No. 98-106

In the
SUPREME COURT OF THE UNITED STATES
October Term 1997

DORIS L. SASSOWER,

Petitioner,

- against -

HON. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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Exhibit G

INTRODUCTION

This supplemental brief presents supervening facts, reinforcing the Court's duty to grant certiorari under its "supervisory power", as well as its duty under codes of professional conduct to refer the subject federal judges and New York's Attorney General ["the A.G."], counsel to respondents and himself a respondent, for disciplinary and criminal investigation. These facts include:

(1) the A.G.'s August 4, 1998 waiver [SA-9];

(2) the U.S. Solicitor General's inappropriate August 10, 1998 response [SA-10] to petitioner's July 20, 1998 letter seeking his *amicus* support and his non-response to her included request for disciplinary and criminal referral of the subject federal judges and the A.G. [SA-11];

(3) the U.S. Justice Department Public Integrity Section's non-response to petitioner's July 27, 1998 letter requesting criminal investigation of the involved public officials [SA-47]; and

(4) the House Judiciary Committee's inaction on petitioner's requests for impeachment investigation of the subject federal judges, as highlighted by the written statement of the Center for Judicial Accountability, Inc. (CJA)[1] in connection with the House Judiciary Committee's June 11, 1998 "oversight hearing of the administration and operation of the federal judiciary" [SA-17].

The supervening facts relating to the Solicitor General, Justice Department, and House Judiciary Committee demonstrate a complete breakdown of checks on federal judicial misconduct by the Executive and Legislative Branches -- paralleling the breakdown of checks within the Judicial Branch, detailed in the cert petition and supplemented by CJA's aforesaid written statement [SA-21, SA-25-27]. This, combined with the dereliction of the organized bar [SA-90; SA-102], empirically rebuts the "all's well" conclusions of the 1993 Report of the National Commission on Judicial Discipline and Removal as to the efficacy of existing mechanisms to restrain federal judicial misconduct -- conclusions adopted by the Judicial Conference in its 1995 Long-Range Plan (at 88-89). The reality, concealed by these government

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[1] Petitioner is CJA's co-founder and director, as identified at fn. 8 of the cert petition (at p. 16).

documents, but exposed herein, is that the constitutional protection restricting federal judges' tenure in office to "good behavior" does not exist because all avenues by which their official misconduct and abuse of office might be determined and impeachment initiated (U.S. Constitution, Article III, §2, Article II, §4 [SA-1]) are corrupted by political and personal self-interest. The consequence: federal judges who pervert, with impunity, the constitutional pledge to "establish Justice", (Constitution, Preamble [SA-1]) and who use their judicial office for ulterior purposes.

Such supervening facts call for the Court to protect the public by reasserting the constitutional protection of "good behavior" and by reinforcing the ethical duty to report attorney and judicial misconduct. This duty is reflected in Rule 8.3 of the ABA's Model Rules of Professional Conduct [A-20], Canon 3D of its Model Code of Judicial Conduct [A-18], and Canon 3B(3) of the Code of Conduct for U.S. Judges [A-17] -- provisions ignored by the lawyers and judges whose derelictions are the subject of this supplemental brief.

The significance of these reporting obligations and the failure of lawyers and judges to meet them have been discussed in scholarly commentary, *inter alia*, Thode, "*The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1 Utah Law Review 95-102 (1976); Levy, "*The Judge's Role in the Enforcement of Ethics -- Fear and Learning in the Profession*", 22 Santa Clara Review 95-116 (1982), and noted in ABA guide materials, including its "Standards for Imposing Lawyer Discipline" (1992 ed., Preface, at 4). They have also been the subject of discussion and recommendation by the ABA's Special Committee on Evaluation of Disciplinary Enforcement, chaired by former Associate Justice Tom Clark, as well as by the ABA's Commission on Professionalism, formed in response to a recommendation from then Chief Justice Warren Burger that the ABA study professionalism issues. To foster reporting, both the 1970 Clark Committee Report and the 1986 Report of the Commission on Professionalism, the latter reprinted at 112 F.R.D. 243, proposed that "proceedings be brought in appropriate cases against lawyers who fail [to report misconduct]", *id*, at 287-288. At bar is such "appropriate case", where the unreported attorney and judicial misconduct has completely subverted federal judicial/appellate/and disciplinary processes and the attorneys who have failed in their reporting duties are at the highest levels of

power and influence, in government and out.

