To be argued by:
GEORGE SASSOWER
TIME: 30 minutes

Supreme Court of the State of New York
Appellate Division—Second Department

DORIS L. SASSOWER and CAREY A. SASSOWER,
Plaintiffs-Respondents,

-against-

ERNEST L. SIGNORELLI,
Defendant-Appellant,

JOHN P. FINNERTY, WARDEN REGULA, ANTHONY MASTROIANNI, and THE NEW YORK LAW JOURNAL PUBLISHING COMPANY,
Defendants.

BRIEF FOR PLAINTIFFS-RESPONDENTS

DORIS L. SASSOWER
Attorney for Plaintiffs-Respondents
283 Soundview Avenue
White Plains, N.Y. 10606
(914) 681-0770

GEORGE SASSOWER
On the Brief

Dick Bailey Printers, 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

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BRIEF OF PLAINTIFFS-RESPONDENTS

PRELIMINARY STATEMENT

1. Appellant's meritless cross-motion was merely a ploy to delay compliance with plaintiffs' demands for pre-trial disclosure. This equally meritless appeal is nothing less than a continuation of such ploy, which by now, is obvious and transparent.

Thus, when plaintiffs' contended that their motion for summary judgment on liability for compensatory damages did not operate as a stay, under the raison d'etre of CPLR 3214[b], since punitive damages were also being sought, appellant cross-moved for summary judgment based entirely on some exhibits

which merely revealed that appellant was a Surrogate and that plaintiff-attorney ("DLS") was substituted before the acts complained of in the complaint.

2. Furthermore, since appellant had previously recused himself, a submission on his behalf which showed little, if anything, more than appellant's judicial position, is absurd, if not ludicrous.

QUESTIONS PRESENTED

Specifically excluded, but nevertheless raised and preserved, is the question whether this Court has jurisdiction in the legal, including constitutional, sense, because of, inter alia, the transactional involvement of some of its members in the events.

At bar, plaintiffs' contend this Court cannot made any determination that it has jurisdiction.

1. Should appellant's, omnibus and unconverted CPLR 3211(a) cross-motion, have been granted more than three (3) years after his attorney had interposed an answer to plaintiffs' complaint?

Sub silentio, Special Term held in the negative.

2. Should appellant's "First Affirmative Defense" [failure to state a cause of action] and "Fourth Affirmative Defense" [improper venue] been stricken?

Special Term held in the affirmative.

3. Should appellant's cross-motion for summary judgment have been summarily rejected where appellant made no attempt to comply with CPLR 3212(b) in its statutory or constitutional sense?

Special Term did not answer the question directly.

4. Is appellant estopped from cross-moving for summary relief when there was then, and is now, a number of outstanding notices and orders (some in default) for pre-trial disclosure, relevant, if not decisive, to the merits of appellant's cross-motion?

Special Term did not specifically answer the question.

5. Should this Court take judicial notice of judicial events subsequent to the Order appealed from, for the purpose of affirming such Order?

This question was not before Special Term.

6. Should appellant's cross-motion for summary judgment been granted when neither appellant nor anyone else submitted an affidavit or other evidence revealing lack of merit to plaintiffs' claims or merit to appellant's claim of absolute privilege (immunity)?

Special Term did not specifically answer the question.

7. Should appellant's cross-motion for summary judgment have been granted based upon judicial absolute privilege (federal and state), when the acts complained of:

(1) occurred after appellant had recused himself;

(2) occurred after the plaintiff, Doris L. Sassower, Esq. (hereinafter referred to as "DLS") had been substituted as the attorney of record and plaintiff, Carey A. Sassower (hereinafter referred to as "CAS") was never the subject of appellant's jurisdiction;

(3) were non-judicial in nature;

(4) were manifestly outside appellant's jurisdiction;

(5) were with actual knowledge that appellant had no jurisdiction;

(6) were intentionally overpublicized with the intent to defame and injure;

(7) did not decide any legal or factual issue nor did appellant intend to decide any legal or factual issue; and

(8) in other respects were not privileged or immune?

Special Term denied, appellant's cross-motion for summary judgment, holding that:

> "factual issues exist not susceptible of determination on the papers submitted" (A13).

STATEMENT

A. The Proceedings:

1. Plaintiffs' moved to separately strike each of appellant's affirmative defenses and for summary judgment on the issue of liability for compensatory damages against appellant and the other defendants (A39-A41).

Only *after* plaintiffs requested pre-trial disclosure, did appellant cross-moved for summary judgment based on the doctrine of judicial absolute privilege (A404-405).

2a. Outstanding at the time of appellant's cross-motion, was plaintiffs' (1) unresponded to Notice to Admit (A386-A399) and (2) an uncomplied with Notice of Discovery and Inspection, factually related to the legal question of judicial absolute privilege (A400-A403).

b. Also outstanding and unanswered at the time, were (3) Interrogatories by George Sassower, Esq. (hereinafter referred to as "GS") against other defendants related to appellant and his claim of judicial absolute privilege.

c. Presently, the (4) defendants, John P. Finnerty, Warden Regula, and Anthony Mastroianni, with whom appellant acted jointly and in concert with, are in default for their failure to timely respond to the Notice to Admit (A386-A399).

d. Additionally, in the action by "GS" (5) the Suffolk County officialdom have failed to respond to his Interrogatories dated July 30, 1982 [which this Court has transferred to the Appellate Division, Fourth Department]. The (6) defendants Anthony Mastroianni and John P. Finnerty have wilfully and deliberately defaulted in submitting to an examination before trial pursuant to Court Order in Supreme Court, New York County (Index No. 5774-1983), the venue wherein "GS's" action has been transferred.

In short, every attempt is being made by appellant and the defendants to preserve their "code of silence" (Bonsignore v. City of New York (683 F.2d 635, 637 [2d Cir.]), to the extent that even valid court orders are being deliberately disobeyed.

e. Significantly, to the extent that this "iron curtain" has been breached, resulting in probative testimony, it clearly reveals unprivileged conduct by the appellant.

* * *

On Thursday, June 23, 1977, "GS" had been released pursuant to a Writ of Habeas Corpus returnable in Supreme Court, Suffolk County on Monday, June 27, 1977 (A171-A173).

Consequently, no judicial proceeding was taking place in Suffolk County, particularly Surrogate's Court, on Friday, June 24, 1977.

It is now defintely established that it was on this particular Friday -- when no judicial proceedings were taking place in Suffolk County or any place else -- that appellant gave a private interview, solicited by him or those acting with him to Art Penny of the New York News.

Clearly then, such statement, which appeared in The News the following Monday (when the Writ of Habeas Corpus was returnable), was made "out-of-court [office]", as alleged in "GS's" complaint (Harris v. Harvey, 605 F2d 330, 336 [7th Cir.]).

This private interview was preceded by three or four telephone calls to Penny to:

> "get over here [Surrogate's Court] ... we have a great story for you, with an indication that there was $90,000 never accounted for" [SM40, SM50-51],

is certainly an "affirmative, non-judicial act", as this court's newly established doctrine, requires to be alleged as part of the complaint, as a basis of liability.

On April 8, 1983, Art Penny, the reporter (stringer) for the Daily News testified at a Court ordered examination before trial (on notice to all attorneys), that:

> " ' [I know Judge Signorelli] eighteen, twenty years' (SM46), 'I knew him [Signorelli] as Assistant District Attorney' (SM47), 'I knew him [Signorelli] when he was a County Judge. I watched him in court, I covered his court' (SM48). 'I know Vincent G. Berger, Esq. [Signorelli's campaign manager

and attorney for Public Administrator Mastroianni, a Signorelli appointee] for fifteen years ... [we are] on freindly terms' (SM95). [I know] Anthony Mastroianni ... [for] ten, twelve, fifteen years' (SM100], '[on a] first name basis' (SM101). '[I was] certainly on on a friendly basis [with Mervin Woodward, Chief Clerk of Surrogate's Court] ... we were good friends for many years' (SM106).

'[My] office [is] in the Court Building ... Suffolk County paid for the phones. It was a courtesy ... the phone bill used to be picked up by the County [of Suffolk]' (SM17-18), '[I got the story] from somebody [I] knew ... I had three or four calls on this story, I think some of the people had given me leads before ... made to my office ... [to] the press room in the Criminal Courts Building ... my best estimate is I got the calls the Friday [June 24], probably in the morning' (SM37-SM38], 'I believe several of the calls came from friends that I had dealt with before. I think one of the calls came from a complete stranger who I never met before' (SM39), '[the messages were] get over here to the Surrogate's Court, we have a great story for you (SM40), 'they said we got a good one [story] for you ... we have got a good story for you" (SM50) 'I undoubtedly [went to Surrogate's Court], very obvious [I] spoke to certain people' (SM41), 'I remember two of [the people who I got calls from - whose identities he refused to disclose]' (SM42), 'I believe I met ... the people that made the calls to [me] at Surrogate's Court" (SM42), 'I don't think I was in the courtroom at all ... I might have been in chambers ... or outer office' (SM43), 'I don't remember ... who was present when Judge Signorelli gave that explanation ['The Judge explained that he allowed [Geo.] Sassower to purge himself of the contempt charges by giving Mastroianni a complete accounting of the estate'] ... I think it was an indication that $90,000 was never accounted for' (SM51), 'it should have been he would allow or is allowing Sassower to purge himself of the contempt charges by giving Mastroianni a complete accounting of the estate' (SM54), [my understanding was "GS"] was held in contempt of court because [he] failed to give a complete accounting as directed by [Signorelli]' (SM57), 'I don't believe ... [I

got] any photostatic copies of any of the documents from Surrogate's Court or any other court before [I] wrote the story' (SM-31).

'I was the author of that story [Exhibit "1" to "GS's" complaint]' (SM-13), 'I doubt very much that it [the published story] was changed' (SM-15), 'I may have called them [the News] on a Friday [June 24, 1977]'.

