall of 2006. Judge Livingstone has communicated with the Housing Authority concerning certification of the Section 8 unit since he became a judge.

Admitted and further answering, Judge Livingstone has owned the three-family residential building located at 69 Katherine Street, New Bedford since 1995. His sister lives in one unit and a Section 8 tenant occupies a second unit. The third unit is vacant. The tenants pay their own utilities and Judge Livingstone pays taxes, insurance, and water charges. When Ms. Andre was bookkeeper, she paid the bills and during her absence, Judge Livingstone took over the payments. When Mr. Hotte and Judge Livingstone were partners, Mr. Hotte handled the rental of the units and arranged for needed repairs. Rents are sent to Judge Livingstone, and his son, Michael, arranges for any needy repairs.

(i) Canon 5C(2) of the Former Code provided that a judge "should not serve as an officer, director, manager, advisor or employee of any business." *Id.* Judge Livingstone did not comply with Canon 5C(2) of the Former Code.

Canon 4D(2) of the Current Code provides that judges "shall not serve, with or without remuneration, as an officer, director, manager, general partner, advisor or employee of any business." Judge Livingstone did not comply with Canon 4D(2) of the Current Code.

The language is admitted of the current and former Code. However, Judge Livingstone did not fail to comply with either the Current or Former Code.

(j) Judge Livingstone was personally and directly advised of the prohibition and was aware that certain of his activities may have constituted violations of the Current

Code. On March 11, 2004, Judge Livingstone requested an advisory opinion from the Committee on Judicial Ethics concerning his real estate activities. The Committee on Judicial Ethics (the "CJE") issued its advisory opinion (No. 2004-6) to Judge Livingstone on June 23, 2004, which *inter alia* stated that:

- Section 4(D)(2) of the Code of Judicial Conduct prohibits a judge from serving, with or without remuneration, as an officer, director, manager, general partner, adviser, or employee of a business.
- Judge Livingstone's activities with regard to the residential apartment buildings (the two buildings owned by High Low) "are within the bounds of what is permitted under the Code. You have delegated the managerial labor associated with the apartments to your real estate partner, who handles all interaction with the tenants and the payment of all expenses. Your role is strictly passive. The management tasks are left to your partner."
- Judge Livingstone's involvement with the three-family house (69 Katharine Street) "also is within the limits of permissible activity. Your real estate partner is responsible for the rental of the units and for responding to the tenants' requests for repairs. While the rent is sent to you, and you pay the bills, this activity does not rise to a level of engagement that amounts to managing a business."
- Judge Livingstone's involvement in the commercial properties (222 Union Street and 261 Union Street) "does move into the prohibited area of business management." Citing to In re Imbriani, 139 N.J. 262 (1995), in which the judge "received rent checks from the corporation's bookkeeper, assisted the bookkeeper in the payment of the corporation's bills, and assisted the corporation's accountant in filing tax returns," the CJE informed Judge Livingstone that "you need to restrict your level of involvement in your commercial real estate investments to that of a passive owner."
- Specifically, the CJE stated that (amongst other things) the "day to day operation of the buildings, including the accounting and bookkeeping functions, must be handled by others."

(Emphasis added.)

Judge Livingstone admits that he received an advisory opinion No. 2004-6 on or about June 2004, but denies that any language in the opinion was highlighted in the fashion contained in the Commission's Formal Charges and that to add emphasis unfairly characterizes

**the letter that Judge Livingstone received,
a copy of which is attached as Tab B.**

(k) Judge Livingstone has been a general partner of High Low during his entire tenure as a judge. This is a per se violation of Canon 4D(2) of the Current Code.*

Denies.

(l) Judge Livingstone is not a passive investor in the LLC because the LLC by its organizational documents is "member managed" and Judge Livingstone has a 99% membership interest. After reviewing the CJE opinion he made his wife "manager" of the LLC which he acknowledged was meaningless. This is a violation of Canon 5C(2) of the Former Code and Canon 4D(2) of the Current Code.

**Judge Livingstone believed that by
making his wife the manager of the LLC,
he was conforming to both the Current
and Former Code and was in compliance
of the suggestion of the Commission's
Committee on Judicial Ethics.**

(m) Just a few months following his receipt of the CJE's advisory opinion, in December 2004, when Mr. Hotte gave up any managerial responsibility for High Low, Judge Livingstone simply took over these responsibilities including the accounting and bookkeeping functions for High Low. Judge Livingstone also executed lease recertifications with the New Bedford Housing Authority, collected Section 8 rents, and threatened one tenant with eviction if she did not pay her rent.