This Court's pivotal role in sensitizing the legal community and up-and-coming lawyers to ethical obligations -- including the obligation to report professional misconduct -- is highlighted in "*The Judge's Role in the Enforcement of Ethics*", *op cit*:

> "...One sensible place to begin is at the top. The Supreme Court's opinions are the primary written source of teaching and learning in the legal profession, both during and after law school. Also, one would assume that the Justices are judicial role models... If the Supreme Court started the process of openly commenting on ethical issues inherent in their cases, other courts would follow. Without leadership or a role model there will be no movement." (at 114-116)

This case dispositively proves that there is no "leadership" or "role model" from any governmental quarter -- nor from the organized bar -- to meet the professional responsibilities that arise in the face of serious judicial misconduct and the non-function of judicial oversight mechanisms. Rather there is hostility and silence. Consequently, without this Court's intervention, the public and the few whistle-blowing lawyers, like petitioner, who take their reporting and other ethical obligations seriously, will remain wholly unprotected from the obliteration of the rule of law and of constitutional guarantees that the record herein demonstrates.

THE ATTORNEY GENERAL'S WAIVER

In the ordinary case, where respondents waive their right to oppose a petition for a writ of certiorari, a supplemental submission may be unnecessary. This, however, is not an ordinary case and respondents' counsel is not an ordinary lawyer, but a public officer, tainted by multiple conflicts of interest.

Particularized by the petition is official misconduct by Second Circuit judges, who knowingly obliterated *all* cognizable adjudicatory and ethical standards and rendered fraudulent decisions to protect high-ranking state defendants, New York state judges and the A.G., sued for corruption and civil rights violations under 42 U.S.C.§1983 and §1985. The petition chronicles how these state defendants,

represented by the A.G. -- New York's highest legal officer -- were permitted to engage freely in litigation misconduct, including fraud, at all stages of the action: before the district judge, in the appellate case management phase, and on the Second Circuit appeal. As emphasized by the petition, the A.G. employed such litigation misconduct and fraud because he and his co-defendant clients had no legitimate defense to the verified Complaint's material allegations [A-49-94] -- allegations establishing the unconstitutionality of New York's attorney disciplinary law, as written and as applied [A-120-131].

This Court's Rule 15.2 is very specific as to the purpose of a brief in opposition:

> "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. ..."

Consequently, by his waiver [SA-9], the A.G. has conceded, *inter alia*, the truth of the petition's factual recitation of criminal conduct by federal judges and by state public officials, including himself, and the validity of the petition's legal arguments addressed thereto. These arguments are set forth in Point I of "*Reasons for Granting the Writ*" (at pp. 23-26) as to the Court's "supervisory" duty under its Rule 10[.1](a), and its duty, under codes of professional conduct, to make disciplinary and criminal referrals, even were it not to grant review.

Among the code provisions cited and reproduced in the appendix [A-20] is Rule 8.3 of the ABA's Model Rules of Professional Conduct, mandating the reporting of serious attorney and judicial misconduct to "the appropriate authority". Thomas D. Hughes, Esq., who signed the waiver [SA-9], is not only a member of the U.S. Supreme Court bar, but an Assistant Solicitor General for the A.G. As such, he can be presumed to know that the Court relies on the ABA Model Rules of Professional Conduct as a general standard. Moreover, the New York State Bar Association's Code of

Professional Responsibility, DR-103, adopted by New York's Appellate Divisions as 22 NYCRR §1200.4 [SA-6], mandates the reporting of attorney misconduct "to a tribunal or other authority". Its DR 7-102(B)(2) -- 22 NYCRR §1200.33 [SA-8] -- explicitly requires a lawyer to reveal "fraud upon a tribunal". The A.G., whose statutory duty it is to protect "the public interest", "public safety", and "public justice" (New York Executive Law, Article 5, §63, ¶8 [SA-2]) and who is independent of the constraints that inhibit private lawyers from reporting judicial misconduct, can be expected to recognize an obligation to report and reveal fraud perpetrated by the tribunal.

