COURT OF APPEALS
STATE OF NEW YORK
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In the Matter of DORIS L. SASSOWER,

Petitioner-Appellant,

-against-

Affidavit in Reply and in Further Support of Reargument, Reconsideration, Leave to Appeal, and Other Relief

HON. GUY MANGANO, as Presiding Justice of the Appellate Division, Second Dept., HON. MAX GALFUNT, as Special Referee, and EDWARD SUMBER and GARY CASELLA, as Chairman and Chief Counsel respectively of the Grievance Committee for the Ninth Judicial District,

Respondents-Respondents.
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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss:

DORIS L. SASSOWER, being duly sworn, deposes and says:

1. This Affidavit is submitted in reply to the Attorney General's so-called "Memorandum of Law in Opposition", which refers to only one case (at p. 3) involving an undisputed, elementary principle of law, inapplicable to the case at bar. Such Memorandum contemptuously continues the misconduct for which, as part of my requested relief on the instant motion, I seek "criminal and disciplinary investigation" of the Attorney General of the State of New York.

2. The Attorney General's scanty, boiler-plate Memorandum does not identify, let alone discuss, any of the issues germane to the instant motion. Those issues were

carefully delineated by me in separately-captioned headings and subheadings, as follows:

> APPEAL LIES AS OF RIGHT TO THE COURT OF APPEALS AND, IF NOT, THE ARTICLE 78 STATUTE IS UNCONSTITUTIONAL (at pp. 3-4)
>
> THE MERITS OF THIS APPEAL PRESENT MULTIPLE ISSUES DIRECTLY INVOLVING SUBSTANTIAL CONSTITUTIONAL QUESTIONS (at pp. 4-23)
>
> A. Venue (at pp. 4-6)
>
> B. Disqualification (at pp. 6-10)
>
> C. Due Process and Equal Protection (at pp. 11-14)
>
> D. First Amendment (at pp. 14-16)
>
> E. The Unconstitutionality of Judiciary Law §90 and the Disciplinary Rules of the Appellate Division (at pp. 16-23)
>
> THIS COURT HAS AN AFFIRMATIVE DUTY TO REPORT MISCONDUCT BY JUDGES AND LAWYERS OF WHICH IT HAS BECOME AWARE IN THIS ARTICLE 78 PROCEEDING (at pp. 23-24)

3. The Attorney General's Memorandum makes no attempt to confront the legal authority and analysis I provided under each of the aforesaid headings and subheadings--any one of which alone would suffice to merit review by this Court. Instead, it flagrantly misrepresents my motion papers.

4. As illustrative, the very first point of my Affidavit in support of reargument states:

> "this Court, in rendering its...Order...has, sub silentio, and without articulation of any reasons therefor, altered the well-settled and accepted rule that appeal lies of right form an order or judgment in an Article 78 proceeding originating in the Appellate Division." (at ¶4)

For that proposition, I cited the authority of well-respected

treatises. Yet, the Attorney General, without challenging such legal authorities--or providing even <u>one</u> case to the contrary--baldly states:

> "Petitioner points to no significant or relevant facts, or to any controlling principles of law, that were overlooked by this Court, in its May 12, 1994 order" (at p. 3)

5. Such factual representation by the Attorney General is patently untrue--as the most cursory review of my motion papers resoundingly shows.

6. Certainly, if the Attorney General disagreed with the text-based authorities I cited (at ¶5), which are unanimous that appeal lies of right in Article 78 proceedings where the Appellate Division is the court of first instance, he should have had no difficulty in coming forth with law to support his position. As part of his official duties, the Attorney-General routinely represents judicial respondents in Article 78 proceedings and thus has a reservoir of cases at his disposal, unavailable to me.

7. Likewise, the Attorney General should have been able to show, with precedents established in such other cases, that judges accused in other Article 78 proceedings did not disqualify themselves from deciding their own cases and, further, that such conduct does not violate basic rules regarding conflict of interest, embodied in Judiciary Law §14, the Rules of Judicial Conduct, decisional law, and the historic origin and legislative intent of the Article 78 statute. Obviously, the

Attorney-General could not find another case to support such ludicrous contention.

