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NEW YORK SUPREME COURT
Appellate Division -- First Department

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

Petitioner-Appellant,

-against-

COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF NEW YORK,

Respondent-Respondent.

PETITIONER-APPELLANT'S CRITIQUE OF THE RESPONDENT'S BRIEF

PRESENTED TO THOSE CHARGED WITH SUPERVISORY RESPONSIBLITIES IN THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

TO ASSIST THEM IN MEETING THEIR PROFESSIONAL AND ETHICAL OBLIGATIONS, inter alia, BY WITHDRAWING THE RESPONDENT'S BRIEF

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INTRODUCTION

On March 23, 2001 – more than two months after having obtained from Petitioner a stipulation extending his time to respond to her Appellant's Brief -- the New York State Attorney General, representing Respondent New York State Commission on Judicial Conduct, served a Respondent's Brief. Such Respondent's Brief, fashioned on wilful misrepresentation and omission of the material facts and concealment of the applicable law, was immediately objected to by Petitioner. In telephone conversations with Assistant Solicitor General Carol Fischer, signator of the Respondent's Brief, and Deputy Solicitor General Michael S. Belohlavek, whose name appears on its cover and concluding signature page, Petitioner outlined key respects in which the Respondent's Brief was a sanctionable deceit. She advised that unless the Respondent's Brief was withdrawn, she would have no choice but to burden the Court with a sanctions motion.

Although the sanctionable nature of Ms. Fischer's Respondent's Brief is readily apparent simply by comparing it with Petitioner's Brief, Petitioner agreed to Deputy Solicitor General Belohlavek request for "something in writing". This, so that he could discharge his mandatory supervisory responsibilities under New York's Disciplinary Rules of the Code of Professional Responsibility[1], to which Petitioner directed his attention [DR 1-104; 22 NYCRR §1200.5].

The within critique is that "writing". It provides virtually a line-by-line analysis of

[1] These have been promulgated as joint rules of the Appellate Divisions of the Supreme Court and codified as 22 NYCRR §1200 *et seq.* The Appellate Division, First Department has reinforced their applicability to both attorneys and law firms by Part 603 of its Rules – making those who violate or fail to conduct themselves in conformity therewith "guilty of professional misconduct within the meaning of

Ms. Fischer's Respondent's Brief – because it is otherwise impossible to conceive how utterly deceptive a document it is. Such critique demonstrates that Ms. Fischer's Respondent's Brief can properly be defined as "fraudulent" and as a "fraud upon the court" designed to mislead it as to the material facts and law governing this important public interest case.

So that there is no mistake as to the meaning of "fraud", it is defined by Black's Law Dictionary (7th ed., 1999) as:

> "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (especially when the conduct is willful) it may be a crime."

"Fraud on the court" is defined as:

> "A lawyer's or party's misconduct in a judicial proceeding so serious that it undermines or is intended to undermine the integrity of the proceeding."

New York's Disciplinary Rules of the Code of Professional Responsibility also define fraud [22 NYCRR §1200.1(i)] . It is conduct containing:

> "an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another."

New York's Disciplinary Rules expressly proscribe "conduct involving dishonesty, fraud, deceit or misrepresentation" and "conduct that is prejudicial to the administration of justice" [DR 1-102(a)(4)(5); 22 NYCRR §1200.3(a)(4)(5)]. Judiciary §487 makes it a misdemeanor for any attorney to be guilty of "any deceit or collusion, or consents to any

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subdivision 2 of section 90 of the Judiciary Law".

deceit or collusion, with intent to deceive the court or any party". This is over and beyond 22 NYCRR §130-1.1, defining "frivolous" conduct to include "assert[ing] factual statements that are false."

As herein demonstrated, the factual statements in Ms. Fischer's Respondent's Brief are not just false and misleading, they are knowingly and deliberately so. They are, by definition, fraudulent.

I. MS. FISCHER WILFULLY OBLITERATES FROM HER RESPONDENT'S BRIEF ANY MENTION OF PETITIONER'S ANALYSES OF THE DECISIONS OF JUSTICES CAHN AND LEHNER, THE ACCURACY OF WHICH SHE DOES NOT DENY OR DISPUTE

Ms. Fischer did not have to do more than read Justice Wetzel's decision [A-12-13] to see that his dismissal of Petitioner's Article 78 proceeding against the Commission relied, *exclusively*, on Justice Cahn's decision in *Doris L. Sassower v. Commission* [A-189-194] and Justice Lehner's decision in *Michael Mantell v. Commission* [A-299-307][2].

Nor did she have to do more than read the Petitioner's Brief to know that the record before Justice Wetzel contained more than what his decision describes as Petitioner's "contention" that these decisions were "corrupt" and that each case was "thrown" [A-13]. From the Brief (at pp. 12-13, 24-25, 33, 35, 58-60), Ms. Fischer was fully aware that Petitioner had challenged these decisions with written analyses [A-52-54; A-321-334], substantiated by copies of the files of those cases [A-346; A-350], and that the Attorney

[2] Nevertheless, Ms. Fischer's "Statement of the Case" (at p. 13) falsely makes it appear that Justice Wetzel relied SOLEY on *Mantell v. Commission* in dismissing Petitioner's case. *See* discussion at p. 37 *infra*.

General, representing the Commission, had not only never denied nor disputed the accuracy of these analyses, but had, throughout the proceeding, ignored them, as if they did not exist.

Petitioner's Brief (at p. 60) categorically asserted:

> "Based on the record before him, Justice Wetzel knew, beyond doubt, that the reason Respondent ignored Petitioner's analysis of Justice Cahn's decision [A-52], *as if it did not exist*, and thereafter ignored Petitioner's analysis of Justice Lehner's decision [A-321], *as if it did not exist*, was because these analyses established the fraudulence of each decision. The fact that Justice Wetzel also ignores these *uncontroverted* analyses, *as if they do not exist*, bespeaks his knowledge that he could not confront them without exposing the fraud he is committing in predicating dismissal of Petitioner's Verified Petition on those decisions."

Consequently, the only way Ms. Fischer could legitimately argue for affirmance of Justice Wetzel's decision of dismissal[3] – and show that Justice Wetzel's reliance on the decisions of Justices Cahn and Lehner was not a knowing fraud by him, manifesting his actual bias, for which Petitioner was entitled to his recusal -- was by confronting Petitioner's analyses and controverting them. Ms. Fischer does not do this. Instead, she continues the subterfuge of concealing their existence, also without denying or disputing their accuracy.

It is because Ms. Fischer's "Statement of the Case" never once refers to Petitioner's analyses that her Argument section, which also never refers to the analyses, is able to

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[3] Even still, Ms. Fischer could not legitimately argue for affirmance – since, as detailed by Petitioner's Brief (at pp. 53-54), the posture of the case precluded Justice Wetzel from granting Respondent's dismissal motion, as he purported to do. Ms. Fischer's knowledge of this may be seen from the fact that her "Statement of the Case" contains no section devoted to the course of the proceedings in the lower court. Rather, it skips from "The Petition" (at pp. 9-11) to "Petitioner's Application for Recusal" (at pp. 11-14).

purport, under the heading, "Justice Wetzel's Decision Is Not Itself Evidence of Disqualifying Bias" (at p. 19):

> "It suffices to say that petitioner's claim that the decision demonstrates bias mandating recusal amounts to no more than a claim that the court stubbornly refused to accept petitioner's arguments, such as her assertion that she has established, as a matter of incontrovertible fact, the 'fraudulence' of the decisions in the (sic) D. Sassower and Mantell (A. 60)[4]".

Conspicuously, Ms. Fischer does not deny or dispute the accuracy of Petitioner's "assertion that she has established, as a matter of incontrovertible fact, the 'fraudulence' of the decisions" of Justices Cahn and Lehner. This reflects her knowledge, based on the analyses, that Petitioner established the fraudulence of those two decisions. As such, Ms. Fischer's advocacy for affirmance of Justice Wetzel's decision resting on those fraudulent decisions is a knowing and deliberate deceit.

II. MS. FISCHER FASHIONS HER BRIEF ON KNOWINGLY FALSE PROPOSITIONS ABOUT THE COMMISSION, WHICH SHE DERIVES FROM THE DECISIONS OF JUSTICES CAHN AND LEHNER, WITHOUT ACKNOWLEDGING THIS FACT

Without denying or disputing that Petitioner has "established the fraudulence of the decisions" of Justices Cahn and Lehner, Ms. Fischer infuses her Brief with claims from these two fraudulent decisions, without ever identifying that fact.

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[4] Ms. Fischer's citation to A.60 --the second page of "*Judicial Independence is Alive and Well*", (NYLJ, 8/20/98) by the Commission's Administrator – is erroneous. Presumably, she intends page 60 of Petitioner's Brief, whose first paragraph, "Based on the record before him...", pertaining to Petitioner's analyses before Justice Wetzel, is hereinabove quoted (at p. 4).

A. The Insidious Influence of Justice Cahn's Decision

The insidious influence of Justice Cahn's decision is evident from the outset of Ms. Fischer's Brief. Thus, the first two of her three "Questions Presented" are:

> "Does Judiciary Law §45[5] (sic) require the Commission to *fully* investigate every complaint of judicial misconduct, even when after it concludes that the complaint does not merit *comprehensive* investigation?" and
>
> "Does a person who files a judicial misconduct complaint with the Commission that he claims is "valid on its face" have standing to compel the Commission to reverse its dismissal of that complaint, and institute a *full* investigation." (emphases added)

By these Questions, Ms. Fischer fosters the misimpression that the Commission has a category of lesser investigation, short of "full" and "comprehensive" investigation. This is then picked up at the very outset of her "Statement of the Case", where she purports, as "Background" to the Commission (at pp. 3-5), that "[p]ursuant to 22 NYCRR §7000.1 and §7000.3, the Commission established a two-part procedure for investigating a complaint" (at p. 4) and that the first part is "initial review and inquiry".

Notwithstanding the definition of "initial review and inquiry" from 22 NYCRR §7000.1(i) -- which Ms. Fischer quotes (at p. 4) -- makes plain that its purpose is "to aid the commission *in determining whether or not to authorize an investigation*..." (emphasis added) – in other words that it is *not* itself an investigation – Ms. Fischer nonetheless implies that it is an investigation. This, because, after pretending that there is "a two-part

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[5] Ms. Fischer repeatedly substitutes the incorrect statute, Judiciary Law §45, relating to confidentiality, for Judiciary Law §44.1, relating to the Commission's duty to investigate facially-meritorious complaints. *See* discussion at pp. 45 *infra*.

procedure for investigating complaints", she references (at p. 5) the "*full-fledged* investigation" which the Commission may undertake following its "initial review and inquiry" (emphasis added).

Ms. Fischer does not cite Justice Cahn's decision as the source for her statements about "initial review and inquiry" being a preliminary phase of "investigation". However, the "initial review and inquiry" pretense is the central hoax perpetrated by Justice Cahn's decision [A-192]. Petitioner's analysis [A-53] highlighted this fact – as likewise the fact that this pretense was Justice Cahn's own *sua sponte* concoction, not advanced by the Commission. Indeed, the uncontroverted evidence in the record, consisting of information provided by the Commission's Administrator, is that there is

> "only one class of investigation... once the Commission authorizes an investigation, there is a full formal investigation. There are no gradations, such as initial inquiry or preliminary investigation"[6].

Thus, Ms. Fischer "Background" that "initial review and inquiry" is the first part of "investigation" (at p. 4) and her first two Questions implying that there is some "investigation" short of "full" and "complete" investigation (at p. 3), are deliberate deceits, refuted by the Commission's own rules and uncontroverted evidentiary statements.

Nonetheless, Ms. Fischer lends legitimacy to her false presentation by her subsequent description of Justice Cahn's decision as having:

> "concluded that the Commission had correctly interpreted its legislative mandate to 'investigate' complaints to include the power to make discretionary preliminary determinations as to whether it

[6] *See* Petitioner's July 28, 1999 Memorandum of Law in support of her omnibus motion, p. 29, fn. 31, quoting Practices and Procedures of State Judicial Conduct Organizations by the American Judicature Society, based on information supplied by the Commission's Administrator.

> wished to undertake more comprehensive investigations (A. 192). The Commission, therefore, had the power to promulgate, and follow, regulations permitting it to decide which complaints it believed worthy of comprehensive investigation and which it did not (A. 192-193)." [Fischer Br. 6-7].

To this, Ms. Fischer provides no counterbalance -- as by disclosing the analysis [A-52-54]. Based on Petitioner's analysis, Ms. Fischer knows, but does not disclose, that *every* aspect of this description (at pp. 6-7) is a deceit as to the true facts: the Commission had NOT "correctly interpreted its legislative mandate", "investigate" does NOT include making so-called "preliminary determinations", and, most importantly, such *sua sponte* concoction by Justice Cahn does not resolve the facial incompatibility between 22 NYCRR §7000.3 and Judiciary Law §44.1, making 22 NYCRR §7000.3 beyond the Commission's authority to promulgate, pursuant to Judiciary Law §42, which she cites (at p. 3).

B. <u>The Insidious Influence of Justice Lehner's Decision</u>:

Adding to the pretense in Ms. Fischer's Brief that there are levels of investigation – which she derives from Justice Cahn's decision [A-192] -- is her pretense that the Commission has "discretion" in the investigation of judicial misconduct complaints. This she derives from Justice Lehner's decision [A-301-302].

