CONTINUING LEGAL EDUCATION

Fall 2011

October 27, 2011

ETHICS UPDATE 2011
ETHICS VERSUS MORALITY:
HAS THE TRUTH BECOME MORE RELEVANT IN THE DIGITAL AGE OF DEFENDING YOUR CLIENT

PERY D. KRINSKY, ESQ.

SPONSORED BY:
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NEW YORK STATE SUPREME COURT
APPELLATE DIVISIONS,
FIRST & SECOND JUDICIAL DEPARTMENTS
& THE ASSIGNED COUNSEL PLAN
OF THE CITY OF NEW YORK

PRESENT:

ETHICS UPDATE 2011

"ETHICS V. MORALITY: HAS THE TRUTH BECOME MORE RELEVANT IN THE DIGITAL AGE OF DEFENDING YOUR CLIENT?"

OCTOBER 27, 2011
NEW YORK CITY

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PRESENT:

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"ETHICS V. MORALITY: HAS THE TRUTH BECOME MORE RELEVANT IN THE DIGITAL AGE OF DEFENDING YOUR CLIENT?"

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INTRODUCTORY COMMENT.

As the legal profession faces a more digital and global decade, litigators, and the judges before whom they appear, are increasingly faced with novel and sometimes unfamiliar challenges of when, where and how the "practice" and the "business" of law are conducted – in the broader context of evaluating claims of ethical impropriety. Some of the most significant of these challenges involve the interpretation and application of ethics-related and other rules of engagement in what has been described as "Rambo"-type lawyering.

Indeed, Rambo or sometimes overly aggressive litigation tactics – specifically in this more digital and global decade – have brought greater attention to the debate: *"Ethics v. Morality" – has the truth become more relevant in the digital age of defending your client*? This Continuing Legal Education program will address new ethics-related issues in the "digital context," the new and modified Rules of Professional Conduct, as well as some of the frequently-raised issues relating to aggressive litigation and the adversarial process, which should be "spotted" by attorneys for closer examination. Need-to-know, "high-impact" ethics issues to keep both your client and your law license include: understanding the differences between ethics and morality; questionable investigative techniques; the media's sensationalism of the "trial lawyer"; the "zealous" advocacy defense; the impact of technology inside and outside the courtroom, including computer malpractice; and understanding the disciplinary process.

Experience has taught litigators (and the attorneys who represent them in ethics-related matters) that there are many pitfalls in an overly aggressive litigation style. This program will address a number of these issues, as well as the disciplinary process; and will suggest guidelines for analyzing proposed conduct by attorneys involved in (sometimes overly) zealous advocacy. Lawyers who face disciplinary committee and court inquiries into their conduct typically get in "trouble" *not* because they make the "wrong" ethical decisions, but, rather, because they do not see the ethical issues involved in the decisions they make. Hopefully, this program will sensitize attorneys who engage in *aggressive* litigation to problems that may arise in the future – because, once those issues are identified, more often than not the lawyer will make the "right" decision.

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT
PANEL A

IN RE: **S. GRAHAM CATLETT**
Arkansas Bar ID #77029
CPC Docket No. 2011-051

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based were developed from information provided to the Committee by Charles Vestal in October 2005. The information related to activities of representatives of Vestal Gourmet Foods, Inc. in mid-2005, including by Respondent S. Graham Catlett, an attorney practicing primarily in Little Rock, Arkansas. In June 2011 Respondent was served with a formal complaint, supported by an affidavit from Sarah Anne Vestal (formerly Charles H. Vestal). Respondent filed a response to the Complaint, Ms. Vestal filed an Affidavit of Rebuttal, and the matter went to ballot vote on September 16, 2011.

As a result of an October 2009 Arkansas court order recognizing a change of sex. Charles H. Vestal, formerly of Little Rock, is now legally Sarah Anne Vestal, and now residing and working in California. After passing a federal government background check, Ms. Vestal has been employed since mid-2009 with the Internal Revenue Service, first as a Tax Compliance Officer and now as a Revenue Agent. As the acts alleged following generally occurred before the gender change, Ms. Vestal will be referred to herein as Mr. Vestal or Ms.

Vestal as time-appropriate.