The A.G.'s reporting obligations to this Court were triggered once his office determined the accuracy of the petition's factual and legal assertions of fraud and corruption by attorneys and judges, particularly federal judges under this Court's "supervisory power". Unless he was prepared to report the misconduct to some other "authority" or "tribunal", as he was required to have done long ago, his duty was to endorse the petition's request for the Court's "supervisory" review and its alternate request for the Court to make disciplinary and criminal referrals, including referral of the subject federal judges to the House Judiciary Committee and Public Integrity Section of the Justice Department. Such endorsement was all the more essential since, prior to the waiver, petitioner had sent the A.G. copies of her July 20, 1998 letter to the Solicitor General [SA-11] and her July 27, 1998 letter to the Public Integrity Section [SA-47]. Those letters presented an evidentiary record of nonfeasance and misfeasance by the House Judiciary Committee, as well as by the Public Integrity Section -- making impeachment and criminal investigation unlikely, absent Supreme Court action, be it by review or referral.

Compromising the A.G.'s affirmative obligations to this Court is his disqualifying conflict of interest, born of his own culpability and that of his assistants for the long course of defense misconduct summarized by the petition (at pp. 4-17). But for his misconduct on the state level, in the context of petitioner's Article 78 proceeding against the judicial defendants, the state judicial corruption, which is the subject of petitioner's verified Complaint, would have been arrested at the state court level. But for the A.G.'s defense misconduct in federal court, the corruption of the federal judicial process could not have occurred -- and, certainly, not to the far-reaching extent it has. The A.G.'s multiple conflicts of interest herein,

as a defendant representing his co-defendants and doing so in both their individual and personal capacities, while, at the same time he is "the People's Attorney", charged with protecting the public, were raised by petitioner before the lower federal courts [A-160; SA-66; SA-74] -- and ignored by those courts. This has now emboldened the A.G., who never responded to petitioner's conflict of interest objections, to once more disregard them. Indeed, Mr. Hughes should have recognized that he was disqualified from signing the waiver, based on his prior knowledge of, and involvement in, the fraud and corruption the petition detailed.

Nearly a year and a half ago, Mr. Hughes' name, as the A.G.'s Assistant Solicitor General, appeared on the cover of appellees' "corrected" brief in opposition to petitioner's Second Circuit appeal. As pointed out in the cert petition (at pp. 15-16), appellees' opposing brief was a sanctionable deceit. Indeed, petitioner so informed Mr. Hughes at the time, providing him with corroborative documentation so that he could take immediate corrective steps. Such documentation consisted of: (1) petitioner's fact-specific reply brief, supported by record references, demonstrating that appellees' opposing brief made a mockery of ABA Model Rules of Professional Conduct, Rule 3.1 "Meritorious Claims and Contentions" and Rule 3.3, "Candor Toward a Tribunal" [SA-3-4]; and (2) her simultaneously-filed sanctions motion, further particularizing the A.G.'s fraud and misconduct in the appellate case management phase, apart from appellees' opposing brief. Yet, Mr. Hughes' stated view was that he had no obligation to take corrective action and that "it was for the Court, rather than himself, to examine the misconduct and fraud issues relative to the Appellees' Brief on which his name appear[ed]." [SA-72, ¶54; SA-75, ¶2; and SA-77, ¶8]. Much as other lawyers in the A.G.'s office, including the A.G. himself, had previously taken no corrective steps after petitioner advised them of the office's litigation fraud and misconduct before the district judge and of the district judge's fraudulent decision, so Mr. Hughes took no corrective steps. The result: the Second Circuit corrupted the appeal with its own fraudulent, record-falsifying decisions [A-21; A-32; A-33]. Like the district judge's decision, these also ignored, without comment, the A.G.'s fraud and misconduct -- including his mandatory duty under DR-104D "Responsibilities of a Supervisory Lawyer", 22 NYCRR §1200.5 [SA-6-7]. Such rule is the only one in the country to impose

