Motion #581/02

NEW YORK COURT OF APPEALS

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

Petitioner-Appellant,

-against-

COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF NEW YORK,

Respondent-Respondent.

PETITIONER-APPELLANT'S CRITIQUE OF ASSISTANT SOLICITOR GENERAL CAROL FISCHER'S MAY 17, 2002 "*MEMORANDUM OF LAW OF RESPONDENT COMMISSION ON JUDICIAL CONDUCT IN OPPOSITION TO PETITIONER'S MOTION FOR DISQUALIFICATION*"

BY: 

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Dated: June 7, 2002

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The Title of Ms. Fischer's Opposing Memorandum of Law

The knowingly false and misleading nature of Ms. Fischer's opposing memorandum begins with its title reference to Petitioner-Appellant's "Motion for Disqualification". Petitioner-Appellant's May 1, 2002 motion was for "Disqualification/Disclosure" – and was so identified in the titles of her notice of motion, moving affidavit, and table of exhibits.

This omission of "disclosure" is replicated throughout Ms. Fischer's opposing memorandum, where *no* reference to the issue appears. Thus, Ms. Fischer neither identifies nor discusses §100.3F of the Chief Administrator's Rules Governing Judicial Conduct, invoked by Petitioner-Appellant as entitling her to disclosure, does not address the treatise authority, cited by Petitioner-Appellant's ¶8:

> "'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" [A-252, A-237].

and does respond to the specific disclosure Petitioner-Appellant has requested under the section heading, "The Duty of this Court's Judge to Make Disclosure of Pertinent Facts Bearing Upon their Interest and Bias" (¶¶116-121).

Petitioner-Appellant's factual and legal showing of entitlement to disclosure is therefor undenied and undisputed – and, as a matter of law, conceded.

Indeed, Ms. Fischer does not deny or dispute the proposition of law, also cited at ¶8 of Petitioner-Appellant's motion:

> "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 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)".

The obvious reason for Ms. Fischer's obliteration of the disclosure issue is because she cannot fashion *any* argument against it. After all, in arguing to this Court, the Commission has stated "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" (7/10/89 Brief in *Matter of Edward J. Kiley*, at p. 20) -- citing *Matter of Fabrizio*, 65 N.Y.2d 275 (1985). Moreover, since 1998, the Commission's Annual Reports have highlighted:

> "All judges are required by the Rules [Governing 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."[1]

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[1] This quote from the Commission's Annual Reports since 1998 is already part of the record – appearing at p. 5 of Petitioner-Appellant's November 19, 2001 letter to then Presiding Justice of the Appellate Division, First Department Joseph Sullivan. This letter was part of Petitioner-Appellant's November 16, 2001 interim relief application, as likewise her November 20, 2001 interim relief application to postpone oral argument pending adjudication of her August 17, 2001 motion.

Ms. Fischer's approach to the issue of disclosure – to conceal its existence – replicates *precisely* what she did in the Appellate Division, First Department. There, in response to Petitioner-Appellant's August 17, 2001 motion for disqualification of, and disclosure by, judges of that court[2], Ms. Fischer's August 30, 2001 opposing "affirmation" and memorandum of law concealed the motion's disclosure request. This was demonstrated by Petitioner-Appellant's September 17, 2001 critique thereof[3], annexed as Exhibit "AA" to her October 15, 2001 reply affidavit in further support of the August 17, 2001 motion[4].

The same approach was taken in Supreme Court/New York County by Ms. Fischer's predecessor, Assistant Solicitor General Carolyn Cairns Olson. Ms. Olson's opposition [A-294-307] to Petitioner-Appellant's December 2, 1999 letter to Justice Wetzel for his disqualification/disclosure [A-250-290] also ignored the requested disclosure – a fact identified by Petitioner-Appellant's responding December 9, 1999 letter to Justice Wetzel [A-308-334, *see* A-313].

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[2] The requested disclosure summarized by the August 17, 2001 notice of motion was particularized at ¶¶68-74 of Petitioner-Appellant's moving affidavit. Further requested disclosure was particularized at ¶31 of her October 15, 2001 reply affidavit in further support of her August 17, 2001 motion.

[3] *See* pp. 29-30, 56 of Petitioner-Appellant's September 17, 2001 Critique.

[4] *See* ¶40 of Petitioner-Appellant's October 15, 2001 reply affidavit. *Also*, Petitioner-Appellant reiteration of the state of the record as to the disclosure issue in (1) her November 16, 2001 interim relief application; (2) her November 21, 2001 oral argument; (3) her January 17, 2002 reargument motion by its annexed reargument analysis and reconstructed oral argument.

Ms. Fischer's "Preliminary Statement" (at p. 1):

Ms. Fischer's "Preliminary Statement" identifies two bases for opposing Petitioner-Appellant's motion for the Court's disqualification: (1) it is "premature, because this Court has not determined whether it has jurisdiction over this appeal"; and (2) it is "substantively meritless" because it is based on "conclusory and unsupported allegations of 'longstanding and ongoing systemic corruption by judges and lawyers on the public payroll". Yet, the subsequent pages of Ms. Fischer's opposing memorandum cite NO LAW for either proposition. Nor does she deny or dispute the multitude of fact-specific, document-supported allegations of Petitioner-Appellant's sworn 68-page moving affidavit. Instead, Ms. Fischer so mischaracterizes and actually falsifies the few facts from the motion she cites as to present NO FACTUAL OPPOSITION. In that regard, Ms. Fischer has never denied or disputed the legal proposition which Petitioner-Appellant set before the Appellate Division at page 39 of her Brief[5]:

> "'when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party.' Corpus Juris Secundum, Vol. 31A, 166 (1996 ed., p. 339)",

with an included reference to *People v. Conroy*, 90 NY 62, 80 (1884),

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[5] Ms. Fischer's predecessor, Assistant Attorney General Olson also did not deny or dispute this legal proposition, which Petitioner-Appellant had put before Supreme Court/New York County in her September 24, 1999 reply memorandum of law in further support of her July 28, 1999 omnibus motion (at p. 18).

