TABLE OF EXHIBITS

Exhibit "A":	Elena Sassower's October 7, 2002 letter to Suzanne Aiardo, Chief Motion Clerk, Court of Appeals
Exhibit "B-1":	Court of Appeals' September 12, 2002 decision/order (Mo. No. 581)
"B-2":	Elena Sassower's May 1, 2002 "Law Day" notice of motion for disqualification/disclosure and pages 1-8 of her moving affidavit
Exhibit "C-1":	Court of Appeals' September 12, 2002 decision/order (Mo. No. 719)
"C-2":	Elena Sassower's May 1, 2002 "Law Day" notice of appeal
"C-3":	Elena Sassower's June 17, 2002 notice of motion to strike, for costs, sanctions, disciplinary and criminal referrals, disqualification of Attorney General, etc.
Exhibit "D":	*New York State Association of Criminal Defense Lawyers v. Kaye*, 95 N.Y.2d 556 (2000)
Exhibit "E-1":	Court of Appeals' decision/order in *Schulz v. New York State Legislature*, Mo. No. 1075
"E-2":	*Schulz v. New York State Legislature*, 92 N.Y.2d 917 (1998)
Exhibit "F-1":	*Sims v. New York State Commission on Judicial Conduct*, 62 N.Y.2d 884 (1984)
"F-2":	*New York Criminal and Civil Courts Bar Association v. New York*, 46 N.Y.2d 730 (1978)
Exhibit "G":	Robert Schulz' August 17, 1998 motion to disqualify in *Schulz v. New York State Legislature*

CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

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

Tel. (914) 421-1200
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E-Mail: judgewatch@aol.com
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Elena Ruth Sassower, Coordinator

October 7, 2002

Suzanne Aiardo, Chief Motions Clerk
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

RE: *Elena Ruth Sassower, Coordinator of the Center for Judicial Accountability, Inc., acting pro bono publico v. Commission on Judicial Conduct of the State of New York*
(Motion No. 581; Motion No. 719)
Confirming Time for Reargument/Leave to Appeal

Dear Ms. Aiardo:

This is to confirm your advice to me that since the 30 days from the September 12th date of the Court's two orders in the above-entitled matter falls on Saturday, October 12th and the following Monday, October 14th is Columbus Day, my motion to reargue does not have to be served until Tuesday, October 15th.

As discussed, this will "make up" for the fact that the Court's September 12th orders were not posted until September 17th – as may be seen from the enclosed copy of the envelopes.

I will be separately moving for leave to appeal. Having been served, by mail, with the orders with notice of entry on September 19th, my 35 days within which to serve such order extends to October 24th.

Ex "A"

Thank you.

Yours for a quality judiciary,

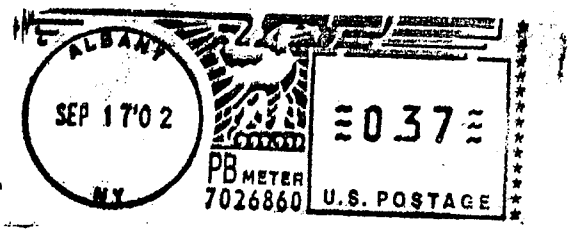
ELENA RUTH SASSOWER
Petitioner-Appellant *Pro Se*

Enclosure

cc: Attorney General Eliot Spitzer
ATT: Solicitor General Carol Fischer
New York State Commission on Judicial Conduct

719 Sassower v SCJC

COURT OF APPEALS
CLERK'S OFFICE
ALBANY, NY 12207-1095

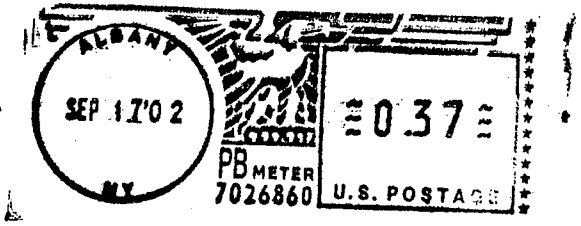


Elena Ruth Sassower
Box 69 Gedney Station
White Plains, New York 10605-0069

10603+0069 02

581 Sassower v SCJC

COURT OF APPEALS
CLERK'S OFFICE
ALBANY, NY 12207-1095



Elena Ruth Sassower
Box 69 Gedney Station
White Plains, New York 10605-0069

10603+0069 02

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth *day of* September 2002

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 581
Elena Ruth Sassower, &c.,
Appellant,
v.
Commission on Judicial Conduct of the State of New York,
Respondent.

A motion seeking disqualification of Chief Judge Kaye and Judges Smith, Levine, Ciparick, Rosenblatt and Graffeo, and an application seeking recusal in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks disqualification of Judge Rosenblatt, be and the same hereby is dismissed as academic; and it is

ORDERED, that the said motion, insofar as it seeks disqualification of Chief Judge Kaye and Judges Smith, Levine, Ciparick and Graffeo, be and the same hereby is dismissed upon the ground that the Court has no authority to entertain the motion made on nonstatutory grounds. The application seeking recusal is referred to the Judges for individual consideration and determination by each Judge.

Ex "B-1"

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo concur.

Judge Rosenblatt took no part.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo each respectively denies the referred motion for recusal.

Stuart M. Cohen

Stuart M. Cohen
Clerk of the Court

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION September 12, 2002

Mo. No. 581
Elena Ruth Sassower, &c.,
Appellant,
v.
Commission on Judicial Conduct
of the State of New York,
Respondent.

Motion, insofar as it seeks disqualification of Judge Rosenblatt, dismissed as academic; motion, insofar as it seeks disqualification of Chief Judge Kaye and Judges Smith, Levine, Ciparick and Graffeo dismissed upon the ground that the Court has no authority to entertain the motion made on nonstatutory grounds. The application seeking recusal is referred to the Judges for individual consideration and determination by each Judge.
Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo concur.
Judge Rosenblatt took no part.
Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo each respectively denies the referred motion for recusal.

COURT OF APPEALS
STATE OF NEW YORK

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.

NOTICE OF MOTION FOR DISQUALIFICATION AND DISCLOSURE

AD 1st Dept. #5638/01
S.Ct./NY Co. #108551/99

PLEASE TAKE NOTICE that upon the annexed Affidavit of Petitioner-Appellant, ELENA RUTH SASSOWER, dated May 1, 2002, "Law Day", the exhibits annexed thereto, and upon all the papers and proceedings heretofor had, ELENA RUTH SASSOWER will move this Court at 20 Eagle Street, Albany, New York 12207-1095 on Monday, May 20, 2002 at 10:00 a.m. or as soon thereafter as Respondent-Respondent and its counsel can be heard for an order:

1. Disqualifying this Court's Chief Judge and Associate Judges from participating in the above-captioned appeal for interest, pursuant to Judiciary Law §14 and §100.3E of the Chief Administrator's Rules Governing Judicial Conduct, as well as for bias, pursuant to §100.3E of the Chief Administrator's Rules Governing Judicial Conduct;

2. Designating justices of the Supreme Court to serve as Associate Judges of this Court for all purposes of this appeal, pursuant to Article VI, §2a of the

Ex "B-2"

New York State Constitution, with the condition that the so-designated judges make disclosure pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct of material facts bearing upon their personal, professional, and political relationships with, and dependencies on, the persons and entities whose misconduct is the subject of this appeal or exposed thereby.

3. Such other and further relief as may be just and proper, including disciplinary and criminal referrals, pursuant to §§100.3D(1) & (2) of the Chief Administrator's Rules Governing Judicial Conduct and DR 1-103(A) of New York's Disciplinary Rules of the Code of Professional Responsibility, of the documentary proof herein presented of longstanding and ongoing systemic corruption by judges and lawyers on the public payroll.

Dated: May 1, 2002, "Law Day"
White Plains, New York

Yours, etc.

