COURT OF APPEALS
STATE OF NEW YORK

In the Matter of DORIS L. SASSOWER,
An Attorney and Counselor-at-Law

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT

Petitioner-Respondent,

- against -

DORIS L. SASSOWER,
Admitted Under the Name of
DORIS LIPSON SASSOWER

Respondent-Appellant.

NOTICE OF MOTION FOR LEAVE TO APPEAL

SIR:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of David B. Goldstein, sworn to on July 18, 1991, the Decisions and Orders of the Appellate Division, Second Department, entered on October 18, 1990, and June 12, 1991, and the notices of entry thereof and the Decision and Order of the Appellate Division immediately, indefinitely, and unconditionally suspending Doris L. Sassower from the practice of law, entered June 14, 1991, and served on June 19, 1991 and the notice of entry thereof, and the record in the Appellate Division, the appellant will move this Court at the Court of Appeals Hall, City of Albany, New York, on the 29th day of July, 1991, at 10 a.m. for an ORDER:

a) pursuant to CPLR § 5602(a)(1), granting appellant Doris L. Sassower leave to appeal to this Court from the Order of the Appellate Division, Second Department, which immediately, indefinitely, and unconditionally suspended her from the practice of law in the State of New York;

b) staying the suspension of Doris L. Sassower nunc pro tunc pending resolution of this motion, and if granted, resolution of this appeal; and

c) granting such other and further relief as the Court deems just and proper.

The grounds upon which this leave to appeal is requested are set forth in detail in the annexed affirmation of David B. Goldstein and are concisely stated as follows:

1. Whether the immediate suspension of Ms. Sassower, without any findings, statement of reasons, or an evidentiary hearing violated 22 NYCRR § 691.4(l), conflicts with decisions of this Court, violates due process and is against the interests of substantial justice; and

2. Whether the Second Department's predicate order of October 18, 1990, was unlawful in that this proceeding was a) brought without a petition in violation of 22 NYCRR §§ 691.4, 691.13(b); b) was based on improperly obtained confidential court records; c) that the court's order improperly delegated to Grievance Committee Counsel the sole discretion to select a single medical expert to examine Ms. Sassower, in viola-

tion of 22 NYCRR § 691.13(b)(1); and d) that the court lacked personal jurisdiction due to defective service under Jud. Law § 90(6), (10).

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served on the undersigned on or before the return date of this motion.

PLEASE TAKE FURTHER NOTICE that your personal appearance in opposition to this motion is neither required nor permitted.

Dated: New York, New York
July 19, 1991

Yours, etc.,

RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

Attorneys for Doris L.
Sassower

TO: Gary Casella, Esq.
Chief Counsel
Grievance Committee, Ninth Judicial District
Crosswest Office Center
399 Knollwood Road -- Suite 200
White Plains, New York 10603
(914) 949-4540

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of DORIS L. SASSOWER, An Attorney and Counselor-at-Law GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT Petitioner-Respondent, - against - DORIS L. SASSOWER, Admitted Under the Name of DORIS LIPSON SASSOWER Respondent-Appellant.	)	**AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL**

David B. Goldstein, an attorney duly admitted to practice in the courts of the State of New York, affirms under penalty of perjury:

INTRODUCTION

1. I am an associate at the law firm of Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., attorneys for appellant Doris L. Sassower. I am fully familiar with the facts and prior proceedings, and submit this affirmation in support of appellant's motion for leave to appeal from a decision and order of the Appellate Division, Second Department, dated June 14, 1991, and served on Ms. Sassower on June 19, 1991 ("June 14 Order"). A copy of the decision and order, together with respondent's notice of entry dated June 19, 1991, is annexed hereto as Exhibit 1. Also appealed from are the decision and order of the Appellate Division in this proceeding dated and entered June 12,

1991 ("June 12 Order), and the decision and order dated and entered October 18, 1990 ("October 18 Order"), copies of which are annexed hereto as Exhibits 2 and 3, respectively.

2. In its October 18 Order, the Second Department, without an evidentiary hearing or findings or statement of reasons, ordered Ms. Sassower, a distinguished attorney of 35 years standing, "to be examined by a qualified medical expert, to be arranged for by the Chief Counsel for the Grievance Committee for the Ninth Judicial District [hereinafter "Committee"] to determine whether [Ms. Sassower] is incapacitated from continuing to practice law." In its June 12 Order, the court, without an evidentiary hearing or findings or reasons, denied Ms. Sassower's motion to vacate the October 18 Order, and on June 14, the court, without an evidentiary hearing and without opinion or statement of findings or reasons, indefinitely, immediately, and unconditionally suspended Ms. Sassower from the practice of law.

3. This case presents an extraordinary and unfortunate situation that cries out for this Court's review in the interests of substantial justice. It involves accusations of the most sensitive and damaging nature imaginable -- that an attorney is mentally incapacitated from practicing law -- which demand careful and strict adherence to the salutory principles set down by this Court and the provisions of the rules of the Appellate Division, Second Department establishing meaningful safeguards in such proceedings. The proceedings below, however, have been fundamentally flawed from their inception and throughout by numerous significant procedural and substantive errors created by

the actions of an aggressive and overzealous prosecutor. The result has been to destroy for no apparent reason the legal career of Ms. Sassower, a prominent and respected long-time leader of the New York Bar. Ms. Sassower has not engaged in any misconduct that immediately or otherwise threatens the public interest that could possibly justify her immediate and indefinite suspension without an evidentiary hearing. See Matter of Padilla, 67 N.Y.2d 434, 447, 503 N.Y.S.2d 548, 554 (1986); 22 NYCRR § 691.4(l)(1). Ms. Sassower, through counsel retained for that purpose, has merely asserted her legal rights under the Judiciary Law, sought compliance with the Second Department's own rules, and raised legitimate concerns as to the manner in which the Grievance Committee was implementing the Appellate Division's October 18, 1990 Order, which has put her in no better position than if she had simply wholly ignored or deliberately flouted the October 18 Order and the Committee. The decision of the Second Department to impose the extraordinarily harsh punishment of immediate and indefinite suspension is totally unjustified and demands reversal.

4. The questions of law presented are both novel, of considerable public importance (not only to members of the Bar), and the reasoning of the court below conflicts with prior decisions of this Court and other Appellate Divisions. Moreover, review by this Court is essential in the interests of substantial justice to prevent the destruction of an outstanding legal career, without any factual or legal basis, and to make clear that the Grievance Committee and the Appellate Divisions must

adhere to their own rules and procedures established to prevent unjustified severe punishment of attorneys, with all the harm that imposes on the attorneys and their clients.

