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

----------x

ELENA RUTH SASSOWER, Coordinator
of the Center for Judicial Accountability, Inc.,
acting *pro bono publico*,

Petitioner,

Index # 99-108551

-against-

COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF NEW YORK,

Respondent.

----------x

**PETITIONER'S MEMORANDUM OF LAW
IN OPPOSITION TO RESPONDENT'S DISMISSAL MOTION
& IN SUPPORT OF PETITIONER'S MOTION
FOR DISQUALIFICATION OF THE ATTORNEY GENERAL,
SANCTIONS, A DEFAULT JUDGMENT, AND OTHER RELIEF**

ELENA RUTH SASSOWER
Petitioner *Pro Se*
Box 69, Gedney Station
White Plains, New York 10605-0069
(914) 421-1200

TABLE OF CONTENTS

PREFATORY STATEMENT

As set forth by Petitioner at the June 14, 1999 court conference[1], the Attorney General's dismissal motion is not properly before the Court. The post-default extension of time granted pursuant to CPLR §3012(d) by Justice Diane Lebedeff on May 17, 1999[2], over Petitioner's objections, was *after* she had already recused herself, and in face of CPLR §7804(e)'s *explicit* language defining her authority on the return date to either granting a default judgment in Petitioner's favor or directing Respondent to file its answer. No legal authority was cited by Justice Lebedeff or the Attorney General to support her action -- and Petitioner is aware of none. Moreover, the extension granted by Justice Lebedeff was without the slightest inquiry by her to determine whether Respondent met the standard for CPLR §3012(d) discretionary relief, i.e., "a showing of reasonable excuse" -- which, in fact, it did not -- and without any provision for "just" terms. In the circumstances at bar, no terms could be "just".

Without prejudice to these four threshold objections (*infra*, pp. 96-99), as well as to the threshold objections relating to the Attorney General's disqualification (*infra*, pp. 33-37) and that of the Court[3], this Memorandum of Law responds, as directed, to the Attorney General's wholly frivolous and fraudulent dismissal motion, "on the merits". This, to demonstrate the truth of Petitioner's assertion to the Court at the June 14th conference, that "it is, from beginning to end, filled with falsification, concealment, omission, misrepresentation, distortion" (at p. 22, lns.

---

1 The June 14, 1999 transcript is annexed as Exhibit "O" to Petitioner's accompanying Affidavit.

2 The May 17, 1999 transcript is annexed as Exhibit "K" to Petitioner's accompanying Affidavit.

3 *See* Exhibit "O", pp. 9-17.

13-15) and to "make good" on the notice given on that date that she would seek "severe sanctions, criminal sanctions" (at p. 28, ln. 6). As hereinafter shown, Petitioner is not only entitled to sanctions relief, but to ALL the relief requested by her accompanying motion, including, under CPLR §3211(c), summary judgment in her favor on her Verified Petition.

Petitioner's accompanying Affidavit amply depicts the arrogant, abusive, and profligate way in which the taxpayer-supported Attorney General's office has handled this important public interest case, needlessly burdening the Court, in addition to the *pro se* Petitioner, and perverting the "summary" nature of this special proceeding in the process.

As identified therein , shortly following service of the Verified Petition, Petitioner notified the Attorney General's office that there was NO legitimate defense to its allegations of Respondent's unlawful, unconstitutional, and corrupt conduct and that, therefore, it was she who was championing the public interest and entitled to the benefit of the Attorney General's advocacy. Indeed, she explicitly offered to withdraw the proceeding *IF* Respondent had a legitimate defense to the Petition's allegations (¶¶68-76). Petitioner's May 12, 1999 letter to the Attorney General[4] details the failure and refusal of the Attorney General's office to discuss, or even identify, any legitimate defense or to respond to her repeated inquiries as to who was evaluating her right to the Attorney General's advocacy on the public's behalf, while, at the same time, attempting to take advantage of her as an unrepresented litigant by seeking a stipulation that would effectively relieve Respondent of its default.

Immediately upon receipt of the Attorney General's dismissal motion on May 26th,

---

[4] Exhibit "I" to Petitioner's accompanying Affidavit.

Petitioner notified the Chief of the Litigation Bureau that the motion had to be withdrawn because it was "deceitful, false, and frivolous", requesting supervision of the Assistant Attorneys General involved, whose litigation misconduct had already been the subject of repeated complaint (¶93). This is set this forth in Petitioner's May 28, 1999 letter to the Court[5] (at p. 5), a copy of which she hand-delivered for the Litigation Bureau Chief. Petitioner received no response from the Bureau Chief nor anyone on his behalf to either her May 26th phone message or May 28th letter -- much as she received no response from him or anyone else to her May 12th letter. Likewise, she received no response from executive level personnel in the Attorney General's office. Their position, as reflected by their non-response and as subsequently articulated, is that Petitioner should go to Court for adjudication of the misconduct issues[6].

Similarly, Respondent, staffed with attorneys and a mostly-attorney membership, refused to exercise oversight over its counsel, of whose misconduct it is the beneficiary. Petitioner received no response from Respondent to her May 17th written notification[7] of the Attorney General's litigation misconduct, hand-delivered and faxed to it on that date -- nor to her aforesaid May 28th letter, hand-delivered to Respondent on that date. The May 28th letter specifically challenged Respondent (at p. 3) to "back up" Assistant Attorney General Olson's deceitful claim to the Court in her May 25th letter[8] that:

---

5 Exhibit "N" to Petitioner's accompanying Affidavit.

6 *See* ¶101 of Petitioner's accompanying Affidavit.

7 Exhibit "L" to Petitioner's accompanying Affidavit.

8 Exhibit "M" to Petitioner's accompanying Affidavit.

> "Justice Lebedeff had the authority to grant [the] Commission's request for an extension [of time to submit opposition to the Verified Petition] in the same proceeding in which she determined to recuse herself."

Respondent not only failed to do so, but at the June 14th court conference, Ms. Olson's factual recitation to the Court made it appear that Justice Lebedeff had granted the extension prior to recusing herself (Exhibit "O", pp. 2-3), reversing the order in which the material events took place.

The aforesaid behavior, flagrantly violative of New York's Standards of Civility of its Disciplinary Rules of the Code of Professional Responsibility[9], as well as of the Disciplinary Rules themselves, manifests the Attorney General's disqualifying conflict of interest, as particularized in the accompanying Affidavit (¶¶8, 14-53), for which he should, and must, be disqualified, and, together with culpable staff subordinates, financially sanctioned, professionally disciplined, and criminally prosecuted, along with Respondent's Commissioners and culpable staff.

---

[9] "Lawyers' Duties to Other Lawyers, Litigants and Witnesses...
II "When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation already commenced"
A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so." ...
IV. A lawyer should promptly return telephone calls and answer correspondence reasonably requiring a response."

APPLICABLE ETHICAL AND LEGAL PROVISIONS

The New York State Attorney General is the state's highest law enforcement officer. The issue, highlighted by Petitioner at the June 14th court conference (at p. 7, lns. 15-19) and presented by this Memorandum, is whether the Attorney General will be held to fundamental ethical and professional standards, applicable to every other attorney in this state, or whether, in defending the state agency charged with enforcing judicial standards, he and it will be permitted to obliterate basic litigation standards and obstruct justice by fraudulent and deceitful advocacy. In fact, the Attorney General, as a government lawyer, is bound by a higher standard:

> "A government lawyer who has discretionary power relative to litigation should refrain from...continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to the lawyer should so advise his or her superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and develop a full and fair record, and should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlement or results..." EC 7-14 of the New York State Bar Association's Code of Professional Responsibility

This Court's duty to ensure the integrity of the judicial process is set forth in Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct, as well as in the Code of Judicial Conduct, adopted by the New York State Bar Association -- a primary source of judicial ethics that Respondent is supposed to enforce[10]. Part 100.3(C) relates to a

---

[10] *See* 22 NCYRR §7000.9 "Standards of Conduct",

(b) "In evaluating the conduct of judges, the commission shall be guided by :... (2) the requirement that judges abide by the Code of Judicial Conduct, the rules of the Chief

judge's "Disciplinary Responsibilities". In mandatory language it states:

> "(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility *shall* take appropriate action."[11] (emphasis added).

The Disciplinary Rules of the Code of Professional Responsibility, promulgated as joint rules of the Appellate Divisions of the Supreme Court, are Part 1200 of Title 22 of New York Codes, Rules and Regulations. Particularly relevant is the Code's definitions section, which specifies "fraud" as involving:

> "scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another"(§1200.1(I)).

Under §1200.3 [DR- 1-102], "Misconduct", a lawyer or law firm is prohibited from, *inter alia*, "Violat[ing] a disciplinary rule", §1200.3(a)(1); "Circumvent[ing] a disciplinary rule through actions of another", §1200.3(a)(2); "Engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation", §1200.3(a)(4); and "Engag[ing] in conduct that is prejudicial

---

Administrator, and the rules of the respective Appellate Divisions governing judicial conduct."

See also, 1999 Annual Report of the Commission on Judicial Conduct (p. 1), reprinting the Chief Administrator's Rules at pp. 61-76. *See also*, Transcript of the 9/22/87 Hearing of the NYS Assembly Judiciary Committee on the Commission on Judicial Conduct, Testimony of Gerald Stern, p. 15.

[11] This reporting duty has been reiterated by the Advisory Committee on Judicial Ethics, *See*, *inter alia*, Op. 89-54, 89-74, 89-75; 91-114. Its importance is further underscored in the ABA/BNA Lawyers' Manual on Professional Conduct: "It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency. Failure to render such reports is a disservice to the public and the legal profession. Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies." (*See*, "Standards for Imposing Lawyer Discipline, Preface, 01-802) *See also*, *People v. Gelbman*, 568 N.Y.S.2d 867, 868 (Just. Ct. 1991) "A Court cannot countenance actions, on the part of an attorney, which are unethical and in violation of the attorney's Canon on Ethics... . ... A Court cannot stand idly by and allow a violation of law or ethics to take place before it.".

to the administration of justice", §12003(a)(5).

Under §1200.4 [DR-1-103], "Disclosure of Information to Authorities", lawyers possessing knowledge of a violation of §1200.3:

> "that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness in other respects as a lawyer *shall* report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." (emphasis added)

These provisions are adapted from the American Bar Association's Model Rules of Professional Conduct. However, of the 50 states and the District of Columbia, New York alone has extended the Model Rules to law firms, *"New Rule Authorizes Discipline of Firms"*, New York Law Journal, 6/4/96, p.1, top, cols. 5-6; "*Taking a Firm Hand in Discipline*", ABA Journal, Vol. 84, 9/98. Under §1200.5 [DR 1-104], "Responsibilities of a Partner or Supervisory Lawyer", a law firm is required to "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules" and to "adequately supervise", §1200.5(c). Additionally, "a lawyer with management responsibility...or direct supervisory authority" is required to make "reasonable efforts" to ensure adherence to the disciplinary rules, §1200.5(b), and is responsible for the violations of another lawyer if "the lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it"; or

> "knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated", §1200.5(d).

Under §1200.33 [DR 7-102], "Representing a Client Within the Bounds of Law",

a lawyer cannot, *inter alia*, "...assert a position, conduct a defense...or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another", §1200.33(a)(1); "knowingly make a false statement of law or fact", §1200.33(a)(5); or "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent, §1200.33(a)(7). Moreover, a lawyer who receives "information clearly establishing" that a fraud has been perpetrated upon the tribunal, is required to take corrective steps. If the fraud has been perpetrated by his client, the lawyer "shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal...", §1200.33(b)(1).

§1200.20, [DR 5-101], "Refusing Employment When the Interests of the Lawyer May Impair Independent Professional Judgment", requires that "neither a lawyer nor the lawyer's firm shall accept employment" in litigation "if the lawyer knows or it is obvious" that he or another lawyer in the firm may be called as a witness other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client", with §1200.21 [DR 5-102], "Withdrawal as Counsel When the Lawyer Becomes a Witness", requiring his withdrawal under such circumstances, where he has already undertaken the employment.

While the Disciplinary Rules of the Code of Professional Responsibility are the basis for imposition of discipline on lawyers in this State, criminal prosecution is also available. Among the relevant provisions: Judiciary Law §487, "Misconduct by attorneys", which makes it a misdemeanor for an attorney to be guilty of "any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" -- with punishment in accordance with

the penal law[12]. Also, Penal Law §210.10 pertaining to perjury, which makes it a felony for a person to swear falsely when his false statement is:

> "(a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved."

Accomplices to perjury can be criminally prosecuted as conspirators. Under §105.05(1), "Conspiracy in the Fifth Degree",

> "A person is guilty of conspiracy in the fifth degree when, with intent that conduct constituting:
>
> 1. a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct."

Additionally, since the Attorney General and Respondent's Commissioners and staff are public servants, whose duty it is to uphold the law and safeguard the integrity of the judiciary, the paramount "interest of the state"[13], Penal Law §195, "Official Misconduct", is available. Under §195:

> "A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:
>
> 1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
>
> 2. He knowingly refrains from performing a duty which

---

12 Judiciary Law §487 also makes the guilty attorney liable for treble damages, recoverable in a civil action.

13 "There can be no doubt that the State has an overriding interest in the integrity and impartiality of the judiciary. There is 'hardly *** a higher governmental interest than a State's interest in the quality of its judiciary' (*Landmark Communications v. Virginia*, 435 US 829, 848 [Stewart, J., concurring]..." *Nicholson v. Commission on Judicial Conduct*, 50 NY2d 597, 607 (1980).

> is imposed upon him by law or is clearly inherent in the nature of his office."

Official misconduct is a misdemeanor.

The Chief Administrator of the Courts has also promulgated rules, Part 130-1.1, empowering the Court to award costs and sanctions for "frivolous" conduct. Pursuant to 130-1.1(c), conduct is "frivolous" if:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false."

The subject dismissal motion meets the test for frivolousness on all three counts.

Under 130-1.1, costs and sanctions may be imposed on the party, the attorney, or both -- and may be against the attorney who personally appeared, or against the government agency with which the attorney is associated and has appeared as attorney of record. Rule 130-1.1 specifically identifies two factors to be considered in determining whether conduct is frivolous and whether costs and sanctions should be imposed:

> "(1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct;
>
> (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

These factors also aggravate or mitigate attorney disciplinary sanctions, as they do

the imposition of criminal penalties.

Attorney General Spitzer has "over 500 lawyers and over 1,800 employees, including ...legal assistants,...investigators, and support staff"[14] -- and promotes the "credentials, integrity, and commitment to public service" of his "staff of legal professionals"[15]. As particularized in Petitioner's accompanying Affidavit (¶¶54-63), the Attorney General's office had over two and a half months *before* this Article 78 proceeding was commenced in which to verify if there was ANY legal or factual basis for the conduct that gave rise to it -- and repeated offers from Petitioner to assist it in evaluating the underlying documentation, which she had transmitted, including the file of the prior Article 78 proceeding against Respondent[16]. These offers continued after the instant Article 78 proceeding was commenced and, thereafter were combined with Petitioner's repeated notification to appropriate supervisory personnel of the litigation misconduct by the Assistant Attorneys General assigned to the case. All such supervisory personnel uniformly ignored and rebuffed Petitioner's offers and notifications (¶¶64-103).

Likewise, Respondent failed to take any corrective steps upon written notice (¶96), prior to the filing of the dismissal motion and immediately thereafter, of the Attorney General's sanctionable conduct on its behalf.

---

[14] *See* Exhibit "A-3" (at p. 1) to Petitioner's accompanying Affidavit.

[15] *See* Exhibit "A-2" (at p. 1) to Petitioner's accompanying Affidavit.

[16] The "prior Article 78 proceeding against Respondent" refers to the proceeding entitled, *Doris L. Sassower v. Commission on Judicial Conduct of the State of New York* (N.Y. Co. #95-109141), identified in ¶EIGHTH of the Verified Petition. A copy of the file therein, as transmitted to Mr. Spitzer on December 24, 1998, is part of File Folder I.

Under 130-1.1-a(a) every "paper, served on another party or filed or submitted to the court" is required to be signed. This constitutes certification that

> (b) By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1."

The Attorney General's dismissal motion consists of a Notice of Motion, signed by Assistant Attorney General Kennedy, in which Respondent moves to dismiss pursuant to CPLR §§7804(f) and 3211(a)(3), (5), and (7). To this is attached a 4-1/4 page Affirmation from Mr. Kennedy, dated May 24, 1999, and a 3/4 page-Affidavit of Respondent's Clerk, Albert B. Lawrence, sworn to on May 17, 1999. A 41-page "Memorandum in Support of a Motion to Dismiss", dated May 24, 1999, is signed by Assistant Attorney General Olson, appearing "of counsel" with Mr. Kennedy, and consists of four parts, a "Preliminary Statement" (pp. 1-4), a "Statement of the Case" (pp. 4-11), a four-Point argument (pp. 11-40), and a "Conclusion" (p. 41).

THE ARGUMENT

ASSISTANT ATTORNEY GENERAL KENNEDY'S INSUFFICIENT AND KNOWINGLY FALSE AND FRIVOLOUS SUPPORTING AFFIRMATION

> The same rules govern an affirmation as an affidavit. CPLR §2106 provides:
>
> "The statement of an attorney...when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit."[17]

Although Mr. Kennedy expressly identifies that his May 24, 1999 Affirmation is "under penalty of perjury"(at p. 1), he does not affirm it "to be true". Nor does he set forth the basis upon which it is made -- whether personal knowledge or upon information and belief, and, if the latter, the source of the information and belief. As such, his Affirmation is completely non-probative:

> "It has too long been the rule to need the citation to authority, that such averments in an affidavit have not [sic] probative force. The court has a right to know whether the affiant had any reason to believe that which he alleges in his affidavit." *Fox v. Peacock*, 97 App. Div. 500, 501 (1904).

Pachucki v. Walters, 56 A.D.2d 677, 391 N.Y.S.2d 917, 919 (3rd Dept. 1977); *Soybel v. Gruber*, 132 Misc. 2d 343, 346 (NY. Co. 1986), citing *Koump v. Smith*, 25 N.Y.2d 287, for the proposition, "An affirmation by an attorney without personal knowledge of the facts is without probative value and must be disregarded."[18]

---

[17] "While attorneys always have a professional duty to state the truth in papers, the affirmation under this rule gives attorneys adequate warning of prosecution for perjury for a false statement.", McKinney's Consolidated Laws of New York Annotated, 7B, p. 817 (1997), Commentary by Vincent C. Alexander.

[18] The Attorney General's office was presented with these very cases -- and this objection -- in the prior Article 78 proceeding against Respondent -- which Mr. Kennedy was on notice to review, (Petitioner's Affidavit, ¶68 -- as well as in the *Sassower v. Mangano* Article 78 proceeding -- in which Ms. Olson was one

Mr. Kennedy's Affirmation conspicuously fails even to allege that he is familiar with the papers and proceedings herein.

Among the papers most relevant to this proceeding and upon which it is based are Petitioner's document-supported correspondence to the Attorney General which she transmitted to him in the months prior to its commencement[19]. Mr. Kennedy's Affirmation does not identify whether he reviewed any of that correspondence -- let alone his assessment as to whether, as Petitioner contended, it established: (1) her entitlement to the Attorney General's advocacy on behalf of the public interest; and (2) the self-interest of Attorney General Spitzer and his top staff, including Richard Rifkin, Deputy Attorney General for State Counsel, in preventing such advocacy.

Particularly significant -- in view of his ¶3(b) asserting a *res judicata* /collateral estoppel defense based on Justice Cahn's decision in the prior Article 78 proceeding -- is Mr. Kennedy's failure to state that he reviewed the file of that prior proceeding, a copy of which

---

of two Assistant Attorneys General representing the Respondents. [*See*, petitioner's 6/8/95 Memorandum of Law in *Sassower v. Commission*, at p. 4; petitioner's 7/19/93 Memorandum of Law in *Sassower v Mangano*, at pp. 7-8)

It thus appears that the Attorney General's office has a standard practice that the sworn statements of its attorneys NOT conform to long-settled and elementary rules of law designed to insure their reliability and trustworthiness -- an appearance reinforced by Ms. Olson's May 17, 1999 "Affirmation in Support of Respondent's Application Pursuant to CPLR 3012(d)". Her Affirmation not only fails to state that it is on personal knowledge or the source of her information and belief, but does not identify that it "true" and "under penalty of perjury". As such, it should have been rejected by Justice Lebedeff.