**Admitted, but in further answering,
Judge Livingstone believed that Mr.
Hotte's abandonment of his duties as
manager of High Low presented an
emergent situation that required him
temporarily to take over those activities.
He specifically denies any threat.**

(n) Judge Livingstone has during the time periods noted in paragraph 4(b) through 4(i), 4(1) and 4(m) been actively involved in managing real estate business activities at 69 Katherine Street, 22 Union Street, 261 Union Street and the properties owned by High Low which, separately (particularly in the case of High Low) and taken together, constitute a separate violation of Canon 4D(2) of the Current Code.

Denies.

(o) He also maintained an office at 261 Union Street and was claiming significant law practice business expenses on his tax return.

He admits maintaining an office at 261 Union Street, but denies the characterization that follows with regard to his tax return.

(p) The activities described above were not passive and Judge Livingstone thereby violated Canon 5C(2) of the Former Code and Canon 4D of the Current Code.

Denies. Judge Livingstone believed that the activities that he undertook with regard to the property was passive and also in accord with the canons.

6. False Reporting to the SJC and State Ethics Commission in Violation of Canon 6 of the Former Code and Canon 4 of the Current Code.

Inaccurate reports of financial activities submitted to the SJC and state ethics commission.

Insofar as he is required to do so, he denies the highlighting of the beginning of Paragraph No. 6.

(a) Canon 4H(2) of the Code of Judicial Conduct states:**

A judge shall report on or before April 15 of each year, with respect to the previous calendar year, the date, place and nature of any activity for which the judge received compensation, the name of the payor, the amount of compensation so received, and such other information as is required by the Supreme Judicial Court or by law. . .The judge's report shall be filed as a public document.

There is a correct statement of the Code.

* Under the Former Code, effective through September 30th, 2003, Canon 5C(2) stated that "Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity permitted by Canon 4, but should not serve as an officer, director, manager, advisor or employee of any business." Thus, until October 1, 2003, the Code of Judicial Conduct did not include an express reference to a judge serving as a "general partner" of a business.

** Before October 1, 2003 Canon 6C.

(b) State court judges are also required to file each May 1 for the previous calendar year a financial statement with the State Ethics Commission, commonly described as a Statement of Financial Interests or "SF1."

Admitted.

(c) Under M.G.L. c. 268B, § 7, a person who files a false statement of financial interest with the State Ethics Commission “shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than three years, or in a house of correction for not more than two and one-half years, or both.”

Contains a correct statement of the law.

(d) By signing the State Ethics financial filings (SFIs), Judge Livingstone swore that he had made a “reasonably diligent effort to obtain reportable information” and that the information on the form “is true and complete, to the best of my knowledge.”

Admitted and it is a correct statement of the law with regard to the filings. However, in further answering, Judge Livingstone believed that he was in conformity with the law.

(e) Judge Livingstone violated his reporting obligations by failing to report the income he was receiving from Attorney Warren.

Admitted and it is a correct statement of the law with regard to the filings. However, in further answering, Judge Livingstone believed that he was in conformity with the law.

(f) Judge Livingstone also violated his reporting obligations by failing to report that he was a partner in High Low.

Denies. Judge Livingstone believed, pursuant to a letter from Robert S. Bloom, Deputy Administrative Assistant to the Supreme Judicial Court, attached as Tab C that he was not required to report either legal fees and past legal work or for payments in connection with the sale of the law practice.

And further answering, Judge Livingstone denies that he has engaged in a pattern of conduct which constitutes willful misconduct in office; or conduct prejudicial to the administration of justice and unbecoming a judicial officer or that brings the judicial office into disrepute and violates the Code of Judicial Conduct and the Rules of Professional Conduct.

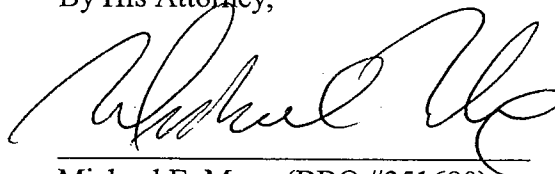
And further answering, Judge Livingstone admits that in hindsight he made certain errors with regard to his financial dealings, but denies that he at any time acted with intent to deceive and at all times thought he was acting in conformity with his

understanding of advice obtained from his accountant, the Committee on Judicial Ethics and the Assistant to the Supreme Judicial Court, with regard to extra judicial income and the agreement with Attorney Warren. Although he recognizes that he may have made errors, he does not believe that he has acted in a fashion that has violated the cannons of conduct or ethics and that at all times, even in difficult emergent circumstances, he has acted in accord with his understanding of his obligations as a judge.

