

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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DAVID B. JACOBS,

Petitioner,

CV 93 3566

PETITION FOR  
A WRIT OF  
HABEAS CORPUS

-against-

ROBERT P. GUIDO,  
FRANK A. FINNERTY, JR.,  
GRIEVANCE COMMITTEE FOR THE  
TENTH JUDICIAL DISTRICT,  
MOSES WEINSTEIN,  
PATRICIA WARMHOLD,  
DOMINICK PELLE,  
DAVID PELLE,  
GUY JAMES MANGANO, JR.,  
WILLIAM C. THOMPSON,  
LAWRENCE J. BRACKEN,  
THOMAS R. SULLIVAN,  
SONDRA MILLER, and the  
STATE OF NEW YORK,

Defendants.  
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PETITION

1. Name and location of court which entered the judgment of conviction under attack- Appellate Division of the Supreme Court of the State of New York, Second Department, 45 Monroe Place, Brooklyn, New York.
2. Date of judgment of conviction-March 8, 1993.
3. Length of sentence- Three Years Suspension, beginning April 12, 1993

4. Nature of offense involved (all counts)

Petitioner was charged by the New York State in a Grievance Committee proceeding with:

- a) Charging a client an alleged clearly excessive fee for legal services in violation of Disciplinary Rule 2-106;
- b) Improperly obtaining a confession of judgment from this same client for legal fees;
- c) Improperly attempting to limit his liability to this same one client;
- d) Charging this same one client a second excessive fee for further legal services in connection with her matrimonial matter.

5. What was your plea?      **No plea was entered.** - The petitioner denied the charges against him.

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:      **Not Applicable**

6. Kind of trial:      Judge only

Proceeding was termed a hearing not a trial

Heard by Referee

7. Did you testify at the trial?      **Yes**

Proceeding was termed a hearing not a trial

8. Did you appeal from the judgment of conviction?      **No**

Permission to appeal was denied the petitioner.

9. If you did appeal, answer the following: **Not Applicable**

(a) Name of court

(b) Result

(c) Date of result

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court? **Yes**

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court - UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

(2) Nature of proceeding- Summons and Verified Complaint-Civil Action under docket # CV 93 3566, ORDER TO SHOW CAUSE with REQUEST FOR TEMPORARY RESTRAINING ORDER, NOTICE OF MOTION, Cross-Motion to Court's sua sponte Order To Show Cause under docket # 93 Misc. 059.

(3) Grounds raised

a) The Appellate Division of the Supreme Court of the State of New York that rendered the decision and sentence did not have subject matter jurisdiction to determine the case or controversy and/or fact issues raised therein;

b) If the Appellate Division of the Supreme Court of the State of New York did have subject matter jurisdiction to determine the case or controversy and/or fact issues raised therein it did not follow its own State's

Constitutional provisions or enabling acts to hear and determine the case or controversy;

c) The petitioner was denied among other protected rights, his substantive and procedural due process rights under the 5th, 6th, 7th, 8th and 14th Amendments to the Constitution of the United States and parallel provisions under the New York State Constitution, including the petitioner's right to a jury trial and under 42 U.S.C. section 1983, 1985;

d) The decision and order was against the weight of the credible evidence with respect to the underlying disciplinary hearing and/or the disciplinary penalty;

e) Neither the referee nor the Appellate Division complied with CPLR 4213(b);

f) No reasons or rational basis was shown or indicated in the decision or order of the Appellate Division, dated, March 8, 1993, for omitting the time expended in the Family Court proceedings by the petitioner on behalf of the complainant in computing the reasonableness of the fee charged, but never collected;

g) The decision is at variance with established New York State precedent for determining the amount of an attorney's fee;

h) The basis for the petitioner's request for a temporary restraining order and preliminary injunction were that petitioner has and continues to suffer irreparable injury and hardship, there is a likelihood of success on the part of the petitioner, and the petitioner has no adequate remedy at law; and

i) The penalty imposed, three years suspension, transfer and forfeiture of all legal work, unemployability in the legal and/or paralegal professions is unconstitutional both in scope and effect in consideration of the charges.

(4) Did you receive an evidentiary hearing on your petition, application, or motion? **No**

The Court (Judge Platt) refused to determine the motion on submitted papers pending a hearing. Judge Platt refused to rule on the applications. The Judge Platt said that the petitioner's applications would have to await determination of the Federal Grievance Committee's determination as to whether the petitioner should be suspended from Federal Court practice pursuant to Judge Platt's sua sponte Order To Show Cause under docket no. 93 Misc. 059.

(5) Result- None to date

(6) Date of result

(b) As to any second petition, application, or motion, give the same information: **Does Not Apply**

(1) Name of court

(2) Nature of proceeding.

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application, or motion?