[19] These were listed in Petitioner's May 10, 1999 letter, faxed to Mr. Kennedy on that date and reinforced by her May 12, 1999 letter, likewise faxed to Mr. Kennedy and, thereafter, given in hand to Ms. Olson for him. [Exhibits "G" and "I", respectively to Petitioner's accompanying Affidavit, *See* also ¶¶71, 76, 81 thereof].

Petitioner transmitted to Mr. Spitzer under her December 24, 1998 coverletter[20] to establish Mr. Rifkin's complicity in Respondent's corruption and his unfitness for the high office to which Mr. Spitzer had appointed him. From Petitioner's May 3rd conversation with him[21], he knew the importance of that file in substantiating the first two exhibits to the Verified Petition: Exhibit "A": CJA's fact-specific, record-supported analysis of Justice Cahn's fraudulent decision dismissing the proceeding; and Exhibit "B": CJA's public interest ad, "*Restraining 'Liars in the Courtroom' and on the Public Payroll*" (NYLJ, 8/27/97, pp. 3-4), summarizing the decision's fraud, as well as the Attorney General's fraudulent defense tactics therein. Yet, Mr. Kennedy's Affirmation never mentions the file, analysis, or the ad. This enables him to advance the *res judicata*/collateral estoppel defense in the Memorandum's Point II, where he and Ms. Olson mischaracterize as "a conclusory claim" Petitioner's allegations that Justice Cahn's decision is "false and "fraudulent" (at p. 13) -- while, again, not mentioning the file, analysis or ad.

Adding to the failure of Mr. Kennedy's Affirmation to identify his *own* review of the papers herein is its failure to identify who, if anyone, in the Attorney General's office reviewed them to determine "the interests of the state" and whether, as Petitioner contended, they established that it was she who was entitled to the benefit of the Attorney General's advocacy on the public's behalf. Such silence is particularly conspicuous in light of Petitioner's vigorous efforts to obtain this information -- including from Mr. Kennedy himself[22].

---

[20] Exhibit "B" to Petitioner's accompanying Affidavit.

[21] *See* ¶68 of Petitioner's accompanying Affidavit

[22] *See* ¶¶64-95 of Petitioner's accompanying Affidavit.

The inferences reasonably drawn from Mr. Kennedy's failure to identify who reviewed the public's right to the Attorney General's intervention -- and its outcome -- are that: (1) the Attorney General's office did not actually undertake such review; (2) the reviewer was not an independent, objective evaluator; or (3) the resulting evaluation does not support the Attorney General's representation of Respondent, rather than Petitioner, as being in "the interests of the state".

As pointed out by Petitioner's May 12th letter (Exhibit "I", p. 3) -- to which Mr. Kennedy was an indicated recipient -- Mr. Spitzer and Mr. Rifkin are self-interested in "ensuring that there be no independent evaluation of the People's rights in this Article 78 proceeding" since this would serve to expose their own official misconduct in covering up Respondent's corruption and the Attorney General's defense fraud in the three cases featured in "*Restraining 'Liars'*", including in the prior Article 78 proceeding against Respondent. Mr. Kennedy's Affirmation does not deny or dispute such record-supported allegations, but, instead, ignores them, as well as the self-interest of Ms. Olson, identified in Petitioner's hand-delivered May 28th letter (Exhibit "N", p. 4)[23].

It is because Mr. Kennedy cannot provide pertinent information without exposing the Attorney General's duty to intervene on the public's behalf and his disqualifying conflict of interest that his Affirmation is exclusively devoted to reciting the relief sought by Petitioner and

---

[23] Such silence is replicated by the dismissal motion as a whole, which likewise never identifies Petitioner's objection to the Attorney General's conflict of interest. This includes footnote 1 of the Memorandum's "Preliminary Statement", to which Mr. Kennedy and Ms. Olson relegate their sole mention of Petitioner's challenge to the Attorney General's representation of Respondent.

the grounds for the dismissal motion. This recitation is wholly superfluous because it repeats, virtually *verbatim*, the Memorandum's "Preliminary Statement". Indeed, ¶¶2, 3, and the first sentence of ¶4 of Mr. Kennedy's Affirmation, including its two footnotes, are essentially identical to the recitation at pages 2-4 of the "Preliminary Statement". This twice-repeated recitation is replete with subtle and not-so-subtle distortions and misrepresentations, which then blossom into more brazen deceits in the unsworn Memorandum's "Statement of the Case" and its four Points.

The following is illustrative of the distortions and misrepresentations in ¶2 of Mr. Kennedy's Affirmation, purporting to identify the relief sought by Petitioner at ¶FIFTH of the Verified Petition:

1. In his Affirmation's ¶2(1), as in the "Preliminary Statement", Mr. Kennedy does not differentiate whether Petitioner's challenges to Judiciary Law §§45, 41.6, and 43.1 are *as written* or *as applied*, and whether such challenges are made directly or by way of alternative relief. Such material distinctions were clearly enunciated by the Verified Petition's ¶FIFTH, subparagraphs (3) and (4), as well as in Petitioner's identically-phrased Notice of Motion (at p. 2). As set forth therein, Petitioner seeks a judgment:

> "(3) declaring Judiciary Law §45, *as applied* by Respondent, unconstitutional, and, IN THE EVENT SUCH RELIEF IS DENIED, that Judiciary Law §45, *as written*, is unconstitutional;
>
> (4) declaring 22 NYCRR §7000.11 unconstitutional, *as written and as applied*, and IN THE EVENT SUCH RELIEF IS DENIED, that Judiciary Law §§41.6 and 43.1 are unconstitutional, *as written and as applied*." (capitalization added for emphasis)

This failure to accurately represent Petitioner's challenges in Mr. Kennedy's

Affirmation is not the result of quick summarization, but part of a calculated design, without which his affirmatively false claims elsewhere in the dismissal motion would be more easily detected. Thus, the Memorandum's Point III, "Petitioner's Claims are Non-Justiciable" (at pp. 19-29), rests on a false assertion that Petitioner is challenging the Legislature's wisdom, expressed in its statutory enactments, Judiciary Law §§45, 41.6, and 43.1, when, as reflected by ¶FIFTH and by her Third and Fourth Claims for Relief relating thereto, Petitioner is seeking to uphold Judiciary Law §45, *as written*, from being unconstitutionally applied by Respondent, and her constitutional challenge to Judiciary Law §§41.6 and 43.1 is only in the event her Article 78 challenge to 22 NYCRR §7000.11 is denied.

2. In his Affirmation's ¶2(2), as in the "Preliminary Statement", Mr. Kennedy creates the misimpression that the October 6, 1998 judicial misconduct complaint was solely against "a judicial candidate for the Court of Appeals"-- a misimpression then reinforced in the Memorandum's "Statement of the Case"(at p. 7) and echoed in the Memorandum's Point IV (at pp. 33-34). As examination of the October 6, 1998 complaint shows[24], such complaint was not only directed against Albert Rosenblatt, the Second Department Associate Justice then being considered for the State Court of Appeals, but against "his co-defendant Appellate Division, Second Department justices in the *Sassower v. Mangano, et al.* federal civil rights action." This fact, reflected as well in ¶SEVENTEENTH of the Verified Petition, is particularly critical to an understanding of the February 3, 1999 judicial misconduct complaint against Commission member Justice Daniel Joy, an Appellate Division, Second Department Justice. However, not

---

[24] Exhibit "C-1" to the Verified Petition.

once does the dismissal motion ever identify that the October 6, 1998 complaint was also directed against these other Appellate Division, Second Department Justices, while it obscures the very existence of the February 3, 1999 complaint as a complaint.

3. In his Affirmation's ¶2(4), footnote 2, as in footnote 3 to the "Preliminary Statement" (at p. 3), Mr. Kennedy gratuitously cites Respondent's February 5, 1999 letter to Petitioner as a "reply" to Petitioner's February 3, 1999 judicial misconduct complaint, identifying it as Exhibit "F-7" to the Verified Petition. In so doing, he fails to recite Petitioner's "reply" thereto, her responding March 11, 1999 letter, annexed as Exhibit "G" to the Verified Petition. Such incomplete recitation is designed to advance his misrepresentation in the Memorandum's Point III and IV (at pp. 29, 38) that Petitioner failed to respond to Respondent's February 5, 1999 letter, thereby disentitling her to her requested relief.

As for the purported grounds for Respondent's dismissal motion, summarized by ¶¶3, 4 and 5 of Mr. Kennedy's Affirmation, their knowingly false and fraudulent nature is hereinafter particularized in the context of Petitioner's rebuttal to the Memorandum's four Points of Law. However, comment is warranted on the second and third sentences of Mr. Kennedy's ¶4, which purport to amplify why the Verified Petition "fails to state a claim upon which relief can be granted as against the Commission", as well as the second and third sentences of Mr. Kennedy's ¶5, as to why Petitioner's challenge to the continued chairmanship of Henry Berger is, purportedly, "without merit". None of these sentences are replicated in the "Preliminary Statement", but are echoed elsewhere in the dismissal motion.

A. The second and third sentences of ¶4 of Mr. Kennedy's Affirmation,

which are thereafter echoed in Point IV to support a spurious argument for dismissal on the ground that "The Petition Also Fails to State A Claim for Relief under CPLR Article 78", state:

> "Mandamus does not lie to compel the Commission to formally investigate *each and every complaint* it receives. Moreover, mandamus does not lie to review the Commission's determination to dismiss petitioner's complaints *pursuant to Jud. L. §44.1(b) and 22 NYCRR §7000.3 upon the ground that 'the complaint lacks merit on its face,'* and, even if it did, the Commission's determination to dismiss petitioner's complaint -- which was *based solely on 'innuendo' and her unsupported 'belief'* that 'fraud' was involved in prior decisions -- is not arbitrary or capricious and should be upheld." (at pp. 3-4, emphasis added)

These two sentences are factually false in three material respects:

(1) Petitioner is not, as Mr. Kennedy implies, seeking mandamus to compel the Commission to investigate "*each and every complaint it receives*" (emphasis added). As reflected by Petitioner's First and Second Claims for Relief (¶¶FORTY-SEVENTH through FIFTY-EIGHTH), she is seeking to compel Respondent's investigation of complaints which, pursuant to Judiciary Law §44.1, it is required to investigate because it has not determined them to be facially lacking in merit[25]. [In his "Statement of the Case" (at p. 5), Mr. Kennedy falsely states that the Petitioner in the prior Article 78 proceeding against Respondent sought "investigation into each and every complaint"-- and (at p. 6) claims that the instant proceeding is "practically identical".]

---

[25] This would have been more apparent had Mr. Kennedy's Affirmation correctly identified the basis for Petitioner's request for an order requesting the Governor to appoint a special prosecutor. It is not, as Mr. Kennedy simplistically represents at ¶2(5) "to investigate judicial corruption", but, rather, "to investigate Respondent's complicity in judicial corruption by...*inter alia*... "its pattern and practice of dismissing facially-meritorious judicial misconduct complaints...without investigation or reasons" [¶FIFTH(7) of the Verified Petition].

(2) Petitioner is not, as Mr. Kennedy implies, seeking mandamus to review of Respondent's "determination to dismiss petitioner's complaints *pursuant to Jud. L.§44.1(b) and 22 NYCRR §7000.3 upon the ground that 'the complaint lacks merit on its face'*" (emphasis added). As alleged at ¶¶THIRTY-SECOND, THIRTY-THIRD, THIRTY-FOURTH and documented by the exhibits referred to therein (Exhibits "F-3" and "F-4"), Respondent's purported dismissal of Petitioner's October 6, 1998 complaint failed to identify *any* legal authority or reason for the dismissal. [Mr. Kennedy's Points III and IV are each based on this false inference, there more explicitly presented (at pp. 19, 21, 23-25, 32. 34), as it is, likewise, more explicitly presented in his "Statement of the Case" (at pp. 8, 9)]

(3) Mr. Kennedy's material misrepresentation that Petitioner's October 6, 1998 judicial misconduct complaint is predicated "*solely on 'innuendo'* and her *unsupported 'belief'* that 'fraud' was involved in prior decisions" (emphases added) is exposed as a purposeful lie by the face of the complaint (Exhibit "C-1"), specifying the supporting documents transmitted therewith: Petitioner's October 5, 1998 letter to the Commission on Judicial Nomination particularizing the reasons for the belief that Justice Rosenblatt perjured himself in his responses to two specific questions on its questionnaire and the uncontroverted record-referenced cert petition and supplemental brief in the *Sassower v. Mangano* federal action. These documents -- neither of which Mr. Kennedy even claims to have reviewed -- are, additionally, cited by ¶TWENTY-THIRD of the Verified Petition and abundantly establish that Respondent's purported dismissal of the October 6, 1998 complaint, without investigation, was, indeed, "arbitrary and capricious", as alleged by ¶EIGHTY-SECOND of the Verified Petition, entitling

her to relief under CPLR §7803(3). [This affirmative misrepresentation is varyingly repeated in the "Statement of the Case" (at p. 7) and at Point IV (at pp. 33-4)].

B. The second and third sentences of ¶5 of Mr. Kennedy's Affirmation, thereafter echoed in Point IV (at p. 37) to support dismissal of Petitioner's Fifth Claim for Relief, state:

> "Additionally, petitioner's challenge to the term of Commission Chair Henry Berger as allegedly exceeding the 2 year term limit of Jud. L.§41.2 is without merit because he has been reappointed to successive 2 year terms. See the annexed Affidavit of Albert B. Lawrence, sworn to on May 17, 1999."

Petitioner's challenge is not because of a "2 year term limit of Jud. L. §41.2", but, as particularized in her Fifth Claim for Relief[26], because Judiciary Law §41.2 expressly restricts the chairmanship to a member's "term in office or for a period of two years, *whichever is shorter*" (emphasis added). The operative statutory clause is "*whichever is shorter*" -- reference to which the dismissal motion totally omits (*Cf.* pp. 11, 37). The 3/4-page Affidavit of Respondent's Clerk, Albert Lawrence, attesting ONLY to Mr. Berger's election as Chairman five times over the past ten years to consecutive two-year terms[27], with no showing or even a statement that such re-election is consistent with the apparent meaning and legislative intent of the *"whichever is shorter"* clause -- does not confront, let alone resolve, the issue presented by Petitioner.

---

[26] *See also* ¶THIRTY-EIGHTH of the Verified Petition.

[27] Mr. Lawrence's failure to annex any supporting documentation and his references to publicly-inaccessible records amounting to hearsay, without even an offer of *in camera* inspection, renders his Affidavit non-probative.

THE ATTORNEY GENERAL'S CONSPICUOUS FAILURE TO PROVIDE PROBATIVE AFFIDAVITS, LEGISLATIVE HISTORY, OR OTHER EVIDENTIARY PROOF

The Attorney General does not support his dismissal motion with competent evidence, probative of the issues presented by this proceeding -- although there was no shortage of persons available to him to supply substantive affidavits and an abundance of resources at his disposal from which to obtain applicable legal and legislative information and substantive advisory opinions. Thus, if Mr. Lawrence, who has been Respondent's Clerk since 1983 and in Respondent's employ for three years before that[28], was unable to attest that Chairman Berger's continued re-election is consistent with Judiciary Law §41.2 and to illuminate the meaning of "*whichever is shorter*", with the pertinent history and legislative debates, an affidavit could have been procured from, among others, Chairman Berger, who is an attorney, or Respondent's other Commission members, eight of whom are attorneys, four of whom are also judges, and from long-time staff, first and foremost, its Administrator and counsel, Gerald Stern, Esq.

Mr. Stern is uniquely qualified to have provided an affidavit , not only because he has been Administrator since Respondent began its operations in 1975[29], but because he was involved in the Legislature's drafting of the current Article 2A of the Judiciary Law pertaining to Respondent. Mr. Kennedy should know this -- had he reviewed one of the most important documents in the file of the prior Article 78 proceeding against Respondent: the Memorandum

---

[28] *See* Respondent's 1999 Annual Report, at p. 45.

[29] Mr. Stern's biography and the biographies of Respondent's staff attorneys, as well as of Respondent's 11 Commission members appear at pages 37-45 of Respondent's 1999 Annual Report.

of Law submitted by the Petitioner therein. Indeed, that Memorandum of Law and, specifically, Point II was highlighted by the first page of the analysis of Justice Cahn's decision, annexed to the Verified Petition as part of Exhibit "A". Point II (at pp. 14-15) quotes from Mr. Stern's testimony before the Senate and Assembly Judiciary Committees on December 18, 1981 at a hearing about Respondent:

[Transcript, at p. 6]

> "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..."

Thus, Mr. Stern would have been well able to attest to the Legislature's intent by its "*whichever is shorter*" wording of Judiciary Law §41.2 -- which, in the two predecessor versions of Article 2A, in 1974 and 1976, had similarly worded the tenure of Respondent's chairman as "for a period of two years or until his office becomes vacant, *whichever event shall occur first.*"[30] (emphasis added). Mr. Stern could have easily provided a statement if such provision were not, as contended at ¶SEVENTY-SEVENTH of the Verified Petition "to increase public confidence that no one commissioner will exercise undue influence and power by virtue of a prolonged tenure."

Similarly, Mr. Stern should have been able to attest to the Legislature's intent

---

[30] *See* Judiciary Law §41.1 [1974, 1976 versions].

regarding other key provisions of Article 2A at issue herein, such as whether the Legislature intended, by its authorization of three-member panels in Judiciary Law §§43.1 and 41.6, that Respondent would make no provision for administrative review by the full eleven-member Commission of a panel's dismissal of a complaint, without investigation, as alleged by ¶SEVENTY-FIFTH of the Verified Petition -- where, additionally, the Judiciary Law contains no diversity provision to prevent panels from being composed of all judges or with no non-lawyer members, or with members not reflective of the three-branches making appointments to the Commission; and no procedures governing the use of panels to prevent them from being "invidiously, discriminatorily, and selectively" employed, as alleged at ¶SEVENTY-SECOND of the Verified Petition.

Indeed, Mr. Stern could have illuminated why, in view of the authorization for three-member panels in Judiciary Law §§43.1 and 41.6, both he and Respondent's then Chairman, Victor Kovner, nonetheless gave testimony before the Assembly Judiciary Committee on September 22, 1987, making it appear that judicial misconduct complaints are decided by the full eleven-member Commission:

[Testimony of Administrator Stern, p. 39]

> "Every single complaint goes to all members of the Commission and they receive a full complaint. And then the Commission, and only the Commission, can decide whether to dismiss or investigate a matter."

[Testimony of Chairman Kovner, p. 185]

> "The Commission sits as a body one or two days each month. During those sessions we review each and every complaint that is

submitted in the prior month, usually numbering between 60 and 80 new complaints per month. I want to emphasize that the Commission sees and reviews every complaint..."

[Testimony of Chairman Kovner, p. 224]

"...I think it's helpful to have the entire [Commission] input on each of the judgments. The most important judgments of this commission are not what sanction to impose or the findings of fact. And they're not even what charges to issue, in my judgment. The most important decisions are what happens to investigators (sic) or dismiss at the earliest juncture.

We are sensitive to the burden that even an investigation may impose on a judge is not pleasant. We are sensitive that we must not infringe the independence of the Judiciary, and I want, you [to] know, the full eleven members whenever possible, and our attendance is pretty good, considering that we've got people from all over the state and they full (sic) -- although I think a somewhat reduced calendar in the last couple of years -- I want the benefit of all of their thinking each time."