As to this pretense of "discretion", its first appearance is in Ms. Fischer's "Preliminary Statement" (at p. 2), which asserts:

> "Initially, as a matter of law petitioner has no standing to seek an order compelling the Commission *to exercise its discretion* by 'accepting' and 'investigating' a previously-dismissed judicial misconduct complaint." (emphasis added)

This pretense of the Commission's "discretion" is a hoax borne of Justice Lehner's decision. Ms. Fischer's "Statement of the Case" (at p. 13) describes this decision in the context of citing Justice Wetzel's reliance on it:

> "... the court chose to follow the holding of Mantell v. Comm'n on Judicial Conduct, 181 Misc. 2d 1027 (Sup. Ct. N.Y. Co. 1999), and concluded that petitioner could not seek a writ of mandamus to require the Commission to investigate a particular complaint, as such investigation was a discretionary, rather than administrative act (A. 12-13). (As discussed further below, this Court affirmed Mantell after Justice Wetzel rendered his decision.)"

From Petitioner's analysis of Justice Lehner's decision [A-326-330], Ms. Fischer knew that Justice Lehner's explanation about the unavailability of mandamus rested on his pretense that because the Commission has discretion to investigate complaints filed by its administrator, it also has discretion to investigate complaints received from outside sources. Such pretense, also not advanced by the Commission, required Justice Lehner to conceal that different statutory provisions, Judiciary Law §44.1 and §44.2, govern these two different kinds of complaints [A-326-330]. Ms. Fischer's knowledge of this hoax is reflected by her "Background" section (at p. 4) which, like Justice Lehner's decision [A-301-302], falsely makes it appear that Judiciary Law §44.1 govern both kinds of complaints. This, because she does not cite Judiciary Law §44.2 as authority for the Commission's "power to initiate an investigation of a judge on its own motion"[7].

Moreover, from Petitioner's analysis [A-329], Ms. Fischer knew that that the non-

[7] Conspicuously, Ms. Fischer's "Background" section (at pp. 3-5) omits any discussion, or even mention, of the Commission's supposed "discretion" to investigate judicial misconduct complaints – a "discretion" NOT reflected in her quoted excerpt from Judiciary Law §44.1 (at p. 4).

discretionary "shall investigate" language of Judiciary Law §44.1 had already been interpreted by the New York Court of Appeals in *Nicholson v. State Commission on Judicial Conduct*, 50 NY2d 597, 610-611 (1980), recognizing:

> "...the commission ***must*** investigate following receipt of a complaint, unless that complaint is determined to be facially inadequate (Judiciary Law §44, subd 1)..."[8] (emphasis added)[9]

As the analysis pointed out [A-329], the Court of Appeals' recognition in *Nicholson* as to the mandatory nature of Judiciary Law §44.1 was consistent with the Commission's position that:

> "Unless the Commission determines that the complaint on its face lacks merit, the law requires that the Commission 'shall conduct an investigation of the complaint' (Judiciary Law §44[1])..." (emphasis in the original)."[10]

Ms. Fischer's pretense of "discretion" – resting on Justice Lehner's decision -- is then carried forward by her Point I (at pp. 14-15). Point I addresses the issue of

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[8] The full sentence in *Nicholson* itself makes evident the distinction between the mandatory Judiciary Law §44.1 and the discretionary §44.2:

> "Specifically, the commission must investigate following receipt of a complaint, unless that complaint is determined to be facially inadequate (Judiciary Law §44, subd 1), and may on its own motion initiate an investigation upon the filing of a written complaint signed by the administrator of the commission (Judiciary Law, §44, subd 2)."

[9] *See* Point II of Doris L. Sassower's June 8, 1995 Memorandum of Law (at p. 14) in *Doris L. Sassower v. Commission* – referenced at the outset of Petitioner's analysis of Justice Cahn's decision [A-52].

[10] As noted by Petitioner's Verified Petition [A-29], the Commission's Administrator has "publicly recognized the controlling significance of Judiciary Law §44.1 in requiring investigation of facially-meritorious judicial misconduct complaints" by his essay "*Judicial Independence is Alive and Well*", NYLJ, 8/20/98 [A-59-60].

"discretion" only by way of the Appellate Division, First Department's affirmance of Justice Lehner's decision, whose pertinent sentence it quotes:

> "Respondent's determination whether or not a complaint on its face lacks merit involves an exercise of discretion that is not amenable to mandamus."

Even were Ms. Fischer unaware of Petitioner's December 1, 2000 memorandum to the Attorney General and the Commission, putting them on notice of the fraudulence of the Appellate Division's affirmance of Justice Lehner's decision and containing a substantiating analysis[11], she could see for herself that its claim of the Commission's "discretion" was unsupported by ***any*** substantiating facts or argument, the Appellate Division having wholly relied on Justice Lehner's decision – whose fraudulence she was well aware of from Petitioner's analysis [A-321-334].

III MS. FISCHER'S RESPONDENT'S BRIEF IS, FROM BEGINNING TO END, A FRAUD UPON THE COURT, FILLED WTH KNOWING AND DELIBERATE FALSIFICATION, MISREPRESENTATION, AND OMISSION OF MATERIAL FACT AND LAW

A. Ms. Fischer's "Preliminary Statement" is Based on Knowing and Deliberate Material Omission, Falsification, and Misrepresentation

The very first sentence of Ms. Fischer's "Preliminary Statement" (at p. 1), which is the first sentence of her Brief, begins with a material omission: it omits that Petitioner's appeal of Justice Wetzel decision is also from his imposition of a filing injunction against her and the non-

[11] That December 1, 2000 memorandum was referred to at page 3 of Petitioner's January 10, 2001 letter to Attorney General Spitzer. A copy of that January 10, 2001 letter was hand-delivered, on that date, for Assistant Attorney General Carolyn Cairns Olson, who was Ms. Fischer's predecessor handling the case.

party CJA. This same material omission also ends Ms. Fischer's Brief. Her one-sentence "Conclusion" (at p. 23) omits that a filing injunction against Petitioner and the non-party CJA is part of Justice Wetzel's decision.

These omissions have no purpose but to obscure that even were the Appellate Division to accept Ms. Fischer's assertion in her "Preliminary Statement" (at p. 2) and Point I (at p. 14) that Petitioner's purported lack of "standing" "disposes of all relief she sought in the proceeding" (at p. 14), she would still have an independent appeal based on the injunction.

The second sentence of Ms. Fischer's "Preliminary Statement" (at p. 1) materially misrepresents that the Commission dismissed Petitioner's judicial misconduct complaint against Justice Joy. This is absolutely untrue. The Commission refused to "receive" and "determine" Petitioner's February 3, 1999 complaint against Justice Joy, as Ms. Fischer may be presumed to know from Petitioner's Brief (at pp. 7-10, 11) and Verified Petition [A-33-37; 45], which are as clear as clear can be on the subject[12].

The devious purpose behind Ms. Fischer's material misrepresentation of the status of the February 3, 1999 complaint may be seen from her Point I (at p. 14), whose first sentence,

> "Petitioner has no standing to challenge the Commission's 'summary dismissal' of the complaints she that (sic) filed against Justices Rosenblatt and Joy",

is buttressed with the non-sequitur from the appellate decision in *Mantell*:

> "Respondent's determination whether or not a complaint on its face lacks merit involves an exercise of discretion that is not amenable to mandamus." (emphasis in Ms. Fischer's Brief)

Obviously, for Ms. Fischer to concede that the Commission neither acknowledged nor

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[12] Indeed, Ms. Fischer's awareness may be inferred from her "Statement of the Case" (at p. 9), omitting

dismissed Petitioner's February 3, 1999 complaint would immediately expose that mandamus lies against the Commission for violation of its mandatory duty to receive and determine complaints. Indeed, Ms. Fischer nowhere denies that, as set forth in Petitioner's Sixth Claim for Relief [A-45], the Commission has such mandatory duty, pursuant to VI, §22a of the New York State Constitution and Judiciary Law §44.1.

The third sentence of Ms. Fischer's "Preliminary Statement" (at pp. 1-2) misleadingly states that "[t]he ultimate goal" of the proceeding "was to have various New York State disciplinary proceeding laws and rules declared unconstitutional". Omitted is the material fact that the "disciplinary proceeding laws and rules" at issue pertain to the Commission. By such omission, Ms. Fischer creates the false inference that the constitutional challenges of this proceeding repeat the constitutional challenges presented by the *Doris L. Sassower v. Mangano, et al.* Article 78 proceeding and federal action. Those lawsuits, which Ms. Fischer gratuitously includes in her "Statement of the Case" (at p. 5), are described by her as having both "challenged [the] constitutionality of New York's disciplinary rules" – a description which materially omits that the "disciplinary rules" there at issue were entirely different, pertaining to attorney discipline.

This intended ambiguity fosters the impression of repetitive lawsuits, necessary to giving an aura of legitimacy to Justice Wetzel's filing injunction against Petitioner and the non-party CJA – affirmance of which Ms. Fischer advocates in Point IV[13] of her Brief (at

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any mention of the Commission's disposition of Petitioner's February 3, 1999 complaint.

[13] Ms. Fischer's Brief has no Point III.

pp. 20-22).

As for the final paragraph of Ms. Fischer's "Preliminary Statement" (at p. 2), referencing her Point I relating to Petitioner's supposed lack of "standing" making "recusal, and the other forms of relief petitioner sought... beside the point" and her Point II relating to Petitioner's supposed speculative claims as to Justice Wetzel's interest in the proceeding, requiring his recusal, her false claims are exposed herein in the context of discussion of those Points. [*see* pp. 40-47; 54-58 *infra.*].

B. Ms. Fischer's "Questions Presented" is Based on Knowing and Deliberate Falsification and Misrepresentation of Material Fact and Law, Followed by Knowingly False and Misleading Supposed "Answers" of the Lower Court

Ms. Fischer's "Questions Presented" (at pp. 2-3) is unauthorized. Respondent did not cross-appeal. Consequently, pursuant to CPLR §5528(b), Ms. Fischer was limited to "a counterstatement of the questions involved... only if respondent disagrees with the statement of the appellant". Ms. Fischer's Brief identifies *no* respect in which Respondent disagrees with Petitioner's statement of questions.

Beyond that, Ms. Fischer's "Questions Presented" violate the fundamental requirement "that the facts incorporated in the question presented... be fairly stated and fully supported by the record.", Thomas R. Newman, New York Appellate Practice, §7.10 (2000). As herein demonstrated, Ms. Fischer's "Questions Presented" are founded on flagrant misrepresentation, of both fact and law.

Question 1:

Aside from the fact that Ms. Fischer's Question 1 (at p. 2) refers to Judiciary Law §45, the statute relating to confidentiality, rather than §44.1, the statute relating to the Commission's duty upon receipt of a judicial misconduct complaint, it alters the language defining the Commission's statutory duty under Judiciary Law §44.1 from "investigate" to "fully investigate" and then builds upon that alteration by suggesting that the Commission can "conclude[] that the complaint does not merit comprehensive investigation", when Judiciary Law §44.1 expressly conditions dismissal of a complaint without investigation on the Commission determining "that the complaint on its face lacks merit".

Contrary to Ms. Fischer's claim (at p. 2) that Justice Wetzel answered this Question "in the negative", he did not. Reflecting this, her Brief is devoid of any subsequent reference as to how and in what context Justice Wetzel allegedly answered this Question. Indeed, her Question 1 has no corresponding Point in the Argument section of her Brief[14].

Moreover, inasmuch as Ms. Fisher's "Statement of the Case" (at p. 13) makes it appear that Justice Wetzel predicated his dismissal decision solely on Justice Lehner's decision in *Mantell v. Commission* and not also on Justice Cahn's decision in *Doris L. Sassower v. Commission*, Ms. Fischer cannot – and does not -- purport that Justice Wetzel's supposed "answer" to Question I came *via* his reliance on Justice Cahn's claim that "initial review and inquiry" is a kind of preliminary investigation.

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[14] *See*, Newman, New York Appellate Practice, §7.10 (2000): "The questions presented should be

Question 2:

Ms. Fischer's Question 2 (at pp. 2-3), relating to a complainant's standing – presumably to sue the Commission and impliedly for violation of Judiciary Law §44.1 in dismissing a complaint "valid on its face" -- refers to "full investigation", although this is not what Judiciary Law §44.1 requires and the record establishes only a single level of "investigation" at the Commission.

Contrary to Ms. Fischer's claim, Justice Wetzel did not answer Question 2 "in the negative". If anything, to the extent Question 2 concerns a complainant's standing to sue the Commission for dismissing his facially-meritorious judicial misconduct complaint in violation of Judiciary Law §44.1, Justice Wetzel answered "in the affirmative". This, because he did not grant dismissal based thereon, notwithstanding the Attorney General asserted lack of standing as a defense in his dismissal motion.

Question 3:

Ms. Fischer's Question 3 (at p. 3) asks:

> "Was an Acting Supreme Court Justice required to recuse himself from a case based on speculation that the outcome might negatively affect the Governor, upon whom the justice was dependent for reappointment, or on speculation that the outcome might persuade the Commission to revisit previously-dismissed complaints concerning the justice?"

Ms. Fischer's question conceals that Justice Wetzel was not being asked to recuse himself based on speculation. Rather, he was being asked to recuse himself based on Petitioner's December 2, 1999 application [A-250-290], which particularized his self-

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directly related to the point headings that follow in the argument portion of the brief. The point headings

interest in the context of a record requiring that the case be decided in Petitioner's favor *as a matter of law*.

