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September 22, 2009

By Regular Mail and
Email: elena@judgewatch.org

Elena Ruth Sassower
Director
Center for Judicial Accountability
PO Box 3002
Southampton, New York 11969

Dear Ms. Sassower:

In response to your letter of September 16, 2009, enclosed please find two indexes of litigation against the Commission since April 1995 – those commenced by complainants, and those commenced by judges and/or their attorneys.

We noticed in compiling these lists that the following case was inadvertently omitted from the pre-1995 list which my predecessor, Gerald Stern, had provided to you: *Hanft v. Commission*, Index No. 8255/86 (Sup Ct NY Co), dismissed 7/2/86; app dismissed (1st Dept).

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert H. Tembeckjian".

Robert H. Tembeckjian

cc: Senator John L. Sampson
Timothy Spotts, Esq.

From: Robert H. Tembeckjian
To: elena
CC: sampson@senate.state.ny.us; spotts@senate.state.ny.us
Date: 9/22/2009 7:01 PM
Subject: Re: Litigation Challenges to the NYS Commission on Judicial Conduct --Particularly by Complainants
Attachments: rht-to-sassower.2009-09-22.pdf; Litigation Against Commission by Judges.1995-2009.pdf; Litigation Against Commission by Complainants.1995-2009.pdf

Dear Ms. Sassower:

Enclosed are the cases you asked for and my cover letter of today's date, which will also be mailed to you, Senator Sampson and Mr. Spotts. The cases are organized into two lists: litigation commenced against the Commission by complainants, and litigation commenced against the Commission by judges and/or their attorneys. The volume (and sometimes vehemence) of litigation by both groups tends to underscore my argument that disappointed litigants believe the Commission does too little, judges tend to think the Commission does too much, and the truth is we get it just about right.

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>>> On 9/16/2009 at 11:00 AM, in message <29B84753AB8F4D1E915075F0D578132A@cja001>, elena <elena@judgewatch.org> wrote:

Dear Mr. Tembeckjian,

Attached is my already-faxed letter of today's date.

Thank you.

Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)
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ACTIONS COMMENCED BY JUDGES
AGAINST THE COMMISSION ON JUDICIAL CONDUCT

CHALLENGES TO COMMISSION PROCEDURES & POLICIES

Court of Appeals Decisions
(1978 to present)

Matter of Going, 97 NY2d 121 (2001)

Commission has jurisdiction to investigate allegations of misconduct notwithstanding that the Commission never received a written complaint or filed an administrator's complaint with respect to the conduct, where the Commission had advised the judge about the matter prior to the judge's investigative testimony and the judge did not object to the scope of inquiry at the investigative appearance.

Matter of Washington, 100 NY2d 873 (2003)

Court of Appeals may consider evidence submitted in support of a motion to reconsider where Commission has granted reconsideration, reviewed the evidence and adhered to its original determination.

Matter of K., 92 NY2d 1041 (1999)

Dismissing appeal on the ground that the Court of Appeals does not have jurisdiction to entertain an appeal from an order of the Commission denying a judge's motion to dismiss a formal written complaint.

Matter of Shaw, 96 NY2d 7 (2001)

Court of Appeals lacks jurisdiction to consider evidence submitted in support of a motion to reconsider after the Commission has declined reconsideration.

Matter of LaBelle, 79 NY2d 350 (1992)

Court of Appeals lacks jurisdiction to review Commission's order denying judge's motion to vacate an agreed statement of facts and waiver of a hearing and for reconsideration of Commission's determination that the judge should be removed from office.

Matter of Harris, 72 NY2d 335 (1988)

Rejecting judge's argument that the Commission was obligated to give a judge a private warning (rather than a public sanction) because it had done so in connection with a similar charge involving another judge.

Matter of Lenney, 70 NY2d 863 (1987)

Court of Appeals lacks jurisdiction to review Commission's order denying judge's motion for reconsideration of a determination of removal after summary determination.

Matter of Seiffert, 65 NY2d 278 (1985)

Commission's rule requiring proof by preponderance of the evidence satisfies constitutional requirements.

Stern v. Morgenthau, 62 NY2d 331 (1984)

Grand Jury may not subpoena confidential records of the Commission. Sections 44, 45 and 46 of the Judiciary Law prohibit disclosure of such records to Grand Jury investigating the conduct of a judge.