ELENA RUTH SASSOWER
Petitioner-Appellant *Pro Se*
Box 69, Gedney Station
White Plains, New York 10605-0069
(914) 421-1200

TO: ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Respondent-Respondent
120 Broadway
New York, New York 10271
(212) 416-8020

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT
Respondent-Respondent
801 Second Avenue
New York, New York 10017
(212) 949-8860

COURT OF APPEALS
STATE OF NEW YORK

---------- x

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

AFFIDAVIT IN SUPPORT OF DISQUALIFICATION & DISCLOSURE

Petitioner-Appellant,

A.D. 1st Dept. #5638/01
S.Ct./NY Co. #108551/99

-against-

COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF NEW YORK,

Respondent-Respondent.

---------- x

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the *pro se* Petitioner-Appellant, fully familiar with all the facts, papers, and proceedings in this important public interest Article 78 proceeding against Respondent-Respondent New York State Commission on Judicial Conduct [hereinafter "Commission"].

2. This motion is for the threshold relief of disqualifying this Court's judges from adjudicating this appeal by reason of their interest, proscribed by Judiciary Law §14 and §100.3E of the Chief Administrator's Rules Governing Judicial Conduct, as well as their bias, also proscribed by §100.3E of the Chief Administrator's Rules. Pursuant to Article VI, §2a of the New York State Constitution[1], I seek to replace this

[1] In pertinent part, Article VI, §2a states:

Court's judges as adjudicators of the jurisdictional issues of my Notice of Appeal and of the subsequent appeal[2] with specially-designated Supreme Court justices, who will make pertinent disclosure of disqualifying facts pursuant to §100.3F of the Chief Administrator's Rules Governing Judicial Conduct.

3. To avoid needless repetition of the basic facts of this extraordinary appeal, as to which, additionally, there can be no doubt as to public importance and decisional conflict – the standard for appeal by leave (22 NYCRR §500.11(d)(1)(v)) -- I refer the Court to my simultaneously-filed Jurisdictional Statement and the record on which it rests, most particularly, my motions in the Appellate Division, First Department for reargument and for leave to appeal.

4. Because virtually every judge in this State is under the Commission's disciplinary jurisdiction and because the criminal ramifications of this lawsuit reach this State's most powerful leaders upon whom judges are directly and immediately dependent and with whom they have personal, professional, and political relationships, I raised legitimate issues of judicial disqualification and disclosure in the courts below, always suggesting alternative more neutral tribunals. Before the Appellate Division, First Department, I made a threshold August 17, 2001 motion for

---

> "...In the case of the temporary absence or inability to act of any judge of the court of appeals, the court may designate any justice of the supreme court to serve as associate judge of the court during such absence or inability to act..."

[2] If notwithstanding this Court's holding in *Valz v. Sheepshead Bay*, 249 N.Y. 122, 131-2 (1928), the Court dismisses my appeal of right, I request, in the interest of judicial economy and justice, that it, *sua sponte*, grant leave to appeal for all the reasons set forth in my February 20, 2002 motion to the Appellate Division, First Department for leave. Otherwise, I will make a formal motion for leave to appeal, reiterating and expanding upon the grounds therein set forth.

its disqualification for interest and bias, pursuant to Judiciary Law §14 and §100.3E of the Chief Administrator's Rules Governing Judicial Conduct, and for disclosure by its justices, pursuant to §100.3F of the Chief Administrator's Rules. Before Justice Wetzel, I presented a threshold December 2, 1999 letter-application for his disqualification for interest and bias and for disclosure pursuant to these same statutory and rule provisions [A-250-290].

5. By its December 18, 2001 decision & order[3], the Appellate Division, First Department denied my August 17, 2001 motion -- *without* findings, *without* reasons, *without* even identifying that the motion sought disqualification and disclosure and, indeed, by *falsifying* its requested relief. By his January 31, 2000 decision, order & judgment [A-9-14], Justice Wetzel denied my December 2, 1999 letter-application – *without* findings, *without* identifying any of the grounds it set forth as warranting his disqualification, and by concealing and totally ignoring its requested disclosure relief.

6. Just as Justice Wetzel's wrongful denial of my December 2, 1999 letter-application was the threshold and overarching issue on my appeal to the Appellate Division, First Department of his January 31, 2001 decision (*see* my Appellant's Brief, at pp. 1, 36-52), so the Appellate Division, First Department's wrongful denial of my August 17, 2001 motion in the last sentence of its December 18, 2001 decision is the threshold and overarching issue on my appeal to this Court (*see* my Jurisdictional Statement, pp. 5-6, 11-12).

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[3] The Appellate Division, First Department's December 18, 2001 decision & order is Exhibit "B" to my Jurisdictional Statement.

7. Consequently, on this motion, the Court will be grappling with the same statutory and rule provisions of judicial disqualification and disclosure that are the substantive content of the appeal as they relate to the lower courts. Here – as there – the decisive question is the legal sufficiency of the subject motion/application in establishing statutory disqualification for interest, as well as my entitlement to "discretionary" recusal for bias, both actual and apparent, and for disclosure. Thus, while the substance of this appeal calls upon the Court to enunciate the fundamental adjudicative standards that must govern a judge when confronted with a judicial disqualification/disclosure application – as to which it appears this Court has *never* spoken -- this motion requires the Court to teach by its own example. There is no better way for this Court to instruct our State's judiciary[4].

8. It is my contention – so stated before the Appellate Division, First Department (my Appellant's Brief: pp. 38-9; my reargument motion: Exhibits "B-1", p. 6) -- that:

> "Adjudication of a recusal application should be guided by the same legal and evidentiary standards as govern adjudication of other motions. If the application sets forth specific supporting facts, the judge, as any adversary, must respond to those specific facts. To leave unanswered the 'reasonable questions' raised by such application would undermine its very purpose of ensuring the appearance, as well as the actuality, of the judge's impartiality.
>
> The law is clear...that 'failing to respond to a fact attested in the moving papers...will be deemed to admit it', Siegel, New York Practice, §281 (1999 ed., p. 442) -- citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 599 (1975), itself citing *Laye v. Shepard*, 265 N.Y.S.2d 142 (1965), aff'd 267 N.Y.S.2d 477 (1st Dept. 1966) and

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[4] *Cf.* "*The Judge's Role in the Enforcement of Ethics – Fear and Learning in the Profession*", John M. Levy, 22 Santa Clara Law Review, pp. 95-116 (1982).

> Siegel, McKinney's Consolidated Laws of New York Annotated, Book 7B, CPLR 3212:16. 'If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it' *id.* Undenied allegations will be deemed to be admitted. *Whitmore v. J. Jungman, Inc.*, 129 N.Y.S. 776, 777 (S.Ct., NY Co. 1911)".

Further, based on treatise authority placed before the Appellate Division, First Department (my Appellant's Brief, p. 38; my reargument motion: Exhibit "C", p. 5) and, prior thereto, before Justice Wetzel [A-252; A-237]:

> "'The judge is ordinarily obliged to disclose to the parties those facts that would be relevant to the parties and their counsel in considering whether to file a judicial disqualification motion', Flamm, Richard E., Judicial Disqualification, p. 578, Little, Brown & Co., 1996."

9. Consistent with §100.3E of the Chief Administrator's Rules Governing Judicial Conduct that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"[5], all seven of this Court's judges must recuse themselves so as to avoid the appearance of their bias. Six judges, however, are statutorily disqualified for interest, pursuant to Judiciary Law §14:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which... he is interested."

---

[5] In reviewing the Commission's determinations of public discipline against judges, this Court routinely repeats, as the standard, the need to avoid the "appearance of impropriety", *Matter of Sardino*, 58 N.Y.2d 286, 290-291 (1983); *Matter of Sims*, 61 N.Y.2d 349, 358 (1984), citing cases, *Matter of Duckman*, 92 N.Y.2d 141, 153 (1998). Likewise, in public statements, Chief Judge Kaye reiterates that "judges must disqualify themselves when their impartiality might reasonably be questioned.", citing the Chief Administrator's Rules and the Model Code of Judicial Conduct, "*Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism*", 25 Hofstra Law Review 703, 713 (Spring 1997).