Ms. Fischer's claim that Justice Wetzel answered Question 3 "in the negative" is misleading. Justice Wetzel's decision denying Petitioner's recusal application did not address, let alone identify, any of the grounds it set forth as warranting his disqualification – a fact particularized by Petitioner's Brief (at pp. 42-52). Thus, it is a distortion for Ms. Fischer to purport that Justice Wetzel rejected Petitioner's asserted grounds for his disqualification as being based on "speculation".

C. Ms. Fischer's "Statement of the Case" is Permeated with Knowing and Deliberate Falsification, Misrepresentation, and Omission of Material Fact

Ms. Fischer's "Statement of the Case" (at pp. 3-14) is, likewise, unauthorized. As Respondent did not cross-appeal, Ms. Fischer was limited, pursuant to CPLR §5528(b), to "a counterstatement of the nature and facts of the case... only if respondent disagrees with the statement of the appellant". Ms. Fischer's Brief identifies *no* respect in which Respondent disagrees with Petitioner's "Statement of the Case". Indeed, Petitioner's recitation is, in every respect, undenied and undisputed.

It is to obscure this fact – establishing Petitioner's right to all the relief she seeks on the appeal – that Ms. Fischer interposes a four-section "Statement of the Case", fashioned on wilful and deliberate misrepresentation and omission of the material facts, misleading inferences, disparaging characterizations, and introduction of defamatory matter having no

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should be affirmative statements in answer to each question presented."

relevance.

Ms. Fischer's A. Background: 1.
"The Commission on Judicial Misconduct"

The first part of Ms. Fischer's two-part "Background" mistitles the Commission, "The Commission on Judicial *Mis*conduct" (sic).

Although Ms. Fischer ostensibly is providing legal framework for understanding the Commission, her four paragraphs under this heading (at pp. 3-5) are essentially a mix of misinformation and deliberate misrepresentation about the statutes and rules involved in the Verified Petition's first three Claims for Relief [A-37-42]. As to the second three Claims for Relief [A-42-45], Ms. Fischer simply omits any discussion of the statute, rules, and constitutional provisions involved.

The apparent purpose of this omission is to obscure that these Claims do not correspond to anything in *Doris L. Sassower v. Commission* and that neither the decision therein nor in *Mantell v. Commission* dispose of Petitioner's entitlement to relief based thereon. This would additionally underscore the spuriousness of Justice Wetzel's imposition of a filing injunction against Petitioner and the non-party CJA based on his pretense that Petitioner's lawsuit is duplicative of Doris Sassower's lawsuit against the Commission.

Ms. Fischer begins her first paragraph (at p. 3) by purporting that the Commission was "created in 1976 by the New York State Legislature". At best, this is a gross simplification to conceal the significant facts surrounding the Commission's creation, such

as those highlighted in Point II of the Memorandum of Law in *Doris L. Sassower v. Commission*[15], referred to at the outset of Petitioner's analysis of Justice Cahn's decision [A-52]. The Commission – first operating as a temporary commission – was created by the Legislature in 1974. This was Article 2-A of the Judiciary Law. In 1975, the People of this State approved a constitutional amendment, as a result of which the Legislature amended Article 2-A to make the temporary commission permanent. Then, after the People approved a further constitutional amendment in 1978, the Legislature amended Article 2-A yet again. Most significant about these two emendations of Article 2A, which followed passage of each of the two constitutional amendments, is that the language of the current Judiciary Law §44.1 describing the Commission's investigative duty was left unchanged even while substantial revisions were being made directly above and below that language.

Ms. Fischer's first paragraph (at p. 4) also replicates the hoax perpetrated by Justice Lehner's decision in *Mantell v. Commission* as to why the Commission is not subject to mandamus. As hereinabove set forth (at pp. 9-10 *supra*), she does this by concealing that the Commission's mandatory investigative duty under Judiciary Law §44.1 does not apply to complaints it initiates against "a judge on its own motion", which is separately governed by Judiciary Law §44.2, giving the Commission discretion with respect thereto.

Ms. Fischer's second paragraph (at p. 4), which quotes from Judiciary Law §45, conspicuously avoids identifying the "few exceptions" specified therein to the

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[15] Such Memorandum of Law is not only part of the physically-incorporated record in *Doris L. Sassower v. Commission* [A-346], but was annexed by Petitioner as Exhibit "Y" to her September 21, 2000 motion to intervene, etc. in the appeal of *Mantell v. Commission*.

confidentiality it imposes. As Ms. Fischer knows from the record [A-97-98; A-104-105]–including the Verified Petition [A-40-42] -- §44 is exempted and the notification that the Commission is required to give complainants as to the disposition of their complaints contains no restrictions as to its form and content. Moreover, contrary to Ms. Fischer's inference (at p. 4), the issue is not "access to the Commission's records". The issue is access to basic information substantiating the legitimacy of the Commission's dismissal of a judicial misconduct complaint.

Ms. Fischer's third and fourth paragraphs (at pp. 4-5) pertaining to the so-called "two-part procedure for investigating a complaint" under 22 NYCRR §§7000.1 and 7000.3 is, as hereinabove detailed (at pp. 6-8 *supra*), a knowing and deliberate deceit – perpetuating the hoax perpetrated by Justice Cahn's decision – and belied by Petitioner's analysis thereof [A-52-54], as well as by the uncontroverted evidentiary proof in the record from the Commission's Administrator.

Ms. Fischer's A. Background: 2
"Previous Lawsuits Involving Doris Sassower, the Commission, and The Justices of the Appellate Division, Second Department"

The second part of Ms. Fischer's two-part "Background" of her "Statement of the Case" consists of four paragraphs (pp. 5-7).

Ms. Fischer's first paragraph (at p. 5) begins with a misleading first sentence, "In 1991, the Grievance Committee of the Appellate Division, Second Department, indefinitely suspended the law license of petitioner's mother, Doris L. Sassower". Aside from the fact that it is not the Grievance Committee that indefinitely suspended Doris Sassower's law license, but the

Appellate Division, Second Department, Doris Sassower's suspension is irrelevant. Reflecting this, neither the allegations of the Verified Petition [A-22-46] nor Justice Wetzel's decision [A-9-14] refer to it. For that matter, neither cite the *Doris L. Sassower v. Mangano* state Article 78 proceeding and federal action based thereon.

To the extent that Doris Sassower's suspension is relevant – as, for example, to elucidate the underlying judicial misconduct of Appellate Division, Second Department justices – Justices Rosenblatt, Thompson and Joy, among them -- the subsequent sentences of Ms. Fischer's first paragraph conceal ALL the pertinent uncontroverted facts as they appear in the underlying record – *to wit*, that Doris L. Sassower's suspension was politically-motivated retaliation for her judicial whistle-blowing advocacy, that she was suspended *without* an underlying petition, *without* a pre-suspension hearing, *without* findings or reasons, *without* any appellate rights, and, thereafter, that she was denied *any* post-suspension hearing. As these pertinent uncontroverted facts would have been disclosed had Ms. Fischer referenced the record, her first paragraph conspicuously fails to include a single citation to the record for Doris Sassower's suspension.

Instead, Ms. Fischer reinforces the illusion of the suspension's legitimacy by making it appear that it has withstood due process challenge. Thus Ms. Fischer states, "D. Sassower challenged her suspension *unsuccessfully* in both state and federal court" (emphasis added). She also describes the decisions in the *Sassower v. Mangano* federal action as "reviewing history of the disciplinary proceedings regarding D. Sassower". Here, too, she fails to include a single record reference for the federal and state decisions in *Doris L. Sassower v. Mangano*. This, because the uncontroverted record before her details that these decisions

are not only factually fabricated and legally insupportable, but resulted from the fraudulent litigation tactics by the Attorney General's office[16]. Indeed, the Attorney General's litigation misconduct in those cases, as likewise in *Doris L. Sassower v. Commission*, are among the grounds, detailed in Petitioner's omnibus motion as warranting his disqualification for multiple conflicts-of-interest[17].

The obvious purpose of Ms. Fischer's defamatory references to Doris Sassower's suspension and to the rejection of her legal challenges thereto, without disclosure of any of the uncontroverted underlying facts, is to foster an inference that Doris Sassower could not have filed "valid" judicial misconduct complaints with the Commission and that her subsequent Article 78 proceeding against it was yet a further baseless legal challenge by this suspended attorney. Were this inference unintended, Ms. Fischer could easily have referenced Doris Sassower's stellar credentials, appearing in the verified petition in *Doris*

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[16] Ms. Fischer's familiarity with record references on the subject may be seen from her citations to the record, in other contexts. As illustrative, her "Statement of the Case" (at p. 7) gives a citation to the record [A-55] for CJA's "public interest advertisement[]" expressly because it refers to *Doris L. Sassower v. Commission* as being "CJA's case". However, the significance of the ad [A-55-56], evident from its title, "*Restraining 'Liars in the Courtroom' and on the Public Payroll*", and from the most cursory examination of its content, is its particularized recitation of how *Doris L. Sassower v. Commission* as well as the *Sassower v. Mangano* state Article 78 proceeding and federal actions were "thrown" by fraudulent judicial decisions, aided and abetted by the State Attorney General.

Likewise, in Point IV of her Argument, Ms. Fischer provides (at p. 21) a string of citations to documents in the Appendix to support the proposition that Petitioner's correspondence to state officers and agencies, outside the court, have been "in the name of CJA". The fraudulence of the *Sassower v. Mangano* decisions, state and federal, and the Attorney General's conspiring role [A-57-84; 86-90] is elucidated in two of the four documents located at those citations.

Moreover, the uncontroverted cert petition in the *Sassower v. Mangano* federal action – a copy of which is part of the record herein [A-348] – particularizes the Attorney General's litigation misconduct in both the *Sassower v. Mangano* federal action, as well as in the Article 78 proceeding – beyond the synopsis version in "*Restraining 'Liars in the Courtroom' and on the Public Payroll*".

[17] *See, inter alia*, Petitioner's July 28, 1999 affidavit in support of her omnibus motion, ¶¶10-53.

L. Sassower v. Commission [A-179, ¶SEVENTH][18].

Ms. Fischer's second paragraph (at pp. 5-6) materially misrepresents the verified petition in *Doris L. Sassower v. Commission* by claiming that it

> "alleged that [Doris Sassower] had filed complaints concerning *a justice of the Second Department (in the D. Sassower case, Justice William B. Thompson)*, but that the Commission had violated its mandatory duty under *Judiciary Law §45* to investigate such facially valid complaints by summarily dismissing them (A. 181-183)." (emphases added)

Firstly, Doris Sassower's judicial misconduct complaints were not solely against Appellate Division, Second Department Justice Thompson, as Ms. Fischer falsely makes it appear, but against a variety of judges. Most pertinent of these complaints were three, dated September 19, 1994, October 26, 1994, and December 5, 1994, against panels of Appellate Division, Second Department Justices of which both Justices Rosenblatt and Thompson were members. Ms. Fischer's knowledge of that fact may be presumed from the record in *Elena Ruth Sassower v. Commission* [A-57], including ¶SEVENTEENTH of the Verified Petition therein [A-28]. Moreover, as evident from ¶EIGHTH thereof [A-25], but not identified by Ms. Fischer, when Doris Sassower filed these three judicial misconduct complaints with the Commission, each facially meritorious and each dismissed without investigation and without reasons, Justice Thompson was the Commission's highest-ranking judicial member [A-25].

Secondly, the mandatory investigative duty which Doris Sassower's verified petition

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[18] Ms. Fischer's intentions to defame may be further seen from her gratuitous citations (at pp. 8, 7) to *Blaustein v. Sassower* and *Wolstencroft v. Sassower* – whose irrelevance and baselessness is hereinafter particularized. *See* discussion herein at pp. 27, 55 (fn. 39) *infra*.

alleged the Commission to have violated is Judiciary Law §44.1, NOT Judiciary Law §45. Indeed, Judiciary Law §45 is nowhere cited in Doris Sassower's verified petition – a copy of which was part of the Appendix, readily accessible to Ms. Fischer [A-177-188].

As for Ms. Fischer's third paragraph (at pp. 6-7), describing Justice Cahn's July 13, 1995 decision dismissing the petition in *Doris L. Sassower v. Commission*, she conspicuously skips over any recitation of the procedural history of the case. A concise summary was part of the record before her – and its accuracy was completely uncontroverted. This is the summary that appears in "*Restraining 'Liars in the Courtroom' and on the Public Payroll*" [A-55-55a]. As to Ms. Fischer's recitation of Justice Cahn's decision, Ms. Fischer knows from the record before her that the basis upon which Justice Cahn dismissed the proceeding, which she uncritically repeats (at pp. 6-7), is factually fabricated and legally insupportable[19]. Those parts of the record include "*Restraining 'Liars'*" [A-55-56], CJA's analysis [A-52-54], and ¶NINTH of Appellant's Verified Petition [A-25-26]– all uncontroverted.

Ms. Fischer's Section B
"Petitioner's Misconduct Complaint Concerning Justice Rosenblatt"

Ms. Fischer's second section (at pp. 7-9) under the "Statement of the Case" heading consists of four paragraphs, all materially misleading:

The first paragraph (at p. 7) is false and misleading in several material respects. Firstly, the October 6, 1998 judicial misconduct complaint is not – as Ms. Fischer falsely

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[19] *See, inter alia*, discussion herein at pp. 3-5 *supra*.

makes it appear – solely against then Appellate Division, Second Department Justice Rosenblatt. This is evident from the October 6, 1998 complaint itself [A-57-58] – to which Ms. Fischer, conspicuously, provides NO record reference – as well as from Petitioner's Brief (at pp. 2, 5). These make plain that the October 6, 1998 complaint is also against the other Appellate Division, Second Department's justices, including Appellate Division, Second Department Justice Joy, who had replaced Justice Thompson as the Commission's highest-ranking judicial member [A-33]. Such omission serves the apparent purpose of concealing Justice Joy's obvious disqualification from determining Petitioner's October 6, 1998 complaint [A-57-58] – a disqualification which was the basis for Petitioner's February 3, 1999 complaint against him [A-98-99].