Matter of Sims, 61 NY2d 349 (1984)

Judge was not denied procedural and substantive due process during Commission's investigation by the filing of additional Administrator's Complaint based on discovery of possible misconduct during an investigation of the initial Administrator's Complaint.

Commission on Judicial Conduct v. Doe, 61 NY2d 56 (1984)

Commission subpoenas upheld based upon a showing that the subpoenas were reasonably related to a proper subject of inquiry; some portions of the subpoenas went beyond the scope of the Commission's investigation and were overbroad.

Matter of Aldrich, 58 NY2d 279 (1983)

Rejecting judge's suggestion that the Commission has authority to impose a conditional sanction, noting that there is neither a constitutional nor a statutory basis for contingent or probationary penalty.

Matter of Petrie, 54 NY2d 807 (1981)

Upholding Commission rule providing for summary determination; statutory requirement authorizing Commission to make determination after a hearing does not require Commission to hold a formal hearing where no issue of fact is raised.

Nicholson v. Commission on Judicial Conduct, 50 NY2d 597 (1980)

Commission subpoenas upheld based upon the Commission's broad powers to inquire into the conduct of a judge and a showing that the information sought is reasonably related to a proper subject of inquiry. Confidentiality of Commission proceedings did not require sealing of court records.

CHALLENGES TO THE RULES GOVERNING JUDICIAL CONDUCT

Court of Appeals Decisions
(1978 to present)

Matter of Raab, 100 NY2d 305 (2003)

Restrictions on partisan political activity in Sections 100.5(A)(1) and 100.5(A)(1)(c) – (g) of the Rules did not violate judge's First Amendment rights; the rules are narrowly tailored to further compelling state interests, such as preserving the impartiality and

independence of the judiciary and maintaining public confidence in the state court system.

Matter of Watson, 100 NY2d 290 (2003)

Section 100.5(A)(4)(d)(i) of the Rules, which prohibits judicial candidates from making pledges or promises of conduct in office, did not violate candidates' First Amendment rights because the rule is narrowly tailored and does not prohibit candidates from speaking their views on legal issues.

Matter of Sims, 61 NY2d 349 (1984)

Appearance of impropriety standard in Rules is not unconstitutionally vague.

OTHER STATE LITIGATION AGAINST THE COMMISSION
(1995 to present)

Shelton v. Commission on Judicial Conduct, Supreme Court, New York County (2007)
(Available on Westlaw at 2/21/2007 N.Y.L.J. 22 and Lexis at 237 NYLJ 34)
Dismissing Article 78 proceeding alleging that the Commission lacked jurisdiction to investigate the pending complaints against her and seeking a judgment enjoining the Commission.

Shelton v. Commission on Judicial Conduct, Supreme Court, New York County (2007)
Article 78 proceeding seeking a stay and judgment annulling the Commission's appointment of a hearing Referee who previously worked for the Commission; discontinued pursuant to the terms of the public Stipulation in *Matter of Marian R. Shelton*.¹

Spargo v. Commission on Judicial Conduct, 23 AD3d 808 (3d Dept. 2005)
Affirming lower court's judgment dismissing a judge's Article 78 petition seeking to prohibit the Commission from enforcing *inter alia* the political activity limitations of the Rules. The Court held that the prohibitions in the Rules pertaining to partisan political activity do not violate either free speech or equal protection rights.

Jones and Spargo v. Commission on Judicial Conduct et. al.,
Supreme Court, Albany County (2005)
Granting Article 78 petition in which judge and his attorney sought to overturn a decision by referee granting Commission counsel's motion to disqualify the attorney from representing the judge. The Commission declined to appeal the Court's decision.

¹ <http://www.scjc.state.ny.us/Determinations/S/shelton.htm>

Doe v. Commission on Judicial Conduct, 246 AD2d 409 (1st Dept 1998)

Dismissing Article 78 proceeding brought by a judge who sought to overturn the Commission's determination on the ground that one of the six-member majority who voted for admonition was not a member of the Commission when the determination was filed. The Court held that the Commission's "discretionary or quasi-judicial act here was its ... deliberations and vote on the disciplinary action," and the Commission's subsequent vote to approve a draft of the determination did not make the earlier vote "preliminary."

Doe v. Commission on Judicial Conduct, Supreme Court, New York County (1996)

A judge under investigation by the Commission commenced an Article 78 proceeding seeking *inter alia* to stay his appearance to testify before the Commission or to dismiss the complaint before the Commission. The matter was discontinued by stipulation.

