Memorandum of Elizabeth Holtzman in Support of Petition to Vacate
(Excerpts) (2d Dep't April 23, 1990)
[pp. A145-A197]

CONFIDENTIAL -- FILED UNDER SEAL

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

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In the Matter of :

The Application of ELIZABETH HOLTZMAN, :

Petitioner, :

To Vacate a Letter of Reprimand :
Pursuant to Section 691.6(a) of
the Rules of the Appellate Division, : Index No.
Second Department,
:

- against -
:

GRIEVANCE COMMITTEE FOR THE
TENTH JUDICIAL DISTRICT, :

Respondent. :

- x

ELIZABETH HOLTZMAN'S MEMORANDUM OF LAW IN SUPPORT OF HER PETITION TO VACATE A LETTER OF REPRIMAND

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Underwood also testified that when she reviewed the release, she did not believe that it would be illegal or unethical for petitioner to issue it, and did not "advise the District Attorney that it would be illegal or unethical to include [the challenged] sentence in the press release." Id. at 641-42.

There is no Code provision or case remotely suggesting that a lawyer's issuance of a press release, which she believes is true and is, in fact, true -- and which she issues for a proper purpose expressly authorized by a Disciplinary Rule after consulting with experienced and competent counsel -- adversely reflects on her fitness to practice law.

POINT III

AS APPLIED TO PETITIONER'S PUBLIC STATEMENTS ABOUT JUDGE LEVINE, DR 1-102(A)(5) AND (6) ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

DR 1-102(A)(5) and (6) -- which the Reprimand asserts were violated by petitioner's public statements about Judge Levine -- are far too vague and overbroad to proscribe such speech consistent with the free speech provisions of the United States and New York State Constitutions. A lawyer reading DR 1-102(A)(5) and (6) cannot ascertain whether a particular accusation against a judge would be viewed by a grievance committee as being "prejudicial to the administration of justice" or "adversely reflect[ing]" on her "fitness to practice law." If

construed as proscribing all public accusations by lawyers against judges, DR 1-102(A)(5) and (6) would prohibit a broad range of constitutionally-protected statements, thereby chilling the right of lawyers to engage in constitutionally-protected speech. Accordingly, the Reprimand represents an abridgement of petitioner's free speech and due process rights.

A. DR 1-102(A)(5) and (6) are unconstitutionally vague as applied to lawyers' statements about judges.

As applied to speech, a vague statute deprives the potential speaker of notice of whether the intended speech is proscribed or not. It can thus have the pernicious effect of a prior restraint, choking constitutionally-protected speech because the speaker is unwilling to risk the possibility that a court or other governmental agency will view it differently. Accordingly, the Supreme Court, New York's Court of Appeals, and this Court, have not hesitated to strike down laws that purport to restrict speech but fail to give the speaker precise notice of their reach.

The Court of Appeals recently commented that vague standards are "especially intolerable in a statute regulating speech [because] . . . it subjects individuals to arrest and prosecution, even if ultimately unsuccessful, by officials strictly enforcing the statute's prohibitions." People v. Dietze, 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989). The concern that vague standards chill free and open discussion

on public issues has rendered unenforceable statutes using the following standards: "sacrilegious" (Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)); "offensive" (Rosenfeld v. New Jersey, 408 U.S. 901 (1972)); "abusive" (Gooding v. Wilson, 405 U.S. 518 (1972)); and "loiter" (Kolender v. Lawson, 461 U.S. 352 (1983)).*

The identical concerns are present when DR 1-102(A)(5) and (6) are used to discipline a lawyer for making a public statement about a judge. How is a lawyer to know whether an accusation of judicial misconduct (such as that contained in the McDonald letter), or an explanation for why that accusation was made (such as the December 22 press release), will be viewed by a grievance committee or court as "prejudicial to the administration of justice" or as "reflect[ing] adversely" on her "fitness to practice law"?

In the cases of DR 1-102(A)(5) and (6) as applied to lawyers' statements about judges, the vagueness problem is compounded by the fact that the Code contains specific Disciplinary Rules -- DR 8-102(B) and DR 7-107 -- which are carefully crafted to govern such statements consistent with free speech protections. It is more than reasonable for a lawyer to assume that

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* See also, e.g., Baggett v. Bullitt, 377 U.S. 360 (1964) (requiring school teacher to swear that he or she will "promote respect for the flag" and "promote . . . undivided allegiance to the United States government" is unconstitutionally vague); People v. Bright, 71 N.Y.2d 376 (1988) (loitering statute unconstitutionally vague).

statements about judges which conform to the requirements of those rules will not be found to be unprofessional.

Directly applicable to the instant proceeding is Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979). In that case, the Court held that DR 7-107(D), which prohibits public statements "reasonably likely to interfere with a fair trial," was unconstitutionally vague and overbroad as applied to public statements concerning bench trials and lawyer disciplinary proceedings. The Court concluded:

> This proscription is so imprecise that it can be a trap for the unwary. It fosters discipline on a subjective basis depending entirely on what statements the disciplinary authority believes reasonably endangers a fair trial. Thus neither the speaker nor the disciplinarian is instructed where to draw the line between what is permissible and what is forbidden.
>
> -- 594 F.2d at 371.

This Court's rules compound the impermissible vagueness inherent in applying DR 1-102(A)(5) and (6) to speech. Thus, Section 691.6(a) of the Rules of this Court gives a grievance committee the power to issue a letter of caution "when it is believed that the attorney acted in a manner which, while not constituting clear professional misconduct, involved behavior requiring comment." 22 N.Y.C.R.R. § 691.6(a). (emphasis added). And, if the committee issues an admonition or a letter of caution, the attorney may request a hearing (as petitioner did in

this case), after which "the committee shall take such steps as it deems advisable." Id. (emphasis added).

An attorney, of course, has no way of knowing what sort of statement about a judge which does not violate DR 8-102 (B) or DR 7-107, will nevertheless strike a given grievance committee as "requiring comment." Nor can an attorney who receives an admonition or letter of caution for having made a statement about a judge, and thereafter requests a hearing possibly guess what "steps" such a committee will "deem advisable."

B. DR 1-102(A)(5) and (6) are unconstitutionally overbroad as applied to lawyers' statements about judges.

Even assuming, for the sake of argument, that DR 1-102(A)(5) and (6) are applicable to lawyers' statements about judges, and that they are not void for vagueness, they are unconstitutionally overbroad. A law proscribing speech which is not unconstitutionally vague, is nevertheless unenforceable if it covers speech that it constitutionally protected as well as speech which is not. Such statutes improperly chill expression because the protected speech is threatened by the statute's unnecessarily broad coverage.

For example, a law prohibiting the depiction of "nudity" is unconstitutionally overbroad because it prohibits medical texts, which are protected, and pornography, which is not. Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

Similarly, the Court of Appeals in People v. Dietze, supra, held that a statute, which proscribed "abusive" speech, was overbroad in that it covered both constitutionally unprotected speech -- i.e., "fighting words" -- and also protected speech -- i.e., "casual conversation" -- that might well be "abusive" although not of the kind likely to provoke "immediate violence or other breach of the peace." 75 N.Y.2d at 51, 52.*

This Court has recently applied the overbreadth doctrine to strike down a Judge's order that counsel in a criminal case "refrain from any discussion of this case with the news media, to avoid any cover[age] or any attribution or any information in the media that would affect a fair trial of this case, and also in subsequent cases." NBC v. Cooperman, 116 A.D.2d 287, 289, 501 N.Y.S.2d 405 (2d Dep't 1986). This Court held that the directive was both vague and overbroad, since it was not drawn with specific precision to apply only to the type of speech that a trial judge could, in the course of a trial, prevent counsel to the parties from uttering.

