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Ex "E"

ANALYSIS OF THE DECISION

Michael Mantell v. NYS Commission on Judicial Conduct **(NY Co. #99-108655)**
Justice Edward H. Lehner (September 30, 1999)

I. The Decision Omits the Procedural History of the Proceeding & the Papers Before the Court

The decision does not recite the procedural history of the case before Justice Lehner, including the papers before him. Most conspicuously, it does not identify that Mr. Mantell superseded his Verified Petition with an Amended Verified Petition. Indeed, the decision's sole reference to either document is an ambiguous reference in its penultimate paragraph "the petition is therefore dismissed" (at p. 9).

Instead, the decision begins as if in the middle of some other discussion, referring to "this motion" (at p. 1), which is not identified either as to whose it is or what it seeks. It is unclear whether it is Mr. Mantell's Verified Petition[1] or his Amended Verified Petition, or whether it is the Attorney General's "Cross-Motion to Dismiss the Petition" or his "Cross-Motion to Dismiss the Amended Petition".

CPLR §2219(a) requires that an order determining a motion "recite the papers used on the motion". Justice Lehner's single short-form order pertaining to this proceeding recites no papers, notwithstanding the form order contains a pre-printed section as to the "papers... read on this motion". This pre-printed section has been left completely blank, as likewise, the pre-printed line inquiring as to what the decided motion is "to/for". The only identification in the short-form order of the motion "decided in accordance with [the] accompanying memorandum decision" is its return date of "5/25/99" and its motion sequence of "001".

It thus appears from the short-form order that the motion being decided is the Verified Petition, whose Notice of Petition set a May 25, 1999 return date. However, by stipulation between the parties, occasioned by the Attorney General's request for additional time, Mr. Mantell consented to a stipulation adjourning the Article 78 proceeding "for all purposes until June 23, 1999". Such date was then reflected on the

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[1] *See* Official Court Rules, Supreme Court, NY County, Chapter 9 "Operating Statement": B(1) Judgements in Special Proceedings. "In special proceedings..the proceeding is the motion..."

Attorney General's June 7, 1999 "Notice of Cross-Motion to Dismiss the Petition", consisting of a Notice, Memorandum of Law, but no supporting affidavit. Thereafter, on June 15, 1999, Mr. Mantell served his Amended Verified Petition[2], accompanied by a request for the Attorney General's consent to an enclosed stipulation to further adjourn the return date to July 15, 1999. The stipulation was signed and the Attorney General's June 23, 1999 "Cross-Motion to Dismiss the Amended Petition", again with no supporting affidavit, was noticed for a July 15, 1999 return date. Mr. Mantell thereafter filed reply papers, consisting of a July 14, 1999 Reply Affidavit and Memorandum of Law.

A review of the documents in the court file does not reveal the Attorney General's June 7, 1999 "Cross-Motion to Dismiss the Petition". This may not have been filed in view of the Attorney General's superseding June 23, 1999 "Cross-Motion to Dismiss the Amended Petition", which is in the court file. The pre-printed short-form order, which provides "Yes" and "No" boxes to signify whether the decided motion has a "cross-motion", has neither box checked.

II. The Decision Obliterates the Critical Arguments Presented by the Papers before the Court, including Mr. Mantell's Arguments that the Key Issue to be Determined was the "Facial Merit" of the Allegations of his Judicial Misconduct Complaint, Dismissed by the Commission without Investigation, and, Based Thereon, His Entitlement to Relief under CPLR §7803(3), in addition to CPLR §7803(1)

