To Be Argued By:
MICHAEL MANTELL

New York Supreme Court

Appellate Division—First Department

MICHAEL MANTELL,

Petitioner-Appellant,

–against–

NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT,

Respondent-Respondent.

APPELLANT'S REPLY BRIEF

MICHAEL MANTELL
Petitioner-Appellant pro se
1211 Avenue of the Americas
New York, New York 10036
(212) 750-3896

New York County Clerk's Index No. 108655/99

Virgil Mountain, Inc. (212) 779-4046 (Printed on Recycled Paper) L5192

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases Cited:

I. JUDICIAL MISCONDUCT IS ESTABLISHED

Conspicuously absent from the brief of the respondent is any reference to the most important part of appellants's brief, at the top of page 3:

> By reason of said omissions [absence of any reference to the sufficiency of the allegations], Petitioner asserts to this Court that there is no issue that the accusations of judicial misconduct by Judge Recant are facially sufficient.

One would think that the most fundamental point of appellant's argument would at least elicit some opposition! Respondent's failure to rebut, or even comment, appellant respectfully submits to this Court, is an admission that the allegations of judicial misconduct are facially sufficient.

One needn't have to have a Ph.D. in logic to understand a very simple syllogism:

I. Major premise

The Commission must investigate allegations of judicial misconduct which are facially sufficient.

II. Minor Premise

The allegations of judicial misconduct by Judge Recant in this case are (admittedly) facially sufficient.

III. Conclusion

The commission must investigate these allegations.

There is nothing discretionary about this. The word "discretion", or any synonym thereof, is not included in the constitution, the statute, or that rules promulgated by the Commission. Quite obviously, the Commission must first understand what the complaint is about before it decides whether it is facially sufficient. Finding out what a complaint is about is

not the same thing as conducting a investigation, whether by the constitution, the statute, the rules, or any layman's definition.

The decision by Judge Cahn in Doris L. Sassower v. Commission on Judicial Conduct of the State of New York, et al., Index No. 109141/9, makes the point:

> The term "investigate" as used in the constitution and the statute has been correctly interpreted by the Commission to include those aspects of the proceedings which the Respondent-Commission has designated and defined as its "Initial review and inquiry." While the initial review and inquiry apparently serves a different purposes from its subsequent examination they are each integral parts of the Respondent-Commission's investigatory task, and the performance of each is an investigation, as that term is used in the constitution and statutes herein referred to.

This reasoning is pure sophistry. To equate "initial review and inquiry" to "investigation" distorts the statutory scheme. First the Commission must make "an initial review and inquiry" simply to understand what the claim is about. Once that understanding is reached, the Commission then decides if the complaint is facially sufficient or not; if not, it dismisses; if sufficient, it investigates. There is no other reasonable way to interpret this scheme of the rules.

More to the point in this particular case, said argument (i.e., Judge Cahn's transportation of definitions in the first Sassower case) is not even consistent with the record. The respondent herein is not in any position to claim protection from Judge Cahn's reasoning that it's "initial review and inquiry" was an "investigation", because the Commission itself, as part of the res gestae, stated:

> Upon careful consideration, the Commission concluded that there was no indication of judicial misconduct upon which to base an investigation (R49)

Stated another way, the respondent's own determination is such that it cannot even claim that it conducted an investigation.

The second Sassower decision is no support to respondent on this appeal because therein Judge Wetzel stated: "The Court adopts Justice Lehner's finding that mandamus is unavailable to require the respondent to investigate a particular complaint." It is devoid of any other analysis.

But it is Judge Lehner's holding that is in issue in this appeal; specifically, whether Judge Lehner's opinion is consistent with the ratio decidendi of the Court of Appeals in the case of Matter of Nicholson v. State Commission on Judicial Conduct (15 NY2d 5, 1997). Both parties on this appeal make repeated reference to the Nicholson case. The references by appellant are by way of direct quotations, set forth on page 3 of appellant's brief. The effect of these is that the actual wording of the decision in Nicholson is that the Commission "must" investigate a complaint that is facially sufficient.

In rebuttal, and on page 10 of it's brief, the respondent says; "Rather, the Court reaffirmed the proposition that the Commission has the discretion to determine whether a complain is facially inadequate. 60 N.Y.2d at 610-11."

Nowhere on page 610 or 611 (or elsewhere in that opinion) did the Court in Nicholson even address the question of discretion with respect to a determination of facial adequacy, let alone make such a determination discretionary by the Commission. The aforesaid argument by in the respondent's brief is a result either of wishful thinking or of a fertile imagination.

