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BY FAX: 518-436-7109 (10 pages)

September 18, 2002

James C. McKinley, Jr.
The New York Times
Albany Bureau

RE: ELECTION YEAR COVERAGE:
THE REAL ATTORNEY GENERAL SPITZER – NOT
THE PR VERSION: Balancing Coverage of Lawsuits he
has INITIATED by Examination of Lawsuits he has
DEFENDED

Dear Mr. McKinley:

Thank you for agreeing to telephone the Attorney General's office for comment regarding CJA's assertion, *based on the FILE evidence in your possession*, that Attorney General Spitzer has been defending the NYS Commission on Judicial Conduct with litigation misconduct so serious that it would be grounds for disbarment if committed by an individual attorney. Although David Nocenti, his counsel, is fully familiar with the matter, you should speak to Mr. Spitzer DIRECTLY, as he is ALSO knowledgeable of ALL aspects of my public interest lawsuit against the Commission – a lawsuit generated by his failure and refusal to investigate the evidence of the Commission's corruption, provided to him in late 1998 and early 1999.

The "linchpin" of the story is my 3-page analysis of the decision of Justice Herman Cahn in *Doris L. Sassower v. Commission* [A-52-54; A-189-194]¹ and my 13-page analysis of the decision of Justice Edward Lehner in *Michael Mantell v. Commission* [A-321-334; A-299-307]. Mr. Spitzer's Law Department has NEVER denied or disputed the accuracy of these analyses, yet, nonetheless, urged Justice William Wetzel to dismiss my lawsuit against the Commission based on the decisions of Justices Cahn and Lehner – which is precisely what Justice Wetzel did [A-9-14]. Mr. Spitzer's Law Department then urged the Appellate Division, First Department to affirm the demonstrably fraudulent decisions of Justices Lehner and Wetzel – which it did in appellate decisions of four sentences and eight sentences, respectively. These sentences, additionally, adopted, without discussion of law or fact, Mr. Spitzer's spurious argument that complainants whose judicial misconduct complaints are dismissed by the Commission *without investigation*, lack "standing" to sue.

¹ These references are to the Appendix to my Appellant's Brief before the Appellate Division, First Dept.

ASK MR. SPITZER whether he denies or disputes the accuracy of my two aforesaid analyses – from which you can independently verify the fraudulence of FIVE fraudulent judicial decisions, without which the Commission would not have survived. At very least, ask him to explain to you how Judiciary Law §44.1 can be reconciled with the Commission’s self-promulgated rule, 22 NYCRR §7000.3 [the hoax of Justice Cahn’s decision] and the difference between Judiciary Law §44.1 and Judiciary Law §44.2 [the hoax of Justice Lehner’s decision (see analysis pp. 5-9)].

Please also ASK MR. SPITZER what he has done to verify the accuracy of CJA’s \$3,000 public interest ad, “*Restraining ‘Liars in the Courtroom’ and on the Public Payroll*” (NYLJ, 8/27/97, pp. 3-4), since my public exchange with him on January 27, 1999 at the Association of the Bar of the City of New York, when he announced the establishment of his so-called “Public Integrity Unit”. A copy of that memorable exchange, as recorded by the New York Law Journal is enclosed, along with the ad to facilitate your questioning².

Finally, why don’t you ASK MR. SPITZER to interpret for you Executive Law §63.1 – which is the sole basis upon which he is representing the Commission, albeit without any claim that it is consistent with “the interest of the state” or that the Commission “requires” his services. Ask him, too, to interpret for you New York’s Disciplinary Rules of the Code of Professional Responsibility, which applies to him, just as it does to every other lawyer practicing in this state. Copies of Executive Law §63.1 and the relevant provisions of the Code of Professional Responsibility – including as relates to supervisory responsibilities [DR-1-104] – are also enclosed to facilitate your questioning.

I look forward to responding to Mr. Spitzer comments – which, you may be sure will be substantiated by the evidence in your possession.

Thank you.

Yours for a quality judiciary,
and electorally-meaningful reporting,



ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

Enclosures

² The full transcript, wherein Mr. Spitzer announced the establishment of his “Public Integrity Unit” is annexed to my March 26, 1999 ethics complaint against him, filed with the NYS Ethics Commission – which remains pending, uninvestigated. Such complaint, as likewise my other filed ethics and criminal complaints against Mr. Spitzer are part of the file of my lawsuit against the Commission, in your possession.