In addition to obliterating the identity of the papers in the record, the decision obliterates the arguments presented by those papers. This includes Mr. Mantell's foremost argument that "it would be pointless for the Court to rule in this Article 78 proceeding" without examining the facial sufficiency of the allegations of his judicial misconduct complaint, dismissed by the Commission as presenting "no indication of judicial misconduct upon which to base an investigation". As pointed out in Mr. Mantell's Memorandum of Law (at pp. 1-2), as well as in his Reply Affidavit (¶¶7-8), the Attorney General, as the Commission's "defender in this case", totally ignored the sufficiency of those allegations in his "cross-motion" to dismiss. Yet, in addition to not identifying Mr. Mantell's argument that the undisputed sufficiency of his complaint's allegations is the pivotal ruling to be made, Justice Lehner makes no such ruling in his decision. This, because ruling on

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[2] Mr. Mantell did not serve a new Notice of Motion with a new return date for his Amended Verified Petition.

their sufficiency would necessarily expose that the Commission's determination that the allegations present "no indication of judicial misconduct" is not only "affected by an error of law", is "arbitrary and capricious", and an "abuse of discretion" – entitling Mr. Mantell to relief– but an affront to human intelligence.

It was Mr. Mantell's Amended Verified Petition (¶8) which sought relief on these three grounds, in addition to the single ground in the Verified Petition, which had been limited to "failure to perform a duty enjoined upon it by law" (¶8). This fact was expressly pointed out by Mr. Mantell's Reply Affidavit (at ¶2), with his Memorandum of Law (p. 1) identifying that these four grounds represent challenges under CPLR §7803(3) and CPLR §7803(1).

The decision's closest reference to CPLR §7803 is its general statement that "petitioner commenced this Article 78 proceeding seeking a writ of mandamus directing the respondent to conduct an investigation of his complaint" (at p. 2). The decision supplies no specifics as to the basis upon which Mr. Mantell was seeking a writ of mandamus. Nor does it discuss the legal standard governing relief under the never referred to subdivisions (1) and (3) of CPLR §7803, also not referred to. This, notwithstanding their clear relevance to what the first sentence of the decision purports to be "the central issue on this motion" *to wit*, "whether a writ of mandamus is available to require that respondent New York State Commission on Judicial Conduct investigate an attorney's complaint in which he charges that a particular New York City Criminal Court judge violated the standards of judicial conduct during a court hearing."

This concealment of the subsections of CPLR §7803 and the legal standards relating thereto reflect Justice Lehner's knowledge that disclosing them would reveal that the Commission was without any legitimate defense to Mr. Mantell's challenge. Justice Lehner's knowledge can be presumed from the record before him, showing the utter inability of the Attorney General to construct coherent argument in Points I and II of his Memorandum of Law in support of his "Cross-Motion to Dismiss the Amended Petition". Point I was entitled "Commission's Decision to Dismiss Petitioner's Complaint was Neither Arbitrary, Capricious nor Contrary to Law and Should be Upheld".[3] Point II was entitled "A Proceeding in the Nature of

[3] In Point I (pp. 4-7), the Attorney General reviewed, at length, caselaw for the general legal principle that a determination of an administrative body or officer will not be deemed arbitrary and capricious if there is a rational basis for it. That done, he concluded with a single final paragraph (pp. 6-7), which offered

Mandamus is Inappropriate Because It Seeks to Compel a Purely Discretionary Act".[4]

The decision entirely ignores Points I and II of the Attorney General's aforesaid Memorandum of Law, as well as Mr. Mantell's response

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neither facts nor law to show a rational basis for the Commission's determination that Mr. Mantell's judicial misconduct complaint presented "no indication of judicial misconduct". Instead, the Attorney General immediately shifted to arguing that the Commission did not "fail[] to perform a duty enjoined upon it by law" when it refused to investigate Mr. Mantell's complaint. For this, the Attorney General quoted, *verbatim*, Judiciary Law §44.1(a) and (b), without analyzing or discussing either part, but underlining subdivision (b) "the commission may dismiss the complaint if it determines that the complaint on its face lacks merit...". Then, without claiming that "no indication of judicial misconduct" is equivalent to "on its face lacks merit", or showing that the specific allegations of Mr. Mantell's complaint fell into either category, he rested on a bald assertion, "The Commission clearly acted within its statutory authority when it dismissed petitioner's complaint, determining 'that there is no indication of judicial misconduct upon which to base an investigation." Consequently, the concluding sentence of his Point I that "the Commission's determination...was rationally based, and neither arbitrary, capricious, nor contrary to law" was completely devoid of evidentiary support for even one of these three grounds, let alone all three.