Mr. Vestal had started a wholesale organic tomato production business in Arkansas in 2002, as Vestal Greenhouse, Inc. ("VGI"). In December 2003, Vestal secured a USDA-NOP organic producer certificate, QAI #103660-B, for his tomato greenhouse site near Sheridan, Arkansas. In July 2004, Mr. Vestal and his long-time attorney S. Graham Catlett, and others, incorporated Vestal Gourmet Foods, Inc. ("VGFI"), an Arkansas business corporation, to operate and expand the wholesale organic tomato production business. VGFI basically took over Vestal's former VGI. Vestal, also a CPA, was the experienced farmer. Graham Catlett was the lawyer, business adviser, and developer of sources of project financing. The idea was that Vestal and Catlett would each own 50% of the corporate stock. Vestal's shares were in recognition of his $321,900 for creation and startup of the business and his farm management efforts, and Catlett would generally earn his shares by obtaining a minimum of $1,000,000 in capital infusion. In April 2005, a loan closed whereby VGFI borrowed $770,000 in SBA guaranteed funds from Arkansas Capital Corporation. Greenhouse expansion plans of VGFI were then implemented in April 2005 when a $486,393 contract for construction of a new greenhouse for VGFI was signed.

On or abut June 4, 2005, the VGFI greenhouse tomato crop failed. The VGFI field tomato crop being raised was not mature and ready for market at the time, leaving VGFI without a source of organic tomatoes to supply to its many retail customers in central Arkansas. By July 5, 2005, the field tomato crop had also failed. Vestal, Catlett, and others involved in VGFI discussed the emergency situation. A plan was devised by which VGFI would purchase non-organic tomatoes at Arkansas markets, mainly in Warren, label these

tomatoes as "organic" using the company's USDA (United States Department of Agriculture) organic labels, and continue to sell them as "organic" products, which commanded a higher price from retail customers, until a source of organic tomatoes could be developed or a new crop could be raised at the VGFI facility. Between June 5 - July 11, 2005, VGFI agents, delivered 103 shipments of mis-labeled "organic" tomatoes to retail customers in the little Rock area, as detailed in the USDA Report of Investigation.

By August 2005, major problems had arisen between Vestal and Catlett over the management and ownership of VGFI. In early October 2005, Vestal sued Catlett and others involved in VGFI. In September 2006, this state court litigation was settled.

In December 2005, Mr. Vestal reported the mislabeled tomato sales matter to both the USDA and the FBI. The USDA conducted an investigation. In January 2007, a Report of Investigation was issued by USDA. In June 2009, an adverse Decision was issued by the Administrator of the Agricultural Marketing Service and served on Catlett and Vestal, basically revoking the VGFI organic certification but not imposing any financial penalties. The Decision found that the mislabeling scheme in which Catlett participated involved 103 willful violations of the OFPA and NOP regulations. In late June 2009, Catlett waived any appeal rights from the Decision, ending any resistance by the Catlett parties to the Decision.

In early January 2010, Ms. Vestal waived any appeal rights from the Decision, ending any resistance by her to the Decision. In a separate and personal settlement agreement, the USDA agreed with Vestal that she had been the "whistleblower" in the VGFI case and had been in compliance with NOP (National Organic Program) regulations at all relevant times. Ms. Vestal self-reported the USDA investigation to the IRS as part of her employment

process. In January 2010, the IRS closed the file without action and she continued in her IRS employment position.

Upon consideration of the formal complaint and attached exhibit materials, the response to it, and other matters before it, and the Arkansas Rules of Professional Conduct, Panel A of the Arkansas Supreme Court Committee on Professional Conduct finds:

A. The conduct of S. Graham Catlett violated Rule 8.4(c), in that (1) during June-July 2005, Mr. Catlett knowingly participated in a plan and scheme to sell non-organic tomatoes, falsely labeled as organic tomatoes, to customers of Vestal Gourmet Foods, Inc., and (2) during June-July 2005, Mr. Catlett knowingly participated in a plan and scheme to sell non-organic tomatoes, falsely labeled as organic tomatoes, to customers of Vestal Gourmet Foods, Inc., a plan and scheme which the USDA found to result in 103 willful violations of the OFPA and NOP regulations. Arkansas Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that **S. GRAHAM CATLETT**, Arkansas Bar ID #77029 , be, and hereby is, **REPRIMANDED and FINED $1,500.00** for his conduct in this matter and assessed $50.00 costs. The fine and costs assessed herein, totaling $1,550.00, shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct with thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

In the Supreme Court of Georgia

Decided: October 17, 2011

S11Y1549. IN THE MATTER OF MICHAEL B. SESHUL, JR.