Encyclopedia

Attorney general; deputies, assistants, and substitutes, see C.J.S. Attorney General § 4.

WESTLAW Research

Attorney general cases: 46k[add key number].

Notes of Decisions

Appointment of assistants 1
Liability for acts by assistants 2

1. Appointment of assistants

It does not impair the validity of the appointment of "such deputies as he may deem necessary" that the officer is termed a "special deputy attorney-general," nor is it necessary to file the appointment with the secretary of state under § 9 of the Public Officers Law. *People v. Westchester County*, 1915, 168 App. Div. 765, 154 N.Y.S. 266.

Appointment of district attorney as a deputy Attorney General to prosecute defendant for acting as an unlicensed real estate broker and salesman was void, where deputization was allegedly created by telephone conversation between assistant district attorney and assistant Attorney General, Attorney General's office was never contacted and informed of the case's status during investigation, indictment, or trial of defendant, and virtually every decision concerning the case, including decision to indict, was made without any consultation or without consent from Attorney General's office. *People v. Ifill*, 1985, 127 Misc.2d 678, 487 N.Y.S.2d 647.

* § 63. General duties

The attorney-general shall:

1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interest of the state, but this section shall not apply to any of the military department bureaus or military offices of the state. No action or proceeding affecting the property or interests of the state shall be instituted, defended or conducted by any department, bureau, board, council, officer, agency or instru-

mentality of the state, without a notice to the attorney-general apprising him of the said action or proceeding, the nature and purpose thereof, so that he may participate or join therein if in his opinion the interests of the state so warrant.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general, including the salary or other compensation of all deputies employed, shall be a county charge.

3. Upon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of insurance, superintendent of banks, commissioner of taxation and finance or commissioner of motor vehicles, or the head of any other department, authority, division or agency of the state, investigate the alleged commission of any indictable offense or offenses in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department, and to prosecute the person or persons believed to have committed the same and any crime or offense arising out of such investigation or prosecution or both, including but not limited to appearing before and presenting all such matters to a grand jury.

4. Cause all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or the commissioner of general services, to be brought to trial.

5. When required by the comptroller or the superintendent of public works,¹ prepare proper drafts for contracts, obligations and other instruments for the use of the state.

6. Upon receipt thereof, pay into the treasury all moneys received by him for debts due or penalties forfeited to the people of the state.

7. He may, on behalf of the state, agree upon a case containing a statement of the facts and submit a controversy for decision to a

of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(b) *Law firm* includes, but is not limited to, a professional legal corporation, the legal department of a corporation or other organization and a legal services organization.

(c) *Person* includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(d) *Professional legal corporation* means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(e) *State* includes the District of Columbia, Puerto Rico, and other Federal territories and possessions.

(f) *Tribunal* includes all courts and all other adjudicatory bodies. A tribunal shall be deemed "available" when it would have jurisdiction to hear a complaint, if timely brought.

(g) *Bar association* includes a bar association of specialists as referred to in section 1200.10(b) of this Part.

(h) *Qualified legal assistance organization* means an office or organization of one of the four types listed in section 1200.8(d)(1) through (4), inclusive, that meets all the requirements thereof.

(i) *Fraud* does not include conduct, although characterized as fraudulent by statute or administrative rule, which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another.

* "Confidence" and "Secret" are defined in section 1200.19(a) of this Part.

§ 1200.2 [DR 1-101] Maintaining Integrity and Competence of the Legal Profession

(a) A lawyer is subject to discipline if the lawyer has made a materially false statement in, or has deliberately failed to disclose a material fact requested in connection with, the lawyer's application for admission to the bar.

(b) A lawyer shall not further the application for admission to the bar of another person that the lawyer knows to be unqualified in respect to character, education, or other relevant attribute.

§ 1200.3 [DR 1-102] Misconduct

(a) A lawyer or law firm shall not:

- (1) Violate a disciplinary rule.
- (2) Circumvent a disciplinary rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is available a tribunal of competent jurisdiction, other than a Departmental Disciplinary Committee, a complaint of professional misconduct based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

(7) In domestic relations matters, begin a sexual relationship with a client during the course of the lawyer's representation of the client.

(8) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

1. So in original. No par. (b) has been enacted.

§ 1200.4 [DR 1-103] Disclosure of Information to Authorities

(a) A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2), not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of section 1200.3 of this Part 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.

