No. 91-401

In the

Supreme Court of the United States

October Term, 1991

ELIZABETH HOLTZMAN,
Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Accepting that attorneys have a constitutionally protected right to criticize judges and courts, may a state nonetheless privately reprimand an attorney for making highly publicized, demonstrably false specific allegations of misconduct against a named judge, based on that judge's conduct in a concluded proceeding, where the disciplining authority has found that the attorney's conduct in making such accusations was unreasonable and irresponsible and could only be considered protected speech if held protected by this Court's "constitutional malice" standard, as articulated in St. Amant v. Thompson, 390 U.S. 727 (1968)?

2) Is DR 1-102(A)(6), presently DR 1-102(A)(7), of New York's Code of Professional Responsibility which states "A lawyer shall not... [e]ngage in any other conduct that adversely reflects on [her] fitness to practice law", unconstitutionally vague or overbroad as applied to attorney speech?

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STATEMENT OF CASE

On December 1, 1987 Elizabeth Holtzman, then the District Attorney of Kings County, New York, released a letter addressed to Judge Kathryn McDonald, Chair of the Task Force on Women in the Courts, to the press. The letter accused Judge Irving Levine of having made a victim demonstrate the position she was in when raped. Petitioner claimed that the demonstration took place during a trial (People v. Roe) before Judge Levine in the presence of the assistant district attorney, defense counsel, court reporter and court officer. Petitioner further claimed that the victim had been humiliated, demeaned, degraded and exposed to extreme psychological pain. (Pet. App. D).

Prior to publicizing these serious charges District Attorney Holtzman had not reviewed the minutes of the trial, nor had she met with or spoken to Gary Farrell, the inexperienced assistant district attorney who tried the misdemeanor case (Tr. 1605), despite questioning his judgment in not objecting to the demonstration. (Tr. 79-80). Petitioner made no effort to contact any of the eyewitnesses nor the complaining witness, despite the fact that her letter described this woman's reactions to the alleged demonstration. (Tr. 88-89).

Petitioner released her letter in the face of strenuous and unanimous opposition from her senior staff, who repeatedly advised her to

at the very least wait for the trial transcript. (Tr. 69-70).

In making and publicizing the accusations Petitioner relied on intraoffice memoranda prepared by Farrell six weeks after the trial ended in an acquittal, and on a brief affirmation submitted by Farrell on a motion to unseal the People v. Roe minutes. This order was signed the day before the letter was released. On the same day, Barbara Newman, Chief of the Sex Crimes Unit, executed a rush order to expedite the minutes (Tr. 334-36, 340) and advised Petitioner in a note that Farrell was no longer sure of a detail but "the minutes will clarify this." (Tr. 461).

On the day of publication, December 1, 1987, Chief Assistant District Attorney William Donnino learned that a "press alert", an advisory to the press that a major piece of news would be forthcoming, had been issued. (Tr. 77). This information upset Donnino who had previously urged Petitioner not to put words in the complaining witness' mouth without first speaking with her. (Tr. 53). On December 1, Petitioner telephoned her office from her car phone and spoke with Newman who told her that she, Donnino and Barbara Underwood, Chief of Appeals and Counsel to the District Attorney, all opposed releasing the letter without the trial transcript. (Tr. 344-45). When Petitioner returned to

the office she met with Donnino and Underwood. After telling Petitioner that it would be legal and ethical to publish the letter (Tr. 68), Underwood nonetheless insisted that the Petitioner should wait for the minutes. (Tr. 513).

Underwood "thought the transcript might well show a justification for the demonstration and make it either inappropriate to make the complaint at all or not make it in the form it was being made." (Tr. 513). Underwood described a series of hypotheticals that "might mitigate or exculpate the Judge's conduct in this particular case and therefore constitute reasons for not publishing the complaint." (Tr. 71). Petitioner, despite the fact

that she had never tried a criminal case (Tr. 1914), responded that no such justification could exist. (Tr. 513-16).

When the Roe minutes were obtained, they unequivocally refuted Petitioner's allegations by, inter alia, establishing that it was the defense counsel who sought a demonstration and not the Judge. In addition, the transcript revealed that rather than the judge compelling any demonstration, he said "Hold it", immediately following counsel's request to the complaining witness. (Roe Tr. 62-65).

The Appellate Division of the Supreme Court of the State of New York, Second Department, found that Petitioner's accusations were false.

