

CENTER for JUDICIAL ACCOUNTABILITY, INC.

P.O. Box 69, Gedney Station
White Plains, New York 10605-0069

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: judgewatch@aol.com
Web site: www.judgewatch.org

Elena Ruth Sassower, Coordinator

DATE: November 13, 2003

TO: Appellate Division, 2nd Dept. Presiding Justice Gail Prudenti
Appellate Division, 2nd Dept. Justice Gabriel Krausman,
Chair, Second Department Review Committee
Appellate Division 2nd Dept. Justice Nancy Smith,
Co-Chair, Attorney Discipline Subcommittee
Appellate Division 2nd Dept. Justice Barry Cozier,
Co-Chair, Admissions Subcommittee
Member, Chief Judge Kaye's Commission to Promote
Public Confidence in Judicial Elections

FROM: Elena Ruth Sassower, Coordinator

RE: Fulfilling the mandate of Presiding Justice Prudenti's Committee
examining whether the Second Department is "acting fairly and
equitably' when dealing with an attorney's right to practice law"¹
by reviewing the dispositive case file evidence

This memo follows up my phone conversation on Monday, November 10th, with Robert Margolin, law clerk to Presiding Justice Prudenti and assistant to her Committee, chaired by Justice Krausman, examining whether the Second Department is "acting fairly and equitably' when dealing with an attorney's right to practice law". Mr. Margolin telephoned me on behalf of Justice Barry Cozier, for whom I had left a voice mail message on Friday, November 7th inquiring about the status of the Committee's work.

Mr. Margolin advised that the Committee had met last month to go over its final recommendations, which he stated were in process of being put in written form. He was not certain that the Committee would be meeting to review these written recommendations before they were presented to the Appellate Division,

¹ "Committee to Study Discipline Process", New York Law Journal, Cerisse Anderson, 11/26/02.

Second Department's justices, sometime later this month.

In our conversation, Mr. Margolin seemed unaware of CJA's January 27, 2003 and February 3, 2003 letters to Barry Kamins, Esq., co-chair of the Attorney Discipline Subcommittee – copies of which had been provided to his co-chair Justice Smith – for presentment to the Attorney Discipline Subcommittee and, indeed, the full Committee. More significantly, he seemed unaware of their content as to the unconstitutionality of New York's attorney disciplinary law, *as written and as applied*, detailed by the "key documents" in the appendix to the transmitted cert petition in the §1983 federal action, *Doris L. Sassower v. Hon. Guy Mangano, et al.* (No. 98-106): the verified complaint in the federal action [A-49-100] and the "Questions Presented" [A-117] and "Reasons for Granting the Writ" [A-118-131] from Ms. Sassower's predecessor Article 78 proceeding, *Doris L. Sassower v. Hon. Guy Mangano, et al.* (No. 94-1546) -- even to the limited extent of the facial infirmity of the Second Department's §691.4(1) for interim suspensions, so-recognized by the New York Court of Appeals in *Matter of Russakoff*, 79 N.Y.2d 520 (1992) – and identified at footnote 2 of our January 27th letter.

These January 27th and February 3rd letters are discussed at pages 17-24 of CJA's November 6, 2003 letter to Brooklyn District Attorney Hynes, co-chair, with Justice Cozier, of the Committee's Admissions Subcommittee. You are each indicated recipients of that letter to D.A. Hynes – and copies are enclosed, as are copies of CJA's exchange of correspondence with Mr. Kamins, discussed therein.

As pointed out by page 25 of our November 6th letter, Justice Cozier is also a member of Chief Judge Kaye's Commission to Promote Public Confidence in Judicial Elections. As such, he has an "especial duty" to examine the referred-to case file proof that the Appellate Division, Second Department has used its disciplinary and appellate powers to viciously retaliate against Ms. Sassower for championing the public's rights against political manipulation of judicial elections.

