Analysis/"Legal Autopsy"[1] of Assistant Solicitor General Frederick Brodie's December 10, 2018 "Memorandum in Opposition to Appellants' Motion for Disqualification and Other Relief"

Mr. Brodie opens with a two-sentence **"Preliminary Statement" (at p. 1)**, identifying only that appellants' motion, brought on by order to show cause, is for "disqualification and other relief" and that "Appellants' previous three motions for similar relief were summarily denied and, for reasons shown below, this motion should be denied, as well."

He then follows with a **"Statement of Facts" (at pp. 1-3)**, whose one-sentence first paragraph (at p. 1) refers the Court to his September 21, 2018 respondents' brief "For the facts and legal issues underlying this appeal". This is utter fraud. Mr. Brodie's September 21, 2018 respondents' brief is, "from beginning to end, 'a fraud on the court'", so-demonstrated by appellants' October 4, 2018 reply brief and, additionally, by their October 23, 2018 motion to strike his respondents' brief "as 'a fraud on the court" – a motion so dispositive that the appeal panel's November 13, 2018 decision could not give any reasons for denying it.

Rather than furnish any information about appellants' October 4, 2018 reply brief, which his "Statement of Facts" does not mention, or about appellants' October 23, 2018 motion to strike his respondents' brief, which his "Statement of Facts" mentions only in its two-sentence concluding paragraph (at p. 3) – and there concealing that its basis was because his respondents' brief is "a fraud on the court" and that the October 23, 2018 motion was denied, without reasons, by the appeal panel's November 13, 2018 decision – Mr. Brodie seeks to portray appellants as having "unsuccessfully sought the disqualification of every judge who has ruled against her in this matter".

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1 The term "legal autopsy" is from the law review article "*Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*", 73 Albany Law Review 1 (2009), by Gerald Caplan

Ex I

This is what he wants "the Court [to] be aware" of "[w]ith respect to the instant motion" to disqualify the appeal panel for "demonstrated actual bias". Essentially the entirety of his "Statement of the Case" is six bullet points itemizing appellants' unsuccessful prior disqualification motions, concealing the record proof establishing the merit of each motion.

Mr. Brodie then proceeds to his **"Argument" (at pp. 3-16),** all under his title heading **"Appellant's Motion Should Be Denied" (at p. 3)** and introduced by prefatory paragraphs (at pp. 3-4) that appellants' motion should be denied because "As appellant acknowledges, her first three motions sought 'similar and related relief.' (Sassower Aff. ¶23.)". According to Mr. Brodie, appellants' instant fourth motion is an "improper" "successive motion".

This is false – and Mr. Brodie knows this because he skips over the very FIRST sentence of ¶23 of appellant Sassower's moving affidavit in support of the motion so that he might quote from its second sentence. The first sentence reads: "Appellants have made no prior application for the same relief based on the actual bias, demonstrated by the appeal panel's November 13, 2018 decision and oral argument."

Mr. Brodie then presents seven sections, denominated A-G.

Mr. Brodie's Section A. "The Panel Should Not Be Disqualified" (at pp. 4-9) begins with a single prefatory sentence: "Appellant's grounds for disqualifying the panel that heard oral argument lacks a basis in fact or law." This is fraudulent. ¶¶1-6 of appellant Sassower's moving affidavit particularizes fact, law, and legal argument, all either concealed, distorted, or falsified by Mr. Brodie's four subsections, as follows:

Mr. Brodie's Subsection 1: "Adverse Rulings Do Not Support Disqualification" (at pp. 4-5). Mr. Brodie here purports that appellants' disqualification motion is based on bias that has to

be "inferred" from "adverse rulings" not to appellants' "liking"[2]. This is false. ¶¶4-5 of appellant Sassower's moving affidavit, to which Mr. Brodie cites, establishes that at issue is the appeal panel's November 13, 2018 decision, whose denial of appellants' October 23, 2018 motion to strike his respondents' brief, without reasons, cannot be justified. Mr. Brodie does not contest ANY of the particulars set forth therein, instead resting on a bald assertion that "The motion to strike respondents' brief was wholly without merit for the reasons set forth in respondents' opposition memorandum and affirmation filed November 2, 2018". This also is false. Mr. Brodie's November 2, 2018 memorandum and affirmation are each frauds – and this was so-demonstrated by appellant Sassower's November 13, 2018 reply affidavit in further support of the motion to strike – covered up by the appeal panel's November 13, 2018 decision in denying the motion, without reasons.

Mr. Brodie's Subsection 2: "The Rule of Necessity Overrides the Economic Interest Alleged by Appellant" (at pp. 5-7) rests on misrepresenting ¶6 of appellant Sassower's moving affidavit and concealing the further particularizing content of her ¶11-12.

