to holding any hearing, no hearings would have been required and the Decision/Orders would have denied Respondent's other requested relief as a matter of law.

POINT IV

THE DENIAL OF DUE PROCESS VOIDS THE PROCEEDINGS AB INITIO.

The record shows that Appellant was denied basic due process rights guaranteed under the federal and state constitutions. Such fact vitiates all the proceedings before the lower Court and the Decision/Orders based thereon--even had jurisdiction been present. The wholesale denial of due process was particularly egregious since it occurred in the context of contempt proceedings, where the law mandates strictest compliance with additional safeguards:

> "The penalties for any contempt are so drastic, including loss of liberty and substantial fines, that the contemnor's due process rights must be protected. The contemnor has, among other rights, the right to a full evidentiary hearing, Bruno v. Bruno, 50 A.D. 2d 701, 375 N.Y.S.2d 442; Ingraham v. Maurer, 39 A.D.2d 258, 334 N.Y.S.2d 19, State University of New York v.Denton, 35 A.D.2d 176, 316 N.Y.S.2d 297, the right to call witnesses, State of New York v. Denton, supra, the right to the assistance of counsel, Judiciary Law §770, and the right to a finding of contempt by more than a mere preponderance of evidence, Yorktown Central School District No. 2 v. Yorktown Congress of Teachers, 42 A.D.2d 422, 348 N.Y.S.2d 367, Panza v. Nelson, [54 A.D.2d 928, 388 N.Y.S.2d 130], State ex rel. Porter v.Porter, [33 A.D.2d 876, 307 N.Y.S.2d 682]". Larisa F. v. Michael S., 112 Misc.2d 520, 470 N.Y.S.2d 999, 1000 (Fam. Ct., Qns. Cty., 1984).

The transcripts of both contempt proceedings show the Judge flouted the rule of strictissimi juris applicable to contempt proceedings and made a mockery of that controlling standard.

Judiciary Law §773 leaves no doubt as to the legislative mandate regarding the right to counsel:

> "Upon the return of an application to punish for contempt..., the court shall inform the offender that he or she has the right to the assistance of counsel" (emphasis added).

Likewise, the Rules of the Appellate Division, Second Department, make clear that even in the case of summary criminal contempt, unless of the most flagrant and offensive nature, the full panoply of due process rights, including the right to counsel, must be afforded before any contempt adjudication can be made. 22 NYCRR §701.3. See also, Holmes v. Holmes, 89 A.D.2d 921, 454 N.Y.S.2d 22 (2d Dept. 1982).

The transcript of January 8, 1992 shows that on the return date of the first Order to Show Cause, the Court not only failed to perform its aforesaid duty, but summarily denied Appellant that right to counsel when she asserted it (A-395-6, 401, 404-5)(see also A-423-4; 441, 445, 465, 473-5; 516-7, 525, 543-8, 573,662, 682, 705, 954). This was the pattern repeated in the later proceeding as well.

Moreover, the action taken by the Judge on January 21, 1992, in removing the Conte firm over Appellant's objection (A-457-9), should have triggered her right to an automatic stay under CPLR §321(c)--since the Judge viewed that firm as otherwise required to appear as Appellant's counsel for the contempt proceeding. Such stay would have given her at least the 30-day adjournment time Appellant had requested to obtain counsel. Instead, because of the high-pressure, break-neck pace insisted upon by the Court, the proceedings were already completed by such time.

In the second contempt proceeding, the Judge again failed to inform Appellant of her right to counsel on the return date, and when Appellant asserted such right and documented her diligent efforts to retain counsel, he denied her the 30 days she requested for that purpose (A-1017-1033, 1044). As the record further shows, the Judge sought to deprive Appellant of the assistance of her adult daughter, who was aiding her as a paralegal, by excluding her from the counsel table (A-987-92, 1013-6) and, thereafter, by excluding her from the courtroom.

