COURT OF APPEALS
STATE OF NEW YORK

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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.

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AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

Gary L. Casella, an attorney duly admitted to practice law in the State of New York affirms under penalties of perjury:

1. I am attorney for the Petitioner-Respondent, Grievance Committee for the Ninth Judicial District and am fully familiar with this matter.

2. This affirmation is submitted in opposition to Respondent-Appellant's Motion for Leave to Appeal to this Court and other relief she has sought.

3. At paragraph 29 of his Affirmation in Support of the Motion for Leave to Appeal, Respondent-Appellant's counsel claims that the Order of the Appellate Division, Second

Department suspending his client is final within the meaning of CPLR Section 5602(a)(1)(i), the statute pursuant to which they are attempting to proceed. There is an underlying disciplinary proceeding still pending against Doris L. Sassower. The Petition duly served on Respondent-Appellant pursuant to such authorized disciplinary proceeding, is dated February 6, 1990. While such proceeding is pending, the interim suspension of Respondent-Appellant constitutes a non-final, interlocutory order.

If Doris L. Sassower, the suspended attorney, ceases her obstruction and flouting of the Appellate Division Order of October 18, 1990 and undergoes an examination and if she is not found mentally infirm it will be determined that she is fit to proceed with the trial of the disciplinary proceeding. On the conclusion of a disciplinary proceeding and upon a determination by the Appellate Division pursuant thereto there will be a final order in this matter. As such, the suspension of Doris L. Sassower pursuant to Section 691.4(l) (22 NYCRR 691.4(l) constitutes an interlocutory order and accordingly permission to appeal should not be granted by this Court. At the very least, Respondent-Appellant would have to undergo the psychiatric examination and if found mentally infirm to the satisfaction of the Appellate Division, Second Department, she then might be in a position to raise an argument as to whether the interim suspension constitutes a final order.

4. Assuming arguendo that this Court is not satisfied that the interim suspension of Doris L. Sassower pursuant to Section 691.4(1) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department [22 NYCRR 691.4(1)] is a non-final order, the baseless and meritless claims and gross distortions of the record by Respondent-Appellant are addressed hereinafter to more than amply demonstate the reasons that Leave to Appeal should be denied.

5. Petitioner-Respondent, Grievance Committee for the Ninth Judicial District moved by Order to Show Cause dated May 8, 1990 (Exhibit A, pp. 1-2 Affirmation of Gary L. Casella)[1] pursuant to Section 691.13(b)(1) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department [22 NYCRR 691.13(b)(1)] for an order,

> ...directing that the respondent, Doris L. Sassower, be examined by a qualified expert designated by the Court to determine whether the respondent is incapacitated from practicing law by reason of mental infirmity or illness and, if so, for an order suspending her from the practice of law for an indefinite period and until further order of this Court. Alternatively, if the Court is satisfied and concludes upon the medical opinion rendered by Theodore Cherbuliez, M.D. (see infra) that the respondent is incapacitated from the practice of law, that an order be entered immediately suspending the respondent on the ground of such disability.

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[1] Such references are to the Exhibits which are contained in Respondent-Appellant's Record in Appellate Division, Second Department.

Such affirmation continues,

> The petitioner has been aware since the summer of 1989 that a contempt hearing was pending before Hon. Samuel G. Fredman regarding whether the respondent failed to comply with an Order of the Supreme Court directing the release by the respondent of a file in the matter of Breslaw v. Breslaw, New York Supreme Court, Westchester County, Index No. 22587/86.
>
> Since the summer of 1989, the respondent has requested and has been granted numerous adjournments in that matter.
>
> The petitioner has become aware that more than one of these adjournments have been sought by the respondent on the grounds that she was incapacitated and suffering from "major depression." During the fall of 1989, the respondent was apparently voluntarily confined to Silver Hill Foundation, an institution in Connecticut for treatment of this condition.
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> The contempt hearing had been scheduled to proceed on April 11, 1990. However, the respondent's attorney presented an affirmation to Justice Fredman, dated April 10, 1990, from Theodore Cherbuliez, M.D., affirming that the respondent is his patient and that she has been suffering from major depression. The doctor states:
>
> > It is my professional opinion that her condition has not yet sufficiently improved for her to participate personally in contested court proceedings or to be subjected to any unduly stressful situation.
>
> Dr. Cherbuliez recommended that any legal matters in which the respondent was personally involved be deferred another 60 days "to safeguard her convalescence and avoid a relapse."
> . . . .

