

STATE OF NEW YORK  
COURT OF APPEALS

-----X  
ELENA RUTH SASSOWER, Coordinator of  
of the Center for Judicial  
Accountability, Inc., acting pro bono  
publico,

Appellate Division  
Docket No. 5638

Petitioner-Appellant,

-against-

COMMISSION ON JUDICIAL CONDUCT OF THE  
STATE OF NEW YORK,

Respondent-Respondent.  
-----X

**MEMORANDUM OF LAW OF RESPONDENT THE NEW YORK STATE  
COMMISSION ON JUDICIAL CONDUCT IN OPPOSITION  
TO PETITIONER'S MOTION FOR DISQUALIFICATION**

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**Preliminary Statement**

Respondent-respondent the Commission on Judicial Conduct of the State of New York ("Commission") opposes petitioner-appellant Elena Ruth Sassower's ("petitioner") May 1, 2002 motion to disqualify all of this Court's judges from participating in her attempted appeal from the December 18, 2001 decision and order of the Appellate Division, First Department, Sassower v. Comm'n on Judicial Conduct of New York, based upon her conclusory and unsupported allegations of "longstanding and ongoing systemic corruption by judges and lawyers on the public payroll."

(Petitioner's Notice of Motion, ¶3). Petitioner's motion is both premature, because this Court has not determined whether it has jurisdiction over this appeal, and substantively meritless.

## STATEMENT OF THE CASE

The facts are developed more fully in the brief the Commission submitted to the First Department (copy attached). They are summarized here for the Court's convenience.

### A. The Underlying Article 78 Proceeding

The petition in this CPLR article 78 proceeding alleged that the Commission, which oversees judicial conduct, was required by Judiciary Law §44.1 to conduct a comprehensive investigation of every "facially-meritorious" complaint of judicial misconduct, and therefore was without the discretion to dismiss complaints that petitioner filed, notwithstanding its conclusion that they did not warrant a full-scale investigation. Petitioner sought an order of mandamus directing the Commission to vacate its dismissal of her complaint concerning Judge Albert Rosenblatt (then an Appellate Division, Second Department Justice), and to "receive" and "determine" her complaint concerning Justice Daniel W. Joy, also of the Appellate Division, Second Department. Petitioner sought to have Henry T. Berger removed as the Commission's chairman, to have 22 NYCRR §7000.3 and 22 NYCRR §7000.11 (part of the Commission's procedural rules concerning the investigation of complaints) declared unconstitutional, both on their face and "as applied" by the Commission, and Judiciary Law §45 declared unconstitutional, either as applied by the Commission or on its face.

In a Decision and Order dated January 31, 2000 (Exhibit E to Petitioner's Jurisdictional Statement ("Juris.")), Supreme Court, New York County (Wetzel, Acting Justice) dismissed the petition (and denied petitioner's motion for recusal and for sanctions against the Attorney General and the Commission due to their alleged "litigation misconduct"). Supreme Court (following Justice Cahn's decision in D. Sassower v. Commission, N.Y. Co. Clerk's No. 109141/95, a nearly identical proceeding brought by petitioner's mother, Doris Sassower), held that the Commission had the power to make discretionary preliminary determinations as to whether to undertake more comprehensive investigations, and therefore could not be compelled to undertake a comprehensive investigation.

Supreme Court also relied on Mantell v. New York State Comm'n on Judicial Conduct, 181 Misc. 2d 1027 (Sup. Ct. N.Y. Co. 1999), 715 N.Y.S.2d 316 (1<sup>st</sup> Dep't 2000), app. den., 96 N.Y.2d 706 (2001), holding that petitioner had no standing to seek an order compelling the Commission to investigate a particular complaint, because such an investigation was a discretionary, rather than an administrative act (Juris., Ex. E, pp. 4-5). Finally, citing petitioner's frivolous and harassing conduct during the litigation, Supreme Court enjoined both petitioner and her pro bono organization, the Center for Judicial Accountability, Inc. ("CJA") from instituting "any further

actions or proceedings relating to the issues decided herein." (Juris., Ex. E, p. 5). Petitioner appealed to the Appellate Division, First Department.

**B. Proceedings Before The Appellate Division**

Prior to the argument of her appeal, petitioner sought to have the entire Appellate Division, First Department disqualified, due to its alleged self-interest. She also again asked the court to impose sanctions on the Commission and its counsel, and to refer the Commission, the Office of the Attorney General of the State of New York, the Attorney General, the Solicitor General, and other members of the Attorney General's Office for disciplinary and criminal investigation and prosecution.

