APPLICABLE ETHICAL AND LEGAL PROVISIONS

The New York State Attorney General is the state's highest law enforcement officer. The issue, highlighted by Petitioner at the June 14th court conference (at p. 7, lns. 15-19) and presented by this Memorandum, is whether the Attorney General will be held to fundamental ethical and professional standards, applicable to every other attorney in this state, or whether, in defending the state agency charged with enforcing judicial standards, he and it will be permitted to obliterate basic litigation standards and obstruct justice by fraudulent and deceitful advocacy. In fact, the Attorney General, as a government lawyer, is bound by a higher standard:

> "A government lawyer who has discretionary power relative to litigation should refrain from...continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to the lawyer should so advise his or her superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and develop a full and fair record, and should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlement or results..." EC 7-14 of the New York State Bar Association's Code of Professional Responsibility

This Court's duty to ensure the integrity of the judicial process is set forth in Part 100 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct, as well as in the Code of Judicial Conduct, adopted by the New York State Bar Association -- a primary source of judicial ethics that Respondent is supposed to enforce[10]. Part 100.3(C) relates to a

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[10] *See* 22 NCYRR §7000.9 "Standards of Conduct",

(b) "In evaluating the conduct of judges, the commission shall be guided by :... (2) the requirement that judges abide by the Code of Judicial Conduct, the rules of the Chief

Ex "AA"

judge's "Disciplinary Responsibilities". In mandatory language it states:

> "(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility *shall* take appropriate action."[11] (emphasis added).

The Disciplinary Rules of the Code of Professional Responsibility, promulgated as joint rules of the Appellate Divisions of the Supreme Court, are Part 1200 of Title 22 of New York Codes, Rules and Regulations. Particularly relevant is the Code's definitions section, which specifies "fraud" as involving:

> "scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another"(§1200.1(I)).

Under §1200.3 [DR- 1-102], "Misconduct", a lawyer or law firm is prohibited from, *inter alia*, "Violat[ing] a disciplinary rule", §1200.3(a)(1); "Circumvent[ing] a disciplinary rule through actions of another", §1200.3(a)(2); "Engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation", §1200.3(a)(4); and "Engag[ing] in conduct that is prejudicial

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Administrator, and the rules of the respective Appellate Divisions governing judicial conduct."

See also, 1999 Annual Report of the Commission on Judicial Conduct (p. 1), reprinting the Chief Administrator's Rules at pp. 61-76. *See also*, Transcript of the 9/22/87 Hearing of the NYS Assembly Judiciary Committee on the Commission on Judicial Conduct, Testimony of Gerald Stern, p. 15.

[11] This reporting duty has been reiterated by the Advisory Committee on Judicial Ethics, *See, inter alia*, Op. 89-54, 89-74, 89-75; 91-114. Its importance is further underscored in the ABA/BNA Lawyers' Manual on Professional Conduct: "It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency. Failure to render such reports is a disservice to the public and the legal profession. Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies." (*See*, "Standards for Imposing Lawyer Discipline, Preface, 01-802) *See also, People v. Gelbman*, 568 N.Y.S.2d 867, 868 (Just. Ct. 1991) "A Court cannot countenance actions, on the part of an attorney, which are unethical and in violation of the attorney's Canon on Ethics... . ... A Court cannot stand idly by and allow a violation of law or ethics to take place before it.".

to the administration of justice", §12003(a)(5).

Under §1200.4 [DR-1-103], "Disclosure of Information to Authorities", lawyers possessing knowledge of a violation of §1200.3:

> "that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness in other respects as a lawyer *shall* report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." (emphasis added)

These provisions are adapted from the American Bar Association's Model Rules of Professional Conduct. However, of the 50 states and the District of Columbia, New York alone has extended the Model Rules to law firms, *"New Rule Authorizes Discipline of Firms"*, New York Law Journal, 6/4/96, p.1, top, cols. 5-6; *"Taking a Firm Hand in Discipline"*, ABA Journal, Vol. 84, 9/98. Under §1200.5 [DR 1-104], "Responsibilities of a Partner or Supervisory Lawyer", a law firm is required to "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules" and to "adequately supervise", §1200.5(c). Additionally, "a lawyer with management responsibility...or direct supervisory authority" is required to make "reasonable efforts" to ensure adherence to the disciplinary rules, §1200.5(b), and is responsible for the violations of another lawyer if "the lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it"; or

> "knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated", §1200.5(d).

Under §1200.33 [DR 7-102], "Representing a Client Within the Bounds of Law",

a lawyer cannot, *inter alia*, "...assert a position, conduct a defense...or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another", §1200.33(a)(1); "knowingly make a false statement of law or fact", §1200.33(a)(5); or "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent, §1200.33(a)(7). Moreover, a lawyer who receives "information clearly establishing" that a fraud has been perpetrated upon the tribunal, is required to take corrective steps. If the fraud has been perpetrated by his client, the lawyer "shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal...", §1200.33(b)(1).

§1200.20, [DR 5-101], "Refusing Employment When the Interests of the Lawyer May Impair Independent Professional Judgment", requires that "neither a lawyer nor the lawyer's firm shall accept employment" in litigation "if the lawyer knows or it is obvious" that he or another lawyer in the firm may be called as a witness other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client", with §1200.21 [DR 5-102], "Withdrawal as Counsel When the Lawyer Becomes a Witness", requiring his withdrawal under such circumstances, where he has already undertaken the employment.

