

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT

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

New York County  
Clerk's No.  
108551/99

Petitioner-Appellant,

-against-

COMMISSION ON JUDICIAL CONDUCT OF THE  
STATE OF NEW YORK,

Respondent-Respondent.  
-----X

**MEMORANDUM OF LAW OF RESPONDENT  
COMMISSION ON JUDICIAL CONDUCT OF THE STATE OF  
NEW YORK IN OPPOSITION TO PETITIONER'S MOTION FOR  
DISQUALIFICATION, SANCTIONS, AND OTHER RELIEF**

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Dated: August 30, 2001

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**Preliminary Statement**

This memorandum of law is submitted in opposition to the motion of Elena Ruth Sassower, pro se petitioner-appellant ("petitioner") for an order disqualifying this Court from hearing her appeal, due to its alleged self-interest, and for other relief. (Petitioner's August 17, 2001 Affidavit in Support of her Motion ("Pet. Aff."), ¶¶6-7). Petitioner has appealed a January 31, 2000 Decision, Order and Judgment of Supreme Court, New York Co. (Wetzel, Acting Supreme Court Justice), which dismissed her article 78 proceeding seeking mandamus against respondent Commission on Judicial Conduct of the State of New York ("respondent" or "Commission").

Petitioner asks that her appeal be assigned either to a

panel of retired or soon-to-be retired judges, or to the Appellate Division, Fourth Department, the department that she believes is least likely to succumb to the influence of the Commission and to other allegedly interested persons (Pet. Aff. ¶7). In tandem with her request for disqualification and reassignment, petitioner also seeks to strike the Commission's appellate brief as an alleged "fraud on the court," to sanction the Commission and its counsel, and have the Commission, the Office of the Attorney General of the State of New York, as well as the Attorney General, the Solicitor General, and other members of the Attorney General's Office referred for "disciplinary and criminal investigation and prosecution." (Petitioner's Notice of Motion ¶2).

### Statement of Background Facts

#### A. The Underlying Action

The origins of this case are discussed in detail in the Commission's appellate brief, pp. 3-20, and will not be repeated here. The gravamen of petitioner's article 78 proceeding is that the Commission, which oversees judicial conduct, is required by Judiciary Law §44.1 to conduct a comprehensive investigation of every "facially-meritorious" complaint of judicial misconduct, and was therefore without the discretion to dismiss complaints filed by petitioner on behalf of her organization, the Center for Judicial Accountability, Inc. ("CJA"), after the Commission

concluded that the complaints did not warrant a full-scale investigation. As petitioner asserts that the Commission's duty to investigate is mandatory, she sought an order of mandamus directing the Commission to vacate its dismissal of the complaint petitioner had filed regarding then-Appellate Division Justice Albert Rosenblatt, to remove Henry T. Berger as its chairman and to "receive" and "determine" the petitioner's complaint concerning Appellate Division, Second Department Justice Daniel W. Joy. Petitioner also asked that 22 NYCRR §7000.3 and 22 NYCRR §7000.11 (part of the Commission's procedural rules concerning the investigation of complaints) be declared unconstitutional, both on their face and "as applied" by the Commission, and Judiciary Law §45 declared unconstitutional, either as applied by the Commission or on its face.

In a Decision, Order and Judgment dated January 31, 2000 (Petitioner-Appellant's Appendix ("A.") 9-14), Acting Supreme Court Justice Wetzel dismissed the petition (and denied petitioner's motion for recusal and for sanctions against the Attorney General and the Commission due to their alleged "litigation misconduct"). In doing so, the court followed the July 13, 1995 Decision, Order and Judgment of Supreme Court, New York Co. (Cahn, J.) in D. Sassower v. Commission, N.Y. Co. Clerk's No. 109141/95 (A. 174-188). Justice Cahn's decision dismissed a nearly identical proceeding that petitioner's mother,