DR 1-102(A)(5) and (6) would be classic examples of overbroad regulations if they were to be construed so as to prohibit accusations of judicial misconduct. So construed, they

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* The Dietze Court also held that any attempt to save the statute by narrowing its meaning to "fighting words" would render the statute hopelessly vague because its text would convey a far different meaning from its judicially-narrowed construction.

would prohibit constitutionally protected speech -- e.g., truthful accusations made in good faith -- as well as speech which is not -- e.g., "knowingly false" statements, and speech that poses a clear and present danger of interference with pending investigations or proceedings.

POINT IV

PETITIONER'S PUBLIC RELEASE OF THE MCDONALD LETTER AND PETITIONER'S DECEMBER 22 PRESS RELEASE WERE PROTECTED BY THE FREE SPEECH PROVISIONS OF THE UNITED STATES AND NEW YORK STATE CONSTITUTIONS.

Petitioner has been reprimanded for: publicly criticizing a judge because, during the course of a criminal trial, he directed a rape victim to get down on her hands and knees and demonstrate the position she had been in when she was raped; and issuing a press release, three weeks later, explaining why she made the complaint. Those public statements by petitioner cannot provide a basis for professional discipline.

Free and open discussion about judges and the conduct of criminal trials is clearly protected by the free speech provisions of the United States and New York State Constitutions. As was forcefully stated by former Chief Justice Burger:

> These expressly guaranteed freedoms [of the First Amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly, it would be difficult to

> single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.
>
> -- Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

Disciplinary proceedings, like other forms of state sanction, must comply with the free speech provisions of the United States and New York State Constitutions. When a lawyer is subjected to discipline because of her public criticisms of a judge, the constitutional "malice" standard established by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Garrison v. Louisiana, 379 U.S. 64 (1964), is applicable.

Applying that standard, the Grievance Committee could not take action against petitioner unless it could demonstrate, by clear and convincing evidence, that the factual statements her letter to Judge McDonald and the December 22 press release were false, and that they were made with knowledge of their falsity or with reckless disregard for their truth or falsity. No such findings appear in the Reprimand, and no such findings are possible on the record evidence. Moreover, the Committee could not take action against petitioner based on her expressions of opinion about Judge Levine's conduct.

A. Petitioner's public criticism of Judge Levine was protected by the First Amendment.

Attorneys do not forfeit their First Amendment rights upon their admission to the Bar. And, as this Court has observed: "While attorneys have a professional responsibility to protect the fairness and integrity of the judicial process, this does not mean that lawyers surrender their [First] Amendment rights as they exit the courtroom . . . ." NBC v. Cooperman, supra, 116 A.D.2d at 292 (citing In re Halkin, 598 F.2d 176, 186 (D.C. Cir. 1979)).

From the perspective of the First Amendment, petitioner's status as an elected official makes it even more important that she have untrammeled access to the marketplace of ideas. "The role that elected public officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." Wood v. Georgia, 370 U.S. 375, 395 (1962) (recognizing First Amendment right of elected sheriff to criticize judge's grand jury instructions during pendency of investigation); Trails West v. Wolff, 32 N.Y.2d 207, 217-18, 298 N.E.2d 52, 344 N.Y.S.2d 863 (1973); see In re Halkin, supra, 598 F.2d at 186; Martin v. Merola, supra, 389 F. Supp. 323.

The fact that the subject of petitioner's public criticism was the conduct of a judge does not render the First Amendment any less protective of her speech. In Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978), the Supreme Court ruled that a state's interest in protecting "the good repute of judges" was "an insufficient reason 'for repressing speech that would otherwise be free.'" Id. at 841-842 (quoting New York Times Co. v. Sullivan, supra, 376 U.S. at 272-73). The

> assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.
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> -- Bridges v. California, 314 U.S. 252, 270 (1941).

The Supreme Court has consistently protected the right of lawyers to criticize judges. See In re Snyder, 472 U.S. 634 (1985) (court of appeals could not suspend a lawyer for stating that he was "appalled" by the small fees for indigent criminal defense work, that he would not provide additional documentation, and that the judge could "take it or leave it"); Garrison v. Louisiana, 379 U.S. 64 (1964); In re Sawyer, 360 U.S. 622 (1959) (lawyer's suspension for stating, during a Smith Act Trial, that "horrible and shocking" things had occurred and that a fair trial was impossible, overturned because insufficient

evidence to prove lawyer's speech impugned the integrity of the judge).

B. The New York State Constitution is more protective of speech than is the First Amendment.

In applying the constitutional principles of free expression to a lawyer's public criticism of judges, it should be noted that the New York State Court of Appeals has construed Article 1, Section 8 of the State Constitution (the free speech provision) to expand the constitutional protections of the First Amendment. In People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.2d 844 (1986), the Court struck down a New York statute that had been previously upheld by the Supreme Court against the First Amendment challenge. Chief Judge Wachtler, for a unanimous court, wrote:

> However, New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community. . . . Thus, the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression.
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> -- 68 N.Y.2d at 557-58 (citation omitted).

See also Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975) (establishing a more speech-protective standard for private plaintiffs in defamation

actions than recognized by the Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)); People v. P.J. Video, Inc., 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), cert. denied, 479 U.S. 1091 (1987).

New York's heightened concern for free expression thus reinforces the protection accorded petitioner's public statements under the United States Constitution.

C. A grievance committee cannot take action against an attorney based on a public statement about a judge unless the statement was false and was made with knowledge of its falsity or reckless disregard for its truth.

1. New York Times Co. v. Sullivan established the applicable constitutional standard -- "malice".

The Reprimand violates the constitutional values underlying the Supreme Court's seminal decision in New York Times Co. v. Sullivan, supra, 376 U.S. 254. In that case, the Supreme Court held that before a State can take action based on even a false statement about a public official, such as a judge, there must be "clear and convincing" evidence that the speaker made her statement with "malice", i.e., with knowledge of its falsity or reckless disregard for its truth. Id. at 279-280; Gertz v. Robert Welch, Inc., 418 U.S. 323, 331-32 (1974).

The New York Times Court recognized that state libel laws, as applied to criticism of public officials, posed a

serious threat to the free and open discussion of public issues. In holding that the potential for injury to the reputations of public officials, including judges, is not a state interest sufficient to justify the suppression of public expression, the Court stated:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . [E]rroneous statement is inevitable in free debate, and it [must] be protected if the freedoms of expression are to have the "breathing space" that they "need to survive". . . . Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. . . . If judges are to be treated as "men of fortitude, able to thrive in a hearty climate" [Craig v. Harney, 331 U.S. 367 (1947)], surely the same must be true of other government officials. . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.
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> -- Id. at 270-273.