(5) Result

(6) Date of result

(c) As to any third petition, application, or motion, give the same information: **Does Not Apply**

(1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application, or motion? **Does Not Apply**

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application, or motion? (1) First petition, etc. **No**

(2) Second petition, etc. **Does Not Apply**

(3) Third petition, etc. **Does Not Apply**

(e) If you did not appeal from the adverse action on any petition, application, or motion, explain briefly why you did not:

Judge Platt refused to accept the papers for submission to him to rule on the applications. The Judge said that the petitioner's applications would not be received by the Court pending the Federal Grievance Committee's determination as to whether the petitioner should be suspended from Federal Court practice pursuant that Judge Platt's sua sponte Order To Show Cause under docket no. 93 Misc. 059. Petitioner had nothing before the Court to appeal from.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

A. **Ground one:** The Appellate Division of the Supreme Court of the State of New York that rendered the decision and sentence did not have

subject matter jurisdiction to hear or determine the case or controversy and/or fact issues raised therein. Furthermore, the Appellate Division did not have subject matter jurisdiction to impose the nature and extent of the penalty and forfeiture imposed upon the petitioner for the acts complained of. Within this ground it is claimed that the New York State Judiciary Law is unconstitutional, as specifically applied to the petitioner, and in general as it denies or does not provide for the right to a jury trial as provided for in the Federal or New York State Constitutions.

The Appellate Division of the Supreme Court of the State of New York is a Court of limited original jurisdiction. Its jurisdiction emanates from the New York State Constitution. The Judiciary Law, section 90 subd.(2) provides that the Appellate Division shall have original jurisdiction over the discipline of attorneys. Even though the Appellate Division has been called a branch of the Supreme Court, it was never equal or equivalent in subject matter jurisdiction. Neither did it ever function as such. The Appellate Division was, prior to the 1894 Constitution revision, called the General Term, whereas the Supreme Court was called the Trial Term. Prior to the 1894 Constitution revision, the General Term heard and determined appeals only. The petitioner's research indicated that, historically, and as mandated, the Appellate Division could not exercise the same jurisdiction as the trial term if it wanted to. This was the case prior to the 1894 Constitution revision. The 1894 Constitution revision did not provide otherwise. The petitioner's research indicated that historically the Appellate Division did not have original subject matter jurisdiction to hear and determine suits at common law or equity. The 1894 Constitutional revision did not enable the Appellate Division to hear and determine suits at common law or equity.

**B. Ground two:** The Appellate Division did not have subject matter jurisdiction to impose the nature and extent of the penalty and forfeiture imposed upon the petitioner for the acts complained of.

The Petitioner takes the position that an attorney's claim for work, labor and services was and is enforceable by a suit at common law, called Assumpsit, now called Breach of Contract. That, as a matter of history and legal precedent, the issues of controverted fact within this claim were entitled to be tried and determined before a jury as a matter of right. The petitioner further claims that the Appellate Division did not have subject matter jurisdiction to 1) determine the petitioner's right to a specific sum for work, labor and services performed, 2) direct the petitioner to vacate judgments of record, 3) punish and penalize the petitioner by bringing about a forfeiture of the petitioner's law practice (approx. 80 civil cases in progress) and/or 4) prevent the petitioner from obtaining employment in any category or subcategory or work in the law field within the context of a Grievance Committee hearing and without a trial by jury in a Supreme Court Trial Term.

The Appellate Division did not have the jurisdictional power to delegate to a referee to hear, report and/or determine the nature and extent of the petitioner's claim to attorney's fees or to deny to the petitioner his right to a trial by a trial term portion of the Supreme Court.

The Petitioner takes the position that the acts of the Appellate Division, delegated to the referee under the guise of a Grievance Committee hearing, that determined the nature and extent of the petitioner's work, labor and/or services within this disciplinary proceeding were void for want of subject



matter jurisdiction. The basic common law principle that one cannot do indirectly what one cannot do directly was not applied in this matter. The Appellate Division ought not to be permitted to change the name of the proceeding and thus assume subject matter jurisdiction where no jurisdiction was granted to the Appellate Division by the Constitution to hear and determine suits at common law. The Appellate Division ought not to be permitted to delegate authority to a referee to hear and determine suits at common law, an authority that the Appellate Division does not have.

**C. Ground three:** The New York State Judiciary Law, section 90 subd.(2) is unconstitutional as specifically applied to the petitioner and in general as it denies or does not provide for the right to a jury trial as provided for in the Federal or New York State Constitutions under the facts and circumstances of Grievance Committee's claims.

When the issues in a case or controversy or special proceeding are triable by a jury, the Court must give the participants an opportunity to demand a trial of the issues involving controverted facts. In this matter the petitioner was denied his right as guaranteed to him by the New York State Constitution Art. 1 section 2.

**D. Ground four:** The petitioner was denied among other protected rights, his substantive and procedural due process rights under the 5th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. section 1983, 1985.

As to the petitioner's 5th Amendment rights, it is the petitioner's position that he was denied his Constitutional right of liberty and property without due process of law in that the petitioner was:

1) Compelled to be a witness against himself by being directed to give testimony under oath prior to the service upon him of charges and specifications;

2) Denied an opportunity to prepare an adequate defense because of the Appellate Division Court's denial of any pre-hearing discovery by the petitioner of the complainant; and

3) Denied a fair hearing.

