SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MICHAEL MANTELL,

Petitioner,

Index No.: 108655/99

-against-

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

Respondent.

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PETITIONER'S MEMORANDUM OF LAW

MICHAEL MANTELL, ESQ.
Petitioner Pro Se
Office and P. O. Address
400 Madison Avenue, Suite 1411
New York, NY 10017
(212) 750-3896

PETITIONER'S MEMORANDUM OF LAW

INTRODUCTION

This is an Article 78 proceeding brought against the respondent, the New York State Commission on Judicial Conduct, for its complete failure to perform a statutory function, its disregard of law, its arbitrary and capricious ruling, and its abuse of discretion.

The petition now before the Court is actually an amended petition. The only difference between the original petition and the amended petition is that the original petition only relied upon subdiv.(1) of §7803 of the CPLR (failure to perform a duty enjoined upon it by law), whereas the amended petition is grounded also on subdiv. (3), alleging that the respondent's dismissal of a complaint about Judge Recant, viz., "...that there was no indication of judicial misconduct upon which to base an investigation", was an error of law, was arbitrary and capricious, and was an abuse of discretion.

The allegations of the actual complaint to the Commission must be iterated and emphasized herein, not only because that is the basis upon which this Court must make its decision in this proceeding, but because the basis of the complaint was totally ignored, not only by the respondent, but also its defender in this case, the Department of Law of the State of New York.

This is a situation in which allegations were made against a sitting judge, Judge Recant, as follows (please see ¶6 of the Amended Petition):

I. Changing her ruling on a matter before her on the basis of her personal reaction to the attorney representing the defendant.

II. Engaging in a display of intemperate conduct which intimidated lawful advocacy on behalf of a criminal defendant.

III. Making remarks on the record which were a gross departure from required courtesy and civility.

IV. Engaging in an ex parte communication with the attorney for the defendant about a case which was before her.

V. Advising counsel, ex parte, what should be done by counsel to change the judge's attitude and her ruling on a criminal case.

VI. Having a spectator forcibly removed from the court room in which she was presiding for reasons only of her personal animosity.

Petitioner respectfully submits that it would be pointless for the Court to rule in this Article 78 proceeding without reference to these allegations. The point is that this Court is not being asked to make any ruling as to whether or not Judge Recant committed the offenses alleged; this Court is only asked whether the allegations, on their face, are such violations of judicial office that the respondent, in accordance with principles set forth at length below, does not have the right to dismiss for insufficiency.

There is no issue but that Article 4 of the Judiciary Law

mandates that the respondent "shall...investigate...complaints with respect to...misconduct in office...." It naturally follows that if the offenses alleged (notwithstanding whether or not they were actually committed) were "misconduct in office", the respondent-Commission has no choice but to conduct an investigation.

ARGUMENT

POINT I

The Allegations are of offenses which Are Incontrovertibly Misconduct in Office

> The Judge should be the exemplar of dignity and impartiality. He shall suppress his personal predilections, control his temper and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. Uniform Court Rules §700.5(e).

One does not have to be a lawyer to recognize that this should be a fundamental rule binding upon all members of the Judiciary. It is not a matter of "interpreation" or "discretion" that the accusations against Judge Recant (particularly II and III above) are a clearcut violation of thi Court rule.

With respect to the three other violations (I, IV and V), that is, Judge Recant basing her ruling in a criminal case upon her relationship with defendant's attorney, the courts have not been silent:

> But a Judge is a Judge; not a prosecutor or an investigator . . . He must maintain an atmosphere of impartiality, and be impartial, even though his suspicions have been aroused. Parties must feel that if they have a claim, the Judge will listen to it impartially, or let the jury listen to it. And they must be able to do so without fear that the Judge has already made up his mind that they are dishonest, or exaggerating, or acting in bad faith and will probably cause them to suffer severe consequences beyond the loss of the particular case if they persist; e.g., prosecution, disciplinary proceedings, complaints to the Insurance Department, etc. (In the Matter of Mertens, 56 A.D.2d 456, p. 467). (emphasis is original)

Judge Recant lost her temper, both on the bench and in the robing room, as it is alleged in the complaint to the Commission:

> But [the Judge] must lean over backward and err on the side of making sure that he does not intimidate the parties from pursuing legitimate claims or improperly influence the jury. (Mertens, supra, p. 467)

An attempt by the court to intimidate counsel, whether justified or not from a human relations standpoint, is clearly a departure from the well recognized criteria for a Judge's conduct:

> Self-evidently, breaches of judicial temperament are of the utmost gravity. As a matter of humanity and democratic government, the seriousness of a Judge, in his position of power and authority, being rude and abusive to persons under his authority--litigants, witnesses, lawyers--needs no elaboration.
>
> It impairs the public's image of the dignity and impartiality of courts, which is essential to their fulfilling the court's role in society.
>
> One of the most important functions of a court is to give litigants confidence that they have had a chance to tell their story to an impartial, open-minded tribunal willing to listen to them. And the lawyers must feel free to advance their client's cause--within the usual ethical limitations--without fear of being subjected to unpredictable anger, abuse, or threats. Mertens, supra, p. 470).