Mr. Stern's aforesaid testimony about complaints going to every Commissioner followed his statement that the Commissioners "represent a cross section of the community" (at p. 36), as, likewise, Mr. Kovner's testimony was preceded by a lengthy recitation of Respondent's diversified membership, prefaced by the statement:

"You will recall that among the purposes of the revised disciplinary structure was to limit the role of the Judiciary and to expand the role of the public. Thus only four of the eleven members were to be sitting judges, contrasting to the prior court on the Judiciary consisting entirely of judges".

Likewise, Mr. Stern could have attested to the Legislature's intent in excepting from the confidentiality provision of Judiciary Law §45, persons "pursuant to section forty-four", as highlighted at ¶SIXTY-FIRST of the Verified Petition and whether, consistent therewith, it

was the Legislature's intent that Respondent would invoke Judiciary Law §45 not only to deny a complainant basic information establishing the legality and actuality of its dismissal of his complaint, such as the date Commission members purported to dismiss it, the number of Commissioners present and voting, their identifies, the legal authority for their dismissal and whether, pursuant to Judiciary Law §44, they determined the complaint to be facially lacking in merit, but also to deny a complainant information as to procedures for review of his dismissed complaint. If Mr. Stern disputed Petitioner's contention that such over-expansive interpretation of Judiciary Law §45 "makes a mockery of the judicial complaint process and fosters cynicism and contempt of Respondent among the very constituency Respondent was created to serve" and that it "serves no legitimate public interest and is contrary thereto", as alleged at ¶¶SIXTY-NINTH and SIXTY-EIGHTH, he was free to set that forth in a sworn statement.

Needless to say, Mr. Stern could also have challenged the analysis provided in Point II of the Petitioner's Memorandum in the prior Article 78 proceeding, demonstrating with legislative history and case law, the unconstitutionality of 22 NYCRR §7000.3 -- which, *on its face*, is irreconcilable with Judiciary Law §44.1.

The fair inference to be drawn from Mr. Kennedy's failure to provide an affidavit from Mr. Stern, whose attestation of knowledge as to the legislative intent behind Judiciary Law, Article 2A, as well as of the constitutional amendments relating to Respondent, would have been from his direct, first-hand experience, is that Mr. Stern could not substantiate the self-serving positions Mr. Kennedy and Ms. Olson advance in the Memorandum's Point III, unsupported by even a single citation to legislative history. This includes the unsupported claim that Respondent

has discretion to investigate "those complaints it deems appropriate", for which they cite (at p. 21) *Nicholson v. State Commission on Judicial Conduct*, 50 NY2d 597 (1980), and *Wilk v. State Commission on Judicial Conduct*, 97 A.D.2d 716 (1st Dept. 1983). In fact, *Nicholson*, which is referenced in *Wilk*, recognizes Respondent's mandatory investigative duty:

> "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)

Petitioner's Memorandum of Law in the prior Article 78 proceeding included this very excerpt from *Nicholson* in its Point II (at p. 14).

It should not be thought, however, that Mr. Kennedy had to rely on Respondent and its staff for pertinent legislative history. The Attorney General's office has a specifically-designed "Legislative and Intergovernmental Affairs Bureau", whose function includes providing:

> "legislative information and service to every bureau, division and office within the Attorney General's office, working with Assistant Attorneys General and staff to identify and seek to remedy statutory weaknesses which adversely affect the public interest and the success of litigation brought or defended by the State..." (Exhibit "A-3", p. 3)

The unmistakable inference from the failure of Mr. Kennedy and Ms. Olson to have provided such legislative materials in support of Respondent's dismissal motion is there are no such legislative materials.

Other relevant information could have been provided to support the motion -- such as the practices of other state commissions in the handling of judicial misconduct complaints. Here, too, Mr. Stern had the requisite expertise, as reflected by his testimony at the September 27, 1987 hearing of the Assembly Judiciary Committee:

[Testimony of Administrator Stern, p. 17]

> "And I also have some knowledge of what exists throughout the country. I'm on various boards, and I won't bore you with the details of how I have information on what's happening throughout the country."

Indeed, Mr. Stern actively participates in the American Judicature Society's Center for Judicial Conduct Organizations, and has been on the Board of Directors of the Association of Judicial Disciplinary Counsel, where he served on an advisory committee developing a 1990 publication entitled, "Practices and Procedures of State Judicial Conduct Organizations"[31].

Of course, had Mr. Stern come forward with an affidavit, he would have been expected to respond to the critical unanswered questions and issues presented by Petitioner's March 11, 1999 letter to him (Exhibit "G"), identified at ¶¶FORTY-FIRST, FORTY-SECOND, FORTY-FOURTH, and FORTY-FIFTH of the Verified Petition. These include the definition of "not valid on [its] face...Assumedly...equivalent to 'the complaint on its face lacks merit'-- the

---

[31] Because of Mr. Stern's substantial role in that publication, it contains pertinent information about Respondent, supplied by Mr. Stern himself. As set forth in Chapter 4, p. 19: "...there is only one class of investigation in Florida, New York, and Illinois. In fact, in New York, the commission administrator emphasized that once the commission authorizes an investigation, there is a full formal investigation. There are no gradations, such as initial inquiry or preliminary investigation." Such statement further reinforces Respondent's knowledge of the fraudulence of Justice Cahn's dismissal of the prior Article 78 proceeding against Respondent, in which he upheld the constitutionality of 22 NYCRR §7000.3, *as written*, in a false argument that, sua sponte, advanced the claim that "initial review and inquiry" is part of "investigation".

only basis upon which the Commission can dismiss a complaint under Judiciary Law §44.1" and whether, by his bald claim in his February 5, 1999 letter that Respondent had determined the October 6, 1998 complaint to be "not valid on its face", he meant that it was Respondent, by its members, who had made such purported determination, as opposed to a determination made by himself or by staff (¶FORTY-FIRST).

Since Mr. Stern not only prosecutes judicial disciplinary proceedings for Respondent, but makes recommendations to the Commissioners as to how they should dispose of the judicial misconduct complaints they receive[32], he certainly could have supplied a great deal of information as to what constitutes "facial merit" in a judicial misconduct complaint. And he could have explained why Respondent prosecuted and recommended removal of Civil Court Judge/Acting Supreme Court Justice Salvador Collazo, *inter alia*, for his false response to a Senate Judiciary Committee questionnaire in connection with his efforts to secure an interim Supreme Court anointment -- a recommendation with which the Court of Appeals agreed in February 1998, *Matter of Salvador Collazo*, 91 NY2d 251 (1998) -- yet in December 1998 would dismiss, without investigation, a fact-specific complaint of perjury by an Appellate Division Justice in responding to similar inquiries on a questionnaire of the Commission on Judicial Nomination in connection with his candidacy to the Court of Appeals[33].

Actually, as to the question of whether Respondent's members ever determined Petitioner's October 6, 1998 complaint to be "not valid on its face", it is Mr. Lawrence who could

---

[32] *See* Exhibit "D-7" to Exhibit "G" to the Verified Petition.

[33] *See* Respondent's 1998 and 1999 Annual Reports: *Matter of Salvador Collazo*

have provided the attestation. This, because Mr. Stern is excluded from Respondent's meetings, whereas Mr. Lawerence is present, assisting Respondent and keeping its minutes[34]. Consequently, it is Mr. Lawrence -- not Mr. Stern -- who has direct personal knowledge, as well as access to Respondent's minutes, as to whether Respondent ever made such determination as to the October 6, 1998 complaint.

Mr. Lawrence's skimpy Affidavit offers no reason for failing to substantiate Mr. Stern's non-probative claim of Respondent's determination that the October 6, 1998 complaint was "not valid on its face"-- which claim Mr. Kennedy and Ms. Olson fully quote in their "Statement of the Case" (at p. 9), without then identifying Petitioner's March 11, 1999 follow-up inquiry. Judiciary Law §45 is clearly no bar. It did not bar Mr. Stern from making such claim in his February 5, 1999 letter, and Mr. Kennedy and Ms. Olson concede at Point III of the Memorandum (at p. 24) that the "notice requirement" of Judiciary §44.1 includes "explain[ing] that the complaint was dismissed because it lacked merit on its face."

The inference from Mr. Lawrence's failure to come forth with any statement that Respondent, in fact, determined that Petitioner's October 6, 1998 complaint "lacked merit on its face" is that Respondent made no such determination. This is further reflected by Mr. Lawrence's December 23, 1998 letter (Exhibit "F-3"), which, as highlighted by ¶¶THIRTY-SECOND and THIRTY-THIRD of the Verified Petition, did *not* advise Petitioner that Respondent had determined that her complaint was "on its face lack[ing in] merit", when it

---

[34] Upon information and belief, it is for this reason that Respondent's letters, purporting to dismiss complaints, are signed by Mr. Lawrence, not Mr. Stern. [*Cf.* dismissal letters annexed to the Verified Petition in the prior Article 78 proceeding against Respondent: Exhibits "L-1"- "L-6" and "N-3"]

notified her of the purported dismissal[35].

Obviously, Mr. Lawrence was in a position to respond to another key issue, namely, ¶SIXTY-SEVENTH of the Verified Petition, alleging that:

> "Respondent has an invidious, discriminatory, and selective standard for its application of Judiciary Law §45, based, *inter alia*, on who the complainant is and who the complained-of judge is."

In substantiation, ¶SIXTY-SEVENTH identified the testimony of a complainant at the September 22, 1987 public hearing about Respondent before the State Assembly Judiciary Committee that in response to his written inquiry for details concerning Respondent's dismissal of his judicial misconduct complaint against an upstate town justice, he had been provided with the date of its meeting at which the complaint was considered, the place of the meeting, and the identity of three commissioners who did not participate. Pages 368-372 from the hearing transcript, annexed as Exhibit "H" to the Verified Petition, showed that it was Mr. Lawrence who provided that complainant with such information.

Mr. Lawrence's failure to come forward with any explanation for his refusal to provide Petitioner with similarly requested information about the dismissal of her October 6, 1998 complaint must be deemed a concession of the disparate treatment of Petitioner, identified at ¶SIXTY-SEVENTH, rendering Respondent's application of Judiciary Law §45 unconstitutional[36].

---

[35] *Cf.*, the material misrepresentation in the "Statement of the Case" (at pp. 7-8) that "By letter dated December 23, 1998, the Commission advised that the October 6, 1998 complaint was *dismissed because it lacked merit on its face*." (pp. 7-8, emphasis added). *See* discussion, *infra*, pp. 48-49.

[36] The dismissal motion nowhere identifies the issue of Respondent's "invidious, discriminatory, and selective" application of Judiciary Law §45 or that the information Petitioner is contending must be available

THE ATTORNEY GENERAL'S SANCTIONABLE PRELIMINARY STATEMENT

As hereinabove set forth, the three-page "Preliminary Statement" is a repetition, virtually *verbatim*, of ¶¶2, 3, and the first sentence of ¶4 of Mr. Kennedy's Affirmation, including its footnotes.

The key difference[37] is footnote 1 of the "Preliminary Statement", to which Mr. Kennedy and Ms. Olson relegate their one and only acknowledgment of Petitioner's threshold and repeated challenge to the Attorney General's representation of Respondent. In so doing, they convey the false impression that it does not merit discussion in the text. This misimpression is then elevated to affirmative misrepresentation in the first sentence of their three-paragraph footnote by their assertion that:

> "*Any* challenge that petitioner may raise to the authority of the Attorney General to represent the Commission in this proceeding is frivolous." (at p. 1, emphasis added)

Conspicuously, the footnote does not identify either the legal or factual basis of Petitioner's challenge. These were summarized by Petitioner's May 12th letter[38], which quoted (at p. 3) from Executive Law §63.1 to demonstrate that Respondent is not entitled to a knee-jerk defense by the

---

under Judiciary Law §45, if it is to be construed as constitutional, *as written*, is that establishing the actuality and legitimacy of Respondent's dismissals and information as to a complainant's rights to review -- be it administrative or judicial -- of dismissals by three-member panels (Petitioner's Third Claim for Relief, ¶¶FIFTY-NINTH-SEVENTIETH). *See* Attorney General's Memorandum, pp. 10, 18, 23-24, 25, 36-37, 40).

[37] Among the minor, but nonetheless significant differences in the "Preliminary Statement" are the additions of the following:: (1) that Petitioner is suing "*as* the 'coordinator' of the Center for Judicial Accountability, Inc." (at p. 2, emphasis added); and (2) that Petitioner also lacks capacity to sue "*on behalf of the public*" (at p. 3, emphases added). The Memorandum's Point I (pp. 11-12) rests on the first of these claims, with the second claim modified to fit the language of Judiciary Law §478. *See infra* , pp 59-61.

[38] Exhibit "I" to Petitioner's accompanying Affidavit.

Attorney General, but, rather, that he is required to predicate his involvement herein on an evaluation of "the interests of the state". The letter detailed the Attorney General's refusal to identify who was undertaking such evaluation and asserted that the Attorney General and his staff were self-interested in ensuring no independent evaluation, since this would expose their official misconduct. Specifically identified (at p. 3) was CJA's March 26, 1999 ethics complaint against Mr. Spitzer[39], based, *inter alia*, on his protectionism of individuals complicitous in Respondent's corruption, among them, Mr. Rifkin. Yet, instead of confronting -- or even identifying -- these issues, which would have revealed their deceit upon the Court in asserting that Petitioner's challenge is "frivolous", Mr. Kennedy and Ms. Olson deceive the Court yet again in their next sentence. Citing Executive Law §63.1 and the case of *Sassower v. Signorelli*, 99 A.D. 2d 358 (2d Dept. 1984), they proclaim:

> "The Commission is entitled to such representation and the Attorney General is statutorily authorized to defend this proceeding."

Here, too, they conspicuously provide no supporting facts and do not analyze or discuss Executive Law §63.1 -- or even quote its language. Nor do they analyze or discuss *Sassower v Signorelli*. Such explication would, likewise, have exposed their deceit upon the Court.

In pertinent part, Executive Law §63.1 reads:

> "The attorney-general shall: 1. *Prosecute and defend* all actions and proceedings *in which the state is interested*, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, *in order to protect the interest of the state*...

---

[39] Exhibit "E" to Petitioner's accompanying Affidavit.

> No action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein *if in his opinion the interests of the state so warrant.*" (emphases added)

Thus, nothing in Executive Law §63.1, by itself, automatically entitles Respondent to the Attorney General's representation or confers upon the Attorney General authorization to defend this proceeding. Rather, a determination must be made as to "the interests of the state". This determination can only be made by an Attorney General not compromised by personal and professional self-interest. Tellingly, the dismissal motion nowhere even alleges, let alone shows, that the Attorney General ever determined that his defense of Respondent is in "the interests of the state" and that such determination is untainted by his self-interest -- or that of his staff -- in this litigation.

Since *Sassower v. Signorelli* confines discussion of Executive Law §63.1 to a single sentence which palpably misrepresents the statute by its assertion, without analysis or discussion, that "The Attorney General, by statute (Executive Law §63, subd 1) is 'required to represent'" a public official sued in litigation, citation to the case serves no purpose but to further mislead the Court as to what Executive Law §63.1 *actually* says -- and to prejudice the Court against Petitioner. This, because the *pro se* plaintiffs in *Sassower v. Signorelli* are Petitioner's judicial whistle-blowing attorney parents, who the Appellate Division, Second Department "cautioned" for their supposedly frivolous litigation in connection with a lawsuit against the

Suffolk County Surrogate, enjoining them from further litigation therein[40]. It is because Mr. Kennedy and Ms. Olson have neither the facts and law to support their false claim that Petitioner's challenge to the Attorney General's representation is "frivolous", that they attempt to poison the Court against Petitioner with a "guilty by association" argument that Petitioner is from a family of previously-adjudicated "frivolous" litigators, whose challenge to the Attorney General's representation was "without merit".

Citation to *Sassower v. Signorelli* also sets the stage for the false claim in the last sentence of the footnote that Petitioner's challenge to the Attorney General is motivated by bad-faith, being part of:

> "[petitioner's] 'continuing effort to harass and punish'" the Commission for its refusal to initiate formal investigation of the Appellate Division Justices who participated in the determination to suspend her mother, Doris Sassower, from the practice of law." (footnote 1, p. 2)

Mr. Kennedy and Ms. Olson likewise fail to support this claim with any facts -- either as to any prior "efforts" by Petitioner "to harass and punish" Respondent or as to the lawfulness of Respondent's refusal to initiate *any* investigation of the Appellate Division, Second Department justices when presented with two facially-meritorious judicial misconduct complaints relating to their retaliatory suspension of Doris Sassower's law license: the October 24, 1991 and September 19, 1994 judicial misconduct complaints, annexed as Exhibits "D" and "H" to the Verified Petition in the prior Article 78 proceeding against Respondent.

---

[40] Upon information and belief, such decision was without any hearing having been held by the lower court or Appellate Division as to the facts allegedly supporting the defamatory conclusory statements therein.

Sandwiched between these false and unsupported claims in the first and third paragraph of footnote 1 is the assertion in their second paragraph, *to wit*, because CPLR §1012(b) and Executive Law §71 allow the Attorney General to intervene in support of a statute's constitutionality, any "intervention" by him, as sought by Petitioner's Notice of Right to Seek Intervention, "would be for the purpose of opposing petitioner's claims" challenging "the constitutionality of the various provisions of the Judiciary Law." Mr. Kennedy and Ms. Olson do not identify which provisions of the Judiciary Law Petitioner is challenging -- and whether the challenge is, *as written* or *as applied*. This is particularly significant as it relates to Judiciary Law §45, where Petitioner is seeking to uphold the constitutionality of that statute, *as written* against Respondent's unconstitutional application. Thus, their conclusory statement (at p. 2) that "any 'intervention' by the Attorney General would be for the purpose of opposing petitioner's claims" is untrue.

THE ATTORNEY GENERAL'S SANCTIONABLE STATEMENT OF THE CASE

The Attorney General[41] divides his 7-page "Statement of the Case" (pp. 4-11) into "Action"#1[42] -- by which he means the prior Article 78 proceeding against Respondent -- and into "Action" #2 -- the instant Article 78 proceeding against Respondent. Yet, notwithstanding his acknowledgment, tucked away in his Point IV (at p. 30), that on a motion to dismiss for failure to state a claim, the allegations of the pleading must be presumed true, unless they "consist of *bare* legal conclusions, as well as factual claims either *inherently incredible or flatly contradicted by documentary evidence*"(emphases add), his Statement for "Action" #1 (pp. 4-6) does not cite the paragraphs of the Verified Petition relating to the prior Article 78 proceeding, ¶¶EIGHTH through FOURTEENTH. As to his Statement of "Action" #2 (pp. 6-11), he cites (at p. 7) only a single paragraph of the Verified Petition, ¶SECOND, apart from his recitation of Petitioner's Claims for Relief, which he terms "Causes of Action" (pp. 9-11). In so doing, he does not identify a single paragraph of the Verified Petition, which, as written, is "bare" or "inherently incredible or flatly contradicted by documentary evidence". Nor has he moved to dismiss pursuant to CPLR §3211(a)(1) based on a defense "founded upon documentary evidence" or submitted "any evidence that could properly be considered on a motion for summary

---

[41] Hereinafter, for ease of reference, Mr. Kennedy's and Ms. Olson's presentation in the dismissal motion is referred to as being that of "the Attorney General".

[42] The Attorney General, who defends thousands of suits against state agencies and officials each year (Exhibit "A-3", p. 2) may be presumed to know that the word "action" is incorrect. Article 78 proceedings are "special proceedings" [CPLR §7804(a)]. Nonetheless, he also recasts Petitioner's "Claims for Relief" as "Causes of Action", *infra.*

serving recitation in his "Statement of the Case" reveals a pervasive pattern of wilful and deliberate deceit by him. It also reveals that the allegations in the Verified Petition relating to the documents are, in every respect, true and accurate, and that Petitioner is entitled to summary judgment in her favor.

It is from the Attorney General's falsification, distortion, and concealment in his "Statement of the Case" that he fashions his purported grounds for dismissal, set forth in the four "Points" of his Memorandum. To assist the Court in verifying this misconduct in virtually every line of the two-part "Statement", a line-by-line analysis follows.