Secondly, although Ms. Fischer concedes (at p. 7) that "neither the present action nor D. Sassower v. Commission were brought in [CJA's] name", she conceals that the Attorney General's dismissal motion had purported that these proceedings were each brought on CJA's behalf [A-198-199]. It would appear that this concession by Ms. Fischer is to camouflage that Justice Wetzel's *sua sponte* imposition of an injunction against CJA rests on a record showing that the Attorney General wilfully distorted CJA's status[20]. Indeed, Justice Wetzel's decision [A-9-14] not only fails to acknowledge that CJA is a non-party, but opens with the false statement that the Attorney General had previously used, *to wit*, that Petitioner is suing "as the 'coordinator' of the Center for Judicial Accountability, Inc. ('CJA')" [A-9].

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[20] This was one of the many falsehoods in the Attorney General's dismissal motion exposed by

Thirdly, although Ms. Fischer purports (at p. 7) that "for the sake of clarity" the judicial misconduct "complaints at issue" in Petitioner's proceeding will be referred to "as petitioner's complaints, rather than CJA's", she fails to identify that Petitioner was the signator of each of the complaints [A-58, 100]– and that this material fact, as well as its significance, were part of the uncontroverted record before Justice Wetzel [A-212, 210][21].

The second paragraph (at pp. 7-8) is materially misleading in the second of its two sentences, stating:

> "Justices Rosenblatt and Justice Thompson, while they were Associate Justices of the Second Department, had been members of many of the panels that had issued rulings against D. Sassower in the lawsuits related to her disciplinary proceedings. See, e.g, Sassower v. Mangano, 196 A.D.2d 843, supra, (refusing to stay disciplinary proceedings); Sassower v. Blaustein, 208 A.D.2d 820 (2d Dep't 1994) (dismissing D. Sassower's complaint in legal fee action and striking her answer in related legal malpractice due to her failure to comply with discovery orders)."

This sentence, standing as it does without explication, is out of sequence. Its description relates not to the basis of Petitioner's October 6, 1998 judicial misconduct complaint, but to Doris Sassower's facially-meritorious September 19, 1994, October 26, 1994 and December 5, 1994 judicial misconduct complaints, whose dismissal by the Commission, without investigation and reasons, resulted in *Doris L. Sassower v. Commission*[22]. Such context-less presentation, blurring the distinction between the separate

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Petitioner's omnibus motion. *See* record references appearing at fn. 34 of Petitioner's Brief (at p. 62).

[21] *See* pp. 52-56 of Petitioner's September 24, 1999 Reply Memorandum of Law in support of her omnibus motion.

[22] These judicial misconduct complaints are Exhibits "G", "I", and "J" to the verified petition in

proceedings against the Commission brought by Petitioner and by Doris Sassower, serves no purpose but to buttress the false claim that Petitioner's lawsuit against the Commission is a repetition of Doris Sassower's lawsuit. This false claim is critical to Ms. Fischer's Point IV (at pp. 20-22), "The Court Did Not Err By Sua Sponte Enjoining Petitioner and CJA From Filing Further Lawsuits".

Additionally, contrary to Ms. Fischer's pretense (at p. 8), *Sassower v. Blaustein* has nothing to do with "lawsuits related to [Doris Sassower's] disciplinary proceedings". This distortion, as likewise, Ms. Fischer's gratuitous specification of that case as relating to Doris Sassower's "legal malpractice" and "failure to comply with discovery orders", serves no purpose but to give the illusion of substance to the bogus disciplinary proceedings against Doris Sassower, whose basis her Respondent's Brief (at p. 5) leaves altogether unspecified.

Moreover, the "factually and legally insupportable" decision in *Sassower v. Blaustein*, demonstrative of the appellate panel's actual bias for which its disqualification was sought, was the basis of Doris Sassower's December 5, 1994 judicial misconduct complaint against its judges, Justices Rosenblatt and Thompson among them. It followed Doris Sassower's October 26, 1994 complaint against that same appellate panel, based on its misconduct in connection with the oral argument of the case.

The third paragraph (at p. 8), purporting to describe Petitioner's October 6, 1998 judicial misconduct complaint [A-57-83], materially omits that the complaint alleged that

it was facially-meritorious. Instead, Ms. Fischer states "Petitioner concedes, however, that she has never seen Justice Rosenblatt's Commission application". The false inference she creates is that the facial merit of Petitioner's allegation of Justice Rosenblatt's believed perjury depends upon her having seen his application – an inference Ms. Fischer strengthens by concealing that such application is "publicly-inaccessible" [A-29].

The four sentences of Ms. Fischer's fourth paragraph (at pp. 8-9) are false and misleading in numerous material respects and rest, not on a recitation of facts, but on false characterizations and conclusory assertions.

As to the first sentence of that paragraph (at p. 8), "The Commission dismissed petitioner's complaint against Justice Rosenblatt on December 23, 1998", for which Ms. Fischer cites a reference of "A. 93", this is misleading. A-93 is the December 23, 1998 letter of the Commission's Clerk, which does *not* identify that the Commission dismissed the complaint on that date. Indeed, the record shows [A-108] that the date of the complaint's dismissal was among the information the Commission refused to provide – notwithstanding it had previously provided comparable information to another complainant whose complaint had been dismissed without investigation [A-116-121].

As to the second sentence of that paragraph (at pp. 8-9),

> "Undeterred, even after Justice Rosenblatt's appointment to the Court of Appeals had been confirmed, petitioner continued to exchange a series of letters with the Commission asking it to explain, *in detail*, why her complaint against Justice Rosenblatt had been dismissed (A.94-108)." (emphasis added),

Ms. Fischer implies that the Commission first dismissed Petitioner's complaint against Justice Rosenblatt and that his subsequent confirmation to the Court of Appeals should have satisfied Petitioner. This up-ends the record, which shows that Justice Rosenblatt was first confirmed [A-32] – and this, by an unprecedented no-notice, by-invitation-only confirmation hearing at which no opposition testimony was permitted and Petitioner specifically denied the opportunity to testify [A-101]. Only thereafter did the Commission's Clerk send Petitioner his December 23, 1998 letter purporting that the Commission had dismissed Petitioner's complaint – a letter providing no substantiating information whatever [A-93]. Petitioner's subsequent "series of letters" [A-94-115] shows that she was not asking for any explanation "in detail", but, rather, basic information that would establish the legitimacy of this purported dismissal and that she demonstrated, without controversion, that Judiciary Law §45 does not bar the Commission from providing a complainant with such basic information [A-104-105].

As to the third sentence of that paragraph (at p. 9), Ms. Fischer conceals the pertinent facts relating to those stray aspects of Petitioner's correspondence she chooses to disclose. Thus, she states that Petitioner

> "lodged a judicial misconduct complaint with the Commission against Justice Daniel Joy, for allegedly having participated in the decision to dismiss the complaint against Justice Rosenblatt despite having a purported conflict of interest".

She obscures, however, the otherwise obvious conflict-of-interest created by Justice Joy's "participat[ion] in the decision to dismiss" the October 6, 1998 complaint by concealing

that Justice Joy was an Appellate Division, Second Department justice and that Petitioner's October 6, 1998 judicial misconduct complaint was not only against Justice Rosenblatt, but his Appellate Division, Second Department colleagues, of which Justice Joy was one[23].

Ms. Fischer also states (at p. 9) that Petitioner's correspondence asserted that "the State Attorney General and Supreme Court Justice Herman Cahn had committed 'litigation fraud' in connection with the decision in D. Sassower v. Commission". However, she conceals the context, which was Petitioner's particularized contention that the Commission's disposition of the October 6, 1998 complaint was adversely affected by the fact that it was not a fair and impartial tribunal. This, because CJA's "vigorous public advocacy" against the Commission – arising from what occurred in *Doris Sassower v. Commission* – had presumably "engendered considerable animosity among the Commissioners" [A-99]. It is in this context that Petitioner's correspondence highlighted that Chairman Henry T. Berger was not only "a participant in the Commission's fraud" – which is how Ms. Fischer simplistically makes it appear (at p. 9)– but that he could be presumed to have particular animosity against Petitioner resulting from the fact that his complicitous role in the Commission's corruption was "publicly identified in CJA's public interest ad, '*Restraining 'Liars in the Courtroom' and on the Public Payroll*'" [A-55-56].

Ms. Fischer's final fourth sentence (at p. 9) that Petitioner commenced this Article 78 proceeding "[a]fter failing to receive what she believed to be satisfactory answers from

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[23] Nor does Ms. Fischer disclose – except inferentially – that Justice Joy was a member of the Commission. Even inferentially she does not disclose that he was its highest-ranking judicial member, replacing Justice Thompson [A-33, ¶ THIRTY-THIRD].

the Commission", is a wilful deceit by her. This may be gleaned from the fact that she does not support her deprecatory characterization of Petitioner with any particulars from the Commission's correspondence with Petitioner showing its response to be "satisfactory" in any respect. Specifically, she conceals the Commission's wilful failure and refusal to address all the legal issues presented by Petitioner's letters [A-94-115] which, thereafter, Petitioner embodied in her six Claims for Relief [A-37-45]. Among these, the Third Claim for Relief [A-40-42] that Judiciary Law §45 does not preclude the Commission from providing "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" and Judiciary Law §44 does not limit the form or content of such disclosure.

Ms. Fischer's Section C
"The Petition"

Ms. Fischer's third section under the "Statement of the Case" heading (at pp. 9-11) does not identify the six distinct Claims for Relief presented by Petitioner's Verified Petition [A-37-45], such as set forth in Petitioner's Brief (at pp. 10-11). Instead, Ms. Fischer lists the relief, without reference to the Claims for Relief. Comparison of these listed items (at pp. 9-10) with the relief itemized on the pages which Ms. Fischer cites from the Verified Petition [A-23-24] reveals material omissions.

As to the first item (at p. 9), "declare 22 NYCRR §7000.3 to be unconstitutional 'as written and as applied' (A.23)", Ms. Fischer has stripped it so as to delete the additional

word "unlawful" and the continuation:

> "as contravening the letter and spirit of Article VI, §22a of the New York Constitution and Judiciary Law §44.1, and commanding that Respondent cease and be prohibited from making any further dismissals thereunder" [A-23].

As to the second item (at p. 9), "vacate the Commission's 'summary dismissal' of petitioner's judicial misconduct complaint concerning Justice Rosenblatt (A. 23)"[24], Ms. Fischer has deleted reference to the complaint as "facially-meritorious" and to its dismissal by the Commission being "without investigation" [A-23].

As to the sixth item, to "'command[]' the Commission to 'formally 'receive' and 'determine' petitioner's misconduct complaint against Justice Daniel W. Joy (A. 24)", Ms. Fischer has deleted reference to his being an "Appellate Division, Second Department Justice" – and the February 3, 1999 date of the complaint [A-24].

As to the seventh item, "'request' the Governor to appoint a Special Prosecutor to investigate the Commission's 'complicity in judicial corruption (a. 24)", Ms. Fischer has deleted the explanatory continuation: "by powerful, politically-connected judges, *inter alia*, through its pattern and practice of dismissing facially-meritorious judicial misconduct complaints against them, without investigation or reasons" [A-24].

As to the ninth item, to "impose a $250 fine on the Commission under Public Officers Law 79 (A. 24)", Ms. Fischer has deleted the explanatory basis "for, without cause, refusing or neglecting to perform duties enjoined by law" [A-24].

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[24] Petitioner's description of the October 6, 1998 judicial misconduct complaint, appearing at A-23, does not specify any of the judges against whom it was directed.

After itemizing and varyingly expurgating the relief sought by the Verified Petition, Ms. Fischer adds a single additional sentence (at p. 11):

> "The petition asserted that the decision in D. Sassower v. Commission had been a 'fraud' (A. 26) and again asserted that Judiciary Law §45 mandated the acceptance and complete investigation of every 'facially valid complaint (A.37)."

This single sentence is false and misleading in three pivotal respects. Firstly, as Ms. Fischer knows, the Verified Petition more than "asserted" that the decision in *Doris L. Sassower v. Commission* is a "fraud". It detailed specific respects in which Justice Cahn's decision is factually fabricated and legally insupportable. This, by its ¶NINTH [A- 25-26] and by the analysis of Justice Cahn's decision, annexed as an exhibit to the Verified Petition [A-52-54], and whose accuracy was attested to by ¶FOURTEENTH[25] [A-27]. As highlighted by Petitioner's Brief (at p. 59), these provided the "detail required by CPLR §2016(b) for pleading fraud."

Secondly, the Verified Petition never asserted that Judiciary Law §45 mandates investigation of judicial misconduct complaints. As the Verified Petition and its Third Claim for Relief highlight [A-33, 40-42], that statutory provision relates to confidentiality. Thirdly, the Verified Petition never asserted anything having to do with "complete investigation", as Judiciary Law §44.1 confines itself to the Commission's duty to "investigate" every complaint not determined to be facially lacking in merit.

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[25] *See* also the summary of the decision appearing in CJA's public interest, "*Restraining 'Liars in the Courtroom' and on the Public Payroll*" [A-55-56], also annexed to the Verified Petition.

