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June 24, 2024

TO: New York State Commission on Prosecutorial Conduct
Administrative Regulations Review Commission

FROM: Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: Public Comment – April 10, 2024 "Proposed Operating Rules and Procedures" of the Commission on Prosecutorial Conduct

Here submitted is public comment to the Commission on Prosecutorial Conduct's April 10, 2024 "Proposed Operating Rules and Procedures" (Sections 10400.1 – 10400.12), published in the April 24, 2024 New York State Register of the Department of State Division of Administrative Rules – both of which are posted on the Commission's website.

According to the Register (at p. 14), "The proposed rules are consistent with the above statutory authority", *to wit*, "sections 499-a through 499-j of the Judiciary Law" and are "transparent with the public about the Commission's procedures". This is false.

Whereas Judiciary Law §499-d(5) empowers the Commission to:

> "adopt, promulgate, amend and rescind rules and procedures, not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article …",

the proposed rules subvert Judiciary Law Article 15-A pertaining to the Commission's statutory duty with respect to investigation of complaints, set forth in Judiciary Law §499-f(1), and do so by obscuring its clarity, indeed its very existence.

In clear, unequivocal language, Judiciary Law §499-f(1) states:

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

Yet the proposed rules, which begin with a proposed Section 10040.1 of "Definitions" described by the Register (at p. 13) as "[p]rovid[ing] definitions for 18 terms used throughout the rules", provides NO definition of the meaning of a complaint that "on its face lacks merit".

Instead, the rules create a discretionary "Initial review and inquiry" – giving no clue as to the basis for the discretion and concealing that facial merit is the basis for investigation. Thus, proposed Section 10400.1(k) states:

> "*Initial review and inquiry* shall mean the first stage of the commission's process, in which the commission staff may engage in preliminary analysis and fact-finding to aid the commission in determining whether to authorize an investigation." (underlining added).

The "first stage of the commission's process" for staff should be logging in the complaint by assigning it a number, but that is not here indicated – nor whether staff will be sending the complainant an acknowledgment of receipt and information about what to expect. This "first stage" of staff function is skipped in favor of its discretion to engage in undefined "preliminary analysis and fact-finding" whose stated purpose is "to aid the commission in determining whether to authorize an investigation", as if the determination is something difficult, when it is completely straightforward, requiring no more than reading the complaint to determine whether, on its face, it states a cause for complaint pursuant to Judiciary Law §499-f(1), mandating investigation – a task the eleven lawyer-commissioners would each be expert in determining, readily.

This deceitful definition sets the stage for the complete subversion of Judiciary Law §499-f(1) by proposed Sections 10400.2(c) and (d) under the heading "Processing of Complaints" and then by proposed Section 10400.5(b) under the heading "Investigation Procedures".

Proposed Sections 10400.2(c) and (d) state:

> "(c) The commission staff may engage in an initial review and inquiry of the complaint and provide a recommendation to the commission about the disposition of a complaint.
>
> (d) Upon receipt of a recommendation from commission staff, the commission shall (1) authorize an investigation of the complaint; or (2) dismiss the complaint if it determines that the complaint lacks merit." (underlining added).

Note here that the word "may" makes discretionary not only the "initial review and inquiry" of commission staff, but, syntactically and logically, its "recommendation to the commission" without which, pursuant to (d), a complaint does NOT proceed to a Commission determination. Thus, where commission staff, operating under "may" language, makes no "initial review and inquiry" and, therefore, no "recommendation to the commission", the fate of a facially-meritorious complaint ends at (c).

Note, too, that (d) replaces the "on its face lacks merit" determination that is required to be made by the commission if it dismisses the complaint without investigation, pursuant to Judiciary Law §499-f(1). The determination is now changed to "lacks merit", which is NOT the same. A complaint that "lacks merit" can mean one that, on its face, is meritorious, but is not factually substantiated. Yet, the question of factual substantiation requires investigation – here dispensed with by dismissal.

Proposed Section 10400.5(b), entitled "Notice of Investigation", further confuses the situation by a superfluous first sentence which, having no pertinence to the timing and content of the "Notice", puts the final nail into Judiciary Law §499-f(1). It reads:

> "(b) Notice of Investigation. Upon receipt of a complaint or after an initial review and inquiry, the commission may initiate an investigation into the prosecutor's conduct. The prosecutor shall be notified in writing of the commencement of the investigation and provided with a copy of the complaint." (underlining added).