The proceeding brought against the petitioner was, and is, quasi-criminal in nature. In the investigatory stage of these proceedings, no warning or notice was given to the petitioner that the deposition taken of the petitioner could or would be used as evidence in support of any charges in the event of an actual hearing before a referee. At the hearing, the referee, Hon. Moses Weinstein, said that the petitioner had a continuing objection on the record to all of his rulings and to the proceeding itself. Again, the petitioner notes his objection to the use of the petitioner's deposition and to all of the proceedings related to this grievance. No deposition in advance of the charges was permitted to be taken of the complainant. To this procedure the petitioner 1) objected, 2) moved the Appellate Division to depose the complainant and obtain discovery, and 3) was denied this relief.

E. Ground five: The petitioner was denied among other protected rights, his substantive and procedural due process rights under the 6th Amendment to the

*Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. section 1983, 1985.*

As to the petitioner's 6th Amendment rights, it is the petitioner's position that he was denied his Constitutional rights to confrontation and the use of subpoenas as guaranteed by 6th Amendment to the U.S. Constitution and parallel provisions in the New York State Constitution and 42 U.S.C 1983, et. seq., because of the state action through the conduct engaged in by the referee at the grievance hearings, in;

1) Refusing to enforce authorized, served and acknowledged, court ordered subpoenas for the presence of Dominick Pelle and the records of Pelle & Pelle, attorneys for the complainant's husband in both in the Supreme Court, Nassau County Matrimonial Action and in the Nassau County Family Court Proceedings to help prove the time and nature of the legal services performed by the petitioner in connection with the matrimonial and family court proceeding of the complainant;

2) Refusing to permit the petitioner to cross-examine the complainant with respect to the tape recording in which the complainant admitted knowledge of the fees;

3) Refusing to permit the petitioner to cross-examine Dominick Pelle of Pelle & Pelle, Esqs. to test his credibility with regard to the circumstances and information contained in their records with regard to their attorney's fees;

4) Including evidence of collateral acts between the complainant and the petitioner involving the criminal representation of the complainant by the petitioner, without prior notice to the petitioner, and without the petitioner being charged with any acts in connection therewith;

5) Carrying on ex-parte communications with the prosecutor for the Grievance Committee, the content and nature of which was partly disclosed to the petitioner afterwards;

6) Permitting, considering and using as one basis for the penalty imposed, the inclusion in the post-hearing motion to confirm the referee's report, of prior involvements of the petitioner with the Grievance Committee without any prior notice to the petitioner or allowing the petitioner the opportunity to defend and/or explain these prior involvements at the hearing;

7) Refusing to permit the petitioner to conduct any discovery in advance of the hearing;

8) Permitting the Grievance Committee the right to depose the petitioner under compulsion and duress without any warning or notice as to the deposition's possible future use against the petitioner;

9) Permitting the Grievance Committee the right to use this previously taken testimony of the petitioner, as the basis for charges and specifications against the petitioner; and

10) Permitting the Grievance Committee the right to use this previously taken testimony before the Grievance Committee at the hearing without the petitioner's knowing waiver or permission.

Such deprivations and denials are violative of the petitioner's constitutional rights.

No notice was given to the petitioner that his alleged or actual prior acts would be a consideration in determining the sanction or punishment. In a disciplinary hearing the attorney is entitled to prior notice that the disciplinary body would consider prior disciplinary action against the petitioner in fixing his

punishment. Failure to do so is a violation of due process. This should be especially true when the prior discipline did not result from a hearing.

The Grievance Committee attorney's post-hearing motion to confirm the referee's report contained completely extraneous, prejudicial findings of the petitioner's prior involvement with the Grievance Committee. These other matters that were submitted to the referee bore no relation to the charges that were before the referee. They were remote in time and circumstance and not related to the instant underlying charges. The prior incidents that were related in the Grievance Committee's post-hearing motion to confirm the report of the referee completely undercut the principles of due process. They essentially were and are an attempt by the Grievance Committee to further charge the petitioner in this proceeding with prior acts, some of which were not based on any hearing whatsoever. Their cumulative effect was and is prejudicial to the petitioner in regard to their inclusion before the Appellate Division that stated it considered and included those past findings in setting out the three year suspension. Their inclusion in the Grievance Committee's post-hearing memorandum and/or motion to confirm the referee's report violated the petitioner's due process rights to a fair hearing since they were referred to and offered for consideration only after the hearing was closed without any opportunity for the petitioner to offset their prejudicial effect.