PER CURIAM.

This disciplinary matter is before the Court on the report and recommendation of the special master that the Court accept the voluntary petition for discipline filed by Respondent Michael B. Seshul, Jr. (State Bar No. 617061).[1] In his petition, Seshul requests that he be suspended from the practice of law until March 31, 2013, with specified conditions to be met before reinstatement, for his admitted violation of Rule 8.4(a)(2) of the Georgia Rules of Professional Conduct[2] that occurred on March 31, 2009, when he entered a guilty plea in the Superior Court of Fulton County to one felony count of aggravated assault and one misdemeanor count of battery. The Office of General Counsel of the State Bar of Georgia urges the Court to adopt the special master's recommendation and accept Seshul's voluntary petition for discipline.

Since the imposition of disciplinary punishment is largely governed by the

[1]Seshul currently is suspended from the practice of law as a result of this Court's acceptance in May 2010 of his voluntary petition for interim suspension pending imposition of final discipline. In re Seshul, 287 Ga. 158 (695 SE2d 24) (2010).

[2]Rule 8.4(a)(2) provides that it is a violation of the Georgia Rules of Professional Conduct for a lawyer to be convicted of a felony. The violation carries a maximum penalty of disbarment.

particular facts of each case (In re Ortman, 289 Ga. 130 (SE2d) (2011)), this Court requested the parties to provide information concerning the facts underlying Seshul's felony conviction for aggravated assault. In response, Seshul submitted his affidavit and the State Bar submitted a copy of the indictment returned against Seshul and the final disposition of the criminal action. From those documents we have ascertained that in May 2007, Seshul, angry with his then-girlfriend who had thrown a brick that struck him on the arm, picked up the brick and threw it at her, striking the woman's feet. Seshul was given first offender treatment and received a five-year sentence, with one year commuted to time served and the balance to be served on probation. He was required to enter a specified program in Tennessee on June 1, 2009, and participate in the program for 90 consecutive days; to complete a family-violence intervention program; and to pay $827.20 in restitution. While enrolled in the Tennessee program, Seshul received clinical and therapeutic treatment for chronic post-traumatic stress disorder (PTSD),[3] panic disorder, and alcohol abuse.

Although a violation of Rule 8.4 (a)(2) generally is punished by disbarment, there is evidence of mitigating circumstances in the case before us: Seshul has no prior discipline; he experienced personal and emotional problems during the relevant time period; he has taken rehabilitative steps in the form of

[3]A physician certified in Addiction Medicine who treated Seshul explained by letter that a PTSD patient "goes into a primitive survival level of behavior as a response to the actual or perceived threat of physical violence directed towards [him]."

extensive treatment for post-traumatic stress disorder and alcohol abuse;[4] he has good character and a good reputation; he has displayed a cooperative attitude toward these proceedings;[5] and no harm was caused to or directed at any of Seshul's clients. See In re Ortman, supra, 289 Ga. 130, where this Court, faced with similar circumstances, disciplined an attorney who had pled guilty to felony aggravated battery by suspending him for 12 months for violating Rule 8.4 (a)(2). We find this case and the mitigating factors similar to those relied on in Ortman. Accordingly, we accept the petition and hereby suspend Seshul until March 31, 2013, with the following conditions:

between December 31, 2012 and March 31, 2013, Seshul must present the Office of General Counsel with certification from a psychiatrist or psychologist licensed to practice in Georgia that Seshul has no mental or emotional health condition that would adversely affect his ability to practice law; and

prior to his reinstatement to the practice of law, Seshul must provide the Office of General Counsel with the record of his discharge and exoneration to the March 31, 2009 plea (see OCGA § 42-8-62), or other satisfactory written proof of his completion of his probationary period.

---

[4]Following his completion of the Tennessee program, Seshul voluntarily entered an out-of-state residential treatment program where, during his 10-month stay, he participated in group therapy for at least 20 hours a week, obtained part-time employment, and performed over 200 hours of community service.