(Pet. App. B). The New York State Court of Appeals held that finding to be supported by the record. In re Holtzman, 78 N.Y.2d 184, 190 (1991).

The New York State Court of Appeals, in a 6-0 decision, rejected Petitioner's argument that her conduct was not proscribed by the Code of Professional Responsibility, and held that her public dissemination of a specific accusation of improper judicial conduct under the circumstances described could be held to reflect adversely on her fitness to practice law. Id. at 191.

Reasons to Deny the Writ

Petitioner has been issued a private letter of reprimand for irresponsible conduct, a component of which

involved speech. The decision below concentrated on Petitioner's reckless, single-minded rush to publicize her fact-specific unsupported accusations, without waiting for readily available evidence to validate or rebut her serious charges of judicial misconduct.

Petitioner, despite her efforts to recast her conduct, was not disciplined for expressing mere criticism or opinion about a judge or the judicial system, and nothing in the opinion below can be interpreted as an attempt to insulate judges from such protected expressions.

This Court, in Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991), recognized that the protection to be afforded attorney speech must be determined by taking into account the

state interest in regulating a specialized profession, and the interest or interests served by allowing such particular regulation of attorney speech. Id. at 2744-45. Petitioner's argument for protection equal to that enjoyed by press and public in defamation cases fails to recognize that different societal interests are involved, In re Terry, 394 N.E.2d 94, 95 (Ind. 1979), cert. denied, 444 U.S. 1077 (1980); In re Graham, 453 N.W.2d 313, 322 (Minn.) cert. denied, 111 S. Ct. 67 (1990); In re Westfall, 808 S.W.2d 829, 836-37 (Mo. 1991), petition for cert. filed, 60 U.S.L.W. _____ (U.S. Sept. 9, 1991) (No. 91-_____), and that the state has a compelling interest in maintaining the public's confidence in

its system of justice, as well as in assuring that attorneys act responsibly. The adverse impact of irresponsible, false accusations on public confidence in the judicial system, and what Petitioner's conduct as demonstrated in the instant matter reveals about her fitness to practice law, justifies the discipline imposed on her.

Petitioner's argument that DR 1-102(A)(6) is vague or overbroad ignores the fact that codes of professional conduct need not be drawn with the same specificity required for statutes applicable to non-lawyers. In comparing her conduct with that of Gentile, Petitioner disregards that while Gentile was misled by an illusory safe harbor, Gentile, 111 S.

Ct. at 2731, Petitioner willfully ignored advice that releasing her accusations without the minutes would be improper.

It is submitted that this case would have had the same outcome in any of the eighteen other states whose decisions Petitioner cites, and that this Court's decision in Gentile creates no conflict with the decision below.

ARGUMENT

POINT I

NEW YORK CORRECTLY APPLIED AN OBJECTIVE STANDARD IN DISCIPLINING THE PETITIONER FOR CONDUCT WHICH VIOLATED EVERY STANDARD EXCEPT "CONSTITUTIONAL MALICE"

As the Court of Appeals made clear, Petitioner was not reprimanded

for expressions of generalized criticism or opinion about a judge or the courts, but rather for releasing to the media a false accusation of specific wrongdoing aimed at a named judge, without any support other than the intraoffice memoranda of a newly admitted trial assistant, and without waiting for the already ordered minutes which would have shown her allegations to be false. Holtzman, 78 N.Y.2d at 191. No decision by the high court of any state has been found which suggests that the conduct evidenced here is insufficient as a basis for disciplining an attorney, nor does any decision of this Court hold that speech by an attorney, under the circumstances presented in this

matter, enjoys constitutional protection.

Here, New York has protected a compelling state interest in regulating the legal profession; a right recognized by this Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975),:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions....The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice.

Id. at 792 (citations omitted); see also, Westfall, 808 S.W.2d at 836;

Graham, 453 N.W.2d at 322 ("This court certifies attorneys for practice to protect the public and the administration of justice").

Integral thereto is the state's interest in protecting the legal system from unwarranted attacks by attorneys upon the integrity of its most visual component, its judges. The New York State Court of Appeals plainly recognized this compelling state interest of maintaining the integrity of its courts and the public confidence therein. Holtzman, 78 N.Y.2d at 192-93. While this interest is not as immediate or obvious as the interest recognized in Gentile, 111 S. Ct. at 2745 (state interest in preserving the fundamental right to a fair trial), it is no less real and

it is deserving of recognition.