QUESTIONS PRESENTED FOR REVIEW

5. a) Whether, consistent with due process, an attorney may be immediately and indefinitely suspended from the practice of law without evidence or any findings or statement of reasons that the attorney is guilty of serious professional misconduct immediately threatening the public interest, without any evidentiary hearing, and where the attorney has made substantial efforts to cooperate with the Committee and has pending a motion to vacate the order with which the attorney has allegedly not complied;

b) Whether the Appellate Division's October 18 order was a lawful order, in that:

(i) it ordered the attorney to be examined by a single qualified medical expert, to be chosen at the sole and unfettered discretion of the Grievance Committee's own Chief Counsel;

(ii) the entire proceeding was void *ab initio*, as it was unlawfully commenced in violation of the Judiciary Law and the Second Department's own rules;

(iii) the proceeding was based entirely on improperly obtained confidential court records and otherwise lacked a proper evidentiary basis; and

(iv) the court lacked personal jurisdiction over Ms. Sassower because the May 8, 1990 Order to Show Cause initiating this proceeding was improperly served on Ms. Sassower, pursuant to Jud. Law § 90(6).

PROCEDURAL AND FACTUAL HISTORY

6. Gary Casella, Chief Counsel for the Grievance Committee for the Ninth Judicial District purported to commence this proceeding on May 8, 1990 by Order to Show Cause and by his affirmation. Exhibit A to the Record, filed herewith (hereinafter "R. Ex. ___"). In his moving papers, Mr. Casella purported to invoke section 691.13(b)(1) of the New York Rules of Court (22 NYCRR § 691.13(b)(1))[1/], and sought to have the Second Department determine whether Ms. Sassower is incapacitated from continuing to practice law by reason of mental infirmity or illness, and suspend Ms. Sassower immediately pending that determination. These papers were not properly served on Ms. Sassower as mandated by Jud. Law § 90(6), (10).

1/ Section 691.13(b)(1) provides in pertinent part:

> **(b) Proceeding to Determine Alleged Incapacity and Suspension upon Such Determination.**
>
> (1) Whenever a committee appointed pursuant to section 691.4(a) of this Part shall petition this court to determine whether an attorney is incapacitated from continuing to practice law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, this court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including examination of the attorney by such qualified medical experts as the court shall designate. . . .

(Emphasis added).

7. Mr. Casella acted <u>sua sponte</u> and gave Ms. Sassower <u>no</u> prior notice of his intent to seek such relief. Ms. Sassower was never asked or given any opportunity to respond to the allegations -- itself an aberrant departure from the standard practice of the Committee -- in Mr. Casella's papers prior to the commencement of this proceeding.

8. Section 691.13(b)(1) clearly requires that a proceeding to determine incapacity be brought by <u>petition</u> by <u>the Committee</u>. Nonetheless, this proceeding was brought on by order to show cause and affirmation, and the record is clear that <u>the Committee</u> never properly and formally voted to institute a proceeding, and the Appellate Division never authorized the Committee or its Chief Counsel to petition to determine whether Ms. Sassower is incapacitated.

9. At the time this proceeding was commenced, a wholly unrelated petition alleging two acts of misconduct brought by the Committee against Ms. Sassower was pending in the Second Department. At no time in that proceeding has Ms. Sassower claimed or relied upon any mental incapacity as a defense to or to delay that proceeding, pursuant to section 691.13(c)(1).

10. Mr. Casella's order to show cause and affirmation were based exclusively on: a) the testimony of Ms. Sassower's personal doctor, which was compelled on April 13, 1990, over Ms. Sassower's objection, by Justice Samuel G. Fredman, in her absence, in an unrelated matrimonial action -- <u>Breslaw</u> v. <u>Breslaw</u>, Index No. 22587/86 (Sup. Ct. Westchester Co.) to which Ms. Sassower was neither a party nor attorney to a party at that

time -- b) an affirmation by her doctor made a part of the record in Breslaw; and c) the court's April 20, 1990 decision and order in Breslaw. R. Ex. A (Exhibits A, B, C thereto).

11. In that April 20 decision, Justice Fredman held that Ms. Sassower "is presently capable of completing the contempt proceeding" and that she "does understand the nature of the action and is quite capable, physically and mentally, of defending her position to its conclusion, if she chooses to do so." R. Ex. A (Exhibit C thereto at 1-2).

12. Counsel for the Grievance Committee thereafter obtained the doctor's affirmation and a transcript of his testimony, without notice to Ms. Sassower or formal application, although all court records, including transcripts, in Breslaw are confidential pursuant to Domestic Relations Law § 235. Counsel for the Committee has refused to disclose how or from whom he obtained the confidential records. Appellant is unaware of any order from the Second Department or Justice Fredman authorizing transmittal of the transcript, affirmation or decision.

13. Although the court in Breslaw explicitly determined that Ms. Sassower was fully competent to participate in the proceedings before him, and the doctor's affirmation stated only that as of April 10, 1990, he felt Ms. Sassower should not participate in stressful court matters in which she was personally involved for 60 days, R. Ex. A (Exhibit A), Mr. Casella, on the identical record, nevertheless sought to have Ms. Sassower immediately suspended from the practice of law and to have the

court determine her mental capacity. No other evidence than that before Justice Fredman was submitted in support of the Order to Show Cause.

14. On June 7, 1991, Ms. Sassower cross-moved to dismiss this proceeding on grounds, inter alia, that the court had no subject matter jurisdiction, as the proceeding was not properly authorized by the Committee; that, in light of the court's decision in Breslaw, there was no evidentiary basis to institute a proceeding under section 691.13(b)(1); the confidential records in Breslaw were obtained improperly; that the proceeding was part of a pattern of misconduct and selective enforcement by the Committee and/or Mr. Casella against Ms. Sassower and that she was entitled to a hearing on this issue; and that the court lacked personal jurisdiction because of improper service. R. Ex. B; see also R. Ex. D (Reply Affidavit of Ms. Sassower, dated June 25, 1990).

15. In an affirmation in opposition to the cross-motion, dated June 13, 1990, Mr. Casella responded to the objection to the improper institution of the proceeding by asserting only that "counsel to the Grievance Committee for the Ninth Judicial District was given full authority to bring on the subject Order to Show Cause." R. Ex. C (Casella Aff. in Opp. ¶ 4). He did not refer to any vote, report, or petition of the Committee, or any order of the Court authorizing him to bring this proceeding.

16. By order entered October 18, 1990, over six months after her doctor had stated that Ms. Sassower needed a 60-day adjournment, and without any hearing, the Second Department:

> ORDERED that the respondent is directed to be examined by a qualified medical expert, to be arranged for by Chief Counsel for the Grievance Committee for the Ninth Judicial District, to determine whether the respondent is incapacitated from continuing to practice law pursuant to Sec. 691.13(b)(1) . . .

Exhibit 3 (emphasis added). The court also denied Ms. Sassower's cross-motion to dismiss the proceeding. Id.[2/] The court's delegation of the selection of a single medical expert to Mr. Casella, the prosecutor in this matter, was in clear disregard of section 691.13(b)(1), which explicitly provides for "examination of the attorney by such qualified medical experts as this court shall designate" (emphasis added).

