POINT II

PETITIONER IS ENTITLED TO SUMMARY JUDGMENT IN HER FAVOR PURSUANT TO CPLR §§7804(e), 409(b), 3211(c)

As demonstrated at ¶¶21-32 of Petitioner's accompanying Affidavit, and as shown herein by the legislative history and legal authorities cited, Petitioner is entitled to summary judgment in her favor.

Respondent's Self-Promulgated Rule 22 NYCRR §7003, As Written And As Applied, Is Unconstitutional And Statutorily Unauthorized In That Such Rule Converts Respondent's Mandated Duty To Investigate Complaints Into A Discretionary Option

Although the present Article 2-A of the Judiciary Law §44.1 (Exhibit "1") was enacted in 1978, after passage of the 1977 constitutional amendment which created the present Commission on Judicial Conduct, research shows it to be the starting point for examining Respondent's mandatory duty to investigate complaints of judicial misconduct. Indeed, the wording of §41.1:

> "Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit..." (emphasis added)

preceded the 1977 constitutional Amendment (Exhibit "2") and replicates, verbatim, the pertinent wording of §43 of the original Article 2-A (Exhibit "3"), which, in 1974, created the "Temporary State Commission on Judicial Conduct".

Indeed, in 1976, when Article 2-A was amended (Exhibit "4"), following the 1975 constitutional Amendment making the

Ex "Y"

"Temporary State Commission" permanent (Exhibit "5"), the Legislature retained the above-quoted wording of §43--even while making additions and deletions to the balance of that section (Exhibit "4").

Although the 1976 emendation of Article 2-A (Exhibit "4") left intact the prefatory wording of §43 from the 1974 version (Exhibit "3"):

> "The commission shall receive a complaint against any judge with respect to his qualifications, conduct, fitness to perform, or the performance of his official duties" (emphasis added)

with subdivisions (a) and (b) then elucidating the Commission's investigative duty following receipt of a complaint, the 1975 constitutional Amendment (Exhibit "5") worded the Commission's duties as follows:

> "The commission <u>shall receive and investigate</u> complaints of the public with respect to the qualifications, conduct, or fitness to perform or the performance of the official duties of any judge or justice of any court within the unified court system and may, on its own motion, <u>initiate investigations</u> with respect to the qualifications, conduct, or fitness to perform or the performance of the official duties of any such judge or justice." (Article VI, Section 22k, emphasis added).

In 1977, the constitutional Amendment creating the Commission as it exists today altered the above-quoted wording--which is now the preface to Article VI, Section 22a (Exhibit "2"):

> "...The commission...shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system[1]..." (emphasis added).

Such wording of Article VI, §22(a) of the Constitution (Exhibit "1") was then replicated, essentially verbatim, as the prefatory opening of §44.1, when, in 1978, the Legislature amended Article 2-A. This prefatory opening was then followed up by subdivisions (a) and (b), representing the "law" as to the Commission's investigative duty.

Consequently, the "shall...investigate" phrase of Article VI, Section 22a of the Constitution must be interpreted in the context of subdivisions (a) and (b), which preceded it and which the Legislature retained through three versions of Article 2-A (Exhibits "1", "3", and "4") in the four years within which the two constitutional Amendments creating the Commission were passed (Exhibits "2" and "5").

The treatises accord "shall" a presumptively mandatory meaning, in contrast to "may", a term connoting "discretion", 82 C.J.S. Statutes §380. A particularly relevant discussion of the subject is contained in D'Elia on Behalf of Maggie M. v. Douglas R., 524 N.Y.S. 2d 616 (Fam. Ct. 1988):

> "The terms 'shall' and 'may' have opposite meanings; the former mandatory, the latter discretionary. When different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction

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[1] The wording of Article VI, Section 22a continues with the words "in the manner provided by law..."

between them is intended. McKinney's Consol. Laws of N.Y., Book 1, Statutes, Sec. 236, at 403; Albano v. Kirby, supra, 369 N.Y.S.2d at 530, 330 N.E. 2d at 619, citing Waddell v. Elmsndorf, 10 N.Y. 170, 177.

It has been the long recognized rule of construction in the courts of this state that words be construed in accordance with their usual, common and ordinary meaning. (See, McKinney's Consol. Laws of N.Y. Book 1, Statutes, Sec. 232; Riegert Apartments Corp. v. Planning Board of the Town of Clarkstown, 78 A.D. 2d 595, 432 N.Y.S.2d 40, aff'd 57 N.Y. 2d 206, 455 N.Y.S.2d 558, 441 N.E.2d 1076 (2nd Dept. 1982). The plain and ordinary meaning of the word 'shall' denotes command, whereas 'may' denotes permissiveness.

Generally, it is presumed that the use of the word 'shall' when used in a statute is mandatory, while the word 'may' when used in a statute is permissive only and operates to confer discretion, especially where the word 'shall' appears in close juxtaposition in other parts of the same statute. Metro Burak, Inc. v. Rosenthal & Rosenthal, Inc., 51 A.D.2d 1003, 380 N.Y.S.2d 758 (2nd Dept. 1976); 82 C.J.S. Statutes, Sec 380. The deliberate use of the word 'may' shows a settled legislative intent not to impose a positive duty."