8. Indeed, my moving Affidavit not only discussed and analyzed the Rules Governing Judicial Conduct, incorporated by reference in our State Constitution, and the common law genesis and legislative intent behind the Article 78 statutory remedy--with which I showed the Judgement appealed from to be in conflict--but cited numerous cases (at pp. 9-10), including Capoccia v. Appellate Division, Third Department, 104 A.D.2d 536, 479 N.Y.S.2d 160 (3rd Dept. 1984), later proc., 104 A.D.2d 735, 480 N.Y.S.2d 313 (4th Dept. 1984); later proc., 107 A.D.2d 888, 484 N.Y.S.2d 325 (3rd Dept. 1985), involving the precise ethical point at issue. Yet, the Attorney General--without the slightest acknowledgement of the overwhelming authority in support of my position--fraudulently pretends otherwise to this Court by making the further insupportable statement that:

> "...petitioner has not shown that the Appellate Division's order regarding the purported question of law presented here is in conflict with any precedent of this Court or with any decision of the other Appellate Divisions, or that the question sought to be raised is novel or of such public importance as to merit review by this Court." (at p. 5)

9. This bad-faith method of defense, whereby the Attorney General not only does not address the issues, but, by false pretense, knowingly and deliberately portrays appellant's issues as non-existent is unethical and criminal conduct by any officer of the Court, and still more so, by a public officer who is the highest legal officer of our State, (DR 7-102A; Penal

Law, §195.00), empowered and obligated to protect the public interest (Executive Law, §63).

10. The aforecited caption headings, taken from my moving Affidavit, show that what is before this Court is the constitutionality of not just one state statute, but of at least three state statutes: CPLR §506(b)1 and Article 78--as they would require the venue of Article 78 proceedings against Appellate Division Justices be brought in the judicial department where those judges sit, do not specify a mandatory disqualification thereof, and do not explicitly grant a right of appeal from an adverse decision by disqualified judges who do not recuse themselves--and Judiciary Law §90. This is in addition to the issue raised by me as to the constitutionality of the Appellate Division's secretly-drafted and promulgated Rules Governing the Conduct of Attorneys, which has resulted in enactment of substantive law under the guise of the court's rule-making power, in violation of the constitutionally-mandated separation of powers.

11. The Attorney General has simply ignored all these central issues, turning his back on his affirmative duty on behalf of the State to opine that its statutes are constitutional whenever they are impugned (Executive Law §71; see also, CPLR §1012(b)). The whole purpose of such provisions is to safeguard the People from the possibility of unconstitutional laws on our books.

12. In view of such affirmative duty, the Attorney

General's conspicuous failure on this motion to defend the constitutionality of the Article 78 statute, as well as Judiciary Law §90 and the Appellate Division's disciplinary rules, all of which I challenged, as written and as applied, must be taken as his concession of the unconstitutionality thereof.

13. That the Attorney General has made that implied concession of unconstitutionality, while at the same time opposing any review by this Court of such constitutionally indefensible statutes and court rules, whether by right or by leave, must be recognized as an act of official misconduct on his part in that he has thereby knowingly and wilfully subjected the People of this State to laws and rules which violate and deprive them of their constitutional rights. This is plainly contrary to his official mandate to protect the public interest (Executive Law, §63).