17. The Order was not served on Ms. Sassower's counsel -- Eli Vigliano, Esq. -- for over five weeks, until November 26, 1990. Exhibit 3. And not until December 19, 1990 did Mr. Casella, by letter dated December 17, notify Mr. Vigliano of the name of the physician and instruct him to make arrangements for the medical examination. In that letter, sent over seven months after Mr. Casella's order to show cause, Mr. Casella gave Mr. Vigliano only two weeks, until December 31, 1990 -- i.e., during

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2/ The October 18 Order mistakenly stated that it denied Ms. Sassower's cross-motion to dismiss "the underlying disciplinary proceeding". Ex. 3. However, there is no underlying disciplinary proceeding. Rather, there was, as noted, a wholly separate and unrelated petition instituted by the Committee in February 1990. Ms. Sassower's cross-motion was not directed at that petition, but only at the May 8 Order to Show Cause seeking a medical examination, and immediate suspension.

the Christmas and New Year holidays -- to "make prompt arrangements" for a medical examination with Mr. Casella's designated expert, a Dr. Mark Scher. R. Ex. E (Exhibit C, thereto).

18. Mr. Vigliano informed Mr. Casella on January 3, 1991, that he had reached Dr. Scher on December 31, and that Mr. Vigliano was waiting for the doctor to provide available appointment dates. R. Ex. E (Casella Aff. ¶ 8). Neither Mr. Casella nor Dr. Scher informed Mr. Vigliano that Dr. Scher is also a lawyer, a fact which Mr. Casella recently revealed. Letter of David B. Goldstein to Gary Casella, dated July 15, 1991 (copy annexed hereto as Exhibit 5). Dr. Scher refused to discuss any matters with Mr. Vigliano other than the time and place of an appointment, refused to supply him with his credentials, and asserted to Mr. Vigliano that he worked for the Grievance Committee. R. Ex. F (Vigliano Aff. ¶ 14).

19. After this discussion with Dr. Scher on or about January 7, 1991, Mr. Vigliano concluded that Dr. Scher did not perceive himself as a neutral court-appointed medical expert, and he counselled Ms. Sassower not to subject herself to his examination without appropriate safeguards. R. Ex. F (Vigliano Aff. ¶ 14), R. Ex. J (Vigliano Aff. ¶ 18). By letter faxed to Mr. Casella on January 10, Mr. Vigliano objected, <u>inter alia</u>, to the absence of <u>any</u> safeguards for Ms. Sassower, particularly in light of Dr. Scher's selection by Mr. Casella, to the impropriety of the court's delegation of that selection to him, and to the

jurisdictional defects in the proceeding, and he urged Mr. Casella to consent to the vacation of the October 18 Order. R. Ex. F. (Exhibit B).

20. By letter dated January 15, 1991, received by Mr. Vigliano on January 18, Mr. Casella summarily dismissed Mr. Vigliano's well-founded objections, accused Mr. Vigliano of "attempting to delay and obstruct the Appellate Division's Order," and informed him that unless he made arrangements with Dr. Scher by January 23, 1990, Mr. Casella would move to suspend Ms. Sassower immediately for "failure to cooperate and to comply with the court's order." R. Ex. E (Exhibit E). Mr. Casella thereafter refused Mr. Vigliano's request for a voluntary stay pending judicial review of the application. R. Ex. F (Vigliano Aff. ¶ 16). When Mr. Vigliano thereafter informed Mr. Casella that he intended to move to vacate the October 18 Order, Mr. Casella extended his deadline one day to January 24. Given that neither Mr. Casella nor the court displayed any urgency for seven months after this proceeding was commenced, Mr. Casella's sudden demands upon Mr. Vigliano were unreasonable and improper.

21. As the record shows, Mr. Vigliano acted expeditiously to seek a stay in conjunction with judicial review, and kept Mr. Casella apprised of his actions and intentions throughout. R. Ex. J. (Vigliano Aff. ¶¶ 27-40). At no time, however, did Mr. Casella inform Mr. Vigliano that he would move to suspend Ms. Sassower before Mr. Vigliano had an opportunity to seek a stay of the October 18 Order. Id. (Vigliano Aff. ¶ 33). Nevertheless, on January 25, 1991, Mr. Casella submitted his order to

show cause to have Ms. Sassower immediately suspended for an "indefinite period" pursuant to section 691.4(l)(1)(i) for "her failure to comply with an Order of this Court" and "for her failure to cooperate with petitioner." R. Ex. E (Order to Show Cause ¶ 1).[3/] The only "evidence" submitted in support of this motion was the above-stated facts. Mr. Casella made no assertion and produced no evidence that Ms. Sassower's conduct constituted "professional misconduct immediately threatening the public interest," as required by section 691.4(l)(1). See R. Ex. E.

22. The next day, on January 29, Ms. Sassower, through her attorney, moved by Order to Show Cause to vacate the October 18 Order on the grounds, inter alia, that the proceeding was not properly instituted by the Committee, that only the court may designate medical experts pursuant to section 691.13(b)(1), and that this power could not be delegated to the prosecuting attorney. The order to show cause also sought to stay the Committee from further proceedings and to discipline Mr. Casella for abusive tactics documented in Mr. Vigliano's affirmation. R. Ex. F.

23. On February 5, 1991, Mr. Casella cross-moved for sanctions and costs against Mr. Vigliano, apparently for filing the motion to vacate the court's October 18 Order and as part of a further attempt to intimidate Ms. Sassower and her attorney

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3/ The order to show cause is dated January 25, but it was in fact presented to the court and executed on January 28. R. Ex. J (Vigliano Aff. ¶ 41).

into abandoning their legal objections to this proceeding, although Mr. Casella's papers are extremely vague as to the basis for this motion. R. Ex. H.

24. Mr. Vigliano submitted extensive factual rebuttal and a Memorandum of Law in support of his Order to Show Cause in opposition to Mr. Casella's Order. R. Ex. I, J, L, M. By contrast, Mr. Casella's papers never included any assertion nor provided any evidence that Ms. Sassower had engaged in "professional misconduct immediately threatening the public interest." See R. Ex. G, H, K.

25. Four months later, by Decision and Order dated and entered on June 12, 1991, the Second Department denied, without opinion, Ms. Sassower's motion to vacate the October 18 Order and to discipline Mr. Casella. Exhibit 2. The Court also denied Mr. Casella's motion to impose sanctions on Mr. Vigliano, but provided for "leave to renew upon a showing of continued frivolous conduct." R. Ex. O.

26. A scant two days later, on June 14, 1991, the court

> Ordered that the respondent, Doris L. Sassower, pursuant to Section 691.4(1). . . is immediately suspended from the practice of law in the State of New York, until the further order of this court.

Exhibit 1. The court nowhere made any legal or factual findings, nor did it state any reasons for its decision, as explicitly required by section 691.4(l)(1), (2), but by citing to that subsection, the Order obviously suspended Ms. Sassower for alleged misconduct, not because of any alleged mental incapacity.

The Order is not a conditional or interim order that relates in any way to the happening of any other event. This Order, with notice of entry, was personally served on Ms. Sassower on June 19, 1991.

27. On June 20, 1991, Ms. Sassower moved by Order to Show Cause for a stay and to vacate the June 14 Order, which was in the nature of a motion to reargue. Mr. Casella filed an affirmation in opposition dated June 21, 1991. That motion was denied without opinion on July 15, 1991, although the Order has not yet been served on Ms. Sassower.