'In my own mind I am sure I did [speak to Judge Signorelli about this case after [publication on Monday, June 27, 1977]' (SM104), 'during the following two months after publication ... no one ... advise[d] [me] that there were errors in [the] published article' "(SM-27).

Thus, it clearly appears that appellant had committed a number of "affirmative, non-judicial acts" in this matter, the unwarranted assumption from the "GS" complaint by this Court in "GS" v. Signorelli (A.D.2d , N.Y.S.2d , [2d Dept.-7/25/83]), to the contrary, notwithstanding.

* * *

The point is that prior to full disclosure, particularly when appellant has failed to submit any affidavit in this matter, his cross-motion for summary judgment, should be summarily denied, as premature.

3. Appellant did not verify his answer (A38). Appellant did not submit any affidavit in opposition to plaintiffs' motion. Nor did appellant submit any affidavit in support of his cross-motion for summary judgment.

Appellant's cross-motion was supported _only_ by an affidavit of the Chief Clerk of Surrogate's Court, Suffolk County which merely certified that seventeen [out of the many] documents were true copies on file in that (appellant's) Court (A406-A407).

None of these documents are of any significant aid in support of appellant's position, nor does appellant's attorney claim otherwise.

The only relevant documents submitted on behalf of appellant were a (1) "Consent to Change Attorney" executed by "DLS", dated October 20, 1976, as outgoing attorney (A451); (2) a covering letter by "DLS", dated April 21, 1977, to the appellant's Court and the other interested parties, for such "Change of Attorney" (A449); and (3) the acceptance, on May 12, 1977, by appellant's Court of said "Change of Attorney" for filing (A407). All these dates are _prior to_ the acts complained of against appellant.

4. Plaintiffs have abandoned their appeal from the instant order _only_ because the evidence in support of their motion to strike the other affirmative defenses and for summary judgment has become substantially enriched since its making.

B. _Background:_

The relevant facts preceding the causes of action set forth in the complaint, are as follows (A496-A498):

1. On February 3, 1978, there was pending in the United States District Court for the Eastern District of New York, "GS's" motion, brought on by Order to Show Cause, requesting that appellant be restrained:

> "from harassing ["GS"] and those with whom he has business, professional and social engagements." [A496]

In order to induce the United States District Court not to issue interim relief on the aforesaid motion by "GS", appellant authorized his attorney [an Assistant Attorney General] to represent to the Federal Court that the proceedings involving "GS" had been completed (except for possible contempt proceedings against him). [A496]

Based upon such authorized representation by appellant's attorney, "GS" did not, then and there, press the Federal Court for any interim relief pending the adjourned date of such motion. Nor did the Federal Court, based upon such representation by appellant's attorney, consider interim relief. [A497]

On February 8, 1978, the same Federal Court issued another Order to Show Cause wherein "GS" requested an Order:

> "requesting [appellant] from hearing or adjudicating any matter wherein ["GS"] is a party or an attorney."[A497]

At that time, and for a period of at least eight (8) months prior thereto, plaintiff, "DLS", was neither a party nor an attorney with respect to any matter pending in appellant's court [A97].

On February 24, 1978, the day appellant vented his judicial spleen and issued his complaints against "GS" and "DLS" (hereinafter referred to as the "sua sponte diatribe" or "diatribe"), there was not pending before appellant or his court any matter concerning plaintiff, "DLS", or anyone else, including "GS", except a motion by the Public Administrator to held "GS" in criminal contempt. Thus, this "diatribe", sent directly, at appellant's direction, to the colleague of appellant, assigned to try "GS", non-jury, was, ipso fact, a contempt, privately actionable (Taylor v. Kavanagh, 640 F.2d 450, 453 [2d Cir.]; Martin v. Merola, 532 F.2d 191, 195-198 [2d Cir.]: People v. Marino, 87 Misc.2d 427, 435, 383 N.Y.S.2d 147, 153 [Sup. Monroe]; Canons of Judicial Ethics §3[6]).

C. The Complaint:

Plaintiffs' causes of action, federal and non-federal, allege that appellant was acting in concert with the other defendants (Green v. Davis, 182 N.Y. 499, 506; Herman v. Wesgate, A.D.2d , 464 N.Y.S.2d 315, 316 [4th Dept.]).

The alleged concerted actions, clearly confirmed by the events, even before pre-trial disclosure, are non-judicial, rendering appellant liable therefore (Beard v. Udall, 648 F.2d 1264, 1270 [9th Cir.]; Rankin v. Howard, 633 F.2d 844, 847-848 [9th Cir.], cert den 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326).

The plaintiffs, by summarization of their causes of action herein, do not intend thereby to limit the liberal interpretation due them. Obviously, where facts are exclusively within the control of appellant and his sycophants, and were and are subject to their unilateral changes and destruction to meet the situation, tactical pleading suggests that needless disclosure not be prematurely made.

This Court must surely recognize that if "GS" had asserted in his complaint, appellant's affirmative acts, regarding the "out-of-court" Penny private press conference, it would have openly invited only a change of his testimony!

Similarly, to impose upon plaintiffs the burden, prior to pre-trial disclosure, to set forth appellant's non-judicial acts, is to invite a change of the evidence within his control.

First Cause: On June 10, 1978, the unjustified refusal to permit plaintiffs to visit their incarcerated husband/father (A16-A17).

Second Cause: On June 10, 1978, the unjustified refusal to permit plaintiff, "DLS" permission to consult with her incarcerated client (A17-A18).

Third Cause: On June 10, 1978, the incommunicado incarceration of plaintiffs, denying them access to telephone, food, and bathroom facilities, resulting from the service of a Writ of Habeas Corpus on defendants mandating the immediate release of "GS" on his own recognizance (A18-A19).

Fourth Cause: Harassment of plaintiff, "DLS" after withdrawal and compliance with CPLR §321(b), in retaliation for the activities of her husband, "GS", for the ulterior purpose of compelling him to desist from exercise of his legal and legitimate rights (A19-A22).

"DLS's" Fifth and Sixth Causes of Action is factually related to her Fourth Cause of Action, whose allegations are incorporated therein [A22, ¶23], and the acts alleged were intended by appellant "to control and influence" the conduct of "GS" and cause him to "relent and submit in silence to the [appellant's] improper" actions [A21, ¶¶20, 21].

In fact, a portion of the allegations against appellant, in "DLS's" Fourth Cause of Action, includes the assertion that he made "spurious complaints against her" [A22, ¶22].

Significantly, even as to these first four causes of action, neither appellant, nor anyone else having testimonial knowledge, denied plaintiffs' allegations in any respect.

The mere commission of these extremely egregious and unusual acts by lower eschelon employees reveal, ipso facto, the existence of a powerful official, e.g., appellant, requesting same.

Fifth Cause: On March 3, 1978, in blatant violation of Judiciary Law §90(10), appellant "caused to be published in the New York Law Journal", his professional complaints against "DLS", as part of his "sua sponte diatribe" (A22-A24).

Such "diatribe" concluded with the statement that it was being:

> "forwarded ... to the Presiding Justice of the Appellate Division, Second Judicial Department, for such disciplinary action as he may deem appropriate". (emphasis supplied)

The relevant portion of Judiciary Law §90[10] is alleged in Paragraph 28 of plaintiffs' complaint (A23). Nowhere does any provision provide that the Presiding Justice of the Appellate Division is the depository for professional complaints against attorneys or that "he" (the Presiding Justice) may impose any disciplinary action.

Such misdirection, even when unintentional and commonly accepted practice, ipso facto, nullifies any claim of absolute privilege was the holding in Lincoln v. Daniels (1 Q.B. 237, 3 All E.R. 740 [1961]).

It was the "diatribe", as received by the Presiding Justice, along with a copy of His Honor's personal and gracious "letter of thanks" to the appellant, as received by the Grievance Committee, which became the royal charter and mandate, to pursue, persecute, and destroy. It was now the extensively published complaint from a powerful Surrogate, vouchsafed by the high priest at the citadel, published in the New York Law Journal which caused extensive damage to "DLS".

Paragraph 29 of plaintiffs' complaint alleges:

> "On information and belief, the defendants, NEW YORK LAW JOURNAL PUBLISHING COMPANY and ERNEST L. SIGNORELLI, were specifically aware of the aforesaid provision [Judiciary Law §90(10)] of the law". (A23)

Appellant's answer reads:

> "Admits the allegations in paragraph '29' of the complaint, except denies 'specific' awareness as alleged ..." (A34)

The letter of Irving N. Selkin, Esq., Chief Clerk of the Appellate Division, Second Judicial Department states:

> " ... please be advised that this Court is without power to determine what the Law Journal prints or does not print." (A523)

Significantly, years later, "DLS" was resoundingly acquitted, by an unpublished Order of the Appellate Division on all charges lodged against her, with "leave to apply for sanctions" against her prosecutors.

Thus, the thrust of this cause of action is not the spurious disciplinary complaint, but the "out-of-jurisdiction" disclosure, against a non-participant.

The inverted posture of this Court in "GS" v. Signorelli (supra), is that the spurious disciplinary complaint may be made public with impunity, while the vindicating material, if not the vindication itself, is secret!

Contrary to the assertion by this Court in "GS" v. Signorelli" (supra), appellant was not "called [upon] to rule", nor did appellant rule on anything, certainly not anything regarding "DLS". In fact, the public issuance of this "diatribe", addressed and specifically sent to the jurist intended to try "GS", was an patent attempt to influence a pending criminal proceedings, which it obviously did, an unquestioned contempt, independently giving rise to a private cause of action for damages (supra).

Sixth Cause: Defamation, by reason of the publication and overpublication of said "diatribe", by its mass direct mailing and intended inclusion in the March 3, 1978 issue in the New York Law Journal (A24-A27).

Decisively distinguishable from "GS" v. Signorelli (supra), is that ""DLS", unlike "GS", is a third party, without any right to appeal and public vindication.