Dropped is the requirement of proposed Section 10400.2(d) of the Commission's "receipt of a recommendation from commission staff" based on its "initial review and inquiry" – or, indeed, of "initial review and inquiry", as the Commission can here go directly from "receipt of a complaint" to exercising "may" discretion" to "initiate an investigation". Gone entirely is the "shall" mandate of Judiciary Law §499-f(1) that "Upon receipt of a complaint (a) the commission shall" investigate it, absent the commission's determination that "the complaint on its face lacks merit".

Consequently, the four above-quoted sections MUST be revised consistent with Judiciary Law §499-f(1), to be preceded by a section defining "on its face lacks merit".

I suggest the following be added to the proposed Section 10400.1 of "Definitions":

> *Complaint which lacks merit on its face* is a complaint which, even assuming the truth of its allegations, does not state a basis for complaint relating to the "conduct or performance of official duties of any prosecutor", as Judiciary Law §499-f requires.

I suggest the following revision to proposed Section 10400.1(k):

> *Initial review and inquiry* is the first stage of the commission's process in which the commission staff reads the complaint and, if requiring further clarity, contacts the complainant, so as to aid the commission with a recommendation as to whether, as Judiciary Law §499-f requires, the complaint is to be investigated, or, if not, dismissed based on a commission determination that on its face it lacks merit.

I suggest the following revisions to Sections 10400.2(c) and (d):

> (c) The commission staff shall engage in an initial review and inquiry of the complaint and, based thereon, provide a recommendation to the commission as to whether the complaint is facially-meritorious.
>
> (d) Upon receipt of a recommendation from commission staff as to whether a complaint is facially meritorious, the commission shall (1) authorize an investigation of the complaint; or (2) dismiss the complaint upon determining that it lacks merit on its face.

I suggest the following revision to Section 10400.5(b):

> (b) Notice of Investigation. Upon the commission's authorizing investigation of a complaint, the prosecutor shall be notified in writing and provided with a copy of the complaint for his written response within 20 days.

This adds what proposed Section 10400.5, notwithstanding entitled "Investigation Procedures", totally omits, namely, requiring a written response to the complaint from the complained-against prosecutor. This basic – indeed the obvious starting point of investigation – is also missing from the definition of investigation in proposed Section 10400.1(l), which reads:

> "(l) *Investigation* shall mean an examination of a specific complaint and/or the prosecutor's conduct, including the collection and analysis of relevant evidence, testimony under oath or affirmation, and documentation, conducted by the commission or its staff. An investigation shall only be initiated at the direction of the commission."

This definition must be revised for that reason – and also to remove the phrase "an examination of a specific complaint and/or the prosecutor's conduct", which, aside from being obvious, is easily confused with "initial review and inquiry" – presumably intended.

I suggest the following revision to proposed Section 10400.1(l):

> (l) *Investigation* is only initiated at the direction of the commission and shall mean the collection and analysis of relevant evidence – starting with requiring a written response to the complaint from the complained-against prosecutor and furnishing it to the complainant for reply, and, thereafter, as needed, testimony under oath or affirmation, and obtaining documents, including by subpoena.

With respect to proposed Section 10400.3(a) "Dismissal of Complaint" reading:

> "If the commission dismisses a complaint, the commission shall so notify the complainant. If the commission notified the prosecutor of the complaint prior to its dismissal, the commission shall also notify the prosecutor of the determination to dismiss the complaint.",

this is simply a repetition of Judiciary Law §499-f(1)(b), which reads:

> "…If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have notified the prosecutor of the complaint, the commission shall also notify the prosecutor of such dismissal. …"

What is the content of the notification? Will it advise if the dismissal was without investigation based on the Commission having determined that the complaint "on its face lacks merit", explaining this term as failing to state a cause for complaint? And will it furnish the number and

names of the Commission members who dismissed the complaint, without investigation – which, pursuant to Judiciary Law §499-c(6) and Judiciary Law §499-e, can have been as few as two members of a three-member panel. Will the notification identify if Commission members recused themselves? How about of procedures for reconsideration by the full Commission?

I suggest that proposed Section 10400.3(a) be revised by the addition of two paragraphs, as follows:

1. The notification shall state whether the commission dismissed the complaint, without investigation, based on its determination that the complaint on its face lacked merit or did not state a cause of complaint, the number of commission members who made such determination, their identities, and the names of commission members who recused themselves.

2. The complainant shall also be advised that within 30 days of the notification date he/she may make a written request for reconsideration of the complaint by the full commission.