> On Friday, April 13, 1990, Dr. Cherbuliez appeared before Justice Fredman to testify regarding the respondent's application for an additional adjournment of the contempt proceedings upon the ground that she is medically incapacitated. . . .
>
> Dr. Cherbuliez testified that the respondent is suffering from major depression and that there are times when her reasoning is substantially abnormal (Transcript p. 50). He further testified that he has seen her extremely unstable and variable in her state of mind and her mood (Transcript p. 53). Moreover, the doctor testified that he has been surprised by her lack of improvement and that it could be attributable to her ongoing legal activity (Transcript p. 53). He also stated that persons around her are "left to guess whether she will or will not function," (Transcript p. 54), that he has seen her upset a number of times in the course of several months (Transcript p. 65), and that she cries at the slightest provocation (Transcript p. 66).

6. Respondent-Appellant claims that the testimony of her psychiatrist, Dr. Cherbuliez was obtained in violation of Domestic Relations Law Section 235(1). Her claim is disingenuous at best. She was not a party to the matrimonial action Breslaw v. Breslaw but rather a discharged attorney who refused, a court order notwithstanding to return the file of her client. In a proceeding ancillary to the matrimonial action brought on behalf of the defendant, Evelyn Breslaw, her substituted counsel, sought to have Doris L. Sassower held in contempt or in the alternative sanctions imposed against her.

It was in the course of a hearing held pursuant thereto by Hon. Samuel G. Fredman, Justice of the Supreme Court for the Ninth Judicial District that Dr. Cherbuliez gave the testimony referred to in Affirmant's affirmation of May 7, 1990 in support of the aforesaid Order to Show Cause. The hearings held by Justice Fredman were a matter of public record and were reported in the New York Law Journal (Exhibit G, Affirmation in Opposition of Gary L. Casella, dated February 5, 1991 with annexed Law Journal articles) as well as being in the Westchester Gannet papers.

7. Justice Fredman pursuant to the hearings held in which he described in detail his findings with respect to the conduct of Doris L. Sassower imposed sanctions against her in the sum of $9,042.25 in accordance with Sections 130-1.1 and 130-1.2 of the Uniform Rules for Trial Courts. (Copy of decision dated June 24, 1991 annexed hereto and marked PR Exhibit 1).[2]

8. Petitioner-Respondent's Order to Show Cause of May 8, 1990 supported by the affirmation of Gary L. Casella,

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[2] Such references are to Exhibits annexed to the instant Affirmation in Opposition of Petitioner-Respondent and are preceded by the initials PR to distinguish from Respondent-Appellant's Exhibits, some of which have been given numbers.

as set forth above very clearly put Respondent-Appellant on notice of the application being sought before the Appellate Division, Second Department. Respondent-Appellant through her then counsel, Eli Vigliano, Esq., submitted a cross-motion with supporting Affirmation and a subsequent Reply Affidavit (Exhibits B and D).

9. In affirmant's, Affirmation in Opposition of June 13, 1990 (Exhibit C, page 3), it is clearly set forth that,

> Contrary to respondent's claim, counsel to the Grievance Committee for the Ninth Judicial District was given full authority to bring on the subject Order to Show Cause.

In fact, with a formal disciplinary proceeding pending against Respondent-Appellant, the Chairman to the Grievance Committee for the Ninth Judicial District, Petitioner-Respondent, authorized on behalf of the Committee the bringing on of the Order to Show Cause.

