ATT: Michael Mantell, Esq. FAX: 212-997-5070

SUGGESTED CHANGES ON PAGE 1 OF THE REPLY BRIEF:

Insert the following:

#1: "that by reason of the lower court's failure to make any findings as to the facial sufficiency of petitioner's judicial misconduct complaint against Judge Recant, "there is no issue that the accusations of judicial misconduct by Judge Recant are facially sufficient."

#2: Pursuant to Judiciary Law §44.1

#3: Judiciary Law §44.1 is clear. The Commission "shall" investigate a complaint so long as its allegations are facially-meritorious. The Attorney General's so-called "Statutory Framework" is misleading on this point. Not only does the language of Judiciary Law §44.1 precede the two constitutional amendments creating the Commission, and not only was that language retained, unchanged, when the Judiciary Law was, thereafter amended, but the Commission's self-promulgated rules, 22 NYCRR §7000.3(a) and (B), to which the Attorney General refers, are violative of Article VI, §22(c) of Constitution and Judiciary Law §42(5). This, because, contrary to the Attorney General's claim that 22 NYCRR §7000.3(a) and (b) follow Judiciary Law §44.1, they are instead wholly "inconsistent" with that law.

Thus, whereas Judiciary Law §44.1 imposes upon the Commission a mandatory "shall" duty to investigate a complaint unless it determines that "the complaint on its face lacks merit", 22 NYCRR §7000.3(a) and (b) contravenes that duty by giving the Commission complete discretion, unbounded by any standard, to do anything or nothing at all with a complaint – be it "initial review and inquiry", "investigation" or "dismissal".

Ex "D-1"

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, #1

"By reason of said omissions [absence of any reference to the sufficiency of this 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! 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:

#2

The commission must investigate the 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 facially-sufficient allegations.

#3

There is nothing discretionary about this. The word "discretion", or any synonym thereof, is not included in the constitution, the statute, or as 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.

ATT: Michael Mantell, Esq. FAX: 212

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ATT: Michael Mantell, Esq. FAX: 212-997-5070

SUGGESTED CHANGES ON PAGE 2 OF THE REPLY BRIEF:

REPLACE PAGE 2 ENTIRELY and insert the following instead:

As to the Attorney General's citation to Doris L. Sassower v. Commission, (NY Co. 95-109141), examination of that decision shows that Justice Cahn's attempt to uphold the petitioner's challenge therein to 22 NYCRR §7000.3 is sheer sophistry. The "definitions" section to the Commission's rules, 22 NYCRR §7000.1, quoted by Justice Cahn in his decision, belies any claim that "initial review and inquiry" is subsumed within "investigation". Such "definitions" section expressly distinguishes "initial review and inquiry" from "investigation".

Even more importantly, the Court's argument does nothing to reconcile 22 NYCRR §700.3 with Judiciary Law §44.1, since, as hereinabove stated, 22 NYCRR §7000.3 uses the discretionary "may" language in relation to both "initial review and inquiry" and "investigation" – thus mandating neither. Additionally, 22 NYCRR §7000.3 fixes no objective standard by which the Commission is required to do anything with a complaint – be it "review and inquiry" or "investigation. This contrasts irreconcilably with Judiciary Law §44.1, which uses the mandatory "shall" for investigation of complaints not determined by the Commission to facially lack merit.

The Attorney General's reliance on Elena Ruth Sassower, Coordinator of the Center for the Judicial Accountability, Inc., acting pro bono publico v. Commission on Judicial Conduct, (NY Co. 99-108551) for the proposition that "mandamus unavailable to require Commission to investigate particular complaint, adopting decision in Mantell" is likewise unavailing. Such decision is devoid of any analysis. Rather, without discussion, it rests on the demonstrably insupporting decision of Justice Cahn and on the decision of Justice Lehner, herein appealed, which makes no attempt to reconcile 22 NYCRR §7000.3 with Judiciary Law §44.1.

Ex. D-2

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, is part fo 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 is no support to respondent on this appeal, because they're as Judge Wetzel stated: "The Court adopts Justice Lehner's finding that mandamus is unavailable to

require the respondent to investigate a particular complaint." And is devoid of any other analysis.

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 called "Matter of Nicholson v. State Commission on Judicial Conduct (15 NY2d 5, 1997). That Both parties of this appeal make repeated reference to that 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 Court 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 that determination discretionary by the Commission. The aforesaid argument by in the respondent's brief is a result either of wishful thinking or a fertile imagination.

Nor does the respondent's brief in any respect refute the distinctions appellant's brief make between judicial review of a decision by a prosecutor or by a departmental disciplinary committee.

In addition to said distinctions 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.

ATT: Michael Mantell, Esq. FAX: 212-9

SUGGESTED CHANGES ON PAGE 2 OF

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Assistant Attorney General in Charge
Litigation Bureau

September 6, 2000

BY HAND
Honorable Catherine O'Hagen Wolfe
Clerk of Court
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Re: Mantell v. Commission on Judicial Conduct
Sup. Ct. N.Y. Co. Index No. 108655/99

Dear Ms. Wolfe:

This office represents respondent New York State Commission on Judicial Conduct. Enclosed please find ten copies of Sassower v. Commission on Judicial Conduct, Index No. 109141/95 (Sup. Ct. N.Y. Co. 1995) and Sassower v. Commission on Judicial Conduct, Index No. 108551/99 (Sup. Ct. N.Y. Co. 1999) unreported decisions cited to by respondent in its brief. Thank you for your attention to this matter.

Respectfully submitted,

Constantine A. Speres
Assistant Attorney General

cc: Michael Mantell, Esq.
Petitioner-Appellant Pro Se
1211 Avenue of the Americas
New York, New York 10036
(w/encl.)

Ex "D-3"