Thus, Mr. Brodie's very first sentence in this subsection cites to ¶6, purporting that appellant Sassower there argues that "the panel has a financial interest in this appeal because it concerns judicial salaries". He disposes of this by his second sentence, stating:

> "But the Court of Appeals has held that the Rule of Necessity enables judges to decide litigation over judicial salaries, because any judge would face the same purported conflict. *Maron v. Silver*, 14 N.Y.3d 230, 248-49 (2010)."

This is utterly false. Sassower's ¶6 pertains to "the threshold jurisdictional issue" arising from Judiciary Law §14, precluding invocation of "rule of necessity" – which her ¶¶11-12 further

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[2] This replicates, *verbatim*, what he purported by his September 21, 2018 respondents' brief (at pp. 59-60), pertaining to appellants' entitlement to Judge Hartman's disqualification – so-demonstrated by appellants' reply brief (at pp. 2-5).

substantiates, including by the Court of Appeals decision in *Maron v. Silver*, which she identifies as having invoked "rule of necessity" without referencing Judiciary Law §14, even indirectly.

Mr. Brodie's Subsection 3: "The Court Has Jurisdiction to Hear This Matter" (at pp. 7-8) rests on concealing the content of ¶¶10-13 of appellant Sassower's moving affidavit. These are the paragraphs to which Mr. Brodie's first sentence cites in stating:

> "Appellant's argument that Judiciary Law §14 'divests the appeal panel of jurisdiction (11/27/18 Sassower Aff. ¶¶10-13) is incorrect for two reasons".

The "First" of Mr. Brodie's "two reasons" (at p. 7) is because:

> "The only statutory disqualifier alleged here is that the Justices are 'interested' because they benefit from judicial salary increases. As shown above, the Court of Appeals expressly held in *Matter of Maron* that the Rule of Necessity overrides such interest. (*See* Point A[2].)"

Again, Mr. Brodie ignores that the Court of Appeals' decision in *Matter of Maron* does NOT confront the jurisdictional issue, which it does not identify, just as it does not identify Judiciary Law §14, in invoking "Rule of Necessity".

As for the "Second" of Mr. Brodie's "two reasons" (at p. 8), he states:

> "courts have jurisdiction to determine jurisdictional issues. Thus, a litigant cannot strip this Court of jurisdiction simply by claiming that the Court has a prohibited interest in the outcome. The Court must first adjudicate the question of whether a prohibited interest exists. *See, e.g., Matter of Jessey v. Evans*, 70 A.D.2d 673 (3d Dep't 1979) (judge properly refused to recuse himself based on allegation of attenuated family relationship); *accord Flynn-Stallmer v. Stallmer*, 167 A.D.2d 575, 577078 (3d Dep't 1990), *app. dismissed*, 77 N.Y.2d 939 (1991). The court's decision on disqualification is reviewable on direct appeal. *See, e.g., Pier v. Pavement Resource Mgrs., Inc.*, 144 AD2d 803-04 (3d Dep't 1988)."

This is utterly fraudulent – implying, as it does, that appellants are seeking to have the appeal panel NOT "first adjudicate the question of whether a prohibited interest exits". The opposite is the case – and not only is this explicit from the second branch of appellants' order to show cause:

> "enjoining the appeal panel from rendering any decision on the appeal until its justices have ruled on the threshold issue that Judiciary Law §14 bars them from sitting and rendering any decision herein because they are 'interested'";

but from the very first sentence of ¶10 of appellant Sassower's moving affidavit, stating:

> "Appellants make this motion to secure a responsive ruling to the dispositive threshold issue that Judiciary Law §14 divest the appeal panel of jurisdiction, voiding any decision it may render – just as it voids the decisions below that are the subject of the appeal."

Mr. Brodie's Subsection 4: "Appellant's Other Asserted Grounds for Recusal are Meritless" (at pp. 8-9) opens with the assertion that "None of appellant's other grounds for recusal, or supposed indicators of bias, has any merit" – and thereupon purports to set forth three.

The "First" (at p. 8) – for which Mr. Brodie cites ¶7 of appellant Sassower's moving affidavit – he identifies only as "allowing respondents' counsel to participate in oral argument". This is not an accurate summarization of ¶7, which refers to Mr. Brodie only in its last sentence. Nor, for that matter, is it even an accurate summarization of that last sentence, which reads:

> "And [the appeal panel] allowed Mr. Brodie to freely repeat the frauds of his respondents' brief, exposed by appellants' reply brief – whose repetition, at the oral argument, the October 23, 2018 motion had sought to prevent."

The "merit" of such ground is established by appellants' "legal autopsy"/analysis of Mr. Brodie's November 13, 2018 oral argument, annexed to their order to show cause as Exhibit E – the accuracy of which Mr. Brodie has not denied or disputed in any respect.