The charges against petitioner derive from the identical circumstances that led to New York Times -- public accusations of misconduct against a public official.

Committee counsel has advanced the curious argument that because petitioner was a highly respected lawyer and prominent public official, with greater access to the media than many

private citizens and greater ability effectively to criticize a judge, she must be held to some amorphous "higher standard of care." CC Memo. 19. This argument stands the First Amendment on its head. New York Times Co. v. Sullivan, supra, was designed to promote "robust and wide-open" debate on public issues. To restrict the speech of lawyers who are best situated to know about the criminal justice system, and more likely to have access to the press, would slam the door on the sources of knowledge most likely to inform the "robust and wide-open" debate on public issues guaranteed by the First Amendment. New York Times Co. v. Sullivan, supra, 376 U.S. at 270.

That the New York Times is applicable to criticism of judges by elected district attorneys was made clear in Garrison v. Louisiana, 379 U.S. 64 (1964), decided a few months after New York Times. In that case, the Supreme Court applied the New York Times "malice" standard in overturning the criminal libel conviction of an elected district attorney who had publicly attacked the diligence and integrity of eight judges. The Garrison Court made it clear that only "the lie, knowingly and deliberately published about a public official" was excluded from the immunity of New York Times. 379 U.S. at 75.

2. The New York Times "malice" standard is fully applicable to attorney disciplinary proceedings arising out of public statements about judges.

Baker v. Monroe County Bar Ass'n, 34 A.D.2d 229, 311 N.Y.S.2d 70 (4th Dep't 1970), aff'd mem. sub nom. Matter of Baker, 28 N.Y.2d 977, 272 N.E.2d 337, 323 N.Y.S.2d 837, cert. denied, 404 U.S. 915 (1971), indicates that the New York Times "malice" standard is fully applicable to attorney disciplinary proceedings in New York. In that case, the Appellate Division upheld the findings of a referee that an attorney had made statements that were "calculated falsehoods, made with knowledge of their falsity and with reckless disregard of the truth." The Appellate Division set forth the New York Times rule that knowledge of falsity was a constitutional prerequisite for recovering damages for a defamatory falsehood. The Court then concluded that the attorney could be disciplined consistent with New York Times, because he "knew that the defamatory statements made by him were false." 34 A.D.2d at 222-23. The Court of Appeals affirmed.

The Erdmann case in the Court of Appeals is to the same effect. Thus, in his Erdmann dissent, Judge Burke argued that New York Times Co. v. Sullivan, supra, and Garrison v. Louisiana, supra, were "irrelevant." 33 N.Y.2d at 563. At the same time, Judge Gabrielli, in dissent, argued for the adoption of the "certainty" standard of EC 8-6, a standard that is

clearly violative of the "malice" standard set forth in New York Times and Garrison. Id. at 565. The Erdmann majority, however, reversed the Appellate Division, and held that Erdmann's "vulgar and insulting words" could not justify professional discipline.*

The Supreme Court of Appeals of West Virginia -- in expressly holding that the New York Times "malice" standard is applicable to disciplinary proceedings relating to lawyers' accusations against judges -- has read New York's decision Baker v. Monroe County Bar Ass'n, supra, as impliedly adopting the same rule. Committee on Legal Ethics v. Douglas, 370 S.E.2d 325, 330 (W. Va. 1988) cert. denied, 110 S. Ct. 406 (1989); accord Hoye, Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys, 38 Drake L. Rev. 31, 48-53 (1988-89).

Other states, for example, California and Texas, follow New York in applying the New York Times "malice" standard to lawyer disciplinary proceedings. See Ramirez v. State Bar, 28 Cal. 3d 402, 619 P.2d 399 (1980); State Bar v. Seamaan, 508 S.W.2d 429 (Tex. Civ. App. 1974).

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* Moreover, Judge Greenblott's dissent from the Appellate Division's censuring of Erdmann for "intemperate, vulgar and insulting language," argued that Erdmann had a constitutional right "to criticize the judiciary or any other branch of our State and Federal Governments." Judge Greenblott cited the Court of Appeals' affirmance of Matter of Baker, supra, in support of his constitutional argument.

The courts applying the New York Times "malice" standard to lawyer disciplinary proceedings recognize that the imposition of professional discipline on a lawyer for public criticisms of a judge is a more onerous restraint on the lawyer's right of free expression than the threat of damages for libel. Professional discipline can harm a lawyer's reputation and his or her capacity to maintain a professional career. Even a supposed non-public action by a grievance committee -- such as the Reprimand in this proceeding, the earlier Admonition, or a letter of caution -- can cause irreparable damage to a lawyer's career. At various stages of her career, a lawyer may be required to state whether she has been subjected to disciplinary action. The consequences are particularly onerous for lawyers who seek public office; candidates do not enjoy the luxury of a "no comment" when questioned about publicized allegations of misconduct. And even if the disciplinary action remains non-public, it "may be considered in determining the extent of discipline to be imposed in the event other charges of misconduct are brought against the attorney subsequently." 22 N.Y.R.C.C. § 691.6(c); see Anonymous v. Grievance Committee, 136 A.D.2d 344, 527 N.Y.S.2d 248 (2d Dep't 1988).

3. Attorney disciplinary proceedings have traditionally been governed by First Amendment principles.

Applying the New York Times "malice" standard to attorney disciplinary proceedings, as New York and other states

have done, is consistent with decisions of the Supreme Court subjecting lawyer disciplinary proceedings to the strictures of the First Amendment. In NAACP v. Button, 371 U.S. 415 (1963), the Court unanimously concluded that a state may not prohibit "modes of expression and association protected by the First and Fourteenth Amendments . . . under its power to regulate the legal profession . . . ." Id. at 429. Rejecting the argument that Virginia's regulations against client solicitation by the NAACP were designed "merely to insure high professional standards, and not to curtail free expression," the Court concluded that a State "may not, under the guise of prohibiting professional conduct, ignore constitutional rights." Id. at 439.

Similarly, in the lawyer advertising cases, the Supreme Court rejected the argument that a State's interest in professional standards, or the administration of justice, justified a different constitutional standard for lawyer advertising. See, e.g., Bates v. Arizona, 433 U.S. 350, 368-377 (1977).

In this State, the courts have consistently interpreted the First Amendment to prohibit the application of disciplinary rules to limit otherwise constitutionally protected speech. Thus, the Court of Appeals has stated:

> [A]lthough the State, through its professional disciplinary committees, possesses broad power to regulate the legal profession because lawyers are essential to the primary governmental function of administering justice and because

> they are officers of the court . . . the recognition that lawyer advertising is a form of commercial speech subject to First Amendment protection requires the courts to eschew blanket prohibitions of solicitation and to assess the validity of the regulation by carefully balancing the First Amendment interest at stake with the public interest allegedly served by the regulation.
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> -- In re Von Wiegen, 63 N.Y.2d 173, 470 N.E.2d 858, 481 N.Y.S.2d 40 (1984).

See also In re Koffler, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), cert. denied, 450 U.S. 1026 (1981).

This Court has recently applied First Amendment principles in upholding the constitutionality of the Second Department's rule requiring certain disclosures in a lawyer's advertisement. Anonymous v. Grievance Committee, 136 A.D.2d 344, 527 N.Y.S.2d 248 (2d Dep't 1988).

