

*To Be Argued By:
Elena Ruth Sassower*

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NEW YORK SUPREME COURT
Appellate Division -- First Department

ELENA RUTH SASSOWER, Coordinator
of the Center for Judicial Accountability, Inc.,
acting *pro bono publico*,

Petitioner-Appellant,

-against-

COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF NEW YORK,

Respondent-Respondent.

PETITIONER-APPELLANT'S REPLY BRIEF

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PETITIONER-APPELLANT'S REPLY BRIEF

The *only* reply appropriate to the New York State Commission on Judicial Conduct's Respondent's Brief, submitted by its attorney, the New York State Attorney General, is a motion to strike it, to sanction the Commission and the Attorney General, to refer them for disciplinary and criminal investigation and prosecution, and to disqualify the Attorney General for violation of Executive Law §63.1 and conflict of interest rules. This, because Respondent's Brief, *from beginning to end*, is based on knowing and deliberate falsification, distortion, and concealment of the material facts and law – and because the Commission and Attorney General, *directly and incontrovertibly*, know this to be so, but have failed and refused to withdraw it.

Most everything that needs to be said about Respondent's Brief, Appellant has *already* said in a May 3, 2001 Critique, whose 66 pages constitute a virtual line-by-line analysis of it. Appellant has therein demonstrated that Respondent's Brief is not merely "frivolous" under 22 NYCRR §130-1.1 in "assert[ing] material factual statements that are false", but that, in nearly every line, it is "fraudulent" and a "fraud on the court" – as those terms are defined by Black's Law Dictionary (7th ed. 1999) and 22 NYCRR §1200.1(i). As such, Respondent's Brief more than violates New York's Disciplinary Rules of the Code of Professional Responsibility, DR 1-102(a)(4) [22 NYCRR §1200.3(a)(4)], proscribing "a lawyer or law firm" from "Engag[ing] in

conduct involving dishonesty, fraud, deceit or misrepresentation”, and DR 7-102(a)(5) [22 NYCRR §1200.33(a)(5)], proscribing a lawyer from “Knowingly mak[ing] a false statement of law or fact” on behalf of his client. It violates Judiciary Law §487, which makes it a misdemeanor for an attorney to be “guilty of any deceit or collusion or [to] consent[] to any deceit or collusion, with intent to deceive the court or any party”.

The background to Appellant’s Critique is set forth in its “Introduction”:

“On March 23, 2001 – more than two months after having obtained from Petitioner a stipulation extending his time to respond to her Appellant’s Brief -- the New York State Attorney General, representing Respondent New York State Commission on Judicial Conduct, served a Respondent’s Brief. Such Respondent’s Brief, fashioned on wilful misrepresentation and omission of the material facts and concealment of the applicable law, was immediately objected to by Petitioner. In telephone conversations with Assistant Solicitor General Carol Fischer, signator of the Respondent’s Brief, and Deputy Solicitor General Michael S. Belohlavek, whose name appears on its cover and concluding signature page, Petitioner outlined key respects in which the Respondent’s Brief was a sanctionable deceit. She advised that unless the Respondent’s Brief was withdrawn, she would have no choice but to burden the Court with a sanctions motion.

Although the sanctionable nature of Ms. Fischer’s Respondent’s Brief is readily apparent simply by comparing it with Petitioner’s Brief, Petitioner agreed to Deputy Solicitor General Belohlavek’s request for ‘something in writing’. This, so that he could discharge his mandatory supervisory responsibilities under New York’s Disciplinary Rules of the Code of Professional Responsibility¹, to which Petitioner directed his attention [DR 1-104; 22 NYCRR §1200.5].

¹ These have been promulgated as joint rules of the Appellate Divisions of the Supreme Court and codified as 22 NYCRR §1200 *et seq.* The Appellate Division, First Department has reinforced their applicability to both attorneys and law firms by Part 603 of its Rules – making those who violate or fail to conduct themselves in conformity therewith “guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law”.

The within critique is that 'writing'.

On May 3, 2001, after delivering a copy of the Critique to the Commission, Appellant delivered two originals to the Attorney General's office, under two coverletters. One coverletter was to Mr. Belohlavek (Exhibit "T-4")² and requested, following his review, that he transmit the Critique to "[his] superior, Solicitor General Preeti D. Bansal, who bears ultimate supervisory responsibility for the workproduct of the Solicitor General's office." The other coverletter was to Attorney General Eliot Spitzer (Exhibit "T-3") and identified the Critique as being transmitted to him so that he could "direct that the Respondent's Brief be withdrawn", in discharge of his "ultimate supervisory responsibilities".