The rule is well established:

> Neither would any affirmative action on our part be appropriate, if it were not for the fact that the reduction of the charges was accompanied by conduct on [the Judge's] part which the Referee found to have been inconsistent with the fair administration of justice. That finding requires the conclusion that such conduct warrants the censure which the Referee has recommended. There is no statute or rule which required

> respondent to explain his ruling, and we are not unmindful of his duty to preserve order in his courtroom and to require a proper respect for the court's rulings. The record does not indicate, however, that the police officer's request for enlightenment as to why the charge which he had made had been reduced, was unreasonable or that his conduct was insolent or contemptuous, and the Referee had found that [the Judge's] action in berating Mingo after his request for enlightenment had been curtly refused, violated [the Judge's] duty of courtesy and civility to those appearing in his court, in the course of the administration of justice. (In the Matter of Murtagh V. Maglio, 9 A.D.2d 515, p. 521).

It is also clearly alleged in the complaint that Judge Recant did have an ex parte discussion with defendant's counsel (petitioner) about the case. Particularly, the Judge told defendant's counsel what he should do to have the Judge revert to a favorable ruling for his client, i.e., modification of the protective order so as to allow the defendant to go to his place of business between that court date and the adjourned date. Regardless of the fact that this discussion was because the Judge was trying to help counsel (as she said), is it not a violation of her office to have such a discussion? If there is an alleged crime then there is an alleged victim. How would the alleged victim feel if she believed her assailant, and potential future assailant, was obtaining favorable treatment by the Court because her assailant hired a lawyer who was nice to the Judge?

> Moreover, [the Judge] had the duty to uphold the independence and integrity of the judiciary by not engaging in ex parte communications concerning a pending matter... Instead, by his conduct [the Judge] conveyed the impression in an ex parte communication

> that his rulings would not be based on merit but on his allegiance and loyalty to the former political leader. (In the Matter of Levine, 74 NY2d 294, p. 297)

Judge Recant made a ruling without a record, and a ruling that affected the rights of a citizen in an essentially public forum, i.e., the courtroom. This includes her direction to the Court Officer to have defendant's attorney (petitioner) removed after he withdrew from the case and had been a silent spectator for about ten minutes.

> If the Judge is acting judicially and formally - as he is if he presides at or participates in voir dire - he is holding court there and the parties are just as much entitled to have a reporter there as in the courtroom. Whenever the Judge is exercising his formal powers, he is holding court. (In Mertens supra, p. 465).

The foregoing applies not only to Judge Recant's exclusion of an attorney from the courtroom for no apparent reason (except to placate herself), but also to her ex parte communication with counsel.

Much press was devoted to attacks on the Judiciary in 1998.

> At a time when the Judiciary is under attack from many quarters, its critics can again revel in the meek reproof now accorded [the Judge] for his "serious breaches of judicial temperament and decorum". (Mertens, supra, dissenting opinion).

Finally, the most unequivocal accusation is VI of the Amended Petition, having a spectator forcibly removed from the court room in which the Judge was presiding for reasons only of her personal animosity.

It is respectfully submitted to this Court that this

allegation (and the sufficiency of the allegation is all that is in issue in this application) is clear, and that the conduct was a flagrant violation of Section 4 of the Judiciary Law:

> § 4. SITTINGS OF COURTS TO BE PUBLIC
> The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, except jurors, witnesses, and officers of the court. (Emphasis added).

POINT II

ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW

Point I of the memorandum of law by the New York State Law Department, on behalf of the respondent, is merely a string of legal platitudes interspersed with citations of authority from which these platitudes were lifted. It may just as well have been lifted from a text book. The cases cited therein are not in point, and some are actually contra.