D. Appellant's Answer:

1. For appellant it is -- absolute privilege or nothing!

Appellant makes no plea or claim of qualified privilege, truth, justification, good faith, or any other privilege or mitigating circumstances (A29-A37, A50).

Appellant's charted course in this and other respects (as well as the applicable law) is very similar to Lincoln v. Daniels (supra).

Appellant has the prerogative of waiving even an absolute privilege (Memory Gardens v. D'Amico, 91 A.D.2d 1160, 1160-1161, 458 N.Y.S.2d 958, 960 [3d Dept.]; Boyd v. Carroll (624 F.2d 730, 732-733 [5th Cir.]).

2. Appellant's answer, verified by his attorney, reads, as a (Second) affirmative defense, as follows:

> "The claims set forth in the complaint are barred by the doctrine of judicial immunity". (A36)

Thus, in the event this Court should search the pleadings, consideration should be given to plaintiffs' motion to strike such defense on the ground that:

> "Signorelli has the burden of showing 'his entitlement' to immunity (Harlow v. Fitzgerald [infra]; Dennis v. Sparks [infra]), by giving 'notice' and setting forth the 'material elements' of such defense, labels do not suffice (CPLR §3013; Jerry v. Borden [infra)]. Obviously, Ernest L. Signorelli, cannot comply." (A50)

3. This entire gratuitous "sua sponte diatribe", which decided nothing nor was it intended to decide anything, was a malicious fake, from beginning to end, not only against "DLS", but also as against her likewise vindicated husband, "GS" (A104-A105).

Appellant's own sworn testimony in October of 1981 reveals that this published "diatribe" was a carefully contrive conglomerate of fabricated and misleading statements. Not one of the more than thirty disparaging remarks contained therein -- not one -- could be called truthful (A104-A105).

4a. Appellant affirmatively alleges that he recused himself on February 24, 1978 (A35), which is more than three months before the conduct complained about in the first three causes of action.

b. Appellant's admitted date of recusal (A35) was about one week before publication of his "sua sponte diatribe", which is the basis of the last two causes of action. It was akin to a defamation by a Last Will and Testament (Brown v. Mack, 185 Misc. Rep. 368, 56 N.Y.S.2d 910 [Sup. Kings]).

In short, on the face of the complaint, five (5) of the six (6) causes of action, there was a manifest lack of subject matter and personal jurisdiction by appellant -- and appellant knew it, because, inter alia, the events occurred after his recusal.

5a. Appellant himself affirmatively alleges that "DLS" withdrew from the estate matter on May 12, 1977 (A35), which was about thirteen months before the conduct complained about in the first three causes of action.

b. Appellant himself affirmatively alleges that "DLS's" withdrawal (A35) was before the conduct complained about in the fourth cause of action.

c. Appellant himself affirmatively alleges that "DLS's" withdrawal (A35) is about ten months <u>before</u> the publication of the "diatribe" in the last two causes of action.

In fact, the "diatribe" itself describes "DLS" as the "former" attorney.

In short, all the conduct complained about was at a time when appellant plainly lacked personal jurisdiction over "DLS" -- and <u>he knew it!</u>.

6a. At the time of the issuance of this maliciously <u>overpublished</u> "<u>sua sponte</u> diatribe" by "Columnist" Ernest L. Signorelli (appellant), and transmitted to persons having no jurisdiction over same at the time, including Presiding Justice Milton Mollen, in a non-judicial capacity, there was no motion or any other proceeding pending before appellant or his Court, except a criminal contempt proceeding involving "GS" (A200-A201), which mandated non-prejudicial conduct by appellant.

b. There was nothing before appellant or his court to decide when he published his "diatribe". Nor did the "diatribe" pretend to decide anything (<u>Matter of Haas</u>, 33 A.D.2d 1, 304 N.Y.S.2d 930 [4th Dept.], app. dis. 26 N.Y.2d 646. 307 N.Y.S.2d 671).

c. The case at bar is more egregious than Haas, where a Writ of Prohibition was issued by the Appellate Division, where the Surrogate involved therein decided something.

At bar, appellant by his "diatribe" decided nothing!

d. The case at bar is more compelling than Haas, where the Surrogate involved did not recuse himself, and had jurisdiction before and after the issuance of his diatribe.

At bar, appellant recused himself, or more realistically was compelled to recuse himself by a federal judge. Appellant, as part of his "last hurrah", recused himself and simultaneously claims judicial immunity for his unwarranted ad hominem attack at "DLS".

e. The statement of this Court in "GS" v. Signorelli (supra) that appellant's "diatribe" was the result of a matter upon which "respondent was called upon to rule" is plainly erroneous, particularly since neither appellant nor his attorney contended or showed this to be a fact. Appellant was neither called "upon to rule"; could not, with due process, "rule"; nor did he, in fact, "rule" on anything.

Appellant, had several times previously refused to recuse himself. The federal court, permitted appellant, to terminate his life in the proceeding, "french style", with his own gun. Thus, as part of his recusal, appellant let loose with his sua sponte defamatory tirade.

The litmus test revealing this Court's error in "GS v. Signorelli (supra), is that appellant's "diatribe" was and is not appealable, despite the broad appellate jurisdiction of this Court on non-final determinations, since it was not an "Order" (CPLR §5701).

Nevertheless, unlike "GS", but like the disparaged Supreme Court justice in the Haas case, "DLS" was not legally an "aggrieved party" (CPLR §5511), and cannot appeal.

In short, by such overpublished defamation, "Columnist" Ernest L. Signorelli was not making any adjudication involving the rights or liabilities of anyone and particularly "DLS".

There is a difference and distinction between a situation wherein a judge "must" make a decision and makes it maliciously, from a situation wherein the matter or issues are not before the judge for decision, and the decision is merely a "guise" for other purposes (Matter of Haas, supra, at p. 8, 938).

There is no civil liability for damages in the first situation (because the judge has jurisdiction, having been legally been "called upon to rule"), but not in the other (because the judge is not being "called upon to rule" -- and he does not "rule").

Similarly, there is immunity for the publication of non-confidential judicially filed papers, except when the primary motivation of the filing is to publish extra-judicially. "Ingenious means of defamation" will not be sanctioned by the courts (Williams v. Williams, 23 N.Y.2d 592, 598, 298 N.Y.S.2d 473, 479; Brown v. Mack, supra, at 374-375, 917-918).

Thus, appellant's published remarks on this estate, which appellant's sycophants have permitted to lie dormant for years to prevent appellate review, might only be possibly reviewed in the theoretical future by "GS", not by "DLS", if "GS" is an "appellant" on some provision that he is "aggrieved" (CPLR §5501(a)[4]; §5711).

"DLS" never will have any right to review this calumny since she is not a party and not legally aggrieved.

7. Over the plaintiff, "CAS" there was never any personal or subject matter jurisdiction by appellant or any of the defendants.

E. Bootstrapping The Issue Precluded "Diatribe":

1a. The assertions in appellant's "sua sponte diatribe" have been resoundingly shown to be false, contrived, and misleading by appellant's sworn testimony and documents filed in his own court.

b. At every attempt by appellant's attorney to bootstrap the "diatribe" into evidence, for the truth thereof or for its prejudicial value, "GS" challenged appellant:

> "to submit an affidavit to this Court, executed outside of Suffolk County, swearing to the truth of the contents of his statement of February 24, 1978, which he had published by the New York Law Journal on March 3, 1978." [emphasis supplied] (A105).

c. Despite the repeated challenges, appellant has refused to verify his published "diatribe" for the truth thereof. Likewise, his attorney has refused to verify same for its truth, even on information and belief.

d. Appellant's attorney correctly states that plaintiffs consented to his requested adjournment conditioned upon the verification of the "diatribe" by appellant. Presumably, after consultation with his judicial-client (appellant), plaintiffs' conditional offer was rejected (App. Br. 11 footnote), appellant refuses to verify!

e. Thus, it is morally and ethically, in addition to being the epitome of gall, for appellant and his attorney to present such unverified discredited "diatribe" (A223-A224), directly or indirectly, for truth thereof in this or any other court, particularily in support of his cross-motion for summary judgment (CPLR 3211[b]).

2a. Those facts, as are contained in the "diatribe", have been the subject of extensive disciplinary investigation and hearings -- resulting in the complete vindication of "DLS" (as well as "GS"), precluding relitigation of these issues.

b. The disciplinary proceedings were not a cursory and summary undertaking by the Grievance Committee (cf. Gilberg v. Barbieri, 53 N.Y.2d 285, 441 N.Y.S.2d 49; Hunt v. OSR 85 A.D.2d 681, 682-683, 445 N.Y.S.2d 499, 501-502 [2d Dept.]).

c. Because of the judicial instigation and intervention (including the unwitting and duped involvement of the Presiding Justice by appellant), it became one of the most extensive, intensive, and expensive investigation and prosecution ever undertaken by the Grievance Committee for the Ninth Judicial District.

d. Nevertheless, despite its intensity, at the hearings, the appellant's charges, and his published lies, went down like the Titanic.

Even appellant's perjured testimony and his destruction and/or suppression of judicially filed exculpatory papers in his Court could not alter his inevitable disaster, in the disciplinary proceedings.

e. The point is that it was appellant and his entourage which attempted to, and did exert, control over the Grievance Committee, so that there was an identity of persons, subject matter, and purpose.

f. Under these circumstances, the issues determined in this vigorously fought disciplinary proceeding are binding and determinative in this and every other action or proceeding (Bernstein v. Birch, 71 A.D.2d 129, 132-135, 421 N.Y.S.2d 574, 575-578 [1st Dept.], aff'd 51 N.Y.2d 932, 434 N.Y.S.2d 994), precluding all courts from making any contrary findings, as a matter of law.