The litany of the Judge's due process violations in the first contempt proceeding was set forth by Appellant, with abundant legal citation and argument thereon, in her papers in support of her Article 78 proceeding, to which this Court is respectfully referred (A-1223,

1262, 1423). The virtually identical pattern of due process violations, which occurred in connection with the second contempt proceeding, include:

(a) denying Appellant's recusal motions (A-1004-9, 1117, 1216-19, 1488, 1514) despite the pendency of Appellant's 78 proceeding wherein he and Appellant were direct adversaries (A-1004, 1010-12, 1071, 1075, 1094), and notwithstanding his participation as a party to the stipulation (A-1012, 1016), making him a prospective witness (A-1017);

(b) refusing to follow the strictissimis juris standard governing contempt proceedings (A-1122) and disregarding the legal insufficiency of the underlying contempt pleadings and jurisdictional deficiencies (A-1122-4, 1514). Such included: omission of essential jurisdictional recitals (A-1121, 1124); omission of specification of the section under which Respondent's contempt proceeding was being brought and the nature of the contempt being charged (A-1124, 1178, 1180-1); omission of required factual allegations and proof thereof (A-1167-8); omission of an underlying legal mandate (A-1114, 1124, 1204); omission of a certified copy of the order served as required under CPLR 5104 (A-1168-9, 1185-7, 1206-8);

(c) interrupting the proceedings to conduct his own questioning to establish that a summary contempt had occurred on February 11, 1992 (A-1101, 1123-7, 1142-3, 1160-1) and, without notice, using the contempt proceeding as a purported plenary "hearing" on the February 11, 1992 contempt (A-1159-60);

(d) arbitrarily restricting the scope of the "hearing" to preclude defenses to the alleged contempt and justification for non-performance (A-1101-7);

(e) arbitrarily restricting the length of the "hearing", which commenced at 2:15 on Friday, April 3, 1992 (A-1154), to conclude at 4:50 p.m. on that day (A-1138-9, 1148, 1156, 1162-3, 1175-6, 1185, 1188, 1190, 1192);

(f) arbitrarily halting Appellant's cross-examination of Aurnou at 4:45 p.m. to announce "the proceeding is concluded", but then allowing Aurnou to call Appellant to the stand (A-1189-90) and directing her to testify;

(g) denying and restricting Appellant's right to be "heard" in her own defense--except for "five minutes"--and then denying her the opportunity to offer witnesses in her own behalf (A-1192-5, 1214, 1219-21);

(h) refusing to disqualify Aurnou from acting as lawyer and witness in the proceedings (A-1112-5, 89, 104), and conducting examination of him (A-1112-1115, 1127);

(i) blocking Appellant's wholly proper lines of cross-examination (A-1118, 1155-6, 1159, 1171, 1173-5, 1175-9, 1184,1185-8);

(j) directing court reporters not to take down Appellant's statements (1043);

(k) preventing the marking of evidence (A-1076-1078) and denying offers of proof (A-1487);

(l) countenancing and allowing a pattern of behavior by Aurnou consisting of disparaging, abusive and harassing remarks toward Appellant in open court (A-1141-2, 1154, 1158, 1172, 1182) (A-1504-8, 1532, 1534-5);

(m) sua sponte reopening the proceedings on May 4,1992, without adequate notice, so as to permit testimony by Aurnou as to his counsel fees (A-1477-8), and limiting Appellant's time for cross-examination thereof (A-1479, 1497, 1521-2, 1538-9); and

(n) awarding a counsel fee/fine to Aurnou based on incompetent, non-probative evidence[34] (A-1495-6, 1522[35]) and without affording Appellant the right to be "heard" with respect thereto (A-1494-5).

The foregoing due process violations made a travesty of the so-called "hearing", vitiating the May 4, 1992 Decision/Order based thereon. Said Decision/Order relied on the February 10, 1992 Decision/Order, which itself was the result of similar without-due-process hearings in the first contempt proceeding (A-1446-1450).

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34 Mr. Aurnou's timesheets (A-1544) were clearly not contemporaneous documents--(bearing the date 5/4/92, 11:47 a.m.).

35 Mr. Aurnou admitted at the 5/4/92 "hearing" that there was no document attesting to any obligation by Plaintiff to pay him for his services in connection with the contempt proceedings. In explanation he stated: "...I have no obligation to create items of evidence for your convenience, madam." (A-1522).

