

Notice of Motion for Access to Entire Record and Supporting
Affidavit of Norman Redlich, Esq. (Exhibits Omitted)

COURT OF APPEALS
STATE OF NEW YORK

(Ct. App. December 7, 1990)
[pp. A275-A285]

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In the Matter of	:	
The Application of ELIZABETH HOLTZMAN,	:	
Petitioner-Appellant,	:	
To Vacate a Letter of Reprimand	:	<u>NOTICE OF MOTION</u>
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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PLEASE TAKE NOTICE that upon the annexed affidavit of Norman Redlich, Esq., sworn to December 7, 1990, and all of the prior proceedings herein, petitioner-appellant Elizabeth Holtzman will move this Court, on December 17, 1990, 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 (the "Committee") 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 to transmit to this Court the June 1988 memorandum prepared by its counsel, Frank A. Finnerty, Jr., Esq. (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 Subcommittee Report and the Finnerty Memorandum available to appellant and her counsel.

Dated: New York, New York
December 7, 1990

WACHTELL, LIPTON, ROSEN & KATZ
Robert B. Mazur
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299 Park Avenue
New York, New York 10171
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Attorneys for Appellant
Elizabeth Holtzman

Norman Redlich
- Of Counsel -

TO: Frank A. Finnerty, Jr., Esq.
Chief Counsel
Grievance Committee for the 10th
Judicial District
900 Ellison Avenue
Westbury, N.Y. 11590

Attorney for Respondent

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 : AFFIDAVIT OF

Pursuant to Section 691.6(a) of : NORMAN REDLICH

the Rules of the Appellate Division, :

Second Department, :

- against - :

GRIEVANCE COMMITTEE FOR THE :

TENTH JUDICIAL DISTRICT, :

Respondent-Respondent. :

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STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

NORMAN REDLICH, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and of counsel to the firm of Wachtell, Lipton, Rosen & Katz, attorneys for appellant Elizabeth Holtzman. I am fully familiar with the facts set forth herein. I make this affidavit in support of appellant's 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 (the "Committee") 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 to transmit to this Court the June 1988 memorandum prepared by its counsel, Frank A. Finnerty, Jr., Esq. (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.

2. This is an appeal from a Decision and Order of the Appellate Division, Second Department (Exhibit A hereto), which denied, in part, appellant's petition to vacate a Letter of Reprimand (Exhibit B hereto) issued by respondent Grievance Committee for the Tenth Judicial District (the "Committee").

3. The Reprimand arises out of appellant's public criticism of a judge for having directed a rape victim witness, during the course of a trial, to get down on her hands and knees and demonstrate the position that she was in when she was raped. It was issued after the 17-member Committee received the Finnerty Memorandum, and then sent a Letter of Admonition to appellant (Exhibit C hereto). Upon appellant's demand for a hearing, the Committee issued a Statement of Charges against her, and then held an evidentiary hearing before a three-member subcommittee of the Committee. The Subcommittee conducted a hearing, and then drafted a report on the hearing to the full

Committee. After receiving the Subcommittee Report, the Committee issued the Letter of Reprimand.

4. Neither the Letter of Reprimand nor the Decision and Order states that her accusation was false, let alone that appellant knew that it was false or made it with reckless disregard for its truth or falsity. Nor do they set forth any factual findings whatsoever. The Decision and Order states that the Appellate Division considered the entire record -- which included the Subcommittee Report.

5. On October 23, 1990, this Court entered an order denying respondent's motion to dismiss this appeal.

6. Thereafter, we sought to supply the Court with record material as required by Section 500.5(a) of the Rules of this Court. Because the Committee and the Appellate Division had denied appellant access to the Subcommittee Report, which was part of the record material, appellant necessarily 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." A copy of appellant's subpoena to the Clerk of the Appellate Division, Second Department, is annexed hereto as Exhibit D. 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.

7. By letter of November 2, 1990, we were 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.

8. The Clerk of the Appellate Division did not comply with the appellant's subpoena. Nor did he move to quash it.

9. Rather, on November 13, 1990, I was informed by the Office of the Clerk of this Court that the Committee had requested and obtained an adjournment of the return date of the subpoena. At that point, I 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 needs those materials to prepare her brief, prompt compliance with the subpoena should be required. It was suggested that I submit the relevant background materials to the Court Clerk's Office.

10. On November 14, 1990, I submitted those materials with an explanatory cover letter to the Office of the Clerk. A copy of my cover letter addressed to Martin S. Strnad, Esq. is annexed hereto as Exhibit E.