And further answering, Judge Livingstone will present evidence as to his character, as to his performance on the bench and to his standings in the legal and judicial community.

MICHAEL J. LIVINGSTONE

By His Attorney,

A handwritten signature in black ink, appearing to read "Michael E. Mone", written over a horizontal line.

Michael E. Mone (BBO #351680)
ESDAILE, BARRETT & ESDAILE
75 Federal Street
Boston, Massachusetts 02110
(617) 482-0333

DATED: October 19, 2007

A

LAW OFFICES OF
MICHAEL J. LIVINGSTONE

261 UNION STREET
NEW BEDFORD, MA 02740

(508) 997-9300
FAX (508) 990-8738

December 16, 2002

Dear Client:

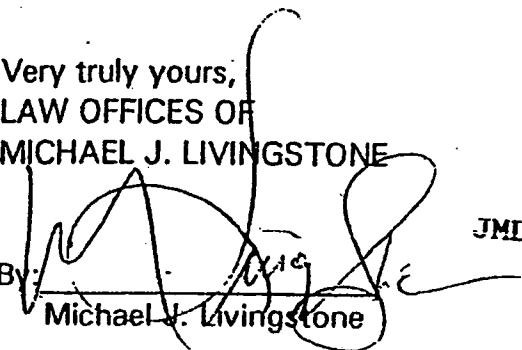
I want to thank you for allowing me to have been of service to you with respect to your legal needs. On December 11th, Governor Swift nominated me for the position of Associate Justice of the Plymouth County Probate & Family Court. As you may be aware, Judges are not permitted to continue to practice law. As such, should I be confirmed for this position by the Governor's Council, I will no longer be able to be your attorney. A judicial appointment is a once in a lifetime opportunity. Some of the happiest years of my father's legal career were those when he served as a Probate Court Judge. For many years, I have wanted to follow in his footsteps. Now I hope to have the opportunity to do so.

Attorney Jane Warren who has been an associate of mine for approximately ten years will be taking over my client files. She has practiced directly across the hall from me here at 261 Union Street since she began her legal career. We often consult with each other on cases and we have covered cases for each other on many occasions over the years. She is very able and will be able to assist you with respect to all of your legal needs as I have done in the past. If you wish to have another attorney represent your interests, you are free to do so and I will cooperate in any way possible relative to the orderly transition of your file to your new attorney. If you would like to come in to meet Attorney Warren, please give me a call upon your receipt of this letter and I will make arrangements for you to do so.

If I am presently nominated in your Will or Trust to serve in a fiduciary capacity or if you have named me in your Health Care Proxy or Durable Power of Attorney, you will be getting a second letter from me concerning the same as these documents will need to be revised. Of course, I would be happy to arrange to take care of the same on your behalf without any cost to you. I would like to thank you for the pleasure of having been of service to you with respect to your legal needs. If you choose to stay with Attorney Warren, I know you will not be disappointed.

I wish you and your family every best wish for the upcoming holidays and a happy and healthy and prosperous New Year.

Very truly yours,
LAW OFFICES OF
MICHAEL J. LIVINGSTONE

By: 
Michael J. Livingstone

JML00002

SUPREME JUDICIAL COURT
COMMITTEE ON JUDICIAL ETHICS

June 23, 2004

Honorable Michael J. Livingstone
Plymouth Probate Court
P.O. Box 277
Brockton, MA 02303

RE: CJE Opinion No. 2004-6

Dear Judge Livingstone,

You have requested an opinion from the Committee on Judicial Ethics concerning your ownership of certain real estate investment properties and your financial activities related to the properties. Your letter states that you have an ownership interest in five properties, all of which are located outside the county in which you usually sit as a judge.

Relevant factual background

You hold a ninety-nine per cent interest in a limited liability corporation that owns a commercial office building. Your wife holds the remaining one per cent interest. Until recently, you were listed as "manager" on the corporation documents, but you have now resigned, and your wife has replaced you in that capacity.

You are also the trustee of a realty trust of which you, your wife, and your children are the beneficiaries. The trust also owns a commercial office building.