"STATEMENT OF THE CASE": ***Attorney General's Memorandum, Page 4:***

"Action #1 -- Sassower v. Commission on Judicial Conduct.
NY Co. Index No 95-109141 (Cahn, J.)"

> An Article 78 proceeding is not an "action", but a "special proceeding", CPLR §7804(a).

"In 1995, Doris Sassower, the **'Director of the Center for Judicial Accountability, Inc.'**, commenced an Article 78 proceeding/declaratory judgment action in this Court entitled **Sassower** v. Commission on Judicial Conduct under Index No. 95-109141 ("Action #1")."

> The Attorney General creates an ambiguity -- which he elevates to outright misrepresentation in his Point II *res judicata*/collateral estoppel defense (at p. 16) -- as to the capacity in which Doris Sassower commenced the prior Article 78 proceeding against Respondent. Had he set forth the full caption of the proceeding, it would have been evident that she brought the suit NOT as CJA's Director, but individually. The corresponding paragraph of the Verified Petition herein -- not cited by the Attorney General -- is ¶EIGHTH, which gives the full caption.

judgment" as CPLR §3211(c) allows[43].

Instead, the Attorney General's two-part "Statement of the Case" is annotated with citations to documents in the record. ALL of these he varyingly mischaracterizes, distorts, and outrightly falsifies by recitations invariably concealing the facts most pertinent, as identified by the paragraphs of the Verified Petition, which he does not cite.

As for "Action" #1 (pp. 4-6), the documents the Attorney General mischaracterizes, distorts, and falsifies in his recitation are the two exhibits annexed to Mr. Kennedy's Affirmation: (1) the Verified Petition in the prior Article 78 proceeding, annexed as "Exhibit "1"; and (2) the dismissal decision of Supreme Court Justice Herman Cahn, annexed as "Exhibit "2".

As for "Action" #2 (pp. 6-11), the documents the Attorney General mischaracterizes, distorts, and falsifies in his recitation are six exhibits annexed to the Verified Petition, and, "part thereof for all purposes", pursuant to CPLR §3014. They are: (1) Exhibits "C": Petitioner's October 6, 1998 judicial misconduct complaint; (2) Exhibit "F-3": Respondent's December 23, 1998 letter purporting to dismiss the complaint; (3) Exhibit "F-4": Petitioner's December 29, 1998 letter; (4) Exhibit "F-6": Petitioner's February 3, 1999 letter; (5) Exhibit "F-7": Respondent's February 5, 1999 letter; and (6) Exhibit "G": Petitioner's March 11, 1999 letter.

Comparison of the eight aforesaid documents with the Attorney General's self-

---

[43] CPLR §3211 permits a dismissal motion to be treated as a summary judgment motion, but only after "adequate notice to the parties". The Attorney General's dismissal motion gives no notice and, apart from Mr. Lawrence's non-probative Affidavit, presents no evidence -- let alone any to support summary judgment for Respondent.

"The petition in Action #1 -- a copy of which ('Kennedy aff.,') is annexed to the Affirmation of Michael Kennedy dated May 24, 1999 as Exhibit 1 -- sought **relief that is essentially identical** to the relief that petitioner seeks here."

> The Attorney General's statement that the relief sought in the prior Article 78 proceeding is "essentially identical" to that herein is overbroad and misleading, designed to advance his Point II *res judicata*/collateral estoppel defense (at pp. 13-18).
>
> As comparison of the two Notices of Petition shows, only a single rule, 22 NYCRR §7000.3, was challenged in the prior Article 78 proceeding, whereas here not only is that rule challenged in the first two Claims for Relief, but there are four additional Claims for Relief challenging Judiciary Law §45, *as written*, and, in the alternative, *as applied* [Third Claim for Relief], challenging 22 NYCRR §7000.11, *as written* and *as applied*, and, in the alternative, Judiciary Law §§41.6, and 43.1, *as written* and *as applied* [Fourth Claim for Relief], seeking a declaration that Respondent's chairman is in violation of Judiciary Law §41.2 [Fifth Claim for Relief], and compelling Respondent to "receive" and "determine" Petitioner's February 3, 1999 judicial misconduct complaint [Sixth Claim for Relief].
>
> Insofar as the prior proceeding also sought a judicial request to the Governor for appointment of a special prosecutor, referral of Respondent and staff for disciplinary and criminal investigation and prosecution, and a $250 fine pursuant to Public Officers Law §79, none of the six Claims of Relief herein seek such relief, whose appropriateness is coincident with the granting of those Six Claims and, particularly, the first two Claims.
>
> The paragraph of the Verified Petition herein -- not cited by the Attorney General -- but relevant because it identifies the essential relief sought by the prior Article 78 proceeding is ¶EIGHTH.

Attorney General's Memorandum, Page 5:

"Specifically, Action #1 sought review of the Commission's determination to dismiss complaints against **the Appellate Division Justices involved in the determination to suspend Doris Sassower from the practice of law. Exhibit 1, ¶¶5, 21.**"

> This statement is false and misleading. There were nine

judicial misconduct complaints annexed to the Verified Petition in the prior Article 78 proceeding -- with only two against the Appellate Division, Second Department justices involved in the suspension of Doris Sassower's law license [the October 24, 1991 and September 19, 1994 complaints, annexed thereto as Exhibit "D" and Exhibit "G", respectively]. Nor does the Attorney General's citation to ¶¶5 and 21 of the Verified Petition therein support his statement. ¶5 does not even mention any of the judicial misconduct complaints, but, rather, the lawless and constitutionally-violative particulars of the suspension of Doris Sassower's law license -- all of which the Attorney General omits from his "Statement". As to ¶21, it identifies that eight judicial misconduct complaints against high-ranking, politically-connected judges are annexed to the Verified Petition as Exhibits "C" through "J", without describing their content other than that they are "substantial and documented".

The Attorney General's misstatement as to the nature of the review sought in the prior Article 78 proceeding provides resonance for his false and unsupported claim in footnote 1 of his "Preliminary Statement" that Petitioner's challenge herein to his representation of Respondent bespeaks a "continuing effort to harass and punish' the Commission for its refusal to initiate formal investigation of the Appellate Division Justices who participated in the determination to suspend her mother, Doris Sassower, from the practice of law..." (at p. 2)

"Petitioner sought to have 22 NYCRR §7000.3 declared unconstitutional **because it permits dismissal of a complaint where the Commission determines that it lacks merit on its face**, and to compel the Commission to conduct an **investigation of each complaint** it receives. **Exhibit 1, ¶¶10, 13, 14, 18 and Wherefore Clause**."

The Attorney General's statement as to the basis for Petitioner seeking to have 22 NYCRR §7000.3 declared unconstitutional is DIAMETRICALLY OPPOSITE to the paragraphs of the Verified Petition in the prior Article 78 proceeding he cites, as well the other more specific paragraphs he does not cite -- most particularly, ¶SEVENTEENTH, which he skips over. Those paragraphs make plain that the basis for Petitioner's challenge to the constitutionality of 22 NYCRR §7000.3 was that it permits Respondent to dismiss a judicial

misconduct complaint WITHOUT determining that it lacks merit on its face:

> "transforming its mandatory duty to 'investigate and hear' into an optional one, with no requirement, as called for by Judiciary Law §44.1, that Respondent first make a determination that the 'complaint on its face lacks merit...', prior to summary dismissal of a given complaint." (¶SEVENTEENTH, emphasis in the original)

Nor did the prior Article 78 proceeding seek to compel Respondent to investigate "each complaint it receives", but, rather, pursuant to Judiciary Law §44.1, that it investigate all complaints that it had not determined to be facially lacking in merit.

These misstatements by the Attorney General about the prior Article 78 proceeding are echoed by his similar misstatements about the instant Article 78 proceeding: (a) at ¶4 of Mr. Kennedy's Affirmation, which falsely makes it appear that Petitioner is seeking mandamus to compel Respondent "to formally investigate *each and every complaint* it receives"; and (b) throughout Points III and IV, which falsely portray Petitioner as challenging Respondent's dismissals of complaints determined to be lacking in merit (at pp. 19, 21, 23-25, 32, 34).

"Petitioner also sought mandamus to review the Commission's determination to summarily dismiss her **eight complaints against the justices,** claiming that the Commission's determination to dismiss them was arbitrary, capricious and violative of law because she was statutorily and constitutionally entitled, under Art. VI, §22.a of the New York State Constitution and §44.1 of the Judiciary Law, to have each complaint investigated. **Exhibit 1, ¶¶19, 20, and 23.**"

The Attorney General creates the misleading inference that the "eight complaints against the justices" are against the previously referred-to "Appellate Division Justices involved in the determination to suspend Doris Sassower from the practice of law" -- which is untrue. As hereinabove noted, only two of the eight complaints against high-ranking, politically-connected judges are against those justices: the October 24, 1991 complaint (Exhibits "D") and the September 19, 1994 complaint (Exhibit "G").

Tellingly, the Attorney General does not identify the basis

for Petitioner's allegation that she was entitled to have each of her complaints investigated -- notwithstanding it is explicitly stated in ¶¶TWENTIETH and TWENTY-THIRD of the prior Verified Petition, which he cites. Indeed, had the Attorney General disclosed the basis identified by ¶TWENTIETH, that of the "eight written complaints...none...was 'on its face lacking in merit'" -- as well as by ¶TWENTY-FOURTH, that "Respondent summarily dismissed each and every one of Petitioner's aforesaid eight complaints, without investigation and without making a determination that any given complaint was 'on its face lacking in merit'..." -- it would have revealed his misstatement in his prior sentence that Petitioner was challenging Respondent's authority to dismiss complaints it had determined to be facially lacking in merit.

As to the language "arbitrary and capricious", it does not appear in ¶¶NINETEENTH, TWENTIETH, and TWENTY-THIRD, which the Attorney General cites, but in ¶TWENTY-NINTH, not cited by him.

"The petition also sought an order **compelling** the Governor to appoint a special prosecutor to investigate the Commission and a court order referring the Commission to law enforcement officials for prosecution. Finally, claiming that the Commission failed or neglected to perform its 'duty,' petitioner sought a $250 fine pursuant to P.O.L. §79. **Exhibit 1, Wherefore Clause.**"

No order was requested "compelling" the Governor to appoint a special prosecutor, but, rather, an order and judgment *requesting* him to make such appointment. This is reflected both by the "Wherefore Clause" cited by the Attorney General, as well as by the Notice of Petition, not cited by him.

Attorney General's Memorandum, Page 6:

"By decision dated July 13, 1995, this Court (Cahn, J.) dismissed the petition in Action #1. Kennedy Aff., Exhibit 2. **The Court rejected petitioner's constitutional challenge to 22 NYCRR §7000.3, concluding that the regulation was consistent with the provisions of N.Y. Const. Article VI, §22 and Judiciary Law §44. Exhibit 1** (sic) **at 1-5.**"

The Attorney General conspicuously omits any identification of the basis for the Court's rejection of Petitioner's constitutional challenge and for its conclusion that 22 NYCRR

§7000.3 is "consistent" with the Constitution and the Judiciary Law. The false and fraudulent nature of the Court's decision -- which would vitiate his Point II *res judicata*/collateral estoppel defense (at pp. 13-18) and his Point IV opposition to declaratory relief (at p. 39) -- was alleged at ¶¶NINTH through FOURTEENTH of the Verified Petition herein, with the specifics identified in the second of the three-page analysis of the Court's decision, as well as summarized in "*Restraining 'Liars in the Courtroom' and on the Public Payroll*", annexed as Exhibits "A" and "B", respectively, to the Verified Petition.

"The Court also rejected the notion the Commission is required to initiate a formal investigation into **each and every complaint** that it receives against a judge and dismissed petitioner's request to vacate the Commission's dismissal of her complaints."

This sentence is false and misleading. As reflected by the decision (at p. 4), the Court held that the Commission's duty of "investigation" is satisfied by "initial review and inquiry". This *sua sponte* claim by the Court, never advanced by Respondent, is belied by the "definition" section of 22 NYCRR §7000.1(I) and (j) -- and so identified by the second page of the three-page analysis of the decision, annexed to the Verified Petition herein as part of Exhibit "A".

"It also denied the requests for appointment of a special prosecutor and to refer the Commission for prosecution upon the ground that the Court lacked the authority to make those directions and, to the extent that it did have the authority, it expressly declined to do so. **Exhibit 1** (sic), **at 5-6.** Finally, the Court denied the application for imposition of a fine under P.O.L. §79, finding that (sic) **petition failed to allege that the Commission refused or neglected to perform a public duty**. **Exhibit 1** (sic) **at p. 6**."

The Court did NOT state that the "petition failed to allege that the Commission refused or neglected to perform a public duty", but that "Petitioner had failed to *adequately* allege that respondent refused to neglect or perform a public duty" (decision, p. 6, emphasis added) --- as to which the Court did not identify in what way Petitioner's allegations were "inadequate".

Attorney General's Memorandum, Page 6:

"**Action # 2** -- Sassower v. Commission on Judicial Conduct,
NY Co. Index No. 99-108551"

Once again, an Article 78 proceeding is not an "action", but a "special proceeding", CPLR §7804(a).

"Petitioner commenced this Article 78 proceeding by Notice of Petition dated April 22, 1999 ('Notice') and Petition verified on April 22, 1999 ('Pet'). The petition is **practically identical** to, and, in fact, repeats many of the claims raised in the petition **filed by CJA 'Director' Doris Sassower in Action #1.**"

The Petition herein is not "practically identical" -- as hereinabove detailed in response to the Attorney General's assertion in his Statement in "Action" #1 that the prior petition "sought relief that is essentially identical to the relief that petitioner here seeks", *supra*, p. 41 .

Once again, the Attorney General creates the misimpression that the Petition in the prior proceeding was filed by Doris Sassower in her capacity as CJA's Director, rather than individually -- which is the affirmative misrepresentation he makes in Point II (at p. 16) to advance his *res judicata*/collateral estoppel defense.

Attorney General's Memorandum, Page 7:

"According to the petition, petitioner pro se, Elena Ruth Sassower, is the Coordinator of CJA, a not-for-profit corporation whose alleged purpose is 'to safeguard the public interest in the integrity of the judicial selection and discipline process.' (sic) **Pet ¶2. She purports to be bringing this action as 'coordinator' of the corporation, and not in her individual capacity. Id.**"

This is the ONLY place in the "Statement of the Case" where the Attorney General cites a paragraph from the Verified Petition herein, apart from his recitation of Petitioner's Claims for Relief , which he misnomers "Causes of Action" (pp. 9-11). However, as examination of ¶SECOND of the Verified Petition shows, the second sentence of the Attorney General's description is an outright falsehood. Petitioner nowhere "purports to be

bringing this action as 'coordinator' of the corporation, and not in her individual capacity". In its entirety, ¶SECOND reads:

> "Petitioner is coordinator and co-founder of the Center for Judicial Accountability, Inc. [hereinafter 'CJA'], a national, non-profit, non-partisan citizens' organization, incorporated in 1994 under the laws of the State of New York, whose purpose is to safeguard the public interest in the integrity of judicial selection and discipline processes."

The Attorney General's false factual claim -- belied by the very paragraph he cites -- is for the purpose of his Point I (pp. 11-12) that "Petitioner Lacks the Legal Capacity to Maintain this Proceeding as 'Coordinator' of CJA". In that Point, he repeats -- this time without *any* record citation -- that "Petitioner...commences this proceeding, not as an individual, but in her capacity as the 'coordinator' of CJA." (at p. 12).

"Acting as CJA's 'coordinator', petitioner filed **a 'complaint' dated October 6, 1998 against the Associate Justice of the Second Department who was being considered for appointment to the Court of Appeals. Pet. Exh. C.**"

As examination of the face of the October 6, 1998 complaint shows (Exhibit "C-1"), it was directed not only against Albert Rosenblatt, the associate justice of the Second Department being considered for the Court of Appeals, but against "his co-defendant Appellate Division, Second Department justices in the *Sassower v. Mangano, et al.* federal civil rights action." This fact -- particularly critical to an understanding of the February 3, 1999 judicial misconduct complaint against Commission member Justice Daniel Joy, an Appellate Division, Second Department justice -- is, additionally, reflected in ¶¶SEVENTEENTH and THIRTY-THIRD of the Verified Petition -- to which the Attorney General makes no reference.

Throughout the dismissal motion, the Attorney General conceals that the October 6, 1998 complaint is directed against any but a single judge. *See* Mr. Kennedy's Affirmation, ¶2(2); Preliminary Statement, p. 2; Point IV, p 33-34.

"The complaint was based upon **CJA's 'belief'** that the justice did not answer a questionnaire **truthfully** and that he, **somehow, obtained a 'fraudulent' dismissal of a federal action** that Doris Sassower, had commenced against him and the other Justices of the Second Department involved in her suspension from the practice of law, entitled Sassower v. Mangano, 927 F. Supp. 113 (S.D.N.Y. 1996), affirmed 122 F.3d 1057 (2d Cir. 1997), cert. denied, ___ U.S. ___, 119 S.Ct. 170 (1998), reh. denied, __ U.S. ___, 119 S.Ct. 582 (1998). **Pet., Exh. C.**"

This description materially misrepresents the October 6, 1998 complaint. Examination shows that it was not based on some mere "belief" that Justice Rosenblatt "did not answer a questionnaire truthfully" -- but, expressly upon a "belief, *for reasons particularized* at page 4" of the accompanying October 5, 1998 letter to the Commission on Judicial Nomination -- "that Justice Rosenblatt *committed perjury* in his responses to *Questions #30(a)-(b) and #32(d)* of the Commission on Judicial Nomination's questionnaire" (emphases added).

Nor did the complaint allege in some vague or incoherent way that Justice Rosenblatt "*somehow*", obtained a 'fraudulent' dismissal" of the *Sassower v. Mangano* federal action. Rather, it alleged that he -- and his co-defendant Second Department judicial brethren -- were collusive and complicitous in the litigation fraud of their co-defendant, the State Attorney General -- the particulars of which litigation fraud were expressly stated by the complaint to be "particularized in [the] *unopposed* cert petition therein, which is also transmitted, together with [the] supplemental brief (S.Ct. #98-106)." These substantiating details and documentation are, additionally, reflected in ¶TWENTY-THIRD of the Verified Petition -- to which the Attorney General makes no reference -- as, likewise, he makes no reference to the preceding ¶TWENTY-SECOND, which identified these allegations of the October 6, 1998 complaint to be "facially-meritorious".

This profoundly serious distortion and mischaracterization of Petitioner's October 6, 1998 complaint appears elsewhere in the dismissal motion, including at ¶4 of Mr. Kennedy's Affirmation, and at Point IV (pp. 33-34).

The Attorney General's falsification of the October 6, 1998 complaint enables him to pretend at Points III and IV that the complaint was facially lacking in merit and so-determined by Respondent, pursuant to Judiciary Law §44.1(b) (at pp. 19, 21, 23-25, 32. 34) -- a lie necessary to advance their defenses.

Attorney General's Memorandum, pages 7-8:

"By letter dated December 23, 1998, the Commission advised that the October 6, 1998 complaint was **dismissed because it lacked merit on its face. Pet., Exh. F-3**."

> This is a falsification of one of the most material facts in this proceeding. The December 23, 1998 letter of the Commission's Clerk (Exhibit "F-3") gives no reason for the purported dismissal of the complaint.
>
> This irrefutable and complained-of fact is expressly identified by ¶THIRTY-SECOND of the Verified Petition, which the Attorney General does not cite, wherein the December 23, 1998 letter is accurately described. In pertinent part, that paragraph reads:
>
> > "Respondent's December 23, 1998 letter, by its Clerk, informed Petitioner that 'the Commission ...has dismissed the complaint' (Exhibit 'F-3'). No particulars were provided, no reasons, and no legal authority was given for the purported dismissal."
>
> The Attorney General's material falsification of the December 23, 1998 letter permeates his Points III and IV (at pp. 19, 21, 23-25, 32, 34), founded on the pretense that Respondent determined Petitioner's October 6, 1998 complaint to be facially lacking in merit, pursuant to Judiciary Law §44.1(b).