The "Second" (at p. 9) – for which Mr. Brodie cites ¶16 of appellant Sassower's moving affidavit, in addition to her ¶7 – is as follows:

"...the Rule of Necessity need not be formally 'invoke[d]' by a court deciding a case []. When the Rule applies, the Court 'must hear and dispose of' the issues presented. *Matter of Maron*, 14 N.Y.3 at 248. The Rule applies here; appellant does not identify any legally-constituted panel without a financial interest in state judicial salaries that could hear this appeal."

Mr. Brodie furnishes NO legal authority for his extraordinary proposition that "the Rule of Necessity need not be formally 'invoke[d]' in situations where it would be applicable – and, plainly, the *Maron* decision, wherein the Court of Appeals invoked "the Rule of Necessity" before ruling on the judicial salary issue, does not stand for Mr. Brodie's proposition.

The "Third" (at p. 9) – for which Mr. Brodie cites footnote 16 of appellant Sassower's moving affidavit, annotating her ¶21 – is described by Mr. Brodie as her "lengthy footnote attacking Justice McCarthy", which he purports to be "wholly unwarranted". In so-claiming, Mr. Brodie's summarization of the footnote not only materially omits ALL the particulars recited by the footnote as to appellant Sassower's communications with Governor Pataki, including criminal and ethics complaints filed against him, during the period in which Justice McCarthy served as senior assistant counsel, pertaining to the very issues that gave rise to CJA's citizen-taxpayer action, but omits ALL the particulars it sets forth about the "citations to cases with the name 'Pataki' in the caption". Such pertains to his knowledge of:

"the apparent fraud committed by the parties to those cases – and the Court of Appeals [*Silver v. Pataki/Pataki v. Assembly & Senate*, 4 N.Y.3d 75 (2004)] – with what Article VII, 4 of the New York State Constitution makes obvious – that the state budget is flagrantly 'OFF the constitutional rails', *inter alia*, because – as highlighted by appellants' fourth, fifth, and ninth causes of action and the record thereon [R.644-645, R.803, R.829] – Article VII, §4 ordains a 'rolling budget', whose budget bills, except for the legislative and judiciary budget bills, never go back to the governor, but are enacted, bill by bill, by the legislature, upon their reconciling differences between the Senate and Assembly amendings of each bill in conformity with Article VII, §4."

Mr. Brodie's Section B: "Respondents are Properly Represented by the Attorney General, Who Cannot Represent Appellant" (at pp. 10-11) is a fraud in purporting that the Court's decisions on appellants' three prior motions were "correct" in having "declined to disqualify the Attorney General". Each of those decisions failed to even identify such requested relief in denying appellants' motions, without reasons – reflective of the fact that the Court could not justify what it was doing, factually or legally, as to that requested relief, or anything else.

As for Mr. Brodie's scant argument that the attorney general's representation of respondents is authorized and his representation of appellants is not, such regurgitates deceits repeatedly exposed by appellants – and so-highlighted by ¶¶6(B), 11-13 of appellant Sassower's November 13, 2018 reply affidavit – without responsive adjudication by the appeal panel's without-reasons November 13, 2018 decision.

Finally, as to Mr. Brodie's citation to ¶18 of appellant Sassower's moving affidavit for the proposition that "Appellant attempts to resurrect her argument that the Attorney General cannot lawfully represent respondents". He does not identify any specifics of this ¶18, namely, that it requests that the appeal panel's certification of questions to the Court of Appeals, include the "additional threshold issue" of:

> "the lawfulness, if not constitutionality, of the attorney general's representation of respondents pursuant to Executive Law §63.1 – where, as demonstrated, the office brazenly corrupts the judicial process with litigation fraud, falsifying and subverting the most black-letter law because it has NO legitimate defense – reflective of the fact that the attorney general's statutory and constitutional duty is to be prosecuting the case, on behalf of appellants, who have summary judgment on each of their ten causes of action."

Mr. Brodie's Section C: "Appellant's Request to Certify Questions to the Court of Appeals Should Be Denied" (at pp. 11-12) cites ¶3 of appellants' order to show cause and ¶17 of appellant Sassower's moving affidavit, but does not identify the questions proposed for certification.

Only by such concealment – and concealment of all the material facts recited by the moving affidavit – is Mr. Brodie able to purport that "None of those issues is appropriate for Court of Appeals review at this juncture" and to advance his three frivolous subsequent paragraphs – whose deceit and fraud are evident from the moving affidavit.