Where -- as in the instant case -- the speech in question is not commercial, but serves the purpose of informing the public of problems in the criminal justice system, it is clear that even greater protection must be afforded against First Amendment violations by professional disciplinary rules. Compare In re Primus, 436 U.S. 412 (1978) (protecting solicitation by lawyers for non-profit organizations) with Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (denying First Amendment protection to in-person solicitation for pecuniary gain).

Moreover, the Supreme Court has indicated that where an attorney is engaged in communication with the public, the state's interest in maintaining professional dignity is less compelling than when the attorney is participating in a courtroom event or pending trial:

> [A]lthough the state undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights.
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> -- Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647-48 (1985) (emphasis added).

D. The Grievance Committee's rejection of the "malice" standard in this proceeding has undermined the robust debate on public issues that New York Times and Garrison v. Louisiana were designed to protect.

Apart from the substantial chilling effect of the possibility of disciplinary action on any lawyer's willingness publicly to criticize a judge, the actions in this very case -- Judge Rosenblatt's press release, the Committee's investigation, the Letter of Admonition, the Statement of Charges, and the Subcommittee hearing -- have inhibited petitioner from publicly defending her conduct in the _____ matter, and from publicly discussing judicial misconduct, specifically "misconduct regarding the treatment of rape victims and violations against women in

the court." Holtzman Tr. 1737. The proceedings in this matter have also had a "chilling effect" on Assistant District Attorneys in Kings County "because I don't think anyone in my office wants to be, as somebody said, the next Gary Farrell." Id. at 1736-38.

By applying the New York Times "malice" standard to attorney disciplinary proceedings, New York has provided the "breathing space" for the discussion of public issues that the First Amendment requires. By way of stark contrast, the Committee reprimanded petitioner based on a charge that she made public accusations of misconduct against a judge "without first determining the certainty of the merit of the accusations." Statement of Charges, Charge One. Under that standard, it would not be sufficient for lawyer to be "certain," or to have had a reasonable basis to be "certain," or even to attempt to determine the certainty of the merit of the accusation. The lawyer would have to be prepared to guaranty the accuracy of her accusation before speaking. Under that standard, free speech about the justice system would not be "chilled" -- it would be frozen solid.

E. Petitioner's complaint against Judge Levine, and its public release, were not made with "reckless disregard for truth or falsity."

1. Petitioner's complaint was true, she was certain it was true, and her certainty was reasonable.

As demonstrated above, Committee counsel failed to prove that the facts set forth in petitioner's complaint letters

were "false", let alone "knowingly" false. And the evidence that petitioner and all of her senior advisors were certain that the facts set forth in her letters were true, and that their certainty was reasonable, stands uncontradicted. It follows that petitioner did not make and publish her complaint against Judge Levine with reckless disregard for its truth or falsity.

2. Petitioner's conduct did not display a "reckless disregard for truth or falsity."

Indeed, even if the Committee had found that petitioner's complaint was false and that her certainty was unreasonable, still it would have failed to satisfy the minimum constitutional standard for suppressing a lawyer's criticism of a judge -- "reckless disregard". Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2696 (1989) ("[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."); St. Amant v. Thompson, 390 U.S. 727, 731, 733 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967); Garrison v. Louisiana, supra, 379 U.S. at 74.

In St. Amant v. Thompson, a candidate for public office (St. Amant), during the course of a televised speech, read certain statements made by one Albin, a union member, to the effect that Thompson a deputy sheriff, had received improper payments from St. Amant's political opponent. 390 U.S. at 728-29. Thompson brought a defamation action, obtaining a judgment

against St. Amant that was upheld by the Louisiana Supreme Court.

The Louisiana court held that St. Amant had published Albin's defamatory statements in violation of the New York Times "malice" standard because he had been reckless, in that

-- St. Amant had had no personal knowledge of Thompson's conduct;

-- St. Amant had relied solely on Albin's affidavit and the record was silent as to Albin's reputation for veracity;

-- St. Amant had failed to verify Albin's information with others who might have known the facts; and

-- St. Amant had given no consideration as to whether or not the statements defamed Thompson but went ahead heedless of the consequences. Id. at 730.

The Supreme Court of the United States reversed, holding that "[t]hese considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson." Id. The St. Amant Court observed that Garrison v. Louisiana, supra, and Curtis Publishing Co. v. Butts, supra,

> are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
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> -- Id. at 731 (emphasis added).

The Supreme Court recognized that its "in fact entertained serious doubts" test

> puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity.
>
> -- Id.

The Court nevertheless concluded that

> New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which

> our cases have drawn between false communications which are protected and those which are not.
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> -- Id. at 731-32.

Any argument that petitioner, because she was an elected public official, must be held to some sort of higher standard than that of St. Amant has been effectively disposed of by New York's Court of Appeals:

> Furthermore, the plaintiffs' intimation that the standard does not apply when the individual defendant is a Congressman seems almost frivolous. If a candidate for public office is deemed entitled to the protection of the Times principle (see St. Amant v. Thompson, 390 U.S. 727), certainly, an elected official merits the same protection. Indeed, a Congressman, who is required by his office to speak out frequently on matters of public or general concern is even more in need of its protection than a private citizen. The threat of damage suits against public officials, it has been said in a related context, tends to "'inhibit the fearless, vigorous, and effective administration of policies of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' Barr v. Matteo, . . . 360 U.S. [564], at 571." (New York Times Co. v. Sullivan, 376 U.S. 254, 282, supra; see, also, Gregoire v. Biddle, 177 F.2d 579, 580.) Without the protection of the privilege announced in the Times case, a Congressman's service both to his constituents and to the common weal is likely to suffer.
>
> -- Trails West v. Wolff, 32 N.Y.2d 207, 217-18, 298 N.E.2d 52, 344 N.Y.S.2d 863 (1973) (emphasis added).

In Trails West, a Congressman and his administrative assistant issued a press release charging that a bus carrying several children from his district on a cross-country tour had safety problems and had been ordered out of service. The release was based on telephone conversations between the administrative assistant and two government transportation officials. Subsequent to the press release, but prior to any newspaper report of the Congressman's charge, the plaintiffs called the administrative assistant, informed him that the press release was false, and requested that he "pull his press release." The Congressman and the administrative assistant refused. Although an inspection report documenting the alleged problems existed, the report was examined only after the press release was issued. Id. at 211-14.

In affirming summary judgment for the defendants, the Court of Appeals ruled that

> "'Reckless disregard,'" the Supreme Court has said in St. Amant v. Thompson (390 U.S. 727, supra), "cannot be fully encompassed in one infallible definition" (p. 730). Reckless conduct, the court continued (on. 731), "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." Other indices of reckless publication have been found in the existence of

> "obvious reasons to doubt the veracity of the informant or the accuracy of his report" (St. Amant v. Thompson, 390 U.S., at p. 732); "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" (Curtis Pub. Co. v. Butts, 388 U.S. 130, 155); or a "high degree of awareness of . . . probable falsity". (Garrison v. Louisiana, 379 U.S. 64, 74.) On the other hand, reliance upon reputable sources of information, whether official or simply a reliable newspaper, if unrefuted, is sufficient to disprove a claim of recklessness. (See, e.g., Schneph v. New York Post Corp., 16 N.Y.2d 1011; Miller v. News Syndicate Co., 445 F.2d 356, 358; see, also, Rosenbloom v. Metromedia, 403 U.S. 29, 56, supra.)
>
> -- Id. at 219.