"'The resort to falsehood and evasion by one accused of a crime affords of itself a presumption of evil intentions, and has always been considered proper evidence to present to a jury upon the question of the guilt or innocence of the person accused.'"

Ms. Fischer's "Statement of the Case" (at pp. 2-5)

Ms. Fischer's purported "Statement of the Case" is procedurally improper, irrelevant, and a knowing fraud on the court.

Procedurally Improper and Irrelevant

A "Statement of the Case" is already before the Court, presented by Petitioner-Appellant's Jurisdictional Statement pursuant to 22 NYCRR §500.2 in support of her appeal of right on due process grounds. Foremost among its assertions (at pp. 1, 6-10) is that the Appellate Division, First Department's December 18, 2001 decision – like the January 31, 2000 decision of Justice Wetzel it affirmed -- is the product of a court legally disqualified for interest, that it is "totally devoid of evidentiary and legal support", and that demonstrating this is Petitioner-Appellant's fact-specific, document-supported 19-page analysis of the decision, whose accuracy was undenied and undisputed by the Attorney General and the Commission in opposing Petitioner-Appellant's January 17, 2002 reargument motion [hereinafter "reargument analysis"].

It was Ms. Fischer's burden to present a "Counterstatement"[6] showing that there was no deprivation of due process and to address the accuracy of Petitioner-Appellant's reargument analysis, especially as its dispositive nature was summarized by the Jurisdictional Statement (at pp. 8-10). This would have included addressing the significance of Petitioner-Appellant's August 17, 2001 motion, whose first branch was for disqualification and disclosure by the Appellate Division, First Department and whose second branch was to strike Respondent's Brief as a "fraud on the court", to sanction the Attorney General and Commission, including by disciplinary and criminal referral, and to disqualify the Attorney General for violation of Executive Law §63.1 and conflict of interest rules.

As identified by the Jurisdictional Statement (at pp. 8-9), the appellate panel's decision denied the August 17, 2001 motion, *without* reasons, *without* findings, *without* legal authority, and by *falsifying* the motion's relief -- thereby concealing

(1) the legal disqualification for interest of both the appellate panel AND Justice Wetzel;

(2) the three fraudulent lower court decisions of which the Commission was a beneficiary: Justice Cahn's decision in *Doris L. Sassower v. Commission*, Justice Lehner's decision in *Michael Mantell v. Commission*, and, Justice Wetzel's decision based on those two;

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[6] The Commission did not cross-appeal. Therefore, Ms. Fischer was limited to "a counterstatement of the nature and the facts of the case...only if respondent disagrees with the statement of the appellant", CPLR §5528. *See* Petitioner-Appellant's May 3, 2001 Critique (at p. 17), annexed as Exhibit "U" to her August 17, 2001 motion.

(3) the fraudulent appellate decision in *Mantell*;

(4) the Attorney General's litigation misconduct on the appeal, *inter alia*, by urging the appellate panel to rely on the fraudulent decisions of Justices Cahn, Lehner, Wetzel and the *Mantell* appellate panel;

(5) the Attorney General's litigation misconduct in Supreme Court/New York County, *inter alia*, by urging dismissal of the verified petition based on the fraudulent decisions of Justices Cahn and Lehner – as to which Justice Wetzel failed to make any findings in denying Petitioner-Appellant's July 28, 1999 omnibus motion for sanctions against him, etc.; and

(6) Petitioner-Appellant's entitlement to ALL relief requested by her verified petition – for which her July 28, 1999 omnibus motion sought summary judgment, denied by Justice Wetzel, *without findings or reasons*.

Ms. Fischer does *not* deny or dispute the accuracy of these or any other facts presented by Petitioner-Appellant's Jurisdictional Statement – *which are the facts relevant to the appeal before the Court.*

Knowing "Fraud on the Court"

Ms. Fischer begins her "Statement of the Case" (at p. 2) by identifying that "The facts are developed more fully in the brief the Commission submitted to the First Department" and that she is physically annexing a copy. This is the same Respondent's Brief, signed by Ms. Fischer, which the second branch of Petitioner-Appellant's August 17, 2001 motion sought to have striken as a "fraud on the court" and which Petitioner-Appellant demonstrated to be a fraud by a 66-page May 3, 2001 Critique, constituting a virtual line-by-line analysis. The Critique – annexed as Exhibit "U" to the motion – established that Ms. Fischer's

Respondent's Brief, "*from beginning to end*, is based on knowing and deliberate falsification, distortion, and concealment of the material facts and law"[7]. Neither the Attorney General nor Commission ever denied or disputed the Critique's accuracy in any respect[8].

Ms. Fischer then purports to summarize, "for the Court's convenience" the "facts" from Respondent's Brief she has attached.

A: "*The Underlying Article 78 Proceeding*" (pp. 2-4)

This subsection is not so much summarized from Ms. Fischer's Respondent's Brief[9], as it is "lifted" from pages 2-4 of her August 30, 2001 memorandum of law in opposition to Petitioner-Appellant's August 17, 2001 motion.

Ms. Fischer's August 30, 2001 opposing memorandum is also a "fraud on the court" -- exposed as such by Petitioner-Appellant's 58-page September 17, 2001 Critique, constituting a "virtual line-by-line analysis" of it and of Ms. Fischer's August 30, 2001 opposing "affirmation". This September 17, 2001 Critique – annexed as Exhibit "AA" to Petitioner-Appellant's October 15, 2001 reply affidavit in further support of her August 17, 2001 motion – established that

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[7] So-stated at page 1 of Petitioner-Appellant's August 17, 2001 Reply Brief.

[8] *See* Petitioner-Appellant's August 17, 2001 motion (¶92); October 15, 2001 reply affidavit in further support of her August 17, 2001 motion: Exhibit "AA", pp. 11-13, 49-55.

[9] Ms. Fischer's "Statement of the Case" appears at pages 3-14 of her Respondent's Brief. These pages are analyzed at pages 17-39 of Petitioner-Appellant's May 3, 2001 Critique, annexed as Exhibit "U" to her August 17, 2001 motion.