* * *

The above was already drafted when, on Thursday, June 20th, I sent Commission on Prosecutorial Chair Simon an e-mail with the subject line: "The Commission on Prosecutorial Conduct's April 10, 2024 'Proposed Operating Rules and Procedures' , the April 24, 2024 NYS Register – & FOIL", reading:

> "The April 24, 2024 New York State Register states (at p. 14), in bold and italicized (at p. 14), with respect to the Commission's proposed 'Operating Rules and Procedures', '***Text of proposed rule and any required statements and analyses may be obtained from*:** Michael A. Simons, Chair, New York State Commission on Prosecutorial Conduct…'.
>
> Are there '***any required statements and analyses***' beyond what is printed in the New York State Register at pp. 13-14 – and, if so, I request same.
>
> Also, who wrote what is printed at pp. 13-14 about the Commission's proposed rules – and, specifically, the 'Regulatory Impact Statement' purporting that 'The proposed rules are consistent with the above statutory authority', *to wit*, 'sections 499-a through 499-j of the Judiciary Law' (Judiciary Law Article 15-A).
>
> Additionally, who drafted the April 10, 2024 'Proposed Operating Rules and Procedures', Sections 10400.1 - 10400.12, posted on the Commission's website? Were the Commission on Judicial Conduct's 'Operating Procedures and Rules' (22 NYCRR Part 7000) used as a model, in particular:

- its §7000.1(k) – '*Initial review and inquiry*', part of its section entitled "Definitions;
- its §7000.1(l) – '*Investigation*', part of its section entitled 'Definitions';
- its §§7000.3 (a) and (b), part of its section entitled 'Investigations and dispositions'.

The Commission on Prosecutorial Conduct's comparable proposed rules are:

- Section 10400.1(k) – '*Initial review and inquiry*', part of its section entitled 'Definitions';
- Section 10400.1(l) – '*Investigation*', part of its section entitled 'Definitions';
- Sections 10400.2(c) and (d), part of its section entitled 'Processing of complaints';
- Sections 10400.5(b), part of its section entitled 'Investigation Procedures'.

Did the Commission members approve the final draft at any meeting by a vote preceded by discussion? If so, was it recorded or were minutes taken – and may I obtain same? Was the vote unanimous?

By the way, I have confirmed today with Senior Attorney Christen Smith of the Committee on Open Government (518-474-2518) that, pursuant to Public Officers Law §87.1(b), accessible from its website, the Commission on Prosecutorial Conduct is required to promulgate rules for public access to records (FOIL). The Commission on Judicial Conduct's website posts its rules for public access to records (22 NYCRR Part 7001) on the same webpage as its 22 NYCRR Part 7000 'Operating Procedures and Rules', here.

The statute establishing the Commission on Judicial Conduct is Judiciary Law Article 2-A.

Thank you."

Notwithstanding I sent this e-mail to the two e-mail addresses for Chair Simon, indicated at p. 14 of the New York State Register: Michael.Simons@cpc.ny.gov and Regulations@cpc.ny.gov, AND, additionally, to info@cpc.ny.gov, presumably monitored by Commission Administrator Susan Friedman, I received no response. Likewise, none after I re-sent it to those same three e-mail addresses, 24 hours later, as *cc*'s to an identically-titled e-mail addressed to the five legislators of the

Administrative Regulations Review Commission, stating:

> "Following up my phone messages and conversations with your staff earlier today – including conversations with the legislative directors of Senate Co-Chair Felder, Assembly Co-Chair Stern, and Senator Ashby – advising that there is a problem with the Administrative Regulations Review Commission's Senate and Assembly offices, whose e-mail addresses are not indicated by the New York State Register and whose staff does not pick up calls to their indicated phone numbers, 518-455-5091, 518-455-2731, during normal business hours, nor, apparently, return voice messages indicating urgency, below is my above-entitled yesterday's e-mail to Commission on Prosecutorial Conduct Chair Michael Simons, to which the only response I received was from the Department of State.
>
> I will have more to say in my formal comment to the Commission on Prosecutorial Conduct's proposed 'Operating Rules and Procedures', to be e-mailed prior to expiration of the comment period, which, because it falls on June 23th, a Sunday, kicks over to Monday, June 24th, as indicated by the NYS Register and reflected by the Commission on Prosecutorial Conduct's website." (underlining added).