3. At nisi prius there might be some claimed justification in reproducing the "diatribe" in opposing plaintiffs' motion for summary judgment, were the facts incorporated in the "diatribe" otherwise unavailable. But in this Court, where only appellant's cross-motion for summary relief is before this Court, this thoroughly discredited unverified "diatribe", is absolutely of no probative value (Friends of Animals v. Associated Fur Manufacturers, 46 N.Y.2d 1065, 1067-1068, 416 N.Y.S.2d 790, 791-792).

4. Ironically, appellant was "hoisted by his own petard" when he was compelled to testify at his inspired disciplinary proceedings, and his "diatribe" became the subject of examination and cross-examination.

5. Mr. Justice Holmes observed that:

> "One thinks that an error exposed is dead, but exposure amounts to nothing when people want to believe." (Holmes-Pollack Letters, p. 219)

In the market place, this human truism may find abode, it has no place in a judicial forum.

POINT I

PLAINTIFFS' COMPLAINT MUST BE TESTED AGAINST FEDERAL, AS WELL AS STATE, LAW.

1. Plaintiffs, having opted to have their federal rights vindicated in a state forum, these rights, as well as plaintiffs' state rights, must be recognized in examination of the merits, vel non, of appellant's appeal (Hathorn v. Lovorn, 457 U.S. 255, 266-270, 102 S.Ct. 2421, 2428-2430, 72 L.Ed.2d 824, 835-837; Brody v. Leamy, 90 Misc.2d 1, 20, 393 N.Y.S.2d 243, 257 [Sup., West]).

2. Plaintiff's rights under state law may exceed his federal rights, since:

> "the Fourteenth Amendment (is not) a font of tort law to be superimposed upon whatever systems may be already administered the the State" (Paul v. Davis [infra., at 701, 1160, 413]).

Thus, in Parratt v. Taylor (451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420) a claim of negligence by prison officials in losing plaintiff's property was not sufficient to sustain a §1983 action, although the prisoner's common law rights obviously remained intact.

In Paul v. Davis (424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405), mere defamation published by a state official was held insufficient to sustain a §1983 complaint. Here again, plaintiff's common law rights were not extinguished.

Additionally, to catapult misconduct into a §1983 action, it must be "under color of state law" (Flagg Brothers v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185).

3. Regarding the other side of the liability issue (privilege), the Court, in Ferri v. Ackerman (444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 355), stated:

> "The narrow issue presented to this Court is whether federal law in any way pre-empts the freedom of a State to decide the question of immunity in this [federally mandated] situation in accord with its own law. We are not concerned with the elements of a state cause of action for malpractice and need not speculate about whether a state court would consider petitioner's allegations sufficient to establish a breach of duty or a right to recover damages. Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that respondent is absolutely immune. For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless of course, the state rule is in conflict with federal law U.S. Const, Art VI, cl 2."

4. Obviously, local law cannot limit or immunize federally guaranteed rights (Martinez v. California, 444 U.S. 277, 284 n. 8, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 488; Scheuer v. Rhodes, 416 U.S. 232, 243, 94 S.Ct. 1683, 1690, 40 L.Ed.2d 90, 100).

O'Neil v. City (642 F.2d 367, 368 footnote 1 [9th Cir.]) clearly recognized that tortious conduct actionable under state law, may not support a §1983 action, since the immunities under state and federal law are not necessarily co-extensive. Appellant's counsel obviously did not read or understand this important footnote (App. Br. p. 16), which recognized that state law does not have to recognize judicial absolute immunity co-extensively with federal law.

Similiarly, state judicial absolute privilege has been abolished under circumstances set forth in CPLR §7003(c), which may not necessarily be co-extensive with judicial absolute privilege under federal law.

5. Thus, although there possibly may not be a double recovery for the same injury (Zarcone v. Perry, 78 A.D.2d 70, 434 N.Y.S.2d 437 [2d Dept.], aff'd 55 N.Y.2d 782, 447 N.Y.S.2d 248), federal as well as state rights must be recognized and considered at bar (Hines v. City, 79 A.D.2d 218, 436 N.Y.S.2d 512 [4th Dept.]).

In short, all the acts complained about must be examined both under federal and state law, and it must be determined what are the immunities, and the extent thereof, under each scheme of law.

7. The state affords a litigant a terminal court for the vindication of his rights. It cannot, unlike the federal system, relegate the victim to another judicial system (Paul v. Davis, supra).

It is damages here or nowhere!

POINT II

AFTER ANSWER, APPELLANT'S CPLR 3211 MOTION MUST BE DENIED.

1. Although not specifically included in CPLR 3211(a)[5], a motion to dismiss a complaint because of absolute privilege, has become an accepted practice, when such privilege appears on the face of the complaint. Thus, if no dismissal motion is made nor pleaded, the defense is waived (Memory Gardens v. D'Amico, supra; Boyd v. Carroll, supra).

2. Since issue was joined by the service of appellant's answer [A29-A38], more than three years before his cross-motion [A38, A404], appellant's CPLR 3211 cross-motion must be denied (CPLR 3211[e]).

In Continental v. Mutual, 77 A.D.2d 316, 432 N.Y.S.2d 952 [4th Dept.], the Court stated:

> "Motions to dismiss under section 3211 must be made within the time allotted for the return of a responsive pleading (CPLR 3211[e]). Defendant served an answer and did

> not for a substantial period of time seek to have a CPLR 3211 motion. The motion was, therefore, untimely; however, a court may consider the motion as one for summary judgment under CPLR 3212." (at p. 318, 954).

3. In any event, pleading at least one legally cognizable cause of action is sufficient to entirely defeat appellant's omnibus CPLR 3211 motion (Advance Music v. American Tobacco Co., 296 N.Y. 79, 84; McInerney v. Village, 87 A.D.2d 861, 862, 449 N.Y.S.2d 299, 300 [2d Dept.]).

4. Appellant now desperately contends, for the first time on appeal, that plaintiffs' complaint does not satisfy CPLR §3013. The argument is tardy and specious since, even if it had validity, it should have been made three years ago at Special Term, pursuant to CPLR 3024.

Plaintiffs' pleaded causes clearly reveal the "occurrences" and their "material elements" upon which they seek recovery. At this juncture, such "occurrences" and "material elements" have been amplified by plaintiffs' Notice to Admit, plaintiffs' Demand for Discovery and Inspection, plaintiffs' Motion for Summary Judgment, and appellant's cross-motion for summary judgment, and extensive recorded oral arguments.

Nothing about plaintiffs' causes of action is or can be the subject of speculation or doubt by appellant, his attorney, or the courts.

5. Contrariwise, it is appellant's pleading which is patently deficient (A36-A37).

a. Appellant clearly has the burden of showing "his entitlement" to immunity (Harlow v. Fitzgerald, 457 U.S. , , 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396, 408; Gomez v. Toledo, 446 U.S.635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578; Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185, 190; Dellums v. Powell, 660 F.2d 802, 807 [D.C. Cir]; LaBelle v. County, 85 A.D.2d 759, 761, 445 N.Y.S.2d 275, 278 [3d Dept.]; Pitt v City, 111 Misc.2d 569, 571, 444 N.Y.S.2d 522, 524 [Sup. N.Y.]).

Appellant -- an acting Supreme Court Justice -- and his attorney, whose office handles most of the litigation for state government officials knows that to properly plead a claim of absolute privilege, it must give "notice" and set forth the "material elements" of such defense (A36) -- labels do not suffice (CPLR §3013; Jerry v. Borden (45 A.D.2d 344, 346-347, 358 N.Y.S.2d 426, 430 [2d Dept.]).

b. Plaintiffs, in order to vindicate their federal rights, need only plead that they have been denied their federal rights "under color of state law" (Gomez v. Toledo, supra).

c. Under state law, the unquestionable obligation to plead or move under a claim of immunity is also upon the party claiming its benefit (Valesh v. Prince, 224 N.Y. 613, 614; Magnus v. New, 212 App. Div. 123, 124, 208 N.Y. Supp. 207 [2d Dept.]; Chapman v. Dick, 197 App. Div. 551, 554, 188 N.Y. Supp. 861, 862-863 [2d Dept.]; Corwin v. Berkowitz, 190 App. Div. 952, 179 N.Y. Supp. 915 [2d Dept.]; Tierney v. Ruppert 150 App. Div. 863, 866-867, 135 N.Y. Supp. 365, 368-369 [2d Dept.]; Salomon v. Mahoney, 271 App. Div. 478, 479, 481, 66 N.Y.S.2d 598, 598-599, 601 [1st Dept.]; Cassidy v. Gannett, 173 Misc. Rep. 634, 639, 18 N.Y.S.2d 729, 734 [Sup. Monroe, per Van Voorhies, J.]; Douglas v. Collins, 152 Misc. Rep. 839, 842, 273 N.Y. Supp. 663, 667 [Sup. Kings], reversed on other grounds, 243 App. Div. 546, 276 N.Y. Supp. 87 [2d Dept.], aff'd 267 N.Y. 557; Toper v. Rotach, 62 Misc.2d 290, 290-291, 307 N.Y.S.2d 805, 807 [Sup. Oneida, per Simons, J.]; 61A Am Jur 2d, Pleading, §78, p. 86; 71 CJS, Pleading, §84, p. 198-201; 2 Carmody-Wait 2d, §13:20, p. 332; 8 Bender's Forms of Pleading, p. 383-3/4, Dec. 82 Supp. Form No. 383.44 -45, p. 26-28).

This is particularly true where, as here, knowledge of the facts are primarily within knowledge of the adverse party (61A Am Jur. 2d, supra, §80, p. 87; 71 CJS, supra, §85, p. 201).

An apparent, but not real, exception exists when it is the complaint which sets forth the material or allegations which reveals the unquestionable existence of an absolute privilege.

This is true in all cases, not only where absolute privilege is involved (805 Third Avenue v. M.W. Realty, 58 N.Y.2d 447, 451, 461 N.Y.S.2d 778, 780; 22 NY Jur 2d, Contracts, §385, p. 291), under federal, as well as state, law (Federal Rules of Civil Procedure, 10[c]; CPLR 3014).