TIMELINESS

28. On July 19, appellant served on the Committee by hand the instant motion for leave to appeal (proof of service is annexed hereto). Therefore this appeal is timely, as the June 14 Order, with notice of entry, was personally served on June 19, 1991, within thirty days of the service of this motion. The timely appeal of the final June 14 Order also brings up for this Court's review the June 12 Order and the October 18 Order. CPLR § 5501(a)(1).

JURISDICTION

29. This Court has jurisdiction of this motion and proposed appeal pursuant to CPLR § 5602(a)(1)(i). The June 14 Order is a final, appealable order that finally determines all the issues in the proceeding by immediately and indefinitely suspending Ms. Sassower from the practice of law, and which does not require or provide for any further act on her part, nor does it contemplate any further proceedings before the Second Depart-

ment. Nor is the order conditional in any way -- e.g., that the suspension will be lifted upon undergoing a medical exam, or upon a determination by the court that she is not incapacitated, or upon completion of the unrelated pending disciplinary proceeding. The order is as final as any other suspension order that finally determines a disciplinary proceeding, whether denoted as an "indefinite" suspension or a suspension for a definite term. When there is nothing more for any party or the court to do, as here, the order is final. See CPLR § 5611.

30. In Matter of Padilla, 65 N.Y.2d 848, 493 N.Y.S.2d 306 (1985), this Court granted leave to appeal to the suspended attorney, even though the suspension order was explicitly stated to be an interim suspension effective only until the completion of pending disciplinary proceedings and further court order thereafter. See Matter of Padilla, 67 N.Y.2d 434, 445, 503 N.Y.S.2d 548, 552 (1986). Here, of course, the court below did not even condition the suspension on completion of the unrelated disciplinary proceeding. Thus, because the interim suspension in Padilla was a final order, the unconditional suspension order here is clearly final.

31. Any possible claim that the June 14 Order is somehow nonfinal, because of the existence of a wholly unrelated disciplinary proceeding, is directly refuted not only by Padilla, but by Mr. Casella's own letter, dated June 21, 1991, to the Hon. Max H. Galfunt, the Referee in the unrelated disciplinary matter, which states that Ms. Sassower's suspension "will result in the disciplinary proceeding continuing to be held in abeyance." A

copy is annexed hereto as Exhibit 4. A party obviously cannot claim that an order is nonfinal by its purported connection to a future event, and then indefinitely prevent that event from occurring.

32. In any event, neither Mr. Casella's initial May 8, 1991 Order to Show Cause nor his January 28, 1991 Order to Show Cause purported to rely in any way on the unrelated disciplinary matter as a basis either for the suspension or the medical exam. Nor did the court's order suspend Ms. Sassower for any reason connected to the unrelated disciplinary proceeding.[4/] Indeed, as set forth, <u>infra</u>, Point IIB, the relief sought pursuant to section 691.13(b)(1) <u>must</u> be by separate proceeding commenced by petition.

33. Moreover, the order is not nonfinal merely because the suspension is indefinite. The court has provided Ms. Sassower with no opportunity to cure her alleged violation and has provided no time in which she must perform some act. Indeed, Mr. Casella has informed the undersigned that even if Ms. Sassower submitted to a psychiatric exam and there was a finding of <u>no</u> mental incapacity, his position is that she should remain suspended because she purportedly failed to comply with the October 18 Order. Exhibit 5. Thus, there is no basis for any

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[4/] The mere fact that a court clerk in the Appellate Division apparently gave this matter and the unrelated disciplinary petition the same docket number, whether for the court's convenience, or in error, cannot alter the fact that the Petition instituted in February, 1990, based on two unrelated alleged acts of misconduct is wholly separate from this proceeding, which was instituted (albeit improperly) pursuant to section 691.13(b)(1), based on Ms. Sassower's purported mental incapacity.

assumption that the June 14 Order is some sort of temporary suspension that will be automatically lifted when Ms. Sassower undergoes and "passes" a medical exam. And even if that were the case, such an interim suspension would be final pursuant to Padilla.

34. Thus, the June 14 Order is a final order within the meaning of CPLR §§ 5602(a)(1)(i), 5611, and review of this Order brings up for this Court's review the October 18 and June 12 Orders. CPLR § 5501(a)(1).

ARGUMENT

I. THE INDEFINITE, IMMEDIATE, UNCONDITIONAL SUSPENSION, WITHOUT ANY HEARING AND WITHOUT EVIDENCE OR FINDINGS OF MISCONDUCT IMMEDIATELY THREATENING THE PUBLIC INTEREST, MERITS THIS COURT'S REVIEW

35. In Padilla, supra, this Court held that the Appellate Divisions have the authority to suspend attorneys pending resolution of disciplinary proceedings "when serious misconduct is admitted or uncontroverted and the public interest is threatened." 67 N.Y.2d at 447, 503 N.Y.S.2d at 554 (emphasis added). This Court held that in "both cases before us, appellants' documented misconduct posed an immediate threat to the public interest", and that "[i]n these narrow circumstances, the Appellate Division has the power to suspend attorneys although disciplinary charges remain pending against them. . . ." Id. (emphasis added).

36. This Court contrasted the situation in Padilla with Matter of Nuey, 61 N.Y.2d 513, 474 N.Y.S.2d 714 (1984), cert. denied, 470 U.S. 1007 (1985), in which "the attorney

disputed all charges of misconduct," and "[t]he Appellate Division order of suspension recited no basis on which a finding of misconduct might have been predicated." Padilla, 67 N.Y.2d at 448, 503 N.Y.S.2d at 554. In Nuey, this Court held, "A finding by the court that an attorney 'is guilty' of professional misconduct . . . is a prerequisite to interference with the attorney's right to practice his or her profession." 61 N.Y.2d at 515, 474 N.Y.S.2d at 715 (emphasis added). Here, the Second Department has made no such requisite finding. This Court also noted that "[i]n the normal progress of attorney disciplinary matters the court's determination of guilt of the offending lawyer occurs only after the findings rendered by a panel or referee have been confirmed," id. at 516, 474 N.Y.S.2d at 715, i.e., only after an evidentiary hearing, as required by Jud. Law § 90(6) ("Before an attorney . . . is suspended . . . he must be allowed an opportunity of being heard in his defense"). Here, of course, no such hearing was afforded to Ms. Sassower.

37. This case simply does not fall into the "narrow circumstances" required by Padilla in which there is admitted or uncontroverted evidence of serious misconduct that poses an immediate threat to the public interest so as to justify an immediate and indefinite suspension without awaiting the conclusion of a hearing. The suspension on this flimsy record and without any evidentiary hearing conflicts with this Court's decisions in Nuey and Padilla, violates Jud. Law § 90(6) and Ms.

Sassower's most basic rights to due process under the United States and New York Constitutions, and raises an issue of substantial public importance.

38. Ms. Sassower was immediately and indefinitely suspended pursuant to 22 NYCRR § 691.4(l)(1)(i), which was added to the Second Department's rules after Padilla and was clearly an attempt to codify that decision. This subsection provides that an attorney who is the subject of an investigation or a disciplinary proceeding may be suspended "upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest" (emphasis added). Section 691.13(l)(2) provides that the "court shall briefly state its reasons for the order of suspension" (emphasis added).