It does not bode well for the future of the Commission that, at this early juncture, its chair and administrator are not "transparent" about its proposed "Operating Rules and Regulations", including the misrepresentation in the NYS Register that they are "consistent" with Judiciary Law Article 15-A, which they flagrantly are not, with respect to complaints whose investigation is mandated by §499-f(1).

Suffice to say, the Commission survived the "as written" challenge to Judiciary Law Article 15-A in *Soares v. New York State, et al.* (Albany Co. #906409-18), in part, because no implementing rules had yet been promulgated. As stated by the January 28, 2020 Decision and Order of Supreme Court Justice Weinstein (NYSCEF #129, at pp. 13-14):

> "To the extent plaintiffs base their due process claim on the charge that the statute fails to set forth the procedures by which the CPC shall operate, that contention also cannot sustain a facial due process claim at this stage, since legislation 'need not be detailed or precise as to the agency's role' (*Garcia v. New York City Dept of Health & Mental Hygiene*, 31 NY3d 601, 609 [2018] [internal citation and quotation omitted]). Rather, 'an agency can adopt regulations that go beyond the text of its [enabling legislation[, provided they are not inconsistent with the statutory language or its underlying purpose' (*id.* [internal quotation and citation omitted]).
>
> Here, the governing statute provides the Commission with the necessary authority to 'adopt, promulgate, amend and rescind rules and procedures, not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article,' which would allow it to explicate its procedures with greater specificity (Jud Law §499-d[5]). That is precisely how the Commission on Judicial Conduct has operated, setting…rules of procedure via regulation, even when not set

> forth in its governing statute (*see* Judiciary Law, Article 2-A; 22 NYCRR 7000.6[i]).
> …
> In short, the Commission is the appropriate body, in the first instance, to determine 'the best methods for pursuing [the] objectives articulated by the legislature' (*Matter of Leading Age v. N.Y., Inc. v. Shah*, 32 NY3d 249, 260 [2018]). Plaintiffs cannot prevail on a facial challenge premised on the absence of procedural rules in the statute, when the regulations which set forth such rules have not yet been promulgated."

Notably, Justice Weinstein's decision, although reciting, at length, the provisions of Judiciary Law Article 15-A (at pp. 3-7), contains a material error in the sentence immediately preceding the paragraph pertaining to Judiciary Law §499-f(1). It reads:

> "…Eight members of the Commission constitute a quorum, and the votes of six members will be needed for such actions as authorizing investigations, approving dispositions and appointing referees (Jud Law §499-c[6]).
> The process for the Commission to open and pursue an investigation is as follows: The Commission may receive or 'initiate' complaints concerning 'the conduct, qualifications, fitness to perform, or performance of official duties of any prosecutor' (Jud Law §499-f[1]), with the 'prosecutor' defined to include both DAs and ADA. In addition, following receipt of a written complaint the Commission 'shall conduct an investigation' except that it may dismiss the complaint if 'on its face [it] lacks merit' (*id*)." (at pp. 3-4, underlining added).

In fact, this misreads Judiciary Law §499-c(6), which states:

> "For any action pursuant to subdivisions four through seven of section four hundred ninety-nine-f or subdivision two of section four hundred ninety-nine-e of this article, eight members of the commission shall constitute a quorum of the commission and the concurrence of six members of the commission shall be necessary. Two members of a three member panel of the commission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken." (underlining added),

and whose meaning is further clarified by Judiciary Law §499-e, which states:

> 1. The commission may delegate any of its functions, powers and duties to a panel of three of its members, one of whom shall be a member of the bar, except that no panel shall confer immunity in accordance with section 50.20 of the criminal procedure law. No panel shall be authorized to take any action pursuant to subdivisions four through nine of section four hundred ninety-nine-f of this article or subdivision two of this section [pertaining to designation of a referee]." (underlining added).

In other words, and apart from the fact that Judiciary Law §499-e is plainly erroneous because Judiciary Law §499-c(1) requires each of the Commission's 11 members to be "a member of the bar",[1] the Commission can delegate to a three-member panel, with the concurrence of two, the determination to investigate and the investigation, as these are pursuant to §§499(f)1-3.

No less notably, the Commission obscures this by its proposed Section 10400.10 entitled "Quorum, Voting":

> "Eight members of the commission shall constitute a quorum of the commission and the concurrence of six members of the commission shall be necessary. Two members of a three member panel of the commission, as defined in section 499-e of the Judiciary Law, shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken.".