The petitioner's substantive due process rights were violated in that nothing in the referee's report to the Appellate Division and nothing in the Appellate Division's decision and order referred to or indicated any rational relationship between the petitioner's prior involvement with the Grievance Committee, the acts that form the basis for the charges, and the reason or reasons

the charges were sustained or the measure of discipline imposed on the petitioner. None of the prior incidents was ever discussed in terms of its nature and/or consequent involvement in the initial phase of the Grievance Committee's investigatory process. None of the prior incidents was ever discussed in terms of its nature and/or consequent involvement prior to the service of any charges and specifications on the petitioner. The Grievance Committee directed the petitioner to appear before it to give testimony under oath concerning the matter bearing on the issues of the attorney's fees, inter alia. The petitioner was told by the Grievance Committee's attorney that the record taken was private and confidential and that the petitioner's cooperation was mandatory. The petitioner complied in good faith to the extent that the petitioner testified candidly and produced the documentation that the petitioner had in his possession at that time. The petitioner explained to the Grievance Committee attorney that further evidence of the time spent and the nature and extent of the petitioner's legal services would be validated by access to the Family Court and Supreme Court records. Those records were unavailable at the time the petitioner's deposition was taken. That deposition was used without the petitioner's permission and over his objection at the hearing on the charges and specifications.

The petitioner, during his cross-examination of the complainant, was not permitted to interrogate the complainant with respect to all of the charges. A transcript of the tape recorded conversation between the complainant and the petitioner was identified at the hearing. This tape recording was previously listened to, examined, and its content agreed upon between the Grievance Committee's attorney and the petitioner. The tape recording of the conversation between the petitioner and the complainant was made with the complainant's knowledge and consent. Both the testimony of the petitioner and the witness, Dr.

Gunsberger, bear this out. The referee continually denied the petitioner the opportunity to use the transcript of the tape recorded telephone conversation for purposes of impeachment during the petitioner's cross-examination of the complainant. This transcript completely contradicted the substance of the complainant's direct testimony. The tape recording showed that the complainant knew, understood and voluntarily agreed with, every circumstance of the legal fee charged to her.

This transcript of the tape recording demonstrated that the complainant fabricated her main contention that she neither knew that she was individually responsible for her own legal fees, or that the amount was \$24,500.000, (said by the complainant to be \$25,000.00 in the transcript), and that this was the sum that had been agreed upon between the complainant and the petitioner for the work that had already been done.

The referee denied the use or entry of the transcript of the tape recorded telephone conversation into evidence at the time when the complainant was on the witness stand. This nullified the impact of the cross-examination of the complainant by refusing to permit the petitioner to use the transcript of the tape recorded telephone conversation for at least impeachment purposes. At the very end of the hearing, Mr. Guido, the Grievance Committee's attorney, offered to permit the entry of the transcript of the tape recorded telephone conversation into evidence, as he put it, "To avoid any reversible error on appeal". The transcript of the tape recording was then admitted. The referee then refused the petitioner's request to recall the complainant to be cross-examined after the transcript of the tape was admitted into evidence. The referee failed to permit the petitioner the opportunity to effectively cross-examine or confront the complainant. These

actions on the part of the referee and Appellate Division violated the petitioner's rights to a fair hearing and the right to effectively confront the petitioner's accuser and main witness under the 5th, 6th and 14th Amendments to the U.S. Constitution and parallel provisions under the New York State Constitution.

An additional 6th Amendment and procedural due process violation involved the refusal of the referee to enforce the personal Subpoena and Subpoena Duces Tecum signed by the referee and personally served upon Dominick Pelle Esq., the attorney that represented the complainant's husband in both the matrimonial and family court proceedings. The information demanded in the Subpoena reflected the billing of these attorneys to the complainant's husband for the legal services rendered to him. That information was intended to help the petitioner prove the services and the hours expended representing the complainant since there would be a direct correspondence regarding the appearances in both Courts for conferences, hearings and the like. Dominick Pelle Esq.'s refusal to appear and the refusal of the referee to enforce his own "So Ordered" Subpoena unduly prejudiced the petitioner's defense since there was no other source available to the petitioner for this information.

A further procedural and substantive due process violation occurred after the hearing was closed by the referee. After both the Grievance Committee's attorney and the petitioner submitted post hearing memorandum, the referee sought and obtained from the Grievance Committee's attorney, an affidavit from Dominick Pelle, Esq. Dominick Pelle, Esq. refused to appear at the hearing before the referee with his office records regarding the legal services and time expended in the matrimonial and family court proceeding involving the complainant and her husband, pursuant to the Subpoena admittedly served upon him. The affidavit



submitted by Mr. Pelle was accepted by the referee in lieu of Mr. Pelle's appearance and testimony at the hearing. The content of Mr. Pelle's affidavit was used by the referee to justify the referee's decision sustaining all the charges against the petitioner. The petitioner was never afforded an opportunity to examine Pelle & Pelle's office records regarding their time records in connection with the matrimonial or family court proceedings, or question or cross-examine Dominick Pelle, Esq., a very damaging absent witness.