See also Chalpin v. Amordian Press, Inc., 128 A.D.2d 81, 88, 515 N.Y.S.2d 434 (1st Dep't 1987) (publisher could rely upon "the integrity of a reputable author [where he] had no substantial reason to question the accuracy of the information provided by such source").

It is apparent that Charge One, on its face, does not remotely allege that petitioner was "reckless" as that term has been defined by the United States Supreme Court and New York Court of Appeals. Charge One simply accuses her of "making public . . . false accusations of misconduct against a Judge without first determining the certainty of the merit of the accusations." "[N]ot determining the certainty of the merit" is a far cry from "in fact entertaining serious doubts as to the

truth." Because there is no evidence that petitioner in fact entertained any doubt as to the truth of her complaint against Judge Levine, let alone a "serious doubt," her publication of that complaint was not reckless.

3. Petitioner's reliance on Farrell was not reckless.

Charge One suggests that petitioner was not justified in relying on Farrell's report. The Supreme Court in St. Amant v. Thompson, supra, effectively disposed of any such argument. In that case, the publisher of the defamatory statement "relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity." 390 U.S. at 730. In contrast, the evidence in this case establishes that petitioner -- who knew that Farrell's integrity and ethics had been reviewed by a character committee and her Office, and that Newman, Farrell's Bureau Chief, had "basically vouched for [Farrell's] integrity when she transmitted his complaint" (Holtzman Tr. 1933) -- had reason to be convinced of Farrell's "reputation for veracity."

There is no evidence that petitioner should have doubted Farrell's integrity or his ability to report what he saw and heard. If the references in Charge One to Farrell's age, the date of his admission to the bar, and his relative experience (he had tried three cases by the time of his initial report

to Broder) are meant to suggest that petitioner should have entertained doubt as to his integrity and ability to report, the Supreme Court, in dealing with allegations of ineffective assistance of counsel, has reached precisely the opposite conclusion:

> [W]e presume that the lawyer is competent . . . That conclusion is not undermined by the fact that respondent's lawyer was young . . . Every experienced criminal defense attorney once tried his first criminal case.
>
> -- United States v. Cronic, 466 U.S. 648, 658, 665 (1984).

The presumption of a young, inexperienced attorney's competence has also been recognized in New York: People v. Brandau, 19 Misc. 2d 132, 189 N.Y.S.2d 818, 822 (Oneida Co. Ct. 1959).

If Farrell was presumed competent to represent the People in court, to try cases as a prosecutor, and to provide effective assistance of counsel to criminal defendants, surely petitioner was entitled to presume that he was competent to describe accurately what he personally saw and heard in Judge Levine's courtroom and anteroom. And Committee counsel did not prove that Farrell's age and experience caused petitioner "to entertain serious doubts as to the truth of" his reports. St. Amant v. Thompson, supra, 390 U.S. at 731.

If a candidate for public office can rely on the affidavit of a union member (St. Amant v. Thompson), if a Congressman can rely on telephone conversations between his assistants and other government officials who the Congressman does not know or, indeed "simply a reliable newspaper" (Trails West v. Wolff, supra), and if a publisher can rely on an author (Chalpin v. Amordian Press, supra), a fortiori, petitioner was entitled to rely on ADA Farrell alone. The fact that she did not rely solely on Farrell, but also considered the advice of her assistants, the reports of the McMichaels jurors' complaints, the conversations with Judge Miller, and her own knowledge of Judge Levine and his reputation, renders absurd any argument that she was "reckless."

4. Petitioner's proceeding without the minutes was not reckless.

Charge One (¶ J) suggests that it was improper for petitioner to publish her complaint against Judge Levine without waiting for the minutes of the _____ trial. The evidence, however, established that she had no reason to believe that the minutes were relevant in any way to the truth of her complaint against Judge Levine. Holtzman Tr. 1554. Indeed, neither the Committee nor its counsel obtained the full minutes of the _____ trial prior to issuing the Letter of Admonition and Statement of Charges against petitioner.

If the failure of the Congressman in Trails West, after he had been advised by representatives of the bus company that his press release was false, to review an existing inspection report before going forward with his press release does not constitute recklessness (see 32 N.Y.2d at 219-21), a fortiori, the failure of petitioner -- who had no reason to believe that her complaint was false or that the _____ minutes would have any impact on her complaint -- to wait indefinitely for those minutes does not remotely tend to establish recklessness, i.e., that she "in fact entertained serious doubts as to the truth of [her] publication." St. Amant v. Thompson, supra, 390 U.S. at 731; Trails West v. Wolff, supra, 32 N.Y.2d at 219.

5. The fact that petitioner did not personally interview Farrell was not reckless.

Charge One (¶ Q) suggests that petitioner should have met with Farrell prior to proceeding with her complaint. In the circumstances, her failure to do so was entirely reasonable:

> I had full credence in the report that was given to me of -- by Barbara Newman of what had happened in the _____ trial. I believe I saw a written memoranda and an affirmation from Mr. Farrell, and there were other indicia that I could elaborate on about the credibility of what he said and my belief in what he said.
>
> And further, the practice in my office where we had at that time roughly 80,000 criminal cases was that I don't personally

> interview the witnesses, I rely on the judgment of Bureau Chiefs who interview the witnesses to report to me.
>
> -- Holtzman Tr. 1605.

Neither the Committee's counsel nor the Committee spoke with Farrell prior to the issuance of the Letter of Admonition and Statement of Charges against petitioner. And the fact that petitioner did not personally interview Farrell does not establish recklessness under St. Amant v. Thompson and Trails West v. Wolff.

6. The failure of the District Attorney's Office to interview additional witnesses was not reckless.

Charge One (¶ R) suggests that it was improper for petitioner to proceed with her complaint without having her Office interview additional witnesses who were present at the trial. The reasons she did not direct additional interviews, however, were more than sufficient:

> My office has never undertaken a personal inquiry of a Judge or others who might be witnesses to judicial conduct outside of my office. I personally don't believe it is appropriate for my office to undertake such an inquiry. That's for the -- that's for the appropriate judicial agencies.
>
> And indeed, an inquiry or investigation by the District Attorney's office might be viewed as -- as creating by the mere inquiry a public -- some public impression that criminal conduct had been engaged in by a member of the judiciary. . . .

> And, by the way, I should add that even when we investigate criminal misconduct of judge, which we have done, I do not personally interview the witnesses.
>
> -- Holtzman Tr. 1615-16.

The suggestion that petitioner should have insisted on interviewing more witnesses who were present at the _____ trial is again inconsistent with Committee counsel's argument that it would have been inappropriate for her to do so (CC Memo. 11, 26, 28). Any such notion is also inconsistent with the conduct of the Committee and its counsel: prior to the Subcommittee hearing, neither the Committee nor its counsel had interviewed anyone who was present at the _____ trial, including Farrell. Farrell Tr. 1033-34.