To our knowledge, Justice Cozier, who was not a member of the Appellate Division, Second Department bench until March 2001, has had no involvement in its disciplinary proceedings against Ms. Sassower or any appellate matters involving her. Consequently, to enable him to gauge the magnitude and gravity of the case file evidence outlined by our November 6th letter – and his

obligation to ensure that findings of fact and conclusions of law are made with respect thereto for incorporation into the work of the Commission to Promote Public Confidence in Judicial Elections where they rightfully belong -- we are herewith transmitting to him the copy of the case files that we had transmitted to Mr. Kamins under our January 27th and February 3rd coverletters for presentment to the Attorney Discipline Subcommittee and full Committee. These case files, which I picked up from Mr. Kamins' office on November 6th², appeared to be in the very same condition as when they were provided to Mr. Kamins nine months earlier -- an impression reinforced by the fact that the original coverletters were still packed with them. As for the cert petition and supplemental brief in the *Sassower v. Mangano* federal action -- the starting point for Mr. Kamins' review -- they were inside the priority mail envelope in which they had been sent, essentially uncreased and bound together by a rubberband, with CJA's informational brochure, still folded with inserts, precisely as I had packaged them³.

By this memo, CJA requests that the Second Department Committee be reconvened for the specific purpose of making findings of fact and conclusions of law with respect to these transmitted case files, consistent with its mandate to examine whether the Second Department is "acting fairly and equitably" when dealing with an attorney's right to practice law". Should that not be done, CJA requests that the Committee's members be supplied with copies of this memo, our January 27th and February 3rd letters to Mr. Kamins, and our November 6th letter to D.A. Hynes so that they may individually assess their professional obligations to evaluate the unconstitutionality of New York's attorney disciplinary law, *as written and as applied*⁴ -- not only on behalf of New York's legal community, but on

² It had been our intention to leave these case files with D.A. Hynes for presentment to the Committee for findings of fact and conclusions of law with respect to the "road-map" documents identified at page 24 of our November 6th our letter to him. However, Jeffrey Ferguson, Deputy Bureau Chief of the Rackets Division, with whom I met on that date, preferred that we retain these substantiating files until after the District Attorney's Office reviewed the "road map" documents, which I provided him in a separate folder.

³ This packed priority mail envelope is being transmitted to Justice Cozier, bound to this memo-letter by a rubberband.

⁴ CJA's website, www.judgewatch.org, contains the pertinent substantiating documents under "Test Cases-Federal (Mangano)" -- including the "road-map" documents specified at page 24 of our November 6th letter.

behalf of the general public, whose welfare directly depends upon safeguarding the rights of retaliated-against judicial whistleblowing lawyers, such as Ms. Sassower. To facilitate such reasonably-requested distribution to Committee members, readily accomplished by e-mail, this memo and our January 27th, February 3rd, and November 6th letters will be attached to a single e-mail to Mr. Margolin.

Needless to say, these four documents, as likewise the case files herein transmitted to Justice Cozier, should be "on the table" before the Appellate Division, Second Department justices at any meeting held on the Committee's recommendations.

Finally, and further reinforcing the decisive value of case files to any honest, methodologically-sound evaluation of the Second Department's treatment of lawyers admitted to practice within its jurisdiction, or seeking admission, or reinstatement, I am enclosing for Presiding Justice Prudenti, as well as for Justice Cozier and D.A. Hynes as co-chairs of the Admissions Subcommittee, copies of the case file materials in CJA's possession relating to the Appellate Division, Second Department's treatment of Zhuyu He in denying him admission to the New York bar (AD2nd #00-02408). These include the January 10, 2001 *amicus* motion of the New York Civil Liberties Union to the New York Court of Appeals pertaining to Mr. He's motion for leave to appeal. To give other Committee members a flavor of the Appellate Division, Second Department's unconstitutional and shameful treatment of Mr. He – and of other attorneys believed to have been similarly denied admissions -- I quote from the affirmation of Civil Liberties' staff attorney Christopher T. Dunn:

- “3. ...Zhuye He [is] a first-time applicant for Admission to the Bar of the State of New York. After passing the bar examination and apparently being recommended for admission by the Second Department Character Committee, Mr. He was denied admission by the Second Department in orders that provide no explanation for the court's action. Mr. He was also not provided with a copy of the report that the Character Committee forwarded to the Second Department.
- ...
5. ...[the Court of Appeals] in 1989 recognized that first-time bar applicants have due process rights under the Fourteenth Amendment of the United States Constitution that require that '[w]hen the criteria for admission have been met, an application should not be rejected upon

charges of unfitness without an opportunity by notice for a hearing and an answer.' *In re Rowe*, 73 N.Y.2d 336, 338, 540 N.Y.S.2d 231, 232 (citing *Willner v. Committee on Character*, 373 U.S. 96, 102-103 (1963)). The federal Court of Appeals has held that, under this principle, a court cannot disregard a recommendation of admission from a character committee without first affording the applicant constitutionally sufficient notice and opportunity to be heard and without providing a written explanation for its denial. *See Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado*, 758 F.2d 1362, 1368-69 (10th Cir. 1985); *In re Berkan*, 648 F.2d 1386, 1388-89 (1st Cir. 1981). Under these principles, which are compelled by long-established principles of procedural due process, Mr. He should have been afforded notice and opportunity to be heard by the Second Department and was entitled to a written explanation of the basis for the court's action.

6. Upon information and belief, the Second Department has a practice of not providing notice of an intent to disregard a Character Committee's recommendation for admission and of not providing, in such circumstances, applicants with an opportunity to be heard. Upon information and belief, the Second Department does not provide written explanations to first-time bar applicants whose bar applications the court denies despite a contrary recommendation from the character committee."
7. As to the issue of the Character Committee report, [the Court of Appeals] squarely addressed this issue last year, holding that even those seeking reinstatement to the bar are entitled to such reports. *See In re Citrin*, 94 N.Y.459, 464-65, 706 N.Y.S.2d 72, 74-75 (2000)..."

I do not know what has since become of Mr. He, a promising young lawyer, whose impressive resume⁵ indicates that he had been a summer intern with a

⁵ In June 1990, Mr. He graduated in the upper 5% of his class from a four-year LL.B program at the University of International Business & Economics School of Law in Beijing, China. He was honored by a National Student Award from 1987-1990 and, from 1989-1990, was editor of the school's International Business Law Review. He remained in Beijing for four years after that. From July 1990-February 1992, he worked for the Ministry of Foreign Trade and Economic Cooperation, with the Department of Treaty & Law and then, from February 1992-July 1994, worked at Beijing Aircraft Maintenance & Engineering Corp. Mr. He then moved to the United States and was enrolled at the University of Minnesota Carlson School of Management

New York law firm working on “political asylum cases”. It was his hope to be a productive member of the New York bar. However, when he contacted CJA for help in April 2001, after the Court of Appeals had denied, without reasons, his motion for leave, he was understandably despondent over how he had been treated and told me he was contemplating returning to China. Perhaps Mr. He may yet benefit from belated recognition by the Appellate Division, Second Department of the fundamental due process rights to which admissions applicants are entitled under controlling case law – and find comfort in the knowledge that his bitter, life-destroying experience in the New York courts was an impetus to making that happen.

The due process principles of *Willner* pertaining to bar admissions – cited by the New York Civil Liberties’ *amicus* motion to the Court of Appeals on Mr. He’s behalf -- are discussed in Ms. Sassower’s Point IV of her “Reasons for Granting the Writ” [A-128-129] as being *a fortiori* in the case of attorneys already admitted to the bar. As stated:

“...in the *a fortiori* case of an attorney already admitted to the bar, New York courts use *ex parte* committee reports, whose existence and content are unknown to the accused attorney, as a basis upon which to authorize the commencement of ‘quasi-criminal’ disciplinary proceedings, depriving him of notice and opportunity to be heard at the outset.” [A-129].