14. The deliberateness of the Attorney General's misconduct is further reflected by his failure to address the due process and equal protection grounds upon which I have also premised review by this Court. Instead, he repeats (at p.4) the legally-inadmissible factual allegations of his Assistant Attorneys General in their dismissal motion before Respondent Second Department, which he clearly knows by now to be false[1], that pre-petition requirements were complied with and that a

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[1] My extensive correspondence with the Attorney General is before this Court, having been annexed to Mr. Schwartz' 3/14/94 letter to this Court as Supp. Exhs. "2", "4", "5", "6", 7", "8", "9"; and to my 7/19/94 reargument motion as Exhs. "M", "N", "O", "P", "R".

remedy exists in the underlying disciplinary proceeding. Conspicuously, he makes no affirmative representation that such alleged facts are true--which is the issue before this Court. Indeed my January 24, 1994 Jurisdictional Statement (at ¶24), as well as Mr. Schwartz' March 14, 1994 supporting letter (at pp. 12-6), highlighted to this Court that such factual allegations were "false, misleading, and perjurious". Mr. Schwartz' letter was quite specific on the subject, stating:

> "The extent of [the] dishonesty by the Attorney-General's Office before the Appellate Division can only be appreciated by reviewing Appellant's papers in support of the Article 78 Proceeding. See Appellant's Cross-Motion ¶¶17-61; Appellant's Affid in Further Opp to Resps' Dismissal Mot and in Further Supp of Cross Mot ¶¶2-4, 12-19, 22-26, 29-30; Mem of Law, Pts II, II, VI and VII.
>
> The resulting Judgment was the product of the Attorney General's aforesaid litigation misconduct, whose deceit was endorsed by the tribunal which was the direct beneficiary thereof" (at p. 13),

and put this Court on notice (at pp. 12-5) that the Attorney General had continued its dishonest conduct by its filed opposition to my Jurisdictional Statement.

15. That the Attorney General has simply ignored my serious charges and not made a statement to this Court as to any investigation thereof conducted by him, as repeatedly requested by me in my extensive correspondence with him, justifies the inference that he cannot answer my charges of misconduct, which must be deemed admitted since they are uncontroverted.

16. Likewise uncontroverted by the Attorney General is

my documented assertion that the ground upon which Respondent Second Department dismissed my Article 78 proceeding, the alleged availability of a remedy in the underlying disciplinary proceeding for my jurisdictional challenge "was and is an outright lie" (Supp. Exh. "4" to Mr. Schwartz' letter).

17. The Attorney General has not come forward with any affirmative statement--let alone an evidentiary showing--that Respondent Second Department's Judgment, which he approvingly cites (at p. 4), is factually supportable and makes no reference at all to the underlying disciplinary files under A.D. #90-00315. Nor does he refer to the events subsequent to Respondent Second Department's Judgment, which I pointed out (Supp. Exh. "4") were dispositive on that issue: the Kafka-esque Star Chamber hearings held on the February 6, 1990 Petition and Respondent Second Department's January 28, 1994 vicious decision on my November 19, 1993 Dismissal/Summary Judgment Motion (See also Mr. Schwartz' letter, at pp. 16-7).

18. In view of the files under A.D. #90-00315, including the November 19, 1993 Dismissal/Summary Judgment Motion, which I transmitted to the Attorney General[2]--and the transcripts of the hearings on the February 6, 1990 Petition,

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[2] My November 19, 1993 Dismissal/Summary Judgment Motion was hand-delivered to the Attorney General under my February 6, 1994 coverletter (Supp. Exh. "4"). The files under A.D. #90-00315 were hand-delivered to the Attorney General under my March 8, 1994 coverletter (Supp. Exh. "7").

which I repeatedly urged him to procure from his clients[3]--the obligation of the Attorney General on this motion was to make an affirmative statement as to what those documents reveal[4]. His failure to do so is a concession of the truth of my statements.

19. So that the Attorney General's bad-faith can be even clearer in this matter, I respectfully refer the Court to Exhibit "N" of my instant motion papers. Such exhibit consists of my March 30, 1994 letter to the Attorney General personally complaining about the misconduct of Abigail Petersen, the Assistant Attorney General to whom he had allegedly assigned review of the files under A.D. #90-00315, which I provided him. That letter complained of Ms. Petersen's complete inability to intelligently discuss her supposed review of those files. Such failure and refusal to discuss the content of those files is

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[3] See, Mr. Schwartz' 3/14/94 letter to this Court: Supp. Exh. "4", p. 2; Supp. Exh. "5", p. 5; Supp. Exh. "7", p. 2; and my 7/19/94 reargument motion, Exh. "N", pp. 2-3.