Another violation of the petitioner's substantive and procedural rights involved the introduction into the hearing of prejudicial testimony completely extraneous to the charges. On cross-examination, the complainant testified with respect to a criminal charge brought against the complainant for aggravated harassment. The complainant was arrested and charged with using her telephone to make prank calls, harassing her husband's girlfriend over a period of months in 1987. The petitioner also represented the complainant in that matter. Since the petitioner was not charged with any acts which were the subject of that representation, this testimony by the complainant was a complete surprise to the petitioner. The complainant's testimony in regard to this matter was offered and accepted by the referee during the hearing. The petitioner objected to the entire portion of the hearing concerned with this testimony, but was overruled.

F. Ground six: The petitioner was denied among other protected rights, his substantive and procedural due process rights under the 7th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution, Art. 1 sec. 2 and under 42 U.S.C. section 1983, 1985.

As to the petitioner's 7th Amendment rights, it is the petitioner's position that he was denied his Constitutional rights to a jury trial on the issue of the nature and extent of his work, labor and services. The New York State Constitution has a parallel provision, Art. 1 sec. 2, that states that the right to a jury trial shall remain inviolate. A suit at common law for work, labor and services was known as Assumpsit. It required a jury trial. The petitioner was not afforded this opportunity at any stage of the proceedings on any issue of controverted fact. The Appellate Division not only delegated its alleged authority to a referee to hear and determine all issues of fact, it permitted the referee to evaluate the amount of the petitioner's fee based on the Grievance Committee attorney's evaluation of the number of hours expended by the petitioner. The Appellate Division also vacated judgments of record that had been duly filed and recorded in the Nassau County Clerk's Office. The Appellate Division also caused a forfeiture of all of the petitioner's legal cases in progress as part of its decision, restrained the petitioner from engaging in any form of the practice of law for three years, required the petitioner to be tested on the code of professional responsibility as a condition of reinstatement, all, without the opportunity for the petitioner to have a trial by jury.

G. Ground seven: The petitioner was denied among other protected rights, his substantive and procedural due process rights under the 8th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. section 1983, 1985.

The petitioner's 8th Amendment argument is that within the context of the charges, the punishment imposed upon the petitioner is unconscionably disproportionate as compared to the conduct of the petitioner and in light of the

other facts and circumstances of this case. Nothing that the petitioner did was intended to harm. The petitioner's only motivation was to secure payment for his services. The petitioner was not charged with any deceit, dishonesty, misrepresentation or breach of any fiduciary duty. The complainant was not harmed in any way by the petitioner's actions. From the facts and circumstances of this case, namely:

- a) The complainant has not suffered any monetary loss;
- b) The complainant's testimony did not include any substantiation or corroborative evidence that her "credit" was ever impaired from the time the first Confession of Judgment was filed to date;
- c) There was no evidence that the complainant paid the petitioner anything for almost five years of legal services in regard to the Matrimonial Action or the Family Court Proceedings;
- d) There was no evidence that the complainant suffered any other form of loss or impairment due to the petitioner's representation of her to date; and
- e) There was no evidence that the petitioner consciously or knowingly failed to explain, describe or counsel the complainant with respect to the confessions of judgment.

The petitioner takes the position that the Court has, in effect, charged the petitioner with acts that were and are in no way criminally or civilly wrong in nature or codified in law at the time that the petitioner was alleged to have committed them. In effect the Court has defined a violation, imposed a sentence, penalty and forfeiture upon the petitioner when no violation existed at the time petitioner acted, subjected the petitioner to a sham hearing, denied him a jury trial under the guise of a disciplinary hearing, sustained charges based on insufficient

and illegally obtained evidence, failed to permit the introduction of exculpatory documentary evidence and/or call exculpatory witnesses for the petitioner, denied the petitioner access to exculpatory records, interfered with the parties' obligation clearly described and acknowledged in a contract for work, labor and services without a jury trial, and exacted a penalty from the petitioner that bears no relation to the acts committed.

With respect to the penalty involved, the suspension of the petitioner resulted in his being be unable to practice law. Every one of the petitioner's cases was transferred to another attorney. Each client was notified of the petitioner's suspension with the consequent loss of contacts and referrals for three years. In effect, every client and future client were lost to the petitioner. All of the petitioner's cases disposed of in the interim will, of necessity, result in some loss of the attorney's fee to the petitioner. With the loss of the petitioner's ability to practice law at 49 years of age, and the restrictions imposed upon the petitioner not to engage in any form of the actual, or apparent, practice of law, the petitioner will be forced to re-enter a different job market and seek employment unrelated to law. Without the ability to settle or try the pending cases, and without the capacity to manage the pending legal cases, the petitioner is now placed in the position of losing his livelihood because of these charges, when there was no wrongful mental state, no wrongful acts or omissions recognized by any codified law and no loss to the one client involved. The measure of the penalty imposed involved the consideration of past acts for which the petitioner had already been punished. This was in violation of the petitioner's civil rights under the 5th, 6th, 7th and 8th and 14th Amendments to the Constitution of the United States and parallel provisions under the New York State Constitution, under 42 U.S.C. section 1983, and U.S. Const. Art 1, section 10.