Some erroneous and unfortunate dicta in Park Knoll v. Schmidt (89 A.D.2d 164, 168-169, 454 N.Y.S.2d 901, 904 [2d Dept.], reversed on other grounds, 59 N.Y.S.2d 205, 464 N.Y.S.2d 424), gave respectability to to an unsupportable, incomplete, and erroneous statement in 5 Carmody-Wait 2d, §30.67, p. 667.

The statement in Carmody-Wait 2d, which this Court adopted in Park Knoll (168-169, 904), is:

> "where the statements are absolutely privileged, the defense of privilege need not be alleged."

Carmody-Wait supports such incomplete and misleading proposition by Salomon v. Mahoney (supra); Cassidy v. Gannett (supra); Brown v. Mack (supra) and Wallach v. Schmer, 82 N.Y.S.2d 202 [Sup. Kings].

None of the aforementioned cases support the Carmody-Wait statement, instead all are cases, like Park Knoll, where the claimed absolute privileged material appears on the face of the complaint.

Procedurally, Park Knoll, as treated by this Court and the Court of Appeals, is unfortunate, serving only to confuse and those litigants interested in delay, by permitting absolute privilege to be treated under CPLR 3211(a)[7], instead of where it properly belongs, under CPLR 3211(a)[5].

The confusion arose during the Code of Civil Procedure era, where even failure to separately state causes of action were "demurrable" (Green v. Davis, supra). Similarly, where the needlessly pleaded material in the complaint revealed the existence of absolute privilege, the motion was unfortunately called a "demurrer" (Corwin v. Berkowitz [supra]; Chapman v. Dick [supra]).

The statement that absolute privilege need not be pleaded is inconsistent with the recent holding by the Third Department in Memory Gardens v. D'Amico (supra, at 1160-1161, 960), and many heretofore cited cases wherein it is stated that defendant must show "entitlement".

In Boyd v. Carroll (supra), the complaint was against one Judge Ross Carlton, but the answer did not plead judicial immunity (nor was any motion made with respect to such defense). A jury verdict was rendered against the defendant-judge, but the Trial Court set this aside and entered judgment in his favor. The Circuit Court of Appeals, in reversing, stated:

> "The failure to plead judicial immunity waived the affirmative defense. This waiver renders irrelevant (Judge) Carlton's contentions that (plaintiff) Boyd is estopped by her pleadings to assert that he was not acting as a judge." (732-733)

Thus, this Court should make it crystal clear that privilege must be affirmatively raised by defendant unless it appears on the face of the complaint in which case a motion may be made under CPLR 3211(a)[5], not [7], in order to (1) conform to federal decisions on the subject (e.g. Gomez v. Toledo, supra); (2) conform practice to substantive rights which hold that even an absolute privilege is waivable (Memory Gardens v. D'Amico [supra]; Boyd v. Carroll [supra]); (3) conform pleadings in judicial absolute privilege defamation situations to non-defamatory cases where similar absolute judicial privilege exists, wherein the plea of privilege must be interposed (e.g. Dennis v. Sparks, supra); and (4) prevent confusion when the pleader is in doubt as to whether an absolute or qualified privilege

exists, since this Court in Park Knoll stated that "absolute privilege ... need not be interposed" [68-69, 904], while the Court of Appeals stated Schmidt, "may [if she desires] plead the [qualified] privilege" (at 210, 427).

Furthermore, recognition of absolute privilege as a CPLR 3211(a)[5] situation, prevents the dilatory and illogic of a CPLR 3211 motion after a CPLR 3212 motion, accompanied by its automatic CPLR 3214(b) stay, which seems to have the strategm and purpose in Park Knoll (67, 904).

Thus, it is respectfully submitted that this Court was in error when, in "GS" v. Sassower v. Signorelli [supra], it treated the case entirely under CPLR 3211(a)[7]. Insofar as judicial absolute privilege was concerned, it could only be treated under CPLR 3211(a)[5], if the absolute privilege appeared on its face, which it did not in the "GS" complaint.

Likewise, appellant's motion herein under CPLR 3211(a)[5] or [7] must be denied since the absolute judicial immunity does not appear on the face of the complaint. On the contrary, the complaint specifically negates any such claim.

6. Appellant, having knowledge of the facts underlying the allegations in plaintiffs' complaint, was legally required to submit an affidavit on his cross-motion for summary judgment, as well as in opposition to plaintiffs motion for similar relief.

7. Goldstein v. Siegel (19 A.D.2d 489, 244 N.Y.S.2d 378 [1st Dept.] and Suarez v. Underwood (103 Misc.2d 445, 426 N.Y.S.2d 208) do not aid appellant at this stage of these proceedings (App. Br. p. 27-28). If plaintiffs' fourth cause of action did not set forth the material elements, appellant should have moved before responding with his answer (Foley v. D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121 [1st Dept.]).

In Goldstein, the Court afforded plaintiff leave to replead (493, 383). In Suarez, there was clearly no viable claim and plaintiff did not claim he did not have all the information necessary to oppose summary judgment (448, 210-211).

POINT III

APPELLANT'S "FIRST" AND "FOURTH" AFFIRMATIVE DEFENSES WERE PROPERLY STRICKEN.

1. Appellant's pleading, by way of defense that "[t]he complaint fails to state a cause of action" is improper and was properly stricken by Special Term (Konow v. Sugarman, 71 A.D.2d 1016, 1017, 420 N.Y.S.2d 411 [2d Dept.]).

2. Improper venue is clearly not jurisdictional, nor a defense to an action (Weinstein-Korn-Miller, ¶509.1). If appellant believed venue to have been improper, he should have followed the procedure set forth in CPLR 511.

In fact, the Suffolk County Attorney's Office, who represented some of the defendants, did move for a change of venue, and it was denied by an Order dated August 20, 1979, in this precise action.

POINT IV

APPELLANT'S (CROSS) MOTION FOR SUMMARY JUDGMENT PATENTLY DOES NOT COMPLY WITH CPLR 3212(b) AND ITS CONSTITUTIONAL UNDERPINNING.

1. CPLR 3212(b) provides:

> "A (cross) motion for summary judgment shall be supported by affidavit ... and other available proof ... . The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show ... that the cause of action has no merit."

In no way has the appellant complied with the basic requirements for summary judgment. Obviously, appellant cannot show the necessary facts to show (1) jurisdiction and (2) judicial acts.

Instead, appellant's papers, in support of his cross-motion for summary relief set forth little, if anything, more than that appellant is a (1) Surrogate and that (2) "DLS" was substituted before the acts complained of in the complaint.

Such acknowledged facts are clearly insufficient for summary relief, particularly under the circumstances at bar. On the contrary, they indicate that summary judgment should have been awarded plaintiffs, as they requested.

2. Since summary judgment is the procedural equivalent of a trial on its merits (Collins v. Bertram, 42 N.Y.2d 1033, 1034, 399 N.Y.S.2d 202), constitutional "due process" necessitates that appellant show by uncontroverted probative proof that no triable issue exists on any material issue.

Merely because appellant was a member of the judiciary did not exempt or excuse him from submitting a testimonial affidavit.

Dennis v. Sparks (supra, at 30-31, 188, 191-192), is dispositive on the subject. Civil immunity from damages for a member of the judiciary (generally existing) is essentially unrelated to the obligation to testify (generally unavailable), where testimonial knowledge exists.

In Jade v. C.I.T. (87 A.D.2d 564, 565, 448 N.Y.S.2d 194, 196 [1st Dept.]) the court, compelled a federal judge to testify as a witness of an occurrence in his court by refusing to quash a subpoena served upon him. Unfortunately, the opinion is muddy by confusing immunity from damages with immunity from testifying (Dennis v. Sparks, supra) because of federal preemption.

Undoubtedly, a federal judge can, and should, testify in federal court on matters on which he has testimonial knowledge, even if such testimonial knowledge has been obtained as part of his judicial function.

A state judge, clearly acting at the very nucleus of his jurisdiction, is not prohibited by any doctrine from testifying as to the events which occurred even during trial, in either state or federal court.

Whether a state court can compel a federal judge to testify is dependent on jurisdiction i.e, whether he was acting in a federal capacity and therefore immune to any and all state process, and not whether the act was judicial in nature.

<u>Jade v. C.I.T.</u> (supra), while correctly determined, in implying that immunity for civil damages was somehow involved in the decision, was clearly misleading.

3. The plain insufficiency of appellant's papers -- an Acting Supreme Court Justice -- on his cross-motion for summary judgment, leads to the irresistible conclusion that his cross-motion was made merely as a ploy to delay his pre-trial disclosure; and/or appellant is proclaiming, in effect, that in lawsuits in this Court, as in chess, rank and position are the determinative factors.

POINT V

APPELLANT IS ESTOPPED FROM SEEKING SUMMARY RELIEF.

1. Outstanding and unresponded to (A11) at the time appellant made his cross-motion for summary relief was, plaintiffs' Notice of Admit (A385-A399), and plaintiff's Demand for Discovery and Inspection (A400-A403).

The pre-trial information requested targeted the very issue on which appellant cross-moved for summary judgment (judicial absolute privilege). Consequently, appellant was estopped from simultaneously moving for summary relief and refusing to comply with pre-trial procedures (Parkoff v. General Tel., 53 N.Y.2d 412, 417, 442 N.Y.S.2d 432, 434; Greenberg v CBS, 69 A.D.2d 693, 709, 419 N.Y.S.2d 988, 997; Country-Wide v. Subaru, 85 A.D.2d 592, 592-593, 444 N.Y.S.2d 710, 711 [2d Dept.]; CPLR 3211[d]; CPLR 3212[f]).