This is simply a replication of Judiciary Law §499-c(6) and §499-e – and does not identify how panels consisting of three members are to be designated and can achieve the equal balancing of prosecutorial and defense attorneys that is the hallmark of Judiciary Law §499-c(1), absent the participation, on each panel, of the chief judge's appointee who is "a full time law professor or dean at an accredited law school with significant criminal law experience" – and to prevent a situation where the two-member quorum of a three-member panel are both prosecutorial attorneys or both defense attorneys, or where all three panel members are prosecutorial attorneys or defense attorneys. As to how this can be done, I have no suggestion of my own for rectifying the palpably insufficient proposed Section 10400.10.

There are other rules that might have occurred to a reasonably engaged Commission of 11 lawyer members and a paid lawyer-administrator, already on staff, filling in a lack of specificity in the Article 15-A statute, as, for instance, pertaining to disqualification of Commission members, other than in the limited circumstances of Judiciary Law §499-c(4), and also staff disqualification, and the availability to complainants of supervisory/reconsideration procedures to review the without investigation dismissal of their complaint – or Article 78 review, available to them. These, however, are not included – nor any rules of procedure for addressing conflict-of-interest of members and staff, either internally, by the Commission, or by recourse to the Commission on Ethics and Lobbying in Government – the latter involving, perhaps, clarification of Judiciary Law §499-c(2) with respect to all Commission members:

> "Membership on the commission by a prosecutor shall not constitute the holding of a public office and no prosecutor shall be required to take and file an oath of office before serving on the commission…."

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[1] That Judiciary Law §499-e refers to "one of whom shall be a member of the bar" – when ALL 11 of the Commission on Prosecutorial Conduct members are required to be lawyers pursuant to Judiciary Law §499-c(1) – is because Judiciary Law §499-e was copied from the materially identical Judiciary Law §44.3 pertaining to the Commission on Judicial Conduct, whose 11 members can include up to six lawyers, pursuant to Judiciary Law §44.1.

* * *

The legislation that became Judiciary Law Article 15-A was enacted in 2018, without legislative due process and by the legislative fraud that the Commission on Judicial Conduct, established by Judiciary Law Article 2-A, was a "successful entity" upon which a commission on prosecutorial conduct should be modeled, so-stated by Senator DeFrancisco's sponsor's memo for S.2412-D and Assemblyman Perry's sponsor's memo for A.5285-C, and, identically, by their sponsor's memos for their prior S.6286 and A.8634 (2013-14 legislative session) and S.24 and A.1131 (2015-16 legislative session).

In fact, the Legislature has known, for decades, that the Commission on Judicial Conduct is corrupt, enabled by deficiencies in Judiciary Law Article 2-A, as, for instance, the absence of a provision for any oversight/compliance audit of its handling of complaints,[2] and by the Commission's subversion of Article 2-A's most important provision, Judiciary Law §44.1, *via* its non-conforming rules 22 NYCRR §§7000.3(a) and (b).

Judiciary Law §44.1 reads:

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

22 NYCRR §§7000.3 (a) and (b) read:

> "(a) When a complaint is received…an initial review and inquiry may be undertaken.
>
> (b) Upon receipt of a complaint, or after an initial review and inquiry, the complaint may be dismissed by the commission or, when authorized by the commission, an investigation may be undertaken." (underlining added).

Since 1995 – nearly 30 years ago – the Legislature has had the EVIDENCE of the Commission's corruption, enabled by subverting Judiciary Law §44.1, by NYCRR §§7000.3(a) and (b), covered-up by a "double whammy" of litigation fraud by the attorney general and fraudulent judicial decisions, as that was when I furnished it with a full copy of the record of the first of three Article 78 proceedings against the Commission[3] – and repeatedly, thereafter, culminating in the records of

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[2] *See* NYS Comptroller Regan's November 15, 1989 Report: "*Commission on Judicial Conduct – Not Accountable to the Public: Resolving Charges Against Judges is Cloaked in Secrecy*" and his December 7, 1989 press release "*Commission on Judicial Conduct Needs Oversight*".