[4] In Point II (pp. 7-10), the Attorney General reviewed, at length, caselaw for the general legal principle that mandamus is inappropriate where a purely discretionary act is sought to be compelled. However, he presented no caselaw showing that Judiciary Law §44.1, in fact, confers discretion upon the Commission to dismiss complaints. Nor did he present any analysis or discussion of Judiciary Law §44.1. Rather, the Attorney General again quoted, *verbatim*, §44.1 (a) and (b), again underlining (b): "the commission may dismiss the complaint if it determines that the complaint on its face lacks merit...". This he followed with a *verbatim* quote of 22 NYCRR §7000.3 – without acknowledging, let alone reconciling, its facially-obvious inconsistency with Judiciary Law §44.1(b) in permitting the Commission to dismiss a complaint with no requirement that it first be determined to lack merit on its face. The Attorney General then summed up with two conclusory sentences that the "statutory language" gives the Commission discretion as to whether to investigate a complaint, which cannot be compelled by mandamus – an assertion belied by Judiciary Law §44.1 – the statutory language at issue, which he had not analyzed or discussed. He then finished by specifying that mandamus was unavailable to compel investigation of Mr. Mantell's complaint. In fact, this was untrue, there having been no claim by the Attorney General that the Commission's determination that his complaint presented "no indication of judicial misconduct" was synonymous with "on its face lacks merit" – which, in order to have probative value would have to have been in affidavit form – and there being no showing that the allegations of the complaint were lacking in merit on their face.

thereto in his Reply Memorandum of Law[5] while nevertheless purporting to determine the "central issue" as to the availability of mandamus. In determining this "central issue", the decision wholly omits anything reflecting Mr. Mantell's CPLR §7803(3) challenge, *to wit*, that the Commission's determination is "affected by an error of law", "arbitrary and capricious" and "an abuse of discretion" – which, along with his Amended Verified Petition raising that challenge -- is never mentioned. Instead, the decision exclusively focuses on CPLR §7803(1), "failure to perform a duty enjoined upon it by law" – which, by holding that the Commission has discretion to investigate complaints, it impliedly rejects.

III. The Decision's Claim that the Commission Has Discretion as to Whether to Investigate Judicial Misconduct Complaints is Not Based on any Examination of the Plain Language of Judiciary Law §44.1, its Legislative History, or Caselaw Pertaining Thereto, but Rests on the Court's own Sua Sponte and Demonstrably Fraudulent Argument

The decision purports (at p. 3) that "based on the express wording of the governing law, the Judicial Commission's actions at issue here were within its authority". The inference is that the "governing law" being referred to is Judiciary Law §44.1 since the decision has just quoted subdivisions (a) and (b) thereof. Yet, nowhere does the decision

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[5] Mr. Mantell's Memorandum of Law characterized the Attorney General's Point I as "merely a string of legal platitudes interspersed with citations of authority from which these platitudes were lifted. It may just as well been lifted from a textbook" (at p. 8). He also analyzed the cases presented by the Attorney General to show that they supported his entitlement to relief and that, by contrast to the reasoned determinations of administrative agencies and officers being judicially reviewed therein, the Commission had provided no reasoning to support its determination that his complaint presented "no indication of judicial misconduct". That the determination was palpably unreasonable was demonstrated by Mr. Mantell in the first Point of his Reply Memorandum (pp. 4-8), showing that the allegations of his judicial misconduct complaint constituted violations of standards of judicial conduct – recognized by the Commission in prior decisions.