[5]"[D]isciplinary sanctions may be mitigated when lawyers who have violated Bar Rules admit their misconduct and take voluntary and affirmative action in response, such as ceasing the practice of law because they anticipate future suspension or disbarment." In the Matter of Onipede, 288 Ga. 156 (702 SE2d 136) (2010).

Solos/Small Firms

Ethics Complaint: Lawyer Lied About 'Adult Gig' Craigslist Ad for Secretary

Posted Oct 22, 2009 6:47 PM CDT
By Martha Neil

An attorney discipline count has been filed against an Illinois immigration lawyer for allegedly lying about an ad for a legal secretary that he posted in the "Adult Gigs" section of Craigslist.

Although the May 2009 job ad did not expressly list any sexual job duties, a follow-up letter sent by attorney Samir Zia Chowhan to a woman who responded to the ad stated that "in addition to the legal work, you would be required to have sexual interaction with me and my partner, sometimes together sometimes separate," alleges a complaint filed yesterday by the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court.

The letter, which is published in its entirety in the ARDC complaint, also states that "this part of the job would require sexy dressing and flirtatious interaction with me and my partner, as well as sexual interaction," and notes that a sexual tryout would be required as part of the job interview. Chowhan was a solo practitioner at this time, the complaint says, but shared an office with another lawyer.

The job applicant complained to the ARDC, which then contacted Chowhan. He denied initially that he had posted the Craigslist ad but later admitted that he had and that he had sent the letter, the complaint states.

It alleges that by lying initially to the ARDC about posting the ad Chowhan violated Rule 8.1 (a)(1) and Rule 8.4(a)(4) of the Illinois Rules of Professional Conduct and Illinois Supreme Court Rule 770. They respectively prohibit making a false statement of material fact in connection with a lawyer disciplinary matter; conduct involving dishonesty, fraud, deceit or misrepresentation; and conduct which tends to defeat the administration of justice or bring the courts or legal profession into disrepute.

The complaint also contains two other counts concerning Chowhan's alleged mishandling of two immigration matters.

A message left for Chowhan early this evening by the ABA Journal at the business phone number listed for him on the ARDC's website did not receive any immediate response.

Hat tip: Legal Profession Blog and Legal Blog Watch.

Matter of Harrington
2011 NY Slip Op 05944
Decided on July 14, 2011
Appellate Division, First Department
Per Curiam
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on July 14, 2011

SUPREME COURT, APPELLATE DIVISION

First Judicial Department

Angela M. Mazzarelli,Justice Presiding,

Richard T. Andrias

Karla Moskowitz

Rosalyn H. Richter

Sheila Abdus-Salaam,Justices.

2055

[*1]In the Matter of James J. Harrington, an attorney and counselor-at-law: Departmental Disciplinary Committee for the First Judicial Department, Petitioner, James J. Harrington, Respondent.

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent, James J. Harrington, was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the Second Judicial Department on December 24, 1964.

Jorge Dopico, Chief Counsel, Departmental

Disciplinary Committee, New York
(Scott D. Smith, of counsel), for petitioner.
No appearance for respondent.
M-2055
May 31, 2011
IN THE MATTER OF JAMES J. HARRINGTON, AN ATTORNEY [*2]

Per Curiam

Respondent James J. Harrington was admitted to the practice of law in the State of New York by the Second Judicial Department on December 24, 1964. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department. Respondent's most recent registration with OCA lists a business address in Newport, Rhode Island, and his registration fee was waived, indicating that he certified he is retired from the practice of law.

The Departmental Disciplinary Committee is now seeking an order, pursuant to 22 NYCRR 603.4(e)(1)(i) and (iv), immediately suspending respondent from the practice of law until further order of the Court because of his noncooperation with a Committee investigation into his professional conduct and his failure or refusal to pay a judgment. Respondent has not responded to this motion.

The events leading up to this motion concern PPX International, Inc. (PPX), an entity controlled by Edward Chalpin. PPX retained respondent in 2003 and 2004 for litigation services on two matters. PPX paid respondent flat fees for both cases totaling $12,500. A billing dispute subsequently arose between them and, in 2005, Chalpin filed a complaint against respondent alleging that respondent neglected the cases. As this was a fee dispute, the Committee closed its investigation and referred the dispute to arbitration.