The file of the Appellate Division, Second Department’s disciplinary proceedings against Ms. Sassower under AD #90-00315 contains a full copy of her 1995 cert petition from her *Sassower v. Mangano* Article 78 proceeding, setting forth those “Reasons for Granting the Writ”. It is Exhibit “C” to Ms. Sassower’s March 27, 1995 reargument/renewal motion, requesting that if the Appellate Division, Second Department did not address the serious and substantial constitutional issues set forth that it grant leave to appeal to the Court of Appeals, or, alternatively, leave to appeal on certified questions of law, *to wit*, the “Questions Presented” by the cert petition:

from 1994-1996, graduating with a Master of Arts degree and grade point average of 3.79. In 1999, he was awarded a J.D. degree, with Regent’s Scholarship from the Texas Tech University School of Law.

“Whether New York’s attorney disciplinary law is unconstitutional, as written and as applied:

1. where an attorney can be immediately, indefinitely, and unconditionally suspended from the practice of law by an interim order, without findings, reasons, notice of charges, a pre-suspension hearing, or a post-suspension hearing for nearly four years;
2. where a disciplined attorney has no absolute right of judicial review, either by direct appeal or by the codified common law writs;
3. where adjudicative and prosecutorial functions are wholly under the control of the courts, enabling them to retaliate against attorneys who are judicial whistle-blowers;
4. where disciplinary proceedings (a) do not comply with the court’s own disciplinary rules; (b) are commenced by *ex parte* applications, without notice or opportunity to be heard; (c) deny the accused attorney all discovery rights, including access to the very documents on which the proceedings purport to be based; (d) do not rest on sworn complaints; (e) do not rest on an accusatory instrument or are asserted ‘on information and belief’, not based on any probable cause finding of guilt.”

To this, Ms. Sassower’s March 27, 1995 motion (at p. 27) added a further certified question for the Court of Appeals: her entitlement to the Appellate Division, Second Department’s disqualification based on her “due process right to an impartial and unbiased tribunal”.

As with virtually every one of the Appellate Division, Second Department’s disciplinary orders under AD #90-00315, Ms. Sassower’s requested relief, fully substantiated by the factual record and black-letter law, was “denied in its entirety” and without reasons (June 23, 1995 decision & order on motion).

Enclosures & cc’s on next page



Enclosures:

- (1) CJA's November 6, 2003 letter to Brooklyn District Attorney Hynes
- (2) correspondence with Barry Kamins, Esq.:
CJA's 1/27/03, 2/3/03 letters
& Mr. Kamins' 3/17/03 and 10/22/03 letters
- (3) cert petition & supplemental brief: *Sassower v. Mangano* federal action
[for Presiding Justice Prudenti, Justice Krausman]
- (4) resume & case file materials pertaining to the admissions application
of Zhuyu He (AD2nd #00-02408)
[for Presiding Justice Prudenti, Justice Cozier, D.A. Hynes]
- (5) CJA's informational brochure, with inserts:
"Where Do You Go When Judges Break the Law?"
(NYT, 10/26/94, \$16,770 public interest ad, Op-Ed page)
"Restraining 'Liars in the Courtroom' and on the Public Payroll"
(NYLJ, 8/27/97, \$3,077 public interest ad, pp. 3-4)

ADDITIONALLY FOR JUSTICE COZIER:

- case file evidence previously transmitted to Mr. Kamins, including
cert petition & supplemental brief: *Sassower v. Mangano* federal action

cc: Robert Margolin, Esq.
Brooklyn District Attorney Charles J. Hynes
ATT: First Deputy District Attorney Michael Vecchione
Assistant District Attorney Jeffrey L. Ferguson,
Deputy Bureau Chief/Rackets Division
Assistant District Attorney Josh E. Hanshaft
Barry Kamins, Esq.
Second Department Committee on Character & Fitness
ATT: Fred A. Bodoff, Executive Secretary
New York Civil Liberties Union
A. Thomas Levin, President, New York State Bar Association
Commission to Promote Public Confidence in Judicial Elections
The Public