2. Appellant has continued such inconsistent conduct by (1) opposing plaintiffs' motion to vacate appellant's statutory CPLR 5519(a) stay [Order No. 1409, March 3, 1983] and (2) requesting CPLR summary relief in this Court.

Thus, in opposing appellant's cross-motion for summary judgment "DLS" stated:

> "CPLR 3212(f): Clearly, there is a great deal of essential evidence, unavailable to plaintiffs. Consequently, no serious consideration should be given to the Signorelli's cross-motion until pre-trial disclosure has been completed." [A487]

3. Alternatively, in the event appellant is not estopped from moving for summary relief while refusing to respond to plaintiffs' Notice to Admit, the facts contained in plaintiffs' Notice to Admit should be deemed admitted on appellant's cross-motion for summary judgment and the documents for which inspection was requested should be deemed as showing that judicial absolutely privilege did not exist.

4. Significantly, appellant's co-conspirators, defendants, John P. Finnerty, Warden Regula, and Anthony Mastroianni, are deemed to have admitted the very same Notice to Admit (A385-A399), by having failed to timely respond, as provided in the Order of January 24, 1983 (A6, A11), or moved to extend their time.

5. Additionally, the defendants have failed to respond to Interrogatories demanded by "GS" and have defaulted in failing to attend and submit to examinations before trial as ordered by the Court.

Clearly, the "code of silence" attempted to be enforced by appellant and the defendants, speaks loudly of liability.

6. Appellant's reliance on Trails West v. Wolff (32 N.Y.2d 207, 344 N.Y.S.2d 863) [App. Br. p. 28], is misplaced for in that case the Court stated:

> "They [plaintiffs] have already examined Paster and two newspaper reporters. ... It would be futile, indeed, to allow them to interrogate Wolff or to question Paster further in the hope of getting them to change their well-documented stories." (221-222, 874).

7. The examination before trial of Art Penny reveals the manifest necessity of complete pre-trial disclosure before consideration of any absolute privilege claim by appellant.

POINT VI

PLAINTIFFS - THE SHIELD OF ZEUS

Plaintiffs are situated in about the most unassailable, impregnable, and invulnerable position known to law:

1. "DLS" causes "First" thru "Fourth:

There can be no defense against "DLS's" first four causes of action, nor does appellant claim otherwise. Except for the pro forma denials in appellant's answer (verified by appellant's attorney), appellant has submitted nothing to support summary disposition in his favor. Appellant's motion should be denied, or denied pending completion of pre-trial discovery (CPLR 3211[d]; CPLR 3212[f]).

"DLS's" Fifth and Sixth Causes of Action is factually related to her Fourth Cause of Action, whose allegations are incorporated therein [A22, ¶23].

Appellant's actions, directly or those with whom he acted in concert, were intended "to control and influence" the conduct of "GS" and cause him to "relent and submit in silence to appellant's improper" actions [A21, ¶¶20, 21].

2. "CAS" causes "First" thru "Third":

For similar reasons, there can be no defense to "CAS's" first three causes of action, nor does appellant claim otherwise.

3. DLS's" Fifth and Sixth causes of action:

In addition to the arguments heretofore set forth, "DLS" submits the following in opposition to appellant's arguments for judicial absolute privilege.

a. Judicial Public Policy: - As stated by Mr. Justice Cardozo in Andrews v. Gardiner (224 N.Y. 440):

> "the tendency of courts [is] to restrict the scope of absolute privilege in libel ... there must be some check on calumny." (at 448)

This policy was reiterated in Park Knoll v. Schmidt (supra), wherein the Court of Appeals stated:

> "As a matter of policy, the courts confine absolute privilege to a very few situations". (at 210, 427)

b. Private Person: - "DLS" is a private person (Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789), doing nothing to orbit herself into the public arena in this matter.

Neither appellant nor the other defendants, by their egregious misconduct, could catapult "DLS" into a public figure status (Hutchinson v. Proxmire, 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411, 431; Greenberg v. CBS, at 703-704, 993-994)

c. Private Matter: - The incidents falsely made the subject matter of appellant's tirade against "DLS" were in the past, were not the subject of controversy at the time of occurrence, or at the time of publication (Wolston v. Readers' Digest, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450; Greenberg v. CBS, supra, at 704, 994).

d. Absence of Subject Matter Jurisdiction: - The "diatribe" reads as a professional disciplinary adjudication of "DLS" (as well as "GS"), with the matter being referred to the Presiding Justice of the Appellate Division for punishment.

The Presiding Justice, one of the number of direct recipients of this "diatribe", was not the proper depository for disciplinary complaints, nor does he have jurisdiction to impose punishment or action, thus defeating, ipso facto, any claim for absolute judicial privilege, were it to otherwise exist (Lincoln v. Daniels, supra).

Plainly, in disciplinary matters, appellant has no special prerogatives as a complainant, nor has appellant subject matter jurisdiction in the adjudication of discipline (Erie v. Western, 304 N.Y. 342, 346, cert. den. 344 U.S. 892, 73 S.Ct. 892, 73 S.Ct. 211, 97 L.Ed. 690; Matter of Haas, supra, at 10, 939-940), which was the sole subject of his "diatribe".

e. Absence of Personal Jurisdiction: - Since "DLS" had been properly substituted at least ten (10) months prior to the "diatribe", appellant had no personal jurisdiction over her.

f. Clear absence of All Jurisdiction: - Appellant struck "Pearl Harbor style" -- without notice or warning. Absent manifest necessity, procedural "due process" requires prior notice and opportunity to respond and defend.

In Gramatan v. Lopez, 46 N.Y.2d 481, 414 N.Y.S.2d 308, the Court, per Cooke, Ch. J., stated:

> "One of the fundamental principles of our system of justice is that every person is entitled a day in court ... . Consideration of due process prohibit personally binding a

party by the results of an action in which that party has never been afforded an opportunity to be heard."

"DLS", was and is being deprived of substantive and procedural "due process" since she was not afforded an opportunity to defend herself prior to the issuance of this culumny or exonerate herself on appeal because of her third party status (CPLR §5511). Unless compensation is awarded, none of the remedies justifying absolute judicial privilege are available to her (Bradley v. Fisher [13 Wall (80 U.S.) 335, 354, 35 L.Ed. 646, 651]).

This was one of the reasons for denying absolute privilege in Toker v. Pollak (44 N.Y.2d 211, 405 N.Y.S.2d 1), where the Court, in distinguishing absolute privilege situations, stated:

> "In contrast, in the present case ... no quasi-judicial hearing at which plaintiff Toker was permitted to challenge defendant's Stern's allegations was ever held. Nor does it appear that the Department of Investigation was empowered based upon its findings, to grant any tangible form of relief reviewable on appeal in the courts. In sum, the proceeding before the Department of Investigation lacked all of the safeguards traditionally associated with a quasi-judicial proceeding."(222, 7)

This state, and most jurisdictions, have, on numerous instances followed the Buckley v. Wood (4 Coke 14b, 76 Eng Rep 888 [1591]) doctrine, quoted with approval in Thorn v. Blanchard (5 Johns. 508, 523-524, 526).

There can be no privilege where the court does not have subject matter and personal jurisdiction. Otherwise stated, the party defamed in the judicial arena must have some right or opportunity to defend or vindicate, before judicial absolute privilege can apply.

Thus, appellant's defamation against "DLS" (a third party), does not stand on the same footing as that of "GS" (assuming he eventually is afforded appellate review from the contents of the "diatribe"). Such third party distinction has been recognized in many decisive opinions (Wels v. Rubin, 280 N.Y. 233, 235; Moore v. Manufacturers' National Bank, 123 N.Y. 420, 426-428; Battu v. Smoot, 211 App. Div. 1011, 206 N.Y. Supp. 780 [1st Dept.]; Schwartz v. Bartle, 49 Misc.2d 848, 268 N.Y.S.2d 715; Rusciano v. Mihalyfi, 165 Misc. Rep. 932, 1 N.Y.S.2d 787 [Sup., Bx.]; Perkins v. Mitchell, 31 Barb. 461; Hosmer v. Loveland, 19 Barb. 111; Anonymous v. Trenkman, 48 F.2d 571 [2d Cir.]; Potter v. Troy, 175 F. 128 [2d Cir.]; Union v. Thomas, 83 F. 803 [9th Cir.]; Hager v. Major, 353 Mo. 1166, 186 SW2d 564; 158 ALR 592 Laun v. Union, 350 Mo. 572, 166 SW2d 1065, 144 ALR 622).

A substantially similar nexus between the litigating party and the party defamed has been held inadequate to protect the defamer in numerous controlling cases. In Moore, the stranger was a third party was one who allegedly collaborated with the embezzler; in Wels, Anonymous, and Union, the third

person was an attorney for a party; in Battu, it was the officers and directors of the corporate party; in Rusciano, it was the president of the corporate party; and in Potter, it involved the executive officer of the corporate party.

q. Mandated Confidentiality: - Under common law (Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 316, per Holmes, J.; People ex rel. Karlin v. Culkin, 248 N.Y. 465, 478-479, per Cardozo, Ch. J.) and by virtue of statute (Judiciary Law §90[10], Matter of Capoccia, N.Y.2d , N.Y.S.2d [7/7/83]), the "diatribe" published by appellant is not, and cannot be, "arguably within the sphere of legitimate public concern ... [and is not] reasonably related to matters warranting public exposition (Chapadeau v. Utica, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64; cf. Gaeta v. New York News, A.D.2d , N.Y.S.2d [1st Dept. - 8/18/83]).

Prior to disciplinary conviction and imposition of punishment, complaints and proceedings have always been considered secret, private, and confidential.

The resounding exoneration of "DLS" (as well as "GS"), with leave to seek sanctions against her prosecutors, speaks eloquently for the common law and statutory prohibition.

Because of appellant's deliberate disregard of well established common and statutory law, which he admitted knowledge of, the accusation remains vividly in the public mind by its constant republication, the vindication is kept secret. An absurd and manifest inversion of law and logic.