Zappacosta, 77 AD2d 928, 431 NYS2d 928. (AD 1980).

4. Case law establishes clearly that such conduct is proscribed and will not be countenanced. Matter of Esworthy, 77 NY2d 280, 567 NYS2d 390 (1991). In the underlying proceeding and action, Respondent repeatedly engaged in acts specifically identified in Esworthy as grounds for removal from the bench. This included "indicating that judge presumed unproven allegations to be true", "repeatedly neglecting to inform litigants [Petitioner] appearing before judge of their constitutional and statutory rights, including right to counsel, and instead exerting undue influence on parties..." Id. See also, Sardino v. State Com'n. on Judicial Conduct, 58 NY2d 286, 461 NYS2d 229 (1983). That case sustained removal of a judge, who, as Petitioner has repeatedly done, engaged in conduct involving gross abuse of judicial power and process, routine denial of defendant's rights, ignoring mandates of law, disregarding jurisdiction, demeaning defendants and acting in manner to bring disrepute to courts and judiciary; Matter of Reeves, 6 N.Y. 2d 105, 480 NYS2d 463 (1984):

> Repeated pattern of failing to advise litigants of their constitutional and statutory rights is serious judicial misconduct. id.

5. The following references to the transcripts of the contempt proceedings are illustrative of the egregious manner in which Respondent conducted the "hearing" of Plaintiff's "quasi-criminal" charges. All such actions are in contravention of the ethical mandate that:

"A judge must perform judicial duties

> impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute." (Commentary to Canon 3A(5), ABA Code of Judicial Conduct).

(a) Denying Petitioner her right to counsel--in violation of Judiciary Law, Sec. 770, as well as 22 NYCRR Part 701, and the state and federal constitutions--and compelling her to proceed pro se, notwithstanding Petitioner's repeated assertion of her right to counsel and that she could not, and did not wish to, act pro se (1/8/92 Tr., pp. 7; 1/9/92 Tr., p. 7; 1/21/92 Tr., pp. 9, 13, 33, 41, 43; 1/28/92 Tr., pp. 10, 18, 36-9, 40, 66, 155; 2/3/92, pp. 18, 41, 178-9);

(b) Directing the Court Reporter, repeatedly, to stop recording the proceedings--in violation of Judiciary Law, Sec. 295--and preventing Petitioner from protecting the record for appellate review (CPLR 5501) (1/9/92 Tr., p. 16; 1/21/92 Tr., p. 14; 1/28/92 Tr., pp. 2-5; 15-16; 2/3/92 Tr., pp. 12-14, 143-4, 233, 236). Such conduct, in and of itself, is prejudicial error under the law. Goldberg v. Mutual Life Ins. Co. of New York, 24 NYS2d 929 (1940), rev'd on other grounds 263 App. Div. 10, 31 NYS 2d 154, app. dism'd 288 NY 662; "...a stenographer "cannot be directed to disregard his sworn statutory duty to take down all rulings and exceptions." Weber v. Interborough Rapid Transit Co., 152 NYS 197 (1915);

(c) Overruling Petitioner's objection--contrary to the rules of evidence--to prospective witnesses remaining in the courtroom during the hearing (2/3/92 Tr., pp. 14-15, 45-47);

(d) Permitting Plaintiff's counsel--in violation of

DR5-102 of the Code of Professional Responsibility--to act as both lawyer and witness (2/3/92, p. 18) and to testify in narrative form (1/28/92 Tr., pp. 62-3; 89-90; 2/3/92 Tr., pp. 17, 38);

(e) Permitting Plaintiff's counsel--contrary to the rules of evidence--to testify in narrative form and to read from documents (1/28/92 Tr., pp. 111-112)--which Respondent refused to have marked for identification for the record (1/28/92 Tr., pp. 115-6);

(f) Permitting Plaintiff's counsel--contrary to the rules of evidence--to testify as to opinions and conclusions (2/3/92 Tr., pp. 28-32);