39. In this case, the Committee made no allegation, nor adduced any evidence that Ms. Sassower had engaged in any serious misconduct immediately threatening the public interest. The Committee asserted only that Ms. Sassower had not submitted to the psychiatric exam as of January 25, 1991, and that this allegedly constituted failure to obey a court order or cooperate with the Committee. This showing falls far short of the demanding standard established by this Court in Padilla. Indeed, that the court took over five months to issue its October 18 Order, that Mr. Casella took no action for two months thereafter even to designate the doctor for the medical exam, and that the court took another four months to issue its orders denying Ms.

Sassower's motion to vacate the October 18 Order and suspending Ms. Sassower, strongly negates, without more, any possible inference of such serious, threatening misconduct.

40. As noted, in its June 14 Order, the court nowhere stated its reasons, as required by section 691.4(l)(2), nor did it make any finding of professional misconduct immediately threatening the public interest, as required by section 691.4(l)(1). In the absence of these mandatory findings and reasons, stated on the record, there is no lawful basis for the suspension. Moreover, Ms. Sassower, as in Nuey, strongly controverted Mr. Casella's allegations of deliberate intent to delay and documented them as wholly unfounded, but was given no evidentiary hearing on this issue.

41. The explicit requirement that the Appellate Division make findings and state its reasons serves the dual purpose of focusing that court on the standards that must be met before it takes the devastating decision to suspend an attorney, and also of enabling this Court to review that decision to determine the legal basis for the lower court's action. See Padilla, 67 N.Y.2d at 448, 503 N.Y.S.2d at 554; Matter of Dondi, 63 N.Y.2d 331, 339, 482 N.Y.S.2d 431, 435 (1984) (requiring strict adherence to procedural requirements when Appellate Division issues orders in disciplinary matters, so that "this court may meaningfully review the basis of the Appellate Division's exercise of discretion"). While this Court in Padilla stated that the Appellate Division's failure "to articulate the reasons for the suspension" was not fatal in that case (where the evidence of

guilt was overwhelming and there were no rules in place at that time governing immediate suspensions), that rationale has no application here, where the record shows no evidence of serious misconduct immediately threatening the public interest, such allegations have been seriously controverted, and there is an explicit rule requiring findings and a statement of reasons. See Nuey, 61 N.Y.2d at 515, 474 N.Y.S.2d at 715. As in Dondi, the court below acted improperly in ignoring the mandatory requirements of section 691.4(l), which are clearly intended to protect attorneys from immediate suspension without the uncontroverted or admitted showing of serious misconduct required by Padilla. Because disciplinary proceedings "are adversary proceedings of a quasi-criminal nature," see In Re Ruffalo, 390 U.S. 544, 551 (1968), the Committee and the Second Department are obligated to follow carefully those procedures designed to protect attorneys from unfair or improper discipline. See Padilla, 67 N.Y.2d at 448, 503 N.Y.S.2d at 554.

42. Moreover, in this case, the court could not have made the necessary findings, even had it complied with the mandates of section 691.4(l)(1)(2). First, the court could not possibly have made a finding of failure to cooperate with the Committee sufficient to find serious misconduct and an immediate threat to the public interest. The entire period from Mr. Casella's notice to Vigliano to arrange for a medical exam until Mr. Casella submitted his motion to suspend for failure to

cooperate was only 37 days -- from December 19, 1990 to January 25, 1991 -- which period included the Christmas and New Year holidays, and during much of which Dr. Scher was unavailable.

43. Mr. Vigliano attempted to cooperate throughout this brief period, during which Mr. Casella consistently set unreasonably short deadlines. As set forth, supra, ¶¶ 18-22, Mr. Vigliano had several conversations with Mr. Casella and Dr. Scher and repeatedly attempted to work out problems he perceived in the court's October 18 Order and in the absence of any protections for Ms. Sassower in the medical exam. After Mr. Casella summarily rejected every reasonable, good faith request, Mr. Vigliano requested a stay from Mr. Casella while the issues were presented to the court. Mr. Casella again flatly refused. The parties then brought on their respective orders to show cause one day apart in late January, in which Mr. Casella sought to suspend Ms. Sassower immediately, and Mr. Vigliano sought to vacate the court's October 18 Order.

44. That these above-stated efforts by Mr. Vigliano could be construed as so serious a failure by Ms. Sassower to cooperate with the Grievance Committee as to justify her immediate suspension is a frightening prospect. No attorney would dare challenge the whims or caprice of Grievance Committee counsel through negotiation -- and if necessary, appropriate motions -- if the consequence is to be immediate suspension of his client. This Court must not tolerate such unbridled power in disciplinary committee counsel, and indeed, in Padilla this Court made clear that it would not.

45. Of course, since the Court made no findings and stated no reasons for its action it is impossible to tell if it suspended Ms. Sassower based on a failure to cooperate with the Committee. In the absence of any findings or evidence to the contrary, or any hearings on this issue, it must be assumed that Ms. Sassower and her attorney acted in utmost good faith in trying to negotiate with Mr. Casella and in then expeditiously bringing their objections to the Appellate Division by proper motion.

46. Moreover, the cases in which attorneys were immediately suspended for failure to cooperate involve either other extremely serious misconduct and/or repeated, flagrant noncooperation over extended periods of time -- not a five-week period of extensive cooperation and good faith efforts at negotiation, followed by an expeditious and good faith motion to the court. See, e.g., Padilla, 67 N.Y.2d at 448 (Padilla's "obstructionism demonstrated over a period of more than a year"); Matter of Elkin, 152 A.D.2d 213, 548 N.Y.S.2d 168, 169 (1st Dept. 1989) (attorney completely ignored "repeated requests by letter, certified mail and telephone" and several subpoenas over several month period; court finds conduct to be "shockingly obvious, deliberate and willful attempts to derail the DDC investigation"); Matter of Perry, 156 A.D.2d 1, 553 N.Y.S.2d 758, 759 (1st Dept. 1990) (attorney's "conduct in wilfully and intentionally refusing to answer eleven pending complaints and otherwise cooperate with the DDC is inexcusable"); Matter of Baltimore, 128 A.D.2d 323, 515

N.Y.S.2d 789 (1st Dept. 1987); Matter of Bing, 119 A.D.2d 249, 506 N.Y.S.2d 694 (1st Dept. 1986); Matter of Spiegelman, 116 A.D.2d 346, 501 N.Y.S.2d 345 (1st Dept. 1986).

47. The other alleged basis for Mr. Casella's motion for immediate suspension was a purported failure "to comply with any lawful demand of [the Appellate Division]," which immediately threatened the public interest. 22 NYCRR § 691.4(l)(1)(i) (emphasis added).

48. Assuming for the moment that the court's October 18 Order that Ms. Sassower be examined by a doctor selected by the chief prosecuting attorney for the Grievance Committee was lawful, there was no serious misconduct such that an immediate suspension was justified. After good faith efforts at negotiation failed, Mr. Vigliano and Ms. Sassower acted with complete propriety in obtaining a signed Order to Show Cause on January 29, 1991, to vacate the court's October 18 Order. If the court suspended Ms. Sassower for her purported noncompliance during the extraordinarily brief period between the failure of negotiations and January 29, there is simply no conceivable factual or legal basis for such a harsh and irrational result. See Padilla, 67 N.Y.2d at 447-49. Of course, because the court gave no reasons, this Court has no way of knowing just what it found Ms. Sassower to have done that so immediately threatened the public interest.