Backal v. Commission on Judicial Conduct, Supreme Court, Nassau County (1995)

A judge sought to enjoin the Commission from further action in a pending matter on the ground that its jurisdiction lapsed upon resignation, and that the provision in the Judiciary Law providing the Commission 120 days in which to remove a judge after resignation was unconstitutional. The court declined to enjoin the Commission from continuing its proceedings, holding that the judge had not shown a likelihood of ultimate success or irreparable harm.

FEDERAL LITIGATION AGAINST THE COMMISSION

(1995 to present)

Hart v. Felder, 2007 WL 4298547 (E.D.N.Y. 2007)

Denying request for a preliminary injunction staying the proceedings against the judge before the Commission on the ground that the defendant (then the Chair of the Commission) was racially biased against the judge and tainted Commission's proceedings.

Spargo v. Commission on Judicial Conduct, 244 F.Supp.2d 72 (N.D.N.Y 2003), *vacated* 351 F.3d 65 (2d Cir. 2003)

Court held that Sections 100.1, 100.2(A), 100.5(A)(1)(c)-(g) and 100.5(A)(4)(a) were unconstitutional and ordered that the Commission was enjoined and restrained from enforcing those sections. The Commission appealed, and the Second Circuit vacated the judgment of the District Court and remanded the case with the instruction that the District Court refrain from exercising jurisdiction.

LaCava v. Commission on Judicial Conduct, 299 F. Supp.2d 176 (S.D.N.Y. 2003)

Dismissing complaint alleging that the Commission's refusal to reopen the judge's case and annul the Commission's determination of admonition was improper.

Connor v. Commission on Judicial Conduct, 260 F. Supp.2d 517 (N.D.N.Y. 2003) Court issued a preliminary injunction enjoining the Commission from enforcing Sections 100.1 and 100.2(A) on the ground that they are unconstitutionally vague. The Court declined to grant a preliminary injunction as to Sections 100.2(C), 100.3(B)(6) and 100.3(E)(1)(a)(i) because judge failed to establish likelihood of success on claim that these sections were unconstitutionally vague. The case was ultimately discontinued by stipulation.

Kunz v. Commission on Judicial Conduct, 356 F. Supp.2d 188 (N.D.N.Y. 2005) Kunz, an attorney representing Supreme Court Justice Thomas Spargo, filed a 42 USC § 1983 action against the Commission and its Administrator alleging that his constitutional rights were violated by the Commission's refusal to permit him to withdraw from representing Spargo in ongoing Commission proceedings. The court granted a preliminary injunction enjoining the Commission from exercising or attempting to exercise jurisdiction over Kunz. While the motion was pending, Kunz and the Commission agreed to a Stipulation of Discontinuance on the condition that Kunz be discharged as Spargo's counsel and that the preliminary injunction be accorded no precedential value.

Mogil v. Stern, et. al., United States District Court, Eastern District of New York (1995) Dismissing lawsuit filed by judge seeking \$60 million dollars in damages against members of the Commission staff, alleging staff violated his rights under 42 U.S.C. § 1983 by investigating and bring disciplinary charges against him.

ACTIONS COMMENCED BY COMPLAINANTS
AGAINST THE COMMISSION ON JUDICIAL CONDUCT

April 1995-Sept 2009¹

Sassower v. Comm'n on Judicial Conduct, No. 95-109141 (Sup Ct NY Co), dismissed 7/13/95

Lagana v. Dillon, Index No. 96-7259 104 F3d 355 (2d Cir 1996), *cert denied*, 520 US 1278 (1997)

Farrell v. Pataki, Index No. 97-Civ-1932 (US Dist Ct, SDNY), dismissed 1998

Taylor v. New York State Grievance Committee, Index No. 97-CV-6414L (US Ct of App, 2d Cir) (date of disposition unknown)

Bernard v. State of NY, Index No. 99-007999-0 (Court of Claims), filed 5/24/99

“Notice of Suit” by *Joseph A.F. Sadowski*, filed 12/5/01

Aramis Fournier, Jr. v. NYS Commission on Judicial Conduct and Hon. Michael A. Battle, Index No. I-2000-6974 (Sup Ct Erie Co), dismissed 1/11/01

Toward Equal Justice Associates et al. v. Salisbury, Index No. 00-CIV-7504 (US Dist Ct, SDNY), dismissed 10/15/01

Glendora v. Alex R. Munson et al., Index No. 01-CV-----, 02-CV-90-F (US Dist Ct, WD Okla)