(b) A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

§ 1200.5 [DR 1-104] Responsibilities of a Partner or Supervisory Lawyer

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

(b) A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.

(c) A law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of the disciplinary rules by another lawyer or for the conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of the disciplinary rules if engaged in by a lawyer if:

(1) The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices or the nonlawyer is employed, or has supervisory authority over the other lawyer or the nonlawyer, and knows of such conduct, or in the exercise or 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.

§ 1200.6 [DR 2-101] Publicity and Advertising

(a) A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole.

(b) Advertising or other publicity by lawyers, including participation in public functions, shall not contain puffery, self-laudation, claims regarding the quality of the lawyers' legal services, or claims that cannot be measured or verified.

(c) It is proper to include information, provided its dissemination does not violate the provisions of subdivisions (a) and (b) of this section, as to:

(1) education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by the code of professional responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates; and

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by subdivision (1) of this section; range of fees for services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal services.

(d) Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in subdivision (C) of this section that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this Rule.

(e) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be delivered to the client at the time of retainer for any such service. Such legal services shall include all those services which are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(f) If the advertisement is broadcast, it shall be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission shall be retained by the lawyer for a period of not less than one year following such transmission. All advertisements of legal services that are mailed, or are distributed other than by radio, television, directory, newspaper, magazine or other periodical, by a lawyer or law firm with an office for the practice of law in this state, shall also be subject to the following provisions:

(1) A copy of each advertisement shall at the time of its initial mailing or distribution be filed with the Departmental Disciplinary Committee of the appropriate judicial department.

(2) Such advertisement shall contain no reference to the fact of filing.

(3) If such advertisement is directed to a predetermined addressee, a list, containing the names and addresses of all persons to whom the advertisement is being or will thereafter be mailed or distributed, shall be retained by the lawyer or law firm for a period of not less than one year following the last date of mailing or distribution.

(4) The advertisements filed pursuant to this subdivision shall be open to public inspection.

(5) The requirements of this subdivision shall not apply to such professional cards or other announcements the distribution of which is authorized by section 1200.7 of this Part.

§ 1200.28 [DR 5-109] **Conflict of Interest—Organization as Client**

(a)¹ When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

1. So in original. No par. (b) has been enacted.

§ 1200.29 [DR 5-110] **Membership in Legal Services Organization**

(a)¹ A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm, provided that the lawyer shall not knowingly participate in a decision or action of the organization.

(1) If participating in the decision or action would be incompatible with the lawyer's duty of loyalty to a client under Canon 5; or

(2) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

1. So in original. No par. (b) has been enacted.

§ 1200.30 [DR 6-101] **Failing to Act Competently**

(a)¹ A lawyer shall not:

(1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to the lawyer.

1. So in original. No par. (b) has been enacted.

§ 1200.31 [DR 6-102] **Limiting Liability to Client**

(a)¹ A lawyer shall not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice, or, without first advising that person that independent representation is appropriate in connection therewith, to settle a claim for such liability with an unrepresented client or former client.

1. So in original. No par. (b) has been enacted.

§ 1200.32 [DR 7-101] **Representing a Client Zealously**

(a) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules, except as provided by subdivision (b) of this section. A lawyer does not violate this disciplinary rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under sections 1200.15, 1200.21 and 1200.24 of this Part.

(3) Prejudice or damage the client during the course of the professional relationship, except as required under section 1200.33 of this Part.

(b) In the representation of a client, a lawyer may:

(1) Where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.

(2) Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

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

(a) In the representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, 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.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

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(7) Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

(b) A lawyer who receives information clearly establishing that:

(1) The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal 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, except when the information is protected as a confidence or secret.

(2) A person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

§ 1200.34 [DR 7-103] **Performing the Duty of Public Prosecutor or Other Government Lawyer**

(a) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

(b) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

§ 1200.35 [DR 7-104] **Communicating With One of Adverse Interest**

(a)¹ During the course of the representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

1. So in original. No par. (b) has been enacted.

§ 1200.36 [DR 7-105] **Threatening Criminal Prosecution**

(a)¹ A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

1. So in original. No par. (b) has been enacted.

§ 1200.37 [DR 7-106] **Trial Conduct**

(a) A lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.

(b) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Controlling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients, the lawyer represents and of the persons who employed the lawyer.

(c) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

§ 1200.38 [DR 7-107] **Trial Publicity**

(a) A lawyer participating in or associated with a criminal or civil matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation

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