Nor does the respondent's brief in any respect refute the distinctions appellant's brief makes between judicial review of a decision by a prosecutor or by a Departmental Disciplinary Committee as compared to a decision by the Commission.

In addition to said distinctions in the reported cases set forth in appellants' brief, appellant makes another point that respondent's brief ignores, viz.:

> It is a matter of basic and fundamental public policy that goes without saying; the Court has the power, the duty, the authority, and the moral obligation to oversee any agency that is a part of the Judicial System. (P. 6)

II. Standing

With respect to standing, there should be no possible question that since petitioner himself was the person who was unlawfully barred from the courtroom (the courtrooms belonging to the public) by Judge Recant, the petitioner has standing. No further argument is needed in support of what is so fundamentally obvious.

With respect to the other accusations against Judge Recant, petitioner has standing because he was an actual participant in these rulings. If a participant in the res gestae of judicial conduct does not have an actual standing, then no one ever has standing to bring such a complaint!

The cases cited by the respondent to support the proposition of standing are not contra. For instance, Matter of Dairylea Cooperative, Inc. v. Walkley, 38 N.Y.2d 6, 8-11 (1975), the court stated:

> A fundamental tenet of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a

> party, judicial review of that action may be had....Only when there is a clear legislative intent negating review... or lack of injury in fact... will standing be denied.... To deny petitioner standing would invite the subversion of the legislative goal of maintaining a healthy competitive atmosphere in the milk industry.

So it is that to deny petitioner standing in this case would invite subversion of the legislative goal of the Commission being required to ("shall") investigate allegations of judicial misconduct. To iterate, this is a situation where the petitioner actually appeared before Judge Recant and was an (unwilling) participant in Judge Recant's violations of her oath of office.

According to respondent's case of Mobil v. Syracuse Indus. Dev., 76 N.Y.2d 428, 433 (1991),

> aggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of defendants (or respondents), or -- put another way -- that it has sustained special damage, different in kind and degree from the community generally.

It was not the community generally who suffered at Judge Recant's hands when she told the petitioner, in the robing room, that if petitioner was respectful to her she would allow his client to return to his place of business!

Respondent's brief (p. 12) says:

> To give standing to every dissatisfied complainant whose complaint is not acted upon by the Commission in the way that the complainant would like, would unnecessarily and unduly burden it with litigation and interfere with the exercise of its discretion.

But the Commission exists for a purpose! Moreover, it should be emphasized that this is not a petition based upon a finding by the Commission after investigation. This is a proceeding

based upon the Commission's implied ruling that the allegations are not facially insufficient. This is not an "exercise of discretion". This is the Commission simply saying, in a left-handed way, that "black is white". This is a Commission who has allegations of the most egregious judicial misconduct and simply says it is not going to investigate. It would not be any unnecessary or undue burden to have the Commission investigate a complaint (made with particularity and supporting documentation) accusing a Judge of flagrantly violating her oath of office.

There must be some protection to the members of the public against any branch of the government acting improperly, even if that branch of the government is the Commission on Judicial Misconduct. In Cunningham v. Stern, (93 Misc.2d 576), respondent's cited case on P. 14, the court ruled as it did because it found:

> The public is rightfully entitled to a forum of responsive procedure for the investigation and disciplinary prosecution of those few within the judiciary whose corrupt or improper actions render disservice to the public and bring discredit to the entire judicial system. (Emphasis Added)

This is in accord with Matter of Dolphin v. The Association of the Bar of the City of New York, 240 N.Y. 89 (1925), cited on page 14 of respondent's brief:

> In all of these features we see an entire lack of character as a party and an entire absence of legal interest based either upon alleged rights or upon a right and obligation to discharge certain official duties...and the denial of which rights would present that situation of being aggrieved which would sustain an appeal.

Dolphin was a complaint by the Bar Association, not the person who suffered as a result of an improper arrest and prosecution. The distinction is that this case is not a complaint brought

by a "body", such as a Bar Association. It is brought by an individual person who was subject to the Judge's outrageous conduct.

CONCLUSION

The decision of the Court below should be reversed, and the Commission should be directed to conduct an investigation of Judge Recant, pursuant to the statute.

Dated: New York, New York
September 15, 2000

Respectfully submitted,

MICHAEL MANTELL, ESQ.
Petitioner-Appellant Pro Se
Office and P. O. Address
1211 Avenue of the Americas, Suite 1502
New York, NY 10036
(212) 750-3896
(212) 354-7700

F:\strignan\mol