Each of the commercial office buildings has eleven tenants, most of whom rent one or two small offices. The first floor tenants in both buildings rent substantially more space. Each building has a superintendent who manages the day to day operation of the building, including the rental of the offices, the collection of rents, and the handling of tenant inquiries. One building has two part-time employees who operate the elevator. The real estate tax bills, water bills, utility bills, repair bills, and other bills related to these properties are sent to you. Each Saturday, in an office you maintain in one of

the buildings, you write checks and pay the bills. Until recently, these bookkeeping tasks were performed by your former legal secretary. Each year you prepare the annual tax returns together with your accountant. You report any profit or loss on your personal returns.

You and a real estate partner each own a fifty per cent interest in two multi-family residential apartment buildings. Your real estate partner manages the day to day operation of the buildings, including the rental of the units, the collection of rents, the handling of tenant inquiries, and the payment of all bills. You report your profit or loss on your personal tax return.

Finally, you have sole ownership of a three-family house. Your real estate partner handles the rental of the units and arranges for any needed repairs. The rents are mailed to you, however, and you pay the bills associated with the property.

You receive no salary in connection with your activities involving any of the properties.

Applicable code provisions

Section 4 D of the Code of Judicial Conduct is the primary section that addresses the type of financial activities you have described. Section 4 D states in relevant part:

"(1) A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, that may interfere with the proper performance of the judge's judicial position, that may reasonably be perceived to exploit the judge's judicial position, or that may involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

"(2) Subject to the requirements of this Code, a judge may hold and manage investments, including real estate, and receive compensation as set forth in Section 4 H, but shall not serve, with or without remuneration, as an officer, director, manager, general partner, advisor or employee of any business.

* * * * *

"(4) A judge shall manage his or her investments and other financial interests to minimize the number of cases in

which disqualification is required or advisable. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification."

Participation by a judge in financial and business dealings is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety, as well as the specific prohibition in Section 2 B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1.

Analysis

In applying the Code to your activities, the committee sees no conflict with Section 4 D (4). You state in your letter that none of your tenants has ever appeared before you, and therefore frequent disqualification has not been an issue; moreover, since the properties in which you have an ownership interest are located outside the county in which you usually sit, it is unlikely that frequent disqualification would be an issue in the future. You have indicated that, should a tenant appear as a party before you, you would disqualify yourself, as is proper. See CJE Opinion No. 91-1 (concluding that a judge who had a five per cent interest in an office building as beneficiary of the realty trust that owned the building would not be disqualified from sitting on cases in which the lottery commission, a tenant in the building, was a neutral stakeholder; but stating that the judge should not participate in any other cases involving the commission). Further, if any of your tenants are attorneys, you should recuse yourself from all contested or ex parte matters in which your tenant represents a party. See CJE Opinion No. 93-3 (stating that a judge was disqualified from all contested and ex parte matters in which one of his attorney tenants represented a party). If your real estate partner is an attorney, you should also recuse yourself from all matters (not just contested matters) in which he or she represents a party.

The committee also sees no conflict with Section 4 D (1). The financial and business dealings you describe do not appear to reflect adversely on your impartiality, interfere with the proper performance of your judicial position, cannot reasonably be perceived to exploit your judicial position, and do not involve you in frequent transactions or continuing business relationships with lawyers or other persons likely to come before you. In making this determination, the committee considers it significant

that your interaction with the tenants appears to be minimal, and that the weekend time that you spend paying the bills and the like does not appear to interfere with your performance as a judge.

However, the committee believes that certain of your real estate activities are problematic under Section 4 D (2). While that section expressly permits a judge to hold and manage real estate "investments," it prohibits a judge from serving, with or without remuneration, as an officer, director, manager, general partner, adviser, or employee of a "business."

The question is when does permitted management of real estate "investments" cross the line and become forbidden management of a real estate "business." Factors to be considered include the nature, extent, and complexity of the holdings.¹ The distinction between capital and labor has also been proposed as a factor for differentiating between "investment" and "business." "[A]s any financial pursuit becomes more active, personal, and time consuming, even in the absence of interference with the 'proper performance' of judicial duties, it becomes more business-like and therefore more likely to be prohibited." See J. Shaman, S. Lubet & S. Alfini, *Judicial Conduct and Ethics* § 7.11 (2000) (footnote omitted). The Court of Appeals of Maryland stated that the difference between permitted management of a real estate investment and prohibited management of a real estate business is "that a judge may establish policy and participate in decisions, while actual management is left to others." *In re Foster*, 271 Md. 449, 475 (1974). The court also stated that "[i]n almost every case of this sort, there is no litmus test, but rather an elastic standard based on questions of degree." *Id.* at 475. In general, a judge may establish policy and participate in decisions regarding the purchase, sale, and use of land, but the actual management must be left to others.