Doris L. Sassower, had brought against the Commission, on the ground that, under its governing legislation, the Commission had the power to make discretionary preliminary determinations as to whether it wished to undertake more comprehensive investigations, and therefore could not be compelled to undertake a comprehensive investigation (A. 192). Judge Wetzel also relied upon Mantell v. New York State Comm'n on Judicial Conduct, 181 Misc. 2d 1027 (Sup. Ct. N.Y. Co. 1999) (then on appeal to this Court, which affirmed, Mantell v. New York State Comm'n on Judicial Conduct, 715 N.Y.S.2d 316 (1<sup>st</sup> Dep't 2000), app. den., 96 N.Y.2d 706 (2001)), holding that plaintiff had no standing to seek an order compelling the Commission to investigate a particular complaint, as such investigation was a discretionary, rather than an administrative act (A. 12-13). Petitioner had sought to intervene in the Mantell appeal, or to have Mantell consolidated with the present case (Pet. Aff., ¶49); the Commission opposed her motion, and this Court denied it.

**B. Proceedings On Appeal**

Petitioner's appeal is now fully submitted and argument is scheduled to be heard during the October Term of this Court. However, following the Commission's filing of its brief in March 2001, and prior to petitioner's submission of her reply brief on August 17, 2001, petitioner had numerous communications with the Commission's counsel, the Office of the Attorney General of the

State of New York. In her communications, which were both written and oral, she repeatedly asserted that the Commission's brief was a "fraud," and that she intended to seek disqualification, as well as sanctions against the Attorney General, the Solicitor General, and other attorneys, if the brief was not immediately withdrawn. Much of the written correspondence is attached to petitioner's motion in Exhibits T through Z, and it is upon this that petitioner basis her claim that the Commission's brief should be stricken, and it and its counsel should be sanctioned (Pet. Aff. ¶¶90-92).

Argument

POINT I

**PETITIONER HAS ESTABLISHED NO BASIS FOR THE  
DISQUALIFICATION OR RECUSAL OF THIS COURT**

The only grounds for the mandatory disqualification of a court are those stated in Judiciary Law §14: relationship by consanguinity with a litigant, or an "interest" - a present, nonspeculative interest - in the outcome of the litigation. In all other circumstances, including alleged bias or prejudice, the question of whether a court should recuse itself from hearing a case is a matter of the court's conscience. People v. Moreno, 70 N.Y.2d 403, 405 (1987).

Accordingly, that branch of petitioner's motion which seeks the disqualification or recusal of the entire Appellate Division,

First Department, involves matters that can only be addressed by individual members of the Court itself. However, on its face petitioner's motion is based on unsupported, unproven allegations of widespread judicial wrongdoing, and raises nothing that warrants the drastic relief she seeks.

Petitioner's assertion that this Court's justices have an immediate, personal interest in this case is based on her insinuation that the Commission protects them by refusing to investigate valid complaints of judicial misconduct (Pet. Aff. ¶¶13, 14). If she prevails in her appeal, she argues, various justices of the Court would have to face a full investigation of past complaints lodged against them by her father, George Sassower (Pet. Aff. ¶12), as well as a full investigation of any potential new complaints. This leads her to conclude that the Court has an inherent interest in preventing her case from succeeding (Pet. Aff. ¶14). However, none of her underlying assumptions -- that past complaints against members of the Court were rejected by the Commission without any inquiry, and that the members of the Court believe that complaints against them would be substantiated if actually investigated -- have any basis in the factual record.

Petitioner's claim that Justices of this Court depend on Governor Pataki, on Chief Judge Kaye, and "a host of public officers and agencies whose misfeasance criminally implicates

them in the Commission's corruption and the subversion of the judicial process in the three Article 78 proceedings 'thrown' by Justices Cahn, Lehner and Wetzel" (Pet. Aff. ¶32), and consequently that they should be disqualified (Pet. Aff. ¶¶15-48), is likewise grounded on rank speculation which has no record support. Although she does not expressly state the premise for this claim, it is clear that petitioner believes that if she were to be granted the relief sought in her petition -- i.e., if the Commission were directed to receive and investigate the various complaints lodged with it by petitioner on behalf of CJA -- the end result would be to implicate the Governor, the Chief Judge, and other court officers in a massive pattern of corruption and manipulation of the judicial system.