Ms. Fischer's Section D
"Petitioner's Application for Recusal"

Ms. Fischer's fourth section (at pp. 11-14) under the "Statement of the Case" heading is wilfully misleading from the very first of its seven paragraph. Identifying that Justice Wetzel was the seventh judge assigned to this case, Ms. Fischer's first paragraph states:

> "Six preceding justices, most of whom had been randomly assignment (sic), had recused themselves, some sua sponte and others after petitioner's recusal motions (A-122-127)."

Such general statement – unparticularized as to which judges were randomly assigned, which *sua sponte* recused themselves, and which did so after Petitioner made recusal motions – reflects Ms. Fischer's conscious knowledge that the particulars would expose the fraudulence of the claims asserted by Justice Wetzel in denying recusal and imposing a filing injunction against Petitioner and the non-party CJA. This would prevent her from uncritically repeating them, as she does in subsequent paragraphs under this heading (at p. 13).

Thus, based on the recitation in Petitioner's Brief (at pp. 13-22, 64)– whose accuracy Ms. Fischer does not deny and dispute – she knows that four of Justice Wetzel's six predecessors recused themselves *sua sponte*, that a fifth was removed from the case by Administrative Judge Crane, and that, apart from Justice Wetzel, only Justice Zweibel was the subject of a recusal application – and this Petitioner made orally. Nevertheless, Ms. Fischer uncritically repeats (at p. 13) Justice Wetzel's false claim as to "the case's history

of repeated recusal motions" and then, in her Point IV (at p. 22), justifies the filing injunction against Petitioner and the non-party-CJA based on "petitioner's repeated recusal motions".

Ms. Fischer's first paragraph also materially omits all particulars about the procedural history of the case except that "[w]hen the matter was finally directly assigned to Justice Wetzel by Administrative Judge Stephen Crane (A. 129), two motions, the Commission's Motion to Dismiss the Petition, and petitioner's Motion for Omnibus Relief, were pending."

Her second paragraph (at p. 11) then materially misrepresents the omnibus motion:

> "Petitioner's Motion for Omnibus Relief was directed against the Commission's attorney, the Attorney General of the State of New York (A. 195-197). It asked the court to disqualify the Attorney General from representing the Commission, to sanction the Attorney General and the Commission, and to refer them for criminal and disciplinary action, for their 'litigation misconduct' in connection with the present litigation – apparently by filing the motion to dismiss (Id.)"

Glaringly omitted is that Petitioner's omnibus motion also contained opposition to the Commission's dismissal motion and, indeed, that it sought a default judgment against the Commission and conversion of its dismissal motion to a motion for summary judgment in Petitioner's favor [A-195-197]. Plainly, disclosure of such material facts would expose that the case had progressed to a stage of final adjudication – contrary to Ms. Fischer's false claim in a subsequent paragraph (at p. 13) that Justice Wetzel's resistance to recusal was because, as a result of the prior recusals, "the case was needlessly absorbing scarce judicial

resources *without progressing beyond its preliminary stages*"[26] (emphasis added).

Moreover, by her use of the word "apparently" (at p. 11), Ms. Fischer deceitfully makes it seem as if there is some doubt that the sanctions/disciplinary/criminal referral relief sought by the omnibus motion relates to the dismissal motion. Ms. Fischer also makes it appear that the issue was "filing the motion to dismiss", rather than the content of the motion, which Petitioner's Brief highlighted (at p. 20) as being "from beginning to end, filled with falsification, concealment, omission, misrepresentation, distortion" [A-165]. The effect is to make Petitioner's dispositive omnibus motion seem frivolous.

Ms. Fischer's third paragraph (at pp. 11-12) is likewise misleading. Referring to Petitioner's omnibus motion, she states:

> "petitioner also asked that the case be assigned to a retired or about-to-be-retired judge, one who no longer had an interest in further judicial appointment. The claimed reason for this request was that prior actions against the Commission, including D. Sassower v. Commission, had been 'thrown' by 'fraudulent' judicial decisions (A. 221)."

Ms. Fischer's cited record reference of A-221 shows that the "claimed reason" is not as she sets forth. Rather, the reason specified by Petitioner was because "there is a reasonable question whether *any* judge under the disciplinary jurisdiction of the Commission can be fair and impartial in a case such as this." [A-221, emphasis in the original]. Ms. Fischer omits this, presumably because it is so immediately obvious that judges dependent upon the Commission have a conflict-of-interest in adjudicating a lawsuit

[26] The italicized portion is Ms. Fischer's own elaboration on Justice Wetzel's decision [A-9-14], which makes no such claim.

designed to reinvigorate its statutory investigative duty.

As to Ms. Fischer's reference (at p. 12) to "prior actions against the Commission", she conspicuously identifies only the *Doris L. Sassower v. Commission* Article 78 proceeding. A-221 shows that Petitioner cited two Article 78 proceedings against the Commission as evidencing the need for special assignment of the case so as to obtain a fair and impartial tribunal. Those cases were *Mantell v. Commission* and *Doris L. Sassower v. Commission* in that order. Ms. Fischer's "Statement of the Case" materially omits that Petitioner had identified that *Mantell v. Commission* had been "thrown" by a fraudulent judicial decision – or that she had provided an analysis [A-321-334] and copy of the case file in substantiation [A-350].

The purpose behind this material omission is evident three paragraphs later (at p. 13) when Ms. Fischer describes Justice Wetzel's decision. Startlingly, Ms. Fischer makes it appear as if Justice Wetzel's decision is based entirely on the *Mantell* decision – which decision she has heretofore concealed as having been challenged by Petitioner as fraudulent. Conspicuously omitted by Ms. Fischer is the first ground upon which Justice Wetzel predicated his dismissal: the decision in *Doris L. Sassower v. Commission* -- the only decision Ms. Fischer identified Petitioner as having challenged as fraudulent. *Thus, Ms. Fischer makes it appear that Justice Wetzel's dismissal is based on a single decision whose legitimacy had never been impugned, rather than, as the record shows, on two decisions, whose fraudulence Petitioner had demonstrated in the record before him.*

Also materially misleading is Ms. Fischer's single sentence (at p. 12) regarding

Petitioner's December 2, 1999 application for Justice Wetzel's recusal [A-250-290]. Ms. Fischer identifies only two grounds for Petitioner's recusal request: Justice Wetzel's "dependency on the Governor for appointment (in his case, to the Court of Claims), and because the Commission had dismissed several misconduct complaints concerning him." Ms. Fischer conceals that these two grounds, which she so incompletely identifies, are not the whole of Petitioner's application. In addition to these two grounds relating to Justice Wetzel's disqualification for interest under Judiciary Law §14, the application presented a litany of grounds based on the appearance and actuality of bias under §100.3E of the Chief Administrator's Rules Governing Judicial Conduct – meticulously summarized in Petitioner's Brief (at pp. 50-51).

The significance of this omission may be seen from the Argument section of Ms. Fischer's Brief (at p. 17). Other than referring to §100.3E of the Chief Administrator's Rules, it identifies none of the grounds thereunder for recusal, as specified by Petitioner's December 2, 1999 application. This is understandable as it also provides no argument to counter the appearance and actuality of bias established by such grounds.

Likewise, materially omitted from Ms. Fischer's one-sentence description (at p. 12) of Petitioner's December 2, 1999 application [A-250-290] is that it sought more than recusal. It sought, in the alternative, Justice Wetzel's disclosure of facts it particularized as constituting grounds for his disqualification under Judiciary Law §14 and §100.3E of the Chief Administrator's Rules. This material omission is also carried over into Ms. Fischer's Argument section, which wholly omits Justice Wetzel's disclosure obligations.

As to the last four paragraphs (at pp. 12-13) under the "Petitioner's Application for Recusal" heading, they recapitulate the conclusory claims of Justice Wetzel's decision, without denying or disputing any of facts in Petitioner's Brief (at pp. 42-68) establishing the baselessness of such claims. These paragraphs do, however, contain a significant material omission and addition – hereinabove both mentioned. As to the material omission, Ms. Fischer's omission (at p. 13) that Justice Wetzel based his dismissal of Petitioner's lawsuit on the decision in *Doris L. Sassower v. Commission* so as to make it appear the *Mantell* decision was the sole ground for dismissal. As to the material addition, Ms. Fischer's pretense (at p. 13) that Justice Wetzel's decision not to recuse himself had something to do with his concern that the lawsuit had not "progress[ed] beyond its preliminary stages", when Justice Wetzel never made such claim and the lawsuit had proceeded to a level of ultimate adjudication by Petitioner's request for summary judgment in her omnibus motion [A-196].

The last of these paragraphs also contain a speculation, not part of Justice Wetzel's decision. Thus Ms. Fischer purports (at p. 13) that Justice Wetzel's injunction against the non-party CJA, in addition to Petitioner, was because he "clearly regard[ed] petitioner, D. Sassower and their not-for-profit organization, CJA, as alter egos". This speculation does not belong in a "Statement of the Case", which is supposed to be limited to facts.

D. Ms. Fischer's "Argument" is Based on Knowing and Deliberate Falsification, Misrepresentation and Omission of Material Fact and Law

Ms. Fischer's Point I
"Petitioner Has No Standing to Sue the Commission"

Ms. Fischer makes big claims for her Point I (at pp. 14-15), referencing it in her "Preliminary Statement" (at p. 2) for the proposition:

> "Initially, *as a matter of law* petitioner had no standing to seek an order compelling the Commission to exercise its discretion by 'accepting' and 'investigating' a previously-dismissed judicial misconduct complaint. Therefore, recusal, and the other forms of relief petitioner sought, are beside the point." (emphasis added)

Yet, Ms. Fischer's Point I cites only a single New York case for this "matter of law", the Appellate Division, First Department's decision in *Michael Mantell v. New York State Commission on Judicial Conduct*, 715 N.Y.S.2d 316 (1st Dept. 2000)[27] – a decision which, tellingly, cites NO law on the standing issue.

From the *Mantell* appellate decision, Ms. Fisher quotes two of its five sentences, underscoring the second for emphasis:

> "Petitioner lacks standing to assert that, under Judiciary Law §44(1), respondent is required to investigate all facially meritorious complaints of judicial misconduct. Respondent's determination whether or not a complaint on its face lacks merit involves an exercise of discretion that it not amenable to mandamus. " (emphasis in Ms. Fisher's Brief, at p. 14)

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[27] The first footnote to Petitioner's Brief (at p. 3) gave Ms. Fischer notice that Petitioner had made a motion to intervene in the *Mantell* appeal. Had Ms. Fischer reviewed the appeal file of that case, she would know that the Attorney General opposed such intervention, in face of his own concession that the *Mantell* appellate decision "may impact the arguments presented in and the outcome of Sassower's appeal." By reason of that opposition, Ms. Fischer should be ashamed -- if not estopped -- from presenting the *Mantell* appellate decision as grounds for dismissing Petitioner's appeal.

Ms. Fischer's underscored second sentence from the *Mantell* appellate decision has NO relationship, other than proximity, to the first sentence. Its inclusion is as "filler" to mask that her scanty argument on "standing" is devoid of factual and legal support.

As for the first quoted sentence from the *Mantell* appellate decision, "Petitioner lacks standing to assert that, under Judiciary Law §44(1), respondent is required to investigate all facially meritorious complaints of judicial misconduct", this is NOT equivalent to the broad proposition advanced by Ms. Fischer's Point I title that "Petitioner Has No Standing to Sue the Commission". Obviously, there are many grounds for suing the Commission – and Petitioner's suit, unlike Mr. Mantell's, is grounded on more than the Commission's investigative duty under Judiciary Law §44.1. This is evident from her Third through Sixth Claims for Relief [A-40-45].

Nor does the above-quoted first sentence of the *Mantell* appellate decision even stand for the more limited proposition with which Ms. Fischer's Point I opens, "Petitioner has no standing to challenge the Commission's alleged 'summary dismissal' of the complaints she filed against Justices Rosenblatt and Joy" (at p. 14). This, because the *Mantell* appellate decision does not hold, except by inference, that Mr. Mantell lacked standing to challenge the Commission's summary dismissal of *his* – as opposed to *all* -- judicial misconduct complaints. As Ms. Fischer nowhere purports that Mr. Mantell's supposed lack of standing as to *all* facially-meritorious complaints equates to his lack of standing as to his *own*, it is a deceit for her to pretend, citing nothing but the *Mantell* appellate decision, that Petitioner lacks standing as to her own facially-meritorious judicial

misconduct complaints.

Ms. Fischer's only other legal citation in her Point I is to *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). This appears to be for the proposition that standing requires personal injury as a predicate for a constitutional challenge. Conspicuously, Ms. Fischer does not discuss in what respect Petitioner's allegations in her Verified Petition that she is personally aggrieved do not meet that criteria. Indeed, she does not even acknowledge the existence of those allegations. This is understandable, as the record shows that Petitioner highlighted the allegations of injury when she opposed the Attorney General's dismissal motion, which had raised a defense based on lack of standing[28].

The record further shows that the Attorney General did not, thereafter, deny or dispute the sufficiency of those allegations – nor Petitioner's citation to legal authority based on New York case law[29] showing that a defense based on standing was "frivolous" and in "bad faith". Petitioner's uncontroverted legal presentation was as follows:

> "...the Attorney General's frivolous, bad-faith invocation of a "standing" defense... is manifest upon reading the commentary on the subject of standing in Siegel, New York Practice, §136 (1999 ed., pp. 223-5). Such commentary quotes and discusses *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6 (1975), a case cited in the Attorney General's dismissal motion (at p. 25), *without* interpretive discussion. According to the commentary:
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> > 'Although a question of 'standing' is not common in New York, its infrequent appearance is likely to be where administrative

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[28] *See* Petitioner's July 28, 1999 Memorandum of Law, pp. 75-80.