¹ In past opinions, the committee has examined the demarcation between the permitted participation in "civic" organizations and prohibited participation in a "business." In CJE Opinion 98-7, the committee determined that a nonprofit golf club fit neatly into neither category. The committee ultimately concluded that the golf club had more elements of a "business," because it had 600 members, eighteen to thirty employees, a budget in excess of \$1 million, and a major capital improvement project underway. The committee therefore determined that the Code did not permit the judge to serve as a director of the golf club.

With these guiding principles in mind, the committee looks at your real estate investments and your activities associated with those investments in an effort to determine where your activities fall on the continuum between management of an "investment" and management of a "business."

Your activities with regard to the residential apartment buildings clearly are within the bounds of what is permitted under the Code. You have delegated the managerial labor associated with the apartments to your real estate partner, who handles all interaction with the tenants and the payment of all expenses. Your role is strictly passive. The management tasks are left to your partner.

Your involvement with the three-family house also is within the limits of permitted activity. Your real estate partner is responsible for the rental of the units and for responding to the tenants' requests for repairs. While the rent is sent to you, and you pay the bills, this activity does not rise to a level of engagement that amounts to managing a business. See New York Advisory Opinion 92-33 (concluding that a judge may collect rent from the tenant of a one-family residence).

The committee is of the opinion that your involvement in the commercial properties, however, does move into the prohibited area of business management. While there is no bright line of demarcation, the increased complexity of the transactional details involved with these two properties warrants the advice that your involvement must be limited. This conclusion is supported by a decision of the Supreme Court of New Jersey, holding that a judge who assisted in the management of the affairs of a corporation that held an office building as its primary asset violated the prohibition on managing a business. In the Matter of Imbriani, 139 N.J. 262 (1995). The judge in that case "received rent checks from the corporation's bookkeeper, assisted the bookkeeper in the payment of the corporation's bills, and assisted the corporation's accountant in filing tax returns. He [also] performed other miscellaneous services for the corporation and the office building, including handling maintenance." *Id.* at 264. In your case, you have taken on the responsibilities of your former bookkeeper. The real estate tax bills, water bills, utility bills, repair bills, and other bills related to your commercial office properties are sent to you, and each weekend, in an office you maintain at one of the properties, you write the checks and pay the bills.

It is the opinion of this committee that you need to restrict your level of involvement in your commercial real estate

investments to that of a passive owner. The day to day operation of the buildings, including the accounting and bookkeeping functions, must be handled by others. This will ensure that the mandated buffer between "investment" and "business" remains intact. The hiring of a replacement bookkeeper would be one step toward removing you from business management, but it would not be determinative, since the day to day supervision of employees also is categorized as business management. Your letter indicates that the superintendents of your commercial buildings have considerable autonomy and flexibility in the management of these buildings. You might want to have any replacement bookkeeper report to a superintendent, or to your real estate partner, so as to lessen your active involvement and ensure compliance with the Code.

In closing, the committee reiterates that establishing a dividing line between management of an "investment," on the one hand, and management of a "business," on the other hand, is a matter of degree, and it must be done based on the unique facts of each case.

Very truly yours,



Neal Quenzer
Secretary

NQ/lp

C

SUPREME JUDICIAL COURT
1300 NEW COURT HOUSE
BOSTON, MASSACHUSETTS 02108

Robert S. Bloom
Deputy Administrative
Assistant

617-557-1165

March 28, 2003

Hon. Michael Livingston
Plymouth Probate and Family Court
Russell Street
P.O. Box 3640
Plymouth, MA 02361

Dear Judge Livingston:

This letter is in response to your written inquiry of March 25, 2003. As I told you in our telephone conversation, judges need not report income in Item I on the form (Extra-Judicial Services) for services performed prior to appointment to judicial office. Thus, legal fees for past legal work performed by an attorney or payments from sale of your law practice should not be reported on the "Annual Report of Extra-Judicial Income."

Rental income from tenants of various commercial and residential properties would only have to be reported in Item I if you are performing extra-judicial services to obtain this income. Also if you were holding any business, professional or fiduciary office or position related to the rental income, you would have to report that in item IV. See S.J.C. Rule 3:09, Canon 5(C) and (D) on financial and fiduciary activities.

I hope that this letter is of some assistance to you.

Sincerely,

Robert S. Bloom

Robert S. Bloom

RSB/pg