"On December 29, 1998, petitioner **protested** the Commission's response to her 'individually' because she had filed the complaint as the 'coordinator' of CJA. **Pet. Exh. F-4**. She also **demanded** that the Commission set forth its reasons for its dismissal in writing and that she be advised whether Commission member Justice Joy, who, as an Associate Justice of the Second Department, was allegedly a defendant in her mother's federal lawsuit, participated in the Commission's decision to dismiss CJA's complaint. **Id.**"

> Having misrepresented that Respondent's December 23, 1998 letter advised Petitioner that her complaint was dismissed "because it lacked merit on its face" -- when, in fact, no reasons were given -- the Attorney General conceals the following pertinent statement in Petitioner's December 29, 1998 letter to Respondent's Clerk (Exhibit "F-4"):

"Specifically, you do NOT claim that the Commission determined that the complaint 'on its face lacks merit' -- the ONLY ground on which the Commission may dismiss a complaint under Judiciary Law §44.1(a), without investigating it."

Examination of the December 29, 1998 letter (Exhibit "F-4") shows that the Attorney General's characterization that Petitioner "protested" and "demanded" is false and unfounded. Such examination further shows that apart from "reasons" for Respondent's purported dismissal, Petitioner requested information substantiating its legitimacy and actuality -- including: (1) the date on which the Commission purported to review and dismiss the complaint; (2) the number of Commissioners present and voting; (3) the identities of the Commissioner's present and voting; and (4) the legal authority for the purported dismissal. Petitioner additionally sought "any and all procedures for review of the Commission's purported dismissal" of the complaint. The Attorney General does not identify these informational requests here -- or anywhere in the dismissal motion, disregarding ¶THIRTY-THIRD of the Verified Petition which sets them forth.

As to Justice Joy, examination of the December 29, 1998 letter shows that it neither "demanded" nor even "requested" to be advised as to Justice Joy's participation in the dismissal of the October 6, 1998 judicial misconduct complaint -- apart from the letter's general request for "the identities of the Commissioners present and voting". This is also reflected by ¶THIRTY-THIRD.

"On January 25, 1999, petitioner's **request** was denied. **Pet. Exh. F-5**."

The Attorney General identifies only a single "request" as being denied -- presumably referring to Petitioner's request for "reasons" for the purported dismissal of her complaint. In fact, Respondent's January 25, 1999 letter (Exhibit "F-5") denied all information sought by Petitioner, including her request for information concerning procedures for review of Respondent's purported dismissal -- and did so based on unspecified "law".

Respondent's invocation of unidentified "law" to deny all of Petitioner's informational requests (including her request for review procedures) was identified at ¶THIRTY-FOURTH of the

Verified Petition -- not cited by the Attorney General.

"By letter dated February 3, 1999, petitioner complained to the Commission's Administrator, Gerald Stern, Esq., about the **perceived inadequacy** of the Commission's January 25, 1999 response. **Pet. Exh. F-6**. This letter also **claimed** to be CJA's "complaint" against Justice Joy. It argued that, because the Commission's January 25, 1999 letter did not **expressly** deny Justice Joy's involvement in the Commission's December 23, 1998 dismissal of CJA's October 6, 1998 complaint, it 'lends strength to the inference' that he was involved, and that his 'involvement', CJS [sic] believes, violates the Code of Judicial Conduct. **Pet. Exh. F-6**."

> Petitioner's February 3, 1999 letter (Exhibit "F-6") did not complain about "perceived" inadequacy of Respondent's January 25, 1999 letter, it provided an analysis of Judiciary Law §45, showing that that statute "does not bar the Commission from providing the complainant with relevant facts explaining the dismissal [of his complaint] and establishing its lawfulness and propriety." This analysis is identified in ¶THIRTY-FIFTH of the Verified Petition -- which the Attorney General does not cite.
>
> Nor did the February 3, 1999 letter "claim[]" to be CJA's complaint, but explicitly requested (Exhibit "F-6", at p. 2)[44] that it be considered a judicial misconduct complaint against Justice Joy, "absent express notice" that he did not participate in the consideration of the October 6, 1998 judicial misconduct complaint, in which he had a "direct, personal interest in the outcome". This is also identified in ¶THIRTY-SIXTH of the Verified Petition -- which the Attorney General does not cite.
>
> Likewise, the February 3, 1999 letter did not rest on inference, but set forth facts (at p. 2) showing that Respondent's previous dismissal letters had identified if a Commissioner did not participate in the consideration of a complaint, whereas Respondent's December 23, 1998 letter contained no such identification. It was this, combined with the false claim in the Commission's January 25, 1999 letter that the "law" prevented disclosure of information identifying whether Justice Joy participated, that Petitioner argued "lends strength to the inference that he did so."
>
> Additionally, "the Code of Judicial Conduct" was not the

---

[44] Further highlighting that it was to be considered a judicial misconduct complaint was the RE: caption of the letter (Exhibit "F-6", at p. 1).

only authority invoked by Petitioner, specifying Canon 3C thereof, but also Judiciary Law §14, §100.3 of the Chief Administrator's Rules Governing Judicial Conduct, as well as Judiciary Law §41.4, "explicitly disqualify[ing] a judicial member of the Commission from participating in 'any and all proceedings' concerning a complaint of which he is the subject".

Attorney General's Memorandum, Page 9:

"Mr. Stern responded by letter dated February 5, 1999. **Pet. Exh. F-7**. It explained, inter alia:

> The Commission dismisses complaints that are not valid on their face. Every complaint dismissed by the Commission without an investigation was based on the Commission's judgment that the complaint was not valid on its face. The Commission determined that your October 1998 complaint against a judge who was being considered for the Court of Appeals was not valid on its face. No further explanation is warranted or expedient."

Pet. Exh. F-7. The letter also **invited petitioner to file complaints against any judge that she or CJA saw fit**. Id."

Mr. Stern's February 5, 1999 letter (Exhibit "F-7") did not invite petitioner "to file complaints against any judge that she or CJA saw fit", but that she could "make a complaint against any judge who is a member of the Commission".

As to the Attorney General's inclusion of Mr. Stern's above-quoted statement that Respondent had determined her October 6, 1998 complaint to be "not valid on its face", he does not then include Petitioner's response thereto in her March 11, 1999 letter (Exhibit "G") -- although he purports to describe that letter in the sentence immediately following, *infra*.

"**Not surprisingly**, petitioner **deemed** this response **inadequate**. Petitioner's letter dated March 11, 1999, raised more **'inferences'** and **protests** concerning, inter alia, the Commission's dismissal of written complaints that CJA perceived to be 'facially meritorious.' **See Pet. Exh. G.**"

The Attorney General's inappropriate sarcasm conceals that Petitioner's March 11, 1999 letter (Exhibit "G") particularized not only "inadequacies" of Mr. Stern's February 5, 1999 letter, but, by

voluminous appended exhibits, demonstrated a pattern of deceit and misrepresentation by him -- of which that letter was a further example. Conspicuously, the Attorney General's description of Petitioner's March 11, 1999 letter omits her precise response to his above-quoted statement that Respondent determined her October 6, 1999 to be "not valid on its face." This response was identified, as well, at ¶FORTY-FIRST of the Verified Petition, which the Attorney General does not cite:

> "...Petitioner requested Respondent's Administrator to provide a definition of 'not valid on its face', assumed to be 'equivalent to...'on its face lacks merit' -- the only basis upon which the Commission can dismiss a complaint under Judiciary Law §44.1', and to clarify that such alleged determination as to the October 6, 1998 complaint was made by the Commissioners themselves and not by him or other staff." (¶FORTY-FIRST)

Nor does his description of Petitioner's March 11, 1999 letter identify that she expressly responded to Mr. Stern concerning her February 3, 1999 judicial misconduct complaint against Justice Joy:

> "...it appears you have not deemed our February 3, 1999 letter to be a judicial misconduct complaint against Justice Joy. This, notwithstanding the letter specifically asked that it be considered a judicial misconduct complaint against him, 'absent express notice' that he did not participate in the Commission's dismissal of our October 6, 1998 complaint. Your February 5, 1999 letter gives no such notice.
>
> As you know, the Commission routinely acknowledges judicial misconduct complaints by a form letter that always states the 'complaint will be presented to the Commission, which will decide whether or not to inquire into it'. Except for our October 6, 1998 judicial misconduct complaint -- which the Commission failed to acknowledge until our November 3, 1998 reminder letter -- our past judicial misconduct complaints have always been

> acknowledged within two weeks. Yet, five weeks have now passed without the Commission's usual form-letter acknowledgment of our February 3, 1998 complaint against Justice Joy." (Exhibit "G", pp. 4-5)

> The Attorney General's concealment of Petitioner's March 11, 1999 letter as a response to Mr. Stern's February 5, 1999 letter "invitation" to file a judicial misconduct complaint is for purposes of pretending that Petitioner never filed any complaint and that, therefore, as argued in his Point IV (at pp. 37-38), "mandamus to compel" does not lie.

"This Article 78 proceeding followed."

> The Attorney General skips over the material fact, identified at ¶FORTY-SIXTH of the Verified Petition, that this Article 78 proceeding followed upon Mr. Stern's failure to respond to Petitioner's March 11, 1999 letter (Exhibit "G").

Attorney General's Memorandum, Pages 9-10:

"In the First and Second **Causes of Action**, the petition claims, **as did the petition in Action #1**, that 22 NYCRR §7000.3, promulgated by the Commission, **and its parallel statute, Jud. L. §44.1(b)**, are unconstitutional on **its** face and as applied because **it** wrongfully transforms the Commission's alleged 'mandatory duty' to investigate judicial misconduct complaints (see N.Y.S. Constitution Art. VI, §22(a)) into an optional one, with no requirement that **it first make a determination explaining the basis of its determination that the complaint on its face lacks merit prior to dismissal of a complaint**. See **Pet. 6, 7, 47-50, 51-58**."

> This one sentence contains numerous material factual errors, and, apart from its grammatical errors, makes no sense. First and foremost, the Attorney General's claim that the First and Second Claims for Relief present constitutional challenges, *as written* and *as applied*, to **both** 22 NYCRR §7000.3 AND Judiciary Law §44.1(b) is false -- as is his claim that "Action" #1 presented a similar challenge to both the rule and statute. This is readily established by examination of the paragraphs of the Verified Petition he cites -- as, likewise, by examination of the Notice of

Petition and Verified Petition in the prior Article 78 proceeding. Not only does neither proceeding challenge Judiciary Law §44.1(b), but both proceedings rest squarely on Judiciary Law §44.1, (a) and (b), to challenge the constitutionality of 22 NYCRR §7000.3.

Indeed, the Memorandum's "Preliminary Statement" (at pp. 2-3), which purports to itemize the relief sought by Petitioner, does NOT recite any challenge by Petitioner to Judiciary Law §44.1(b) -- as, likewise, none is recited in Mr. Kennedy's Affirmation -- containing (at pp. 1-2) the identical itemization. Similarly, where the Memorandum (at pp. 5, 6, 15, 17) describes the prior Article 78 proceeding, it does not recite any challenge having been made therein to Judiciary Law §44.1(b)

It would appear that the Attorney General's *sua sponte* inclusion of Judiciary Law §44.1, which he falsely characterizes as a "parallel statute" to 22 NYCRR §7000.3, was an after-the-fact insertion to a sentence that contains three singular, rather than plural, pronouns: "*its* face"; "*it* wrongfully transforms", and "no requirement that *it* first make a determination". Moreover, only by reading the original as limited to Petitioner's challenge to §7000.3 -- which is exclusively the subject of Petitioner's First and Second Claims for Relief (¶¶FORTY-SEVENTH - FIFTY-EIGHTH) -- does the whole sentence have some possibility of making sense -- and then only by removing the words "explaining the basis of its determination" so that the final clause reads "with no requirement that it first make a determination...that the complaint on its face lacks merit prior to dismissal of a complaint."

This does not mean that the addition of Judiciary Law §44.1(b) or the words "explaining the basis of its determination" is inadvertent error. It is perfectly consistent with the false inferences and misrepresentations in Points III and IV that Petitioner is challenging Judiciary Law §44.1(b) and the dismissal of her October 6, 1998 complaint thereunder (at pp. 19, 21, 23-25, 32. 34) and that she is seeking to expand Judiciary Law §44.1's "notice requirement" (at p. 24).

Attorney General's Memorandum, Page 10:

"Petitioner also alleges, in the Third **Cause of Action**, that the confidentiality requirement of Jud. L. §45, **as written and applied**, is unconstitutional to the extent that it permits the Commission

to dismiss a complaint **without articulating a reason more detailed than its opinion that the complaint lacked merit on its face**. Petitioner believes that the Commission's refusal to substantiate the basis for its opinion that the complaint lacks merit 'serves no legitimate public purpose' and conflicts with petitioner's perception of the legislature's intent in enacting Jud. L. §44.1, which provides that the Commission shall notify a complainant whose complaint has been dismissed. **Pet. 59-70** ."

> Notwithstanding the Attorney General's citation to paragraphs of the Third Claim for Relief, they do NOT challenge Judiciary Law §45, *as written*, but only as an alternative to Petitioner's challenge, *as applied*, in the event the Court upholds Respondent's restrictive and invidiously selective interpretation of Judiciary Law §45 (¶SEVENTIETH).
>
> Nor does the challenge rest on Respondent's refusal to provide more than "its opinion that the complaint lacked merit" or to "substantiate the basis for its opinion that the complaint lacks merit" -- *as if Respondent now informs a complainant that Respondent determined that his summarily-dismissed complaint was facially lacking in merit*, which is the misimpression the Attorney General is trying to create. Rather Petitioner's challenge rests on *Respondent's invocation of Judiciary Law §45 to refuse to provide a complainant, such as Petitioner, with any and all information substantiating the legitimacy and actuality of its purported dismissal of his complaint, without reasons, including, if that were the case, that it was determined to be facially lacking in merit* -- as well as information as to "any and all review procedures for review" of dismissed complaints.
>
> The Attorney General bases his Point III and Point IV defenses to the Third Cause of Action (at pp. 19, 23-25, 36-37, 40) on his misrepresentation and concealment of its allegations.

Attorney General's Memorandum of Law, Pages 10-11:

"In the Fourth **Cause of Action**, petitioner alleges that Jud. L. §§43.1, 41.6 and 22 NYCRR §7000.11 are unconstitutional on their face and as applied because they permit the Commission to delegate certain functions, such as the **initial review of a written complaint**, to a three-member panel. According to the petition, no provision in the New York State Constitution permits disposition of complaints by panels of less than all eleven-members of the Commission. Petitioner also complains that the Legislature and Commission did not establish adequate standards for a Commission member's assignment to the panels to insure that the panel parallels

the diverse background that the Legislature established for the Committee as a whole. Pet. ¶¶71-75."

> The Fourth Claim for Relief's challenge to Judiciary Law §§43.1 and 41.6 was clarified at ¶FIFTH (4) of the Verified Petition and in the Notice of Petition as being alternative, in the event the Court did not declare 22 NYCRR §7000.11 unconstitutional, *as written* and *as applied*.
>
> Moreover, the Fourth Claim for Relief did not identify "initial review of a written complaint" as an unconstitutional delegation to a three-member panel, but, rather dismissal of judicial misconduct complaints, without investigation (¶¶SEVENTY-FIRST and SEVENTY-THIRD). Among the allegations of the Fourth Claim, to which the Attorney General does not refer herein -- or anywhere else in the dismissal motion -- are those pertaining to the lack of any standard as to when a three-member panel is to be assigned, thereby allowing Respondent to use panels invidiously, discriminatorily, and selectively; the failure to specify a method for selecting panel members, whether random, rotation, by seniority, or hand-picked choice of Chairman, Administrator, Clerk, or other party; and the lack of any provision for review by the full 11-members;
>
> The Attorney General bases his Point III and Point IV defenses to the Fourth Cause of Action (at pp. 19, 24-25, 37, 39-40) on his misrepresentation and concealment of its allegations.

Attorney General's Memorandum, Page 11:

"The Fifth **Cause of Action seeks** mandamus to compel the Commission to remove Commission member Henry T. Berger upon the ground that his term has **exceeded the two year term permitted by Jud. L. §41.2. Compl., ¶¶76-80**."

> Examination of the Fifth Claim for Relief (¶¶SEVENTY-SIXTH through EIGHTIETH) shows that it does not seek mandamus to compel Mr. Berger's removal as Respondent's Chairman, but seeks his removal in the context of declaratory relief. Moreover, such relief is not sought because "his term has exceeded the two year term permitted by Jud. L. §41.2", but because Judiciary Law §41.2 restricts a chairman's term to a member's "term in office or for a period of two years, *whichever is shorter*"

(emphasis added).

The Attorney General bases his Point IV defense to the FIFTH Cause of Action (at p. 37) on his concealment of the "*whichever is shorter*" clause.

"Finally, the Sixth **Cause of Action** seeks mandamus to compel the Commission to 'receive' petitioner's February 3, 1999 letter as a 'complaint' against Justice Joy. **Compl. ¶¶80-83**."

Examination of the Sixth Claim for Relief (¶¶EIGHTY and EIGHTY-FIRST) shows that it seeks to compel Respondent not only to "receive" Petitioner's February 3, 1999 judicial misconduct complaint by formal acknowledgment, but to dispose of it -- both of which are identified as its "legally-mandated duty". This is reflected, as well, by the Notice of Petition (at p. 2, #6) and ¶FIFTH(6) of the Verified Petition.

"For the reasons that follow, each of the foregoing claims should be dismissed **as a matter of law**."

As hereinafter detailed, none of the Petitioner's Claims for Relief are dismissible because the four Points of the Attorney General's Memorandum are wholly spurious in that they are founded on falsification, distortion, and concealment of the material allegations of the Verified Petition in a manner similar to that in his "Statement of the Case". As a matter of law, Petitioner is entitled to severest sanctions against the Attorney General and Respondent, including disciplinary and criminal referrals.

THE ATTORNEY GENERAL'S POINT I IS SANCTIONABLE

The Attorney General's Point I, "Petitioner Lacks the Legal Capacity to Maintain this Proceeding as 'Coordinator' of CJA"(at pp. 11-12), rests on his wilful and deliberate material misrepresentation that "Petitioner Elena Ruth Sassower...commences this proceeding, not as an individual, but in her capacity as the 'coordinator' of CJA." (at p. 11)

Conspicuously, Point I cites no record reference to substantiate this claim -- not to the caption of the Verified Petition nor to the Verified Petition's allegations. Rather, its only record reference, to ¶SECOND, is for the proposition that "CJA is a corporation". This has nothing to do with the capacity in which Petitioner is bringing this proceeding. Such citation to ¶SECOND contrasts sharply with the Attorney General's previous citation of ¶SECOND -- which was in his "Statement of the Case", *supra*, pp. 46-47. There it was for the proposition that Petitioner "purports to be bringing this action as 'coordinator' of the corporation, and not in her individual capacity" (at p. 7). While that proposition would be relevant here, it is unsupported by ¶SECOND, as examination of that paragraph plainly shows.

The Attorney General provides no other record reference for his false assertion that Petitioner is not bringing this proceeding individually. No record reference appears in Mr. Kennedy's Affirmation, whose ¶3(a) asserts, without substantiation, that Petitioner is suing "on behalf of a corporation". Nor is there any in Ms. Olson's May 17, 1999 "Affirmation in Support of Respondent's Application Pursuant to CPLR 3012(d).", which, in two separate places, likewise asserts that Petitioner's suit is "on behalf of CJA" (¶4); and "on behalf of a corporation"

(¶6), also without substantiation. Indeed, nowhere in the pleading do those words appear. Consequently, such statement by the Attorney General is knowingly false and made for the sole purpose of misleading the Court as to the applicability of a defense that does not apply to the facts of this case. In the absence of a factual predicate, his case citations are knowingly irrelevant, his argument specious, and his defense a pretextual sham.

