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May 28, 2002

By Hand

Stuart M. Cohen,
Clerk of the Court
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, NY 12207-1095

Re: Sassower v. Comm'n on Judicial Conduct,
(1st Dep't Docket No. 5638/01)

Dear Mr. Cohen:

On behalf of the New York State Commission on Judicial Conduct (the "Commission"), respondent in the above proceeding, we reply to your May 17, 2002 letter inviting the parties to address whether the Court has subject matter jurisdiction over this appeal.

Petitioner Elena Ruth Sassower asserts in her 22 NYCRR §500.2 jurisdictional statement that she may appeal as of right under CPLR 5601(b)(1) (an appeal to this Court may be taken as of right "from an order . . . where there is directly involved the construction of the constitution of the state or of the United States."). Petitioner is in error. Neither the December 18, 2001 Decision and Order of the Appellate Division, First Department that petitioner seeks to appeal, nor the Supreme Court decision it affirmed, ever reached an issue of state or federal constitutional construction. Instead, both courts held that petitioner had no right to seek a writ of mandamus.

The petition in this CPLR article 78 proceeding alleged that the Commission, which oversees judicial conduct, was required by Judiciary Law §44.1 to conduct a comprehensive investigation of every "facially-meritorious" complaint of judicial misconduct, and therefore was without the discretion to dismiss petitioner's complaints, notwithstanding the Commission's conclusion that they did not warrant a full-scale investigation. Petitioner sought an

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order of mandamus directing the Commission to vacate its dismissal of her complaint concerning Judge Albert Rosenblatt (then an Appellate Division, Second Department Justice), and to "receive" and "determine" her complaint concerning Justice Daniel W. Joy, also of the Appellate Division, Second Department. Petitioner also sought to have Henry T. Berger removed as the Commission's chairman, to have 22 NYCRR §7000.3 and 22 NYCRR §7000.11 (part of the Commission's procedural rules concerning the investigation of complaints) declared unconstitutional, both on their face and "as applied" by the Commission, and Judiciary Law §45 declared unconstitutional, either as applied by the Commission or on its face.

Supreme Court, New York County (Wetzel, Acting Justice) dismissed the petition, holding that the Commission had the power to make discretionary preliminary determinations as to whether to undertake more comprehensive investigations, and therefore could not be compelled to undertake a comprehensive investigation. Supreme Court further held that, because the decision to undertake a comprehensive investigation was a discretionary, rather than an administrative act, petitioner had no standing to seek an order compelling the Commission to investigate a particular complaint

In its December 18, 2001 Decision and Order, the First Department unanimously affirmed Justice Wetzel's decision, holding that the "petition to compel respondent's investigation of a complaint was properly dismissed since respondent's determination whether to investigate a complaint involves an exercise of discretion and accordingly is not amenable to mandamus." Further, "inasmuch as petitioner has failed to demonstrate that she personally suffered some actual or threatened injury as a result of the putatively illegal conduct, she lacks standing to sue the Commission."

Thus, the decision petitioner wishes to challenge did not reach any issue of statutory construction. Instead, petitioner's case was resolved by the application of a basic principle of administrative law, that mandamus will not lie to compel performance of a discretionary act. Because of this, petitioner may not appeal it as of right. See Board of Education of the Monroe-Woodbury school District v. Wieder, 72 N.Y.2d 174, 182

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(1988) (citations omitted, emphasis added), in which this Court stated:

To support an appeal as of right [under CPLR 5600(b)(1)], appellants must demonstrate that the ground for appeal is "directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States." Even where a constitutional question may otherwise be involved, an appeal as of right does not lie if the decision appealed from was or could have been based upon some ground other than the construction of the Constitution.

Accord, Westchester-Rockland County Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 437 fn.2 (1979): "Although appellant claims a right of appeal to our court on constitutional grounds, the determination below did not necessarily reach the constitutional issue and thus the appeal must be dismissed."

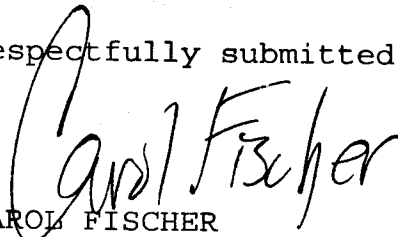
Petitioner nonetheless contends that she may appeal as of right to this Court because the "threshold and decisive" issue on appeal is her alleged deprivation of her right to a "fair tribunal" at the hands of a "biased" First Department (Petitioner's Jurisdictional Statement, pp. 5-6). If her contention were correct, every litigant claiming to have been deprived of a fair hearing or adequate review would be entitled to an appeal to this Court as of right. On its face, CPLR 5601 does not authorize such a result, and it has never been interpreted by this Court to do so. In fact, the sole case petitioner cites, Valez v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122 (1928), does not support her argument that any petitioner asserting a nebulous "due process" claim may appeal as of right to this Court. To the contrary, Valez falls squarely within the terms of CPLR 5601(b)(1), since in order to resolve the dispositive "due process" issue in that case the Court needed to assess the constitutionality of the New York statute providing for service by publication.

Neither the facts of this case nor the decision appealed from raise any issue concerning the constitution of the State of New York or of the United States. We submit that this Court does not have subject matter jurisdiction over this appeal under CPLR

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5601(b) (1), and that it should be dismissed.

Respectfully submitted,



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cc: Elena Ruth Sassower,
petitioner pro se
(via facsimile and regular mail)