In any event, the fact that petitioner proceeded on December 1 without further investigation does not remotely establish that she in fact entertained serious doubts about the truth of her complaint. St. Amant v. Thompson, supra, 390 U.S. at 730 (speaker's failure to verify a union member's information with others who might have knowledge of the facts held to fall "far short" of proving "reckless disregard"); Trails West v. Wolff, supra.

F. The State cannot take action against petitioner based on the McDonald letter's expression of her opinions about Judge Levine's conduct.

As demonstrated above, the second pages of petitioner's complaint letters do not make accusations of fact. Rather, they express her opinions of Judge Levine's conduct as reported by ADA Farrell and set forth on the first pages of the letters. CXs 6, 7. And the record evidence establishes that those opinions were sincerely held. See Holtzman Tr. 1623-25; Donnino Tr. 123. The Grievance Committee cannot take action against petitioner for expressing those opinions.

Expressions of opinion, including opinions about judges, are constitutionally protected. In defamation cases, courts have recognized an absolute privilege for opinions, as opposed to facts. In Immuno A.G. v. Moor-Jankowski, 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989), the Court of Appeals recently emphasized that "unlike assertions of fact, ideas or opinions merit protection for their role in a competition or marketplace of ideas, as stimulants of "uninhibited, robust and wide-open debate on the public issues." Id. at 556.

In Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, cert. denied, 434 U.S. 969 (1977), the Court of Appeals held:

> The First Amendment does not recognize the existence of false ideas. . . . Opinions, false or not, libelous or not, are

> constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth. . . . Especially in a State in which Judges are elected to office, comments and opinions on judicial performance are a matter of public interest and concern.
>
> -- Id. at 380.

Further, Rinaldi held that "[w]hether a particular statement constitutes fact or opinion is a question of law." Id. at 381. The Court of Appeals defined the type of statement that constitutes opinion, as a matter of law, as follows:

> To state that a Judge is incompetent is to express an opinion regarding the Judge's performance in office. Likewise, to advocate a Judge's removal from office is to express the opinion that the Judge is unfit for his office. Both opinions, even if falsely and insincerely held, are constitutionally protected, if the facts supporting the opinions are set forth.
>
> -- Id. (emphasis added).

If expressions of opinions that are falsely and insincerely held are "constitutionally protected", a fortiori, petitioner's expressions of her opinions about Judge Levine and what he had done -- opinions which were truly and sincerely held -- cannot subject her to professional discipline.

Since, as shown, the First Amendment would prevent the Committee from disciplining petitioner for "demeaning" Judge Levine with a false accusation, it follows that the Committee cannot discipline her for a statement about the judge that is true.

H. The existence of a judicial disciplinary procedure cannot justify restricting an attorney's constitutional right publicly to criticize a judge.

Contrary to Committee Counsel's argument to the Subcommittee (Tr. 2236), the Grievance Committee cannot abridge petitioner's constitutional right publicly to criticize a Judge by creating a new standard of professional conduct that would have required her to refrain from such public criticism pending action on her complaint by the CJC. Such a disciplinary standard has no authority in law. Neither the Code of Professional Responsibility, nor the statute setting forth the functions and procedures of the CJC, contains any restriction on a lawyer's freedom to publicize the facts of a complaint that the lawyer is simultaneously transmitting to the Commission. See Point I.C., supra.

Moreover, any rule of professional conduct that would silence public criticism of a judge pending the CJC's investigation and proceeding would drastically infringe on lawyers' rights of free expression. The First Amendment imposes narrow limits on the power of government to control the timing of a message whose

content is protected by the First Amendment. Such limitations are justified only if they are: (1) content-neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels of communication. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

None of these standards is met in this instance. First, the Reprimand is not content-neutral. It is directed specifically at the content of petitioner's public message, namely, her criticism of Judge Levine.

Second, there is no compelling governmental interest that justifies any delay in that public message. Protecting the reputation of Judge Levine, or the judiciary generally, is not a sufficiently compelling governmental interest, as has been frequently stated by the Supreme Court. E.g., Landmark Communications, Inc. v. Virginia, supra, 435 U.S. at 841-42; New York Times Co. v. Sullivan, supra, 376 U.S. at 272-73. See Point IV.A, supra. While the government does have a compelling interest in securing fair adjudicative proceedings, there is no evidence that petitioner's letter or press release posed any threat to any proceeding.

Third, the Reprimand issued to petitioner would not appear to leave open any alternative public channels of communication.

Finally, and most importantly, temporary restraints on speech are constitutional only when the State provides a prompt judicial determination of the constitutionality of the government's action, as occurs when applications for permits to use a park or to display a film are denied, or where the government obtains a restraining order against allegedly obscene films, or against demonstrations in public parks or streets. Freedman v. Maryland, 380 U.S. 51 (1965); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957); Shuttlesworth v. Birmingham, 394 U.S. 147, 155 n.4 (1969). Proceedings before the CJC, however, can continue for months, even years. Stern Tr. 1812, 1814-15; Holtzman Tr. 1555-58; see, e.g., Matter of Levine, supra, 74 N.Y.2d 294. And the State -- which never contemplated that the pendency of the CJC proceedings would restrain speech by the complainant -- has not provided for any sort of judicial proceeding to determine whether the complainant should be allowed to publicize her complaint before the proceeding is concluded. Contrast CPLR § 6330(1)-(2).

Thus, the Reprimand against the petitioner's public disclosure of the letter and press release cannot be justified on grounds that it is merely a regulation of timing, rather than content. Regulations of timing are subject to strict constitutional standards, none of which has been met in this instance.

POINT V

THE PROCEDURES IN THIS MATTER DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

Attorney disciplinary proceedings "are adversary proceedings of a quasi-criminal nature," and are, therefore, subject to the requirements of procedural due process, including the right to a fair and impartial hearing. In re Ruffalo, 390 U.S. 544 (1968). The procedures followed by the Grievance Committee in this matter deprived petitioner of her due process rights. Accordingly, the Reprimand must be vacated.

A. The Grievance Committee that issued the Reprimand had previously disciplined petitioner for the same conduct.

Based on a report by Committee counsel, and without the benefit of input from petitioner or her counsel,* the Grievance Committee, on December 17, 1988, by a vote that according

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* When this matter was originally referred to the Grievance Committee, petitioner recognized that any action by the Committee, including a so-called "private" admonition or letter of caution, would necessarily amount to a public discipline for petitioner, a public official. Accordingly, through her counsel, petitioner made every effort to acquaint the Committee with the facts and law applicable to this proceeding. She cooperated fully with the Committee by producing all documents requested by Committee's counsel and by responding to all questions posed by Committee's counsel at a deposition.

Despite this cooperation, petitioner's requests that she be provided with copies of the transcripts of depositions of two Assistant District Attorneys were denied, as were requests that her counsel be permitted to appear before the Committee and that a memorandum prepared by her counsel be made available to the Committee. Tr. 2-35.

to Committee's counsel was unanimous, issued the Letter of Admonition, which states:

> It was the decision of the Committee that the totality of the circumstances presented by this matter require that you be admonished for your conduct, to wit: in making public a letter containing specific allegations of misconduct by a judge without first determining the certainty of the merit of those accusations. . . . In addition, the Committee disapproved of your press release of December 22, 1987, which rather than alleviating the situation, further demeaned the judicial officer by references to other allegations of his misconduct known to you; all in violation of DR 8-102(B) and DR 1-102(A)(5) (6), EC 8-6 of the Code of Professional Responsibility.*

The same Committee issued the Statement of Charges based on that same conduct. Thereafter, based on findings of fact made by the three-member Subcommittee after the hearing, the same Committee issued the Letter of Reprimand.