In response to the Attorney General's Point II, Mr. Mantell observed that if the availability of mandamus was guided by the interpretation of Judiciary Law §44.1, the term "shall" in the statute mandated the Commission's investigation of allegations of "misconduct in office" and that "as the exact wording of the statute indicates" it "was not the intention of the Legislature in creating the Commission" to give it discretion as to whether to investigate complaints alleging judicial misconduct.

actually state that the dismissal of Mr. Mantell's complaint is within the Commission's authority under Judiciary Law §44.1.

Like the Attorney General's dismissal "cross-motion", the decision contains no analysis of the plain language of Judiciary Law §44.1. Nor does it contain any finding that in dismissing Mr. Mandell's complaint, without investigation, the Commission made the determination expressly required by subdivision (b), *to wit*, that the complaint "lacks merit on its face". This would have required the Court to conclude that the phrase "no indication of judicial misconduct", appearing in the Commission's letter notifying Mr. Mantell of the dismissal of his complaint, was equivalent to "on its face lacks merit". The decision does not do this – any more than the Attorney General did this in his dismissal "cross-motion".

Instead, Justice Lehner embarks upon a *sua sponte* argument, not advanced by the Attorney General, that because the Commission has discretion to investigate complaints filed by its administrator, it also has discretion to investigate complaints received from outside sources, such as Mr. Mandell.

To advance this *sua sponte* argument, Justice Lehner conceals that a different "governing law" applies to administrator's complaints, which is deemed "filed" with the Commission, as opposed to a complaint from an outside source, which is deemed to be "received". Justice Lehner's knowledge of these distinct statutory provisions and the different phraseology may be presumed from his excerpting of *New York State Commission on Judicial Conduct v. Doe*, 61 NY2d 56 (1984) twice in his decision (p. 2, 3). His second excerpt, that "filing of a complaint... triggers the commission's authority to commence an investigation into the alleged proprieties" is in two respects selective. Firstly, it omits the immediately preceding sentence of that Court of Appeals decision, expressly distinguishing Judiciary Law §44.1 as pertaining to a complaint received by the Commission "from a citizen" and Judiciary Law §44.2 as pertaining to "a complaint on its own motion", filed by its administrator. Secondly, it omits the words from *Commission v. Doe* immediately preceding "filing of a complaint", *to wit*, "it is the receipt of" – which relate to a complaint under Judiciary Law §44.1. Having omitted this phraseology for a complaint under Judiciary Law §44.1, Justice Lehner is able to make a statement that is true for Judiciary Law §44.2, but not §44.1 that "it does not require an investigation to take place." This would have been obvious had Justice Lehner identified subdivisions (1) and (2) of Judiciary Law §44 – and compared them.

A comparison of Judiciary Law §§44.1 and 44.2 would have readily disclosed that these are two very different "governing laws": Judiciary law §44.2 using the discretionary "may" for investigation of an administrator's complaint, in contrast to Judiciary Law §44.1, using the directive "shall" for investigation of a complaint from an outside source, absent a determination by the Commission that the complaint on its face lacks merit.

Indeed, *Doe v. Commission on Judicial Conduct*, 124 A.D.2d 1067 (4th Dept. 1986), which Justice Lehner purports (at p. 3) "support[s]" his conclusion that no investigation is required does so only insofar as it relates to no investigation being required for an administrator's complaint – the sole issue before that court.

It is without identifying that administrator's complaints are governed by Judiciary Law §44.2, not Judiciary Law §44.1, that Justice Lehner states:

> "..the language granting the Judicial Commission the wide latitude to decide whether or not to investigate a charge does not distinguish between the two delineated types of complaints. The discretion to decline to investigate applies regardless of the source of the complaint." (decision, p. 3)