The first case cited, Matter of Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1967) was actually an examination in detail by the court of the matter in dispute before the respondent in that case, as opposed to the form letter rejection as in this case:

> Consequently, the present record before the Administrator, coupled with the data available to him from regulation in this area, amply satisfied the test of rationality. Nor was it necessary that his

> reasoning, which is either detailed or inferable from the material presented to him or created by the agency, be so comprehensive as to provide specific argumentative analysis of each of the statutory factors. Moreover, there are no facts other than those already conceded which might have required findings of fact by a quasi-judicial tribunal, which this agency is not.

Note that in this case there was not only no examination by respondent, but also absolutely no reasoning whatsoever.

Respondent's memorandum's next case, Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv., 77 N.Y.2d 753, 758 (1991), is actually in accord with the argument of petitioner in this case:

> Thus, the inquiry here is to determine whether the stated reason for petitioner's termination is in accord with those rules.
>
> The record demonstrates that the sole reason advanced by the Bd. of Coop. Educ. Serv. and the Ontario County Civil Service Personnel Officer for dismissing petitioner was that she "vacated the position of Typist when she accepted a Leave of Absence from her probationary appointment as Data Entry Operator" because it was "impossible for an employee to encumber two positions".

In Scherbyn, the court tracked the "reasoning" of the agency and clearly found that what the agency did was patently ridiculous. So it is in this case, as the Commission on Judicial Conduct acted in a patently ridiculous way in stating that these very serious accusations about Judge Recant, blatant violations of the most fundamental parts of her job, were "no indication of judicial misconduct".

Respondent's reliance on Pell v. Board of Education, 34

N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974) is even more farfetched:

> The arbitrary or capricious test chiefly "relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact." (1 N.Y. Jur., Administrative Law, at 184, p. 609.) Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. In Matter of Colton v. Berman, (supra, p. 329), this court (per Breitel, J.) said "the proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law."

In this proceeding, it has not been, and cannot be even alleged in defense of respondent, that there was any sound basis in reason for the respondent's dismissal. Not only is there no rational basis for the respondent's ruling, there is no basis for it at all, rational or irrational.

The dictum in Pell is squarely in accord with the entire thesis of this proceeding:

> That purpose [the reason for the enactment of CPLR §7803] should be fulfilled by the courts not only as a matter of legislative intention, but also in order to accomplish what a sense of justice would dictate.

The issue in respondent's memorandum's next case, County of Monroe v. Kaladjian, 83 N.Y.2d 185, 189 (1994) was:

> ...whether the Department of Health's (DOH) decision to deny petitioner Monroe County's request, on behalf of its County hospital operation, for additional Medicaid reimbursement due to the difference between petitioner's estimated electric utility costs for 1983, a rate base year, and actual usage in 1990, was arbitrary and capricious.

In County of Monroe there was an actual hearing, and calculations were made. How can the Attorney General argue to this Court, in good faith, that a decision by way of analysis of a detailed and contentious accounting matter has any comparison to this case, a flat refusal to even consider serious allegations of the Judge's conduct?

Equally farfetched is respondent's reliance upon the case of Diaz v. Abate, 215 A.D.2d 275, 276 (1st Dept. 1995), where the issue was "deferred restoration of the petitioner's off-duty weapon for one year". This is a very short decision in which the court appropriately found that there was a "rational basis of agency decision". But, in the case at bar, there is no basis whatsoever for the Commission's decision.

Petitioner contends that no reasonable mind seeking to fulfil the mandate of the statute could have found that these six allegations about Judge Recant present "no indication of judicial misconduct".

For the respondent to rely upon Buck v. N.Y. State Liquor Authority, 19 Misc.2d 912, 915 (Sup. Ct. Kings Co.), aff'd, 8 A.D.2d 851 (2d Dept. 1959) is to completely disregard the record in this case, including, particularly, the allegations and the response of the Commission on Judicial Misconduct. Buck is simply a review of a decision by the New York State Liquor Authority disapproving the relocation of a liquor store. The decision in Buck is full of an analysis of the reasoning of the respondent therein, whereas in this case there isn't even any

reasoning by the respondent for the Court to look at!

It cannot be iterated enough that the accusations in this case are peculiarly within the ambit of the judicial system. This is not a case against the State Liquor Authority or a police commissioner or a county supervisor. This is a case against a constitutionally created overseer of the judiciary for failing to fulfil its duty with respect to a Judge.

The respondent's citation of Donovan v. Bellacosa, 129 A.D.2d 152, 154 (1st Dept. 1987) shows the weakness of respondent's argument herein, as the following excerpt from that case shows:

> While it is true that methods of determining workload other than that used under the new plan may be as good or even better, administrative determinations concerning the classification of civil service positions are subject to limited judicial review.