[3] The three Article 78 proceedings, each brought in Supreme Court/New York County, the second two appealed to the Appellate Division, First Department and then to the Court of Appeals, are:

- *Doris L. Sassower v. Commission*, commenced by an April 10, 1995 verified petition;
- *Elena Ruth Sassower v. Commission*, commenced by an April 22, 1999 verified petition;
- *Michael Mantell v. Commission*, commenced by an April 22, 1999 verified petition, amended June 15, 2099.

all three, summarized, with appended substantiating exhibits, by a final October 24, 2002 motion to the Court of Appeals for leave to appeal, which, quoting the Court's own interpretation of Judiciary Law §44.1 in *Matter of Nicholson*, 44 N.Y.2d 597, 610-611 (1980):

> "… 'the commission MUST investigate following receipt of a complaint, unless the complaint is determined to be facially inadequate (Judiciary Law 44, subd. 1)…' (emphasis added)" (at p. 3),[4]

The fraud of the judicial decision in the first Article 78 proceeding is summarized by CJA's letter to the editor "*Comm'n Abandons Investigative Mandate*" (NYLJ, August 14, 1995), further identified by CJA's $1,648,36 ad "*A Call for Concerted Action*" (NYLJ, November 20, 1996), and given greatest particularity in CJA's $3,077.22 ad "*Restraining 'Liars in the Courtroom' and on the Public Payroll*" (NYLJ, August 27, 1997), furnished to the Senate and Assembly Judiciary Committee and legislators, again and again.

The fraud of the judicial decisions in the second two Article 78 proceedings is far more pernicious, as it insulated the Commission from further lawsuits by enjoining CJA from suing the Commission for corruption and its rules and by purporting, in the two Appellate Division decisions, that complainants have no standing to sue the Commission for dismissal of their complaints. Summarizing this, *inter alia*, is the March 30, 2012 verified complaint in the declaratory judgment action *CJA v. Cuomo, et al.* to which the Senate and Assembly and their leaders were named defendants, whose first cause of action pertained to the Legislature's collusion with the executive and judicial branches in violating constitutional "checks-and-balances" with respect to systemic judicial corruption involving the Commission on Judicial Conduct – and rendering judicial salary raises unconstitutional (*see* ¶¶19, 27, 28 under the title heading "A Tale of Six Lawsuits: Three by Citizens – Suing for Judicial Accountability, Three by Judges & the Unified Court System – Suing for Pay Raises".

[4] This dispositive quote of the Court of Appeals in *Nicholson*, at p. 3 of my October 24, 2002 motion for leave to appeal, is also at its pp. 10, 17-18, in the context of demonstrating that it was prominently before the lower courts, which simply ignored it in fabricating the Commission's unbounded discretion for investigating complaints. My May 1, 2002 jurisdictional statement in support of an appeal of right had also featured *Nicholson* and the quote (pp. 7-8, pp. 19-20) and is, like the October 24, 2002 motion, a must-read for its particulars as to the fraudulence of the lower court decisions presented for Court of Appeals review. Here's a portion, germane to how, absent a clarifying statute or rule, a complainant whose facially-meritorious complaint to the Commission on Prosecutorial Conduct has been dismissed, without investigation, may be sabotaged in bringing an Article 78 challenge:

> "Upon information and belief, over the 27 years of the Commission [on Judicial Conduct]'s existence, during which time it has been sued approximately two dozen times by complainants for wrongful dismissals of judicial misconduct complaints, courts never held – until the *Mantell* appellate decision and the appellate panel's decision herein – that complainants lack 'standing' to sue the Commission. That two Appellate Division, First Department panels have now done so in such a procedurally deficient fashion manifests the true import of their appellate decisions: to eliminate the rights of aggrieved members of the public to sue the Commission under any circumstances. Otherwise, their unprecedented decisions would have articulated the prerequisites for 'standing' to sue the Commission, including for declaratory relief as to the constitutionality of contradictory rule and statutory provisions under which the Commission operates, such as sought by Petitioner-Appellant's Verified Petition [A.18-20]. The decision & order thus additionally violates the right to petition the government for redress of grievances, as guaranteed by Article I, §9 of the New York State Constitution and the First Amendment to the New York State Constitution."

stated (at pp. 6-7):

> "This appeal presents the Court with five judicial decisions arising from three separate Article 78 proceedings against the Commission, all involving its mandatory duty under Judiciary Law §44.1 to investigate *facially-meritorious* judicial misconduct complaints[fn3]. No provision is more important to a complainant of judicial misconduct than Judiciary Law §44.1.
> …
> That these five decisions are judicial frauds[fn], falsifying both the material facts AND applicable law in each proceeding so as to 'protect' a corrupted Commission, is *readily-verifiable* from the record herein… reveal[ing] an identical *modus operandi* in all three Article 78 proceedings: the Commission had NO legitimate defense; was defended with litigation misconduct by the State Attorney General; and was rewarded by fraudulent judicial decisions without which it would not have survived." (italics and capitalization in the original).

