

COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of :
The Application of ELIZABETH HOLTZMAN, :
Petitioner-Appellant, :
To Vacate a Letter of Reprimand :
Pursuant to Section 691.6(a) of :
the Rules of the Appellate Division, :
Second Department, :
- against - :
GRIEVANCE COMMITTEE FOR THE :
TENTH JUDICIAL DISTRICT, :
Respondent-Respondent. :

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MEMORANDUM OF APPELLANT ELIZABETH HOLZTMAN
IN SUPPORT OF HER MOTION FOR ACCESS TO THE
ENTIRE RECORD BELOW

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Preliminary Statement

This memorandum of law is submitted on behalf of appellant Elizabeth Holtzman in support of her motion for an order, pursuant to Section 500.5 of the Rules of this Court, directing: (1) the Clerk of the Appellate Division, Second Department, and respondent Grievance Committee for the Tenth Judicial District to transmit to this Court the entire record below, including, but not limited to the September 1989 report of a subcommittee to the Committee (the "Subcommittee Report");

(2) the Committee transmit to this Court the June 1988 memorandum prepared by Frank A. Finnerty, Jr., the Committee's counsel (the "Finnerty Memorandum"); (3) that the Finnerty Memorandum be part of the record on appeal in this Court; and (4) the Clerk of this Court to make the entire record on appeal, including the Finnerty Memorandum and the Subcommittee Report, available to appellant and her counsel.

It will be demonstrated herein -- and in the accompanying affidavit of Norman Redlich, Esq., sworn to December 7, 1990 ("Redlich Aff.") -- that:

- appellant should be granted access to the Subcommittee Report and the Finnerty Memorandum, which were important parts of the record below (see Point I, infra); and
- contrary to the Committee's position, the confidentiality provisions of Section 90(10) of the Judiciary Law cannot be invoked by the Committee to deny appellant access to the record on appeal in this Court (see Point II, infra).

Accordingly, appellant's motion should be granted in all respects.

Facts

A. The nature of this appeal

This is an appeal from a Decision and Order of the Appellate Division, Second Department, denying, in part, appellant's petition to vacate a Letter of Reprimand issued by the respondent Committee. This appeal is before this Court because it raises substantial issues under the free speech and due process provisions of the State and Federal constitutions. See Redlich Aff., Ex. J. The Committee's motion to dismiss this appeal was denied by this Court on October 23, 1990.

B. The Committee's Letter of Admonition

Prior to June 1988, Committee counsel conducted an investigation of a complaint that appellant engaged in professional misconduct in connection with her public criticism of Judge Irving M. Levine* for having directed a rape victim, during the course of a trial, to get down on her hands and knees and demonstrate the position that she had been in when she was raped. Redlich Aff., Ex. F at 1-2.

In June 1988, Finnerty prepared his Memorandum with respect to his investigation and submitted it to the Committee.

* Based on Judge Levine's admissions that (1) at the request of a political ally, he promised to misuse his office, and (2) he lied about the matter to federal law enforcement officials, this Court has removed Judge Levine from the bench. Matter of Levine, 74 N.Y.2d 294 (1989).

Id. Thereafter, on June 17, 1988, the Committee issued a Letter of Admonition to appellant. Redlich Aff., Ex. C. That letter made certain allegations of fact relating to her criticism of Judge Levine, and went on to assert that she had violated DR 8-102(B), DR 1-102(A)(5) and (6), and EC 8-6. As the Committee did not hold a hearing before issuing the Letter of Admonition, it appears that it was based, at least in part, on the Finnerty Memorandum.

C. The Subcommittee hearing

On July 15, 1988, appellant requested a hearing on the Letter of Admonition pursuant to Section 691.6(a) of the Rules of the Appellate Division, Second Department. Thereafter, the Committee issued a Statement of Charges that was essentially repetitive of the Letter of Admonition. Like the Letter of Admonition, the Statement of Charges was apparently based on the Finnerty Memorandum.

Appellant answered the Statement of Charges, denying the material allegations of fact set forth in its three charges. She also asserted defenses, including that her public statements about Judge Levine were protected by the free speech provisions of the United States and New York State Constitutions.