Can anyone, whether it be the New York State Attorney General, the Commission on Judicial Conduct, or Judge Recant, make a sane argument to this Court that methods of determining whether there has been judicial misconduct are subject to limited judicial review?

The quotation at the top of page 6 of respondent's memorandum supports the petitioner's argument. The "evaluation" that is called for in this case is certainly not the type of decision that the Court should defer to an agency. This is a case where there are accusations that a sitting Judge openly and flagrantly violated the most fundamental rules of being a Judge. What could be more within the purview of the courts?

In the case cited by the respondent for the point "evaluation of factual data", (Kurcsics v. Merchants Mutual Insurance Co., 49 N.Y.2d 451, 459 (1980)), the court framed the issue by saying:

> This appeal raises a question of first impression in this court concerning the construction of the phrase "first party benefits" as used in Article 18 of the Insurance Law (670-678), New York's Comprehensive Automobile Insurance Reparations Act, which provides no-fault insurance protection to "covered persons".

Is not the subject matter of the review in the Kurcsics case dramatically and drastically different from the subject of review in this case, at least as concerns the proper function of a court in determining the propriety of an agency's actions?

The "accord" relied upon by respondent's memorandum in the case of Howard v. Wyman, 28 N.Y.2d 434, 438 (1971) is also obviously distinguishable. The matter of Howard v. Wyman, concerned whether or not a welfare mother was improperly ruled against in denying an application for replacement of necessary personal property. Therein, the Court found:

> It is highly unfortunate that burglaries are endemic to many sections of the city and occur in great numbers, but such misfortune may not be labeled a "catastrophe" within the sense of the statute and, certainly, to so construe it -- as the agency has -- may not be said to be irrational or unreasonable. In fact, to include within the phrase a "like catastrophe" a burglary would require a rewriting of the statute; the courts should not resort to such unwarranted judicial legislation. If there is to be a change in the Commissioner's construction of the statute, it must be accomplished by legislative amendment.

In each of the cases in which the court declined to intervene based upon the doctrine of "arbitrary or capricious" or "contrary to law", there was an actual examination and finding by the agency. Moreover, it was an examination and finding peculiar to the agency's expertise, as distinct from the court's lack thereof.

Both of those factors are contrary to the fundamental premises of this proceeding. Here there was no examination, no finding, but rather a form letter in response to charges which, on their face, constitute serious and flagrant violations of the office of Judge. Moreover, the area of "expertise" of the respondent-Commission is wholly and completely within the ambit of the Court and cannot, within our system of justice, escape scrutiny by the Court, nor should it.

POINT III

MANDAMUS IS THE ONLY REMEDY AVAILABLE TO PETITIONER

For the respondent's memorandum to allege that it is "discretionary" for the Commission on Judicial Conduct to decide whether or not to investigate a charge that a Judge changed a ruling in a criminal case because of her personal dislike of the defendant's attorney, or had an ex parte discussion with the attorney advising what he had to do to make the Judge revert to her original ruling, and that there was no indication for action when the allegation is that the Judge had a spectator removed from the court room because she did not like him, is to render a

tortured definition to the word "discretionary".

Under the argument advanced to this Court on behalf of the respondent-commission, if the complaint to the Commission alleged that Judge Recant, while sitting on the bench in her black robes, took $500 from a criminal defendant and put it in her pocket, in front of the whole court room, and advised that this was the basis for her dismissing the case against him, the Commission could just simply say (as it has herein), "There was no indication of judicial misconduct...", and that would be the end of it.

According to the respondent's theory, such a hypothetical decision by the Commission would be "discretionary" and this Court would powerless to order the Commission to investigate blatant bribery. Surely this was not the intention of the legislature in creating the Commission, as the exact wording of the statute indicates.

Just to illustrate a point, one of the cases cited under Point II of respondent's brief is Harper v. Angiolillo, 89 N.Y.2d 761. In Harper, the issue was as follows:

> The primary issue on this appeal is whether a former defendant in a criminal proceeding which terminated in his favor may obtain automatic access to all files relating to his arrest and prosecution from the Westchester County District Attorney's office pursuant to CPL 160.50 (1)(d) through a CPLR article 78 proceeding for mandamus.

That decision by the Westchester District Attorney to deny access, which was analyzed by the court in Harper, included analysis of the statute. The court found:

> The Legislature, by enacting specific legislation designed to avoid the pitfalls of providing untrammeled access to law enforcement records, has already recognized that a defendant's interest in such records may be outweighed by competing policy considerations.