14

10. These six judges, in the order in which their statutory disqualification is discussed, are: Associate Judge Albert M. Rosenblatt, Chief Judge Judith S. Kaye, Associate Judge George Bundy Smith, Associate Judge Victoria A. Graffeo, Associate Judge Carmen Beauchamp Ciparick, and Associate Judge Howard A. Levine. As herein demonstrated, their disqualifying interest is based on *their participation in the events giving rise to this lawsuit or in the systemic governmental corruption it exposes -- as to which they bear disciplinary and criminal liability.*

11. Consequently, the interests of these six judges are personal and pecuniary. This contrasts sharply with the *ex officio* interests of this Court's judges in *Morgenthau v. Cooke*, 56 N.Y.2d 24 (1982), and the shared generic judicial interests in *Maresca v. Cuomo*, 64 N.Y.2d 242 (1984) -- two appeals where no motions were even made for the Court's disqualification. It also contrasts sharply with *New York State Association of Criminal Defense Lawyers, et al. v. Kaye, et al.*, 95 N.Y.2d 556 (2000), where the Court, in denying a formal motion to disqualify those of its judges who had participated in the Court's challenged approval of administrative rule-making, explicitly stated:

> "The respondent Judges have no pecuniary or personal interest in this matter and petitioners allege none. Nor do petitioners allege personal bias or prejudice." (at 561).

12. Moreover, the "rule of necessity", invoked by the Court in each of these three cases, is inapplicable to the instant motion, based, as it is, on the individual disciplinary and criminal liabilities of the Court's judges. Replacement Supreme Court justices would not be so encumbered. Nor would they be material witnesses to

an official investigation born of this lawsuit, a further ground for judicial disqualification (*Cf.* §100.3E(1)(d)(iv) of the Chief Administrator's Rules Governing Judicial Conduct).

13. Finally, to the extent that this Court in *New York State Association of Criminal Defense Lawyers, et al., supra*, takes exception to the

> "substitution of the entire constitutionally appointed court, leaving 'the most fundamental questions about the Court and its powers to persons whose selection and retention are not tested by constitutional processes' (*In re Vermont Supreme Ct. Admin. Directive No. 17 v. Vermont Supreme Court*, 154 Vt. 217, 226, 576 A.2d 127, 132)", at 560,

the systemic governmental corruption exposed by this lawsuit embraces the corruption of the very "merit selection" process whereby this Court's judges are chosen. Indeed, at the time the Court issued its December 21, 2000 decision in *New York Association of Criminal Defense Lawyers*[6], adopting the notion that its judges are "tested by constitutional processes", Chief Judge Kaye was not only in possession of the documentary proof *from this lawsuit* chronicling how sham and repugnant these "constitutional processes" had become, but had received, *in hand*, my December 9, 2000 letter urging that she secure an official investigation thereof (¶¶90-98 *infra*).

14. Such long overdue official investigation would necessarily emerge from adjudication of this appeal by a fair and impartial tribunal – to which I and the People of this State are constitutionally entitled.

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[6] According to the decision (at 558, fn. 1), Chief Judge Kaye recused herself as "It is not an uncommon practice for the Chief Judge alone to be recused in similar appeals involving judicial administration", citing *Maresca v. Cuomo*.

15. For the convenience of the Court, a Table of Contents follows:

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State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth *day of* September 2002

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 719

Elena Ruth Sassower, &c.,
Appellant,

v.

Commission on Judicial Conduct of the State of New York,
Respondent.

The appellant having filed notice of appeal to the Court of Appeals and a motion to strike respondent's memorandum of law &c. in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion to strike respondent's memorandum of law &c. be and the same hereby is denied.

Judge Rosenblatt took no part.

Stuart M. Cohen

Stuart M. Cohen
Clerk of the Court

Ex "C-1"

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION September 12, 2002

Mo. No. 719
Elena Ruth Sassower, &c.,
Appellant,
v.
Commission on Judicial Conduct
of the State of New York,
Respondent.

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.
Motion to strike respondent's memorandum of law &c. denied.
Judge Rosenblatt took no part.

14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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.

NOTICE OF APPEAL

S. Ct./NY Co. #108551/99
AD 1st Dept. #5638/01

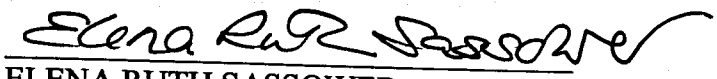
PLEASE TAKE NOTICE that Petitioner-Appellant ELENA RUTH SASSOWER hereby appeals to the New York Court of Appeals, 20 Eagle Street, Albany, New York 12207-1095, pursuant to Article VI, §3(b)(1) of the New York State Constitution and CPLR §5601(b)(1), as interpreted by the Court of Appeals in *Valz v. Sheepshead Bay*, 249 N.Y. 122, 131-2 (1928), from the Decision & Order of the Appellate Division, First Department, entered on December 18, 2001, and from each and every part thereof.

The appealed-from Decision & Order finally determines this Article 78 proceeding and directly involves the construction of Article I, §§1, 5, 6, 9, and 11 and Article VI, §§20(b)(4), 22, and 28(c) of the Constitution of the State of New York and the First, Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

Ex "C-2"

Dated: May 1, 2002, "Law Day"
White Plains, New York

Yours, etc.



ELENA RUTH SASSOWER
Petitioner-Appellant *Pro Se*
Box 69, Gedney Station
White Plains, New York 10605-0069
(914) 421-1200

TO: CLERK, SUPREME COURT/NEW YORK COUNTY
60 Centre Street
New York, New York 10007

ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Respondent-Respondent
120 Broadway
New York, New York 10271
(212) 416-8020

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT
Respondent-Respondent
801 Second Avenue
New York, New York 10017
(212) 949-8860

SOLICITOR GENERAL OF THE STATE OF NEW YORK
Department of Law
The Capitol
Albany, New York 12224

COURT OF APPEALS
STATE OF NEW YORK

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

Petitioner-Appellant,

NOTICE OF MOTION TO STRIKE, FOR COSTS, SANCTIONS, DISCIPLINARY & CRIMINAL REFERRALS, DISQUALIFICATION OF ATTORNEY GENERAL, etc.

-against-

AD 1st Dept. #5638/01
S.Ct./NY Co. #108551/99

COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF NEW YORK,

Respondent-Respondent.

PLEASE TAKE NOTICE that upon the annexed affidavit of Petitioner-Appellant, ELENA RUTH SASSOWER, sworn to June 17, 2002, the exhibits annexed thereto, and upon all the papers and proceedings heretofore had, ELENA RUTH SASSOWER will move this Court at 20 Eagle Street, Albany, New York 12207-1095 on Monday, July 1, 2002 at 10:00 a.m. or as soon thereafter as Respondent-Respondent, New York State Commission on Judicial Conduct, and its counsel, the New York State Attorney General, can be heard for an order:

1. Striking the Attorney General's May 17, 2002 memorandum of law in opposition to Petitioner-Appellant's disqualification/disclosure motion, as likewise his May 28, 2002 letter responding to the Court's *sua sponte* jurisdictional inquiry, based on findings that each such document is a "fraud on the court", violative of 22

Ex "C-3"

NYCRR §130-1.1 and 22 NYCRR §1200 *et seq.*, specifically, §§1200.3(a)(4), (5); and §1200.33(a)(5), with a further finding that the Attorney General and Commission are "guilty" of "deceit or collusion... with intent to deceive the court or any party" under Judiciary Law §487, and, based thereon, for an order: (a) imposing maximum monetary sanctions and costs on the Attorney General's office and Commission, pursuant to 22 NYCRR §130-1.1, including against Attorney General Eliot Spitzer, *personally*; (b) referring Attorney General Spitzer and the Commission for disciplinary and criminal investigation and prosecution, along with culpable staff members, consistent with this Court's mandatory "Disciplinary Responsibilities" under §100.3D(2) of the Chief Administrator's Rules Governing Judicial Conduct, for, *inter alia*, filing of false instruments, obstruction of the administration of justice, and official misconduct; and (c) disqualifying the Attorney General from representing the Commission for violation of Executive Law §63.1 and conflict of interest rules;

2. Granting such other and further relief as may be just and proper, including referral of the record herein to the New York State Institute on Professionalism in the Law for study and recommendations for reform.

