

State Commission Can Refuse to Investigate Judge

BY MICHAEL A. RICCARDI

THE STATE Commission on Judicial Conduct has the discretion to refuse to investigate charges brought to it by an attorney against a judge, a Manhattan Supreme Court justice has ruled.

"[T]he Judicial Commission's failure to investigate the instant complaint is not appropriately subject to judicial review because the Commission's function is in many respects similar to that of a public prosecutor," Justice Edward H. Lehner said.

Justice Edward H. Lehner upheld the commission's decision not to proceed with an investigation into the actions of Manhattan Criminal Court Judge Donna G. Recant, who was accused of changing a court ruling based on personal animus against the complaining lawyer.

Justice Lehner said that, like prosecutors in criminal court, the 11-member commission — comprised of five lawyers, four judges and two laypersons — has the authority not to go ahead with a probe.

In *Mantell v. New York State Commission on Judicial Conduct*, Index No. 108655/99, Michael Mantell of Mantell & Haskel filed a six-page complaint a year ago against Judge Recant with the commission.

The decision will be published on Thursday.

The crux of the complaint was that Judge Recant made a decision and then changed it based on a dispute over courtroom demeanor between herself and the complaining trial lawyer.

But Justice Lehner said no writ of mandamus, under Article 78, was available to force an investigation.

Under Judiciary Law §44(1), the commission must either investigate the charges, or dismiss the complaint if it determines that, "the complaint on its face lacks merit."

Mr. Mantell argued that the allegations in a complaint must be taken as true in the commission's initial review. He analogized the situation to a court's review of the validity of a complaint on the pleadings.

But Justice Lehner chose a different analogy, comparing the commission to a prosecutor with the discretion to press forward or let go of charges.

"[T]he Judicial Commission's failure to investigate the instant complaint is not appropriately subject to judicial review because the Commission's function is in many respects similar to that of a public prosecutor," Justice Lehner said.

The court observed that prosecutorial decisions are "shielded with absolute immunity from civil lawsuits."

Mr. Mantell said in an interview yes-

terday that case law on prosecutorial discretion should not have been relied upon.

"The question here ... is the Judiciary policing itself, as distinct from the Judiciary exercising authority over a prosecutor," he said. "I think that's a fundamental distinction."

Making a second analogy, the court said that in attorney discipline cases,

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decisions not to investigate may also not be reversed under Article 78. And the attorney discipline law does not expressly grant the power of dismissal, as does the judicial discipline law.

In his complaint, Mr. Mantell said that Judge Recant on Sept. 14, 1998, initially refused to limit a protective order that would have prevented his client from entering his place of business. The modification, which would have allowed Mr. Mantell's client to go to work, was allegedly agreed upon by counsel for all of the parties, including the woman who sought the protective order.

Mr. Mantell and an assistant district attorney were apparently working out a protective order that would have allowed Mr. Mantell's client to go to work, but no limited protective order was on Judge Recant's desk.

After several calls of the case, there was still no definitive word from the District Attorney's office on a resolution of the issue, according to a court transcript of the day's proceedings.

Ex Parte Exchange

Judge Recant apparently became frustrated and chose not to modify the order, putting the case on her calendar for six weeks later.

"I have been trying to help you," Judge Recant is recorded as saying to Mr. Mantell, referring to her attempts to confirm the prosecutors' agreement to the modified protective order. "Instead you are shaking your finger at this court. And you think that you have a right to be disrespectful to me, but you don't."

She then said, according to the transcript, that the lawyer can work out an agreement with the District Attorney, but she will not be involved.

Later in the transcript, the judge is recorded in a colloquy with Mr. Mantell's client, who apologized for Mr. Mantell's conduct and asked for him to be relieved as counsel.

Judge Recant then modified the protection order to allow the client to enter his place of business.

Mr. Mantell also said that he and the judge engaged in an ex parte exchange in Judge Recant's robing room, in which she told him to be respectful. That meeting, according to Mr. Mantell, ended with the judge losing her temper after the lawyer said he would be "as obsequious as possible" in the court's presence. The lawyer also complained that Judge Recant ejected him from the courtroom.

The commission chose not to investigate the incident and dismissed the complaint in January.

Mr. Mantell, who represented himself in challenging the commission's decision, said he intends to appeal to the Appellate Division, First Department.

Defending the discretion of the commission was the State Attorney General's office, with Constantine A. Speres appearing.

Judge Recant has found herself at the center of other dustups with attorneys, most seriously one occurring in April of this year, in which she is accused of having a Legal Aid lawyer handcuffed

to a bench for more than an hour and sentencing him to 10 days in jail for contempt of court, for allegedly making a "rude remark" in court.

That case is on appeal.

Lawyers who support Judge Recant said in an August article in *The New York Times* that she is the object of attack because she holds lawyers to high standards and is openly critical when they fall short.