If interpretation of the meaning of a statute is to be a guide as to whether or not mandamus will lie, then, certainly, the use in this statute (Judiciary §44, supra) of the term "shall" mandates an investigation in any situation where there are allegations of "misconduct in office".

The brief of the respondent quotes the portion of the statute that says: "the commission may dismiss the complaint if it determines that the complaint on its face lacks merit..." It is the essence of this proceeding that, as a matter of law, these six allegations are sufficient. Stated another way, as a matter of law, it cannot be said that these allegations lack merit.

Respondent's memorandum also says: "The cited statutory language does not require or compel the Commission to conduct an investigation merely because a complaint is filed alleging judicial misconduct." But that is not the res gestae herein. The res gestae in this case is not "merely...a complaint...alleging judicial misconduct". This is a complaint setting forth the underlying facts which, if true (hypothetical) are the very essence of judicial misconduct.

POINT IV

PETITIONER'S CLAIM IS COMPLETELY JUSTICIABLE BY THE COURTS OF NEW YORK STATE

Respondent's argument to this Court is that "It is well settled that questions of broad legislative and administrative policy are non-justiciable and beyond the scope of judicial correction" is completely beside the point, because in this case we are not concerned with "questions of broad legislative and administrative policy". Here we are concerned strictly and singly with the sufficiency of allegations of a Judge flagrantly violating her oath of office, repeatedly!

Respondent's memoradum's cases themselves do not support the respondent's argument, either being clearly distinguishable or contra.

For instance, in Jones v. Beame, 45 N.Y.2d 402, 408 (1978), the question under consideration by the court (i.e., the question before the agency) concerned the rights of private persons and organizations to combat allegedly cruel treatment of animals. The court specifically found:

> questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena.

Certainly, the distinction between cruelty to animals and judicial misconduct is overwhelming.

The court in Jones went on to state:

> Obviously, it is untenable that the judicial process, at the instance of particular persons and groups affected by or concerned with the inevitable consequences of the city's fiscal condition, should intervene and

> reorder priorities, allocate the limited resources available, and in effect direct how the vast municipal enterprise should conduct its affairs.
>
> * * *
>
> Hence, inescapably, in both cases there are questions of broad legislative and administrative policy beyond the scope of judicial correction. Not only is the situs of responsibility elsewhere, but the judicial process is not designed or intended to assume the management and operation of the executive enterprise.
>
> * * *
>
> There is one recurrent theme: the court as a policy matter, even apart from principles of subject matter jurisdiction, will abstain from venturing into areas if it is ill-equipped to undertake the responsibility, and other branches of government are far more suited to the task.

It is inappropriate, at best, for respondent to cite Jones to this Court, as if this Court was "ill-equipped to undertake the responsibility" to determine whether allegations of judicial misconduct are sufficient on their face.

Similarly, in respondent's next case, New York State Law Enforcement Employees v. Cuomo, the court discussed the doctrine:

> At the heart of the justification for the doctrine of justiciability lies the jurisprudential canon that the power of the judicial branch may only be exercised in a manner consistent with the "judicial function".

New York State Law Enforcement concerned a matter other than the propriety of judicial conduct as, indeed, all the cases cited in respondent's memorandum concerned subject matters other than the propriety of judicial conduct. The court in New York State

Law Enforcement went on to state:

> By seeking to vindicate their legally protected interest in a safe workplace, petitioners call for a remedy which would embroil the judiciary in the management and operation of the State correction system.
>
> * * *
>
> Where, as here, policy matters have demonstrably and textually been committed to a coordinate, political branch of government, any consideration of such matters by a branch or body other than that in which the power expressly is reposed would, absent extraordinary or emergency circumstances [citation] constitute an ultra vires act.

But for the courts of this state to consider whether or not an allegation of judicial misconduct is legally sufficient cannot be "an ultra vires act".

The questions herein certainly are not subject to the discharge of duties by other branches of government. How can the Court be asked to abdicate its most fundamental responsibility, that is, to maintain its own standards?

The next case cited by respondent, Wilk v. N.Y.S. Commission on Judicial Conduct, is distinguishable because it was a proceeding "in the nature of prohibition". In dictum, the court therein did state:

> Determinations of the respondent [the same as the respondent herein] are subject to review by the Court of Appeals.

If this is true, then is not the determination by the respondent in this case also subject to judiciary review?