Dated: June 17, 2002
White Plains, New York

Yours, etc.

ELENA RUTH SASSOWER
Petitioner-Appellant *Pro Se*
Box 69, Gedney Station
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(914) 421-1200

TO: ATTORNEY GENERAL OF THE STATE OF NEW YORK
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120 Broadway
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(212) 416-8020

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT
Respondent-Respondent
801 Second Avenue
New York, New York 10017
(212) 949-8860

In the Matter of New York State Association of Criminal Defense Lawyers et al.,
Appellants,
v.
Judith S. Kaye, as Chief Judge of the New York State Court of Appeals, et al.,
Respondents.

Court of Appeals of New York

Submitted October 30, 2000;

Decided December 21, 2000

SUMMARY

Motion to disqualify Chief Judge Kaye and Judges Smith, Levine, Ciparick and Wesley from participating in the decision of a motion for leave to appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered June 22, 2000 (269 AD2d 14), which affirmed an order of the Supreme Court (Dan Lamont, J.; opn 182 Misc 2d 85), entered in Albany County in a proceeding pursuant to CPLR article 78, dismissing a petition to review an administrative order of the Court of Appeals approving a reduction in the fee schedule applicable to court-appointed private counsel in capital cases.

HEADNOTES

Judges--Disqualification--Participation by Court of Appeals Judges on Motion for Leave to Court of Appeals in Proceeding Challenging Administrative Rule Issued by Court of Appeals--Designation of Substitutes--Rule of Necessity

(1) The Chief Judge and four Associate Judges of the Court of Appeals should not be disqualified from participating in the decision of a motion for leave to appeal to the Court of Appeals from an order in a proceeding challenging an administrative order of the Court of Appeals which approved a reduced fee for attorneys representing capital defendants. The Court's exercise of its dual responsibilities as administrator of the judicial branch of government and adjudicator of last resort on questions of State law does not require or warrant disqualification. The Rule of Necessity compels participation by the five Judges, who are named parties in the proceeding (*see*, Judiciary Law § 14; Code of Judicial Conduct Canon 3 [C] [1] [d] [i]). The designation of substitute Judges is not appropriate. Requiring disqualification whenever the Judges are sued as individuals upon a challenge to an act of the Court could result in substitution of the entire constitutionally appointed Court, leaving the most fundamental questions about the Court and its powers to persons whose selection and retention are not tested by constitutional processes. Moreover, disqualifying the Judges of the Court of Appeals each time their administrative powers are challenged would render its rule-making process self-defeating and nugatory, leaving the ultimate determination regarding one of its administrative orders to a Bench comprised of substitute jurists. Substitution would subject the judicial system to an inordinate amount of delays and inefficiency, and would permit litigants to frustrate the judicial system by allowing them a circuitous appeal from the *557 Court of Appeals as regularly constituted to the Court as specially constituted.

Judges--Disqualification--Participation by Court of Appeals Judges on Motion for Leave to Court of Appeals in Proceeding Challenging Administrative Rule Issued by Court of Appeals--Reconsideration of Prior Determination

(2) The Chief Judge and four Associate Judges of the Court of Appeals should not be disqualified from participating in the decision of a motion for leave to appeal to the Court of Appeals from an order in a proceeding challenging an administrative order of the Court of Appeals which approved a reduced fee for attorneys representing capital defendants. The adoption of the rule in question by the Judges of this Court acting in their administrative capacity does not preclude them from deciding, in their adjudicatory capacity, a subsequent case challenging the validity of the rule. The exercise of the Court's rule-making power does not carry with it a decision that the amended rules are all constitutional, for such a decision would be the equivalent of an advisory opinion which the Court is without constitutional power to give. The fact is that the Court's promulgation of the rule is not a prior determination that it is valid and constitutional. That determination must await the adjudication in this or a future case. To the extent that a decision in this article 78 proceeding may involve reevaluation by this Court of limited aspects of its own prior determination, this Court may reconsider its own decision.

Judges--Disqualification--Participation by Court of Appeals Judges on Motion for Leave to Court of Appeals in Proceeding Challenging Administrative Rule Issued by Court of Appeals--Rule of Necessity

(3) The Chief Judge and four Associate Judges of the

Ex "D"

Court of Appeals should not be disqualified from participating in the decision of a motion for leave to appeal to the Court of Appeals from an order in a proceeding challenging an administrative order of the Court of Appeals which approved a reduced fee for attorneys representing capital defendants. Judiciary Law § 14 and the Code of Judicial Conduct, which provide for the disqualification of Judges when they are named as parties to a proceeding, should not be mechanically applied. Rather, the nature of the conflict posed by acting as both Judge and party in the particular case, and the efficacy of replacing the Judges, must be considered. The respondent Judges are named as parties only in their administrative capacity, and petitioners seek only to invalidate a Court order. The Judges have no pecuniary or personal interest in the matter; nor are there any allegations of bias. The Court's dual responsibilities of diligent administration and impartial adjudication do not create a conflict requiring disqualification. Accordingly, the Rule of Necessity requires participation by the respondent Judges. The constitutional provision for the designation of substitute Judges is not to be used as a vehicle to force removal of the constitutionally appointed members of the Court by naming them as parties when challenging administrative actions of the Court.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Judges, §§ 86-92, 95, 96, 160, 161.

Carmody-Wait 2d, Officers of Court §§ 3:62-3:64, 3:67, 3:*558 75.

McKinney's, Judiciary Law § 14.

NY Jur 2d, Courts and Judges, §§ 395-397, 408-410.

ANNOTATION REFERENCES

See ALR Index under Judges.

POINTS OF COUNSEL

Paul, Weiss, Rifkind, Wharton & Garrison, New York City (*Julia Tarver* of counsel), for appellants.

Eliot Spitzer, Attorney General, Albany (*Alicia Ouellette* of counsel), for respondents.

OPINION OF THE COURT

Per Curiam.

The issue presented is whether Chief Judge Kaye, [FN1] Judges Smith, Levine, Ciparick and Wesley, named as parties in this CPLR article 78 proceeding brought to invalidate an administrative order of the Court, should be disqualified from participating in the decision of petitioners' motion for leave to appeal from an order affirming the dismissal of the proceeding. [FN2]

FN1 The Chief Judge has recused herself. Thus, petitioners' motion as to her should be dismissed as academic.

It is not an uncommon practice for the Chief Judge alone to be recused in similar appeals involving judicial administration (*see, e.g., Maresca v Cuomo,* 64 NY2d 242, 247, n 1).

FN2 The motion at bar is labeled as one for recusal. Because it is statutorily based, however, it is appropriately treated as a motion for disqualification raising an issue of law for decision by the Court (*see, Schulz v New York State Legislature,* 92 NY2d 917).

In 1995, the Legislature reinstated the death penalty. In connection therewith, it enacted Judiciary Law § 35-b, which provides a vehicle to afford legal representation to indigent capital defendants through a Capital Defender Office and court appointed individual attorneys. On November 21, 1996, pursuant to article VI, § 30 of the New York Constitution and Judiciary Law § 35-b, the Court of Appeals issued orders approving the fee schedules for capital counsel. By order dated December 16, 1998, the Court of Appeals approved a reduced capital counsel fee.