In New York, the Code of Professional Responsibility encourages attorneys to engage in justified criticism directed toward improvement of the legal system. Code of Professional Responsibility EC 8-6 (Appendix to Jud. Law McKinney 1981 & Supp. 1991). However, for a state to permit its system of justice to be unnecessarily and irresponsibly undermined by false accusations of judicial misconduct is to endanger the authority of the courts and to invite instances of self-help on the part of the public. In his dissent in Matter of Fuchsberg, 426 N.Y.S.2d 639 (Ct. on the Jud. 1978), then Justice Simons (presently a member of the Court of Appeals), succinctly stated the

interest involved here:

> ...the impartiality of its judges and the integrity of the court's decisions. The public interest requires that neither be compromised in appearance or in fact for the public must respect the courts and the Judges of the court must deserve the respect of the public. That is the bedrock upon which our system of law is built for the courts have little else to enforce compliance with their judgments other than the acceptability of them borne of public respect. The public need not always be convinced of the correctness of the court's decisions but they must always believe in the integrity of the decision-making process.

Id. at 666-67.

Moreover, in protecting the aforementioned interest, the Court of

Appeals acted in as narrow a fashion as possible by measuring Petitioner's conduct against the standard of a reasonable attorney. Holtzman, 78 N.Y.2d at 192-93.

* * *

Although the state decisions cited by Petitioner have utilized differing analyses, none has applied to attorney misconduct proceedings the subjective standard enunciated in St. Amant v. Thompson, 390 U.S. 727 (1968), and only two states appear to have applied defamation standards. See Ramirez v. State Bar, 28 Cal.3d 402, 411, 619 P.2d 399, 404, 169 Cal. Rptr. 206, 211 (1980); Committee on Legal Ethics v. Douglas, 270 S.E.2d 325, 332 (W.Va. 1988), cert. denied,

110 S. Ct. 406 (1989); Committee on Legal Ethics v. Farber, 1991 W.Va. LEXIS 70 (June 27, 1991). Thus, Petitioner's contention that decisions of nineteen states are in disarray with respect to attorney speech about the judiciary is misleading.

The Supreme Court of California, in Ramirez, suspended the attorney despite his continued protestations of his belief in the truth of his charges against the judiciary. The court held that the demeaning statements had been made with a reckless disregard of the truth, citing Garrison. Id. at 411, 619 P.2d at 404, 169 Cal. Rptr. at 211. Comparatively, in the instant case Petitioner's persistent claims as to the truth of her accusations were

rejected as being disproved by the record and recklessly made. Holtzman, 78 N.Y.2d at 190. After measuring her conduct by the narrow test of what reasonable attorneys would have done in similar circumstances, and noting what three experienced attorneys actually advised her to do, the court held her conduct reckless and irresponsible and deserving of discipline. Id. at 192-93.

In West Virginia, the Supreme Court of Appeals, in Douglas, remanded the case for further development of the facts after stating (incorrectly, as is now clear), that New York had impliedly adopted a defamation standard in attorney misconduct cases, citing Baker. Douglas, 370 S.E.2d at

330 (citing Baker v. Monroe County Bar Ass'n, 34 A.D.2d 229, 311 N.Y.S.2d 70 (4th Dep't 1970), aff'd, 28 N.Y.2d 977, 272 N.E.2d 337, 323 N.Y.S.2d 837, cert. denied, 404 U.S. 915 [1971]). The court indicated its willingness to apply Garrison to these matters. Id. at 329.

Thereafter, in Farber, the West Virginia court publicly disciplined an attorney for his accusations despite the attorney's claim of a personal belief in the accuracy of the statements. Farber, 1991 W.Va. LEXIS at 31.

The Supreme Court of Washington, in In re Kaiser, 111 Wash.2d 275, 759 P.2d 392 (1988), interpreted a prior decision of that

court, In re Donohoe, 90 Wash.2d 173, 580 P.2d 1093 (Wash. 1978), as having applied a subjective standard to attorney speech. Kaiser, 111 Wash.2d at 285, 759 P.2d at 398. However, the Kaiser court noted that Donohoe had actual knowledge of the falsity of her statements and, like the New York court in Baker, found no constitutional protection. Id. Both courts disciplined the attorneys in question.