10. Such claim by Respondent-Appellant of a lack of authority by Petitioner-Respondent to bring on the Order to Show Cause is now raised again. Also raised again is the claim that the Order to Show Cause signed by a then Justice of the Appellate Division of the Second Department, Hon. Isaac Rubin (Exhibit A) and ultimately determined by a full bench of the Appellate Division, Second Department (Exhibit 3, Order of October 18, 1990) in which the Court directed that Respondent-Appellant,

> ... be examined by a qualified medical expert to be arranged for by the Chief Counsel to the Grievance Committee for the Ninth Judicial District to determine whether respondent is incapacitated from continuing to practice law pursuant to Section 691.13(b)(1) of the Rules of this Court (22 NYCRR Section 691.13(b)(1)

is by some contorted logic, without foundation. Such order also provided that,

> . . . petitioner's motion to suspend respondent is held in abeyance and upon receipt of and consideration of the report of the medical expert, the court will determine whether to suspend respondent from the practice of law based upon her incapacity and it is further
>
> Ordered that respondent's cross-motion to dismiss the underlying disciplinary proceeding based upon, inter alia, lack of personal jurisdiction is denied (Exhibit 3).

11. In such order, the Appellate Division, Second Department delegated authority to the Grievance Committee for the Ninth Judicial District to select a qualified medical expert to examine Respondent-Appellant. The Appellate Division is fully empowered to so delegate in accordance with its inherent authority as well as its rules [22 NYCRR 691.13(b)(1)] which place no restriction on the Appellate Division taking such action.

12. Respondent-Appellant's claim that the Order to Show Cause (Exhibit A) brought on by Petitioner-Respondent resulted in an "unlawful" order of the Appellate Division, Second

Department dated October 18, 1990 (Exhibit 3) is specious and vacuous. It cannot be seriously argued that the language of Section 691.13(b)(1), of the Appellate Division's Rules Governing the Conduct of Attorneys, in using the word petition as a verb, is intended in anything but a generic sense. Certainly an Order to Show Cause can be employed rather than a petition. Further, where an attorney may be mentally incapacitated it is the responsibility of Petitioner-Respondent to move as expeditiously as possible, to wit, by Order to Show Cause to have the subject attorney examined. Section 691.13(b)(1) clearly doesn't provide that a Confidential Report must be filed with the Court and then a formal petition. If there were such a requirement, inordinate delay could be engendered in having the subject attorney examined at a time when the matter should proceed expeditiously. The result would be enormous prejudice visited on the public, the bar, bench, and subject attorney. Plainly that is not what the rule requires nor what it provides for.

Moreover, under Section 691.13(b)(2), the form of notice is within the discretion of the Appellate Division, Second Department. In this case the Appellate Division in signing the Order to Show Cause and by virtue of its further determinations in this matter, has approved the Order to Show Cause as a proper form of notice.

The rule specifically provides [22 NYCRR 691.13(b)(1)(2)]

> (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 incapacited 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 suchqualified medical experts as this court shall designate. If, upon due consideration of the matter, this court is satisfied and concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order suspending him on the gound of such disability for an indefinite period and until the further order of this court and any pending disciplinary proceedings against the attorney shall be held in abeyance.
>
> (2) This court may provide for such notice to the respondent-attorney of proceedings in such matters as it deems proper and advisable and may appoint an attorney to represent the respondent, if he is without adequate representation. (Emphasis supplied)

Reference by Respondent-Appellant to Section 691.4 of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department (22 NYCRR 691.4) is misplaced since that rule inter alia, provides the basis for the institution of formal disciplinary proceedings against an attorney. The rule, Section 691.4 on its face does not apply to an application as

in the instant case brought on by an Order to Show Cause to have the attorney examined to determine if she is suffering from a mental infirmity, which is controlled by Section 691.13(b)(1).

Additionally, the claim by Respondent-Appellant, raised at paragraph 59 of Mr. Goldstein's Affirmation that the rule, Section 691.13(b)(1) requires more than one medical expert to be appointed is absurd. Clearly it is within the discretion of the Appellate Diivision whether one expert or more need be appointed. In Respondent-Appellant's case if more than one expert were appointed to examine her that would comprise two or more experts that she would create reasons not to be examined by.