Equally frivolous is his two-sentence argument that

> "because [Petitioner] is not a lawyer, she can not maintain this proceeding pro bono publico *on behalf of anyone other than herself.* See Jud. L. §478 (It is unlawful for a person to practice or appear *for another* in a court of record unless she is a licensed attorney)" (at p. 12, emphasis added),

The Attorney General does not contend that Petitioner cannot maintain this proceeding *pro bono publico*. Rather, he argues that Petitioner cannot do so "on behalf of anyone other than herself", an undisputed fact. However, that she is not doing so is transparently clear from his failure to provide any record reference for who "other than herself" she is representing.

Petitioner's accompanying Affidavit (¶¶114-120) provides the relevant facts proving her intent to bring this proceeding individually, in her own name, and not in CJA's name or on its behalf. The proceeding's caption, to which no objection has been raised by the Attorney General, does not say Petitioner is suing "as" CJA's coordinator. The words following Petitioner's name are descriptive only and, plainly, not ground for dismissal. *Gianunzio v. Kelly,* 90 App.Div. 2d 623 (1982, 3rd Dept.). Under CPLR §2001, "a mistake, omission, defect, or irregularity...shall be disregard if a substantial right of a party is not prejudiced". The Attorney General has nowhere alleged, let alone proven, that any substantial right was prejudiced by the

inclusion of the descriptive language. Even pre-CPLR, descriptive words in a caption were viewed as surplusage that could be disregarded, *In re Kandler,* 18 Misc. 2d 109, 187 N.Y.S.2d 702 (Sup. Ct. Queens Co. 1959).

THE ATTORNEY GENERAL'S POINT II IS SANCTIONABLE

The Attorney General's Point II, "The Claims are Barred by Res Judicata and Collateral Estoppel" (at pp. 13-18), rests on several wilful and deliberate material misrepresentations. None is more egregious, however, and so dispositively vitiates a defense founded on *res judicata* and collateral estoppel, than the Attorney General's characterization that Petitioner's allegations concerning the "false" and "fraudulent" nature of Justice Cahn's decision dismissing the prior Article 78 proceeding is a "conclusory claim" (at p. 13). For such assertion, the Attorney General cites ¶¶EIGHTH through SIXTEENTH of the Verified Petition.

Examination of those paragraphs reveals that Petitioner's aforesaid allegations were not conclusory, but were supported by the "detail" required by CPLR §3016(b). Indeed, the specific facts alleged in ¶NINTH of the Verified Petition relate to the very issues on which the Attorney General is most urgent in asserting a *res judicata*/collateral estoppel defense: the constitutionality of 22 NYCRR §7000.3, *as written and as applied.*

¶NINTH reads as follows:

> "In July 1995, the prior Article 78 proceeding was dismissed by a Supreme Court decision (per Herman Cahn, J.) which upheld the constitutionality of §7000.3, *as written*, by falsely attributing to Respondent the Court's own *sua sponte* argument which did not reconcile the facial discrepancy between §7000.3 and Judiciary Law §44.1. As to the constitutionality of §7000.3, *as applied* to Respondent's dismissals of the aforesaid eight facially-meritorious judicial misconduct complaints, the decision falsely stated that the Petitioner therein had contended that Respondent had "wrongfully determined" that her complaints lacked facial merit -- which she had not -- and then falsely held that the "issue is not before the court"...."

The Verified Petition then provided further specificity by a three-page analysis of Justice Cahn's decision, annexed as part of Exhibit "A". Pursuant to CPLR §3014, this is part of the pleading "for all purposes". Said analysis is specifically referred to at ¶¶TWELFTH and THIRTEENTH, with ¶FOURTEENTH providing an attestation thereof:

> "The facts and legal argument set forth in that analysis as to the false and fraudulent nature of the decision in the prior Article 78 proceeding were, and are, accurate and correct."

Petitioner's particularized explanation as to why Justice Cahn's *sua sponte* argument as to the constitutionality of §7000.3 *as written* does not reconcile its facial inconsistency with Judiciary Law §44.1 was set forth in the appended analysis as follows:

> "The definitions section of §7000.1 (Exhibit "A-1"), which the Court itself quotes in its decision, belies its 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 aforesaid sua sponte argument, which it pretends to be the Commission's 'correct[] interpret[ation]' of the statute and constitution, does NOTHING to reconcile §7000.3, as written, with Judiciary Law §44.1 (Exhibit "A-2"). This is because §7000.3 (Exhibit "A-1") uses the discretionary 'may' language in relation to both 'initial review and inquiry' and 'investigation' -- THUS MANDATING NEITHER. Additionally, as written, §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." (at p. 2, emphases in the original)

Thus, the Attorney General's pretense that Petitioner's allegations of the decision's

fraudulence is a "conclusory claim" is a demonstrable deceit upon the Court, designed to conceal the devastating truth: he cannot address the factual specificity provided by Petitioner, without exposing that the decision is, as she contends, "false" and "fraudulent". Indeed, as set forth at ¶¶ELEVENTH, TWELFTH and THIRTEENTH of the Verified Petition, none of the "public leaders, in and out of government", to whom Petitioner supplied the aforesaid analysis of the decision ever denied or disputed its accuracy. This includes Mr. Spitzer's predecessor Attorney General, Dennis Vacco -- a fact reflected by the text of Petitioner's May 5, 1997 memorandum, to which the analysis is annexed to the Verified Petition as Exhibit "A", and the public interest ad, "*Restraining 'Liars in the Courtroom' and on the Public Payroll*", annexed as Exhibit "B".

As particularized in the accompanying Affidavit (¶¶41-52), Mr. Spitzer is personally knowledgeable of the decision's fraudulence -- and was provided a copy of the analysis and the file of the prior Article 78 proceeding against Respondent days before he was sworn in as Attorney General. Likewise, both Mr. Kennedy and Ms. Olson, as well as their supervisors, have been personally apprised on the decision's fraudulence, verifiable from the analysis and file (¶¶68, 85).

The Attorney General's knowledge that Justice Cahn's decision pretending to reconcile 22 NYCRR §7000.3 with Judiciary Law §44.1 is "smoke and mirrors" may be seen from his failure to anywhere even attempt to summarize Justice Cahn's argument. Thus, his Point II confines itself to the facile statement (at p. 15) that Justice Cahn "specifically held that 22 NYCRR §7000.3 was constitutional" -- without providing the specifics thereof. Elsewhere, the descriptions are similarly vague and non-committal as to the mechanics of Justice Cahn's

argument:

> "The Court rejected petitioner's constitutional challenge to 22 NYCRR §7000.3, concluding that the regulation was consistent with the provisions of N.Y. Const. Article VI, §22 and Judiciary Law §44." ("Statement of the Case", at p. 6);
>
> "The Court's decision in Action #1 flatly rejected petitioner's claims concerning the constitutionality of 22 NYCRR §7000.3...As set forth in the decision in Action #1, these provision [sic] do not undermine the intent of the state Constitution, nor do they unconstitutionally transform a 'mandatory duty' into a discretionary one." (Point IV, at p. 39)
>
> "The decision in that proceeding concluded, inter alia, that CJA's constitutional challenge to 22 NYCRR §7000.3 was meritless..." (Ms. Olson's May 17, 1999 "Affirmation in Support of Respondent's Application Pursuant to CPLR 3012(d)", (at p. 2).

Having withheld from the Court the material facts showing that Justice Cahn's decision cannot be a predicate for *res judicata* and collateral estoppel because it is a readily-verifiable fraud -- known as such to Attorney General Spitzer, *personally*, as well as to the Assistant Attorneys General whose names appear on this dismissal motion -- Point II proceeds to misrepresent the status of the Petitioners in both the prior and instant Article 78 proceeding so as to establish applicability of those inapplicable doctrines:

> "Although petitioner's mother, Doris Sassower, was the petitioner in Action #1, the final judgment on the merits in Action #1 bars relitigation of these claims in Action #2 because *Doris Sassower sued as the 'Director' of the CJA in 1995, and Elena Ruth Sassower is now suing as the co-founder and 'coordinator' of CJA.* Since both petitioners brought their claims *as and on behalf of CJA*, it must be said that the petitioners in each case are the same." (at p. 16, emphasis added)

"...both petitioners commenced their respective proceedings *as officer or employee* [sic] *of CJA*." (at p. 17, emphasis added)

Once again, the Attorney General provides no record reference to support his assertion as to the capacity in which the two Petitioners brought their respective Article 78 proceedings against Respondent. As hereinabove shown (at pp. 59-61), the Attorney General's Point I presents no record support for its claim that Petitioner herein is suing "as" CJA's coordinator, "on behalf of" the corporation. Similarly, he provides no record support for his Point II claim that the prior Article 78 proceeding was brought by the Petitioner therein "as" CJA's Director, "on behalf of" the corporation. Examination of the Verified Petition in the prior Article 78 proceeding -- annexed as Exhibit "1" to Mr. Kennedy's Affirmation -- shows that she, like the Petitioner herein, sued Respondent in her individual capacity.

Moreover, contrary to the Attorney General's bald assertion (at p. 17), the fact that CJA "spearheaded" the prior Article 78 proceeding does not mean CJA was a party, anymore than CJA is a party to this proceeding. Likewise, it does not mean that Petitioner herein, as CJA's co-founder and coordinator, "controlled the conduct of the prior proceeding to further her own interests", since it was an individual capacity action, to which she was not a party.

Finally, notwithstanding Point II's concluding paragraph that "petitioner's claims are barred, *in whole* or in part, by res judicata and collateral estoppel" (at p. 18, emphasis added) -- echoing "the *in whole* or in part" language of the Attorney General's Notice of Motion (at p. 3), his "Preliminary Statement" (at pp. 3-4) and Mr. Kennedy's Affirmation (at ¶3(b))-- his Point II argument is confined to Petitioner's first three Claims for Relief. This is somewhat obscured

because he purports that "petitioner is attempting to relitigate *many of the same claims for declaratory relief* which were previously raised and rejected in the prior Article 78 proceeding." (at p. 15). To provide a veneer for this claim, the Attorney General cites (at p. 16) not only Petitioner's First and Second Claims for Relief, but her request for

> "an Order requesting the Governor to appoint a Special Prosecutor, and an Order referring the respondent to the New York State Attorney General, the United States Attorney, The District Attorney in New York and The New York State Ethics Commission for criminal and disciplinary investigation".

However, this relief, as well as Petitioner's request for a fine under Public Officers Law §79, clearly pertain to the First Two Claims for Relief, which Point II admits (at p. 17).

As to the Third Claim for Relief, challenging Respondent's interpretation of Judiciary Law §45, the Attorney General falsely purports (at p. 18) that it also challenges the "notice requirements of Jud. L. §44" and that Petitioner is collaterally estopped because the prior Article 78 proceeding purportedly challenged the adequacy of the Commission's notice of dismissal, which was "necessarily resolved against petitioner in Action #1". Examination of Justice Cahn's decision shows that this is yet another deceit. Justice Cahn did not resolve the adequacy of the Commission's dismissal notice, adjudication of which was nowhere requested by the Notice of Petition in the prior Article 78 proceeding.

THE ATTORNEY GENERAL'S POINT III IS SANCTIONABLE

The Attorney General's Point III, "Plaintiff's Claims are Non-Justiciable or She Lacks Standing to Raise Them" (pp. 19-29), is based on a pattern of wilful and deliberate material misrepresentations of the allegations of the Verified Petition, none of which it cites with paragraph references.

A. The Attorney General's Sanctionable Subpoint A:

The Attorney General begins his Subpoint "A", "Petitioner's Claims are Non-Justiciable" (pp. 19-25) with a first paragraph purporting to recite Petitioner's first four Claims for Relief, which he contends are "non-justiciable". In fact, he misrepresents and/or conceals *each* of these four Claims and their material allegations.

As to the First and Second Claims for Relief, he asserts:

> "Petitioner seeks review of the Commission's decision to dismiss her complaints *upon the ground that they lack merit on their face* and its refusal to *further* investigate or prosecute the justice against whom she complains. Petition, First and Second Causes of Action." (p. 19, emphases added)

This description actually has nothing whatever to do with Petitioner's First Claim for Relief. The paragraphs of that Claim (¶¶FORTY-SEVENTH through FIFTIETH), which the Attorney General has completely concealed, challenge Respondent's self-promulgated rule, 22 NYCRR §7000.3, ***as written***, contending that it not only violates Article VI, §22(a) of the New York State Constitution, but also Judiciary Law §44.1, with which it is "facially inconsistent and irreconcilable" [¶FORTY-SEVENTH].

The description is also diametrically opposite to Petitioner's Second Claim for

Relief, challenging §7000.3, *as applied*. Not only does the Attorney General not identify that challenge, but it is not reflected by his description. Indeed, Petitioner is NOT challenging Respondent's dismissal of "her complaints *on the ground that they lack merit on their face*" -- as if any such determination had been made, pursuant to Judiciary Law §44.1(b) -- or "its refusal to *further* investigate or prosecute" -- as if Respondent had conducted some prior investigation or prosecution. Rather, as reflected by ¶¶FIFTY-FIRST through FIFTY-EIGHTH, Petitioner is challenging Respondent's dismissal of her facially-meritorious October 6, 1998 complaint and of the eight facially-meritorious complaints against high-ranking, politically-connected judges, annexed to the Verified Petition in the prior Article 78 proceeding, "*without* investigation and *without* any determination as to their facial merit" [¶FIFTY-SIXTH, emphases added].

As to the Third Claim for Relief, the Attorney General states:

> "She also claims that the *confidentiality requirements of Jud. L. §45 are unconstitutional* and *demands* that the Commission provide a written rationale and explanation in support of its determination to dismiss the complaint. Pet., Third Cause of Action." (at p. 19, emphases added)

This description materially misrepresents and obscures Petitioner's Third Claim for Relief, as set forth in ¶¶FIFTY-NINTH through SEVENTY of the Verified Petition. Those paragraphs do not claim that the confidentiality requirements of Judiciary Law §45 are unconstitutional. Rather they allege that Respondent's interpretation of Judiciary Law is unconstitutional since, "*as written*, Judiciary Law §45 does not prevent Respondent's disclosure of information to a complainant substantiating the legality and propriety of its dismissal of his complaint." [¶SIXTY-FIRST] and, moreover, that "Respondent has an invidious, discriminatory,

and selective standard for its application of Judiciary Law §45" [¶SIXTY-SEVENTH] . Additionally, nothing in the Third Claim for Relief "demands" from Respondent any information -- such mischaracterization only serving to reinforce the Attorney General's misrepresentation in his Point IV (p. 31) that Petitioner is seeking "mandamus to compel" in connection with the Third Claim for Relief.

As to Petitioner's Fourth Claim for Relief, the Attorney General states

> "She also complains that the use of panels, which is authorized by Jud. L. §43, is *improper* and *demands* to know the identity and background of the panel members who reached this conclusion. Pet., Fourth Cause of Action." (p. 19, emphases added)

This description materially misrepresents the Fourth Claim for Relief, as set forth in ¶¶SEVENTY-FIRST through SEVENTY-FIFTH of the Verified Petition. Those paragraphs do not contend that the use of panels is merely "improper". What is claimed is that it is unconstitutional, "there being no provision in the New York State Constitution for formation of, and disposition of judicial misconduct complaints by, panels, rather than the full eleven-member Commission" [¶SEVENTY-FIRST]. Additionally, nothing in the Fourth Claim for Relief "demands" from Respondent any information. Here, too, such mischaracterization only serves to reinforce the Attorney General's misrepresentation in his Point IV (at p. 31), this time that Petitioner is seeking "mandamus to compel" in connection with the Fourth Claim for Relief.

The Attorney General's misrepresentation of Petitioner's first Four Claims for Relief is key to the false argument he then presents that Petitioner is challenging "broad legislative and administrative policy" and that the Court is being called upon to violate separation

of powers and impose itself on the wisdom of the Legislature (pp. 19-20). However, the wisdom of the Legislature, as reflected by its statutes, has no bearing whatever on the First and Second Claims for Relief, which seek to uphold the legislative statute, Judiciary Law §44.1, by having the Court strike down Respondent's self-promulgated rule, 22 NYCRR §7000.3. Likewise, the Third Claim for Relief, seeking to uphold Judiciary Law §45 by challenging Respondent's overly restrictive interpretation, which it invidiously and selectively applies. As to the Fourth Claim for Relief, Petitioner's challenge is not, initially, to Judiciary Law §§43.1 and 41.6, but to 22 NYCRR §7000.11. Only if that rule is not declared unconstitutional, does Petitioner challenge, *as written and applied*, Judiciary Law §§43.1 and 41.6 -- and on grounds that such panels are inconsistent with the State Constitution's establishment of an eleven-member commission, with a diversified membership of judges, lawyers, and laypeople, where, in addition, the statute fails to provide for review by the full committee of a three-member panel's action.

The Attorney General makes NO argument as to the First or Second Claims for Relief, challenging the constitutionality of Respondent's self-promulgated rule, 22 NYCRR §7000.3 -- which rule he nowhere even refers to in his Subpoint A that "Petitioner's Claims are Non-Justiciable"! The closest he comes is a false argument, consuming the bulk of Subpoint A, that Petitioner is challenging Respondent's dismissals of complaints *upon its determination that the complaints lack facial merit* -- and that, indeed, Petitioner's complaint *lacks facial merit*:

> "...the determination whether to dismiss a case that, *in the Commission's determination lacks merit on its face* is a matter vested to the Commission's discretion and is not reviewable." (at p. 21, emphasis added)

"The power and authority to determine whether to investigate or prosecute a complaint of judicial misconduct, and *whether to dismiss it where the Commission determines 'that the complaint on its face lacks merit,' Jud. L. §44.1(b)*, has been vested to the discretion of the Commission." (at p. 23, emphasis added)

"Accordingly, the Commission's decision to dismiss *a complaint where, as here, the complaint lacks merit on its face*, is a matter over which the Court's (sic) have no oversight." (at p. 23, emphasis added)

"Accordingly, petitioner's invitation for the court to overrule the Legislature's decision to extend discretion to dismiss a complaint *where, in the Commission's opinion, it lacks merit on its face*...should be declined" (at p. 24, emphasis added)

The inference intended by the Attorney General is that Petitioner seeks to have the Court strike down the will of the Legislature, reflected by Judiciary Law §44.1(b), because it gives Respondent discretion not to investigate facially-meritless complaints -- such as hers. This inference echoes the Attorney General's affirmative misrepresentation in his "Statement of the Case" (at p. 9) that Petitioner's First and Second Claims for Relief challenge Judiciary Law §44.1(b). However, since the First and Second Claims make no such challenge, his argument and legal authorities based thereon in his Subpart A are wholly deceitful and irrelevant[45].