Justice Lehner uses the phrase "the language" in the same way he uses the phrase "the governing law" – with intended ambiguity. To the extent that the "language" to which Justice Lehner is alluding is that of "the Judiciary Law" – referred to generically in *Doe v. Commission* – which he has just excerpted – Judiciary Law §44.1 and §44.2 clearly delineate between the two types of complaints, as likewise the investigative responsibilities of the Commission. To the extent that "the language" to which he is alluding is 22 NYCRR §7000.3, reference to which also appears in *Doe v. Commission*, which he has just quoted, this Commission-promulgated rule is facially inconsistent with Judiciary Law §44.1 precisely because it gives the Commission "wide discretion" not conferred by that statutory provision. Justice Lehner's awareness of this infirmity may be seen from his conspicuous failure to identify or quote 22 NYCRR §7000.3 in connection with his opening discussion of the Commission's authority and Judiciary Law §44.1. This, notwithstanding the Attorney General's "cross-motion" twice cited and quoted it, including under the heading "statutory framework" (p. 2), wherein he falsely claimed (at p. 3) that it "follows the language of Jud. L. §44(1)".

It must be noted that except for the single instance, at the outset of the decision (pp. 2-3), where Justice Lehner cites and quotes Judiciary Law §44.1, the subsequent three references in the decision to Judiciary Law §44 are without specifying the subdivision. Once again, this permits Justice Lehner to make misleading statements as to the discretion it confers which, while true for administrator-filed complaints under Judiciary Law §44.2, are not true for complaints received from outside sources under Judiciary Law §44.1. Thus, he speaks of "the specific deference granted in Judiciary Law §44" (at p. 8) and "the explicit discretion granted the Judicial Commission by Judiciary Law §44." (at p. 9).

That Judiciary Law §44.1 imposes a mandatory investigative duty upon the Commission is clear from *Matter of Nicholson*, 50 NY2d 597 (1980) – reference to which appears in the excerpt from *Commission v. Doe*, *supra*, appearing at page 2 of the decision. In *Nicholson*, the Court of Appeals stated:

> "...the commission ***must*** investigate following receipt of a complaint, unless that complaint is determined to be facially inadequate (Judiciary Law §44, subd. 1)..." at 346-7 (emphasis added)

Such definitive interpretation of the "language" of Judiciary Law §44.1 by our state's highest court was based on briefs filed by the Commission. Indeed, instead of pursuing his own *sua sponte* excursion into the Commission's discretion to take no action on an administrator's complaint, Justice Lehner could more profitably have devoted himself to a *sua sponte* exploration of the *Nicholson* briefs so as to verify how the Commission interpreted the "shall" language of Judiciary Law §44.1, upon which the Court of Appeals based its own "must" interpretation. In view of the Commission's failure to interpret Judiciary Law §44.1 in the dismissal motion of its attorney, the Commission's interpretation in *Nicholson* was particularly relevant.

Not surprisingly, the Commission's brief in *Nicholson* took the position that "shall" requires an investigation:

> "Unless the Commission determines that the complaint on its face lacks merit, the law requires that the Commission '<u>shall</u> conduct an investigation of the complaint' (Judiciary Law §44[1])..." (at p. 38, emphasis in the original).

Since analysis of the plain language of Judiciary Law §44.1, reinforced by the interpretive decisional law of the Court of Appeals establishes the Commission's mandatory investigative duty, Justice Lehner's citation to *Harley v. Perkinson*, 187 A.D.2d 765 (3rd Dept. 1992) that no relief can be granted because "the action involved the exercise of judgment or discretion" is inapplicable. In the absence of a Commission determination that Mr. Mandell's complaint "lacks merit on its face", mandamus to compel was available – there having been no assertion by the Attorney General or finding by Justice Lehner that the Commission's letter dismissal that "there is no indication of judicial misconduct" is equivalent thereto.

IV. The Court's Analogy of the Commission to a Public Prosecutor whose Discretionary Prosecutorial Decisions are Not Subject to Judicial Review is Unsupported by any Legal Authority and, Additionally, is Belied by Judiciary Law §44.1 and Judicial Interpretation Thereof

Justice Lehner presents no legal authority for his subsequent argument (at pp. 4-6) that "the Commission's function is in many respects similar to that of a public prosecutor" (at p. 4). This duplicates the Attorney General's failure to provide legal authority for his similar claim, albeit more scantily presented in Point III of his memorandum of law in support of his dismissal "cross-motion" (at p. 13), that the Commission is "like a prosecutor".