The callous immorality of the entire situation is due to the fact that the principal republishers of this "diatribe" is by the Attorney General and Suffolk County Attorney, who republish with knowledge of its falsity and resounding vindication of "GS" and "DLS". This Court stands in _pari delicto_ for affording absolutely no relief from such outrageous misconduct by its own attorney, the Attorney General and his office.

In _Cowley_, a disciplinary complaint was filed in court (as was the practice at that time), and although such filing was deemed confidential, defendant newspaper published its contents, truly and fairly (393, 319), resulting in a money damage suit by the attorney involved.

Nisi prius held the publication absolutely privileged (393, 319). Mr. Justice Holmes, speaking for the Court, reversed. In this seminal decision on the "open court" and "free press", he, nevertheless held that such money damage suit could be maintained.

This state, as well as every other state, has followed the Cowley doctrine in this respect (Stuart v. Press Pub. Co., 83 App. Div. 467, 476, 82 N.Y. Supp. 401, 407 [1st Dept.]; Shiles v. News Syndicate, 27 N.Y.2d 9, 313 N.Y.S.2d 104, cert den. 400 U.S. 999, 91 S.Ct. 454, 27 L.Ed.2d 450).

A damage suit was also upheld in McCurdy v. Hughes (63 ND 435, 248 NW 512, 87 ALR 683), based upon the publication of a disciplinary proceeding. This oft-cited opinion relied extensively on New York decisions, and was approvingly cited in Weiner v. Weintraub (22 N.Y.2d 330, 332, 292 N.Y.S.2d 667, 669).

McCurdy is directly on point once it is accepted that publication of a disciplinary complaint, except in the appropriate forum in a confidential manner, is not an emolument of appellant's office.

The words in the statute (Judiciary Law §90[10]):

> "Any statute or rule to the contrary notwithstanding ..."

may not be to be blithely ignored, as supererogatory, by this Court, appellant, or the New York Law Journal.

This Court has a non-delegable obligation, not only to punish ethical violators, but to protect accused and vindicated attorneys -- or so counsel always thought!.

In People ex rel. Karlin v. Culkin (supra), Mr. Chief Justice Cardozo, speaking for the Court, stated:

> "The argument is pressed that, in conceding to the court a power of inquisition, we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation is such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. ... Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages. ... The closest analogue is an inquisition by the grand jury for the discovery of crime. There secrecy of counsel is enjoined upon the jurors by an oath of ancient lineage. It would be strange if disclosure were a duty upon an inquisition by the court. There is a practice of distant origin by which disciplinary proceedings, unless issuing in a judgment adverse to the attorney, are recorded as anonymous. The need of secrecy is the greater when the proceeding is in the stage of preliminary investigation." (at 478-479)

In a constitutionally more compelling situation, since it involved a public official [a judge], the Court of Appeals, in Nichols v. Gamso [former Chief Clerk of the Appellate Division, First Department] (35 N.Y.2d 35, 358 N.Y.S.2d 712), adopted the position of the Attorney General and stated:

> "... judicial investigations of charges or complaints against judicial officers are confidential, and no authority, decisional or statutory, suggest otherwise. ... Certainly, so much of the record and proceedings which do not relate to the charges sustained need not be disclosed." (at 38-39, 713-714)

In Nixon v. Warner (435 U.S. 589, 598, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570, 580), the Court stated:

> "... the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of the 'painful and sometimes disgusting details of a divorce case (cases cited). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption (cases cited, including Cowley v. Pulsifer, supra and Munzer v. Blaisdell, 268 App. Div.9, 11, 48 N.Y.S.2d 355, 356 [1st Dept.]), or as sources of business information that might harm a litigant's competitive standing ...".

The courts have never denied its inherent power to prohibit publication of certain judicial or governmental proceedings (Branzburg v. Hayes, 408 U.S. 665, 685, 92 S.Ct. 2646, 2658, 33 L.Ed.2d 626, 641-642). They have only refused to prohibit publication of material when "lawfully obtained" or in the public domain (Smith v. Daily Mail, 443 U.S. 97, 104, 99 S.Ct. 2667, 2671, 61 L.Ed.2d 399, 405; Landmark Communications v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1).

Even then, when the confidential information is received from one of the participants, there is liability (Shiles v. News Syndicate, supra).

In the post-Chapadeau decision of Time v. Firestone (424 U.S. 448, 454-457, 96 S.Ct. 958, 965-967, 47 L.Ed.2d 154, 163-165), the Court recognized that even certain judicial proceedings must be deemed private.

One of the reasons set forth for not granting a Weiner v. Weintraub (supra) absolute privilege in Toker v. Pollack (supra), was the absence of mandated secrecy.

h. Disciplinary Complaint-Judicial Proceedings:

Designation of disciplinary complaints as the commencement of a judicial proceeding, which historically were filed in court (Weiner v. Weintraub, supra), explains but does not justify the distinction between those and other types of complaints, since analagous complaints to a policeman or district attorney have not been held to initiate a criminal proceeding, and thus qualifying for a absolute privilege (Percue v. West, 233 N.Y. 316).

Only the secrecy proviso can rationally justify the absolute privilege, and while a complainant may not be held responsible because of the conduct of a third party, not reasonably to have been anticipated, he is certainly responsible for his own out-of-court republication (Schiles v. News, supra; Williams v. Williams, supra).

Thus, had the appellant not filed his complaint with the the Grievance Committee, but with the Appellate Division, that Court, by a clerk, would have probably mailed same to the Grievance Committee with a pro forma covering letter.

Instead the appellant (1) mailed same to various persons who no disciplinary power, including his colleague who was to criminally try "GS", non-jury; (2) "caused" same to be published in the Law Journal; and (3) published same to the Presiding Justice, who likewise had no personal disciplinary power.

The appellant not only made no attempt at secrecy, but in a cluster-bomb fashion, caused its publication in the places wherein the damage could be the most devastating, and wherein clearly no jurisdiction existed.

i. Overpublication:

The "diatribe" was overpublished by appellant eradicating any absolute privilege claim. All privileges are subject to defeasance if published excessively, which is essentially a question of fact (50 Am Jur 2d, Libel and Slander, §278 -§283, p. 797 -803).

Thus, on "DLS" contention of "overpublication" contention, Special Term was eminently correct.

In Stukuls v. State (42 N.Y.2d 272, 397 N.Y.S.2d 740), Mr. Judge Wachtler, dissenting, contending an absolute privilege should prevail in that case, stated:

> "Thus, while Dr. Corey's statement before the committee are protected by absolute privilege, were he to read the same letter to the general public from the steops of the schoolhouse, no such protection would be granted." (288, 751)

The *only* tribunal having a legitimate interest in appellant's complaint was the Grievance Committee. Anyone may, with legal protection, complain against an attorney, provided such complaint is properly filed.

Appellant's mailing of the "diatribe" to many others, including the Presiding Justice, the jurist assigned to try "GS" criminally, and his "caused" publication in the Law Journal, clearly expose his ulterior purpose, not only to defame, but to strike at "GS", through "DLS".

Appellant's *modus operandi* in overpublishing and going public is obvious from the private press interview he gave Art Penny of the Daily News, on the eve of "GS's" habeas corpus proceeding.

Thus, if appellant did not intend to defame and violate the spirit, intention, and words of *Judiciary Law* §90[10], and assuming, *arguendo*, a portion of the "diatribe" decided something [which it did not], appellant could have separated the disciplinary complaint portion and sent in on to the Grievance Committee, or employed fictitious names, or marked same "Not for Publication", a practice routinely followed by this Court and the Family Court.

While a court should be impartial and decide essentially on the evidence presented, at times it has the:

> "concomitant responsibility [not to avoid the obvious] by the simple expedient of closing one's eyes, covering one's ears, and holding one's breath." (Cohen v. Hallmark, 45 N.Y.2d 493, 500, 410 N.Y.S.2d 282, 286)

Appellant's manifest intent in his overpublication is so transparently obvious and overt that had he set it forth, in haec verba, it would have been supererogatory.

j. Statutory Construction: - This Court, in "GS" v. Signorelli (supra), in its sub silentio construction of Judiciary Law §90[10] totally ignored the staute's manifest and overriding intent which begins with the words:

> "Any statute or rule to the contrary notwithstanding ..."

This Court, in effect, held that the simultaneously enacted and amended §91 of the Judiciary Law was intended to except such prohibitory language in §90, which conformed to common law practice of confidentiality.

k. Penumbral Constitutional Right of Privacy: -

Manifestly clear is the purposeful intention of appellant to strike "GS" through "DLS", and except for its distinctiveness, viciousness, and damage it is essentially a part of "DLS's" Fourth Cause of Action.

Whether "GS" be saint or sinner, moral or amoral, "DLS" could not be defamed or denied her right to statutory confidentiality with impunity merely because of her familial relationship, at least not since the Married Women's Property Act of 1848 (Domestic Relations Law §50). That reform recognized married women's separate entity status, thereby obliterating the ancient common law concept of marital oneness crystallized in the expression "vir et mulier ut una persona in lege".

The Constitution of the United States outlawed the infamous "bills of attainder" (Art. 1, §9 clause 3, §10 clause 1), which, in effect, appellant attempted to resurrect by including "DLS", a non-party, in his "sua sponte diatribe".

Even if "GS's" were in any way unjustified, which clearly he was not, appellant had no legal right to transgress the marital zone of privacy by harassing and embarrassing "DLS" for her husband's conduct, employing the transparent and self-defeating guile of designating her as the "former attorney" (16 Am Jur 2d, Constitutional Law, § 599, et seq.; 62 Am Jur 2d, Privacy, §1, et seq.).