Ms. Fischer's opposition to the motion, like her Respondent's Brief, is "'*from beginning to end*, based on knowing and deliberate falsification, distortion, and concealment of the material facts and law'". Consequently, the October 15, 2001 reply affidavit sought further sanctions against Ms. Fischer and her culpable superiors at the Attorney General's office and at the Commission. Here, too, neither the Attorney General nor the Commission ever denied or disputed the accuracy of the September 17, 2001 Critique in any respect.

Thereafter, Petitioner-Appellant exposed the fraudulence of pages 2-4 of Ms. Fischer's August 30, 2001 opposing memorandum a second time. This, after Ms. Fischer transposed those pages to ¶¶3-4 of her February 27, 2002 "affirmation" opposing Petitioner-Appellant's February 20, 2002 motion to the Appellate Division for leave to appeal. ¶¶10-11 of Petitioner-Appellant's March 6, 2002 reply affidavit, which sought sanctions against Ms. Fischer and her culpable superiors at the Attorney General's office and the Commission, annexed the pertinent pages from her September 17, 2001 Critique in rebuttal, these being pages 20-26.

Consequently, in response to Ms. Fischer's subsection A, resurrecting, with but minor alterations, pages 2-4 of her August 30, 2001 opposing memorandum of law, pages 20-26 of Petitioner-Appellant's September 17, 2001 Critique are largely sufficient. The pertinent response from those pages – as to which the

Appellate Division never made any findings -- is set forth in the indented, single-spaced text that follows:

The first paragraph of Ms. Fischer's subsection A. (at p. 2) purports to summarize the verified petition. Comparison with the verified petition [A-22-121], especially with its six Claims for Relief [A-37-45], shows it to be materially inadequate and, as to its first sentence, knowingly false. Thus, Ms. Fischer's first sentence purports that the verified petition alleged "the Commission...is required by Judiciary Law §44.1 to conduct a *comprehensive* investigation of every 'facially-meritorious' judicial misconduct complaint" (emphasis added).

> "As highlighted by Appellant's [May 3, 2001] Critique (at p. 7),
>
> > 'uncontroverted evidence in the record, consisting of information provided by the Commission's Administrator, is that there is:
> >
> > > 'only one class of investigation...once the Commission authorizes an investigation, there is a full formal investigation. There are no gradations, such as initial inquiry or preliminary investigation.''
>
> Ms. Fisher's use of phrases like '*comprehensive* investigation' and then '*full-scale* investigation', also in this [first] sentence (...emphases added), is a deliberate deceit, playing off the central hoax perpetrated by Justice Cahn's decision in *Doris L. Sassower v. Commission* – a hoax exposed by Appellant's [May 3, 2001] Critique (at pp. 6-8).
>
> Second, the Commission did not conclude that Appellant's 'complaints did not warrant full-scale investigation.' Only one of Appellant's complaints was dismissed – and this, Appellant's October 6, 1998 judicial misconduct complaint [A-57-83]. As highlighted by Appellant's *uncontroverted* [May 3,

2001] Critique (at pp. 12-13, 46-47), her February 3, 1999 judicial misconduct complaint [A-97-101] was not dismissed [A-36-7].

Third, Ms. Fischer conceals the specific reason Appellant's Verified Petition contended that, pursuant to Judiciary Law §44.1, the Commission was 'without the discretion to dismiss' -- as it did -- her October 6, 1998 complaint [A-57-83] *to wit*, that such complaint – as likewise Appellant's February 3, 1999 complaint [A-97-101] -- is *facially-meritorious*."

...

As to the third and final sentence of Ms. Fischer's first paragraph under subsection A,

> "pertaining to Appellant's (separate) requests that 22 NYCRR §§7000.3 and 7000.11 be declared unconstitutional, *as written and applied*, [she] conceals that the Verified Petition [A-19, A-42] specified that in the event 22 NYCRR §7000.11 were to be upheld, Judiciary Law §§41.5 and 43.1 were to be challenged as unconstitutional, *as written and applied*."

Ms. Fischer's second and third paragraphs under her subsection A (at pp. 3-4), skip over the course of the proceedings in Supreme Court/New York County and go directly to Justice Wetzel's January 31, 2001 decision & order [A-9-14].

As to Ms. Fischer's second paragraph (at p. 3), it not only tucks inside a parenthesis that Justice Wetzel "(...denied petitioner's motion for recusal and for sanctions against the Attorney General and the Commission due to their alleged 'litigation misconduct')", but omits the details *expressly* identified by Petitioner-Appellant's May 1, 2002 disqualification/disclosure motion (¶¶4-8, 33-38) as being relevant, *to wit*, Justice Wetzel's denial of Petitioner-Appellant's December 2, 1999 letter-application for his

disqualification/disclosure was "*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" and, further, that his denial of Petitioner-Appellant's July 28, 1999 omnibus motion for sanctions against the Attorney General and Commission was similarly *without* findings.

Ms. Fischer identifies that Justice Wetzel relied on "Justice Cahn's decision in D. Sassower v. Commission, N.Y. Co. Clerk's No. 109141/95". This

> "represent[s] a critical turn-about from her Respondent's Brief (at p. 13) since, as highlighted by Appellant's *uncontroverted* [May 3, 2001] Critique (at p. 37), Respondent's Brief had falsely made it appear that Justice Lehner's decision in *Mantell v. Commission* was the SOLE basis upon which Justice Wetzel dismissed Appellant's proceeding. However, [in so doing Ms. Fischer is deceptive... -- because Justice Wetzel's decision did NOT identify "D. Sassower v. Commission" as such [A-12]. Justice Wetzel identified it as "Sassower v. Commission" and pretended that Appellant herein was "the same petitioner" in that case [A-12]. This material falsehood in Justice Wetzel's decision is concealed by Ms. Fischer... wh[o] identifies the petitioner in the prior case as "petitioner's mother, Doris [] Sassower", without acknowledging that this is NOT what Justice Wetzel's decision purports as to who the petitioner was.
>
> Ms. Fischer...also materially misrepresents -- much as Justice Wetzel did in his decision – that the proceeding Justice Cahn dismissed was 'a nearly identical proceeding' to Appellant's. This untruth is highlighted by Appellant's Brief (at pp. 55-58) in the context of rebutting Justice Wetzel's dismissal of Appellant's Verified Petition on grounds of *res judicata*/collateral estoppel. Further, Ms. Fischer repeats the pretense, derived from Justice Cahn's decision, that:

> 'the Commission had the power to make discretionary preliminary determinations as to whether...to undertake more *comprehensive* investigations, and therefore could not be compelled to undertake a *comprehensive* investigation ...' (emphases added).
>
> Such pretense, the central hoax of Justice Cahn's decision, is rebutted at pages 6-8 of Appellant's *uncontroverted* [May 3, 2001] Critique under the heading 'The Insidious Influence of Justice Cahn's Decision'. Ms. Fischer wholly avoids addressing these pages – although her obligation to do so is highlighted by Appellant's [August 17, 2001] moving Affidavit (at ¶¶89, 92) and her [August 17, 2001] Reply Brief (at p. 5)."

As to Ms. Fischer's third paragraph under subsection A (at p. 3), referring to Justice Wetzel's further reliance on *Mantell v. Commission* to dismiss Appellant's verified petition, Ms. Fischer modifies the presentation from her August 30, 2001 opposing memorandum of law and her February 27, 2002 opposing "affirmation" to make it appear – *even more falsely than previously* -- that Justice Wetzel's decision rests on the *Mantell* appellate affirmance. Once again,

> "Ms. Fischer uses the [Appellate Division's] add-on about 'standing' from its affirmance – which was NOT part of Justice Lehner's decision – as if it were part of the original decision. [Further], the [Appellate Division] did NOT even say that Mr. Mantell 'had no standing to seek an order compelling the Commission to investigate a particular complaint' – but, rather, that he had no standing as to 'ALL facially-meritorious complaints of judicial conduct' (emphasis added). This fact was highlighted in Appellant's *uncontroverted* [May 3, 2001] Critique (at pp. 41-42) – which Ms. Fischer fails to address, notwithstanding her obligation to do so was underscored in Appellant's [August 17, 2001] moving Affidavit (at ¶¶66, 89, 92) and [August 17, 2001] Reply Brief (at p. 5)."

Ms. Fischer then refers (pp. 3-4) to Justice Wetzel's imposition of a filing injunction against "both petitioner and her pro bono organization, the Center for Judicial Accountability, Inc. ('CJA') from instituting 'any further actions or proceedings relating to the issues decided herein'". She materially omits that CJA is a *non*-party and that such imposition, as to both, was *sua sponte*, *without* notice and opportunity to be heard, and *without* making any findings. These essential facts, as likewise, the complete factual baselessness of such injunction, are integral to Petitioner-Appellant's right to appeal on due process grounds – and so reflected by her Jurisdictional Statement (at pp. 18-19), with a specific "Question Presented" based thereon.

B: "*Proceedings Before The Appellate Division*" (pp. 4-5)

With the exception of Ms. Fischer's two-sentence final paragraph under subsection B (at p. 5), this subsection is "lifted", with only slight modification, from ¶¶5-7 of her February 27, 2002 "affirmation" in opposition to Petitioner-Appellant's February 20, 2002 motion for leave to appeal. Petitioner-Appellant's March 6, 2002 reply affidavit (at ¶¶11-12) also already exposed the materially misleading and deceitful nature of these paragraphs.

As to Ms. Fischer's first paragraph under her subsection B, purporting to summarize the relief sought by Petitioner-Appellant's August 17, 2001 motion, it contains a particularly significant modification. Deleted by Ms. Fischer – although *included* in her February 27, 2002 opposing "affirmation" (at ¶5) – is that

the August 17, 2001 motion sought "to strike Respondent's Brief as a purported 'fraud on the court.'" The reason for this deletion is obvious. Ms. Fischer has just put that same Respondent's Brief before this Court, annexing it to her memorandum of law in opposition to Petitioner-Appellant's disqualification/disclosure motion.

Like her aforesaid February 27, 2002 version (at ¶5), Ms. Fisher again materially omits that Petitioner-Appellant's August 17, 2001 motion sought the Appellate Division's disqualification not only for "alleged self-interest", but for bias, both actual and apparent. Likewise, she materially omits that the August 17, 2001 motion sought disclosure and to disqualify the Attorney General for violation of Executive Law §63.1 and conflict of interest rules[10].

Ms. Fischer's second and third paragraphs under her subsection B (at pp. 4-5) skip to the Appellate Division's December 18, 2001 decision. Stating (at p. 4) that it "denied petitioner's motion for recusal, disqualification, and sanctions", Ms. Fischer again omits the very facts *expressly* identified by Petitioner-Appellant's May 1, 2002 motion (at ¶¶5-8, 36-37) as most relevant, *to wit*, that the Appellate Division's denial of her August 17, 2001 motion was "*without* findings, *without* reasons, *without* even identifying that the motion sought disqualification and

[10] As pointed out by Petitioner-Appellant's March 6, 2002 reply affidavit (¶11), Ms. Fischer also omitted these from her August 30, 2001 opposition to the August 17, 2001 motion.

disclosure and, indeed, by *falsifying* its requested relief". Here again, Ms. Fischer's description of the motion omits disclosure.

As for the remainder of Ms. Fischer's second and third paragraphs under her subsection B (at pp.4-5), Ms. Fischer quotes three sentences of the appellate decision – relating to the Commission's "discretion" to dismiss complaints; Petitioner-Appellant's lack of "standing", and the "filing injunction" against Petitioner-Appellant and CJA. No mention is made of Petitioner-Appellant's 19-page analysis of the decision, annexed to her January 17, 2002 reargument motion, demonstrating the fraudulence of these three sentences, as likewise, of the four-sentence balance of the decision.