Rather, the only law Justice Lehner presents is for the proposition that the discretionary prosecutorial decisions of a public prosecutor are not subject to judicial review. Indeed, after two pages of legal citations for that proposition (at pp. 4-6), Justice Lehner concedes that he has no caselaw specifically holding that the Commission is like a prosecutor, not subject to judicial review. He confesses to drawing an analogy – one which, in order to be applicable, rests on the Commission being vested with discretion:

> "While the District Attorney is an elected official whose activity or inactivity is ultimately subject to review by the electorate, in light [of] the wide latitude statutorily granted to the Judicial Commission in accomplishing its functions and the similarity of the public policy issues involved, the comparison to a District Attorney appropriately serves as a guideline in resolving the issue at hand" (at pp. 6-7)

Since, as herein demonstrated, there is no "wide latitude statutorily granted" by Judiciary Law §44.1, Justice Lehner's analogy falls. Moreover, the "public policy issues" are reflected by the language of Judiciary Law §44.1 – as likewise from its legislative history showing that despite two emendations of Article 2A of the Judiciary Law, following the two constitutional amendments creating and strengthening the Commission, that mandatory language remained unchanged.

The fact that the decision cites numerous cases for the proposition that the District Attorney has prosecutorial discretion, which is not subject to judicial review, and fails to cite a single case either for the proposition that the Commission has discretion under Judiciary Law §44.1 to decline to investigate facially-meritorious complaints or for the unavailability of judicial review to challenge the Commission's dismissal, without investigation, of facially-meritorious judicial misconduct complaints takes on added significance further on in the decision. It is there that Justice Lehner admits (at p. 8) that under County Law §700 "a District Attorney is not expressly granted the authority to decline to prosecute". In other words, prosecutorial discretion is not authorized by that statute, but has been judicially created.

This is recognized and rationalized in *Matter of Johnson v. Boldman*, 24 Misc. 2d 592 (1960) – a case cited for other purposes in Point III of the Attorney General's memorandum of law supporting his dismissal motion (at p. 12). In *Johnson v. Boldman*, the court confronted that the seemingly mandatory statutory language pertaining to the district attorney's duty did not support the discretionary judicial interpretation:

> "A cursory examination of annotated statutes shows that section 700 of the County Law has undergone several legislative reviews and revisions in the past 50 years without substantial revision of the phrase: 'It shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county'. It is inconceivable that these successive Legislatures were so unaware of the existing practices in the lower courts that when they used the word 'duty' it was intended as a mandate to the District Attorney to conduct all prosecutions for crimes and offenses. It is equally inconceivable that these successive Legislatures all would ignore any real conflict between known actual practices and the true legislative intent behind the wording of the statute." (at p. 594).

In other words, the legislature was deemed to have acquiesced to judicial interpretation at odds with the statute by its failure to respond to it. Since Justice Lehner cites no cases from "the lower courts" over the 25-year history of the Commission countering the mandatory investigative language of Judiciary Law §44.1, recognized nearly 20 years ago by the highest state court in *Nicholson*, the "public policy" is reflected by the plain language of Judiciary Law §44.1 and the faithful interpretation in *Nicholson*.

