a judge's "impartiality might reasonably be questioned" or he has an interest, he may:

> "disclose on the record the basis of the judge's disqualification. If, following such disclosure of any basis for disqualification, the parties who have appeared and not defaulted and their lawyers, without participation of the judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding."

The Commission on Judicial Conduct's annual reports explicitly instruct:

> "All judges are required by the Rules of Judicial Conduct to avoid conflicts of interest and to disqualify themselves or disclose on the record circumstances in which their impartiality might reasonably be questioned."

According to the Commission in its brief before the New York Court of Appeals in *Matter of Edward J. Kiley*, (July 10, 1989, at p. 20),

> "It is cause for discipline for a judge to fail to disclose on the record or offer to disqualify under circumstances where his impartiality might reasonable (sic) be questioned."

Treatise authority holds:

> "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 disqualification motion", Flamm, Richard E., Judicial Disqualification: Recusal and Disqualification of Judges, p. 578, Little, Brown & Co., 1996.

The facts giving rise to the Court's disclosure obligations are set forth at pages 4-5 herein.

II. The Court's Second Threshold Duty: To Ensure that the Parties are Properly Represented by Counsel

Executive Law §63.1 identifies that the Attorney General's litigation position is contingent on "the interest of the state". It reads as follows:

> "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

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> 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 instrumentality 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." (underlining added).

State Finance Law Article 7-A also contemplates the Attorney General's affirmative role in safeguarding against "wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property" (§123-b) – including as plaintiff:

> §123-a defines "person" to include "the attorney general" and he is the only "person" so-specified;
>
> §123-c(3) states "Where the plaintiff in such action is a person other than the attorney general, a copy of the summons and complaint shall be served upon the attorney general."
>
> §123-d states that costs and security "shall not apply to any action commenced by the attorney general in the name of and on behalf of the people of the state."

The Attorney General's duty is thus not to provide a knee-jerk defense, but to determine "the interest of the state". Where there is no legitimate defense to a lawsuit, the Attorney General's obligation is not to defend, but to intervene and/or represent the plaintiff so as to uphold "the interest of the state".

Certainly, if the Attorney General had had any legitimate defense to plaintiffs' complaint, AAG Kerwin would not have engaged in the litigation fraud she has by her dismissal cross-motion. Such establishes, *prima facie*, what was already proven in the predecessor citizen-taxpayer action: that the Attorney General has no legitimate defense and his duty is to be representing plaintiffs or intervening on their behalf.

As set forth by plaintiff Sassower's accompanying affidavit, AAG Kerwin has not responded to her requests that she identify who in the Attorney General's office independently evaluated "the interest of the state" and the Attorney General's duty, consistent therewith, to be assisting plaintiffs – here acting as private attorneys general.

That Attorney General Schneiderman is a named defendant, with a direct, financial interest in the sixth, seventh, and eighth causes of action pertaining to the Commission on Legislative, Judicial and Executive Compensation, makes the Court's inquiry of him even more compelled.

In *Greene v. Greene*, 47 NY2d 447, 451 (1979), the Court of Appeals articulated key principles governing attorney disqualification for conflict of interest – the situation at bar where Attorney General Schneiderman, in addition to representing himself, represents his co-defendant public officers:

> "It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law (Code of Professional Responsibility, canon 7). For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests (see, e.g., *Cardinale v Golinello*, 43 NY2d 288, 296; *Eisemann v Hazard*, 218 NY 155, 159; Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large.
>
> ...where it is the lawyer who possesses personal, business or financial interest at odds with that of his client, these prohibitions apply with equal force (Code of Professional Responsibility, DR 5-101, subd [A]). Viewed from the standpoint of a client, as well as that of society, it would be egregious to permit an attorney to act on behalf of the client in an action where the attorney has a direct interest in the subject matter of the suit. ...the conflict is too substantial, and the possibility of adverse impact upon the client and the adversary system too great, to allow the representation."

The former DR 5-101 is now reflected in Rule 1.7 of New York's Rules of Professional Conduct. Rule 1.7(a)(2) bars a lawyer from representing a client if a "reasonable lawyer" would conclude:

> "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interests."[12]

Such "significant risk" is here present, compounded by the fact that Attorney General Schneiderman's preeminent duty of representation is not to his co-defendants who he has heretofore protected, but to the state, to which he has a diametrically-conflicting interest by reason of his salary interest in the compensation issues.

III. The Court's Power under 22 NYCRR §130-1.1(d) to Act "Upon its Own Initiative" and Impose Costs & Sanctions against AAG Kerwin for her Frivolous Cross-Motion

To enable a court to safeguard the integrity of its proceedings, NYCRR §130-1.1(d) explicitly empowers it to act "upon its own initiative, after a reasonable opportunity to be heard" in imposing costs and sanctions against a party or his attorney for "frivolous" conduct in "Every pleading, written motion, or other paper" he has signed.

§130-1.1(c) defines conduct as "frivolous" if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false."

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[12] Such is permitted under Rule 1.7(b) only if, *inter alia*, "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client"; and "(4) each affected client gives informed consent, confirmed in writing".