49. From January 29 until June 12, 1991, Ms. Sassower had a proper motion pending in the Second Department to vacate the court's order. During this period, Mr. Casella, who had been ordered to arrange for the exam, made no further inquiries or

immediate and indefinite suspension by the express terms of section 691.4(l)(1)(i), which requires that there be noncompliance with a "lawful" order.

II. THE OCTOBER 18 ORDER WAS NOT A LAWFUL ORDER WITHIN THE MEANING OF SECTION 691.4(l)(1)(i)

51. The October 18 Order is defective in several important respects, including: 1) the court below had no authority to delegate the choice of medical experts to the Committee's own counsel; 2) this proceeding is void ab initio as it was not properly instituted by the Committee; and 3) the evidence upon which the proceeding was based was improperly derived from confidential court files without legal authorization for their use. These issues merit this Court's review in the interests of substantial justice, and they are of great public importance and conflict with prior decisions of this Court and other Appellate Divisions.

A. The Order Improperly Delegated the Selection of the Medical Expert to the Committee's Own Attorney

52. The Appellate Division rules providing for the suspension of attorneys for mental incapacity attempt to strike a delicate balance between the need to protect the public and the rights of attorneys to procedural and substantive protections so that their careers and reputations are not ruined without proper cause and due process.

53. In the Second Department, when the Committee petitions the court to determine whether an attorney is incapacitated, "this court may take or direct such action as it deems nec-

essary or proper to determine whether the attorney is so incapacitated, including examination of the attorney by such qualified medical experts as this court shall designate." 22 NYCRR § 691.13(b)(1) (emphasis added); see also id. § 603.16(b)(1) (First Department); id. § 806.10(a) (Third Department); id. § 1022.23(b) (Fourth Department). While the Appellate Divisions have broad discretion to determine incapacity, such discretion may not be exercised arbitrarily, and the courts must adhere to the explicit requirement that the court shall designate the medical experts. Such a requirement is obviously intended to insure the appointment of neutral, independent experts unbeholden to the Committee or its counsel.

54. Here, the Appellate Division improperly delegated to the Chief Counsel of the Grievance Committee -- i.e., the very attorney that had brought on the proceeding seeking to have Ms. Sassower suspended as mentally incompetent -- to choose, in his unfettered discretion, a single "qualified medical expert".

55. Such an order is unlawful under both the explicit terms of section 691.13(b)(1) and as a matter of fundamental fairness. Indeed, it is difficult to imagine a less fair proceeding than one in which one's professional career depends entirely on the opinion of one psychiatrist chosen by the prosecutor, who has already stated his intent and goal of trying to suspend the attorney.

56. Certainly the rule cannot be construed to permit the selection to be in the sole discretion of the Committee's chief prosecuting counsel, particularly after counsel has already

stated his position that the attorney should be suspended for medical incapacity without any medical exam. R. Ex. A (Casella Aff., final para.). The delegation by the Second Department here is diametrically at odds with the decisions of other appellate courts. See Matter of Rochlin, 100 A.D.2d 263, 474 N.Y.S.2d 14, 16 (1st Dept. 1984) (attorney "will be permitted to choose an independent psychiatrist from a list provided by counsel for the Committee") (emphasis added); Matter of Anonymous, 21 A.D.2d 48, 50 (1st Dept. 1964) (examination by physician selected by Medical Report Office, Supreme Court, New York County).

57. Nor can there be any pretense that Mr. Casella is a neutral, detached, or disinterested party. The papers below amply and indisputably demonstrate that Mr. Casella acted throughout these proceedings as a zealous and aggressive advocate for the position that Ms. Sassower is mentally incompetent and must be immediately suspended. The court's order delegating to this zealous advocate the sole authority to choose the medical expert who will effectively determine Ms. Sassower's professional future is akin to placing the fox in charge of the hen house.

58. Not surprisingly, the substantial problems that can be expected to arise when an interested adverse attorney is delegated this extraordinary authority occurred here. Thus, it is undisputed that: 1) Mr. Casella chose a psychiatrist who is also an attorney as his expert, and who would therefore bring his own well-formed opinions and attitudes toward appropriate attorney behavior unrelated to his psychiatric expertise; 2) Mr. Casella did not disclose to Ms. Sassower or her attorney that Dr.

Scher was an attorney until after her suspension, and then only after Dr. Scher refused to answer a direct inquiry as to whether he is an attorney; 3) Dr. Scher informed Ms. Sassower that he works for the Grievance Committee and that he would not provide a copy of his report to her or her counsel; 4) Mr. Casella and Dr. Scher have refused to provide Ms. Sassower or her attorneys with Dr. Scher's resume or curriculum vitae; and 5) Mr. Casella and Dr. Scher have refused to permit an attorney to be present at her exam despite explicit Second Department authority to the contrary. See Ponce v. Health Insurance Plan of Greater New York, 100 A.D.2d 963, 475 N.Y.S.2d 102, 103 (2d Dept. 1984) (party "is entitled to be examined in the presence of her attorney. . . we warn respondents and their physicians against repeating their earlier attempt to exclude them") (emphasis added); Nalbandian v. Nalbandian, 117 A.D.2d 657, 498 N.Y.S.2d 394, 395 (2d Dept. 1986). See Exhibit 5, annexed hereto.

59. Furthermore, section 691.13(b)(1) provides for the designation of "medical experts", not a single expert. The obvious purpose of such a rule is to protect against the destruction of an attorney's career based on the observations of a single doctor. The salutory purpose of requiring more than one medical examiner is highlighted here, in which the single doctor, selected by adverse counsel, was finally revealed to be an attorney himself, and who holds himself out as in the employ of the Committee.

60. When the facial unfairness of such a delegation is combined with the actual facts of this case, the reason that the Rules of Court require that the court, not the prosecuting attorney, must designate the medical experts becomes crystal clear. This Court should review this question of extreme public importance to make clear that the Appellate Divisions may not delegate such crucial power to the prosecuting attorney. This is a question of great importance to the general public as well as members of the Bar, because of the numerous proceedings in which court-appointed experts are involved in the most fundamental decisions of personal liberty and property. This Court must make clear that, in government enforcement proceedings in general, and attorney disciplinary proceedings in particular, interested prosecuting government attorneys may not replace the courts' historic role in the selection of mandated neutral and independent experts.

B. This Proceeding Is Void Ab Initio

61. In the Second Department, unless the attorney is involuntarily committed or judicially declared incompetent, 22 NYCRR § 691.13(a), or raises his incompetence as a defense to a pending disciplinary proceeding, id. § 691.13(c), the court obtains jurisdiction to determine mental incapacity only when "a committee appointed pursuant to section 691.4(a) of this part shall petition this court to determine whether an attorney is incapacitated. . . ." id. § 691.13(b)(1) (emphasis added). Although this proceeding was purportedly instituted pursuant to this latter subsection, these mandatory procedures were

admittedly not followed in this case, and this proceeding is thus void _ab initio_ and must be dismissed as jurisdictionally defective.