Such discussion reinforces the meaning to be accorded "shall" and "may", as they respectively appear in Judiciary Law §44.1(a) and (b), where such words are in close proximity, and juxtaposed with one another.

Moreover, only by a mandatory interpretation of the "shall" of Judiciary Law §44.1(a) does Judiciary Law §44.1(b) make any sense. Plainly, Judiciary Law §44.1(b) would be superfluous were Judiciary Law §44.1(a) to be read as anything other than mandating that Respondent investigate complaints of

judicial misconduct filed with it.

This logical interpretation of Judiciary Law §44.1(a) is further supported by the decision of our state's highest court in Nicholson v. State Commission on Judicial Conduct, 431 N.Y.S.2d 340 (1980). In that case, the New York Court of Appeals, referring to the present Judiciary Law (Exhibit "1"), goes on to state:

> "The Judiciary Law implements the constitutional authorization and establishes the commission, granting it broad investigatory and enforcement powers (see Judiciary Law, §§41, 42, 44). Specifically, 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).

A year following the aforesaid Court of Appeals' decision in Nicholson, supra, the Commission's administrator, Gerald Stern, testified at public hearings before the combined Judiciary Committees of the New York Senate and Assembly as to the effort that went into the promulgation of Article 2-A and the excellence of that legislation:

> [December 18, 1981 Transcript, pp. 6-8]
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> "It was just about four years ago when we met in Albany, almost on a daily basis, as I recall, during the months of December and March and April of 1978; that is, December of 1977, as part of a task force of representatives of the judiciary and the Commission, meeting with your respective committees to discuss new legislation to implement the recently adopted Constitutional Amendment.
>
> We spent a great deal of time together and came up with legislation which is now Article

2-A and, based upon the nearly three and a half years of experience the Commission has had with this legislation, the Commission has asked me to appear today and take a very strong position in telling you that this--the legislation has worked extremely well. It was the product of a few hectic months of consideration and consideration of a wide range of views concerning judges' rights and the powers of the Commission. It is an excellent piece of legislation. It has worked well, and we recommend that no changes be made on balance in the legislation.

...

I want to emphasize today that, on a comparative basis, legislation -- Article 2-A of the Judiciary Law -- is the very best in the country. I am familiar with procedures and laws in the United States. 50 states have commissions. I am on boards, national boards, committees, have met often with my colleagues in other states, and I can tell you that this is the very best legislation in the country governing procedures for commissions on judicial conduct."

Just as the 1978 emendation of Article 2-A (Exhibit "1") replicated the wording of Article VI, Section 22a of the Constitution (Exhibit "2"), so too the provision contained in Article VI, Section 22c requiring that the rules and procedures to be adopted by the Commission "not [be] inconsistent with law"[2] (Exhibit "2") was incorporated into the 1978 version of Article 2-A. Thus, whereas the 1974 and 1976 versions of Article 2-A, which, in identical wording, gave the Commission power to makes rules and procedures "necessary to carry out the provisions and purposes of this article" (Exhibits "3" and "4"), the 1978 version of Article 2-A added the proviso of Article VI, Section 22c of the Constitution, to wit, that such rules and procedures

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[2] See, footnote 1 hereinabove.

be "not inconsistent with law" (Exhibit "2), which reinforced Article VI, Section 22a "in a manner provided by law" (Exhibit "2"). Thus, §42.5 of the present Judiciary Law (Exhibit "1") permits the Commission:

> "To adopt, promulgate, amend and rescind rules and procedures not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article." (emphasis added)

Nevertheless, when the Commission, thereafter, promulgated 22 NYCRR §7000 et seq., its rule numbered §7000.3 was plainly "inconsistent with law" and not "in a manner provided by law", since it made Respondent's investigation of a facially-meritorious judicial misconduct complaint optional, whereas the Judiciary Law imposed upon Respondent a mandatory duty. In pertinent part, said 22 NYCRR §7000.3 reads:

> (b) Upon receipt of a complaint, or after an initial review and inquiry[3], the complaint may be dismissed by the commission or, when authorized by the commission, an investigation may be undertaken." (emphases added)

Such rule, with its discretionary "may", is clearly unconstitutional and statutorily unauthorized. As set forth at paragraphs "SEVENTEENTH" and "EIGHTEENTH" of the Verified Petition, 22 NYCRR §7000.3 has converted Respondent's mandatory duty ["shall"] to investigate complaints of judicial misconduct to a discretionary function ["may"], without even providing the defined standard against which performance can be measured

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[3] 22 NYCRR §7000.3 defines the phrase "initial inquiry and review", as well as "Investigation" in a definitions section. See, §7000.1(i) and (j).

[Judiciary Law §44.1(b)], dispensing with the requirement that Respondent determine that a complaint summarily dismissed be first determined to be "on its face without merit."

The unconstitutionally and statutorily violative result of §7000.3 is demonstrated by Respondent's summary dismissals of Petitioner's complaints of judicial misconduct, without a determination that her complaints so-dismissed were on their face "without merit" and where objective examination shows the complaints to be facially meritorious, the allegations of judicial misconduct detailed and well documented.