13. With respect to the service of the Order of October 18, 1990 (Exhibit 3) directing that Respondent-Appellant be examined, such order was served on her then counsel, Eli Vigliano, Esq., pursuant to his direction that he be served and not his client, Doris L. Sassower. During the period of time that passed until November 26, 1990 when service was effected, Mr. Vigliano was away for approximately one week. The investigator to Petitioner-Respondent had difficulty hooking up with Mr. Vigliano and a devastating fire resulting from arson occurred at the offices of Petitioner-Respondent on November 13, 1990, wreaking havoc on the office for approximately two months thereafter as well as the after shocks that are still being felt in an effort to catch up. It should be

noted that it is the practice of the Appellate Division, Second Department to send copies of orders such as of October 18, 1990 not only to the Grievance Committee but to the subject attorney as well, in this case Respondent-Appellant. Doris L. Sassower has not disputed that she in fact received a copy of the order of October 18, 1990 shortly after its issuance by the Appellate Division, Second Department. This matter was addressed through the various applications brought on by Petitioner-Respondent as well as Respondent-Appellant before the Appellate Division, Second Department in light of the Order of October 18, 1990.

14. Petitioner-Respondent sent letters to Respondent-Appellant, through her then counsel, Eli Vigliano, dated December 17, 1990 and January 15, 1991 (Exhibit E) ultimately providing in the latter communication,

> Since you have not secured a stay of the Appellate Division's Order, unless arrangements are made by January 23, 1991, for your client to be examined by Dr. Scher, we will move her immediate suspension, based on her failure to cooperate and to comply with the Court's order.

Such provision decidedly demonstrates that the claim by David B. Goldstein, counsel to Respondent-Appellant, that Petitioner-Respondent failed to give notice that it would move to suspend Doris L. Sassower is preposterous.

The outside date afforded to Respondent-Appellant of January 23, 1991 to comply was nearly two months after her counsel, Eli Vigliano, was served (at his request) on November 26, 1990 and more than three months from the issuance of the Order of October 18, 1990 by the Appellate Division, Second Department.

It is clear that Respondent-Appellant has obstructed and flouted the order of the Appellate Division, Second Department of October 18, 1990 giving the court no alternative but to suspend her.

15. Respondent-Appellant's attorney, David B. Goldstein, attempts to twist and contort into something nefarious the fact that he was recently apprised by affirmant that Dr. Scher is not only a psychiatrist but also a lawyer. Affirmant was first contacted by telephone by David Goldstein to advise that he was representing Doris L. Sassower, on July 9, 1991. It was within a couple of days of that time that Affirmant having recently learned that Dr. Scher is also an attorney so advised Mr. Goldstein.

16. In fact in Affirmant's view the fact that Dr. Scher is also an attorney will prove of invaluable assistance in examining Respondent-Appellant as well as any other attorneys who the Appellate Division, Second Department may require that he examine for psychiatric purposes.

17. Dr. Scher has made clear that he cannot make a proper psychiatric assessment of Respondent-Appellant if a third person, in this case her counsel, is present during the examination. Affirmant has previously so advised David B. Goldstein. Annexed is an affidavit executed by Dr. Scher on July 23, 1991, setting forth his opinion that he cannot make a proper assessment if a third party is present during the psychiatric examination (PR Exhibit 2).

18. It is clear that Respondent-Appellant has had no intention of complying with the Order of the Appellate Division, Second Department dated October 18, 1990, and that she has and will continue to raise every conceivable objection and excuse to avoid the examination. She also has demanded that Dr. Scher provide his curriculum vitae before she will consent to being examined. It is plain that Respondent-Appellant is seeking to intimidate Dr. Scher as she attempts with virtually every adversary, judge and even client, that she deals with. She is litigious in the extreme. Indeed it is fortunate, at least at this point, that Dr. Scher is still willing to conduct the examination when it is plain that he will be subjected to her attack through harassing litigation. What other possible justification can Respondent-Appellant have to seek Dr. Scher's curriculum vitae in advance of even being examined by him let along his rendering a report?