During the period December 7, 1988, to September 13, 1989, a three-member Subcommittee of the Grievance Committee conducted a hearing on the issues raised by the Statement of

Charges and appellant's Answer. The Subcommittee heard the testimony of 8 witnesses and received 54 exhibits in evidence. Those exhibits did not include the Finnerty Memorandum, which the members of the Subcommittee, as members of the Committee, had previously received.

Consistent with Section 691.4(h) of the rules of the Appellate Division, Second Department, the Subcommittee, after the hearing, was required to "make findings of fact and report those findings to the Committee."

D. The Letter of Reprimand

Following the Subcommittee hearing, appellant requested the opportunity to submit papers to and appear before the full Committee before it acted. That request was denied.

In September 1989, the Subcommittee delivered its Report to the full Committee. According to Mr. Finnerty, that report "provided the full Committee with a thorough explanation of the evidence" and "[t]he full Committee utilized [the report] in its deliberations before issuing its final determination." Redlich Aff., Ex. F at 2-3.

On October 19, 1989, the Committee issued the Letter of Reprimand. Redlich Aff., Ex. B. It states, among other things, that the Committee received the Subcommittee Report and sustained two of the three charges. The Letter of Reprimand does not assert that any of appellant's statements about Judge

Levine was false in any respect. Indeed, it contains no supporting findings of fact.

Notwithstanding appellant's right to petition the Appellate Division to vacate the Letter of Reprimand on "the entire record" (Rules of the Appellate Division, Second Department, § 691.6), the Committee denied her request for a copy of the Subcommittee Report.

E. The Appellate Division proceedings

On November 17, 1989, appellant filed with the Appellate Division a petition seeking an order vacating the Letter of Reprimand. The Petition asserted that the issuance of that letter was contrary to the free speech and due process provisions of the United States and the New York State Constitutions. Also on that day, appellant moved the Appellate Division for an order granting her access to the entire record of the proceedings before the Committee and Subcommittee. That motion was denied without opinion.

By Decision and Order dated July 17, 1990, the Appellate Division, without findings of fact or an opinion explaining its reasoning, upheld one of the charges referred to in the Letter of Reprimand. Redlich Aff., Ex. A. That is the subject of this appeal.

F. Prior proceedings in this Court

On August 16, 1990, appellant filed her Notice of Appeal to this Court from the Decision and Order. After initially requesting that the matter be treated on a confidential basis, on September 10, appellant withdrew that request. Redlich Aff., Ex. K.

Respondent's motion to dismiss this appeal was denied by this Court on October 23.

Thereafter, pursuant to Section 500.5(a) of the Rules of this Court, appellant sought to supply the Court with the record material. Because the Committee and the Appellate Division denied appellant access to the Subcommittee Report, which was part of the record material, appellant proceeded under subparagraph (1) of Section 500.5(a), and subpoenaed "to this court, from the clerk of the court of original instance . . . the original file." It required the Clerk to produce to the Court of Appeals the "original file of the proceedings in Matter of Elizabeth Holtzman v. Grievance Committee for the Tenth Judicial District, Motion Nos. 570, 571 Atty. . . ., and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises," on or before November 12, 1990. Redlich Aff., Ex. D.

By letter of November 2, 1990, appellant was advised that the appeal had been placed on the Court's March 27, 1991

calendar, and that appellant's brief was due on December 24, 1990.

The Clerk of the Appellate Division did not comply with appellant's subpoena. Nor did he move to quash it. Rather, he requested and obtained an adjournment of the subpoena from the Office of the Clerk of the Court. Redlich Aff. ¶¶ 8-9. At that point, appellant's counsel explained that because appellant did not have a copy of the Subcommittee Report and possibly other parts of the record below, and because her brief was due on December 24, 1990 and she needed those materials to prepare her brief, prompt compliance with the subpoena was required. The Clerk's Office suggested that appellant submit the relevant background materials to the Court. She did so on November 14. Redlich Aff. ¶¶ 9-10.

On November 21, Mr. Finnerty sent a letter to the Court. Redlich Aff., Ex. E. In that letter, he acknowledged that he had submitted the Finnerty Memorandum to the Committee in June 1988, and that the Subcommittee had submitted its Report to the Committee in September 1989. Notwithstanding the fact that the Committee that disciplined appellant received and considered both the Finnerty Memorandum and the Subcommittee Report -- and the further fact that the Subcommittee Report was part of the record on which the Appellate Division entered the Decision and Order that is the subject of this appeal -- Mr. Finnerty

took the position that appellant should continue to be denied access to those documents.