The cover of the Critique (Exhibit "U") itself reinforced the Critique's salutary purpose in assisting

"THOSE CHARGED WITH SUPERVISORY RESPONSIBILITIES IN THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL...IN MEETING THEIR PROFESSIONAL AND ETHICAL OBLIGATIONS, *inter alia*, BY WITHDRAWING THE RESPONDENT'S BRIEF"

As noted by the Critique's "Conclusion" (Exhibit "U", p. 66), withdrawing the Respondent's Brief – to prevent "fraud on the court" – was "the most minimal" of "reasonable remedial action" required by the mandatory provisions of DR-104 of the Code of Professional Responsibility [22 NYCRR §1200.5]. This, because,

"[m]anifest from the fraudulence of Respondent's Brief is that there is NO legitimate defense to this appeal. Consequently,

² See exhibits annexed to accompanying motion, incorporated herein by reference, *infra*.

more significant action is required of the Attorney General. Pursuant to Executive Law §63.1, which predicates the Attorney General's litigation advocacy on 'the interests of the state', he must disavow representation of the Commission and join in support of the appeal."

In the three and a half months that Attorney General Spitzer and Solicitor General Bansal have had to review the Critique (Exhibit "U"), neither they nor anyone on their behalf or at the Commission have denied or disputed the accuracy of any aspect of its 66-page presentation. Nonetheless, they have refused to withdraw Respondent's Brief (Exhibits "V" and "X-1").

It is to safeguard the integrity of the appellate process, defiled by a Respondent's Brief already demonstrated to be a "fraud on the court", that Appellant now makes the accompanying motion to strike it on that ground, and for sanctions against the Commission and Attorney General, disciplinary and criminal referral of them, as well as for disqualification of the Attorney General for violation of Executive Law §63.1 and conflict of interest rules. Appellant's Critique is Exhibit "U" to that motion, whose first branch is for special assignment/transfer of this appeal because of this Court's disqualification for interest and bias, both actual and apparent. As the accompanying motion notes, the very fact that the Attorney General and Commission would put before this Court such a fraudulent Respondent's Brief – and not withdraw it in face of incontrovertible proof -- bespeaks their confidence that this Court is not a fair and impartial tribunal and will let them get away with anything. No other

conclusion is possible.

In the interest of judicial economy, this Reply Brief will not repeat the Critique's 66-page analysis of Respondent's Brief (Exhibit "U"), except for the following dispositive highlights:

- (1) Point I of the Critique (at pp. 3-5) details that Respondent's Brief conceals that Justice Wetzel's dismissal of Appellant's Verified Petition is based exclusively on decisions *whose fraudulence was established by uncontroverted evidentiary proof in the record before him*: Appellant's 3-page analysis of the decision of Justice Herman Cahn in *Doris L. Sassower v. Commission* [A-52-54] and her 13-page analysis of the decision of Justice Edward Lehner in *Mantell v. Commission* [A-321-334] – the accuracy of which analyses Respondent's Brief does not deny or dispute;
- (2) Point II of the Critique (at pp. 5-11) details that Respondent's Brief is fashioned on knowingly false propositions about the Commission, derived from the decisions of Justices Cahn and Lehner, without identifying these decisions as its source – and that the falsity of these propositions is established by Appellant's analyses of those decisions and by the *uncontroverted* evidence in the record;
- (3) Point III(D)(1) of the Critique (at pp. 40-47) details that Respondent's Brief relies on this Court's appellate decision in *Mantell* to support inflated claims that Appellant lacks "standing" to sue the Commission – concealing not only the different facts of Appellant's case, making the *Mantell* appellate decision inapplicable, but the fraudulence of the *Mantell* appellate decision, highlighted by Appellant's *uncontroverted* 1-page analysis thereof – the accuracy of which analysis Respondent's Brief does not deny or dispute.

The Appellant's Critique and accompanying motion are incorporated herein by reference with the same force and effect as if physically set forth.

CONCLUSION

As requested by Appellant's accompanying motion, Respondent's Brief must be stricken as a "fraud on the Court", the Attorney General and Commission sanctioned and referred for disciplinary and criminal investigation, and the Attorney General disqualified for violation of Executive Law §63.1 and conflict of interest rules.



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