collective responsibility on law firms. *See*, "*Taking a Firm Hand in Discipline*", ABA Journal, Vol. 83, September 1998, p. 24. *See, also* ABA Model Rule 5.1, "Responsibilities of a Partner or Supervisory Lawyer" [SA-4]. This, in addition to ignoring New York's DR 1-102 (22 NYCRR §1200.3) [SA-5] and DR 7-102 (22 NYCRR §1200.33) [SA-8], as well as the A.G.'s transcending duty under EC-7-14 [SA-7] as "a government lawyer...[with] the responsibility to seek justice and to develop a full and fair record".

In signing the waiver, Mr. Hughes apparently retains the belief that he has no duty to take corrective steps and that he can disregard his own conflict of interest. This underscores the need for the Court to articulate the fundamental standards of conduct expected of lawyers appearing before it -- and before the lower federal courts.

The Court's waiver form, as signed by Mr. Hughes, expressly states that a response to the petition will not be filed "unless one is requested by the Court" [SA-9]. Under the circumstances, the A.G. should be requested to respond. He should be called upon to identify why, with other attorneys in his Solicitor General's office presumably able to sign the waiver, Mr. Hughes was its signator, notwithstanding his personal involvement in the fraud recited by the petition, and to explain why he has taken no corrective steps based on the concessions implicit in the waiver. These steps would properly include: (1) initiating criminal and disciplinary investigation of the federal judges and state officials who corrupted the federal judicial/appellate/ disciplinary processes in this case; (2) investigating petitioner's allegations that the A.G.'s office, as a *modus operandi*, engages in litigation fraud, in state and federal courts, to defend state judges and other public officials and agencies, when it has no legitimate defense [A-261-268]; and (3) vindicating petitioner's uncontroverted factual and legal showing of the unconstitutionality of New York's attorney disciplinary law, as written and as applied to her [A-120-131]. This includes consenting to *immediate* vacatur of his judicial co-defendants' June 14, 1991 "interim" order suspending petitioner's law license [A-97].

THE NONFEASANCE AND MISFEASANCE OF ALL THREE GOVERNMENT BRANCHES AND THE ORGANIZED BAR

As reflected by the cert petition (at p. 24), because of the

Second Circuit's annihilation of anything resembling a judicial process and its corruption of appellate and disciplinary remedies, petitioner long ago supplied a copy of the record to the Administrative Office of the U.S. Courts for presentment to the Judicial Conference and, likewise, to the House Judiciary Committee. This was done so that the Judicial and Legislative Branches of our government could exercise oversight -- not only on petitioner's behalf, but on behalf of the public, endangered by federal judicial corruption and by judicial subversion of the very congressional statutes designed to protect the public from biased and unfit federal judges -- 28 U.S.C. §§144 and 455, relating to judicial disqualification, and 28 U.S.C. §372(c), relating to judicial discipline [A-2-5].

The petition recited (at p. 24) the response of the Administrative Office: it not only refused to make the requested presentment to the Judicial Conference for oversight intervention, but failed to respond to letters or return phone messages inquiring about such presentment.

Not recited was the response of the House Judiciary Committee to CJA's two Memoranda that accompanied transmittal of the record to it [A-295; A-301]: a non-response whose unmistakable deliberateness only became evident after the petition's May 16th filing date, in the context of attempts to meet with the Courts Subcommittee Chief Counsel and to secure the opportunity to testify at its June 11, 1998 "oversight hearing on the administration and operation of the federal judiciary".