By letter dated November 27, 1990 (Redlich Aff., Ex. G), appellant's counsel answered Mr. Finnerty's letter, explaining why appellant was entitled to the Finnerty Memorandum and Subcommittee Report, and needed them in order effectively to prosecute her appeal in this Court. Mr. Finnerty replied to that letter on November 29. Redlich Aff., Ex. H.

On December 5, the Clerk of this Court sent a letter to counsel, acknowledging receipt of counsels' letters, and stating that the question of access to the requested documents must be resolved by formal motion to this Court.

Argument

POINT I

APPELLANT SHOULD BE GRANTED ACCESS TO THE SUBCOMMITTEE REPORT AND THE FINNERTY MEMORANDUM, WHICH WERE IMPORTANT PARTS OF THE THE RECORD BELOW.

- A. The Subcommittee Report is central to appellant's free speech arguments.

As the only report by anyone as to the testimony and exhibits introduced into evidence at the Subcommittee hearing, the Subcommittee Report appears to have been the single most critical part of the record before the Committee which issued the Letter of Reprimand. Mr. Finnerty himself asserts that it

is a thorough explanation of the evidence, and that it was discussed, debated, analyzed and utilized by the full Committee in issuing the Letter of Reprimand. Redlich Aff., Ex. F at 2-3. And the Subcommittee Report was part of the entire record considered by the Appellate Division before rendering its Decision and Order. Redlich Aff., Ex. E at 2; see Redlich Aff., Ex. H at 1-2.

A central point on this appeal is whether an attorney can be disciplined for making an accusation against a judge, which was not proven and found to have been knowingly or recklessly false, or even false. See Redlich Aff., Ex. J, Points I-II. Because the Letter of Reprimand and the Decision and Order do not themselves contain any detailed findings of fact, the Subcommittee Report remains the only document that could contain any findings of fact upon which the Reprimand could be based. Access to the Subcommittee's Report is essential to an effective presentation to this Court of appellant's argument that discipline is unconstitutional on the evidence and findings in this case.

B. The Finnerty Memorandum and the Subcommittee Report are central to appellant's due process arguments.

This appeal raises substantial state and federal constitutional due process issues, including: the Committee's dual role of adjudicating appellant's guilt after having previously decided that she was guilty; Committee counsel's treble role as

investigator, advisor to the Committee, and prosecutor of the Committee's charges before the Subcommittee; the denial of appellant's request to present argument directly to the full Committee before it disciplined her; and the denial by the Appellate Division of appellant's motion for access to the entire record. See Redlich Aff., Ex. J, Point IV. The Finnerty Memorandum and the Subcommittee Report are central to those interrelated issues.

Thus, the Finnerty Memorandum was generated by Committee counsel in his role as investigator. He furnished it to the Committee in his role as advisor. And the Committee admonished appellant and charged her with professional misconduct after having considered it. Redlich Aff., Ex. F at 1-2. The same Committee that had previously disciplined and charged appellant based on the Finnerty Memorandum adjudicated those charges and issued the Letter of Reprimand. Because appellant never had access to the Finnerty Memorandum, she did not have a meaningful opportunity to respond to it during the course of the Subcommittee hearing. And having been denied a chance to appear before the full Committee, she never had an opportunity to be heard by the body that disciplined her on the subject of the Finnerty Memorandum, the Subcommittee Report, or anything else.

Mr. Finnerty's contentions that his memorandum "has become remote to the current situation" and that "[i]ts value to and relevance to Appellant is at best historical" (Redlich Aff.,

Ex. F at 2) hinge on the assumption that the Committee which received and considered the Memorandum in issuing the Letter of Admonition and, apparently, the Statement of Charges, was in no way influenced by the Memorandum when the Committee subsequently issued the Letter of Reprimand. Depending upon the contents of the Memorandum, any such assumption may well be unrealistic.

In order effectively to present her due process arguments to this Court, appellant needs to put the contents of the Finnerty Memorandum and the Subcommittee Report in context and explain how she was prejudiced by having been denied access to them below. Appellant cannot do so without access to them at this time.