[4] As I pointed out at ¶¶ 14-15 of my Jurisdictional Statement, the transcripts of the hearings on the February 6, 1990 Petition show that:

> "Respondent Referee: (a) refused to require Respondent Casella to prove the contested jurisdictional allegations of the February 6, 1990 Petition before proceeding with the charges pleaded therein; and (b) refused to permit Appellant to show by evidentiary proof that there was no jurisdiction to proceed." (at fn. 7)

For the convenience of the Court, I specifically draw attention to the following pages in substantiation of the foregoing, which include testimony of the present Chairman of the Grievance Committee, Respondent Sumber, and former Chairman William Daley: pp. 252-3; 498-516; 535-7; 540-7; 582-99; 610-11 ; 628-654; 678-80; 756-782.

evident in the "Memorandum of Law" Ms. Petersen has authored and now submitted to this Court, which never mentions the files she was specifically assigned to review nor any determination she made with respect thereto. This is no accident--but, rather, a deliberate suppression and concealment of material facts this Court was entitled to know, in clear violation of DR 7-102A(3) of the Code of Professional Responsibility.

20. Ms. Petersen's failure to attest to any of the facts found by her in the course of her alleged review of my underlying disciplinary files or to provide an affidavit from her judicial clients--who have never submitted an affidavit in this action attesting to any facts--must be deemed an admission of the truth of all material facts alleged by me in my submissions to this Court and to Respondent Second Department. This is particularly so in light of the Factual Chronology, annexed as Exhibit "J" to my moving Affidavit, which I further incorporate herein by reference and affirm the truth thereof in all respects, as if fully set forth herein.

21. Such Chronology, replete with copious cross-referencing to the pertinent portions of the files under A.D. #90-00315, proves the abandonment of all rules of law, evidence, and ethics by the Article 78 Respondents and the profound First Amendment dimensions of what can only be understood in the context of an on-going pattern of harassment and retaliation against me for my judicial whistle-blowing activities.

22. In light Ms. Petersen's knowledge that the files

under A.D. #90-00315 and the transcripts of the February 6, 1990 Petition are in the possession of this Court, her statement (at p. 5) that my request for a criminal and disciplinary investigation of the Attorney General is "baseless" is a reflection either of the contempt in which she holds this Court or her confidence that the Attorney General's misconduct, no matter how brazen, will be permitted by this Court with impunity.

23. Plainly, it is a matter of deep public concern that the disciplinary power reposed by the Legislature in the Appellate Divisions of our Supreme Courts should be so abused as to prevent and punish exposure of judicial misconduct by attorneys who take seriously their ethical duty under Canon 8 of the Code of Professional Responsibility "to assist in improving the legal system" and, more specifically under EC 8-6, by working to ensure that "judges and administrative officials having adjudicative powers be...persons of integrity...".

24. As a supervisory lawyer, the Attorney General must be held accountable (DR 1-104A.2 of the Code of Professional Responsibility) for the unethical conduct of his staff counsel in covering up what the record under A.D. #90-00315 plainly shows is criminal conduct by his the Article 78 Respondents. His inaction with respect to my formal complaints and his active complicity in the misconduct complained of--notwithstanding his actual knowledge of the facts showing that such misconduct had occurred, reflected by my correspondence--are inexcusable and reprehensible violations of his oath of office "to support the constitution of

the United States and of the State of New York". (New York State Constitution, Article XIII)

25. The unrefuted record before this Court establishes that the Attorney General has been totally derelict in his statutory and ethical duty to the public to "seek justice" (Executive Law, §63; EC 7-13 of the Code of Professional Responsibility. See also, Imbler v. Pachman, 424 U.S. 309 (1975), at 427, n.25) and has been in knowing complicity with his clients' fraudulent and collisive conspiracy to deprive me of my civil rights by jurisdictionless, hearingless, findingless "interim" suspension Order (Exhibit "D-6), which they have perpetuated for more than three years, without my ever having had a hearing to establish the basis of such unconstitutional "interim" suspension.