---

[45] Without directly saying so, the Attorney General implies (at p. 21) that Petitioner should have no judicial review of Respondent's dismissal of her complaints because the statute contains no provision for judicial review comparable to that permitting a "judge who is the target of ...investigation". This is a false argument. The silence of the statute on a complainant's right to review is in the context of its requirement that Respondent's dismissal of a complaint be based on its determination that a complaint lacked merit on its face -- and does not govern the situation, at bar, where Respondent made NO such determination as to the October 6, 1998 complaint -- or as to the eight facially-meritorious complaints annexed to the verified petition in the prior Article 78 proceeding against it -- and where it has failed to acknowledge, let alone dismiss, the February 3, 1999 complaint. Moreover, even where a statute expressly proscribes judicial review, review is NOT barred. Illustrative of the relevant law -- of which the Attorney General is presumed to be familiar -- is the Court of Appeals decision in *NYC Department of Environmental Protection v. NYC Civil, Service Commission, et al.*, 78 NY2d 318, (1991) -- where Respondent's former Chairman, Victor Kovner, as Corporation Counsel,

As to the Attorney General's argument that Petitioner's Third Claim for Relief is non-justiciable, he actually concedes Respondent's violation of the legislative intent. He does this by claiming that "...the legislature did not impose a requirement that the Commission articulate a reason for its decision to dismiss the complaint, *other than to explain that the complaint was dismissed because it lacked merit on its face*." (at pp. 23-4). This he refers to as "...the notice requirement of Jud. L. §44.1(b)" (at p. 24). In view of the fact that ¶¶TWENTY-THIRD and TWENTY-FOURTH of the Verified Petition allege -- and Exhibits "F-3" and "F-4" substantiate -- that Respondent did *not* explain to Petitioner that her October 6, 1998 complaint "lacked merit on its face" when it purported to dismiss it by letter dated December 23, 1998 and, that it, thereafter, took the position that Judiciary Law §45 barred Respondent from providing her

---

successfully presented that argument:

> "Even where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given [***] by statute or in disregard of the standard prescribed by the legislature" (*Matter of Guardian Life Ins. Co. v. Bohlinger*, [308 NY 174], at 183)
>
> ...But we emphasize that however explicit the statutory language, judicial review cannot be completely precluded. First, if a constitutional right is implicated, some sort of judicial review must be afforded to the aggrieved party. ...
>
> Second, judicial review is mandated when the agency has acted illegally, unconstitutionally, or in excess of jurisdiction. In *Pan Am. World Airways v. New York State Human Rights Appeal Bd.* (61 NY2d 532, 548), for example, we stated that even if statutory language precluded review, '[s]ome standards to guide [the agency's] broad discretion are necessary if the statute is to be valid. Quoting from *Baer* [*v. Nyquist*, 34 NY2d 291, 298], we said that a court should step in if an agency acts in violation of the Constitution, statutes or its own regulations (*id.*; see also, *Marine Midland Bank v. New York State Div. of Human Rights*, 75 NY2d 240, 246)." [*supra*, at 323-324]

with such information, Respondent has admitted to having violated the "notice requirement" as conceded by the Attorney General.

The Attorney General then presents the irrelevant argument (at p. 24) that Judiciary Law §44.1 "does not require the Commission to disclose its rationale for its determination or its deliberative process", when the issue, as set forth at ¶SIXTY-SECOND of the Verified Petition, is that Judiciary Law §44.1 places "no limitation as to...[the] form or content" of Respondent's notice to a complainant of the dismissal of his complaint. Not only does the Attorney General not identify this pivotal paragraph or ¶SIXTY-FIRST that

> "*As written*, Judiciary Law §45 does not prevent Respondent's disclosure of information to a complainant substantiating the legality and propriety of its dismissal of his complaint -- because it expressly excepts disclosure pursuant to Judiciary Law §44",

but he argues *against* each of these fact-specific paragraphs by a false assertion that "the Legislature...precludes the additional explanations that petitioner demands" (at p. 24). He presents no facts to support such assertion, which the statute, *as written*, belies. Nor does he present any legislative history.

As to Petitioner's Fourth Claim of Relief, Attorney General's two-sentence argument (at p. 24) is similarly false and misleading in stating, "...Jud. L §43 provides that the Commission may delegate certain of its functions to a panel of three members. The legislature did not require each and every function to be performed by the full panel." This is not the issue presented by the Fourth Claim for Relief. The issue there presented is that three-member panels are "constitutionally unauthorized" [¶SEVENTY-FIRST], can be employed invidiously,

discriminatorily, and selectively, with a membership not reflective of the diversity required by Article VI, §22(b)(1) of the Constitution, as well as by Judiciary Law §44.1 [¶SEVENTY-SECOND], and that the lack of any provision for administrative review by the full Commission of a panel's dismissal, without investigation, of a judicial misconduct complaint further adds to the statute's unconstitutionality [¶SEVENTY-FIFTH].

B. **The Attorney General's Sanctionable Subpoint B:**

The Attorney General's Subpoint B, "Petitioner Also Lacks Standing to Sue" (pp. 25-29), does not identify to which of Petitioner's Six Claims for Relief it is addressed -- information which is also not supplied by his Notice of Motion or "Preliminary Statement", each of which state, without specificity, "petitioner lacks standing to raise *some or all* of the claims asserted in the petition." (emphasis added)[46].

From his argument, however, it appears that the Attorney General contests Petitioner's "standing to sue" only as it relates to her challenge to Respondent's dismissal of her October 6, 1998 judicial misconduct complaint -- and the other eight judicial misconduct complaints encompassed by the Second Claim for Relief. As to these, he falsifies and omits the pertinent allegations of the Verified Petition and presents factually-unsupported argument which, additionally, flies in the face of common sense.

His very first sentence of Subpoint B, which would seem to relate only to the October 6, 1998 judicial misconduct complaint and the eight prior judicial misconduct complaints, reads:

---

[46] *See* Notice of Motion to Dismiss, ¶3(d); "Preliminary Statement", p. 4.

> "Petitioner also lacks standing to challenge the Commission's determination to dismiss the complaints *pursuant to Judiciary Law §44.1(b) and 22 NYCRR §7000.3 upon the ground that each complaint on its face, lacks merit.*" (at p. 25, emphasis added)

This statement falsifies Petitioner's challenge, which is based on Respondent's dismissal of her October 6, 1998 complaint -- and the eight prior complaints -- *without* legal authority and *without* any finding of their lack of facial merit.

Likewise, falsifying Petitioner's challenge is the Attorney General's statement,

> "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 burden it with litigation and interfere with *the exercise of its discretion.*" (at p. 26)

As alleged in the Verified Petition (¶¶SIXTH, FORTY-EIGHTH, and FIFTY-SECOND) -- and the basis for Petitioner's challenge -- Respondent has no discretion, pursuant to Judiciary Law §44.1, but to investigate facially-meritorious complaints, and the October 6, 1998 judicial misconduct complaint, being facially meritorious, entitled Petitioner to an investigation, much as the Petitioner in the prior Article 78 proceeding was entitled to investigation of her eight facially-meritorious judicial misconduct complaints.

The Attorney General then purports (at p. 26) that "petitioner is not within the zone of interest protected by the statute" and that "the statutes and regulations" have a "generalized purpose...insufficient to confer standing...even upon the person who files the complaint against a judge". In so doing, he conceals the *express* requirement of Judiciary Law §44.1 that Respondent "shall so notify the complainant" if it dismisses his complaint -- which,

in his Subpoint A, he conceded (at p. 24) to be a "notice requirement" to explain to a complainant that his complaint was "dismissed because it lacked merit on its face". Such statutory notice requirement presupposes that the complainant occupies a "zone of interest" -- or else it would not exist.

The Attorney General then purports that "...neither [Petitioner] nor CJA alleges any injury in fact." (at p. 28). He, thereby, ignores the paragraphs of the Verified Petition that address the injury caused by Respondent's purported dismissal of the October 6, 1998 judicial misconduct complaint, its unconstitutional and violative rules and procedures, as well as its "pattern and practice of official misconduct,...subvert[ing] the constitutional and statutory intent in creating an independent monitoring agency, outside the judiciary, to ensure judicial integrity and accountability"-- which ¶¶ NINETEENTH and TWENTIETH allege have "personally aggrieved" both Petitioner and the public, causing them, as alleged at ¶EIGHTY-THIRD, "severe economic consequences". ¶¶SIXTEENTH, EIGHTEENTH and TWENTY-SEVENTH pertains to the continued "corrupt and lawless conduct" of judges against whom facially-meritorious complaints were filed and unlawfully dismissed by Respondent, among them, Justice Rosenblatt -- the subject of three previous judicial misconduct complaints. As alleged, Justice Rosenblatt would have long before been removed from the bench, but for Respondent's corruption and the fraudulent decision of which it was the beneficiary in the prior Article 78 proceeding. Instead, he "was emboldened to seek appointment as an associate judge of the New York Court of Appeals -- a position he was able to obtain in December 1998 by virtue of Respondent's unabated protectionism..." -- enabling him to now "corrupt the rule of law on a more exalted level than he

was able to do while sitting in the Appellate Division, Second Department."

The Attorney General then asserts, seemingly as a general proposition, that "the initiation of an investigation or disciplinary proceeding against a judge has no direct benefit to petitioner *because it results in neither monetary nor injunctive relief for the complainant*" (at pp. 28-29, emphasis added). Plainly, however, "injunctive relief" is the practical effect of preventing a corrupt judge from obtaining higher officer, as, likewise, is removing a corrupt judge from his current office, thereby preventing him from using his office for further corrupt acts. Moreover, once a judge is removed from office -- or publicly disciplined following disciplinary proceedings against him at a complainant's instance -- a complainant can more easily initiate a legal action to obtain monetary relief for the damage caused by his corrupt acts.

Following his aforesaid general proposition, the Attorney General affirmatively asserts:

> "Nor will an investigation or commencement of disciplinary proceedings or pronouncement of 'findings of fact' by the Commission have any impact on the petitioner or on the outcome of her mother's federal lawsuit in Sassower v. Mangano, supra, 927 F. Supp. 113." Petitioner is thus not harmed by the Commission's determination to dismiss the complaint, rather than proceed with a more formal investigation or charges." (at p. 29).

This is plainly untrue. "Findings of fact", following investigation and commencement of disciplinary proceedings, as to whether Justice Rosenblatt perjured himself on his application to the Commission on Judicial Nomination and was collusive with his Appellate Division, Second Department brethren in the Attorney General's defense fraud in the *Sassower v. Mangano* federal action -- would have powerfully impacted on Petitioner -- and on

the lawsuit. A promptly-commenced investigation would have forestalled Justice Rosenblatt's then Court of Appeals' candidacy, much as, even now, it would provide a basis for his removal, as well as for an official investigation into the corruption of the "merit selection" process by the Commission on Judicial Nomination, the leaders of the bar, the Governor, and the Chairman of the State Senate Judiciary Committee. The front-page headlines resulting from "Findings of Fact" confirming Justice Rosenblatt's perjury and collusion then, as now, will catapult Petitioner and CJA to public attention -- exposing the dysfunction of the judicial selection process, which, for years, they have been working to reform, without benefit of such headlines. As for impacting the outcome of the federal action, the public outcry following exposure of the defense fraud and litigation misconduct therein would impel criminal prosecutions of Justice Rosenblatt and his co-defendants and, as part thereof, spur government motions to vacate the orders therein for fraud and for immediate restoration of Doris Sassower's unlawfully-suspended law license.

The Attorney General continues his "Petitioner is thus not harmed" sentence, with the following:

> "In fact, as advised by Mr. Stern, petitioner is free to file complaints she may chose to file with the Commission, Pet. Exh. F-7, and could have provided more detail of her claims. The fact that petitioner has apparently elected not to pursue this course does not confer standing upon her to compel the Commission to reconsider her complaint or to conduct a full and formal investigation based upon the complaint she has filed." (at p. 29)

Although it would appear that the October 6, 1998 complaint is being referred to -- including because the preceding sentence refers to "the Commission's determination to dismiss the complaint" -- Mr. Stern's advice was NOT that petitioner was "free to file complaints she may

choose to file". Rather, his February 5, 1999 letter (Exhibit "F-7") advised that she was free to file "a complaint against any judge who is a member of the Commission" and made no request for "more detail of her claims". This was in the context of Petitioner's February 3, 1999 letter (Exhibit "F-6"), which had expressly requested to be considered a judicial misconduct complaint against Commission member, Appellate Division, Second Department Justice Daniel Joy.

Moreover, the Attorney General's statement that "petitioner has apparently elected not to pursue this course" is a flagrant deceit and falsification of the record in that Petitioner's March 11, 1999 letter (Exhibit "G", pp. 4-5) responded to Mr. Stern's February 5, 1999 statement that she was free to file "a complaint against any judge who is a member of the Commission", by reiterating her February 3, 1999 letter-complaint. This response is specifically alleged at ¶FORTY-FIFTH of the Verified Petition.

THE ATTORNEY GENERAL's POINT IV IS SANCTIONABLE

The Attorney General's Point IV, "The Petition Also Fails to State a Claim for Relief under CPLR Article 78" (pp. 30-40), is based upon a pattern of wilful and deliberate misrepresentation, distortion, and concealment of the allegations of the Verified Petition, not a single one of which it cites[47].

Although the Attorney General concedes that on a motion to dismiss for failure to state a claim, the factual allegations of the pleading are presumed true, he quotes case authority that such presumption is not accorded where the factual allegations "consist of bare legal conclusions" or are "either inherently incredible or flatly contradicted by documentary evidence" (p. 30) -- creating a false inference that his quote has some relevance. That it has no relevance may be seen from the fact that he does not claim that a single one of the factual allegations of the Verified Petition are in those categories of exceptions. Indeed, in advancing his argument, he purports to be "assuming, arguendo, the truth of the allegations contained in the petition" (at p. 30).

Notwithstanding CPLR §7803 contains no references to the terms "mandamus to review" and "mandamus to compel", the Attorney General quotes that statutory provision *verbatim*, following which he purports (at p. 31) that all six of Petitioner's Claims for Relief seek "mandamus to compel", with the first two Claims for Relief additionally seeking "mandamus to review". This is a knowingly false division.

---

[47] This excepts a single reference to ¶FIFTH of the Verified Petition -- a paragraph containing no factual allegations, but, rather, reciting the relief sought. *See* p. 31.

As reflected by the Notice of Petition, as well as by the corresponding ¶FIFTH of the Verified Petition, the word "commanding" -- suggestive of "mandamus to compel" -- appears only for the relief sought as to the unconstitutionality of 22 NYCRR §7000.3, *as written and as applied* [the First and Second Claims for Relief], and for the relief pertaining to Petitioner's February 3, 1999 judicial misconduct complaint against Justice Joy [the Sixth Claim for Relief]. As to the relief sought for what are the Third, Fourth and Fifth Claims for Relief, Petitioner's requests are framed in declaratory terms. It is in that context that the Fifth Claim for Relief also uses the word "mandating".

The self-serving purpose of the Attorney General's false division is to enable him to argue for dismissal of the Third, Fourth, and Fifth Claims for Relief on grounds not relevant, while concealing that he has no grounds for dismissal on grounds that would be relevant.

A. <u>The Attorney General's Sanctionable Subpoint A</u>:

Despite the Attorney General's classification of both the First and Second Claims for Relief as seeking "mandamus for review", his Subpoint A (pp. 32-34), entitled "Petitioner Fails to State a Claim For Mandamus for Review", presents argument UNRELATED to either of those Claims. Neither Claim has anything to do with challenging "the Commission's decision to dismiss a complaint pursuant to Jud. L.§44.1(b)..." (at p. 32) -- an assertion which continues his false inference in Point III that Petitioner seeks to require Respondent to investigate complaints which are facially-meritless and have been so determined by it, in controversion of the Legislative will, expressed in Judiciary Law §44.1(b). Such assertion here, like his Point III inference, echoes his affirmative misrepresentation about the First and Second Claims in his

"Statement of the Case" (at p. 9-10), *supra*, pp. 54-5.

Since the allegations of the Verified Petition are diametrically opposite, namely, that judicial misconduct complaints dismissed by Respondent -- such as Petitioner's October 6, 1998 complaint -- are facially-meritorious and being dismissed without any statement, let alone showing, that Respondent ever determined them to lack facial merit -- and, additionally, without any identification of the legal authority pursuant to which Respondent is purporting to dismiss them -- the Attorney General argues against those allegations. This, notwithstanding he has purported to accept them as true.

Thus, he rewrites the October 6, 1998 complaint to make it appear other than it actually is and is alleged to be by the Verified Petition:

> "Petitioner's October 6, 1998 complaint to the Commission *simply states CJA's 'belief'* that the Justice *misstated an answer* to his application for nomination to the Court of Appeals and, *in most conclusory terms*, speculated that Doris Sassower lost her federal lawsuit against the Appellate Division because of some sort of 'litigation fraud.' See Pet., Exhibit C." (at pp. 33-34, emphases added)

This replicates his similar falsification about the October 6, 1998 complaint in the "Statement of the Case" (at p. 7) and in Mr. Kennedy's Affirmation (at p. 4). As in both those previous instances, the Attorney General not only misrepresents the complaint as pertaining to a single judge and as vague and completely speculative, but conceals that at issue is pleaded "perjury" to two specifically-identified questions by a judicial candidate to the New York Court of Appeals on a publicly-inaccessible application, as well as a fact-specific, uncontroverted presentation of litigation fraud, of which said candidate was alleged to be complicitous, alleged at ¶TWENTY-

SECOND. Here, too, the Attorney General conceals the documentary proof, alleged at ¶TWENTY-THIRD and referred to by the face of the complaint itself.

It is from this material falsification of the October 6, 1998 complaint that the Attorney General presents the *ipsi dixit* false conclusion that:

> "On its face, this complaint lacks merit and, at a minimum, is inadequate to trigger the consequence of a formal investigation against the judge." (at p. 34)

This then leads to further factual falsifications and false conclusions in the two subsequent sentences of the Attorney General's argument (at p. 34). His sentence, "Petitioner has *failed to demonstrate* that the Commission's *determination* was unreasonable" (at p. 34, emphasis added) contains two falsehoods, firstly, that Petitioner "failed to demonstrate", when, in fact, he has expunged Petitioner's demonstration of the facially-meritorious and substantiated nature of her October 6, 1998 complaint; highlighted by ¶¶TWENTY-SECOND, and TWENTY-THIRD of her Verified Petition, and secondly that Respondent made a "determination", when the only relevant "determination" is one that ¶¶FIFTY-SECOND and FIFTY-SIXTH allege Respondent never made and could not make, to *wit*, that the October 6, 1998 complaint was on its face lacking in merit.

From this, the Attorney General builds to his final false conclusion, based on yet further falsification, *to wit*, that

> "the Court should defer to the Commission's decision to dismiss petitioner's October 6, 1998 judicial misconduct complaint *pursuant to Jud. L. 44.1(b) because her complaint was invalid on its face*." (at p. 34, emphasis added).

Aside from ¶¶THIRTY-SECOND, THIRTY-THIRD, THIRTY-FOURTH, THIRTY-FIFTH, THIRTY-NINTH, FORTIETH, FORTY-FIRST, FORTY-SIXTH and SIXTY of the Verified Petition that Respondent never identified any legal authority for its purported dismissal of the complaint -- the Attorney General fosters the false inference that Respondent's unspecified "determination", to which his previous sentence refers, was its "decision to dismiss...[the] complaint *pursuant to Jud. L. 44.1(b) because the complaint was invalid on its face*" -- which, again, argues against all the allegations of the Verified Petition he purported to accept.

The Attorney General also misrepresents Justice Cahn's decision in order to provide support for his otherwise unsupported proposition, "mandamus to review does not lie to review the Commission's determination to dismiss a complaint" (at p. 33). Because Justice Cahn's decision made no such ruling, the Attorney General purports it to have been expressed at page 3 by the statement "the petition as pleaded fails to state an actionable claim." Examination of the decision shows that this statement, appearing in a paragraph of the decision relating to the construction of statutes, followed by subsequent paragraphs upholding 22NYCRR §7000.3, ***as written***, has nothing to do with the availability of mandamus for review of dismissed complaints. Moreover, Justice Cahn never made any ruling as to the availability of mandamus review of Respondent's dismissals of complaints, where it has made *no* determination that those complaints lack merit on their face -- which is the issue in the Second Claim for Relief. Indeed, the closest Justice Cahn came was at page 4 of his decision, where, unsupported by clarifying legal authority or specific facts, he stated, "To the extent that petitioner contends that the Commission *wrongfully determined that her particular complaints lack facial merit* and declined

to take further action thereon, the issue is not before the court." (emphasis added). Petitioner herein does not contend that the October 6, 1998 complaint was ever determined to "lack facial merit" -- much as the Petitioner in the prior proceeding never so contended as to her challenged complaints. Consequently, there is ample "basis to depart" from Justice Cahn's decision -- contrary to the Attorney General's spurious conclusion that there is none (at p. 33).

B. <u>The Attorney General's Sanctionable Subpoint B</u>:

In his Subpoint B argument, "Mandamus To Compel Does Not Lie" (pp. 34-38), addressed to all six Claims for Relief, the Attorney General purports that

> "Petitioner fails to set forth *any* facts which demonstrate a clear legal right to relief by way of mandamus" (at p. 35, emphasis added).