In April 1999, petitioners, four individual attorneys certified to accept capital cases and the New York State Association of Criminal Defense Lawyers, on behalf of its members so certified, commenced a CPLR article 78 proceeding seeking to annul the order approving the reduction in fees. The petition *559 named as respondents Chief Judge Kaye, former Judge Bellacosa, and Judges Smith, Levine, Ciparick and Wesley, the six Judges who comprised the Court of Appeals when the December 16, 1998 order was issued. The Judges were sued "as Chief Judge and Associate Judges of the New York Court of Appeals, acting in their administrative capacity." Petitioners claimed that the Judges acted beyond their authority when revising the rates in the First Department, and that the reduced fee schedule for all Departments did not meet the standards of Judiciary Law § 35-b for adequate compensation. The Attorney General filed an answer asserting that petitioners lacked standing to

maintain the proceeding and that the petition failed to state a cause of action.

Supreme Court determined that petitioners had standing but, on the merits, concluded that petitioners failed to satisfy their burden of establishing that the December 16, 1998 order was made in violation of lawful procedure, or was affected by an error of law, or was unreasonable or irrational or was an abuse of discretion. The Appellate Division unanimously affirmed solely on the ground that petitioners lacked standing to challenge the revised fee schedule. The Appellate Division subsequently denied petitioners' motion for leave to appeal to this Court. Petitioners have moved in this Court for leave to appeal from the Appellate Division order of affirmance. By separate motion, they seek to disqualify Chief Judge Kaye and Judges Smith, Levine, Ciparick and Wesley from participating in the Court's determination of the motion for leave to appeal.

(1) Petitioners contend that disqualification is required by Judiciary Law § 14 and a parallel provision of the New York Code of Judicial Conduct (Canon 3 [C] [1] [d] [i]), both of which provide that a Judge is disqualified from participating in any matter in which the Judge is a party. Petitioners further argue that the Rule of Necessity does not apply because the Court of Appeals may designate substitutes to sit in the place of the respondent Judges. While petitioners assert that as "parties" the respondent Judges are disqualified automatically, the fundamental issue presented is whether this Court's approval of the subject fee reduction by administrative order requires disqualification. For institutional reasons, we conclude that the Court's exercise of its dual responsibilities as administrator and adjudicator does not require or warrant disqualification. The Rule of Necessity compels participation by the respondent Judges.

This Court has exclusive jurisdiction under the Constitution and the CPLR to entertain petitioners' motion for leave to appeal ***560** (NY Const, art VI, § 3 [b]; CPLR 5602). No other judicial body exists to which the motion for leave to appeal could be referred for disposition. Petitioners acknowledge this, but assert that the Court could designate substitutes to hear this matter. Although the Constitution provides for substitution of Judges of this Court who choose to recuse or are disqualified (NY Const, art VI, § 2), the designation of substitute Judges is not appropriate here.

The Court of Appeals has a unique role and responsibility in State government. It is the court of last resort from which no appeal lies on questions of New York law (*see,* NY Const, art VI, §§ 2, 3). Furthermore, under our State constitutional system, the Court of Appeals decides the scope of its own power and authority. If disqualification were required whenever the Judges were sued as individuals upon a challenge to an act of the Court, the result could be substitution of the entire constitutionally appointed court, leaving "the most fundamental questions about the Court and its powers to persons whose selection and retention are not tested by constitutional processes" (*In re Vermont Supreme Ct. Admin. Directive No. 17 v Vermont Supreme Ct.,* 154 Vt 217, 226, 576 A2d 127, 132).

The Court also has primary responsibility for the administration of the judicial branch of government, and some administrative rule-making powers are vested exclusively in the Court of Appeals (*see,* NY Const, art VI, §§ 28, 30). Thus, disqualifying the Judges of this Court each time their administrative powers are challenged would "render the rule-making process self-defeating and nugatory" (*Berberian v Kane,* 425 A2d 527, 528 [RI]). In each instance, the ultimate determination regarding an administrative order promulgated by this Court would be rendered by a Bench comprised of substitute jurists. Moreover, substitution of other Judges for this Court under these circumstances would "subject the judicial system to an inordinate amount of delays and inefficiency" (*State ex rel. Hash v McGraw,* 180 W Va 428, 432, 376 SE2d 634, 638). It would also "put power in the hands of litigants to frustrate our judicial system" (*Cameron v Greenhill,* 582 SW2d 775, 776 [Tx], *cert denied* 444 US 868) by allowing them "a circuitous appeal from this court as regularly constituted to this same court as specially constituted" (*Ex parte Farley,* 570 SW2d 617 , 623 [Ky]).

(2) The adoption of the rule in question by the Judges of this Court acting in their administrative capacity does not preclude them from deciding, in their adjudicatory capacity, a subsequent ***561** case challenging the validity of the rule. The exercise of the Court's rule-making power "does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which ... we are without constitutional power to give" (Statement Accompanying Amendments to the Federal Rules of Civil Procedure, 383 US 1031, 1032 [Black, J., dissenting]). "The fact is that our promulgation of the [rule] is not a prior determination that it is valid and constitutional. That determination

must await the adjudication in this or a future case" (*In re Vermont Supreme Ct. Admin. Directive No. 17 v Vermont Supreme Ct., supra,* 154 Vt, at 223, 576 A2d, at 130). To the extent that a decision in this article 78 proceeding may involve reevaluation by this Court of limited aspects of its own prior determination, this Court may reconsider its own decision (*see, Matter of Rules of Ct. of Appeals for Admission of Attorneys & Counselors at Law,* 29 NY2d 653 [Judges of this Court decided application for reconsideration of administrative order they participated in adopting]; *see also, Ex parte Farley, supra* [comparing review of administrative determination to motion for new trial or petition for rehearing]; *Board of Overseers of Bar v Lee,* 422 A2d 998, *appeal dismissed* 450 US 1036 [Me] [comparing challenge to constitutionality of rule to reconsideration in a litigated case of issue decided in Judge's prior advisory opinion]).

(3) Finally, we reject petitioners' arguments for a mechanical application of Judiciary Law § 14 and the Code of Judicial Conduct. The respondent Judges of this Court are not disqualified automatically merely because they are named parties. "A judge cannot be disqualified merely because a *litigant* sues or threatens to sue him or her. We cannot encourage such an easy method of disqualification" (*In re Vermont Supreme Ct. Admin. Directive No. 17 v Vermont Supreme Ct., supra,* 154 Vt, at 226, 576 A2d, at 132 [emphasis in original]). Rather, the nature of the conflict posed by acting as both Judge and party in the particular case, and the efficacy of replacing the Judges, must be considered (*see, Ex parte Farley, supra; State ex rel. Hash v McGraw, supra; In re Vermont Supreme Ct. Admin. Directive No. 17 v Vermont Supreme Ct., supra; Cameron v Greenhill, supra*).

The respondent Judges are named as parties only in their administrative capacity. Petitioners seek only to invalidate a Court order. The respondent Judges have no pecuniary or personal interest in this matter and petitioners allege none. Nor do petitioners allege personal bias or prejudice. No ***562** traditionally recognized basis for conflict exists here. The Court's "dual responsibilities of diligent administration and impartial adjudication do not create a conflict requiring disqualification" (*State ex rel. Hash v McGraw, supra,* 180 W Va, at 431, 376 SE2d, at 637).

For the foregoing reasons, we conclude that the Rule of Necessity requires participation by the respondent Judges in this case. The constitutional provision for the designation of substitute Judges is not to be used as a vehicle to force removal of the constitutionally appointed members of this Court by naming them as parties when challenging administrative actions of the Court.