The petitioner is responsible for the support of three individuals besides himself. These include his wife and two infant children. In sum, without a temporary restraining order suspending the effect of the Appellate Division Order and decision or significant reduction in the penalty imposed, the petitioner cannot sustain family life or maintain his home in New York for any significant length of time and is in danger of becoming a public charge. The petitioner can only respectfully request that the instant relief requested be granted.

**H. Ground eight:** The petitioner was denied among other protected rights, his substantive and procedural due process rights under the 14th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. section 1983, 1985.

The petitioner's 14th Amendment argument is that those grounds and the basis for them as described above are binding on the State of New York and its Judicial branch, its Courts, and their agents acting under authority or color of State law. The petitioner's position is that the State of New York violated and deprived the petitioner of his constitutional rights under the 5th, 6th, 7th, 8th Amendments to the U.S. Constitution as guaranteed by and binding on the States through the application of the 14th Amendment to the United States Constitution and the petitioner's civil rights under 42 U.S.C. 1983, 1985 as described above. The State of New York, the Judges of the Appellate Division, the referee, the Grievance Committee for the Tenth Judicial District, all in their official capacities and/or their individual private capacities, and/or acting under color of state law, the complainant, and the other parties named in the caption acted singularly or in concert to deprive the petitioner of his rights, including his civil rights as

guaranteed by and binding on the States under the 14th Amendment to the United States Constitution and the petitioner's civil rights under 42 U.S.C. 1983, 1985 and parallel provisions under the New York State Constitution as described above. It is claimed that the persons named above acted under color of state law in their official and/or private individual capacities to deprive the petitioner of his civil rights without due process of law either singularly and/or in concert as described above. The Petitioner incorporates by reference the summons and complaint in the action under docket number CV 93-3566 and the other pleadings and papers heretofore filed therein as part of that action and the instant proceeding. Accompanying this petition and also made part hereof is the petitioner's affidavit in support of the petitioner's previously made Order To Show Cause under docket number CV 93-3566.

I. Ground nine: The decision and order of the Appellate Division, was against the weight of the credible evidence with respect to the underlying disciplinary hearing and/or the disciplinary penalty.

a) The decision and order of the Appellate Division dated, March 8, 1993, specifically omitted any reference to hours credited to the legal services expended by the petitioner on behalf of the complainant in the Family Court of Nassau County. No explanation or reasoning was provided in the decision or order to justify this omission.

The mathematical formula or basis or computation which was used to form the findings and/or conclusions that the number of hours relied on (34 1/2 hrs.) to sustain the allegation against the petitioner that the legal fee of \$14,500.00 was clearly excessive, was not indicated or explained. Nowhere in the referee's report or the Appellate Division's decision and order was the basis or reasoning

stated or explained for the statement that 34 1/2 hrs. was the upper limit of the number of hours expended by the petitioner on behalf of the complainant, from March 27, 1987 through August 6, 1987, to justify sustaining that the legal fee charged was excessive or unreasonable. The limit of 34 1/2 hrs. bears no rational or reasonable relationship to the work, labor and legal services actually performed and documented by the petitioner on behalf of the complainant.

The mathematical formula or basis or computation which was used to form the basis for the findings and/or conclusions that the number of hours relied on (43 hrs.) to sustain the allegation that the further legal fees were clearly excessive, was not indicated or explained. Nowhere in the referee's report or the Appellate Division's decision and order was the basis or reasoning stated or explained for the statement that 43 hrs. was the upper limit of the number of hours expended by the petitioner on behalf of the complainant, from August, 1987 through August, 1988, to justify sustaining the allegation that the further legal fees were clearly excessive. The limit of 43 hrs. bears no rational or reasonable relationship to the work, labor and legal services actually performed and documented by the petitioner on behalf of the complainant.

There was no legal, rational basis for sustaining the allegation of the alleged release of liability obtained from the complainant by the petitioner. There was no evidence, credible or not credible, presented by the complainant that discussed the issue of the petitioner attempting to limit his liability for malpractice to the complainant. The only explanation for the content and the presence of the statement in the first confession of judgment was that of the petitioner. The complainant never denied or rebutted the petitioner's perceptions or reasons for

incorporating the sentences into the first confession of judgment that formed the basis for the complainant's allegation against the petitioner.

c) The statements in the Appellate Division's decision, in connection with the allegation that, "The petitioner wrongfully filed the confession of judgment to effect payment rather than holding it as security for payment of his outstanding fees," was not supported by any rational view of the evidence presented or the case law of this State. From the testimony given at the hearings, both the complainant and the petitioner stated that during the times when the confessions of judgment were entered into by the complainant and the petitioner, the complainant and the petitioner did not perceive themselves as being in an attorney-client relationship. Moreover, the distinction between filing a confession of judgment to "effect payment" rather than filing a confession of judgment to "obtain security for future payment" was never explained in the referee's report or the Appellate Division's decision.

CPLR Art. 52 states that only the act of "Executing on a Judgment" can effect payment. There was never any Execution served or filed by the petitioner with respect to either confession of judgment. There was no charge or specification that alleged that the petitioner ever intended to or did execute on either judgment. Without filing the confession of judgment, "holding it as security for payment," creates no security at all.

