UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Kenneth E. Bruce, Esq.,

Plaintiff,

CIVIL ACTION

91 CIV. 1114(GLG)

-against-

Guy J. Mangano, et al.,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

The complaint essentially sets forth two related but independent causes of action:

1. An attack on the New York State atttorney disciplinary scheme, where petitioner seeks no relief for himself in this Court. (District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 [1982]).

2. The penal consequences to attorneys suspended or disbarred by the state where, because of overbreadth, petitioner seeks injunctive relief. (City of Houston v. Hill, 482 U.S. 451 [1987]).

The discussion that follows reveals that one issue is "stone-age" legislation, where the state has refused to respond to subsequent opinions of the U.S. Supreme Court, (Supreme Court of Va. v. Consumers Union, 446 U.S. 719 [1980]).

POINT ONE

A. THE SCHEME USED BY AND IN THE STATE OF NEW YORK TO DISCIPLINE ATTORNEYS IS UNCONSTITUTIONAL

Disciplinary proceedings are quasi-criminal in nature (In re Ruffalo, 390 U.S. 544, 551 [1968]).

The statutory power of the Appellate Divisions to discipline attorneys (in addition to those convicted of felonies) was originally set forth in Judiciary Law Section 88 (Consolidated Laws of 1909). That section applied to an attorney

> ...who is guilty of any deceit, malpractice, crime or misdemeanor...

That statutory power was enlarged in 1912 (and became Judiciary Law Section 90) to include an attorney

> who ...is guilty of professional misconduct, ... fraud ...or any conduct prejudicial to the administration of justice...

The Defendant-Justices do not define any of the terms, except for "professional misconduct" which is defined in 22 NYCRR 691.2 as follows:

> Any attorney who fails to conduct himself, either professionally or personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law, and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or any disciplinary rule of the Code of Professional Responsibility, as adopted by the New York State Bar Association, as amended to May 1, 1978, or any canon of the Canons of Professional Ethics, as adopted by such bar association, or any of the special rules concerning court decorum, shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law.

Despite the recognition that attorneys are no longer "second class citizens" (Spevack v. Klein, 385 U.S. 511 [1967]), that the right to practice law is protected by the "privileges and immunities" clause of the United States Constitution (Barnard v. Thorstenn, 489 U.S. 546 [1989]) and clothed with other basic constitutional rights (Schware v. Board of Bar, 353 U.S. 232 [1957]), no statutory changes have been made to either the New York statute or the administrative rule.

The language of New York Judiciary Law Section 90(2) and (3) and of Section 691.2 of the Rules of Defendant Appellate Division-Justices (22 NYCRR 691.2) are overbroad on their face.

Judiciary Law Section 90(2) and (3) states:

> Section 90(2):...It shall be the duty of the appellate division to insert in each order of suspension or removal hereinafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:
>
> a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.
>
> b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto...
>
> If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.
>
> Section 90[3]: The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state." (Emphasis added)

Judiciary Law 90(2) is overbroad in that it violates the 1st Amendment right to freedom of speech. It also results in a suspended or disbarred attorney being subject to criminal

prosecution for the unauthorized practice of law (New York Judiciary Law Sec. 476) for merely advising successor counsel on a matter. Certainly, a disbarred or suspended attorney has post disbarment or post suspension obligations to his client and the successor counsel. At what stage does the 6th Amendment guarantee of the assistance of counsel become subordinate to New York State's alleged right to silence an attorney?

Judiciary Law Section 90(2)(b) also prevents an attorney from giving an opinion in a street corner conversation. At what stage does the 1st Amendment's guarantee of freedom of speech become subordinated to New York State's alleged right to silence an attorney?

This Honorable Court has raised this issue in Baccus v. Karger, 692 F.Supp. 290, [1988]. In Footnote 18, (page 299) this Court wrote:

> We note, in passing, that Plaintiff currently is employed by Emanuel Law Outlines, Inc. in Larchmont, New York. Some might perceive a certain irony in this state of affairs - while New York denies Plaintiff the opportunity to be admitted to the State bar, he helps prepare legal outlines that will be used by students, certain of whom will undoubtedly gain admission to the bar of this state.

How can Baccus, a lawyer not admitted to practice by any New York State Appellate Division, give his opinion as to the law, when an attorney disbarred or suspended by the New York State Appellate Division is not allowed to give his opinion as to the law, even in a casual conversation?

Since the language of Judiciary Law Section 90(2) and (3) and 22 NYCRR 691.2, are "plain" and their meanings are "unambiguous," they are unconstitutional on their face and should be declared void.

In terms of the custom and usage in the state disciplinary scheme, there is no justification for the Defendants

1. refusing to heed Spevack v. Klein (supra), a defiance more flagrantly outrageous, because of the consequences, than that exhibited by the Supreme Court of Virginia (Supreme Court of Va. v. Consumers Union, supra) or

2. retaliating because of the assertion of Fifth Amendment rights (Blackledge v. Perry, 417 U.S. 21 [1974]) or

3. making adjudications based on confidential reports (Pointer v. Texas, 380 U.S. 400 [1965]) or

4. refusing to give Brady v. Maryland, (375 U.S. 83 [1963]) material, or

5. invariably appointing the prosecutor and the referee, both of whom serve at the pleasure of the Defendant-Justices (cf. Gibson v. Berryhill, 411 U.S. 564 [1973]); Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 [1986]).