As for Ms. Fischer's fourth and final paragraph under her subsection B (at p. 5), Ms. Fischer provides no information, *other than dates*, for Petitioner-Appellant's motions in the Appellate Division for reargument and leave to appeal – and for the Appellate Division's denial thereof. This, notwithstanding the significance of these two motions was highlighted by ¶3 of Petitioner-Appellant's May 1, 2002 disqualification/disclosure motion as presenting the "basic facts" of this case, establishing her entitlement to appeal of right, as well as "public importance and decisional conflict – the standard for appeal by leave (22 NYCRR §500.11(d)(l)(v)) ".

Ms. Fischer's "Argument" (at pp. 5-11)

Ms. Fischer's contention (at p. 5) that Petitioner-Appellant's May 1, 2002 motion is "premature" and that the Court should *first* determine its jurisdiction over the appeal is so frivolous that she gives *no* title heading to such contention, which appears in an prefatory section to her two-part "Argument".

Indeed, in scantily putting forth her contention, for which she supplies NO LAW, Ms. Fischer ignores, without comment, the treatise authority presented at the outset of Petitioner-Appellant's Jurisdictional Statement (at fn. 1, pp. 2-3) for the proposition that "The Court's determination of [the] disqualification/disclosure motion is threshold to its determination of Petitioner-Appellant's entitlement to this appeal of right", *to wit*, 48A Corpus Juris Secundum §145:

> "So long as the affidavit [to disqualify] is on file, and the issue of disqualification remains undecided, the judge is without authority to determine the cause or hear any matter affecting substantive rights of the parties",

as well as Judicial Disqualification: Recusal and Disqualification of Judges, Richard E. Flamm [A-232-233]:

> "As a general rule,...once a challenged judge has...been made the target of a timely and sufficient disqualification motion, he immediately loses all jurisdiction in the matter except to grant the motion and in some circumstances to make those orders necessary to effectuate the change."

Inasmuch as the Commission is the state agency that has foremost expertise on matters of judicial disqualification, with access to all caselaw and commentary on the subject, Ms. Fischer's failure to produce ANY legal authority for her

proposition of "prematurity" must be deemed a reflection that such does NOT exist.

Obviously, the practical effect of the inversion suggested by Ms. Fischer would be to permit self-interested and biased judges to deny jurisdiction over the appeal and, having done so, to then deny a legally-sufficient disqualification motion as "moot".

It is in the complete absence of legal authority and legitimate argument that the motion is "premature" that Ms. Fischer moves to the two contentions that will comprise her two-part "Argument". Her first contention is that "it is highly unlikely that the Court will conclude that it does have jurisdiction" because the case "does not directly involve a substantial constitutional issue. CPLR 5601(b)(1)" (at p. 5). This, she combines with her assertion that there is "no basis upon which a motion for leave could be granted (See 22 NYCRR §500.11(d)(1)(v)", purporting that "The dispositive legal issue in this case is identical to the one in Mantell, supra, in which the Court denied leave" (at p. 5). Her second contention is that Petitioner-Appellant has "no right to demand the recusal of the entire court" because her motion is "based on wild speculation that has no basis in reality and is devoid of record support" (at p. 6). Both these contentions are flagrant deceits upon the Court.

Ms. Fischer's Point A:
***"Petitioner's Appeal Does Not Involve A Constitutional Issue"* (at pp. 6-8)**

Ms. Fischer's emphatic title, "Petitioner's Appeal Does Not Involve A Constitutional Issue", is flagrantly deceitful. This is demonstrated by Petitioner-Appellant's Jurisdictional Statement, particularizing (at pp. 5-20) the important constitutional issues involved in the appeal, including by a series of seven "Questions Presented" (at pp. 11-20).

Only once does Ms. Fischer cite the Jurisdictional Statement (at p. 7). This, to acknowledge that Petitioner-Appellant's appeal rests on "alleged deprivation of her 'due process' at the hands of a biased Appellate Division (Juris., pp. 5-6)", but *without* conceding the constitutional issue arising therefrom explicit from the very pages she cites. Those pages quote relevant U.S. Supreme Court caselaw, *Holt v. Virginia*, 381 U.S. 131, 136 (1965),

> "...since 'A fair trial in a fair tribunal is a basic requirement of due process,' *In re Murchison*, 349 U.S. 133, 136, it necessarily follows that motions for change of venue to escape a biased tribunal raise constitutional issues both relevant and essential";

and *Garner v. Louisiana*, 368 U.S. 157, 163 (1961) and *Thompson v. Louisville*, 362 U.S. 199 (1960) that a decision "totally devoid of evidentiary support...[is] unconstitutional under the Due Process Clause" of the United States Constitution.

Ms. Fischer does not deny or dispute that Petitioner-Appellant made an August 17, 2001 disqualification/change of venue motion before the Appellate Division, First Department and that its denial, *without* reasons, *without* findings,

without legal authority, and by *falsifying* the relief sought, is the threshold and decisive issue on the appeal to this Court[11]. Nor does she deny or dispute that the Appellate Division's appealed-from decision – like Justice Wetzel's decision -- is "totally devoid" of both evidentiary and legal support or the substantial constitutional issues arising therefrom, as summarized by Petitioner-Appellant's Jurisdictional Statement. She thus concedes the facts underlying Petitioner-Appellant's appeal of right, taken pursuant to *Valz v. Sheepshead Bay Bungalow Corp.*, 249 N.Y. 122, 131-2 (1928).

As this Court's decision in *Valz* is the sole and explicit basis upon which Petitioner-Appellant has predicated her appeal of right on due process grounds, the ONLY relevant discussion in Ms. Fischer's 2-1/2 page argument is her single paragraph addressed thereto (at p. 7). Ms. Fischer has since replicated this paragraph, virtually *verbatim*, in her May 28, 2002 letter to the Court's Clerk, in response to the Court's *sua sponte* jurisdictional inquiry. Petitioner-Appellant's June 7, 2002 reply thereto, by affidavit in support of her appeal of right, is incorporated by reference in the interest of judicial economy.