This statement is a wholesale falsification of the Verified Petition, which, in innumerable paragraphs particularized facts relative to the only Claims for which Petitioner sought mandamus to compel, the Second and Sixth Claims for Relief. Indeed, Petitioner accompanied these facts with constitutional and statutory authority, the text of which she provided, as well as with evidentiary proof. The Attorney General expunges ALL of these from his presentation -- since they establish Petitioner's entitlement to relief under the very authorities he cites.

Among the substantiated facts the Attorney General has expunged relative to the Second Claim: Respondent's violation of its legally-mandated duty to investigate facially-meritorious judicial misconduct complaints, and, most particularly, Petitioner's facially-meritorious October 6, 1998 judicial misconduct complaint:

> ¶¶ THIRD and FORTY-EIGHTH: that Article VI, §22(a) imposes a "mandatory investigative duty" on Respondent -- with the text thereof annexed as part of

Exhibit "A";

¶¶SIXTH and FORTY-EIGHTH: that "Judiciary Law §44.1 imposes on Respondent a mandatory duty to investigate", absent its determination that a "complaint on its face lacks merit." -- with the text thereof annexed as part of Exhibit "A";

¶TWENTY-FIRST: that Respondent has recognized the controlling significance of Judiciary Law §44.1 in requiring the investigation of facially-meritorious complaints by its Administrator's published essay, "*Judicial Independence is Alive and Well*"-- with a copy appended to Petitioner's October 6, 1998 judicial misconduct complaint, annexed to the Verified Petition as Exhibit "C-1";

¶¶TWENTY-SECOND and TWENTY-THIRD: identifying the facially-meritorious and substantiated allegations of Petitioner's October 6, 1998 judicial misconduct complaint;

¶¶ THIRTY-SECOND and THIRTY-THIRD: that Respondent's December 23, 1998 letter purporting to dismiss the complaint provided no reasons or legal authority and, specifically, made no claim that Respondent had determined the complaint "on its face lacks merit";

¶¶THIRTY-FOURTH, THIRTY-FIFTH, THIRTY-NINTH, FORTIETH, FORTY-FIRST, FORTY-SIXTH and SIXTY that Respondent, thereafter refused to provide legal authority for its purported dismissal of Petitioner's October 6, 1998 complaint and that when Respondent's Administrator's subsequently claimed that Respondent had determined the complaint to be "not valid on its face", he failed and refused to (a) define its meaning; (b) confirm that it was equivalent to "on its face lacks merit -- the only basis upon which the Commission can dismiss a complaint under Judiciary Law §44.1"; and (c) clarify that such alleged determination was made by Respondent's members and not by him or other staff;

¶¶EIGHTH and FIFTY-SECOND: that the eight complaints against powerful, politically-connected judges, annexed to the Verified Petition in the prior Article 78 proceeding, were each facially meritorious and were each dismissed by Respondent without any determination that they were on their face lacking in merit and, likewise, without any identification of the legal authority for said dismissals;

¶FORTY-FOURTH: that Respondent ignored repeated requests for information substantiating its purported dismissals of those eight-facially-meritorious

complaints -- with Respondent's Administrator never claiming that any of them were not "not valid on [their] face" or that they had been so-determined by Respondent.

¶FIFTY-THIRD: that "[T]here has been no judicial determination of the lawfulness and validity of Respondent's purported dismissals, without investigation of those eight-facially-meritorious complaints inasmuch as the Supreme Court decision in the prior Article 78 proceeding expressly held that 'the issue is not before the court'"

Among the "facts"expunged by the Attorney General relating to Petitioner's Sixth Claim for Relief: Respondent's violation of its legally-mandated duty relative to Petitioner's February 3, 1999 judicial misconduct complaint [¶EIGHTY-FIRST]:

¶EIGHTY: as to Respondent's duty to "receive" and "investigate" and "hear" judicial misconduct complaints, under Article VI, §22 of the Constitution and Judiciary Law §44.1 -- the text of which constitutional and statutory authority was annexed to the Verified Petition as part of Exhibit "A";

¶¶ THIRTY-SIXTH and FORTY-FIFTH: that Petitioner's February 3, 1999 letter to Respondent requested that it be deemed a judicial misconduct complaint against Commissioner Joy, "absent express notice" that he did not participate in consideration of her October 6, 1998 complaint; and that this was reiterated by Petitioner's March 11, 1999 letter;

¶FORTY-SIXTH: that Respondent has failed to respond to Petitioner's March 11, 1999 letter and to acknowledge the February 3, 1999 letter as a judicial misconduct complaint against Commissioner Joy.

The Attorney General obliterates ALL these "presumed-to-be true" allegations of the Verified Petition from his presentation. He then baldly pretends that the First and Second Claims for Relief fail to state a claim because Respondent has discretion "whether to investigate or dismiss a written complaint...which cannot be compelled in a particular way by mandamus" (at p. 36).

In purporting that Respondent has "discretion", the Attorney General offers no textual analysis or legislative history of Article VI, §22(a) of the New York Constitution or Judiciary Law §44 -- such as was highlighted by the three-page analysis, annexed to Exhibit "A" to the Verified Petition. The first page of the analysis referenced Point II of the Memorandum of Law submitted by the Petitioner in the prior Article 78 proceeding against Respondent. That Point demonstrated that Article VI, §22(a) is to be interpreted from Judiciary Law §44.1 and that it gives Respondent *no* discretion but to investigate facially-meritorious complaints. In further support, Point II quoted (at p. 14) from the Court of Appeals in *Matter of Nicholson*, 431 N.Y.S.2d 340 (1980), that "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.

Because the substantiated showing in that Point II would establish Respondent's mandatory investigative duty under Judiciary Law §44.1, the Attorney General simply quotes Judiciary Law §44.1, followed by a quote of 22 NYCRR §7000.3, which he falsely claims "tracks the language of Jud. L. §44.1" (at p. 36)[48]. In so doing, he never addresses the palpable facial irreconcilability of the two, as particularized in the analysis, annexed to the Verified Petition as part of Exhibit "A".

This false declaration of Respondent's discretion as to whether to investigate

---

[48] Indeed, the Attorney General tries to conceal Respondent's mandatory duty under Judiciary Law §44.1 by underlining from §§44.1(b) the words, "the commission may dismiss the complaint if it determines that the complaint on its face lacks merit on its face..." and, from 22 NYCRR §7000.3 the words, "the complaint may be dismissed by the Commission".

complaints, belied by the language of Judiciary Law §44.1 he never discusses, is the totality of the Attorney General's argument as to why mandamus to compel does not lie for review of the complaints reflected by the Second Claim for Relief.

As to the Sixth Claim for Relief, the Attorney General fashions his two-paragraph argument (at pp. 37-38) by falsely suggesting that Petitioner did not respond to Respondent's February 5, 1999 letter that "if petitioner wished to make a complaint against any judge, she could do so". He thus conceals that Petitioner did respond, by her March 11, 1999 letter, reiterating her February 3, 1999 letter as a judicial misconduct complaint against Commission member Justice Joy, as set forth at ¶¶FORTY-FIFTH and FORTY-SIXTH of the Verified Petition.

The Attorney General's concealment of Petitioner's March 11, 1999 letter[49] reflects his awareness that were it to be identified, it would dispose of any claim that mandamus does not lie to compel Respondent to "receive" and "determine" Petitioner's February 3, 1999 judicial misconduct complaint against Justice Joy.

Finally, although Petitioner's Fifth Claim for Relief seeks the removal of Respondent's Chairman in the context of declaratory relief, the Attorney General includes the Fifth Claim for Relief as "mandamus to compel". His assertion (at p. 37) that because Chairman Berger was elected to successive two-year terms, Petitioner's application to compel Mr. Berger

---

[49] Indeed, the Attorney General's concealment of the fact that Petitioner's March 11, 1999 letter responded to that "invitation" is reflected by his "Statement of the Case", which fails to identify such fact. Even more dramatically, it is reflected by the Attorney General's "Preliminary "Statement" (p. 3), which includes in its footnote #3 to Petitioner's request for relief seeking to compel Respondent to receive and determine the February 3, 1999 letter not only the Exhibit identification of that letter, but that for Respondent's February 5, 1999 letter, which it identifies as a reply thereto.

fails because "[n]othing in Jud. L. §41.3 (sic) prohibits successive reappointments" shows that the Fifth Claim for Relief is, properly, for declaratory relief. As alleged at ¶SEVENTY-SIXTH, "Judiciary Law §41.2 expressly restricts the chairmanship to a member's 'term in office or for a period of two years, whichever is shorter." The addition of the clause "*whichever is shorter*" implies that the unbroken succession of five reappointments, by which Chairman Berger has remained in office for now nine years, was not what the Legislature intended -- and the Attorney General has made neither a showing, nor even a statement, to the contrary.

C. **The Attorney General's Sanctionable Subpoint C:**

The Attorney General begins his Subpoint C, "Plaintiff's Request for Declaratory Relief Also Fails as a Matter of Law" (pp. 39-40), by asserting that Petitioner's claims for "declaratory relief and an investigation of the Commission" should be dismissed because of the "limited nature of an article 78 proceeding". In so doing, the Attorney General does not identify that Petitioner's Notice of Petition (at p.3) expressly sought "conversion of this proceeding to the extent required by law into a declaratory judgment action." Nor does he cite any legal authority to oppose conversion.

CPLR §103(c) states:

> "If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution."

He then urges dismissal "on the merits" of Petitioner's constitutional challenges to "Judiciary Law §§41.6, 45, 43.1 and 22 NYCRR §§7000.3 and 7000.11", without identifying

the Claims for Relief to which those challenges relate. Nor does he provide record references so that his arguments can be compared to Petitioner's actual challenges. Comparison shows that his three one-paragraph arguments that follow are false, misleading, and designed to camouflage the fact that he has no defense "on the merits" to the challenges set forth in the particularized paragraphs of Petitioner's Claims for Relief.

On the issue of the constitutionality of 22 NYCRR §7000.3 -- challenged *as written and as applied* by Petitioner's First and Second Claims for Relief (¶¶FORTY-SEVENTH through FIFTY-EIGHTH) -- the Attorney General's three-sentence argument (at p. 39) relies exclusively on Justice Cahn's decision. Conspicuously, he does not identify how Justice Cahn reconciled Petitioner's challenge to the rule. As hereinabove stated (at pp. 62-67) and as alleged by ¶¶NINTH and FIFTY-THIRD of the Verified Petition, analysis of Justice Cahn's decision shows that it did not reconcile the rule *as written* and that the decision explicitly did not address the rule, *as applied*, asserting that it was "not before the court" (at p. 4). The Attorney General's knowledge that, "on the merits", 22 NYCRR §7000.3 cannot survive a constitutional challenge may be seen from his failure to confront Point II of the Petitioner's Memorandum of Law in the prior Article 78 proceeding, identified on the first page of the three-page analysis of Justice Cahn's decision, annexed to the Verified Petition herein as part of Exhibit "A". That Point II is dispositive of Petitioner's right to a declaratory judgment striking 22 NYCRR §7000.3, *as written and as applied*.

The Attorney General then skips to the issue of the constitutionality of Judiciary Law §43 and 22 NYCRR §7000.11 -- challenged by Petitioner's Fourth Claim for Relief

(¶¶SEVENTY-FIRST through SEVENTY-FIFTH). His four-sentence argument (at pp. 39-40) is limited to asserting that "the Constitution does not contain any mandate that all decisions must be rendered by the entire commission" and that the use of panels is "a reasonable and practical way for the Commission to perform its functions". In so doing, he makes no claim that among the decisions that can be constitutionally delegated to a panel are dismissals of judicial misconduct complaints, without investigation -- the constitutional issue presented by ¶¶SEVENTY-FIRST and SEVENTY-THIRD of the Verified Petition. He then entirely ignores all the other constitutional issues presented by the Third Claim for Relief: ¶¶SEVENTY-SECOND (A), (B), and (C), which challenged Judiciary Law §43.1 as unconstitutional, *as written*, based on its lack of any provision delineating procedures to ensure that panels are designated in a fashion conforming with due process standards, as well as the standards of diversity, mandated in Article VI, §22; ¶SEVENTY-FOURTH, which challenged, *as applied*, Judiciary Law §§43.1 and 41.6 and 22 NYCRR §7000.11 as "unconstitutional and unlawful because Respondent's refusal to provide basic information to an aggrieved complainant as to whether the dismissal of his complaint was by a three-member panel -- and the membership thereof -- permits judicial misconduct complaints to be dismissed, without investigation, by commissioners whose bias and self-interest are concealed by their complete anonymity"; and ¶SEVENTY-FIFTH, challenging the constitutionality, *as written and as applied*, of Judiciary Law §§43.1 and 41.6 and 22 NYCRR §7000.11, based on the lack of any provision for administrative review by the full eleven-member Commission of the dismissal of a complaint, without investigation, by a three-member panel

The Attorney General then turns back to the constitutionality of Judiciary Law §45 -- challenged by Petitioner in the Third Claim for Relief (¶¶FIFTY-NINTH through SEVENTIETH). His four-sentence argument (at p. 40) begins by asserting that "the confidentiality provisions of Jud. L. §45 are reasonable on their face and as applied in this case", which he then follows with the assertion that "petitioner has pointed to nothing that supports a conclusion that the legislature's determination to require confidentiality of complaints and proceedings involving the judiciary is unreasonable and contravenes the Constitution." In so doing, the Attorney General does not identify the basis for Petitioner's challenge, particularized by the paragraphs of her Third Claim, thus falsely making it appear that Petitioner's challenge is unsupported, which it is not. He also creates the false impression that her unidentified challenge is addressed to overturning the legislative determination of confidentiality, which it also is not. Petitioner's challenge seeks to uphold Judiciary Law §45, *as written*, since, as set forth at ¶¶SIXTY-FIRST and SIXTY-SECOND, the statute expressly excepts disclosure pursuant to Judiciary Law §44, with Judiciary Law §44 placing no limitation on Respondent as to the form and content of its notification to a complainant of the dismissal of his complaint. Indeed, as demonstrated by the evidentiary proof, annexed to the Verified Petition as Exhibit "H" and identified at ¶SIXTY-SEVENTH, Respondent disclosed to another complainant the same kind of information as to the dismissal of his complaint that Petitioner unsuccessfully sought in connection with Respondent's purported dismissal of her complaint.

THE ATTORNEY GENERAL'S SANCTIONABLE CONCLUSION

The Attorney General's fraudulent and frivolous dismissal motion, hereinabove particularized, demonstrates that he has no basis for seeking dismissal of the Verified Petition "in its entirety". To the extent that he seeks for Respondent "*fifteen (15) days* after service of this Court's order in which to serve and file its answer pursuant to CPLR 7804(f)", the requirement of CPLR §7804(f) is that the "answer shall be served and filed *within five days* after service of the order with notice of entry." There is no reason for the Court to afford Respondent three times the number of days as prescribed by statute -- and the Attorney General has not presented the Court with any reason for deviation in its order. Nor, under the circumstances of the Attorney General's wilful misconduct and fraud upon the Court, would doing so be "just".

THE ATTORNEY GENERAL'S SANCTIONABLE POST-DEFAULT CPLR §3012(d) APPLICATION

Nowhere referred to in the Attorney General's dismissal motion is the threshold issue of Respondent's default, raised by Petitioner's May 12th letter, and vigorously asserted by her on the May 14th return date of the Verified Petition before Senior Court Attorney David Sheehan and on May 17th before Justice Lebedeff. As particularized at ¶¶104-113 of Petitioner's accompanying Affidavit, the Attorney General simply ignored Petitioner's argument that the Court had no jurisdiction to extend Respondent's time to make a dismissal motion -- as did Mr. Sheehan and Justice Lebedeff, who additionally, ignored the predicate for granting an extension pursuant to CPLR §3012(d): terms that are "just" and "a showing of reasonable excuse for delay or default."

CPLR §7804(a) expressly identifies that an Article 78 proceeding "is a special proceeding."

§202.9 of the Uniform Rules for the New York State Trial Courts states that "Special proceedings...shall be *governed by the time requirements of the CPLR relating to special proceedings*." (emphasis added). CPLR §7804(c) sets forth the pertinent time requirements governing Article 78 proceedings:

> "...a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served *at least five days before* such time." (emphasis added)

Under CPLR §7804(f):

> "The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice *within the time allowed for answer.*" (emphasis added)[50]

CPLR §7804 contains no provision for a respondent to extend his time to answer or move, which, pursuant to CPLR §7804(c), is dictated by the return date.

Indeed, in seeking to extend Respondent's time, the Attorney General invoked no provision of the Article 78 statute -- either on the May 14th return date of the petition, nor on May 17th before Justice Lebedeff. Rather, the only authority the Attorney General presented to obtain an extension -- which was on May 17th -- was CPLR §3012(d) -- and this, in Assistant Attorney General Olson's Affirmation in support of Respondent's application, which she handed up to Justice Lebedeff on that date. The transcript of that May 17th proceeding (p. 15, lns. 5-6)[51] shows that Petitioner pointed out to Justice Lebedeff that that application was "not made pursuant to §7804".

Neither during her appearance before Justice Lebedeff nor in her May 17th Affirmation did Ms. Olson provide any legal authority for the applicability of CPLR §3012(d) to this proceeding. Nor is any provided in the May 24th dismissal motion.

---

[50] "Objections in point of law may be raised either in the answer or in a motion to dismiss made within the time allowed for answer, i.e., no later than five days before the return date on the petition. See CPLR 7804(c). If the point of law is raised by motion, the motion must be made returnable on the same return date as that of the hearing on the petition. CPLR 406." McKinney's Consolidated Laws of New York Annotated, 7B, p. 657 (1994), Commentary by Vincent C. Alexander.

[51] Exhibit "K" to Petitioner's accompanying Affidavit.

CPLR §7804(e) prescribes the procedures upon a respondent's default:

> "Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted."

This prescription, appearing in the last sentence of CPLR §7804(e), renders CPLR §§103(b) and 2004 inapplicable -- provisions upon which Ms. Olson's May 17th application pursuant to CPLR §3012(d) can be presumed to rest.

CPLR §103(b) states: :

> "*Except as otherwise prescribed by law*, procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings." (emphases added)

Likewise, CPLR §2004:

> "*Except where otherwise expressly prescribed by law*, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application is made before or after the expiration of the time fixed." (emphases added)

Obviously, were a court to be empowered, pursuant to CPLR §§2004 and 3012(b), to extend a defendant's time to make a pre-answer motion to dismiss, CPLR §7804(e) would be emptied of any meaning.

Even were CPLR §7804(e) not to be interpreted as barring a court from extending a respondent's time pursuant to CPLR §3012(d), Justice Lebedeff was barred from granting the Attorney General's extension application. This, because CPLR §3012(d)'s express language, similarly reflected by CPLR §2004, requires that the Court's extension be "upon such terms as

may be just and upon a showing of reasonable excuse for delay or default". As detailed at ¶¶104-113 of Petitioner's accompanying Affidavit, Ms. Olson's May 17th Affirmation not only failed to show "good cause"-- but her representations that the adjournment was "not unreasonable, given the volume of petitioner's moving papers, and the numerous issues involved" and that Respondent had "good and absolute defenses to each of the causes of action" were deceits upon the Court -- which would have been exposed as such had Justice Lebedeff given Petitioner the opportunity to be heard with respect thereto. Such inquiry would have revealed that no terms for an extension would have been "just" -- and that the threshold duty of a fair and impartial judge was to immediately clarify ¶3 of Ms. Olson's Affirmation as to who at the Attorney General's office had evaluated Petitioner's request for the Attorney General's advocacy -- and the outcome thereof. This remains this Court's threshold duty -- after deciding Petitioner's objection as to its own disqualifying self-interest.

Dated: July 28, 1999

ELENA RUTH SASSOWER
Petitioner *Pro Se*
Box 69, Gedney Station
White Plains, New York 10605-0069
(914) 421-1200