(g) Acting as counsel to Plaintiff's counsel--contrary to the Code of Judicial conduct--while Plaintiff's counsel was testifying as a witness, by conducting the interrogation for Plaintiff's counsel's direct examination (1/21/92 Tr., p. 50-1; 2/3/92 Tr., pp. 33-4);

(h) Answering questions for Plaintiff's counsel--contrary to the rules of evidence and the Code of Judicial Conduct (2/3/92 Tr., pp. 75-6);

(i) Permitting hearsay testimony--contrary to the rules of evidence (1/28/92 Tr., pp. 64, 94, 98; 2/3/92 Tr., pp. 35);

(j) Offering <u>his own</u> hearsay as testimony--contrary to the Code of Judicial Conduct and the rules of evidence--and defending Plaintiff's counsel's submission of an Order to Show Cause, returnable the next morning, <u>without</u> a showing of

exigency, and without compliance with relevant CPLR requirements[10] (2/3/92 Tr., pp. 115-116);

(k) Excluding relevant testimony of Respondent's trial counsel as to Petitioner's emotional state of Petitioner at time of the December 13, 1991 stipulation--contrary to the rules of evidence--and, contrary to the Code of Judicial Conduct, proffering his own opinions on that subject (2/3/92 Tr., pp. 177-179);

(l) Offering testimonial opinion as to the quality of such trial counsel's representation of Petitioner (2/3/92 Tr., p. 186);

(m) Cutting off Petitioner's cross-examination of Mr. Aurnou (2/3/92 Tr., 85-87, 140-143, 236); cutting off cross-examination of Mr. Conte (2/3/92 Tr., p. 211, 232); cutting off cross-examination of Mr. Leghorn (2/3/92 Tr., pp. 259-60); insisting on conclusion of the hearing without affording Petitioner time to testify in her own defense or to offer witnesses and evidence on her own behalf (2/3/92 Tr., p. 219, 235);

(n) Directing that Petitioner's trial counsel, Mr. Conte, be called to the stand (2/3/92 Tr., pp. 49-50, 78, 141-2); denying adequate time for Petitioner to review documents produced by Mr. Conte (2/3/92 Tr., p. 149);

(o) Denying Petitioner the opportunity to obtain

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10 [1/21/92 Tr., p. 61]

Court: "Whether he tried to serve you first or not is relevant" (emphasis added)

documents from counsel for her insurer (2/3/92 Tr., pp. 241-2)

(p) Engaging in coercive tactics--in violation of the Code of Judicial Conduct, see Commentary to Canon 3B(8)--to pressure Petitioner to surrender her legal rights[11], including denying Petitioner's reasonable requests to attend to her medical needs, where there was no prejudice to any party, and requiring her to participate in proceedings held well after normal court hours, despite her complaints of physical exhaustion and her obvious adverse health, including constant coughing and laryngitis, impairing her ability to speak (inter alia, 1/29/92 Tr., p. 14; 2/3/92 Tr., pp. 150-1, 153, 176, 235).

6. The integrity of our judicial process rests on the expectation that our judges will be sufficiently competent and moral to follow the law and ethical rules governing judicial conduct. The rationale of Canon 2A is that a judge who, as his regular modus operandi wilfully ignores applicable law, court rules and ethical mandates erodes public confidence in the judiciary as a whole, whose decisions all become suspect.

7. The actions of such a judge are likely to be

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[11] The December 13, 1991 transcript of the stipulation of settlement shows that Respondent intruded himself as a party thereto by insisting on a sealing order over Petitioner's objection. Such coerced action by Respondent was designed to circumvent the established public policy of the State limiting a court's power to seal its own records. Nicholson v. Judicial Comm., 50 NY 2d 597, at 613 (1980). Moreover, Respondent's interest in maintaining the stipulation intact raised an additional "appearance of impropriety", since it allied him with the interest of the Plaintiff--contrary to the intent of Judiciary Law, Sec. 14, "based on the maxim that no man can be a judge in his own cause ant that a judge not be, or appear to be, aligned with a party appearing before him". Matter of Estate of Sherburne, 124 Misc.2d 708, 476 NYS2d 419 (Surr. 1984.)