The annotating footnote 3 read:

> "Judiciary Law §44.1 is NOT the only issue presented by this Article 78 proceeding, whose verified petition contains six claims for relief addressed to a variety of statutory and rule provisions [A-37-45]." (capitalization in the original).

I highlighted this October 24, 2002 motion and its companion October 15, 2002 motion in an October 5, 2016 e-mail entitled "Proposed Commission on Prosecutorial Conduct", addressed to the legislative director of Assemblyman Perry who, with Senator DeFrancisco, had held a June 8, 2016 "public forum" on the topic as sponsors of the Senate and Assembly bills that would ultimately become Judiciary Law Article 15-A.

The e-mail stated:

> "As discussed, although I favor establishment of a commission on prosecutorial conduct, it must NOT be modeled on the statute establishing the Commission on Judicial Conduct, as that Commission is a corrupt façade. This Senator DeFrancisco well knows from the evidentiary proof I supplied him, repeatedly, during the years of his tenure as chairman of the Senate Judiciary Committee and, thereafter, during his years as chairman of the Senate Finance Committee. None of this proof was more important and decisive than the October 15, 2002 and October 24, 2002 final two motions before the Court of Appeals in the Center for Judicial Accountability's public interest lawsuit against the Commission on Judicial Conduct – *Elena Ruth Sassower v. Commission* – with SIX causes of action challenging the Commission statute, *as written and as applied*. Senator DeFrancisco received hard copies of these from me, directly, twice. The first time was at the face-to-face, sit-down March 17, 2003 meeting I had with him and Malcolm Smith, who was then the

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(jurisdictional statement, at p. 17, underlining in the original).

Senate Judiciary Committee's ranking member – and my March 5, 2003 letter reflecting the scheduling of that meeting is posted here: http://www.judgewatch.org/web-pages/judicial-discipline/nys/judicial-discipline-nys.htm . On that webpage you can also access Comptroller Regan's 1989 report about the Commission '*Not Accountable to the Public*' – about the need to amend the Commission statute to include a provision to allow for auditing of Commission records pertaining to the complaints it receives. The second time I furnished these two dispositive motions to Senator DeFrancisco, directly, was when, as chairman of the Senate Finance Committee, I testified before him at the Legislature's February 6, 2013 budget hearing on 'public protection', in opposition to the judicial salary increases recommended by the August 29, 2011 report of the Commission on Judicial Compensation. Here's the link to the video of my February 6, 2013 testimony before Senator DeFrancisco: http://nystateassembly.granicus.com/MediaPlayer.php?view_id=2&clip_id=327 (last speaker: at 7:21:50 hrs).

Notwithstanding the proof I had furnished Senator DeFrancisco, repeatedly, that the Commission on Judicial Conduct dumps judicial misconduct complaints that are not only facially-meritorious (in violation of Judiciary Law 44.1), but fully documented – and that it survived successive lawsuits suing it for corruption only because its attorney, the NYS Attorney General corrupted the judicial process and was rewarded with fraudulent judicial decisions – he refused, as Senate Judiciary Committee chairman, my repeated requests for hearings on the Commission – or on the court-controlled attorney disciplinary system. It was only in 2009, under the chairmanship of then Senator John Sampson, that hearings were held, albeit aborted after the second, *without* investigation, *without* findings and *without* any committee report being thereafter rendered. The above link contains a link to CJA's webpage for the 2009 Senate Judiciary Committee hearings under Senator Sampson – and includes my comprehensive written testimony that I had prepared for the December 16, 2009 hearing that was aborted. Here is that webpage directly: http://www.judgewatch.org/web-pages/judicial-discipline/nys/nys-sjc-hearing.htm. Particularly devastating is the testimony of two lawyer witnesses about the Commission's dumping of complaints they had filed: court attorney James Montagnino, at the June 8, 2009 hearing **(**video at 0:10:07 - 0:22:22) and of attorney Regina Felton at the September 24, 2009 hearing (video at 2:00:01 - 2:27:09).