It is the act of "filing", in itself, which creates the lien, which acts as security for future payment. But this does nothing to "effect payment". Only the act of "Execution" can effect payment. See "Execution", Black's Law Dictionary, 5th Edition. The petitioner could find no case law to apprise the petitioner of any decision of any court that indicated any known or understood standard by which "filing", in itself, in any way means to "effect payment" in the context of filing a



confession of judgment. The "legal fiction" by the Appellate Division in this specific instance violated the petitioner's right to substantive due process as guaranteed to the petitioner by the 5th, 6th, 7th, 8th and 14th Amendments to the Constitution of the United States and parallel provisions under the New York State Constitution together with U.S. Const. art 1, section 10. There was a lack of any reasonable standards or guidelines provided to enable the petitioner to be on notice of the requirement(s) for conduct for which the petitioner was held answerable.

**J. Ground ten:** Neither the referee nor the Appellate Division complied with CPLR 4213(b).

The Appellate Division and the referee did not comply with their own rules, namely, CPLR 4213(b). That section requires that the trial court state facts it deems essential to its determination. CPLR 4213, subd.(b) requires that where a case is tried before the court without a jury, the court's decision shall state the facts upon which the rights and liabilities of the parties depend. Both the referee's decision and the Appellate Division decision and order are patently insufficient to meet that requirement. Moreover, effective appellate review of the instant proceeding requires that appropriate factual findings be made by the trial court. Certainly, in a case such as this, when the penalty imposed is tantamount to a complete loss of the ability to earn a living, along with the loss of the petitioner's complete clientele, the Court should be required to state the basis for its conclusions.

**K. Ground eleven:** No reasons or rational basis was shown or indicated in the decision or order of the Appellate Division, dated, March 8, 1993, for omitting the time the petitioner expended, either in the Family Court proceedings

on behalf of the complainant or in computing the reasonableness of the fee charged, but never collected.

The referee's report and the decision and order of the Appellate Division specifically omit any reference to the number of hours claimed by the petitioner to have been expended on behalf of the complainant in any of the Family Court proceedings. The notices of appearance, entered into evidence and uncontroverted for over twelve hearing dates, were omitted without any basis.

These additional hours taken together with the petitioner's testimony and documentary evidence showed clearly that the fees charged were not unreasonable or excessive.

The mathematical formula or basis or computation which was used to form the findings and/or conclusions that the number of hours relied on (34 1/2 hrs.) to sustain the allegation against the petitioner that the legal fee of \$14,500.00 was clearly excessive, was not indicated or explained. Nowhere in the referee's report or the Appellate Division's decision and order was the basis or reasoning stated or explained for the statement that 34 1/2 hrs. was the upper limit of the number of hours expended by the petitioner on behalf of the complainant, from March 27, 1987 through August 6, 1987, to justify sustaining that the legal fee charged was excessive or unreasonable. The limit of 34 1/2 hrs. bears no rational or reasonable relationship to the work, labor and legal services actually performed and documented by the petitioner on behalf of the complainant.

The mathematical formula or basis or computation which was used to form the basis for the findings and/or conclusions that the number of hours relied on (43 hrs.) to sustain the allegation that the further legal fees were clearly excessive, was not indicated or explained. Nowhere in the referee's report or the Appellate Division's decision and order was the basis or reasoning stated or

explained for the statement that 43 hrs. was the upper limit of the number of hours expended by the petitioner on behalf of the complainant, from August, 1987 through August, 1988, to justify sustaining the allegation that the further legal fees were clearly excessive. The limit of 43 hrs. bears no rational or reasonable relationship to the work, labor and legal services actually performed and documented by the petitioner on behalf of the complainant.

**L. Ground twelve:** The decision is at variance with established New York State precedent for determining the amount of an attorney's fee.

There was insufficient credible evidence offered by the Grievance Committee to sustain any of the charges against the petitioner. The Grievance Committee sought to give total weight to one factor, and only one factor, in arriving at the reasonable fee to be charged, i.e. the number of hours spent. The law of this state does not dictate this method.

The Grievance Committee did not offer any evidence to sustain the charge that the petitioner charged the complainant an unreasonable or excessive fee. Neither the \$14,500.00 amount nor the \$10,000.00 amount was shown to be excessive or unreasonable. The sole criteria referred to by the Grievance Committee, referee, and/or the Appellate Division to determine the reasonableness or excessiveness of the legal fees charged to the complainant was the number of hours expended by the petitioner in connection with the legal services rendered to the complainant. The cases that the petitioner found reflecting the present state of the law in the State of New York on the subject of the criteria chosen in determining a reasonable fee for legal services indicated that in assessing legal fees there are certain factors to be considered such as the time and labor required, the difficulty of the questions presented, the skill required to perform these services, including the lawyer's experience, ability, and reputation, the amount involved and