Indeed Affirmant has advised David B. Goldstein that there are medical societies with information about doctors practicing in the community if it is so essential that his client, Respondent-Appellant, learn something of Dr. Scher's background before undergoing the psychiatric examination.

19. By letter dated July 15, 1991 (Exhibit 5), David B. Goldstein communicated with Affirmant purporting to confirm our telephone conversations. Such letter not only inaccurately portrays such conversations but was included in the record without Affirmant's response, in the form of a letter dated July 18, 1991 (PR-Exhibit 3).

Of even greater concern, is David B. Goldstein's failure to make any mention in his letter of July 15, 1991 (Exhibit 5) to Affirmant's clear representation that if and when Dr. Scher is given an opportunity to examine Respondent-Appellant and a report is rendered, as soon as it is received by Petitioner-Respondent, a copy would be supplied to Mr. Goldstein. This omission certainly raises further serious questions about the credibility of Mr. Goldstein's claims made on behalf of his client.

20. With respect to claims made by Eli Vigliano, Esq., as to conversations purportedly had with Dr. Scher or otherwise, a review of the record will reveal that Mr. Vigliano's representations must be viewed with great scrutiny (Exhibits H and O).

21. The Order to Show Cause dated January 25, 1991, with supporting Affirmation of Affirmant (Exhibit E) moving to suspend Respondent-Appellant was based on her failure to comply with the Order of the Appellate Division, Second Department dated October 18, 1990, directing that she undergo the psychiatric examination and for her failure to cooperate with Petitioner-Respondent in derogation of Section 691.4(1) of the Rules Governing the Conduct of Attorneys of the Appellate Division, Second Department.

22. The reasons for the motion brought on by Petitioner-Respondent seeking to impose sanctions against Eli Vigliano are fully set forth at Exhibit H. The resulting order of the Appellate Division, Second Department dated June 12, 1991 (Exhibit O) provides that Petitioner-Respondent may renew its motion that sanctions be imposed against Eli Vigliano, Esq.

> . . . upon a showing of continued frivolous conduct as defined by Section 130-1.1(c) of the Rules of the Chief Administrator of the Courts [22 NYCRR 130-1.1(c)]

23. The Order of the Appellate Division, Second Department dated June 14, 1991 (Exhibit 1) suspending Respondent-Appellant from the practice of law specifically states that Petitioner-Respondent had moved for an Order of Suspension based on the failure of Doris L. Sassower to comply

with its order of October 18, 1990. The suspension of Doris L. Sassower from the practice of law is effective until the further order of the Court. The Appellate Division cited therein as the basis of the Order, 22 NYCRR 691.4(1).

Section 691.4(1) provides:

> (1)(1) An Attorney who is the subject of an investigation, or of charges by a Grievance Committee of professional misconduct, or who is the subject of a disciplinary proceeding pending in this court against whom a petition has been filed pursuant to this section, or upon whom a notice has been served pursuant to section 691.3(b) of this Part, may be suspended from the practice of law, pending consideration of the charges against the attorney, upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest. Such a finding shall be based upon:
>
> (i) the attorney's default in responding to the petition or notice, or the attorney's failure to submit a written answer to pending charges of professional misconduct or to comply with any lawful demand of this court or the Grievance Committee made in connection with any investigation, hearing, or disciplinary proceeding, or
>
> (ii) a substantial admission under oath that the attorney has committed an act or acts of professional misconduct, or
>
> (iii) other uncontroverted evidence of professional misconduct.

> (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. The court shall briefly state its reason 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 aforesaid rule, Section 691.4(1) was enacted by the Appellate Division, Second Department (the identical rule was also enacted by the First, Third and Fourth Departments) pursuant to the decision of the Court of Appeals in Matter of Padilla 67 NY2d 440, 448. The Court found in Padilla and its counterpart case Gray (67 NY2d 440, 448) that,

> In both cases before us appellants' documented misconduct posed an immediate threat to the public interest: Padilla's obstructions demonstrated over a period of more than a year frustrated the diligent pursuit of serious charges against him, placed into question his fitness to represent others and itself constituted conduct prejudicial to the administration of justice. . . .