11. On November 21, 1990, Mr. Finnerty sent a letter of his own to Mr. Strnad. That letter (Exhibit F hereto) 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 reprimanded appellant received and considered 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. Mr. Finnerty did not suggest, nor did he request, that any record materials that were before the Appellate Division should be excluded from the record before this Court. Rather, his letter simply "oppos[ed] Appellant Elizabeth Holtzman's request [sic] to review certain documents in connection with her petition to vacate [the] Letter of Reprimand," regardless of the availability of those documents to the full Committee that reprimanded appellant, the Appellate Division that sustained the Reprimand, and this Court, which must now review the decisions of the Committee and the Appellate Division.

12. By letter dated November 27, 1990 (Exhibit G hereto), I responded to 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.

13. By letter dated November 29, 1990 (Exhibit H hereto), Mr. Finnerty replied to my November 27 letter.

14. On December 5, 1990, the Clerk of this Court sent a letter to counsel (Exhibit I hereto), acknowledging receipt of our letters, and stating that the question of access to the requested documents must be resolved by formal motion to this Court.

15. As demonstrated in appellant Memorandum in Opposition to the Grievance Committee's Motion to Dismiss this Appeal (Exhibit J hereto, Points I-II), this appeal raises the question, among others, whether, under the United States and New York State Constitutions, an attorney can be professionally disciplined for publicly criticizing a judge for his conduct in a criminal trial in the absence of clear and convincing evidence and a finding that the attorney's accusation was knowingly false, recklessly false, or even false. As it contains the only factual findings or summary in the record about the testimony and exhibits introduced into evidence at the hearing below, the Subcommittee Report appears to have been the single most critical part of the record before the Committee when it issued the Letter of Reprimand. Mr. Finnerty himself asserts that it was

discussed, debated, analyzed and utilized by the full Committee in issuing the Letter of Reprimand. Exhibit F at 2-3. And the Subcommittee Report was necessarily part of the "entire record" that was considered by the Appellate Division before rendering the Decision and Order. See Exhibit A at 2; Exhibit E at 2; Exhibit F at 3.

16. Because the Letter of Reprimand and the Decision and Order do not themselves contain any detailed findings of fact (see Exhibits A-B), the Subcommittee Report remains the only document that could contain any findings upon which the discipline was based. In fact, Section 691.4 of the Rules of the Appellate Division, Second Department, indicates that the role of a subcommittee of a grievance committee after a hearing is that the subcommittee "shall make findings of fact and report those findings to the committee." That is apparently what happened here. In order effectively to present to this Court her arguments that professional discipline is unconstitutional on the evidence and findings in this case, appellant needs access to the Subcommittee Report and its findings.

17. This appeal also 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 Exhibit J, Point IV. The Finnerty Memorandum and the Subcommittee Report are central to those inter-related issues.

18. The Finnerty Memorandum was generated by Committee counsel in his role as investigator. Exhibit F at 1-2. 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. 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.


19. 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" (Exhibit F at 2) hinge on the assumption that the same Committee

which received and considered the Memorandum in issuing the Letter of Admonition was in no way influenced by its contents when the Committee subsequently issued the Letter of Reprimand. Depending upon the contents of the Finnerty Memorandum, any such assumption may well be unrealistic. In any event, appellant needs access to the Finnerty Memorandum in order effectively to present her due process arguments to this Court.

20. The confidentiality provisions generally applicable to grievance committee proceedings should not bar appellant from having access to all of the record materials relevant to this appeal. In my letter of September 10, 1990 to Stuart M. Cohen, Esq., Deputy Clerk of this Court (Exhibit K hereto), I made it clear that appellant was not seeking to enforce her rights under those provisions in connection with this appeal.


Norman Redlich

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


Notary Public

SHEILA ASHBY
Notary Public, State of New York
No. 31-5115250
Qualified in New York County
Commission Expires August 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

2214W
B/nl

(NOT TO BE PUBLISHED)

GUY J. MANGANO, J.P.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
CHARLES B. LAWRENCE
VINCENT R. BALLETTA, JR., JJ.

Motion No. 570 Atty.

DECISION & ORDER ON MOTION

In the Matter of Elizabeth Holtzman,
an attorney and counselor-at-law,
petitioner,

Grievance Committee for the Tenth
Judicial District, respondent.

Motion by petitioner Elizabeth Holtzman for an order (1) directing the Grievance Committee for the Tenth Judicial District to transmit to the Clerk of this court the entire record of the proceedings before the Committee which issued a Letter of Reprimand to petitioner, (2) directing the Grievance Committee to furnish petitioner with a list of the materials so transmitted, (3) granting petitioner and her counsel access to the entire record of the proceedings before respondent Committee and subcommittee, and (4) directing that these proceedings be confidential and the record of said proceedings and all papers filed therein be maintained by the Clerk of this court under seal.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied except to the extent that this matter shall remain confidential pursuant to §90 subd. 10 of the Judiciary Law.

MANGANO, J.P., THOMPSON, BRACKEN, LAWRENCE and BALLETTA, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN

Martin H. Brownstein
Clerk

January 17, 1990

IN RE HOLTZMAN, ELIZABETH