Nothing in the aforementioned cases invites a conclusion that Petitioner's conduct would have enjoyed greater protection in these other jurisdictions. New York has long recognized the protection accorded attorney criticism and opinion about the judiciary. As the court made clear in Justices of the Appellate

Division v. Erdmann, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973), even instances of vulgar disrespect by lawyers toward the judiciary, however ridiculous and patently untrue, are not subject to discipline. Id. at 559, 301 N.E.2d at 426, 347 N.Y.S.2d at 441.

Petitioner's publicized specific accusations were outside the scope of constitutionally protected criticism and opinion and adversely impacted on the compelling state interests of maintaining the integrity of its courts as well as protecting the public by demanding responsible conduct by attorneys. The court recognized that the harm here affected a different societal interest than that addressed in defamation actions

and the court correctly measured Petitioner's behavior against an objective standard of professional conduct.

POINT II

AS ENACTED AND AS APPLIED BY THE COURT OF APPEALS TO PETITIONER'S CONDUCT DR 1-102(A)(6) IS NEITHER VOID FOR VAGUENESS NOR OVERBROAD

The Code of Professional Responsibility is a code of professional conduct, not a penal or civil statutory scheme, and broader standards are often necessary. In re Charges of Professional Misconduct Against N.P., 361 N.W.2d 386 (Minn.), appeal dismissed, 474 U.S. 976 (1985). In 1856 this Court recognized that "it is difficult, if not impossible, to enumerate and define, with

legal precision, every offense for which an attorney can be removed". Ex parte Secombe, 60 U.S. 9, 14 (1856). Aside from being written by lawyers for lawyers, "more specific guidance is provided by caselaw, applicable court rules, and the lore of the profession". In re Snyder, 472 U.S. 634, 645 (1985).

The New York State Court of Appeals recently held in Niesig v. Team 1, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), that:

> [t]he disciplinary rules have a different provenance and purpose...The Code of Professional Responsibility is essentially the legal profession's document of self governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline.

Id. at 369, 558 N.E.2d at 1032, 559 N.Y.S.2d at 495.

The "provenance and purpose" referred to in Niesig is consistent with this Court's reasoning and holding in Parker v. Levy, 417 U.S. 733 (1974), where the appellee argued, inter alia, that Section 133 of the Uniform Code of Military Justice, which provides punishment for "conduct unbecoming an officer and a gentleman", failed to give him clear notice that his "intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful" remarks were proscribed. Id. at 739. This Court, nowever, held that due to the different particular society served by the Uniform Code of Military Justice, Section 133 was

sufficient to give appellee notice. Id.

Petitioner claims that she was "in the dark as to whether" her conduct was proscribed (Pet. at 27); yet the record establishes that her senior staff unanimously urged her not to release the letter without checking the expedited transcript. Thus, it was apparent that the attorneys upon whom Petitioner relied knew the planned release to be improper conduct for an attorney.

In Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991), this Court found Nevada Disciplinary Rule 177 vague due to the inclusion of an illusory safe harbor provision

(177[3]), and Gentile's conscious effort to comply therewith. Id. at 2731. In the instant matter, no such safe harbor exists to confuse the general mandate of DR 1-102(A)(6). In further contrast to Gentile, Petitioner rejected outright the considered advice of her senior staff in order to meet the demand created by her previously released press alert.

As applied, DR 1-102(A)(6) encompasses Petitioner's conduct and, when taken in context with all the ethical strictures contained in and referenced to the Code of Professional Responsibility, the rule certainly put Petitioner on notice that her conduct was violative.

In her overbroad challenge Petitioner has re-shaped her conduct

in an attempt to convince this Court that the Court of Appeals encroached upon her right of speech. However, the court pointedly indicated that Petitioner's actions, for which she earned her private reprimand were "not general criticism but rather release to the media of a false allegation of specific wrongdoing, made without any support other than the interoffice memoranda of a newly admitted trial assistant, aimed at a named judge". Holtzman, 78 N.Y.2d at 191.

Clearly Petitioner's conduct is a far cry from general criticism or opinion of the judiciary, as she would have this Court believe. Thus, as the Court of Appeals applied DR 1-102 (A)(6) to Petitioner's conduct in

connection with her reckless release of her accusations, the rule did not "sweep" into any constitutionally protected area.

CONCLUSION

Petitioner's conduct violated not only the Lawyer's Code of Professional Responsibility but also commonly accepted standards of decency and fairness. The court below properly upheld the private Letter of Reprimand issued to Petitioner. For a court to do otherwise, and to condone or even permit the recklessly irresponsible behavior exhibited by Petitioner, would be to render the Code of Professional Responsibility meaningless.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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