24. Strikingly similar to the misconduct of Padilla is that of Respondent-Appellant, Sassower, through her obstruction, failure to comply with an Order of the Appellate Division, Second Department that is rapidly approaching one year since its issuance on October 18, 1990 and her flagrant failure to cooperate with Petitioner-Appellant and the uncontroverted evidence of her professional misconduct.

Contrary to Respondent-Appellant's claims which purport to portray her as cooperative, the record amply demonstrates precisely the opposite to be her pattern of conduct in this matter.

25. The record fully justifies the Appellate Division's finding that Respondent-Appellant be suspended pursuant to Section 691.4(1).

26. Respondent-Appellant annexes a copy of a letter (Exhibit 4) dated June 21, 1991 sent by Affirmant to Hon. Max Galfunt, Special Referee in the disciplinary proceeding authorized against Doris L. Sassower, in an attempt to bolster her claim that the Order of Suspension is a final Order. The reference to the disciplinary proceeding being held in abeyance (Exhibit 4) results from the unresolved issue as to whether Respondent-Appellant is mentally infirm and if so found, would not be fit to go forward with the trial of a disciplinary proceeding. Accordingly the trial of the disciplinary proceeding is being held in abeyance at this time.

27. The flagrant disregard by Respondent-Appellant of the Appellate Division's order of October 18, 1990 and her failure to cooperate with Petitioner-Respondent strikes to the very core of our attorney disciplinary system which is

dependent on the cooperation of attorneys. Further, our system of justice will collapse if attorneys such as Respondent-Appellant who display arrogance in the extreme can ignore an order of the Court and then after her suspension have the audacity to claim that she has attempted to cooperate. Indeed from in or about early January 1991 until the Order of Suspension which was served on her on June 19, 1991, there was no communication whatsoever by Respondent-Appellant either individually or through her then counsel, Eli Vigliano, with Dr. Scher, the psychiatrist who is to examine her, notwithstanding that Petitioner-Respondent moved by Order to Show Cause dated January 25, 1991 for the suspension of Doris L. Sassower.

28. At paragraph 49 of the Affirmation, Respondent-Appellant through her present counsel, David B. Goldstein, attempts to attribute blame on her former counsel, Eli Vigliano, for her flagrant disregard of the Appellate Division order. This is the first time to Affirmant's knowledge that this claim has been raised, although Respondent-Appellant moved by Order to Show Cause dated June 20, 1991 inter alia, to vacate the suspension order which application has since been denied, by order of the Appellate Division, Second Department dated July 15, 1991.

29. Any adversary, judge or client for that matter, who has ever dealt with Respondent-Appellant would not take seriously a claim that she relied on the advice of counsel and was not the prime mover in whatever action was taken involving her.

30. David B. Goldstein at paragraph 56 of his affirmation claims that Affirmant stated that an attorney "should be suspended for medical incapacity without any medical exam." In fact, Petitioner-Respondent's Order to show Cause dated May 8, 1990 (Exhibit A) which sought to have Respondent-Appellant examined, alternatively sought her suspension based on the testimony of her own psychiatrist pursuant to Section 691.13(b)(1), a far cry from Mr. Goldstein's distorted claim of what Affirmant stated.

31. Respondent-Appellant cites two cases at paragraph 56 of David B. Goldstein's Affirmation with respect to the appointment of a psychiatrist. Matter of Anonymous, 21 AD2d 48, 50 (1st Dept., 1964) which is one of the cases cited involves an examination that took place in 1963. There the petitioner, Association of the Bar of the City of New York (which then handled the investigation and prosecution where appropriate of attorney disciplinary proceedings) sought to have respondent examined by the Medical Report Office of the Supreme Court, New York County. The Departmental Disciplinary

Committee for the First Department did not even come into existence until in or about 1980. In the Second Department, the Rules Governing the Conduct of Attorneys creating the Grievance Committee was not promulgated until approximately 1975.