Glendora v. Maryce Cunningham, Index No. 01-CVS-1400, 02-15608 (US Dist Ct, Nev), *aff'd*, 46 Fed Appx 568 (9th Cir 2002)

Glendora v. John M. Walker, Index No. 02-CV-2049 (US Dist Ct, SD W Va), *aff'd*, 53 Fed Appx 254 (4th Cir 2002)

Glendora v. Stephen P. Friot, Index No. 02-MI-298 (US Dist Ct, ND Ga)

Glendora v. Bert C. Roberts, Index No. 02-CV----- (US Dist Ct, SD Miss)

James Grant v. Commission, Index No. 402750/02 (Sup Ct NY Co)

¹ A number of these cases were abandoned by the petitioners. Citations are therefore unavailable.

Glenn Vickers Bey v. Governor of the State of NY, Index No. 01-7532 (US Dist Ct, EDNY), dismissed 3/29/01; Index No. 02-5069 (US Dist Ct, EDNY); *Glenn Osric Vickers Bey v. Governor of the State of NY*, Index No. 00/04827 (App Div, 2d Dept)

Valle v. United States of America, Index No., 00-3074, 00-CV-1685, 00-6293 (US Ct of App, 2d Cir)

Saferstein v. New York State Comm'n on Judicial Conduct, Index No. 06275/00 (Sup Ct, Westchester Co), dismissed 12/4/01

Mantell v. New York State Comm'n on Judicial Conduct, 277 AD2d 96 (1st Dept 2000), *mot for lv to app denied*, 96 NY2d 706 (2001)

Sassower v. Comm'n on Judicial Conduct, 289 AD2d 119, 734 NYS2d 68 (1st Dept 2001), *app dism'd*, 98 N.Y.2d 719; *reargument denied*, 99 N.Y.2d 554 (2002)

Weissbrod v. Housing Part of the Civil Court, Index No. 02-CV-8627 (US Dist Ct, SDNY)

Capogrosso v. Commission, Index No. 101003/02 (Sup Ct NY Co), dismissed 7/9/02

“Notice of Intention to File Suit” by *Varrel E. Mitchell, Sr.*, filed 5/12/03

Jackson v. State of NY Bar Assn (App Div 3d Dept), filed 4/2/03

Yoonessi v. Medical Bd of Calif, Index No. 04-CV-01884 (US Dist Ct, CDCA), filed 3/18/04, dismissed 2/28/05

Muka v. O'Shea, Index No. 05-023704-0, 6 NY3d 750 (2005), *mot to reconsider denied*, 6 NY3d 891 (2006)

Best v. New York State Comm'n on Judicial Conduct, Index No. 05-102502 (Sup Ct NY Co.), Article 78 proceeding filed 2/21/05, dismissed 5/18/05

Bastic v. Diane B. Eckert (Court of Claims), filed 2/25/05

Morris v. Kikler, Index No. 06-3008-CV (US Ct of App, 2d Cir), filed 8/2/06, dismissed 10/13/06

Matter of Buczek, Index No. 06-CV-460-TCK-PJC (US Dist Ct, ND Okla), papers dated 10/23/06

Davis v. Supreme Appellate First Division Ct., Index No. 05-CV-4182 (US Ct of App, 2d Cir), dismissed 12/17/05, *mot denied* 4/28/06

Edem v. Spitzer, Index No. CV-05-3504 (US Dist Ct, EDNY), filed 7/26/05

Glendora v. Friedman, Index No. CV-03-122-B-V (US Dist Ct Maine), dismissed 7/16/03

Glendora v. Tatta, Index No. Civ-05-1049 (DRD), US Dist Ct, Puerto Rico, dismissed 3/7/05

Valle v. Unified Court System, Index No. 13147-07, court unknown

Pettus v. Pataki, Index No. 6172-06), Article 78 proceeding filed 10/10/06; *application denied* 11/16/06 (App Div, 1st Dept), *lv to app denied* 8/23/07

Morrow v. Comm'n on Judicial Conduct, Index No. 1:07-Civ-10271-BSJ (US Dist Ct, SDNY), filed 11/13/07 (pending)

Capogrosso v. Commission (US Dist Ct, SDNY), §1983 action filed 1/22/08

Matter of Carvel (US Dist Ct, SDNY), petition dated 2/8/08

Uzamere v. Bush (US Dist Ct, SDNY), filed 2/25/08