62. Appellant is not resting on some mere technicality, but on the denial of fundamental procedural protections that were ignored in this case. The procedures by which mental incapacity proceedings may be commenced against attorneys is a matter of substantial public importance and the decision of the court below, which negates the protections built into that court's own rules, requires this Court's review and correction.

63. Section 691.13(b)(1), by requiring the _Committee_ to _petition_ the court for a determination of incapacity, reduces the possibility for abuse that may arise, as occurred here, when the Committee's counsel, in the heat of litigation on unrelated matters, _sua sponte_ raises the issue of mental incapacity. Thus, under the Second Department's rules, _a petition_ cannot be instituted until there has been a majority vote of the full Committee, 22 NYCRR § 691.4(h), and with an opportunity for the filing of a minority report to the court, to accompany "any majority report and the written report of the subcommittee," _id_. § 691.4(i). The Second Department, upon review of the report, then authorizes the institution of a disciplinary proceeding and appointment of an attorney _by order_. A proceeding is then commenced by Notice of Petition executed by the Chairman of the Committee. This procedure at least facilitates discussion, debate and consideration by the Committee _and_ the Court _before_ the Committee initiates the very serious and damaging proceeding alleging that an attorney is

so mentally incapacitated that she must be suspended from the practice of law. It also provides the court with the reports that reflect the Committee's views and assures the court that there has been proper consideration of sufficient cause to proceed further.

64. Here, these requisite and salutory procedures were not followed. Rather than the institution of a plenary proceeding by petition signed by the Committee Chairman, following a vote by the Committee, submission of Committee or subcommittee reports, and authorization by the court, the Chief Counsel instituted this proceeding by mere order to show cause and his own affirmation. Because the record is completely devoid of any hint that the Committee approved the proceeding pursuant to the mandatory procedures of sections 691.4(h),(i), 691.13(b)(1), Mr. Casella simply had no legal authority to institute this proceeding.

65. Even after Ms. Sassower objected to this fatal defect, <u>no</u> evidence that the Committee had properly approved this proceeding <u>prior to its institution</u> was placed on the record. Rather, Mr. Casella simply asserted: "counsel to the Grievance Committee for the Ninth Judicial District was given full authority to bring on the subject Order to Show Cause." R. Ex. C (Cassella Aff. ¶ 6). This irrelevant statement demonstrates that the full Committee did not properly vote to petition the court to determine Ms. Sassower's mental capacity, as required by the Second Department's own rules. Nor can section 691.13(b)(1)

possibly be construed to authorize the Chief Counsel to initiate a medical incapacity proceeding merely because of the existence of an unrelated disciplinary proceeding against that attorney.

66. The meaningful procedural protections of section 691.13(b)(1) must be strictly adhered to because of the drastic consequences that may befall an attorney who is wrongfully subjected to a mental incapacity proceeding, which includes severe damage to personal and professional reputation, improper subjection to psychiatric examination, indefinite suspension from the practice of law, and the grave difficulties of reinstatement, including proof of termination of disability by "clear and convincing evidence," 22 NYCRR § 691.13(e)(1), with the burden of proof placed on the suspended attorney, id. § 691.13(f), and the requirement of waiver of doctor-patient privilege, id. § 691.13(g).

67. This Court should grant leave to make clear that the meaningful procedures established by the Appellate Divisions' own rules must be followed before a proceeding to determine mental incapacity may be instituted, and that the failure to do so renders this proceeding void ab initio.

C. The Proceeding Was Entirely Based On Improperly Obtained Confidential Court Records

68. As noted, supra, Ms. Sassower's psychiatrist was compelled by the court in Breslaw to testify about Ms. Sassower's health in an unrelated matrimonial action. Pursuant to Dom. Rel. Law § 235(1):

> An officer of the court with whom the proceedings in a matrimonial action . . . or before whom the testimony is taken, or his clerk, either before or

after the termination of the suit, shall not permit a copy of any of the pleadings . . . or testimony, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court. (Emphasis added).

69. Mr. Casella has refused to divulge how he obtained the transcript of the doctor's testimony, which was ordered by Justice Fredman, or the doctor's affirmation, which were required to be kept confidential pursuant to Dom. Rel. Law § 235(1). However, there is no dispute that no court order authorized the release of the transcript, affirmation, or decision. Absent such a court order, Mr. Casella's use of these records was improper, as was the Second Department's consideration of them as the sole basis for its October 18 Order.

70. This case is closely analogous to Dondi, supra, in which the Grievance Committee improperly obtained confidential records in a criminal action. This Court held that the Grievance Committee could obtain such records only pursuant to a proper motion by affirmation demonstrating a compelling need for the records, and only upon an order of the Appellate Division unsealing the records, which order would be reviewable in this Court. Dondi, 63 N.Y.2d at 338, 482 N.Y.S.2d at 435. Absent an appropriate showing and a court order, the records would remain sealed. Id.

71. This Court need not decide in this case whether the identical necessity standard must be met in a matrimonial action as in a criminal court action before the Grievance Committee may obtain court records that are made confidential by statute. All this Court need do is reiterate the clear prin-

ciples of Dondi -- that a Grievance Committee is held to the same standards as any other litigant, and that if it wants to use confidential court records against an attorney, it must obtain a proper order making those records available.

72. Nor is it any answer that the confidential records were given to the Chief Counsel, rather than that he obtained the records himself (assuming that this is so). The result in Dondi could not have been different if a court officer had violated CPL § 160.50 and provided the records to the Committee. Mr. Casella knew the transcript was part of a matrimonial action; presumably, he knew that pursuant to Dom. Rel. Law § 235(1), this transcript was part of a confidential record in the absence of a court order; and presumably, he knew of Dondi, which arose in the Second Department. Under these circumstances, it was incumbent upon him to obtain permission from the Appellate Division or other authorized court to have the confidentiality of these records lifted before he could use them or bring them to the Second Department's attention. Again, as in Dondi, whether the court may have granted his motion for access to the records is no excuse for not seeking such permission in the first place. 63 N.Y.2d at 338-39, 482 N.Y.S.2d at 435.

73. Because the use of confidential court records conflicts with this Court's decision in Dondi, and because such use raises a question of substantial public importance, not only

in attorney disciplinary proceedings, but in any case in which government officials seek to use confidential court records, this Court should grant leave to appeal on this issue.[6]

D. The Second Department Lacked Personal Jurisdiction, As The May 8, 1990 Order Was Served In Violation Of Jud. Law § 90.