26. This Court must not shirk its duty to review the serious issues raised on this appeal, involving the constitutionality of two statutes and the Appellate Division, Second Department's disciplinary rules. Indeed, this Court knows from other appeals challenging disciplinary orders over the nearly twenty years since promulgation of such rules that the abuses complained of by me have continuously recurred, abuses of a frighteningly unconstitutional dimension--as does the Attorney General, whose office continually defends the Grievance Committees and the Appellate Divisions not only in Article 78 proceedings, but in federal actions raising constitutional claims. Mildner v. Gulotta, 405 F. Supp. 1982 (1975), affm'd 96

S.Ct. 1489, Thaler v. Casella, 93 Civ. 4061 (1994).

27. Likewise, this Court must not shirk its duty to direct appropriate criminal and disciplinary investigation of the Attorney-General and his clients, which the record under A.D. #90-00315 shows to be warranted. To do otherwise would not only eliminate any normative ethical standard for the State's highest legal officer and its second highest court, but would convey the message to the public and the lower courts that the reporting requirements of the Chief Administrator's Rules of Judicial Conduct, approved by this Court, are not adhered to by this Court itself.

WHEREFORE, it is respectfully prayed that the instant motion for reargument be granted and that upon reargument, this Court take jurisdiction over the appeal herein as of right; and, alternatively, if such relief is denied, that leave to appeal be granted in the interests of justice; and, further that, in any case, there be a referral of the Respondents herein and their counsel, the Attorney General of the State of New York, for criminal and disciplinary investigation, together with such other and further relief as this Court may deem just and proper, including costs and sanctions under 22 N.Y.C.R.R 130-1.1 et seq. against Respondents and their counsel personally.

Doris L. Sassower
DORIS L. SASSOWER

Sworn to before me this
8th day of August, 1994

Louise D. Gracey
Notary Public

LOUISE DIGREGORIO
Notary Public, State of New York
No. 4718571
Qualified in Westchester County
Commission Expires ~~March 30, 1982~~
12-10-94

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age, and resides in White Plains, New York.

On August 7, 1994, Deponent served the

within: AFFIDAVIT IN REPLY AND IN FURTHER SUPPORT OF REARGUMENT, RECONSIDERATION, LEAVE TO APPEAL, AND OTHER RELIEF

upon: G. Oliver Koppell
Attorney General of the State of New York
120 Broadway
New York, New York 10271

by depositing three true copies of same in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office within the State of New York at the address last furnished by him or last known to your Deponent.

Elena Ruth Sassower
ELENA RUTH SASSOWER

Sworn to before me this
8th day of August 1994

Louise Di Crocco
Notary Public

LOUISE Di CROCCO
Notary Public, State of New York
No. 4718571
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12-10 94

Index No. Year 19
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In the Matter of Doris L. Sassower,

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-against-

HON. GUY MANGANO, as Presiding Justice
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et al.,

Respondents-Respondents.

AFFIDAVIT IN REPLY AND IN FURTHER SUPPORT OF REARGUMENT, RECONSIDERATION, LEAVE TO APPEAL AND OTHER RELIEF

DORIS L. SASSOWER, ~~P.C.~~

~~*Attorney for*~~ Pro Se

Office and Post Office Address, Telephone

~~50 MAIN STREET • TENTH FLOOR~~

~~WHITE PLAINS, N.Y. 10606~~

~~(914) 682-3001~~

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

.....

Attorney(s) for

Sir:—Please take notice

☐ NOTICE OF ENTRY

that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

☐ NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for
settlement to the HON. one of the judges
of the within named court, at
on 19 at M.

Dated,

Yours, etc.

DORIS L. SASSOWER, ~~P.C.~~

~~*Attorney for*~~ Pro Se

Office and Post Office Address

~~50 MAIN STREET • TENTH FLOOR~~

~~WHITE PLAINS, N.Y. 10606~~

To

Attorney(s) for