As to the alternative to a commission on prosecutorial conduct – New York's attorney disciplinary committees – touted by New York's district attorneys as sufficient to address district attorney misconduct – I gave relevant testimony about how the attorney disciplinary committees dump legitimate complaints against attorneys – and handed up substantiating proof – last year before the sham Commission on Statewide Attorney Discipline, established by then Chief Judge Jonathan Lippman. Here's the video of my August 11, 2015 testimony: https://www.youtube.com/watch?v=1OV2woYeZ9Q&feature=youtu.be and CJA's webpage of the documentation I handed up, including its budgetary requests for

LESS funding for attorney discipline: http://www.judgewatch.org/web-pages/searching-nys/2015-commission-on-attorney-discipline/public-testimony-hearings/ers-testimony.htm. Its subsequent September 24, 2015 report concealed this opposition testimony in a cover-up report that nonetheless did identify the need for additional funding for attorney discipline. Yet, less than two months later, when the Judiciary submitted its proposed budget on December 1, 2015, it did NOT ask for any additional funding for attorney discipline. I pointed this out in a January 28, 2016 letter to the Senate and Assembly Judiciary Committees – and to the Senate Finance Committee and the Assembly Ways and Means Committee. Here is CJA's webpage posting the letter and its substantiating documentation: http://www.judgewatch.org/web-pages/searching-nys/budget/budget-2016-17/jan-28-ltr-fiscal-jud-committees.htm.

You may be sure that I would have given live testimony to the Legislature about this, had I been permitted to testify at its 2016 budget hearings. However, following my February 6, 2013 testimony before Senator DeFrancisco, I have not been permitted to testify at legislative budget hearings. This is particularized, with substantiating proof, by the verified complaint in the citizen-taxpayer action that CJA commenced on March 28, 2014 and then supplemented on March 31, 2015 with a verified supplemental complaint, and then again by a March 23, 2016 verified second supplemental complaint. As Assemblyman Perry is a member of the Assembly Ways and Means Committee, he should read each of these three pleadings in that citizen-taxpayer action – as well as the September 2, 2016 verified complaint in our current citizen-taxpayer action so that he can better understand what has been going on, including with the knowledge of Assemblyman Lentol, who, in addition to chairing the Assembly Codes Committee, is long-time Assembly co-chair of the Legislature's 'public protection' budget conference subcommittee. The direct link is here: http://www.judgewatch.org/web-pages/searching-nys/budget/menu-budget-reform.htm.

I would add that following this year's rigged legislative 'public protection' budget hearing at which Commission on Judicial Conduct Administrator Bob Tembeckjian pleaded for a mere $160,000 additional for the Commission's budget, I wrote a February 18, 2016 letter to the Senate Finance Committee and the Assembly Ways and Means Committee pointing out (at fn. 7) his significant testimony: http://www.judgewatch.org/web-pages/searching-nys/budget/budget-2016-17/feb-18-16-ltr-to-fiscal-committees.htm.

To no avail. The Legislature did not furnish additional monies for either the Commission on Judicial Conduct or for attorney discipline in the budget for this fiscal year.

There is much more to say, but I must turn to other matters now – including finishing the drafting of an attorney disciplinary complaint against New York's district attorneys that will furnish an empirical TEST of the efficacy of the attorney disciplinary committees in enforcing standards of ethical and professional conduct

> upon district attorneys. Suffice to herein supply you with yet one further link – to my June 29, 2016 letter to the District Attorneys Association of the State of New York, which was addressed to the attention of its then president Rockland County District Attorney Zugibe, with a copy to its incoming president, Oneida County District Attorney McNamara. It summarized (at pp. 6-7) significant facts pertaining to the June 8th public forum and the participation therein of Albany County District Attorney Soares. Here's the link: http://www.judgewatch.org/web-pages/searching-nys/budget/budget-2016-17/6-29-16-ltr-daasny.htm.
>
> I am available to answer questions, including under oath – and would consider it a privilege to do so to assist Assemblyman Perry in discharging the duties of his office.
>
> Thank you." (capitalization, italics, hyperlinking in the original).

As established, resoundingly, by the record of the October 24, 2002 motion and the record of the Article 78 proceeding against the Commission on Judicial Conduct it culminates, were the Commission on Prosecutorial Conduct to enact its proposed Sections 10400.2(c), (d), and 10400.5(b), and perhaps additionally its proposed Section 10400.10, it would be unable to defend against a lawsuit based thereon, other than by litigation fraud – and only fraudulent judicial decisions would save it.

I am eager to testify in opposition to the proposed rules at any hearing to be held. Please advise as to what State Administrative Procedure Act Law, Article 2 requires, as I am unable to interpret its provisions with respect thereto and gauge the meaning at p. 13 of the New York State Register: "No hearing(s) scheduled" on the Commission's "proposed rule making".

Thank you.

s/Elena Ruth Sassower