However, petitioner's conviction that the Governor and the Chief Justice have engaged in criminal activity is based wholly on accusations which she cannot support. She insists, for example, that the Governor "rewarded" then-Administrative Judge Crane and Justice Wetzel with favorable appointments as a "pay-back" for "their demonstrably corrupt and criminal conduct in obliterating my Article 78 proceeding - the subject of this appeal" (Pet. Aff. ¶ 28). In similar fashion, Chief Judge Kaye is alleged to have engaged a pattern of favoritism and protectionism due to her apparent refusal to accept as true petitioner's claims concerning Administrative Judge Crane (Pet.



Aff. ¶¶34, 40-48). Yet no evidence in the record supports either claim.

Petitioner's reliance on this Court's refusal to allow her to intervene in the Mantell appeal as evidence of its self-interest and bias is flawed in a different way. Adverse rulings are not themselves evidence of bias, and cannot support a claim for disqualification or recusal. People v. Moreno, 70 N.Y.2d at 407 ("bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case," citing Berger v. United States, 255 U.S. 22, 31 (1921)). Furthermore, nothing in petitioner's extended account of the adverse reception of her motion to intervene in the Mantell appeal (Pet. Aff., ¶¶49-67) substantiates her claim that it was the product of bias, as opposed to the Court's unwillingness to hear argument from a nonparty.

Finally, predicting a "cover-up appellate decision" (Pet. Aff., ¶78), petitioner seeks permission to make an audio/visual/or stenographic record of the oral argument. She asserts that a record of the Court's conduct during oral argument might supply her with evidence of its bias and self-interest, should she seek leave from the Court of Appeals to appeal its decision (Pet. Aff. ¶¶78-80), in addition to satisfying what she regards as the intense public interest in the case (Pet. Aff., ¶¶83-87).

To the contrary, however, petitioner's submissions to this Court and to the Commission's counsel have been so consistently bitter, and so replete with personal attacks, that it is highly unlikely that allowing oral argument to be played out before a camera, or even a stenographer, would lead to anything other than disruption. Furthermore, as discussed above, a court's failure to accept a party's legal contentions is not evidence of bias. "Bias," therefore, cannot be proven by conduct such as a panel's purported "unresponsiveness" to a petitioner's presentation, or its failure to engage in extensive hostile questioning of petitioner's adversary (Pet. Aff. ¶78). Actual bias can be proven only by a review of a court's rulings, not speculations as to its state of mind, particularly if that state of mind cannot be substantiated by evidence more substantial than videotaped facial expressions or lack of sustained questioning. See, e.g., Solow v. Wellner, 157 A.D.2d 459 (1<sup>st</sup> Dep't 1990) (party claiming that trial judge should have recused himself must "point to an actual ruling which demonstrates bias," rather than rely on allegations concerning the court's possibly hostile "state of mind").

## POINT II

### **PETITIONER HAS FAILED TO DEMONSTRATE ANY FACTUAL OR LEGAL BASIS FOR SANCTIONING THE COMMISSION OR ITS COUNSEL**

The sweeping punishments petitioner seeks for the Commission and its counsel -- i.e., striking the Commission's appellate

brief, monetary sanctions, and reference for disciplinary and criminal investigation and prosecution -- rest on her claim that the Commission's brief is "a fraud on the court," and thus violates 22 NYCRR §§1200.3(a)(4), 1200.3(a)(5), 1200.33(a)(5) and Judiciary Law §487 (Petitioner's Notice of Motion ¶2).

Petitioner, however, misunderstands the meaning and purpose of these rules.