Our denial of this disqualification motion accords with decisions of the high courts of other states (*see, Office of State Ct. Adm'r, Colo. Judicial Dept. v Background Information Servs.,* 994 P2d 420 [Colo]; *Ex parte Farley, supra; Board of Overseers of Bar v Lee, supra; Berberian v Kane, supra; Cameron v Greenhill, supra; In re Vermont Supreme Ct. Admin. Directive No. 17 v Vermont Supreme Ct., supra; State ex rel. Hash v McGraw, supra; see also, Mississippi Pub. Corp. v Murphree,* 326 US 438; *accord, Buschbacher v Supreme Ct. of Ohio,* US Dist Ct, SD Ohio, 1976, No. C-2-75-743, 75-751, 76- 309, *affd sub nom. Cuyahoga County Bar Assn. v Supreme Ct. of Ohio,* 430 US 901; *Palmer v Jackson,* 617 F2d 424 [5th Cir]; *Ables v Fones,* 587 F2d 850 [6th Cir]).

Accordingly, the motion, insofar as it seeks disqualification of the Chief Judge, should be dismissed as academic; the motion, insofar as it seeks disqualification of Judges Smith, Levine, Ciparick and Wesley, should be denied.

Judges Smith, Levine, Ciparick, Wesley and Rosenblatt concur in Per Curiam opinion; Chief Judge Kaye taking no part.

Motion, insofar as it seeks disqualification of Chief Judge Kaye, dismissed as academic; motion, insofar as it seeks disqualification of Judges Smith, Levine, Ciparick and Wesley, denied. ***563**

N.Y

CRIM. DEFENSE LAWYERS v KAYE

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State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second *day of* September 1998

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1075

Robert L. Schulz, et al.,
Appellants,
v.
The New York State Legislature, et al.,
Respondents
The City of New York et al.,
Intervenors-Respondents.

The appellants having filed a notice of appeal and a motion to disqualify Chief Judge Kaye and Judges Bellacosa, Levine and Ciparick in the above title and due consideration having been thereupon had, it is

ORDERED, that the said motion to disqualify Chief Judge Kaye and Judges Bellacosa, Levine and Ciparick be and the same hereby is dismissed upon the ground that the Court has no authority to entertain the motion made on nonstatutory grounds. The application seeking recusal is referred to the Judges for individual consideration and determination by each Judge (see, Matter of Sims v State Commn. on Judicial Conduct, 62 NY2d 884; New York Criminal and Civil Courts Bar Assn. v State of New York, 46 NY2d 730; Matter of Waltemade, 37 NY2d [11]).

Ex E-1

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Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick and Wesley concur.

Chief Judge Kaye and Judges Bellacosa, Levine and Ciparick each respectively denies the referred motion for disqualification.

And it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. All concur.

Stuart M. Cohen

Stuart M. Cohen
Clerk of the Court

Court of Appeals of New York.

Robert L. SCHULZ et al., Appellants,
v.
NEW YORK STATE LEGISLATURE et al.,
Respondents.
City of New York et al., Intervenors-Respondents.

Sept. 22, 1998.

***917 **267** Reported below, 244 A.D.2d 126, 676 N.Y.S.2d 237.

Motion to disqualify Chief Judge Kay and Judges Bellacosa, Levine and Ciparick dismissed upon the ground that the Court of Appeals has no authority to entertain the motion made on nonstatutory grounds. The application seeking recusal is referred to the Judges for individual consideration and determination by each Judge (*see, Matter of Sims,* 62 N.Y.2d 884, 478 N.Y.S.2d 866, 467 ****268** N.E.2d 530; *New York Criminal & Civ. Cts. Bar Assn. v. State of New York,* 46 N.Y.2d 730, 413 N.Y.S.2d 373, 385 N.E.2d 1301; *Matter of Waltemade,* 37 N.Y.2d [a], [ll]).

KAYE, C.J., and BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.

KAYE, C.J., and BELLACOSA, LEVINE and CIPARICK, JJ., each respectively denies the referred motion for disqualification.

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

END OF DOCUMENT

Ex "E-2"

Court of Appeals of New York.

In the Matter of Barbara M. SIMS, Judge of the Buffalo City Court, Erie County,
Petitioner.
State Commission on Judicial Conduct, Respondent.

June 7, 1984.

****530** Motion for reargument denied. [See 61 N.Y.2d 349, 474 N.Y.S.2d 270, 462 N.E.2d 370.]

Motion to disqualify a Judge of this Court dismissed upon the ground that the Court has no jurisdiction to entertain the motion made on nonstatutory grounds. That application was referred to the Judge, and he denied it with the following decision: "Motion denied (see *Matter of Waltemade*, 37 NY2d [jj])."

END OF DOCUMENT

Ex "F-1"

Court of Appeals of New York.

NEW YORK CRIMINAL AND CIVIL COURTS BAR ASSOCIATION, Jerome Patterson and Walter Lubkemeier, Appellants,
v.
The STATE of New York, Hugh L. Carey, Governor etc., and Stephen May, as Chairman of the State Board of Elections, Respondents.

Nov. 30, 1978.

Motion to disqualify three Judges of this Court dismissed and the matter referred to ***374** the three Judges for individual consideration and determination by each Judge. (Matter of Waltemade, 37 N.Y.2d (a)(11).)

BREITEL, C. J., and JASEN and JONES, JJ., respectively deny the referred motion for disqualification.

END OF DOCUMENT

Ex "F-2"

8/17/98

STATE OF NEW YORK
COURT OF APPEALS

ROBERT L. SCHULZ, GARY T. LOUGHREY, MARK N. AXINN, BRADFORD R. ARTER, and JAMES B. STRAWHORN,

Plaintiffs-Appellants,

- against -

THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY AND JOSEPH BRUNO, SENATE MAJORITY LEADER; and THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR, H. CARL MC CALL, COMPTROLLER,

Defendants-Respondents,

And

THE CITY OF NEW YORK; and THE NEW YORK CITY TRANSITIONAL FINANCE AUTHORITY,

Intervenors-Defendants-Respondents.

NOTICE OF MOTION TO DISQUALIFY

Albany County
Index No. 3256-97
A.D. No. 81812

PLEASE TAKE NOTICE that, based on the annexed affidavit by Robert L. Schulz and Gary T. Loughrey, plaintiffs will move this Court on August 31, 1998, to disqualify Chief Judge Judith Kaye and Judges Joseph Bellacosa, Carmen Ciparick, and Howard Levine, and for such other and further relief as the Court may deem proper and just.

DATED: Queensbury, 1998
August 17, 1998

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98-99

STATE OF NEW YORK
COURT OF APPEALS

ROBERT L. SCHULZ, GARY T. LOUGHREY, MARK N. AXINN, BRADFORD R. ARTER, and JAMES B. STRAWHORN,

Plaintiffs-Appellants,

- against -

THE NEW YORK STATE LEGISLATURE, SHELDON SILVER, SPEAKER OF THE ASSEMBLY AND JOSEPH BRUNO, SENATE MAJORITY LEADER; and THE NEW YORK STATE EXECUTIVE, GEORGE PATAKI, GOVERNOR, H. CARL MC CALL, COMPTROLLER,

Defendants-Respondents,

And

THE CITY OF NEW YORK; and THE NEW YORK CITY TRANSITIONAL FINANCE AUTHORITY,

Intervenors-Defendants-Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO DISQUALIFY

Albany County
Index No. 3256-97
A.D. No. 81812

Robert L. Schulz and Gary T. Loughrey, being duly sworn, depose and say:

1. We are the plaintiffs-appellants in the matter captioned above and we make this affidavit in support of plaintiffs' motion to disqualify, returnable August 31, 1998.

2. This is a declaratory judgment action which seeks to have two state statutes declared unconstitutional, null and void: State Finance Law Section 123-b(1) and Chapter 16 of the Laws of 1997.