Given the "death penalty" interests at stake, the state procedures do not comport with due process, (see Santosky v. Kramer, 455 U.S. 745 [1982]); Bell v. Burson, 402 U.S. 535 [1971]); In re Winship, 397 U.S. 358 [1970]).

B. THE AMERICAN BAR ASSOCIATION INVESTIGATION OF THE NEW YORK STATE DISCIPLINARY SCHEME

The American Bar Association ("ABA") has long been concerned about deficiencies in the New York State disciplinary scheme. As far back as 1982, in its "Evaluation of the Lawyer Disciplinary Systems of the State of New York," the ABA wrote:

> New York is the only jurisdiction in the country in which ultimate and exclusive responsibility for the administration of lawyer discipline is not vested in the highest court of the state, the Court of Appeals. The legislature has delegated to the intermediate appellate courts the responsibility for the regulation of the legal profession by Section 90 of the Judiciary Law of New York. Section 90 states that the Supreme Court shall have power and control over lawyers, and that the Appellate Division in each department is authorized to censure, suspend from practice or disbar any lawyer "who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."... In New York the ultimate power to regulate the legal profession is vested in the state legislature....Under New York law, appeals from disciplinary decisions of the Appellate Division to the Court of Appeals are permitted only in limited circumstances.... (Pages 4-5) (Emphasis added and footnotes removed)

The ABA report then focused on what it labeled the first "major deficienc[y]" in the New York lawyer disciplinary scheme: "the lack of a centralized system."

> There is no permanent statewide agency to administer the lawyer discipline system. As a result, complaints against lawyers are processed differently and sanctions for similar misconduct vary significantly among and even within the four departments. (Page 17)
>
> ...Research conducted by the National Center for Professional Responsibility reveals there is a disparity of sanctions imposed for similar conduct. For example, for simple (nonaggravated) failure to file an income tax return the Second Department censures, the Third Department imposes a three month suspension, and the First and Fourth Departments impose a minimum six month suspension.
>
> Diverse treatment is also apparent for similar offenses involving conversion of funds. In those cases where the only charge was conversion, the sanctions ranged from censure to disbarment. Similarly, the sanctions for neglect and incompetence range from censure to disbarment...
>
> Disparities in the system and the perception of those disparities undermine confidence in the disciplinary system...Even though a lawyer may practice before any court, he is potentially governed by different standards. For example, with respect to client fund accounting the First and Second Departments identify specific records which must be maintained for seven

> years, the Third Department does not address the matter, and the Fourth Department specifically requires accountings to a client and general retention of records for five years. ...The ability of a department to reject an amendment to the New York State Bar Association Code of Professional Responsibility creates additional potential for disparate standards.
>
> If there were a structured system to facilitate communication concerning disciplinary enforcement among the courts, professional staff, and volunteers, existing disparities might be lessened. Such a system, however, does not exist, in part because of the confidentiality requirements of Section 90 of the Judiciary Law. (Pages 21-22) (Emphasis added and footnotes removed)

It is clear that not only New York attorneys, but the largest bar association in the United States, have grave concerns about the unconstitutional nature of New York State's disciplinary scheme.

B. PERSONAL CONDUCT IS IMPERMISSIBLY REGULATED

As noted above, 22 NYCRR 691.2 states

> "Any attorney who fails to conduct himself, either professionally or personally, in conformity with the standards of conduct imposed ... by the Code of Professional Responsibility ... or any canon of the Canons of Professional Ethics, ... shall be deemed to be guilty of professional misconduct within the meaning of subdivision (2) of section 90 of the Judiciary Law." [emphasis added]

Canons are defined in the Preliminary Statement to the Lawyer's Code of Professional Responsibility as follows:

> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession.

How can any reasonable person believe that an attorney can be prosecuted for violating an "axiomatic norm?"

This judicial rule suffers from vagueness and overbreadth and should be declared void.

D. PENAL ENFORCEMENT STANDARDS SUFFER FROM OVERBREADTH AND SHOULD BE ENJOINED

In City of Houston v. Hill (supra), an injunction was issued invalidating a legislative enactment for overbreadth. The action was brought by a petitioner who had previously been vindicated for its alleged violation, and who could not, therefore, be prosecuted because of double jeopardy. That petitioner had standing for the purpose of alleging overbreadth, and an injunction was issued, even though petitioner could not be prosecuted again.

In the case before this Court, as an example, a suspended or disbarred attorney can be actually prosecuted and convicted,under New York Judiciary Law Section 476-a, even though he is legally practicing law in this federal court, which is a court of record (28 U.S.C. 132[a]). Furthermore, he can be prosecuted for saying, in a common conversation, something pregnant with an "opinion" on the law, as might be construed by the State Attorney General, a bar association, a district attorney, or anyone else.

The statutory procedures enacted by the State (e.g. Judiciary Law 476-a et. seq., 485) were enacted before Broadrick v. Oklahoma, 413 U.S. 601, [1973]) and have never thereafter been modified to comport with the mandate of the U.S. Supreme Court (cf. Supreme Court of Va. v. Consumers Union, supra).

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be granted in its entirety.

Respectfully submitted,
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Dated: White Plains, New York
March 15, 1991

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To:

Department of Law
West Regional Office

Attorney(s) for

MAR 15 1991

Service of a copy of the within *is hereby admitted.*

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Attorney(s) for

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Dated:

ROBINOWITZ COHLAN & DUBOW
Attorneys for

199 MAIN STREET
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To:

Attorney(s) for