difficulty of the questions presented, the skill required to perform these services, including the lawyer's experience, ability, and reputation, the amount involved and the benefit resulting to the client from the services. In this connection, the evidence presented by the petitioner at the hearing demonstrated that the petitioner expended at least One Hundred and Twenty-Five (125) hours from March 27, 1987 to August 6, 1987. This more than justified charging the complainant a fee of \$14,500.00 for that time frame. See petitioner's Post Trial Memorandum. Likewise, during the period from September, 1987 through August, 1988, the only credible evidence of the time expended was offered by the petitioner. In this connection, the evidence presented by the petitioner at the hearing demonstrated that the petitioner expended at least Ninety (90) hours. This more than justified charging the complainant a fee of \$10,000.00 for that time frame. See petitioner's Post Trial Memorandum. However, the other criteria, specifically the difficulty factor was substantial in this matter. The nature and extent of the continuing legal, economic and emotional conflicts that the complainant was experiencing carried over into every phase of the petitioner's representation of the complainant.

M. Ground thirteen: Secret documents not placed in evidence were used in the determination of one or more portions of the proceedings.

After the decision and order of the Appellate Division suspending the petitioner was served on the petitioner, the petitioner applied to Appellate Judge Vincent Balledda, Jr., by Order to Show Cause to obtain reconsideration of the findings, procedures, and penalty imposed on the petitioner. Judge Balledda was asked to sign the Order to Show Cause by the petitioner. Judge Balledda convened a conference at which the Judge's Law Secretary, the Grievance Committee's attorney and the petitioner were present. Judge Balledda, during the conference, removed from his desk a file he termed a dossier. The Judge said that such

dossier's are compiled and kept on many attorneys. The Judge said that he had the petitioner's dossier in front of him. The Judge said that, based on what was in this file, he would not sign the Order To Show Cause and would not overrule his brothers.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them.

Lack of Subject Matter Jurisdictione was not previously presented because the petitioner did not think of it earlier.

Use of the dossier by Justice Balletta was not previously presented because the petitioner did not think of it earlier.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack? **Yes**

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

The petitioner represented himself at all stages of the proceedings:  
ADDRESS: 30 Pheasant Lane, Woodbury, New York 11797.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?  
**Yes**

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? **No**

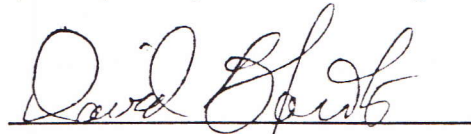
(a) If so, give name and location of courts which imposed sentence to be served in the future:

(b) Give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? **Does Not Apply**

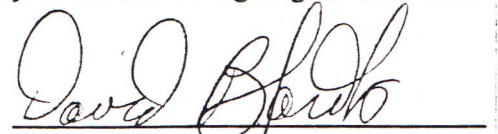
No prior habeas corpus application has been made by this petitioner.

Wherefore, the petitioner requests that the court grant the relief, pursuant to 28 USC Section 2241, 2254, 2255, to which the petitioner may be entitled in this proceeding.



DAVID B. JACOBS

I declare, certify and verify under penalty of perjury that the foregoing is true and correct. Executed on



DAVID B. JACOBS

Signature of the petitioner

NOTICE OF ENTRY

Sir: Please take notice that the within is a

(certified) true copy of a  
duly entered in the office of the clerk of the within  
named court on 19

Dated,

Yours, etc.,

DAVID B. JACOBS

Attorney for

Office and Post Office Address

30 PHEASANT LANE  
WOODBURY , NEW YORK 11797

To  
Attorney(s) for

NOTICE OF SETTLEMENT

Sir: Please take notice that an order

of which the within is a true copy will be presented  
for settlement to the Hon.  
one of the judges of the within named Court, at

at M  
Dated,

Yours, etc.,

DAVID B. JACOBS

Attorney for  
Office and Post Office Address  
30 PHEASANT LANE  
WOODBURY , NEW YORK 11797

To  
Attorney(s) for

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

DAVID B. JACOBS,

Plaintiff,

-against-

ROBERT P. GUIDO, FRANK A. FINNERTY, JR.,  
GRIEVANCE COMMITTEE FOR THE  
TENTH JUDICIAL DISTRICT,  
MOSES WEINSTEIN, PATRICIA WARMHOLD,  
DOMINICK PELLE, DAVID PELLE,  
GUY JAMES MANGANO, JR., LAWRENCE J. BRACKEN  
WILLIAM C. THOMPSON, LAWRENCE J. BRACKEN,  
THOMAS R. SULLIVAN, SONDR A MILLER, AND  
THE STATE OF NEW YORK,

Defendants.

PETITION FOR A WRIT OF HABEAS CORPUS

DAVID B. JACOBS

Attorney for Petitioner-pro-se  
Post Office Address, Telephone  
30 PHEASANT LANE  
WOODBURY , NEW YORK 11797  
516 921 6232  
FAX 516 921 6451

To:

Attorney for

Service of a copy of the within  
is hereby admitted.

Attorney(s) for