As for leave to appeal, 22 NYCRR §500.11(d)(1)(v), quoted by Ms. Fischer (at p. 8), reflects that no constitutional issues are needed. Nonetheless, Ms. Fischer claims that "a motion for leave motion would also be a futile exercise" (at

[11] This was further demonstrated by Petitioner-Appellant's unchallenged reargument analysis, showing that proper adjudication of the August 17, 2001 motion would dispose of every other issue in the lawsuit.

pp. 7-8). According to her, this case does not fall within 22 NYCRR §500.11(d)(1)(v) because it "raises no issue that is... 'of public importance, or [which] involves[s] a conflict with prior decisions of this Court", but

> "involves only the application of an established rule of law (mandamus will not lie to compel performance of a discretionary act) to a particular set of facts. The article 78 petition brought in Mantell, supra, to compel the Commission to conduct a full-fledged investigation of a complaint had previously been dismissed on exactly this legal point, and this Court had denied petitioner's motion for leave to review that decision, Mantell v. New York State Commission on Judicial Conduct, 96 N.Y.2d 706 (2001)" (at p. 8).

Except for the true fact that this Court denied Mr. Mantell's motion for leave to appeal, Ms. Fischer's above-quoted two sentences are also flagrant deceits. Petitioner-Appellant's February 20, 2002 motion in the Appellate Division for leave to appeal demonstrated that this case amply meets the criteria for permission to appeal, set forth in 22 NYCRR §500.11(d)(1)(v). The 15-page moving affidavit particularized "a multitude of issues of 'public importance'", as well as "conflict with a prior decision[] of [this Court]" – and that "dispositive as to both" (¶8) is the Court's decision in *Matter of Nicholson*, 50 NY2d 597 (1980). Tellingly, Ms. Fischer does not address herself to that already-made motion, notwithstanding Petitioner-Appellant's express request that if the Court dismisses her appeal of right, it, *sua sponte*, grant leave to appeal for all the reasons set forth therein[12]. Ms. Fischer has NOT voiced any objection to such *sua sponte* grant,

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[12] *See* Petitioner-Appellant's May 1, 2002 disqualification/disclosure motion, at fn. 2.

which the most cursory examination of that February 20, 2002 motion shows to be compelled by interests of justice and judicial economy.

As to *Mantell*, Ms. Fischer well knows that Justice Lehner's decision [A-299-307] and the Appellate Division, First Department's four-sentence "affirmance" (Exhibit "B-1" to August 17, 2001 motion) are judicial frauds. As the record establishes, she has spent *more than a year* wilfully refusing to address Petitioner-Appellant's 13-page analysis of Justice Lehner's decision [A-321-334] and 1-page analysis of the appellate "affirmance" (Exhibit "R" to August 17, 2001 motion), and the three dispositive "highlights" of Petitioner-Appellant's May 3, 2001 Critique relating thereto.[13] The decisive nature of these "highlights" was emphasized in ALL Petitioner-Appellant's advocacy from her August 17, 2001 Reply Brief (at p. 5) and August 17, 2001 motion[14] to her January 17, 2002 reargument motion[15] and February 20, 2002 motion for leave to appeal[16]. As demonstrated [A-326-329], Justice Lehner's pretense that the Commission has "discretion" in investigating judicial misconduct complaints is constructed from

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[13] The three "highlights" are pages 3-5, 8-11, and 40-47 of the May 3, 2001 Critique -- Exhibit "U" to Petitioner-Appellant's August 17, 2001 motion.

[14] *See* Petitioner-Appellant's August 17, 2001 moving affidavit, ¶89; Petitioner-Appellant's October 15, 2001 reply affidavit: Exhibit "AA", pp. 10-12.

[15] *See* Petitioner-Appellant's January 17, 2002 moving affidavit, ¶¶9-14; Petitioner-Appellant's February 20, 2002 reply affidavit, ¶¶4, 6, 13.

[16] *See* Petitioner-Appellant's February 20, 2002 moving affidavit, pp. 7-8; Petitioner-Appellant's March 6, 2002 reply affidavit, ¶¶9-10.

his concealment of the fact that "a different 'governing law' applies to complaints received from outside sources (Judiciary Law §44.1, imposing upon the Commission a mandatory duty) and complaints initiated by the Commission (Judiciary Law §44.2, imparting the Commission with discretion) – a difference recognized by this Court's *Nicholson* decision.

Secondly, Mr. Mantell did not seek to compel the Commission to conduct a "full-fledged" investigation. There are NO levels of investigation. The pretense that there are, which Ms. Fischer deceitfully implants to the *Mantell* case, is a hoax born of Justice Cahn's decision in *Doris L. Sassower v. Commission* [A-189-194]. Here, too, Ms. Fischer spent *over a year* wilfully refusing to address Petitioner-Appellant's 3-page analysis of Justice Cahn's decision [A-52-54] and the first two "highlights" of her May 3, 2001 Critique relating thereto (pp. 3-5, 5-8), whose decisive significance Petitioner-Appellant repeated over and over again. [*See* footnotes 14-16, *supra*].

Finally, as to the Court's denial of Mr. Mantell's motion for leave to appeal, suffice to say that the limited and ineffective nature of his presentation to the Court on that motion reflects the reason Petitioner-Appellant moved for intervention and other relief in his appeal before the Appellate Division, First Department[17] – a motion the Attorney General had opposed[18]. Indeed, Mr.

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[17] The details of Petitioner-Appellant's September 21, 2000 motion in the *Mantell* appeal are recited at ¶¶49-67 of Petitioner-Appellant's August 17, 2001 motion.

Mantell's exposition failed to even identify Petitioner-Appellant's intervention motion, or to in any way incorporate the 13-page analysis [A-321-334] it had provided, establishing, *without dispute*, the fraudulence of Justice Lehner's decision [A-299-307]. Moreover, as Petitioner-Appellant's February 20, 2002 motion for leave to appeal makes perfectly clear, the multitude of issues of transcending "public importance" go way beyond what Ms. Fischer here purports as "exactly [the] legal point" involved in *Mantell*.