The other case cited is Matter of Rochlin 100 AD2d 263, 264, 265 (1st Dept., 1984). In Rochlin, the respondent attorney did not oppose an examination. In contrast in the case at bar, Respondent-Appellant, Sassower has vociferously and vehemently opposed undergoing an examination. The Court also went on in Rochlin to rule that,

> Respondent shall pay the expenses of any psychiatrist called at this hearing because it is his burden to establish that he is fit to practice law.

It is in the discretion of the Appellate Division to determine in accordance with its rule Section 691.13(b)(1), how the medical expert will be designated. The Appellate Division, Second Department has properly exercised its descretion through its delegation of the examination it ordered of Respondent-Appellant.

32. Mr. Goldstein at paragraph 58 of his Affirmation cites two cases to support his claim that he should be present during the psychiatric examination by Dr. Scher of Doris L. Sassower. As set forth supra, Dr. Scher has made clear in an affidavit (PR, Exhibit 2) that he cannot make a proper

psychiatric assessment of Doris L. Sassower if there is a third party present during the examination. Accordingly Affirmant so advised Mr. Goldstein that Dr. Scher would not permit him to be present.

The first case cited by Mr. Goldstein on this issue is Ponce v. Health Insurance Plan of Greater New York 100 AD2d 963 (Second Dept., 1984). Ponce arises out of a medical malpractice action where the plaintiff was to submit to an examination and not an attorney disciplinary proceeding, the latter where the psychiatrist must examine the subject attorney to determine if the attorney is suffering from a mental infirmity.

The other case cited Nalbadien v. Nalbadien 117 AD2d 657 (Second Dept., 1986) is an action for divorce and again not an attorney disciplinary proceeding. Further, in Nalbadien, the wife in the divorce action placed her psychiatric condition in issue by claiming that her inability to work resulted from such condition.

33. The next meritless claim raised by Respondent-Appellant involves the service of the Order to Show Cause (Exhibit A) and a claim at paragraph 73 (D) of Mr. Goldstein's Affirmation that such service was defective.

Such claim has been fully responded to in Affirmant's Affirmation in Opposition of June 13, 1990 (Exhibit C). Personal service of the Order to Show Cause, and not

substituted service, was effected pursuant to CPLR 308(2) (which is entitled, Section 308. Personal Service Upon a Natural Person) by serving Elena Ruth Sassower, the adult daughter of Doris Sassower at the residence of Respondent-Appellant and by the mailing of such Order to Show Cause as well to the residence. The claim by Mr. Goldstein that such service constitutes a violation of confidentiality pursuant to Judiciary Law Section 90(10) appears to be deceitful. Respondent-Appellant's daughter in fact called Petitioner-Respondent's office a number of times prior to such service and repeatedly stated that all dealings with her mother, Doris Sassower, should be conducted through her in view of her mother's ill health. To now claim otherwise is contemptible.

34. Respondent-Appellant continues to claim that she has been the subject of invidious and selective prosecution. This meritless argument has also been addressed in Affirmant's Affirmation in Opposition of June 13, 1990 (Exhibit C, paragraph 9) where it was noted that, at that time,

> Respondent's claim of "invidious selectivity" curiously ignores the fact that petitioner has received over the years at least twenty-two (22) complaints against her. Under the circumstances petitioner has been more than even-handed and tempered in its dealings with respondent and indeed has displayed perhaps even excessive restraint.

35. Finally, contrary to Respondent-Appellant's claims, attorney disciplinary proceedings are civil in nature and not quasi-criminal, Matter of Zuckerman, 20 NY2d 430 (1967).

WHEREFORE, this Court should deny leave to appeal on the grounds that the subject Order of Suspension is a non-final interlocutory order and that assuming arguendo that it were final, leave to appeal should be denied based on Respondent's-Appellant's flagrant violation of an Appellate Division Order and the proper exercise of authority by the Appellate Division, Second Department in suspending Respondent-Appellant pursuant to Section 691.4(1) of the Rules Governing the Conduct of Attorneys.

Dated: White Plains, New York
July 24, 1991

Gary L. Casella