Pursuant to Jud. Law § 90(6), before an attorney is suspended, "the charges against him must be delivered to him personally," unless the presiding justice determines otherwise. The May 8, 1990, order to show cause, which purported to initiate this proceeding, likewise specifically required personal service on Ms. Sassower. R. Ex. A (Order to Show Cause, at 3). "Personal service" must be strictly construed in disciplinary proceedings, in light of the strict confidentiality provisions of Jud. Law § 90(10). Thus, the substituted service provisions of CPLR 308 are inapplicable in suspension proceedings, because they permit the breach of this strict confidentiality. Here, service of the May 8 Order was not made on Ms. Sassower. The Committee could have, but did not, seek authorization from the presiding

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[6] Appellant submits that the transcript and doctor's affirmation do not, in any event, provide a sufficient evidentiary basis to institute a proceeding to determine mental incapacity under section 691.13(b)(1). Ms. Sassower's physician merely stated in April 1990 that he felt that Ms. Sassower needed a brief sixty-day adjournment from stressful court appearances in which she was personally involved, and that in his opinion, her continued involvement in such matters may be delaying her improvement. R. Ex. A (Exhibit A). As noted, on April 20, 1990, Judge Fredman explicitly found that she was "quite capable" of participating in all proceedings before him, and that there was no medical basis for any adjournment. R. Ex. A (Exhibit C). Had the decision whether to institute this proceeding been properly considered by the full Committee, rather than by a highly partisan advocate, it is unlikely that this proceeding would ever have been commenced.

justice for substituted service. In light of the express provisions of Jud. Law §§ 90(6), (10) and the May 8 Order to Show Cause, this proceeding must be dismissed for lack of jurisdiction due to improper service.

III. A STAY SHOULD BE GRANTED REINSTATING MS. SASSOWER PENDING DETERMINATION OF THE MOTION AND APPEAL

74. The factors for determining the propriety of a stay of the June 14 Order, pursuant to CPLR § 5519(c), weigh heavily in Ms. Sassower's favor. See 7 Weinstein, Korn, Miller, New York Civil Practice, ¶ 5519.13, at 55-181 (1990) (factors "the court will consider are the merits of the appeal, harm that might accrue to the appellant if the stay is denied, and potential prejudice to the respondent if the stay is granted").

75. As demonstrated in Points I and II, supra, Ms. Sassower is likely to prevail on the merits of this appeal. Second, Ms. Sassower is obviously suffering continuing grievous and irreparable harm to her reputation, her career, and her livelihood as a result of her published immediate, indefinite, and unconditional suspension from the practice of law.

76. Third, by contrast, any harm or prejudice to the Committee or the public would be de minimis or nonexistent if Ms. Sassower were reinstated nunc pro tunc pending determination of this motion, and, if granted, ultimate resolution of this appeal. As previously discussed, both the Committee and the Second Department displayed no urgency in this matter and Mr. Casella never met his burden of showing "professional misconduct immediately threatening the public interest".

IV. THE JANUARY 28, 1991 ORDER TO SHOW CAUSE DID NOT CONFORM TO LEGAL REQUIREMENTS AND COULD NOT SERVE AS A BASIS FOR THE JUNE 14 SUSPENSION ORDER.

77. A reading of the relevant provisions of the Judiciary Law and the Rules of the Appellate Division, Second Department, shows that a formal petition procedure is absolutely required for any proceeding calling for suspension, initiated by petitioner independent of any claimed disability on the part of the subject attorney. This is true whether the suspension is predicated on mental incapacity or professional misconduct. The unmistakable intent of the Legislature and of the Appellate Division in both cases is to assure a maximum of protection to the accused attorney by providing many levels of opportunity for caution, review, evaluation, and opportunity to be heard before the drastic step of suspension is taken.

78. Thus, under Section 691.4 of the Rules of the Appellate Division, Second Department, under which Petitioner's Order to Show Cause dated January 28, 1991 purportedly proceeded, it is contemplated under subdivision (e)(4) of that Rule that after initiating a specific complaint, such as here, of "failure to cooperate or comply"--subsequent to preliminary investigation and upon a majority vote of the full committee, it is the Committee which decides whether to "serve written charges upon the attorney and hold a hearing" or, as in subparagraph (5), "forthwith recommend to this Court the institution of a disciplinary proceeding where the public interest demands prompt

action and where the available facts show probable cause for such action". Where no such exigency exists, the Committee is empowered, under subdivision (f), to prefer "written charges predicated thereon, plainly stating the matter or matters charged, together with a notice of not less that 20 days... served upon the person concerned"... who "shall file a written answer... and the committee shall proceed to hold a hearing of the case....Upon the completion of a hearing, the committee... may recommend that probable cause exists for the filing of disciplinary charges against the respondent in this court."

79. As noted hereinabove, prior to obtaining its January 28, 1991 Order to Show Cause seeking immediate suspension for her alleged "failure to cooperate or comply", the Committee never served any written charges based thereon upon Ms. Sassower, never held any hearing on the intended charges against her, and never obtained court approval to initiate a petition to commence a disciplinary proceeding against her based on the aforesaid alleged professional misconduct, after the prescribed majority vote of a committee authorizing same. Without even an allegation, let alone proof of exigent circumstances, i.e., that the Committee believed that "the public interest demands prompt action and that "the available facts show probable cause for suspension, Mr. Casella obtained the January 28, 1991 Order to Show Cause, without the requisite supporting petition setting forth any basis for exigency, but on Mr. Casella's affirmation alone--giving Ms. Sassower as little as seven (7) days to answer Mr. Casella's motion.

80. Moreover, under the explicit language of paragraph 2 of Section 691.4 of the Rules, relied on by Mr. Casella in procuring his January 28, 1991 Order to Show Cause:

> "(2) The suspension shall be made upon the application of the Grievance Committee to this court, after notice of such application has been given to the attorney pursuant to subdivision six of section 90 of the Judiciary Law."

No such notice was ever given.

81. Paragraph (2) goes on to provide:

> "The Court shall further state its reasons for its order of suspension which shall be effective immediately and until such time as the disciplinary matters before the committee have been concluded, and until further order of this court."

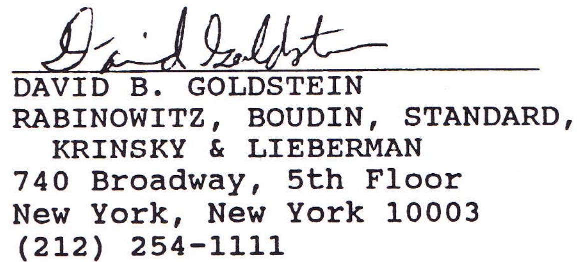
The June 14 Order failed to state <u>any</u> reasons for its suspension order and made it unconditional on the conclusion of any pending disciplinary matters.

82. Those serious and substantive blatant deficiencies manifestly render the June 19 Order jurisdictionally and procedurally void under minimum due process standards. They also further substantiate the contention of invidious and selective prosecution, made by Ms. Sassower in her initial answering papers and in support of her cross-motion (R. Ex. B: pp. 6-9).

CONCLUSION

83. For the reasons stated herein, appellant respectfully urges the court to grant appellant's motion for leave to appeal, and to grant a stay of the June 14 Order, so that Ms. Sassower is reinstated as an attorney in the State of New York nunc pro tunc pending determination of this motion and, if the motion is granted, pending ultimate resolution of this appeal.

Dated: New York, New York
July 19, 1991



DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

Attorneys for Appellant
Doris L. Sassower