[29] *See* Petitioner's September 24, 1999 Memorandum of Law, pp. 56-57.

> action is involved. A good example is *Dairylea Cooperative, Inc. v. Walkley*... The court said that '[o]nly where there is a clear legislative intent negating review... or lack of injury in fact will standing be denied.' The test today is a liberal one, according to *Dairylea*, and the right to challenge administrative action, articulated under the 'standing' caption, is an expanding one.
>
> ...With the taxpayer suit having been expressly adopted in New York, and with the Court of Appeals having acknowledged that in general 'standing' is to be measured generously, the occasion for closing the court's doors to a plaintiff by finding that his interest is not even sufficient to let him address the merits, which is what a 'standing' dismissal means, should be infrequent. Ordinarily only the most officious interloper should be ousted for want of standing.'"

Petitioner again provided this legal presentation to the Attorney General – ***verbatim*** -- when she moved to intervene in Mr. Mantell's appeal[30] inasmuch as the Attorney General had raised a defense of standing against Mr. Mantell. Here too, the Attorney General did not deny or dispute this presentation of New York case law. Under such circumstances – and where, even now, Ms. Fischer does not deny or dispute this legal presentation, based on New York case law -- it is a deceit for her to foist a standing defense on this appeal. This is especially so where she has NO New York case law other than the Appellate Division's fiat in *Mantell*, unsupported by any case law, New York[31] or otherwise.

Moreover, because the *Mantell* appellate decision contains no factual specificity as

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[30] Actually Petitioner's intervention motion *twice* presented such *verbatim* legal presentation: *See* fn 8 (at pp. 9-10) of her moving affidavit and Exhibit "Z-3" thereto.

[31] Among New York cases relevant to establishing the frivolousness of Ms. Fischer's position that a complainant lacks standing to sue the Commission based on its unlawful dismissal of his own complaint – which would plainly result in no one having standing to sue the Commission for violation of Judiciary Law §44.1 -- is *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364 (1975), where the New York Court of Appeals stated "we are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny...".

to why Mr. Mantell supposedly lacks "standing to assert that, under Judiciary Law §44(1), [the Commission] is required to investigate all facially meritorious complaints of judicial misconduct" – such lack of standing cannot be applied to Petitioner, whose lawsuit materially differs from Mr. Mantell's[32]. Ms. Fischer not only fails to disclose these material differences, but her Point I affirmatively conceals them by stating (at p. 14) that Petitioner's Notice of Appeal had described *Mantell*, then on appeal, as a "related proceeding". The inference is that Petitioner herself viewed the *Mantell* lawsuit as materially identical to her own, notwithstanding the record before Ms. Fischer reflects Petitioner's awareness of the material differences. Indeed, Petitioner's Brief itself identifies that "her Verified Petition presented issues different from those in *Mantell v. Commission*" (at p. 61, fn. 33), referencing the pertinent portion of the record in Petitioner's Appendix [A-315, fn. 14].

The record before Ms. Fischer establishes that whereas Mr. Mantell's lawsuit was brought to vindicate his own rights, limited to investigation of his own summarily-dismissed judicial misconduct complaint, Petitioner's lawsuit, as its title reflects, was brought *pro bono publico*, presented constitutional challenges to a variety of rule and statutory provisions, and expressly requested that "with respect to those branches of relief as seek a declaration of the unconstitutionality of statutory provisions, conversion of this proceeding to the extent required by law into a declaratory judgment action" [A-20][33].

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[32] "...precedents are controlling only if their facts are similar to those of the case under consideration." Newman, N.Y. Appellate Practice, §7.11[1] (2000).

[33] *See*, Boryszewski *v. Brydges*, 37 N.Y.2d 361, 365 (1975), "...we exercise the authority granted in CPLR 103 (subd. [c]) and convert the proceeding into an action for a declaratory judgment – the

According to Siegel, New York Practice, §436 (1999 ed., pp. 705-707),

> "As a rule, the declaratory action can be brought *by any person involved in a genuine civil controversy* who feels that a mere judicial declaration of rights vis-à-vis the other side will do the job.
>
> 'The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.'",

citing *James v. Alderton Dock* Yards, 256 N.Y. 298, 305 (1931). (emphasis added)

Ms. Fischer does not dispute that Petitioner is involved in "a genuine civil controversy". However, she appears intent on concealing that the "genuine civil controversy" concerns Judiciary Law §44.1. Thus, her "Statement of the Case" (at pp. 9-10) contains no reference to Judiciary Law §44.1 in itemizing the relief sought by the Verified Petition, *misrepresents* (at p. 11) that Judiciary Law §45 is the statute asserted by the Verified Petition as requiring the Commission to investigate facially-meritorious complaints, and similarly *misrepresents* (at p. 6) this statute as having been at issue in *Doris L. Sassower v. Commission*. All this follows the first of her "Questions Presented" (at p. 2) which *misrepresents* Judiciary Law §45 as the statute relating to investigation of facially-meritorious complaints and her Table of Authorities, which omits Judiciary Law §44.1 from among "Statutes and Regulations".

As Ms. Fischer knows from the Brief and Appendix before her, Judiciary Law §44.1 is the foremost "genuine civil controversy" presented by Petitioner – and the controversy surrounds its statutory language that the Commission "shall" investigate every

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appropriate vehicle for examination of the constitutionality of legislation", citing cases and 3 Weinstein-

complaint it receives, except where it determines that a complaint lacks merit on its face. As recognized by the Court of Appeals in *Nicholson v. State Commission on Judicial Conduct*, 50 NY2d 597, 610-611 (1980) [A-329][34] and by the Commission's Administrator in his essay, "*Judicial Independence is Alive and Well*", NYLJ, 8/20/98 [A-59] – both part of the record – there is nothing discretionary in the "shall investigate" language, which can be obviated only by a Commission determination that a complaint is not facially meritorious.

Consequently, Petitioner is not "su[ing] the Commission to perform a discretionary act" – as Ms. Fischer pretends (at p. 14). She is suing the Commission to compel its compliance with its mandatory investigative duty with respect to Petitioner's October 6, 1998 complaint against then Appellate Division, Second Department Justice Rosenblatt and his Appellate Division, Second Department brethren, whose dismissal by the Commission was unaccompanied by any determination that it lacked facial merit, as well as with respect to Petitioner's February 3, 1999 complaint against then Appellate Division, Second Department Justice Joy – which the Commission neither acknowledged nor dismissed.

Tellingly, Ms. Fischer, whose Brief nowhere denies or disputes that each of these two complaints are *facially-meritorious*, conceals that the October 6, 1998 complaint was dismissed, *without* any determination that it lacked facial merit. She also affirmatively

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Korn-Miller, N.Y. Civ. Prac., ¶2001.06g.

[34] *See* Point II of Doris L. Sassower's June 8, 1995 Memorandum of Law (at p. 14) in *Doris L. Sassower v. Commission* – referenced in Petitioner's analysis of Justice Cahn's decision [A-52].

misrepresents that the February 3, 1998 complaint was dismissed, when it was not[35].

This materially differs from Mr. Mantell's case, where his facially-meritorious complaint was dismissed with a claim that "the Commission concluded that there was no indication of judicial misconduct upon which to base an investigation" [A-300] – a fact expressly pointed out in the record before Ms. Fischer.

Ms. Fischer's Point II
"Supreme Court Did Not Abuse its Discretion by Denying Petitioner's Recusal Motion"

Ms. Fischer prefaces (at p. 15) her 3-part Point II with the assertion that:

> "No matter what Supreme Court justice ultimately was assigned to hear petitioner's case, he or she would have been required, by *Mantell*, to dismiss the petition, just as Justice Wetzel did. Therefore, any question of judicial bias is meritless."

This is a deceit – for any number of reasons. Firstly, irrespective of whether Ms. Fischer is referring to Justice Lehner's decision in *Mantell* [A-299-307], already rendered when this proceeding was before Justice Wetzel, or the Appellate Division's not-yet-rendered affirmance, with its added ground of lack of standing, neither decision could be embraced by any fair and impartial tribunal.

As to Justice Lehner's decision, no fair and impartial tribunal could have embraced it in face of Petitioner's uncontroverted 13-page analysis, in the record [A-322-334], showing the decision to be a fraud. At minimum, such uncontroverted analysis compelled any fair and impartial tribunal to have made findings as to its accuracy. Justice Wetzel's failure to make any findings as to the analysis, whose very existence his decision conceals,

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[35] *See* pp. 1, 8, 14 of Ms. Fischer's Brief.

in and of itself establishes his actual judicial bias. This, because the analysis dispositively proves the fraud his decision perpetrates. Ms. Fischer's awareness of this is evident from her conspicuous failure to deny or dispute any aspect of the analysis – whose very existence she likewise conceals.

As to the appellate affirmance of Justice Lehner's decision, no fair and impartial tribunal could have embraced its further grounds for dismissal based on Mr. Mantell's purported lack of standing. This may be seen from the failure of the Appellate Division, First Department to come forth with any legal authority for its invocation of lack of standing or, for that matter, factual specificity, to buttress dismissal on that ground. Indeed, that neither Justice Lehner nor Justice Wetzel saw any applicability to a defense based on lack of standing may be seen from their failure to adopt such ground in their decisions, notwithstanding it was urged on them by the Attorney General in both cases.

Secondly, the material differences between the narrow issues presented by the *Mantell* lawsuit and the extensive six Claims for Relief presented by Petitioner's, obvious to any fair and impartial tribunal, sharply limit the applicability of the *Mantell* decisions to Petitioner's case, quite apart from the fraudulence of those decisions.

Thirdly, no fair and impartial tribunal could have dismissed the proceeding without addressing the threshold issues presented by Petitioner's omnibus motion as to the Attorney General's profound litigation misconduct, rising to a level of fraud. Indeed, the disciplinary responsibilities which §100.3(D) of the Chief Administrator's Rules Governing Judicial Conduct imposes on a judge are mandatory.

By the same token, the appellate court's affirmative duty to respond to the irrefutable record evidence that the Attorney General, the Commission, and Justice Wetzel corrupted the judicial process transcends the technical issue of standing.

Ms. Fischer's Subpoint A
"The Manner in Which the Case was Assigned was Proper"

Ms. Fischer begins her Subpoint A (at p. 16) with the assertion that:

> "No impropriety, or appearance of impropriety, was created by Administrative Judge Crane's direct assignment of the case to Justice Wetzel, much less a 'flagrant violation of Petitioner's rights' (Pet. Br. 41)."

Such assertion is based on Ms. Fischer's omission of the material facts detailed by Point I of Petitioner's Brief (at pp. 39-42) as to the appearance and actuality of impropriety in Administrative Judge Crane's "direct assignment of the case". Among these material facts – which Ms. Fischer also omits from her "Statement of the Case" (at p. 11) – are: (1) that Administrative Judge Crane did not afford Petitioner notice and opportunity to be heard on either of the two occasions that he interfered with "random selection" in her case; (2) that Administrative Judge Crane ignored Petitioner's written request for information as to the basis for his interference, including whether, before directing the case to Justice Wetzel, he was aware of the facts pertaining to Justice Wetzel's disqualifying self-interest and bias, as particularized in Petitioner's December 2, 1999 application for Justice Wetzel's recusal [A-250-290]; and (3) that Petitioner's written request to Administrative Judge Crane included her assertion that he himself suffered from "disqualifying bias and self interest",

both actual and apparent[36].

Ms. Fischer's omission of these material facts from her Brief reflects her awareness that including them would expose the frivolousness of her pretense that no "appearance of impropriety" had been created by Administrative Judge Crane's direct assignment of the case to Justice Wetzel.

As pointed out by Petitioner's Brief (at p. 41), Administrative Judge Crane's non-response to Petitioner's written request to him was "inconsistent" with his "'Administrative Responsibilities' and 'Disciplinary Responsibilities' under §§100.3C and 100.3D of the Chief Administrator's Rules Governing Judicial Conduct". Ms. Fischer does not deny this. Nor does she deny that "the reasonable inference" presented by Administrative Judge Crane's non-response is that he

> "could not respond without conceding his flagrant violation of Petitioner's rights – including by directing the case to a judge he knew to be disqualified – and that he did not want to provide her with any relief from the prejudice she was suffering therefrom."

The only fact disclosed by Ms. Fischer's Subpoint A (at pp. 16-17) and "Statement of the Case" (at p. 11) is that Administrative Judge Crane "directly" assigned the case to Justice Wetzel. Ms. Fischer purports that this direct assignment is proper because §203.3(c)(5) is "a catchall exception" to "random selection" provided for by Uniform Supreme Court Rule §202.3(b). Actually, Ms. Fischer's citation to §203.3(c)(5) is incorrect.

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[36] The very first footnote of Petitioner's Brief (at p. 3) identifies Administrative Judge Crane's self-interest and presumed bias against Petitioner, as set forth at pages 6-14 of Petitioner's February 23, 2000 letter to Governor Pataki, annexed as Exhibit "G" to Petitioner's September 21, 2000 affidavit in support of her motion to intervene in the *Mantell* appeal.

The correct citation is §202.3(c)(5), whose language Ms. Fischer quotes (at p. 16) as follows:

> "[t]he Chief Administrator may authorize the transfer of any action or proceeding and any matter relating to an action or proceeding from one judge to another in accordance with the needs of the court."