The Matter of Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597, 608 (1980), was also a proceeding in the

nature of prohibition, as opposed to this, which is in the nature of a mandamus. Nonetheless, the reasoning of the court in Nicholson may be of value in this case. That is because therein sitting judges sought to prevent the Commission from investigating them, and the court carefully reviewed what should be done by the Commission. In doing so, the court quite clearly expressed the relationship of the judiciary to the Commission on Judicial Conduct, as the subject of its work and as an overseer of its work:

> If, indeed, the investigation impermissibly chills the exercise of these rights, the commission would be acting in excess of power and prohibition would be the appropriate remedy. That the issues could be raised on appeal from any disciplinary action taken is not a persuasive reason in this instance for denying the availability of the remedy. Thus, we may entertain the instant proceeding seeking prohibition.
>
> * * *
>
> There is hardly***a higher governmental interest than a State's interest in the quality of its judiciary".
>
> * * *
>
> It is in light of these overriding interests that the investigatory activities of the body charged with policing the conduct of the Judges [the Commission on Judicial Conduct] must be examined. (Emphasis added)
>
> We view appellants' challenge as an indirect attack upon a determination that certain activities may constitute judicial misconduct and conclude that the arguments are insufficient to warrant restraining the commission's activities and indeed are premature.

If the criteria enunciated by the court in the Nicholson

case are applied by this Court, then surely this Court must order an investigation of allegations which, on their face, unequivocably set forth very serious judicial misconduct.

The respondent's citation of Johnson v. Boldman, 24 Misc. 2d 592, 594 (Sup. Ct., Tioga Co., 1960), is fundamentally distinguishable. Therein, the Mayor of the Village of Waverly sought to compel a District Attorney to prosecute someone; it was not a case where the judiciary was asked to review its own. In Johnson v. Boldman, the court stated:

> We do not believe that the Legislature of this State...intended that the heavy artillery of the offices of...the district attorney be wheeled into action"..."every time a rabbit be snared or a frog speared after the dark".

If, and only if, this Court finds that the allegations (see page 2, supra) are facially insufficient, then this proceeding will be dismissed. If, hypothetically, the allegations in this case were that Judge Recant was taking notes with her left hand, or that Judge Recant wore eyeglasses, or that Judge Recant sat at the bench with one of her hands on top of the other, then, those allegations would be dismissed by the Commission as insufficient, and this Court would have to sustain the Commission. But those are not the allegations, and a ruling must be made on whether the allegations herein are sufficient.

So is distinguishable respondent's next cases of Clouden v. Lieberman, n.o.r. 1992 WL 54370 (E.D.N.Y.) :

> Prosecutors and those holding equivalent office are immune from suits seeking to force official action.

and Hassan v. Magistrate's Court of the City of New York, 20 Misc. 2d 509, 513 (Sup. Ct., Queens Co., 1959):

> At common law, no part of the power to accuse a person of crime or to prosecute a person for crime was vested in a court....the common law, this allocation of power was continued... It follows, therefore, that the courts will not grand mandamus to compel a magistrate or police justice to issue a warrant, no matter how clear the case may seem to the court.... The courts should not interfere with the discretion lodged in prosecuting officials such as a District Attorney or the Attorney-General to institute criminal proceedings.

That is a rule which is completely in accord with the argument made to this Court by petitioner. This Court is NOT being asked to "interfere with the discretion lodged in prosecuting officials". Rather, this Court is being urged to uphold a fundamental rule of law, as expressed by the legislature, with respect to precisely the allegations made against Judge Recant to the Commission.

POINT V

PETITIONER HAS STANDING TO SUE

With respect to standing, there should be no possible question that since petitioner was the person who was unlawfully barred from his court room (the court rooms belong 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 a participant in these rulings. If a participant in the res gestae of judicial conduct does not have 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 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 judiciary 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 only 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. 14) 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 ruling that the allegations are 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.

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 memorandum. The distinction is that this 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.

> 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.

Finally, in Cunningham v. Stern, 93 Misc.2d 576), respondent's last cited case, the court ruled as it did because it found:

> The public is rightfully entitled to a form 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.

CONCLUSION

This Court should rule that since the allegations, on their face, charge serious judicial misconduct, the Commission should not be allowed to dismiss the complaint based upon no indication of judicial misconduct.

Respectfully submitted,

MICHAEL MANTELL, ESQ.
Petitioner Pro Se
Office and P. O. Address
400 Madison Avenue, Suite 1411
New York, NY 10017
(212) 750-3896

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