C. The Finnerty Memorandum is no longer protected from disclosure by the work product rule.

While the Finnerty Memorandum, as described by Mr. Finnerty, may well have been attorney work product protected from disclosure under CPLR 3101(c) when it was created, because Mr. Finnerty furnished that memorandum to the Committee, which then admonished appellant and issued the Statement of Charges against her based on it -- and because the Memorandum was part of the entire record before the Committee when it issued the

Letter of Reprimand* -- any work product protection it may once have enjoyed has long since been mooted.

POINT II

THE CONFIDENTIALITY PROVISIONS OF THE JUDICIARY LAW ARE NO LONGER APPLICABLE.

Contrary to Mr. Finnerty's argument (Redlich Aff., Ex. F at 3-4), neither the confidentiality provisions of Section 90(10) of the Judiciary Law, nor the Appellate Division's rules implementing those provisions, renders the Subcommittee Report or his memorandum unavailable to appellant at this stage of this matter. Insofar as appellant is aware, those provisions have never been interpreted to deny an attorney access to the full record on an appeal of a disciplinary matter.

The purpose of the confidentiality provisions of Section 90(10) is to protect attorneys who are subject to grievance committee investigations and proceedings -- not grievance committees. Matter of Capoccia, 59 N.Y.2d 549, 554 (1983) ("The provisions for confidentiality set forth in subdivision 10 of section 90, even if in principle considered relevant to the public hearing questions, were enacted primarily, if not only, for the benefit of the attorney under investigation."); see Matter

* Mr. Finnerty's November 29, 1990 letter to this Court states that his Memorandum was not, in fact, among the record materials that the Committee transmitted to the Appellate Division.

of New York News (Cohn), 113 A.D.2d 92 (1st Dep't 1985) (ordering the disclosure of all papers, records and documents in the disciplinary proceeding); Pasik v. State Board of Law Examiners, 114 Misc. 2d 397 (Sup. Ct. N.Y. Co. 1982). Thus, an attorney may waive the confidentiality provided for in Section 90(10). Indeed, he may do so by implication from his conduct. Matter of New York News (Cohn), supra.

In this case, appellant has made it clear that she is not seeking to preserve her right to confidentiality under Section 90(10). See Redlich Aff., Ex. F. Accordingly, the confidentiality provisions of that section are inapplicable to her request for access to the Subcommittee Report and the Finnerty Memorandum.

* * *

In sum, the Subcommittee Report and the Finnerty Memorandum were important parts of the record below. Both documents are necessary parts of the record on appeal in this Court. And appellant requires access to those documents in order effectively to present her constitutional arguments to this Court. Indeed, one of appellant's points on this appeal is that the refusals of the Committee and Appellate Division to provide her with access to such documents deprived her of her constitutional rights to due process of law. This Court cannot assess the significance of appellant's constitutional claims without knowledge

of the contents of those documents and an appreciation of their importance in the context of the rest of the record.

Accordingly, it is respectfully submitted that appellant's motion for access to the entire record before the Appellate Division and the Committee below should be granted in all respects.

Dated: New York, New York
December 7, 1990

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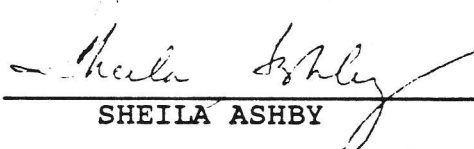
Norman Redlich
- Of Counsel -

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

SHEILA ASHBY, being duly sworn, deposes and says:

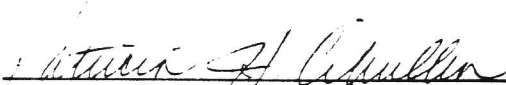
1. I am not a party to this action.

2. On December 7, 1990, I caused to be served by hand a copy of the Notice of Motion and Affidavit of Norman Redlich and a Memorandum of Law of Appellant Elizabeth Holtzman in Support of Her Motion for Access to the Entire Record on Frank A. Finnerty, Jr., Esq., Chief Counsel to the Grievance Committee for the Tenth Judicial District at 900 Ellison Avenue, Westbury, New York 11590.



SHEILA ASHBY

Sworn to before me this
7th day of December, 1990.



Notary Public

PATRICIA H. CIBULKA
Notary Public, State of New York
No. 41-4647806
Certificate Filed in New York County
Commission Expires November 30, 18 91