V. The Decision's Claim that Judicial Challenges to Attorney Disciplinary Committee Dismissals of Attorney Misconduct Complaints Support the Unavailability of Mandamus to Review the Commission's Dismissals of Judicial Misconduct Complaints is Belied by the Cited Judicial Challenges and, Most Importantly, by the Attorney Disciplinary Law

Similarly bogus is Justice Lehner's further argument (at p. 7) that a "review of comparable challenges to the decisions of attorney disciplinary committees" supports his claim that a writ of mandamus is not available to review the Commission's dismissal of Mr. Mandell's complaint without investigation. The "comparable challenges" cited by the decision consist of two cases brought against disciplinary committees to compel investigation of complaints against attorneys. The first of these cases is a brief unpublished decision in a §1983 federal action, *Clouden v. Lieberman*, 1992 WL 54370 (E.D.N.Y. 1992) – which the Attorney General cited in Point III of his Memorandum of Law (at p. 13), but with no argument as to its applicability. The second of these two cases is a two-sentence decision in an Article 78 proceeding, *Schachter v. Departmental Disciplinary Committee*, 212 A.D.2d 378 (1st Dept. 1995). Neither case discusses, or even identifies, the pertinent statutory and rule provisions pertaining to attorney disciplinary committees.

Nevertheless, the decision contends that:

> "these holdings are telling because the provision granting the Disciplinary Committee the authority to discipline attorneys does so with broad language (Judiciary Law §90; 22 NYCRR §603.4) and does not specifically permit the dismissal of a complaint on its face, as is explicitly authorized under the provision governing the Judicial Commission [Judiciary Law §44]." (at p. 8)

The inference is that the language authorizing grievance committees to discipline attorneys is broader than that authorizing the Commission to discipline judges – which is not true – and that Judiciary Law §90 and 22 NYCRR §603.4 lay out a procedure for investigation of complaints more stringent than that of Judiciary Law §44.1 – also not true. Indeed, not only is Judiciary Law §90 completely silent about what attorney disciplinary committees are to do upon receipt of a complaint, but 22 NYCRR §603.4(c) is framed in wholly discretionary language: "Investigation of professional misconduct *may* be commenced upon receipt of a specific complaint... by the Departmental Disciplinary Committee..." (emphasis added). Consequently, neither Judiciary Law §90 nor 22 NYCRR §603.4 impose any duty upon the grievance committees to investigate complaints. Thus, the only thing "telling" about the *Clouden* and *Schachter* cases is that, contrary to the decision's claim, they are NOT "comparable challenges".

VI. The Decision's Sua Sponte Comparison of Judiciary Law §44.1 to Other Statutes is Irrelevant and Conspicuously Devoid of Interpretive Caselaw

The decision concludes (at pp. 8-9) by purporting that Public Health Law §230(10)(a)(i) and Education Law §6510(1)(b) are examples of statutes not affording "the specific deference granted in Judiciary Law §44" as to whether to investigate a complaint.

However, as hereinabove discussed, Judiciary Law §44.1, in contrast to Judiciary Law §44.2, grants the Commission no discretion but to investigate complaints which it has not determined to be facially lacking in merit. This duty to investigate facially meritorious complaints received from outside sources does not become less mandatory as to those complaints just because another agency, operating under Public Health Law §230(10)(a)(i) is required to investigate "each complaint received regardless of the source" (at p. 8).

Moreover, as to Education Law §6510(1)(b), whose language the decision also cites (at p. 9), it would appear that it is roughly comparable to Judiciary Law §44.1 in that it requires that "The department shall investigate each complaint *which alleges conduct constituting professional* misconduct" – such language implying that a complaint not alleging conduct constituting professional misconduct – in other words one which "lacks merit on its face" – is not required to be investigated by the department.

Conspicuously, the decision provides no caselaw showing how courts have interpreted these two statutory provisions, notwithstanding the

decision has just conceded (at p. 8) that County Law §700 has been judicially transmogrified so as to confer upon the district attorney discretion not contained in the statute. It seems likely that the agencies dismissing complaints under Public Health Law §230(10)(a)(i) and Education Law §6510(1)(b) have been the subject of legal challenge, including Article 78, much as the district attorneys and attorney disciplinary committees in the cases the decision cites (at pp. 4-7). Likely, too, courts have commented as to the availability of judicial review, including by way of Article 78, in proceedings challenging the dismissals of complaints by those agencies.