The First Department unanimously affirmed Justice Wetzel's decision and denied petitioner's motion for recusal, disqualification and sanctions (Juris., Ex. B). The court held that the "petition to compel respondent's investigation of a complaint was properly dismissed since respondent's determination whether to investigate a complaint involves an exercise of discretion and accordingly is not amenable to mandamus." (Juris., Ex. B, p. 1). Further, "inasmuch as petitioner has failed to demonstrate that she personally suffered some actual or threatened injury as a result of the putatively illegal conduct, she lacks standing to sue the Commission." (Juris., Ex. B, pp.

1-2).

With respect to the filing injunction imposed against both petitioner and CJA, the First Department concluded that it was "justified given petitioner's vitriolic ad hominem attacks on the participants in this case, her voluminous correspondence, motion papers and recusal motions in this litigation and her frivolous requests for criminal sanctions." (Juris., Ex. B, p. 2).

On January 17, 2002, petitioner moved before the First Department for reargument, and, on February 20, 2002, for leave to appeal to this Court. On March 26, 2002, the First Department denied both motions.

#### ARGUMENT

This motion is premature. This Court has not yet determined whether it has jurisdiction over petitioner's appeal, and it is highly unlikely that the Court will conclude that it does have jurisdiction. Although petitioner purports to appeal of right, no such appeal lies from the unanimous Appellate Division order below, because her case does not directly involve a substantial constitutional issue. CPLR 5601(b)(1). Moreover, there is no basis upon which a motion for leave could be granted. See 22 NYCRR § 500.11(d)(1)(v). The dispositive legal issue in this case is identical to the one in Mantell, supra, in which the Court denied leave.

In any event, even if this Court was inclined to entertain

this appeal, petitioner has no right to demand the recusal of the entire Court. Her motion is based on wild speculation that has no basis in reality and is devoid of record support.

**A. Petitioner's Appeal Does Not Involve A Constitutional Issue**

As the basis for her purported "appeal as of right," petitioner's Jurisdictional Statement invokes CPLR 5601(b)(1) ("an appeal may be taken . . . from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States"). However, to base an appeal on this ground, "the determination below [must] necessarily reach the constitutional issue." In re Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 437 n.2 (1979). An appellant who relies upon CPLR 5601(b)(1) must establish that the constitutional construction "has been not only directly but necessarily involved in the decision of the case. If the decision was or may have been based upon some other ground, the appeal will not lie." In re Haydorn v. Carroll, 225 N.Y.84, 88 (1918). Accord, Pendleton v. New York State Dep't of Correctional Servs., 70 N.Y.2d 682 (1987) (dismissing appeal "upon the ground that it does not lie as of right from the unanimous order of the Appellate Division absent the direct involvement of a substantial constitutional question.").

It is not enough, therefore, that the petition in this case

challenged the constitutionality of Judiciary Law §45 and two of the Commission's procedural regulations, because neither Supreme Court or the First Department ever reached the constitutionality of those provisions. To the contrary, both courts held that petitioner had no right to relief on non-statutory grounds. Supreme Court held, and the First Department affirmed, that whether the Commission chose to undertake a full-scale investigation of a complaint involved an exercise of discretion, and therefore could not be subject to mandamus.

Petitioner nonetheless contends that she may appeal as of right to this Court because her issue on appeal is an alleged deprivation of her "due process" at the hands of a biased Appellate Division (Juris., pp. 5-6). If this contention were correct, every litigant claiming to have been deprived of a fair hearing or adequate review would be entitled to an appeal to this Court as of right. On its face, CPLR 5601 does not authorize such a result, and it has never been interpreted by this Court to do so. In fact, the sole case cited by petitioner, Valez v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122 (1928), falls squarely within the terms of CPLR 5601(b)(1), since in order to resolve the dispositive legal issue the Court needed to assess the constitutionality of the New York statute providing for service by publication.

A motion for leave to appeal would also be a futile



exercise. This case raises no issue that is "novel, or of public importance, or [which] involve[s] a conflict with prior decisions of this Court, or [as to which] there is a conflict among the Appellate Divisions." 22 NYCRR § 500.11(d)(1)(v). Instead, it involves only the application of an established rule of law (mandamus will not lie to compel performance of a discretionary act) to a particular set of facts. The article 78 petition brought in Mantell, supra, to compel the Commission to conduct a full-fledged investigation of a complaint had previously been dismissed on exactly this legal point, and this Court had denied petitioner's motion for leave to review that decision, Mantell v. New York State Comm'n on Judicial Conduct, 96 N.Y.2d 706 (2001).