Plaintiff "DLS" seeking vindication in the state courts, need not, at this juncture, argue whether appellant acting "under color of state law" triggered her §1983 rights. Her penumbral constitutional right of privacy and confidentiality found in Amendments I, III, IV, V, and IX of the United States Constitution are replicated in Article I of the Constitution of the State of New York.

l. Estoppel - Fundamentals of estoppel should prevent appellant from simultaneously and inconsistently recusing himself and claiming judicial immunity. Plainly recusal and a claim of judicial immunity are inherently incongruous.

m. Subterfuge: - Obviously having proclaimed a doctrine of judicial absolute privilege, for judge, lawyer, litigant, witness, and juror, appropriate safeguard must be made to protect, not the person, but the judicial process.

Thus, the person must be judicially acting and for a judicial purpose. A party may not initiate litigation in order to exploit, extra-judicially, his grievance (Williams v. Williams, supra); nor to vent a judicial spleen when there is no duty to rule (Matter of Haas, supra); or defame by legacy (Brown v. Mack, supra).

n. Liability for Subsequent Publication:

Appellant is liable for the subsequent third party republications which he could have reasonably anticipated (Restatement, Torts, Second, §576).

There is no constitutional right to defame or to invade a statutorily protected right of privacy of a private person in a matter not in the sphere of legitimate public concern (Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035; Greenberg v. CBS, supra).

Any immunity attaching to an initial publication does not attach to republication (Hutchinson v. Proxmire, supra, at 121 n. 10, 2681, 422; Doe v. McMillan, 412 U.S. 306, 315-325, 93 S.Ct. 2018, 2026-2031, 36 L.Ed.2d 912, 922-928).

Even when there is an absolute privilege, going further public destroys the privilege (Murray v. Brancato, 290 N.Y. 52).

o. Subsequent publication privileged: - There is no immunity where the subsequent republication is privileged (Restatement, supra, §576 [d]).

p. Lincoln v. Daniels (supra) - In that case the professional complaint against the attorney was innocently filed in the wrong, but generally accepted, place. The Court held that an absolute privilege did not

exist because of such misfiling. The very erudite exhaustive opinions in this case, presents great similarities to the case at bar [leave to appeal to the House of Lords was apprently not perfected].

q. Tort of Outrage: - The egregious conduct of appellant in this matter greatly "exceeds all bounds usually tolerated by a decent (professional) society" (Fisher v. Maloney, 43 N.Y.S.2d 553, 557, 402 N.Y.S.2d 991, 992).

There should be no judicial absolute privilege for this calculated and predictable infliction of emotional and pecuniary harm. The judiciary as a whole is degraded by such singular conduct, particularly when it makes extraordinary attempts to immunize same.

Less egregious conduct has resulted in liability or a plenary trial on the issues (Lopez v. Vanderwater, 620 F.2d 1229 [7th Cir.], cert. dis. 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491; Beard v. Udall, supra; Harper v. Merckle, 638 F.2d 849 [5th Cir.]; Harris v. Harvey, 605 F.2d 330 [7th Cir]).

r. Owen v. City of Independence: - Judicial absolute privilege is a relic of the ages, at odds with with modern concepts that the general public should bear the cost of governmental misdeeds (Town of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673).

POINT VII

APPELLANT - THE PAPER PRIVILEGE

a. Actual Notice of Deficiencies: - Ostensibly, appellant advances one of the strongest immunity or privilege known to law for civil damages. On examination and analysis, appellant advances nothing more than a "paper privilege".

By plaintiffs' motion (A39-A105), appellant and his attorney were given actual notice of the pleading and substantive requirements in order to invoke the doctrine of judicial absolute privilege before making their cross-motion (A50-A53).

b. Entitlement: - Appellant is a judge who must show "entitlement" for an absolute privilege (immunity) under federal and state standards, for his alleged federal and state transgressions.

Appellant's problem is further complicated by the fact that the federal version of judicial immunity on plaintiffs' federal claims, need not and may not reflect New York State's version on the non-federal claims (Ferri v. Ackerman [supra]).

Except for the office of the President of the United States, privilege, judicial or otherwise, is a functional concept attaching to activities, not entities (Nixon v. Fitzgerald, U.S. , 102 St.Ct. 2690, 73 L.Ed.2d 349) (Hampton v. Chicago, 484 F.2d 602 [6th

Cir.], cert. den. 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471; Latour v. Commercial Union Ins., 528 F. Supp. 231, 234 [Rh. Isl.]). Appellant is a "judge", and because he is everywhere addressed by that title (see Fuchsburg, J., in Shilling v. State Commission, 51 N.Y.2d 397, 408, 434 N.Y.S.2d 909, 914), ipso facto, he claims immunity. It is not, and never was, that simple.

If the Cheif Justice of a state can be held liable for his non-judicial conduct, so can the grand mufti of Suffolk County (Supreme Court of Virginia v. Consummers' Union, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, on remand, sub nom, Consumers' Union v. American Bar Association, 505 F. Supp. 822, app. dis. 451 U.S. 1012, 101 S.Ct. 2998, 69 L.Ed.2d 384)

Substantively, judicial immunity involves questions of (a) jurisdiction and (b) judicial conduct (Stump v. Sparkman, 435 U.S. 349, 360, 98 S.Ct. 1099, 1106, 55 L.Ed.2d 331, 341).

More than one hundred years ago, Judge Charles J. Folger, speaking for the Court (Lange v. Benedict, 73 N.Y. 12, 25-26), stated:

> "Such as are by law, made judges of another, shall not be ... made liable to an action for what they do as judges. The converse statement of it is also ancient; where there is no jurisdiction at all, there is no judge; the proceeding is as nothing. ... To be free from liability for the act it must have been done as judge in his judicial capacity; it must have been a judicial act. ... For it is plain

that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there."

Appellant has shown nothing except that he "sits in the seat of justice".

Patently, appellant cannot show more or he would have on his motion.

c. Recusal:

Obviously, there cannot be judicial immunity after recusal (Spires v. Bottorff, 317 F.2d 273, 274 [7th Cir.]). After recusal, the acts cannot be made "in office" (Park Knoll v. Schmidt, supra; Andrews v. Gardiner, 224 N.Y. 440, 446; Gulf & Western v. U.S., 671 F.2d 1322, 1325 [Ct. Claims]). At bar five (5) of the six (6) causes of action relate to occurrences after recusal whereby appellant lacked subject matter and personal jurisdiction over plaintiffs and the Estate of Kelly.

Significantly, on February 3, 1978, three (3) weeks before this "diatribe", appellant, in order to prevent the issuance of interim relief against him by a United States District Judge, he himself made a representation to the Federal Court that the proceedings involving "GS", had been completed. Therefore, appellant's judicial function became spent and all subsequent actions by him lacked judicial immunity (Gulf & Western v. U.S., (supra) [A477].

d. Lack of Jurisdiction: - Rankin v. Howard (supra), holds that both subject matter and personal jurisdiction are necessary in order to qualify for a Stump v. Sparkman (supra) judicial absolute privilege (see also 1 Antieau Federal Civil Rights Acts [Civil Practice] §99, p. 137). Subject matter and personal jurisdiction are "conjunctural" (Rankin v. Howard, supra).

Contrary to appellant's assertion (App. Br. 21), Cairo v. Skow (510 F. Supp. 201 [Wisc]) does not hold that personal jurisdiction is not necessary, since in giving plaintiff the right to replead, the court specifically cited Rankin v. Howard (supra).

e. Stump v. Sparkman: - There is nothing in Stump v. Sparkman (supra) which would permit judicial immunity to be employed when the judge violated clearly established federal or state constitutional, statutory, or decisional rights. On the contrary, the indication was clearly otherwise (at 358, 1105, 340).

At bar, Judiciary Law §90[10] expressly prohibited the publication of any such disciplinary complaints except in the appropriate forum. Additionally, appellant clearly violated the clearly established constitutional right of "due process" by his defamation, without prior notice and opportunity to defend.

f. <u>Actual knowledge of Lack of Jurisdiction</u>:

Pre-trial procedures will clearly reveal that appellant had actual knowledge that he was transgressing his jurisdictional bailiwick.

Appellant's conduct was an arrogant defiance of constitutional and legal values -- <u>he knew it</u> -- and <u>did not care</u> (<u>Schorle v. City</u> (524 F. Supp. 821, 828 [D.C. Ohio]).

Further decisive, is admission in appellant's answer concerning the knowledge of the existence of <u>Judiciary Law</u> §90[10]. As the Court stated in <u>Bradley v. Fisher</u> (supra, 352, 651) "where lack of jurisdiction is known, no excuse will suffice". This statement was approvingly repeated in <u>Stump v. Sparkman</u>, supra, footnote 6 at 356, 1104, 339).

g. Certainly, when law attempts to to provide a remedy for every wrong, particularly intentional ones (<u>Holmes</u>, The Common Law, p. 3), only manifest societal interests warrants denial of relief.

h. <u>Clear absence of all jurisdiction</u>:

Unquestionably, "DLS's" first four causes of action and "CAS's" three causes of action, were non-judicial acts. Appellant has not even, by affidavit, denied his involvement in same.

POINT VIII

THIS COURT LACKS JURISDICTION

Plaintiffs position is that this Court, because of its transactional involvment in this matter, lacks legal, including constitutional, jurisdiction to decide this appeal (Wilcox v. Supreme Council, 210, N.Y. 370, 378; ; Casterella v. Casterella, 65 A.D.2d 614, 409 N.Y.S.2d 548 [2d Dept.]).

The nature of the disqualification is such, that this Court may not make a determination of qualification (In re International Business Machines, 618 F.2d 923, 926 [2d Cir.]; Ellentuck v. Klein, 570 F.2d 414 [2d Cir.]), a matter more fully discussed in a related appeal.

CONCLUSION

EXPEDITIOUSLY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED, WITH SUBSTANTIAL COSTS FOR A MERITLESS APPEAL.

Dated: August 24, 1983

Respectfully submitted,

DORIS L. SASSOWER,
Attorney for respondents.

GEORGE SASSOWER, Esq.
Of Counsel