Ms. Fischer's Point B:
***"Petitioner Has Failed To Identify Any Basis Which Would Justify Her Demand For The Recusal Of This Court"* (pp. 8-11)**

Ms. Fischer's emphatic claim, "Petitioner has failed to identify any basis which would justify her demand for the recusal of this court", is also a flagrant deceit. It is based on her concealing the explicit, all-encompassing ground set forth by Petitioner-Appellant's motion as warranting the disqualification for interest of six of the Court's seven judges, and ALL the particularized facts presented in substantiation, including ALL cited documentary proof. This enables Ms. Fischer to falsely characterize (at pp. 9-10) the motion as resting on "baseless speculation", "grossly speculative assumptions", "remarkably speculative leaps", with "no basis in the factual record" – and, therefore, "requir[ing] little comment".

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[18] As pointed out by the third "highlight" of Petitioner-Appellant's May 3, 2001 Critique (at p. 40, fn. 27) – Exhibit "U" to her August 17, 2001 motion -- the Attorney General's opposition, notwithstanding his concession that the appellate decision therein "may impact the arguments presented in and the outcome of Sassower's appeal", should both ashame and estop Ms. Fischer in using the *Mantell* appellate decision against her.

As a consequence, Petitioner-Appellant's actual factual allegations as to the Court's mandatory disqualification for interest, particularized by the motion, are ALL undenied and undisputed by Ms. Fischer. Indeed, Ms. Fischer further conceals them by continually using the term "recusal" – including in her Point B title. As Ms. Fischer, representing the state agency with unparalleled expertise on the subject, is presumed to know – and as is reflected by her two-sentence discussion in her first paragraph containing her only caselaw citation, *People v. Moreno*, 70 N.Y.2d 403, 405 (1987) -- "disqualification" under Judiciary Law §14 is "mandatory", whereas "recusal" for "alleged bias and prejudice" is "a matter of the court's conscience."[19]

The explicit, all-encompassing ground warranting mandatory disqualification of the Court's judges for interest was set forth at ¶10 of Petitioner-Appellant's motion, in italics, as 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*"

Ms. Fischer, citing this same ¶10, transmogrifies it to:

> "disciplinary and criminal liability based on their actions in other cases, chiefly those which concerned Doris Sassower" (at p. 9).

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[19] "Whereas 'recusal' has traditionally been used to refer to a judge's decision to stand down voluntarily, the term 'disqualification' – in its strictest sense – has typically been reserved for situations involving the statutorily or constitutionally mandated removal of a judge upon the request of a moving party", Judicial Disqualification: Recusal and Disqualification of Judges, Flamm, Richard E., p. 4 (1996), *See also*, *New York State Association of Criminal Defense Lawyers, et al. v. Judith S. Kaye, et al.*, 95 N.Y.2d 556, 558 fn. 2 (2000)].

Most materially concealed by this re-write is the connection between the disciplinary and criminal liability of the various judges and "the events giving rise to this lawsuit or...the systemic governmental corruption it exposes". That this is purposeful is evidenced by Ms. Fischer's "illustrative" assortment of what she purports to be Petitioner-Appellant's contentions – *all* stripped of the context in which the motion presented them, *to wit*, connected to "the events giving rise to this lawsuit...or the systemic governmental corruption it exposes." This includes her passing reference, at the outset, to "past complaints against members of the Court"[20] – as to which she excises the pertinent details and documentary proof specified by the motion (¶¶16-25-- as to Judge Rosenblatt; ¶¶68-84 – as to Chief Judge Kaye; ¶¶113-115 as to Judge Levine).

Ms. Fischer begins her "illustrative" assortment by referring (at p. 9) to Petitioner-Appellant's claim that Chief Judge Kaye and Judge Smith "must recuse themselves":

> "due to their participation in this Court's refusal to grant Doris Sassower leave to appeal in Doris L. Sassower v. Hon. Guy Mangano, et al.," (at p. 9),

Omitted is how *Doris L. Sassower v. Mangano* connects to this lawsuit, although particularized by Petitioner-Appellant's ¶27 to which Ms. Fischer cites, as well as

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[20] As to these complaints, Ms. Fischer pretends that among Petitioner-Appellant's "grossly speculative assumptions" are that they were "rejected by the Commission without any inquiry" (at p. 9). She provides NO affidavit from her client denying or disputing that "grossly speculative assumption". The uncontroverted record is that such past complaints – *facially-meritorious* each and every one -- were dismissed, *without investigation and without reasons* – in violation of Judiciary Law §44.1 and notwithstanding substantiating documentary proof.

ALL detail as to what that case was about so as to render comprehensible the nature of the misconduct of Chief Judge Kaye and Judge Smith, set forth in that and subsequent paragraphs of the motion (¶¶27-31). This would have shown that their "complicity" in "flagrant criminal conduct" is not, as Ms. Fischer purports "in petitioner's mind", but, as demonstrated by the motion, real and substantial.

"In a similar vein" is Ms. Fischer's skeletal presentation of "Petitioner's other assertions concerning Chief Judge" and her "broad pattern of concealing corruption" (at p. 10):

> "refusing to sanction the Attorney General for his 'litigation misconduct' in defending lawsuits brought by Doris Sassower (Sassower Aff. ¶¶32-34), refusing to heed petitioner's complaints regarding judicial appointments (Sassower Aff. ¶¶65-98), and sanctioning a document retention program under which the Court retains jurisdictional statements for two years, and motions for leave to appeal for five years (Sassower Aff. ¶¶56-59)[21]." (at p. 10)

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[21] Ms. Fischer's footnote to this last example is materially false in implying that Doris Sassower, suspended *without* a hearing, has since had a hearing – which she has NOT – and in further implying that Petitioner-Appellant is unaware that the Court granted leave and rendered decisions in *Matter of Russakoff*, 72 N.Y.2d 520 (1992); *Matter of Padilla (and Gray)*, 67 N.Y.2d 440 (1986); and *Matter of Nuey*, 61 N.Y.2d 513 (1984) and that relevant information is available from the decisions and the parties' briefs.