Mr. Brodie's Section D: "Appellant is Not Entitled to Judicial Disclosure" (at pp. 12-14), citing to appellants' request at ¶5(a) of their order to show cause, repeats the fraudulent distortion of §§100.3F and E of the Chief Administrator's Rules Governing Judicial Conduct, exposed again and again by appellants in support of their three prior motions, highlighted, in particular, by ¶¶16-18 of appellant Sassower's October 9, 2018 reply affidavit in support of their order to show cause (#2) to disqualify the Court for demonstrated actual bias, signed by Presiding Justice Garry on September 12, 2018 – without responsive adjudication by the Court's without-reasons October 23, 2018 decision.

Mr. Brodie's Section E: "Appellant is Not Entitled to Supplement Her Rebuttal Argument (at p. 14) seeks to have the Court "disregard[]" Exhibit E to appellant Sassower's moving affidavit, which is her "legal autopsy/analysis" of Mr. Brodie's November 13, 2018 oral argument. Such is frivolous. Appellants are not seeking to supplement appellant Sassower's rebuttal at the November 13, 2018 oral argument, but – as part of their motion's first branch to disqualify the appeal panel for demonstrated actual bias – to establish the fraud it tolerated by Mr. Brodie's oral argument. (See p. 5, *supra*, pertaining to Mr. Brodie's Section A (Subsection 4), and p. 10, *infra* pertaining to Mr. Brodie's Section G).

Mr. Brodie's Section F: "The November 13, 2018 Decision Should Not Be Renewed or Reargued" (at pp. 15-16) purports – citing to ¶5(b) of appellants' order to show cause for

reargument/renewal – that appellants do "not meet the requirements for either type of motion". His deceitful argument is as follows:

"First", that such relief is not "specifically identified" as required by "the first criterion in C.P.L.R. 2221(d)(1) and 2221(e)(i)". This is false – and Mr. Brodie furnishes no caselaw for his inference that the "specific identifi[cation]" is required to be in an abbreviated document title, as opposed to the body of the notice of motion, or in this case, the order to show cause, where it is specified at ¶5(b).

"Second", that appellants had allegedly "not, and cannot show that the Court overlooked or misapprehended any of her arguments on the prior motion". This is false – and the pertinent presentation in appellant Sassower's moving affidavit, at fn. 15, annotating ¶21, was:

> "Inasmuch as the appeal panel 'overlooked' all the facts, law, and legal argument presented by appellants' 'papers filed in support of the motion' – none identified or addressed by its November 13, 2018 decision – such constitutes grounds for reargument, pursuant to CPLR §2221(d)." (underlining in the original).

"Third", that appellants had allegedly not identified any "new facts not offered on the prior motion that would change the prior determination", required by CPLR §2221(e)(2), nor a "reasonable justification for the failure to present such facts on the prior motion", required by CPLR §2221(e)(3), This is false – and the pertinent presentation in appellant Sassower's moving affidavit, also at fn. 15, annotating ¶21, was, as follows:

> "As for 'new facts not offered on the prior motion', constituting a basis for renewal, pursuant to CPLR §2221(e), it is the actual bias of the appeal panel justices demonstrated by the November 13, 2018 decision. The 'reasonable justification' for appellants not having presented this actual bias 'on the prior motion' is that it is a supervening occurrence." (underlining in the original).

Mr. Brodie concludes, stating (at p. 16):

> "Finally, even if reargument or renewal were procedurally proper, the motion should be denied on the merits for the reasons set forth in respondents' November 2, 2018 memorandum and affirmation in opposition to appellant's motion to strike."

Again, this is utterly deceitful. Mr. Brodie's November 2, 2018 memorandum and affirmation are each frauds, so-demonstrated by appellant Sassower's November 13, 2018 reply affidavit in further support of the motion to strike.

Mr. Brodie's Section G: "There is No Basis for a Disciplinary Referral" (at p. 16) is a further flagrant fraud, stating, in full:

> "The relief sought in paragraph 5(c) of the OSC should be denied in its entirety. Respondents' oral argument properly focused on the key constitutional issues before the Court, and then addressed appellant's allegations regarding fraud and disqualification. The undersigned counsel stands by the points made in oral argument." (underlining added).

That Mr. Brodie should "stand[] by the points made in oral argument" – when he has NOT denied or disputed the accuracy of the fact-specific, record-based analysis/"legal autopsy" of his oral argument, annexed as Exhibit E to appellant Sassower's moving affidavit – further mandates this Court's granting of the ¶5(c) relief sought by appellants' order to show cause:

> "'appropriate action', pursuant to §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, for the frivolous and fraudulent November 13, 2018 oral argument of Assistant Solicitor General Frederick Brodie, including a show cause order as to why he and supervising and managerial attorneys in the attorney general's office should not be disciplined (*Cf. Matter of Greenberg*, 15 N.J. 132 (1954))".