It is difficult for a disciplinary authority to provide a fair and impartial hearing when the same authority both investigates the matter and then acts as the decisionmaker after an advisory hearing. Without impugning the personal integrity of the members of the Grievance Committee, it is impossible to provide that basic due process right where -- as in this case -- the same body acts as investigator, decisionmaker, charger, and

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* The portions of the Letter of Admonition relating to Charge Two -- which was not sustained by the Committee -- have been omitted.

then acts as the decisionmaker after an adversary hearing before a subcommittee of its members, particularly when it decides the same issues and uses the same staff throughout the proceedings.

In Lowcher v. New York City Teacher's Retirement System, 54 N.Y.2d 373, 429 N.E.2d 1167, 445 N.Y.S.2d 696 (1981), the Court of Appeals held that a public school employee was denied due process of law when one of three members of a medical board that had rejected her claim for retirement benefits had previously been designated by the other two members of the board as an independent physician to examine the employee, and had recommended that the claim be denied. Judge Meyer, for a unanimous Court, wrote:

> [D]ue process will not allow an administrative decisionmaker to sit in review upon his own decisions. The issue decided [by the examining physician] in his independent report to the medical board was the same issue he later decided as a reviewing member of the medical board.
>
> -- 54 N.Y.2d at 377.

In the instant proceeding, the entire Grievance Committee reviewed a decision it had previously, and unanimously, made when it issued the Letter of Admonition and, later, the Statement of Charges.

In Goldberg v. Kelly, 397 U.S. 254 (1970) (cited with approval in the Lowcher case, supra), the Supreme Court prescribed the procedures that a state must follow before a welfare

recipient's benefits could be terminated. Without precluding some "prior involvement" by a reviewing decisionmaker in "some aspects of a case", the Court concluded that the decisionmaker "should not have participated in making the determination under review." Id. at 271. Here, the decisionmakers -- the entire Grievance Committee -- reviewed its own prior determination of petitioner's professional misconduct.

Just three months ago, the Court of Appeals ruled that public statements by the Chairman of the State Liquor Authority (the "SLA") concerning charges then pending in an SLA proceeding against the licensee, disqualified the Chairman from participating in the administrative review of that proceeding. The Court (per Chief Judge Wachtler) concluded that

> because the Chairman's statements to a Legislative Oversight Committee indicated prejudgment of facts in issue in an adjudicatory proceeding, his failure to disqualify himself from that proceeding deprived the licensee of due process under the Federal Constitution.
>
> -- 1616 Second Avenue Restaurant, Inc. v. New York State Liquor Authority, 75 N.Y.2d 158, 550 N.E.2d 910 (1990).

The deprivation of the due process right to a fair and impartial hearing -- and one that appears fair -- was even more blatant in this case. In 1616 Second Avenue Restaurant, one member of the SLA, the Chairman, made public statements that, in the view of the Court, "indicated prejudgment." The test

applied by the Court was whether "[a] disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Id. at 162 (quoting Cinderella Career & Finishing Schools v. FTC, 467 F.2d 67 (D.C. Cir. 1970)).

In this case, the entire Grievance Committee, including the three members of the Subcommittee who conducted the hearing, had conducted their own previous inquiry, and found petitioner guilty, twice. A "disinterested observer" could only conclude that the Grievance Committee had "in some measure" adjudged the facts and the law in advance of both the Subcommittee hearing and the Committee meeting which resulted in the issuance of the Reprimand.

B. Committee counsel's treble role in this matter deprived petitioner of her right to due process of law.

Committee counsel conducted an investigation of petitioner's conduct. Thereafter, he prepared a report to the Grievance Committee and attended the Committee meeting that resulted in the issuance of the Letter of Admonition. Tr. 2-35.* Committee counsel then prosecuted the Committee's charges against petitioner before the Subcommittee. He had access to the Subcommittee's findings. And he attended the

* As noted, petitioner's requests to submit a memorandum to the Committee before that meeting and to attend and be heard at that meeting were denied. Tr. 2-35.

Committee meeting which resulted in the issuance of the Letter of Reprimand. Tr. 2251-52.

In State Bar v. Beck, 400 Mich. 40, 252 N.W.2d 795 (1977), the Supreme Court of Michigan stated that if the prosecutor (the Grievance Administrator) had been present during deliberations of the Grievance Board, the lawyer would have been denied a fair hearing before an impartial tribunal. The Court held there was no denial of due process only because there was "no evidence . . . that [the prosecutor] took part in, or was even present, during the Board's deliberation of a case." 252 N.W.2d at 798.

Similarly, in State v. Carroll, 54 Ohio App.2d 160, 376 N.E.2d 596 (1977), an Ohio appellate court ruled that a physician was denied due process when an assistant attorney general "who prosecuted a medical disciplinary charge also attended the board meeting during its deliberations, a courtesy not extended to the physician."

The fundamental unfairness of permitting the attorney who prosecutes a disciplinary proceeding to have ex parte communications with the decisionmaker has also been recognized by the United States Court of Claims. In overturning the discharge of a federal employee because the employee who had represented the government before an Army grievance committee engaged in ex

parte communications with the person responsible for advising the officer who made the final decision, that Court ruled:

> It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it.
>
> -- Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967).

The Federal Administrative Procedure Act bars an employee who is engaged in the investigative or prosecuting functions of an agency from participating or advising in the decision of the agency. 5 U.S.C. § 554(d). This provision "serves to insulate decision makers from off-the-record communications from agency staff members whose personal involvement in the proceedings is likely to impair their ability to give objective advice." B. Schwartz, Administrative Law 504 (2d ed. 1982). While not universally applicable to federal administrative agencies, Section 554(d) is observed "in virtually all proceedings where the record is developed through formal hearing procedures." Id.

In this case, Committee counsel not only attended the meeting of the Committee which resulted in the issuance of the Reprimand, he also acted as investigator, advisor to the Committee in connection with the Letter of Admonition, advisor to

the Committee in connection with the Statement of Charges, and prosecutor of the Committee's charges before the Subcommittee. Such merging of the investigatory, advisory and prosecutorial functions deprived petitioner of due process of law.

C. The denial to petitioner of any opportunity to be heard by the full Grievance Committee deprived her of her right to due process of law.