Perfectly evident from ¶¶42-56 of Petitioner-Appellant's motion is her full awareness of the Court's decisions relating to attorneys Russakoff Padilla, Gray, and Nuey—and that at issue is the Court's disparate treatment of Doris Sassower, who, unlike these attorneys to whom the Court promptly granted review of their "interim" suspensions, was turned away six times in her attempts to obtain review of the exponentially more violative "interim" suspension of her law license. As particularized, the ONLY explanation for the Court's disparate treatment of Doris Sassower – as to which Ms. Fischer has obliterated ALL details – is that it is willling to "accept[] for review those appeals where less egregious constitutional violations can be brushed aside as if judicial 'error' – as, for instance, in *Nuey* and *Russakoff* – but of denying review where constitutional violations are, as presented by Doris Sassower, of such nature, magnitude, and duration that they cannot be disguised as anything but corrupt and retaliatory conduct by lower court judges." The applications for appeal of right and leave – destroyed by the Court – are "evidence establishing its pattern and practice of protectionism" (¶56).

Here, too, Ms. Fischer's not only obliterates the connection between her cited examples and this lawsuit – but does so notwithstanding her very cited paragraphs specify that connection. Further, her shorthand characterizations of what these paragraphs are about are distorted to the point of falsehood. This is particularly so as to ¶¶65-98, whose paragraphs provide the most direct and powerful basis for Chief Judge Kaye's disqualification for interest relating, *inter alia*, to my *facially-meritorious* August 3, 2000 judicial misconduct against her, based on the file evidence *from this lawsuit.*

It is only by shearing away ALL context and detail from Petitioner-Appellant's motion that Ms. Fischer is able to falsely proclaim "the sole basis of all these allegations is petitioner's conviction that opposition to her or her mother is proof of corruption" – a variation of "[it being] in petitioner's mind".

Ms. Fischer similarly disposes of Petitioner-Appellant's allegations as to Judges Graffeo, Ciparick, and Levine. She asserts that Petitioner-Appellant "believes" they "should recuse themselves"

> "because petitioner opposed their confirmations, and apparently filed complaints with the Commission concerning Levine and Ciparick (Sassower Aff. ¶¶101, 107-115)".

The particularity of Petitioner-Appellant's ¶¶42-64 exposes the deceit in Ms. Fischer claim that "it is difficult to imagine what specific information petitioner believes has been 'covered-up'". Nothing needs to be imagined. It is stated.

Obliterated are ALL details about the basis for Petitioner-Appellant's opposition to their confirmations and its connection to this lawsuit, although specified as to Judges Ciparick and Levine by the paragraphs of Petitioner-Appellant's motion to which Ms. Fischer cites (¶¶107-115) and specified as to Judge Graffeo by the contextual paragraphs surrounding ¶101, not cited by Ms. Fischer. Moreover, no complaint as to Judge Ciparick is identified as to these paragraphs – with ¶118 making this further obvious.

Having totally expunged ALL material facts, Ms. Fischer then dismisses Petitioner-Appellant's presentation as being

> "a particularly inadequate justification in this case, since petitioner has liberally and publicly attacked the integrity of virtually every judge and attorney who has crossed her path. Petitioner's own reckless behavior should not be used to justify the recusal of any judge of this Court." (emphasis in Ms. Fischer's original).

This is a completely unjustified besmirchment. The record shows nothing "reckless" in Petitioner-Appellant's "own" behavior. ALL her advocacy is as fact-specific and document-supported as her instant disqualification/disclosure motion. This includes her advocacy to expose "longstanding and ongoing systemic corruption by judges and lawyers on the public payroll" – falsely portrayed by Ms. Fischer's "Preliminary Statement" (at p. 1) as "conclusory and unsupported". One need look no further than CJA's $3,000 public interest ad, "*Restraining 'Liars in the Courtroom' and on the Public Payroll*" – which, in addition to being Exhibit "C-1" to the motion, is part of Petitioner-Appellant's *facially-meritorious* October

6, 1998 complaint against Judge Rosenblatt, underlying this lawsuit [A-57, 79-80], to see the precise and relevant facts and file proof, which are her trademark.

The fact that as to Judge Rosenblatt, Ms. Fischer states (at pp. 8-9) it "would appear" that he has "an interest in this appeal" – without straightforwardly acknowledging his obvious disqualification, detailed at ¶¶16-25, combined with her omission of ALL details as to the single complaint to which she refers as "giving rise to this proceeding", further exemplifies the dishonesty of her presentation, including as to the "appearance" that his brethren on this Court could not be fair and impartial (¶26) – which Ms. Fischer never mentions.

The consequence of Ms. Fischer's concealment of the actual factual allegations of Petitioner-Appellant's motion relating to the Court's disqualification for interest is that not only are they undenied and undisputed, but likewise Petitioner-Appellant's factual allegations based thereon as to the appearance that the Court could not be fair and impartial (*inter alia*, ¶¶26, 88, 98). Indeed, although Ms. Fischer's Point B identifies (at p. 8) Judiciary Law §14 relating to disqualification for "interest", she never identifies, let alone quotes from, the rule provision pertaining to bias, §100.3E of the Chief Administrator's Rules Governing Judicial Conduct:

> "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..."

Nor does Ms. Fischer cite a single one of the Commission's own interpretive decisions pertaining thereto or any of the interpretive decisions of this Court,

arising out of the Commission's disciplinary prosecutions for violation of such critical rule provision. Illustrative of these, *Matter of Murphy*, 82 N.Y.2d 491, 495 (1993), where the Court said.

> "...Judges should strive to avoid even the appearance of partiality, and the 'better practice' would be to err on the side of recusal in close cases (*see*, *Corradino v. Corradino*, 48 N.Y.2d 894..."

As the most cursory examination of Petitioner-Appellant's motion makes evident, this is NOT a "close" case for recusal. It is a "clear" case.

Ms. Fischer's "CONCLUSION" (at p. 12)

Ms. Fischer's one-sentence "Conclusion" that "[f]or all the reasons stated above" the Court should deny Petitioner-Appellant's motion to disqualify its judges is a deceit "[f]or all the reasons stated above".