The House Judiciary Committee's wilful failure to discharge its duty of "oversight" over federal judicial misconduct -- either by investigating the judicial misconduct complaints it receives or by ensuring the integrity of the federal judiciary's handling of complaints filed under 28 U.S.C. §372(c) and judicial enforcement of 28 U.S.C. §§144 and 455 -- is recounted in CJA's written statement to the House Judiciary Committee for inclusion in the record of the June 11, 1998 hearing [SA-17]. This was so identified by petitioner in her July 20, 1998 letter to the U.S. Solicitor General [SA-13], which enclosed a copy of that statement and its corroborative evidentiary

compendium[2] so that the Solicitor General could "act on behalf of the otherwise unprotected public" [SA-13].

Petitioner's July 20, 1998 letter to the Solicitor General [SA-11] highlighted that the same reasons warranting the Court's granting the petition warranted his *amicus* support at the certiorari stage, and that, like the Court, which, if it did not grant the petition, would still have a duty under ethical codes to make disciplinary and criminal referrals of the subject federal judges and A.G. for "fraud, collusion, and conspiracy", he, too, was bound by ethical codes to make such referrals -- "separate and apart from [his] duty to support Supreme Court review". The letter stated that a copy of the record, identical to that previously sent to the Administrative Office and House Judiciary Committee, was being sent to the Justice Department's Public Integrity Section so that it could initiate criminal investigation and prosecution, as well as facilitate its endorsement of the Solicitor General's *amicus* support of the petition. Petitioner pointed out that all three Branches had participated in the Report of the National Commission on Judicial Discipline and Removal and that, consistent with that Report, if the Public Integrity Section did not endorse the Solicitor General's *amicus* support and commence a criminal investigation, without necessity of the Court's referral, it should "identify the branch of government responsible for investigating the corruption of the federal judicial/appellate/disciplinary processes, established by the transmitted record, and...make the appropriate referral." [SA- 14].

Petitioner's July 27, 1998 letter to the Chief of the Public Integrity Section [SA-47], in addition to transmitting the record, chronicled a background of Justice Department inaction on her prior complaints of New York state judicial corruption and complicity by state agencies and officials, including the A.G.

By letter dated August 10, 1998 [SA-10] -- the same date on which petitioner had notified the Solicitor General's office of the A.G.'s waiver [SA-9] -- the Solicitor General purported to respond to her July 20, 1998 letter [SA-11]. Ignoring every fact-specific issue

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[2] The compendium to CJA's statement [SA-17] has been lodged with the Clerk of the Court, together with the exhibits to petitioner's July 27, 1998 letter to the Chief of the Public Integrity Section [SA-47], *infra*.

presented by the letter, most particularly that this was the exceptional case mandating the Solicitor General's *amicus* support and disciplinary and criminal referrals, petitioner was advised that the Solicitor General's "general policy" in cases to which the government is not a party, is not to opine as to "the views of the United States" unless invited to do so by the Court.

No response has been received from the Public Integrity Section. However, in an August 14, 1998 phone call to it, petitioner was informed that the box transmitting her July 27, 1998 letter with the cert petition and record had not even been opened.

Such conduct by the Executive Branch, in the face of petitioner's July 20, 1998 letter to the Solicitor General detailing the significance of the Legislative Branch's nonfeasance and misfeasance to Judicial Branch corruption, calls for the Court to "invite" the Solicitor General to present the United States' views not only of the petition, but of the information that letter presented. Since the Public Integrity Section has a copy of the record, the Solicitor General should also be requested to incorporate a report of its findings relative to the petition's recitation of Second Circuit corruption.

Indeed, since the Administrative Office [SA-79; SA-27], the House Judiciary Committee [A-301], the Commission on Structural Alternatives for the Federal Courts of Appeals [SA-35], and the American Bar Association [SA-96; SA-106] also have copies of the record and cert petition, the Court might reasonably invite them to offer their views, including of their ethical and professional obligations with respect thereto, as lawyers, public officials, or both.

CONCLUSION

For the transcending reasons of governmental and professional integrity hereinabove recited, response to the petition and this supplemental brief should be requested from the New York State Attorney General and invited from the U.S. Solicitor General, among others. In any event, the cert petition must be granted and criminal and disciplinary referrals made so as to vindicate constitutional guarantees, the rule of law, and fundamental ethical precepts.

Doris L. Sassower

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