**B. Petitioner Has Failed To Identify  
Any Basis Which Would Justify Her Demand  
For The Recusal Of This Court**

The two grounds for the mandatory disqualification of a court are those stated in Judiciary Law §14: relationship by consanguinity with a litigant, or an "interest" -- a present, nonspeculative interest -- in the outcome of the litigation. In all other circumstances, including alleged bias or prejudice, the question of whether a court should recuse itself from hearing a case is a matter of the court's conscience. People v. Moreno, 70 N.Y.2d 403, 405 (1987).

Only one member of this Court -- Judge Albert M. Rosenblatt, the subject of one of the complaints giving rise to the

proceeding -- would appear to have an interest in this appeal. Petitioner's justification for disqualifying the other members of the Court derives from her baseless speculation if she prevails in this appeal, various judges of the Court would inexorably face disciplinary and criminal liability based on their actions in other cases, chiefly those which concerned Doris Sassower.

(Affidavit of Elena Ruth Sassower in Support of Disqualification, sworn to May 1, 2002 ("Sassower Aff."), ¶10). This conviction, however, is based on a series of grossly speculative assumptions -- that past complaints against members of the Court were rejected by the Commission without any inquiry, and that the members of the Court believe that complaints against them would be substantiated if actually investigated -- that have no basis in the factual record.

Petitioner's claim that Chief Judge Kaye and Judge Bundy must recuse themselves is due to their participation in this Court's refusal to grant Doris Sassower leave to appeal in Doris L. Sassower v. Hon. Guy Mangano, et al. is illustrative. In petitioner's mind, the denial of leave could only be "complicity" in "flagrant criminal conduct." (Sassower Aff. ¶27). Therefore -- so petitioner argues -- their acts would inevitably be investigated by an impartial Commission, and both judges, in turn, would inevitably be subject to severe sanctions (Sassower Aff. ¶29). The remarkably speculative leaps behind such

assertions require little comment.

Petitioner's other assertions concerning Chief Judge Kaye are in a similar vein. To petitioner, Chief Judge Kaye has engaged in a broad pattern of concealing corruption by, inter alia, refusing to sanction the Attorney General for his "litigation misconduct" in defending lawsuits brought by Doris Sassower (Sassower Aff. ¶¶32-34), refusing to heed petitioner's complaints regarding judicial appointments (Sassower Aff. ¶¶65-98), and sanctioning a document retention program under which the Court retains jurisdictional statements for two years, and motions for leave to appeal for five years (Sassower Aff. ¶¶56-59)<sup>1</sup>. The sole basis for all of these allegations is petitioner's conviction that opposition to her or her mother is proof of corruption. (See, e.g., Sassower Aff. ¶43: "any fair and impartial tribunal, not bent on covering up corrupt, politically-motivated judicial conduct, would have been compelled" to grant Doris Sassower's motion for leave to appeal).

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<sup>1</sup> Petitioner apparently believes that if she had access to the since-destroyed motions for leave brought on behalf of certain attorneys who, like her mother, had their licences suspended prior to receiving a hearing, she could demonstrate that these cases were less worthy of review than Doris Sassower's cases (Sassower Aff. ¶¶56-58). However, in each of the instances with which petitioner is concerned, the Court granted leave and rendered decisions (In re Russakoff, 72 N.Y.2d 520 (1992); In re Padilla, 67 N.Y.2d 440 (1986); In re Nuey, 61 N.Y.2d 513 (1984)). Since the facts of these cases remain a part of the public record, either in the parties' briefs or through the Court's decisions, it is difficult to imagine what specific information petitioner believes has been "covered up."

Petitioner believes Judges Graffeo, Levine and Ciparick should recuse themselves because petitioner opposed their confirmations, and apparently filed complaints with the Commission concerning Judges Levine and Ciparick (Sassower Aff. ¶¶101, 107-115). However, this is a particularly inadequate justification in this case, since petitioner has liberally and publicly attacked the integrity of virtually every judge and attorney who has crossed her path. Petitioner's own reckless behavior should not be used to justify the recusal of any judge of this Court.

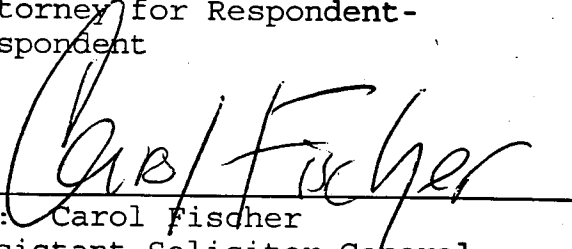
CONCLUSION

For all of the reasons stated above, petitioner's motion to disqualify this Court from participating in this appeal should be denied.

Dated: New York, New York  
May 17, 2002

Respectfully submitted,

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