3. SFL 123-b(1) was enacted in 1975 ostensibly to deny standing to any citizen to maintain an action in court if the subject matter involved public borrowing, even if the citizen's complaint is deeply rooted in the New York or United States Constitutions. Plaintiffs' complaint is that SFL 123-b(1) is violative of plaintiffs' fundamental right to petition for a redress of grievances (1st Amendment and Article I, Section 9.1 of the N.Y. Constitution) and plaintiffs' right to

(1st Amendment and Article I, Section 9.1 of the N.Y. Constitution) and plaintiffs' right to freedom from laws which abridge their privileges and immunities (14th Amendment to the U.S. Constitution) and their right to a government republican in form and substance (Article IV, Section 4 of the U.S. Constitution).

4. Chapter 16 of the Laws of 1997 establishes yet another political subdivision and public corporation of the State -- the N.Y.C. Transitional Finance Authority ("TFA") -- for the expressed purpose of circumventing the N.Y. Constitution's cap on the amount of debt N.Y.C. is authorized to incur.[1] Chapter 16 L97 commits/dedicates City income tax and State sales tax revenues to the TFA, there to be used, first, to pay the principal of and interest on any bonds issued by the TFA, for as long as TFA bonds are outstanding. Plaintiffs' complaint is that Chapter 16 L97 violates the following provisions of the N.Y. Constitution as well as the guarantee clause (Article IV, Section 4) and the privileges and immunities clause (14th Amendment, Clause 2) of the U.S. Constitution:

1. Article VIII, Section 4 (limits NYC debt)
2. Article VIII, Section 2 (requires City to pledge its full faith and credit when incurring debt)
3. Article VIII, Section 12 (requires legislature to prevent abuses in taxation and borrowing)
4. Article X, Section 5 (prohibits the use of public funds to pay the debt of any public corporation)
5. Article VII, Section 7 (requires appropriation by law before any money can be paid out of funds under the care and management of the State Comptroller)
6. Article VII, Section 11 (requires voter approval before the State can contract indebtedness)
7. Article VII, Section 8 (prohibits the State from giving its credit to a public corporation)
8. Article VIII, Section 1 (prohibits the City from giving its credit to a public corporation)

[1] See Section 1, "Legislative findings," Chapter 16 L97.

5. For plaintiffs to be able to receive equal justice under the law in the highest court in the State, much less to prevail in their assertion of constitutional infirmities in this case, it would first be necessary for Chief Judge Judith Kaye and Judges Bellacosa, Ciparick and Levine (hereinafter the "Judges") to do something each has failed to do in prior similar cases brought to them at the Court of Appeals by plaintiff Schulz and other citizens -- recognize the unconstitutionality of SFL 123-b(1) because it is violative of the First Amendment's guarantee of every citizen's right to petition the government for a redress of grievances.

6. Then, with SFL 123-b(1) no longer serving as an impenetrable barrier to judicial review of legislative and executive public borrowing schemes, in order for plaintiffs to receive equal justice in the court to say nothing of prevailing in their assertion of the constitutional infirmities they see regarding Chapter 16 L97, it would then be necessary for the Judges to hazard the value of their personal financial interests and, in the case of Judge Kaye's spouse, the length and content of the list of lucrative state public corporation clients of the law firm of which he is a partner.[2]

7. It is understood that, should plaintiffs prevail in this case, the constitutionality of tens of billions of dollars of outstanding bonds issued by public corporations/political subdivisions of the state would be called into question. This would adversely affect the value of all bonds issued by the state's public authorities and corporations, and compromise the state's ability to redeem those bonds according to their fixed schedules.[3]

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[2] Proskauer, Rose, Getz and Mendelsohn.

[3] Plaintiffs are not interested in creating financial chaos irrespective of any opinions to the contrary. They do believe, however, that the fall of the state's "shadow government" approach to raising money is inevitable and that it must be dealt with sooner rather than later if chaos is to be avoided. Prospective relief is an open avenue and the court knows this since it was brought up in Judge Smith's dissenting opinion in the Court's "Attica decision" of 1993.

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8. Should plaintiffs prevail in this case, the adverse impact on the value of the financial securities owned by the Judges would be substantial. However, if the State's credit rating is kept low by continual use of SFL 123-b(1) as a shield against appropriate Judicial scrutiny of Legislative and Executive borrowing activities, the interest income of bond holders is maintained at a high level.

9. As reported on their financial disclosure forms (attached), the Judges have economic interests as follows:[4]

Judge Kaye's husband has a partnership interest in a law firm that lists among its clients numerous New York bond-issuing authorities, such as the Metropolitan Transit Authority, City of New York, NYC Transit Authority, NYC Housing Authority, NYC School Construction Authority, and several others. She has listed investment that include New York City bonds and government securities and money funds held by Merrill Lynch, Smith Barney, CJ Lawrence, Deutsche Morgan Grenfell, Citibank, and Bessemer -- either in IRA or regular accounts. Her balanced fund, fixed-income fund, and money market fund investments contain hundreds of bonds, which would include New York municipals.

Judge Bellacosa has listed investments that also contain hundreds of bonds, including New York State Urban Development Corporation, NYS Power Authority, Tri-Borough Bridge & Tunnel Authority, Port Authority of NY & NJ, NYC Water Finance Authority, NYS Dormitory Authority, and several others. He has listed Merrill Lynch IRA and Keogh bond accounts and investments in two

[4] Judge Wesley's wife works for the Livonia Central School, but there is no listing of a TIAA/CREF investment on his financial disclosure form. If Mrs. Welsey does, indeed, have one, that could be regarded as a potential conflict or appearance of a conflict.

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Merrill Lynch N.Y. municipal bond funds. The TIAA retirement account is not specific as to the exact TIAA fund(s) it contains, but some of TIAA's five funds have sizable proportions of bonds, and one is specifically a bond fund. Investment time horizons of well-advised senior judges would typically result in a high proportion of bonds.

Judge Ciparick lists TIAA/CREF Retirement Annuity for her spouse on her disclosure form. Again, TIAA/CREF is a family of funds and is not sufficiently specific, any more than it would be to list "Fidelity" or "Vanguard" or "T. Rowe Price," investment firms that each have many funds. As noted above, a fund may be entirely bonds, a mixture of stocks and bonds, or primarily stocks. As retirement nears, the balance would shift toward bonds. Also listed are her Copeland Company N.Y.S. Deferred Compensation Plan and her spouse's City of New York Teachers' Retirement System Tax-Deferred Annuity (TDA). It is quite likely that these investments would contain N.Y. bonds. Since N.Y. has for some time been the state most aggressively pumping out municipal bonds and these bonds are particularly high yield due to New York's low credit rating, it is virtually inevitable that these investments would contain N.Y. bonds.

Judge Levine has listed investments including NYS Dormitory Authority and City of New York bonds, and the (Oppenheimer) Rochester Tax Free Fund (regarded by some as the premier New York muni-bond fund, which contains over 800 NY bond issues).

10. The Judges, except Judge Levine who has recused himself in prior similar cases that came before the Court of Appeals, have, by their action or inaction, conveyed a bias and prejudice

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favor of the State parties to the actions and of their own personal financial interests and against plaintiffs, while so conflicted.

11. For example, in Schulz I,[5] Chief Judge Kaye and Judge Bellacosa (writing for the majority) while conflicted and not personally disinterested in the outcome of their decision, totally ignored plaintiffs' claim that SFL 123-b(1) was unconstitutional but still cited SFL 123-b(1) in dismissing plaintiffs' Article X, Section 5 and Article VII, Section 8 constitutional challenge to Chapter 190 of the Laws of 1990, which "authorized" inter alia the Urban Development Corporation to issue $241 million in bonds for the purpose of purchasing Attica Prison from and leasing it back to the Office of General Services. And, in the same case, with respect to plaintiffs' Article VII, Section 11 (voter referendum) challenge to Chapter 190 L90, Judges Kaye and Bellacosa allowed the State to ***acquire*** (seize) the power to borrow without voter approval. Never, in the history of any state has the Judiciary allowed the state to acquire power restricted by the State Constitution, simply because plaintiffs may have delayed in getting to court.