While the Disciplinary Rules of the Code of Professional Responsibility are the basis for imposition of discipline on lawyers in this State, criminal prosecution is also available. Among the relevant provisions: Judiciary Law §487, "Misconduct by attorneys", which makes it a misdemeanor for an attorney to be guilty of "any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party" -- with punishment in accordance with

the penal law[12]. Also, Penal Law §210.10 pertaining to perjury, which makes it a felony for a person to swear falsely when his false statement is:

> "(a) made in a subscribed written instrument for which an oath is required by law, and (b) made with intent to mislead a public servant in the performance of his official functions, and (c) material to the action, proceeding or matter involved."

Accomplices to perjury can be criminally prosecuted as conspirators. Under §105.05(1), "Conspiracy in the Fifth Degree",

> "A person is guilty of conspiracy in the fifth degree when, with intent that conduct constituting:
>
> 1. a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct."

Additionally, since the Attorney General and Respondent's Commissioners and staff are public servants, whose duty it is to uphold the law and safeguard the integrity of the judiciary, the paramount "interest of the state"[13], Penal Law §195, "Official Misconduct", is available. Under §195:

> "A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:
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> 1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
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> 2. He knowingly refrains from performing a duty which

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[12] Judiciary Law §487 also makes the guilty attorney liable for treble damages, recoverable in a civil action.

[13] "There can be no doubt that the State has an overriding interest in the integrity and impartiality of the judiciary. There is 'hardly *** a higher governmental interest than a State's interest in the quality of its judiciary' (*Landmark Communications v. Virginia*, 435 US 829, 848 [Stewart, J., concurring]..." *Nicholson v. Commission on Judicial Conduct*, 50 NY2d 597, 607 (1980).

> is imposed upon him by law or is clearly inherent in the nature of his office."

Official misconduct is a misdemeanor.

The Chief Administrator of the Courts has also promulgated rules, Part 130-1.1, empowering the Court to award costs and sanctions for "frivolous" conduct. Pursuant to 130-1.1(c), conduct is "frivolous" if:

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
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> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false."

The subject dismissal motion meets the test for frivolousness on all three counts.

Under 130-1.1, costs and sanctions may be imposed on the party, the attorney, or both -- and may be against the attorney who personally appeared, or against the government agency with which the attorney is associated and has appeared as attorney of record. Rule 130-1.1 specifically identifies two factors to be considered in determining whether conduct is frivolous and whether costs and sanctions should be imposed:

> "(1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct;
>
> (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

These factors also aggravate or mitigate attorney disciplinary sanctions, as they do

the imposition of criminal penalties.

Attorney General Spitzer has "over 500 lawyers and over 1,800 employees, including ...legal assistants,...investigators, and support staff"[14] -- and promotes the "credentials, integrity, and commitment to public service" of his "staff of legal professionals"[15]. As particularized in Petitioner's accompanying Affidavit (¶¶54-63), the Attorney General's office had over two and a half months *before* this Article 78 proceeding was commenced in which to verify if there was ANY legal or factual basis for the conduct that gave rise to it -- and repeated offers from Petitioner to assist it in evaluating the underlying documentation, which she had transmitted, including the file of the prior Article 78 proceeding against Respondent[16]. These offers continued after the instant Article 78 proceeding was commenced and, thereafter were combined with Petitioner's repeated notification to appropriate supervisory personnel of the litigation misconduct by the Assistant Attorneys General assigned to the case. All such supervisory personnel uniformly ignored and rebuffed Petitioner's offers and notifications (¶¶64-103).

Likewise, Respondent failed to take any corrective steps upon written notice (¶96), prior to the filing of the dismissal motion and immediately thereafter, of the Attorney General's sanctionable conduct on its behalf.

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[14] *See* Exhibit "A-3" (at p. 1) to Petitioner's accompanying Affidavit.

[15] *See* Exhibit "A-2" (at p. 1) to Petitioner's accompanying Affidavit.

[16] The "prior Article 78 proceeding against Respondent" refers to the proceeding entitled, *Doris L. Sassower v. Commission on Judicial Conduct of the State of New York* (N.Y. Co. #95-109141), identified in ¶EIGHTH of the Verified Petition. A copy of the file therein, as transmitted to Mr. Spitzer on December 24, 1998, is part of File Folder I.

Under 130-1.1-a(a) every "paper, served on another party or filed or submitted to the court" is required to be signed. This constitutes certification that

> (b) By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1."

The Attorney General's dismissal motion consists of a Notice of Motion, signed by Assistant Attorney General Kennedy, in which Respondent moves to dismiss pursuant to CPLR §§7804(f) and 3211(a)(3), (5), and (7). To this is attached a 4-1/4 page Affirmation from Mr. Kennedy, dated May 24, 1999, and a 3/4 page-Affidavit of Respondent's Clerk, Albert B. Lawrence, sworn to on May 17, 1999. A 41-page "Memorandum in Support of a Motion to Dismiss", dated May 24, 1999, is signed by Assistant Attorney General Olson, appearing "of counsel" with Mr. Kennedy, and consists of four parts, a "Preliminary Statement" (pp. 1-4), a "Statement of the Case" (pp. 4-11), a four-Point argument (pp. 11-40), and a "Conclusion" (p. 41).