Judiciary Law §487 and the cited regulations are intended to prohibit misrepresentations which are both intentionally made and which "can be reasonably expected to induce detrimental reliance by another." 22 NYCRR §1200.1(i) (defining "fraud" as used in the Disciplinary Rules). Thus, for example, this Court has held that allegations that an attorney had brought a New York action in order to contravene the order of an Arizona court, and withheld knowledge of the out-of-state proceeding from the New York court, stated a cause of action under Judiciary Law §487. Schindler v. Issler & Schrage, P.C., 262 a.d.2D 226 (1<sup>st</sup> Dep't 1999). Similarly, the plaintiff's claim in Savattere v. Subin Associates, P.C., 261 A.D.2d 236 (1<sup>st</sup> Dep't 1999), that his former attorney falsely represented to a court that plaintiff would submit to blood testing, and then falsely informed plaintiff that the court had ordered such testing, also stated a claim for relief under Judiciary Law §487.

By contrast, petitioner's "Critique of Respondent's Brief,"

(Pet. Aff., Ex. U) shows that petitioner believes the Commission and its counsel to have committed "deceit" and "misconduct" not through any actual or threatened deception but rather through the manner in which they discuss decisions and documents which are clearly before the Court in their complete form in Petitioner-Appellant's Appendix. Petitioner finds "fraud", for example, in the fact that the Commission's brief does not quote, in their entirety, the clauses in her petition describing the relief she seeks (Pet. Aff., Ex. U, pp. 13, 31-33), that it fails to acknowledge the "fact" that the Mantell case had been "thrown" (supra, p. 37), makes purportedly "deceitful" claims about Mantell's holding (supra, p. 41) and that it "attempts" to "conceal" Petitioner's claim for relief under Judiciary Law §44.1 (supra, p. 45). Arguments that draw her particular displeasure, such as the claim that petitioner, D. Sassower and CJA are functionally identical, are deemed by her to be "sanctionable deceit" (supra, p. 63), even though, as detailed in the Commission's brief, pp. 20-12, the complaints to the Commission upon which petitioner has sued were filed in CJA's name, petitioner corresponds in CJA's name with public officials and concerning this litigation, and refers to the D. Sassower v. Commission case as having been brought by CJA.

The reasoning of Lazich v. Vittoria & Parker, 189 A.D.2d 753 (2d Dep't), app. dismissed without op., 81 N.Y.2d 1006 (1993), is

dispositive here. Lazich rejected plaintiff's claim that his wife's divorce attorneys had violated Judiciary Law §487 in the course of the divorce proceedings on the ground that

[a]n essential element of fraud is reliance by a complaining party upon false statements knowingly made by the defendant. All the statements and actions complained of were undertaken in the course of adversarial proceedings and were fully controverted. Therefore, the plaintiff cannot and has not asserted the requisite reliance required for fraud. As there was no fraud, there was no conspiracy to defraud.

Lazich, 189 A.D.2d at 754 (2d Dep't).

Lazich's holding has all the more force in this context, since not only can petitioner not claim to have been "deceived" in any way by the Commission's brief, but there is no evidence that the Court could be victimized by any of the imagined "frauds." Not only has petitioner contested virtually every word submitted by the Commission, but everything that she contends to have been the subject of "deceit" -- the procedural histories of various cases, petitioner's correspondence with the Commission and its responses, the law governing the Commission and its responsibilities, petitioner's Petition itself and its allegations -- is a matter of public record, and in most instances has been reproduced for the Court in the Appendix.

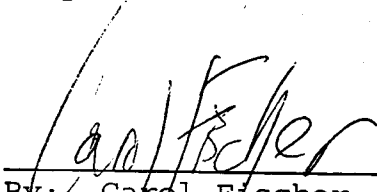
Conclusion

For all of the reasons stated above, petitioner's motion should be denied in all respects.

Dated: New York, New York  
August 30, 2001

Respectfully submitted,

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