12. In Schulz II,[6] Chief Judge Kaye and Judge Bellacosa (writing for the majority), while conflicted and not personally disinterested in the outcome of their decision, totally ignored plaintiffs' claim that SFL 123-b(1) was unconstitutional but still went on to cite SFL 123-b(1) as the cause for dismissing plaintiffs' Article X, Section 5 and Article VII, Section 8 and Article II, Section 11 constitutional challenge to Chapter 220 of the Laws of 1990 as amended by Chapter 946 of the Laws of 1990 and Chapter 2 of the Laws of 1991, which created the Local Government Assistance Corporation ("LGAC"), and authorized it to issue $4.7 billion

[5] Schulz, et al. v State of N.Y., et al., 81 NY2d 336 (1993) (No. 43).
[6] Schulz, et al. v State of N.Y., et al., 81 NY2d 336 (1993) (No. 44).

in tax-supported bonds which, it turned out, were to be used to balance the state's budget.

13. In Schulz III,[7] Chief Judge Kaye (writing for the Court) and Judges Bellacosa and Ciparick concurring (Judge Levine recused), while conflicted and not personally disinterested in the outcome of their decision, totally ignored plaintiffs' claim that SFL 123-b(1) was unconstitutional, but still went on to cite SFL 123-b(1) in dismissing plaintiffs' Article X, Section 5 and Article VII, Section 8 constitutional challenge to Chapter 56 of the Laws of 1993 which "empowered" the Metropolitan Transit Authority and the Thruway Authority to issue $6 billion in bonds "on behalf of the State." With respect to plaintiffs' Article VII, Section 11 constitutional challenge to Chapter 56 L93, Chief Judge Kaye and Judges Bellacosa and Ciparick ruled that the bonds of the MTA and T.A. were not legally enforceable debt of the State because Chapter 56 L93 said they weren't. Judges Kaye, Bellacosa and Ciparick chose to ignore plaintiffs' argument regarding the state constitutional mandate (Article VII, Section 16) which directs the Legislature to appropriate money to repay money borrowed on behalf of the State, and the Comptroller to impound the next money that comes into the State's treasury, if necessary to redeem all bonds issued on behalf of the State.[8] Finally, it must be noted that Judge Kaye recommended that if state borrowing "gimmickry" has "stretched the words of the Constitution beyond the point of prudence," then voters should consider amending the Constitution! She referred to the specific constitutional amendment then being proposed by the Legislature that would have legalized all the unconstitutional financing schemes the State was engaged in, including back-door borrowing,

[7] Schulz, et al. v State of N.Y., et al., 84 NY2d 231 (1994).

[8] To read the decision one would never know the extensiveness of plaintiffs' arguments to the Court, detailing the many reasons why the State would be ethically obliged and, indeed, legally liable to pay the bondholders in bonds issued on behalf of the State. The decision did not address these arguments as would normally be expected in a judicial proceeding.

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increasing the security of all N.Y. bond holders. The voters, indeed, considered that proposal and resoundingly rejected it in 1995. Her own words acknowledge that the gimmicky does, indeed, involve state debt and is contrary to the Constitution.

14. In Schulz IV,[9] the Judges (except Judge Levine who recused), while conflicted and not personally disinterested in the outcome of their decision, totally ignored plaintiffs' claim that SFL 123-b(1) was unconstitutional, but still went on to cite SFL 123-b(1) in dismissing plaintiffs' Article III, Section 16 constitutional challenge to Chapters 412 and 413 of the Laws of 1996. Judge Kaye (writing for the Court) said, in effect, that it was more important to minimize "uncertainty in the minds of potential investors" than to allow citizens to petition the government for a redress of grievances.

15. A pattern of improper activity by Chief Judge Kaye and Judges Bellacosa and Ciparick is obvious. The adverse effect of the improper activity on the economic well-being of the people of the State and the judicial system has been substantial, amounting to tens of billions of dollars in public debt and a dispassionate market assessment giving New York State the lowest of credit ratings among all the states having passed Louisiana on the "race to the bottom." Adverse effects on the judicial system include loss of credibility, setting bad examples for judges of the lower courts, creating bad case law that will be referred to by the courts for years to come, and causing an increase in the disrespect and distrust among the public and a loss of public confidence.

16. For the reasons given in the next 14 paragraphs, as set forth in the rules governing judicial conduct, the Judges are disqualified and should recuse.

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[9] Schulz, et al. v N.Y.S. Executive, et al., ___NY2d___(June 9, 1998).

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17. All Judges in the Unified Court System ***shall*** comply with the rules of judicial conduct as laid down in 22 NYCRR Part 100. See Part 100.6.

18. The text of 22 NYCRR Part 100 et.seq. is intended to govern the conduct of judges and to be binding on them. See Section 100, Preamble.

19. The Judges are prohibited from participating in the instant proceeding because the decision could substantially affect the value of their economic interests. See 22 NYCRR Part 100.D(1),(4). It makes no difference how small that economic interest is. See 22 NYCRR 100.D.

20. An independent and honorable judiciary is indispensable to justice in our society. See Part 100.1. Participation by the Judges in this decision would discredit the integrity and independence of the Judiciary in violation of Part 100.1.

21. The Judges have failed to avoid impropriety and the appearance of impropriety in all the Judges' activities in violation of Part 100.2. Participation by the Judges in this case would erode public confidence in the integrity and impartiality of the Judiciary in violation of Part 100.2(A).

22. For the Judges to participate in this proceeding would be to advance the private interests of the Judges and Judge Kaye's spouse in violation of Part 100.2(c).

23. The Judges cannot be impartial in this proceeding due to their personal biases and prejudices concerning the State -- a party to this case -- and the State's fiscal practices. See Part 100.3(E)(1)(a).

24. The unwarranted and gratuitous imposition of cost sanctions against plaintiff Schulz in the Court's decision in the "Clean Water/Clean Air" case, was apparently done in violation of Part

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130 of Chapter 1 of the Judicial Administration rules.[10] There was no frivolous conduct, no written (or unwritten) explanation as to what conduct was deemed frivolous, and no opportunity to be heard. This shows a mental attitude or disposition of the Judges toward Schulz that renders the Judges unable to exercise their function impartially.

25. Judge Kaye's husband has a prohibited economic interest in the subject matter in controversy and in the State -- party to this case. See Part 100.3(E)(1)(c).

26. The Judges have economic interests which could be substantially affected by this proceeding. See Part 100.3(E)(1)d)(iii).

27. Lack of personal knowledge about their personal economic interests and the economic interests of their spouses is no defense against disqualification. The Judges cannot claim lack of knowledge especially since they were the ones who submitted the information about their spouse's economic interests. See Part 100.3(E)(2).

28. The extra judicial, economic interests of the Judges cast reasonable doubt on their capacity to act impartially as judges. See Part 100.4(A)(1).

29. The Judges' participation in New York's tax-exempt, high-yield municipal bonds and bond funds may reasonably be perceived as an exploitation of the Judges judicial position as arbiter of the constitutionality of such bonds. See Part 100.4(D)(1)(a).

30. The Judges' financial investments and continuing relationship as a lender of money to New York State and its public corporations was prohibited, in the first place, given the likelihood since 1975 that those parties and their representatives would be coming before this Court. See Part 100.4(D)(1)(c).

[10] Schulz, et al. v N.Y.S. Executive, et al., ___ NY2d___ (June 9, 1998).

31. If the Judges are not disqualified, and remain conflicted, there is no reason to believe that this or any future similar case would receive impartial justice.

32. Based on the above considerations, plaintiffs respectfully request an order granting plaintiffs' motion to disqualify Judges Kaye, Bellacosa, Ciparick and Levine.

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