As noted, when petitioner learned that the Grievance Committee would be meeting to consider the results of its counsel's investigation, petitioner asked to be heard by the Committee, and her counsel prepared memoranda of law. Her request to appear before the Committee was denied, as was the request that her memoranda be submitted to the Committee. Tr. 2-35, 2109-10.*

At the conclusion of the Subcommittee hearing, petitioner's counsel requested that all of the material that had been submitted to the Subcommittee -- including the memoranda of law that she had submitted to Committee counsel and the Subcommittee -- be furnished to the full Committee and that she be

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* In the words of a member of the Subcommittee:

> Any request, any time, any place, anywhere. You never appear and were not allowed to appear, and any material you wanted to furnish the Committee, whatever date, you are not allowed to submit. You are allowed to submit material to the Counsel for the Grievance Committee.
>
> -- Tr. 2109.

accorded "[a] hearing, an opportunity to be heard" before the full Committee. Tr. 2250. Those requests were denied.*

It is, therefore, apparent that, despite repeated requests, petitioner was denied the right to be heard, through her counsel, by the full Grievance Committee which issued the Reprimand. At a minimum, she should have been permitted to submit a memorandum and/or present oral argument directly to the full Committee. Having her "material" present "if anybody wanted to know what her point was at a particular time" (Tr. 2250) was not a meaningful substitute. That is especially so because the Committee was to act based on the findings of the Subcommittee -- findings that petitioner never saw and had no opportunity to address in her "material." The fact that Committee counsel was present at the Committee meeting further aggravated the unfairness of denying petitioner the right to address the Committee.

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* The Chair of the Subcommittee stated:

> I will tell you the procedure, as I understand it, which will be that we will write a report to the Committee. At that time, we have the meeting of the full Committee and, of course, we are members of that Committee. There will be a complete discussion. There will be available all of the material that we have here for the purpose of any question. . . . if anybody wants to know what your point was at a particular time, we can refer to the material that you have given us. It would be made available at all times.
>
> -- Tr. 2250.

This Court has not previously decided the issue whether the denial of the opportunity to submit both briefs and oral argument to the body charged with adjudicative responsibility in a disciplinary proceeding violates due process of law.

In Gerzof v. Gulotta, 57 A.D.2d 821, 395 N.Y.2d 26 (1st Dep't) appeal dismissed, 42 N.Y.2d 960, 367 N.E.2d 653, 398 N.Y.S.2d 146 (1977), the First Department, in dictum, commented on a due process claim raised by an attorney who had been denied the opportunity to present oral argument before the Appellate Division which was acting on a referee's report concerning his suspension. Although ruling that the substantive claim was barred by the doctrine of res judicata, the Court said that if it had reached the merits, it would have found the procedure constitutional for reasons stated in the concurring opinions of two members of a three-judge federal court before whom the matter had been originally raised. That court, in turn, indicated quite clearly that it was considering only the issue of the denial of the opportunity for oral argument, and was not considering the constitutionality of a procedure that denied the attorney the opportunity to submit both a written brief and oral argument. See Mildner v. Gulotta, 405 F. Supp. 182, 187 (1975) (E.D.N.Y. 1975), aff'd sub nom. Levin v. Gulotta, 425 U.S. 901 (1976).

The First Department instituted disciplinary proceedings against Gerzof and referred the matter to a referee to hold hearings and to report. The attorney had the benefit of a full hearing before the referee and, as indicated above, the opportunity to respond to the referee's report in a written brief to the Appellate Division. The Appellate Division then conducted its review based on the entire record of the proceedings before the referee -- proceedings that met the constitutional standards of due process in that the lawyer was heard, had the opportunity to present witnesses and argument, and had access to the entire proceeding, including the referee's report.

In this case, unlike Gerzof, petitioner was denied a meaningful opportunity to submit either a memorandum or oral argument to the Committee. While the "material" that petitioner submitted to the Subcommittee may have been "available" to the Committee when it met to consider the Subcommittee's findings and how to act on them, because petitioner did not have access to the Subcommittee findings, she had no opportunity to address them. Because petitioner had no opportunity to be heard before the Committee on the subject of the Subcommittee findings, the Committee's procedures violated due process.

D. The denial to petitioner of access to the "entire record," including the findings of the Subcommittee, deprived petitioner of her right to due process of law.

Simultaneously with the filing of the Petition in this proceeding, petitioner moved this Court for access to the full record of the proceedings before the Grievance Committee "including, but not limited to, the findings delivered by the Subcommittee to the Committee on October 4, 1989." That motion was denied. Accordingly, petitioner is in the position of arguing for a reversal of a decision by an adjudicative body without knowing the factual basis for that decision. The decisions of the three-judge federal court and the First Department in Gerzof v. Gulotta, supra, support the contention that such denial of access to the entire record, including the findings of fact, is a denial of due process.

In Gerzof, the lawyer argued to the three-judge federal court that the Appellate Division's procedures violated due process because they permitted the court without providing reasons or findings, to suspend the lawyer, after reviewing the report of the referee. In rejecting that argument, Judges Neaher and Moore concluded:

> [W]ith respect to the criticism that the court provided no reasons or new findings in a writtn statemnet of findings and reasons overruling the referees in the Mildner and Leaven cases [companion cases heard with Gerzof], we have not been referred to and

> are unaware of any authority for the proposition that the absence of such a statement in a judicial context offends due process . . . special factors applying to administrative proceedings which call for a written statement of findings and reasons are not present here.
>
> -- 405 F. Supp. at 195 (emphasis in original).

The opinion of three-judge court was, in dictum, accepted as a correct ruling on the merits in Gerzof v. Gulotta, supra. It is apparent, therefore, that the Gerzof dictum refers only to the situation where a court, which is reviewing findings of fact, itself provides no findings or reasons. That is not the due process issue raised by petitioner in this proceeding. Her due process claim is based precisely on the "special factors," mentioned in the opinion of the three-judge Court majority, namely, that a person appealing to a court from a decision by another adjudicatory body must be provided with the facts and the reasons supporting the decision of that party.

Petitioner in this proceeding has been denied the benefits of the procedure followed by this Court when it institutes a disciplinary proceeding and refers the matter to a referee for a hearing and report. Petitioner understands that in such proceedings it is the practice to make the report of the referee available to the attorney. Only in that manner can the attorney effectively address her arguments to the report. The opinion of Special Term in Gerzof v. Gulotta, 87 Misc. 2d 768, 386 N.Y.S.2d 790 (Sup. Ct. Nassau Co. 1976), emphasized the

existence of such a report, "which contained detailed findings of fact and conclusions respecting the specified charges," as a basis for its conclusion that the lawyer was provided due process of law. Id. at 797.*

In the instant case, the Subcommittee submitted its findings to the full Grievance Committee, and the Grievance Committee furnished the "entire record", including the Subcommittee findings, to this Court. By virtue of the denial of petitioner's motion for access to the entire record, however, petitioner has been denied access to those findings and has been required to present her case without knowing precisely what it is that she has been disciplined for, and without knowing whether she has addressed the factual and legal bases for the Reprimand.

Conclusion

The Reprimand punishes petitioner for having made public statements about a judge's conduct of a criminal trial. The Reprimand does not assert that those statements violated DR 8-102(B) or DR 7-107, the specific Disciplinary Rules governing lawyers' accusations against judges and lawyers' extrajudicial

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* Similarly, in Solari v. Vincent, 46 A.D.2d 453 (2d Dep't 1975), this Court held that effective judicial review of a parole release determination required a statement of reasons. See also Gold v. Nyquist, 43 A.D.2d 617 (3d Dep't 1973) (Board of Regents' suspension of chiropractor's license could not be reviewed without findings of fact).