Ms. Fischer does not assert that the authorization to the "Chief Administrator" in §202.3(c)(5) extends to an administrative judge[37] -- here at issue. Nor does she identify "the needs of the court" on which, pursuant to §202.3(c)(5), any such transfer would have had to be predicated. The record fails to disclose any "needs of the court", let alone "needs" warranting Administrative Judge Crane to twice interfere with "random selection" so as to remove the case from randomly-assigned Justices Huff and Kapnick – neither of whom were gubernatorial appointees – to Justices Zweibel and Wetzel, each gubernatorial appointees, whose terms, in Justice Zweibel's case, was shortly expiring, and in Justice Wetzel's case, was already expired.

Obviously, were §202.3(c)(5) applicable to either occasion in which Administrative Judge Crane interfered with "random selection", he was in a position to have said so himself, in response to Petitioner's written request for legal authority [A-291-293]. That he failed to come forth with such legal authority strongly suggests that his actions were not based thereon.

It must be noted that Ms. Fischer nowhere acknowledges that Administrative Judge

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[37] The "Definitions" section at §202.1(e) provides that "'Chief Administrator of the Courts' in this Part also includes a designee of the Chief Administrator".

Crane's interference was without affording Petitioner notice and opportunity to be heard. The closest she comes is by her claim (at p. 16) "Rule 203.3(c)(5) does not require any specific fact-finding or hearing for such an administrative transfer to take place". As stated, the record contains *no* evidence that Administrative Judge Crane relied on §202.2(c)(5) -- as he failed to respond to Petitioner's request for legal authority. Moreover, the absence of a requirement for "specific fact-finding or hearing" does not mean that notice and opportunity to be heard can be altogether dispensed with. Conspicuously, Ms. Fischer presents no legal authority for that repugnant proposition, which she does not even expressly articulate. Nor does she address *Morfesis v. Wilk*, 130 A.D.2d 244 (1st Dept. 1988), cited in Petitioner's Brief (at p. 40) for the proposition of notice and opportunity to be heard.

Rather than addressing such relevant due process issue, whose significance was highlighted by Petitioner's Brief (at pp. 1, 39-42), Ms. Fischer asserts "litigants do not have standing to challenge a failure to comply with the Individual Assignment System rules", citing the Appellate Division, First Department's decision in *Coastal Oil N.Y. v. Newton*, 231 A.D.2d 55 (1997). As Ms. Fischer well knows, Petitioner is not challenging Administrative Judge Crane in an independent proceeding, as Coastal Oil challenged Judge Newton -- the context in which standing has relevance. Indeed, as the other two cases cited by Ms. Fischer make manifest, *Vacca v. Valerino*, 161 A.D.2d 1142 (4th Dept. 1990), and *Pomirchy v. Levitan*, 144 A.D.2d 655 (2d Dept. 1998), *app. den*, 73 N.Y.2d 708, *cert. den.*, 493 U.S. 824 (1989), a litigant may freely raise violation of Individual Assignment Rules

on an appeal.

Conspicuously, in the §1983 federal action, *New York Criminal Bar Association v. Newton*, 33 F. Supp.2d 289 (SDNY 1999), which followed the *Coastal Oil N.Y. v. Newton* Article 78 proceeding, the decision of the district court does not identify standing as having been a ground for the Appellate Division, First Department's dismissal of that proceeding. Rather, it describes the Article 78 proceeding as dismissed "on the grounds that Coastal's claims were 'purely speculative' as it had not asserted that 'any ruling made thus far by the presiding judges has been affected by bias.'", 33 F. Supp.2d 291.

Ms. Fischer skips over this further germane difference between the *Coastal Oil NY* Article 78 proceeding and Petitioner's case. As she well knows from Petitioner's Brief (at pp. 26-30), Petitioner's December 2, 1999 application for Justice Wetzel's recusal [A-250-290] demonstrated his actual bias by his November 22, 1999 letter to Petitioner [A-248-249], *inter alia*, purporting Petitioner had not presented an issue of his recusal, denying Petitioner's request for a conference, and imposing a peremptory deadline. Ms. Fischer does not deny or dispute the accuracy of the demonstration presented by the recusal application– a copy of which Petitioner had provided to Administrative Judge Crane when she requested information as to the basis for his directing the case to Justice Wetzel [A-291-293]. Nor does Ms. Fischer deny or dispute any aspect of Petitioner's Brief (at pp. 42-69), documentarily establishing that Justice Wetzel's ruling on that December 2, 1999 application and on Petitioner's lawsuit by his appealed-from decision [A-9-14] to be, in all material respects, factually false, fabricated and legally insupportable.

Finally, Ms. Fischer's citations to *Vacca v. Valerino* and *Pomirchy v. Levitan* – appeals in which challenges to violation of random assignment rules were not upheld -- are irrelevant and misleading. Ms. Fischer's own synopsis (at p. 17) of *Pomirchy* makes plain that it is factually inapposite: "when case was inadvertently assigned to two different judges, no error for clerk's office to select which judge would hear the case". Moreover, as noted by the decision in *Pomirchy* and diametrically opposite to the case at bar: "There is no evidence in the record of bias, prejudice, or wrongdoing on the part of the Justice who heard the case..." 144 A.D.2d 656.

As for *Vacca v. Valerino*[38], which Ms. Fischer misleadingly excerpts (at p. 16) for the proposition that: "The [IAS] rules provide for the assignment of cases to a particular Judge and permit the transfer of any matter from one Judge to another", she omits the specific rules referenced in the decision: "22 NYCRR 202.3[b], [c] [4], [5]." Examination of these rules shows that "random selection" is the designated mode of assignment of judges – with provisions for specific assignments and transfers being exceptions thereto.

Ms. Fischer's Subpoint B
"Petitioner Failed to Demonstrate that Justice Wetzel had any Cognizable 'Interest' in this Action"

Ms. Fischer's Subpoint B (pp. 17-19) is based on obscuring, first the law and then the facts, pertaining to Justice Wetzel's disqualification for interest.

As to the law, Ms. Fischer begins by obscuring the appellate standard governing

[38] At issue was not an original case assignment – such as at bar -- but the assignment of a contempt motion to a judge other than the one whose order was the subject of the motion. The decision in *Vacca* is devoid of particulars as to why and how the contempt motion came to be assigned to such different judge.

mandatory recusal for interest under Judiciary Law §14. This standard is cited in Petitioner's Brief (at p. 46) as "*de novo* review of whether the presented facts constitute interest under law". Ms. Fischer does not deny or dispute this. Nonetheless, she implies that the standard is "abuse of discretion". Thus, she asserts:

> "if no mandatory prohibition applies, the decision of a recusal motion based on allege bias and prejudice is a matter of the judge's conscience. People v. Moreno, 70 N.Y.2d 403, 405 (1987). The decision of a judge not to recuse himself is reviewed for abuse of discretion. Wolstencroft v. Sassower, 212 A.D. 2d 598, 600 (2d Dep't 1995)."[39]

As Petitioner's December 2, 1999 recusal application [A-255, 310-211] expressly asserted that the mandatory prohibition of Judiciary Law §14 applies, the question on this

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[39] Petitioner herself cited (at p. 50) *People v. Moreno* – as well as a raft of other New York cases and New York Jurisprudence for the legal proposition – unchallenged by Ms. Fischer – that the "abuse of discretion" standard is met where "bias or prejudice or unworthy motive" is "shown to affect the "result".

As the decision of the Court of Appeals in *Moreno* sets forth the "abuse of discretion" standard for which Ms. Fischer cites *Wolstencroft v. Sassower*, her citation to that Appellate Division, Second Department decision must be seen as superfluous. Indeed, it is deliberately gratuitous and prejudicial.

As the year of the *Wolstencroft* decision reflects, the Appellate Division , Second Department was then being sued in the *Doris L. Sassower v. Mangano* federal action. The verified complaint therein -- part of the record in this Article 78 proceeding [A-348] -- identifies (at ¶¶121-123) the politically-motivated conduct of the Supreme Court judge in the *Wolstencroft* case, Justice Nicholas Colabella, to whom the case was "steered", and whose disregard of "black-letter law as to jurisdiction and due process" resulted in Doris Sassower's bringing two Article 78 proceedings against him, necessarily in the Appellate Division, Second Department. The results were predictable – as likewise in the subsequent appeal, whose decision to which Ms. Fischer cites is a lawless cover-up of the criminal conduct of Justice Colabella, a childhood friend and former law partner of the then Chairman of the Westchester County Republican Committee who Doris Sassower had sued for his manipulation of elective judgeships [*Castracan v. Colavita*].

It must be noted that the strength of Justice Colabella's political connections were further evidenced in May 1997, when he was able to obtain an appointment by the Governor to the Appellate Division, First Department. He served there for one year until he "decided" to move back down to the Supreme Court. The legitimacy of the Appellate Division, First Department's decision in *Coastal Oil N.Y. v. Newton*, 231 A.D.2d 55 (1997) – where the issue was a litigant's right to random judicial assignment – should be seen in the context of Judge Collabella's participation on the appellate panel, coming from the background of the *Wolstencroft* case to which he had been "directly assigned".

appeal as to whether Justice Wetzel was compelled to recuse himself pursuant to Judiciary Law §14 is governed by *de novo* review.

Moreover, to the extent that Petitioner's December 2, 1999 recusal application [A-250-290] also sought Justice Wetzel's disqualification under §100.3(E) of the Chief Administrator's Rules Governing Judicial Conduct based on the reasonable questions as to his impartiality, Ms. Fischer does not deny or dispute the legal authority cited by Petitioner's Brief (at pp. 49-50) for the proposition that

> "the appellate standard should, likewise, be *de novo* review, particularly where the lower court performed no 'fact-finding', Flamm, Judicial Disqualification, at 1003-4; 1007-8; Stempel, Jeffrey W., *Rehnquist, Recusal and Reform*, Brooklyn Law Review, 589, 661-662 (1987)".

Indeed, Ms. Fischer also does not deny or dispute that Justice Wetzel's decision – to which she never once refers in her Subpoint B (at pp. 17-19) -- makes no findings as to the specific grounds on which Petitioner's December 2, 1999 application sought his disqualification. Tellingly, Ms. Fischer's Subpoint B (at pp. 17-19) fails to provide even a single page citation to Petitioner's December 2, 1999 recusal application [A-250-290] – the operative document to be examined on *de novo* review. Such examination readily reveals the distortions and simplifications in Ms. Fischer's garbled recitation (at p. 18) of the two grounds Petitioner asserted as constituting Justice Wetzel's disqualifying self-interest under Judiciary Law §14. The following is illustrative.

As to the first ground -- Justice Wetzel's immediate dependency on the Governor for reappointment by reason of his expired Court of Claims term -- Ms. Fischer omits (at

p. 18) the specific facts detailed by Petitioner's application as to how the lawsuit "directly implicate[s] the Governor in Respondent's corruption". This, notwithstanding pages 47-48 of Petitioner's Brief to which Ms. Fischer three times cites (at p. 18), highlight these facts, *to wit*, the Governor's knowledge of Petitioner's facially-meritorious October 6, 1998 judicial misconduct complaint against Justice Rosenblatt, prior to appointing him to the Court of Appeals, and his knowledge of the fraudulence of Justice Cahn's decision dismissing *Doris L. Sassower v. Commission* – of which Justice Rosenblatt had been a beneficiary. Indeed, so essential are these facts that Petitioner's Brief not only included them in her Argument (at pp. 46-48), but at the very outset of her "Statement of the Case" (at p 6). Conspicuously, Ms. Fischer omits them from both her Argument and "Statement of the Case"

Moreover, the significance of these essential facts was highlighted at page 48 of Petitioner's Brief:

> "Any adjudication in the proceeding which would require Respondent to investigate the October 6, 1998 *facially-meritorious* judicial misconduct complaint [A-57] would put the Governor at risk, as likewise, any adjudication of Petitioner's analysis of Justice Cahn's fraudulent judicial decision, annexed as Exhibit 'A' to the Verified Petition [A-52] and sworn to at ¶FOURTEENTH [A-27]."

Ms. Fischer does not deny or dispute this.

Ms. Fischer also omits the material allegation, set forth on that same page of Petitioner's Brief (at p. 48), that these specific adjudications were "compelled by the state of the record before Justice Wetzel". Ms. Fischer also does not deny this. Nor does she

deny or dispute *any* of the facts presented by the Brief as to the state of the record, showing Petitioner's "absolute entitlement to the relief requested by her Verified Petition [A-18] and omnibus motion [A-195]." Under such circumstances, where Petitioner's entitlement is *as a matter of law*, it is sheer deceit for Ms. Fischer to pretend (at p. 19):

> "Any 'interest' allegedly possessed by Justice Wetzel thus turned on the occurrence of a serious of speculative and implausible contingencies, all of which were dependent upon establishing petitioner's unfounded allegations of wide-ranging, high-level fraud and corruption."

As to the second ground -- Justice Wetzel's interest in ensuring that a reinvigorated Commission not investigate facially-meritorious complaints against him, such as those it had previously dismissed, without investigation -- Ms. Fischer contends (at p. 18) that this interest is "speculative" because it would first require that Petitioner's lawsuit "succeed[]". Here again, there is nothing "speculative" – the record establishing Petitioner's absolute right to the success of her lawsuit – and Ms. Fischer not denying the facial merit of the judicial misconduct complaint against Justice Wetzel, annexed to Petitioner's December 2, 1999 application for his recusal [A-266-277].

Ms. Fischer's Subpoint C
"Justice Wetzel's Decision is Not Itself Evidence of Disqualifying Bias"

Ms. Fischer's Subpoint C (p. 19) is based on multiple deceits as to Petitioner's argument – the net effect of which is to portray Petitioner as a wilful simpleton. Thus, Subpoint C falsely purports: (1) that Petitioner is "not willing to concede" the point of law articulated by the single case it cites; (2) that Petitioner has called Justice Wetzel's decision a "criminal act" because she "disagree[s]" with its "reasoning"; (3) that Petitioner has

argued that "a refusal to recuse oneself is evidence of bias"; and (4) that "petitioner's claim that [Justice Wetzel's] decision demonstrates bias mandating recusal amounts to no more than a claim that the court stubbornly refused to accept [her] arguments", including as to the fraudulence of the decisions in *Doris L. Sassower v. Commission* and *Mantell v. Commission*.

Taking Ms. Fischer's deceits *seriatim*, it is sanctionable for her to assert that Petitioner is not "willing to concede" the "point" in *Ocasio v. Fashion Inst of Tech*, 86 F. Supp.2d 371 (SDNY 2000) that "a judge's adverse rulings and decisions against a party almost never are a valid basis for a party to seek disqualification based on bias or impartiality." The operative words, "almost never", allows for cases where adverse rulings and decisions can be grounds for seeking disqualification – a proposition with which Ms. Fischer could expect Petitioner to fully agree. Indeed, had Ms. Fischer reviewed the cert petition in the *Doris L. Sassower v. Mangano* federal action – part of the record of this proceeding [A-348] -- she would know that Petitioner is fully familiar with operative recusal standards articulated by the federal judges of the U.S. Supreme Court and Second Circuit for the proposition she has District Court Judge John Sprizzo articulate in *Ocasio*[40].

[40] It is noteworthy that of the innumerable federal cases available to her on the subject of recusal Ms. Fischer would choose one by District Judge Sprizzo. Assuredly she knows – since she cites 927 F. Supp. 113 (SDNY 1996) in her "Statement of the Case" (at p. 5) – that he was the district judge in the *Doris L. Sassower v. Mangano* federal action and that he denied Doris Sassower's motion for his recusal. Presumably, Ms. Fischer would like it to appear that just as Judge Sprizzo recognized operative standards for recusal in *Ocasio*, he did, as well in Doris Sassower's federal action. That he did not was Point I of Doris Sassower's appeal to the Second Circuit – fully reprinted in her cert petition [A-145-151] along with every other legal Point of her Second Circuit brief -- so that the U.S. Supreme Court could see the cover-up by the Second Circuit's summary affirmance. [*See* summary of Judge Sprizzo's lawless decision in the *Doris L. Sassower v. Mangano* federal action set forth in "*Restraining 'Liars in the Courtroom and on the Public Payroll*" [A-56]

Ms. Fischer's reliance on the irrelevant case of *Ocasio v. Fashion* – the only case her Subpoint C cites -- shows she has no law. Obviously, Justice Wetzel's decision – the subject of her Subpoint C -- was not the basis for Petitioner seeking Justice Wetzel's disqualification, as Ms. Fischer mixed-up argument makes it appear. Rather, Petitioner's December 2, 1999 application for Justice Wetzel's recusal [A-250-290] was based on extrajudicial relationships and pressures on him, creating the appearance and actuality of his self-interest and bias, manifested by his November 22, 1999 letter to Petitioner [A-248-249].

Moreover, Ms. Fischer does not challenge Petitioner's citation (Br. at 50) to *Matter of Moreno, supra*, as well as other New York caselaw and New York Jurisprudence for the proposition that a lower court's abuse of discretion in denying recusal is established where "'bias or prejudice or unworthy motive' is 'shown to affect the result'". The "result" herein is Justice Wetzel's decision denying recusal, dismissing Petitioner's case, and enjoining Petitioner and the non-party CJA – a decision whose factual and legal baselessness is detailed by Petitioner's Brief, without controversion by Ms. Fischer.

As to Ms. Fischer's claim that Petitioner is simply disagreeing with the "reasoning" of Justice Wetzel's decision – and that because Petitioner disagrees with it, she has called it a "criminal act" – this deceit is evident even from Petitioner's Pre-Argument Statement [A-7], which Ms. Fischer cites. Even there, Petitioner particularized the basis for characterizing the decision as a "criminal act" – a basis far removed from "disagreement" with Justice Wetzel's "reasoning". Thus, Petitioner stated:

> "The Decision, Order & Judgment violates the most *fundamental* standards of adjudication and due process. It substitutes unwarranted aspersions and characterizations for factual findings and, in *every* material respect, falsifies, fabricates, and distorts the record of the proceeding. This, to wholly subvert the judicial process and deprive petitioner of the relief to which she is entitled by her Verified Petition, omnibus motion, and recusal application. As such it is more than *prima facie* proof of Justice Wetzel's disqualifying actual bias and self-interest, it is a criminal act by him, in which Administrative Judge Crane is complicitous."

As to Ms. Fischer's assertion (at p. 19) that "[t]he argument that a refusal to recuse oneself is evidence of bias is, on its face, ... so devoid of merit that it does not warrant extended discussion", her implication that Petitioner made such bald argument is false. Tellingly, Ms. Fischer provides no record reference for what is a ruse to avoid any discussion – let alone "extended discussion" – of the particularized showing in Petitioner's Brief (at pp. 42-52) that Justice Wetzel's denial of recusal was without addressing ANY of the bases upon which Petitioner sought his disqualification and without ANY of the disclosure pertinent thereto to which she was entitled.

Finally, as to Ms. Fischer's pretense (at p. 19) that:

> "petitioner's claim that Justice Wetzel's decision demonstrates bias mandating recusal amounts to no more than a claim that the court stubbornly refused to accept [her] arguments', such as her assertion that she has established, as a matter of incontrovertible fact, the 'fraudulence' of the decisions in D. Sassower and Mantell (A.60)",

this deceit is resoundingly exposed Petitioner's Brief (at pp. 42-68), particularizing record facts showing Justice Wetzel's decision to be completely baselessness – without controversion by Ms. Fischer.

Ms. Fischer's Point IV
"The Court did not Err by *Sua Sponte* Enjoining Petitioner and CJA From Filing Further Lawsuits"

The final Point of Ms. Fischer's Argument (at pp. 20-22), which she incorrectly numbers as Point IV, rather than Point III, is based on numerous deceits. Thus, while conceding that Justice Wetzel's decision enjoining Petitioner and the non-party CJA from bringing further litigation against the Commission was *sua sponte* and without notice and opportunity to be heard and without any findings, she asserts (at p. 20) that this is perfectly alright as "petitioner has engaged in repetitive litigation by filing virtually the same lawsuit twice against the Commission – first in D. Sassower v. Commission and then in this suit".

In so doing, Ms. Fischer conspicuously avoids making even a conclusory claim that these two lawsuits are "frivolous", let alone providing any substantiating specifics. As pointed out by Petitioner's Brief (at pp. 60-61, 66), Justice Wetzel did not determine either lawsuit to be "frivolous" – and Justice Cahn made no such determination as to Doris Sassower's lawsuit. That the lawsuits are not "frivolous" is evident from examination of the two Verified Petitions, each in the Appendix [A-22-47; 177-188]. Such examination further reveals that Ms. Fischer's claim (at p. 20) that they are "virtually the same lawsuit" is a deceit. Indeed, Petitioner's Brief (at p. 57) highlighted that the lawsuits were not "virtually the same". Four of the six Claims for Relief in Petitioner's lawsuit have no counterpart in Doris Sassower's, with the "merit" of her two Claims for Relief relating to the unconstitutionality 22NYCRR §7000.3, as written and as applied, evident from the fact that Justice Cahn had to resort to fraud to dismiss the similar claims in Doris Sassower's

lawsuit.

Under such circumstances, Ms. Fischer's attempt to argue (at pp. 20-21) that Doris Sassower's lawsuit should be attributed to Petitioner and that she and Doris Sassower are both CJA because, allegedly, the three "function publicly as interchangeable parties" is a sanctionable deceit, as there is *no* "frivolous" litigation to enjoin. Such argument, moreover, is founded on Ms. Fischer's further flagrant deceit that "there is no evidence that petitioner and CJA (and, for that matter, D. Sassower) have acted independently". Petitioner's Brief (at p. 56) not only highlighted the record evidence that Petitioner, Doris Sassower, and CJA are NOT the same – and that CJA did not authorize this litigation – but included it in the Appendix [A-198-203; A-209-213].

It is also deceitful for Ms. Fischer to argue that Petitioner, Doris Sassower, and CJA can be consolidated into a single entity, where, as she concedes (at p. 7) CJA is not a party to this proceeding, was not a party to Doris Sassower's proceeding, and that Petitioner's correspondence with the court, as opposed to her "correspondence with the Commission, and with every other New York State office" has not been "in the name of CJA" (at p. 22). Indeed, the frivolous of her argument is evident from her failure to provide *any* legal authority to support an injunction against the non-party CJA.

The only further reasons Ms. Fischer offers for why Justice Wetzel's "imposition of a filing injunction was amply justified"[41] essentially echo the reasons in Justice Wetzel's decision, whose baselessness, including as to these reasons, Petitioner's Brief exposed (at

[41] However, these reasons cannot support a "filing injunction" as they concern litigation conduct,

pp. 64-68). It is thus a deceit for Ms. Fischer to suggest, as she does (at p. 22), "petitioner's repeated recusal motions and voluminous correspondence" – without any identifying particulars. As highlighted by Petitioner's Brief (at p. 64), Justices Lebedeff, Tolub, Weissberg, and Kapnick, each recused themselves *sua sponte*, and Justice Huff was removed from the case by Administrative Judge Crane. Other than Petitioner's written application for Justice Wetzel's recusal, her only other recusal application – which was oral – was for Justice Zweibel's recusal – and its legitimacy was recognized by him when he stepped down expressly "to avoid even the appearance of any impropriety" [A-242, lns. 18-19]. Consequently, as particularized in Petitioner's Brief (at p. 64), there are no "repeated recusal motions" – quite apart from the fact – also in the Brief (at p. 65)-- that "the right 'to escape a biased tribunal'" is itself a due process right, *Holt v. Virginia*, 381 U.S. 131, 136 (1965), which cannot be punished absent a showing that there is something inappropriate about the language used." Ms. Fischer has not denied this proposition of law and has not come forward to identify any inappropriate language.

As to Petitioner's "voluminous correspondence", since Ms. Fischer does not deny or dispute the assertion in Petitioner's Brief (at p. 65) that "there is nothing in the least bit baseless or inappropriate" about it – and has conspicuously identified nothing – it is a sanctionable deceit for her to suggest that it could support the injunction.

As to Petitioner's supposedly, "bitter and personal attacks on participants in this case" – a rough parallel to Justice Wetzel's claim in his decision [A-11] as to Petitioner's

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not the substance of a lawsuit.

"accusations against... the Attorney General, and the respondent", the baselessness of this ground is demonstrated by the SOLE example Ms. Fischer provides. That example is Ms. Fischer's pretense that A-308-309 shows that Petitioner had

> "argu[ed] that the filing of a proof of service referring to the delivery of a 'supplemental memorandum of law,' rather than the affirmation actually served was a 'fraud upon the Court,', augmenting [her] claim for 'severest sanctions' against the attorney concerned". (at p. 22)

Examination of Petitioner's December 9, 1999 letter to Justice Wetzel [A-308-334] – of which A-308-309 are the first two pages – show that the "fraud upon the Court" for which Petitioner sought increased sanctions against the Attorney General and the Commission related to the content of the Attorney General's affirmation in response to Petitioner's December 2, 1999 application for Justice Wetzel's recusal. Indeed, this is highlighted by the Brief itself (at pp. 30-33), which – without controversion by Ms. Fischer – provides the relevant facts concerning this affirmation and Petitioner's responding December 9, 1999 letter. Among these, the Attorney General's proffering of Justice Lehner's decision in *Mantell* as grounds for Justice Wetzel to dismiss Petitioner's lawsuit –notwithstanding prior notice from Petitioner that that decision is fraudulent.

Ms. Fischer's "Conclusion" Omits a Material Fact

Ms. Fischer's one-sentence "Conclusion" (at p. 23) materially omits that the decision of Justice Wetzel, for which she seeks affirmance, includes a filing injunction against Petitioner and the non-party CJA.

Such omission, like the similar omission at the outset of Ms. Fischer's "Preliminary

Statement" (at p. 2), serves no purpose but to mislead the Appellate Division into believing that it can wholly dispose of the appeal by embracing her claim (at p. 14) that Petitioner's purported lack of standing "disposes of all relief she sought in the proceeding".

CONCLUSION

Based on the foregoing fact-specific, law-supported demonstration, there can be question that Ms. Fischer's Respondent's Brief is, from beginning to end, and in virtually every line, permeated with falsification, misrepresentation, and omission of material fact and law – and that such misconduct by her is knowing and deliberate. Those charged with supervisory responsibilities at the Office of the New York State Attorney General – such as Mr. Belohlavek – and, beyond him, Solicitor General Preeta D. Bansal, and, ultimately, Attorney General Eliot Spitzer -- must, pursuant to the mandatory provisions of DR-104 of New York's Disciplinary Rules of Code of Professional Responsibility [22 NYCRR§1200.5], take "reasonable remedial action". Withdrawing the Respondent's Brief – to prevent fraud upon the court -- is the most minimal of that action.

Manifest from the fraudulence of Respondent's Brief is that there is NO legitimate defense to this appeal. Consequently, more significant action is required of the Attorney General. Pursuant to Executive Law §63.1, which predicates the Attorney General's litigation advocacy on "the interests of the state", he must disavow representation of the Commission and join in support of the appeal.