On December 17, 2007, an arbitration panel found "by a preponderance of the evidence presented by the parties that the client is entitled to a refund of $9500.00 by the attorney" and issued an arbitration award in that amount in favor of PPX International and

against Harrington Henry, LLP, respondent's firm. On March 14, 2008, the Civil Court of the City of New York, New York County, granted, on default, PPX's petition to confirm the arbitration award, together with interest from December 19 [sic], 2007.

On April 4, 2008, Chalpin filed a second disciplinary complaint against respondent alleging that he was unable to collect the arbitration award.
In his answer to the complaint dated May 20, 2008, respondent indicated that he would provide evidence to the Civil Court that Chalpin had given perjured testimony, relying on a November 6, 2006 Memorandum and Decision of U.S. District Judge Lewis Kaplan who found Chalpin's testimony evasive and not credible, in part, in *Experience Hendrix, LLC v Edward Chalpin, PPX Enterprises, Inc., PPX International Inc., et al*, 461 F Supp 2d 165 (SDNY 2006). Respondent was not involved in that litigation.

On June 6, 2008, respondent filed an Order to Show Cause in Civil Court seeking to vacate the March 14, 2008 order confirming the $9,500 arbitration award. Respondent raised similar credibility issues regarding Chalpin. The Court granted the Order to Show Cause to the extent of staying the execution of the March 14 order, pending a hearing and determination of the motion to vacate on June 17, 2008.

Because of respondent's incomplete answer to Chalpin's April 2008 complaint, by letter dated July 7, 2008, the Committee requested specific information from respondent related to the two PPX cases, as well as an update on his motion to vacate the default judgment. The Committee warned respondent that failure to pay a judgment could be grounds for an interim suspension. By letter dated July 17, 2008, respondent provided the specific information requested. As to his motion to vacate the default judgment, respondent explained that, on the [*3]return date of the motion, the parties entered into a stipulation wherein PPX agreed to vacate the default judgment and respondent agreed to accept service of PPX's petition to confirm the arbitration award.
Respondent answered, asserted six affirmative defenses and numerous objections. By decision and order dated October 27, 2008, Civil Court Judge Jeffrey Oing granted PPX's motion to confirm the $9,500 award, with interest from December 17, 2007. Respondent moved for renewal and reargument and, after he defaulted, the court denied the motion.

On February 11, 2009, the Clerk of the Civil Court entered a civil judgment in favor of

PPX and against Harrington Henry LLP (respondent's firm) for $9,500 plus $988.53 in interest, for a total of $10,488.53.

On March 24, 2009, the Committee wrote respondent requesting copies of documents related to the original arbitration, his motion to reargue, his appeal of the February 11, 2009 judgment and to provide dates that he would be available for a deposition. In a letter dated March 30, 2009, respondent answered in a condescending tone. For example, in response to the Committee's notice in its March 24 letter that his failure to cooperate would result in a judicial subpoena compelling his attendance at a deposition, respondent wrote, "Wow. A ***judicial*** subpoena! Perhaps you expect us to be concerned. Prepare to be disappointed."

On April 1, 2009, the Committee wrote back, noting that respondent's insulting and patronizing tone called into question his fitness to practice law and again asked him to schedule a deposition. On April 13, 2009, respondent wrote then Chief Counsel Alan Friedberg, insulting Committee Staff and stating that he would only communicate further with a new Staff Attorney.

On May 5, 2009, the Appellate Term affirmed Judge Oing's October 27, 2008 order. By order entered December 29, 2009, this Court denied respondent's motion for leave to appeal to this Court from the decision and order of the Appellate Term.

For the next year, the Committee had difficulty contacting respondent, primarily because he relocated to Rhode Island without advising the Committee or OCA of his change of addresses even though Judiciary Law § 468-a(2), requires attorneys to notify OCA of address and telephone changes within 30 days. On August 24, 2010, a Committee investigator attempted to serve a judicial subpoena on respondent at his last known business address, 305 Madison Avenue, New York, NY. When the investigator went there, he discovered it was a mail and telephone service that could not accept any legal papers. Next, on August 31, 2010, when the investigator went to respondent's last known home address, in Manhattan, the building superintendent informed him that, although respondent owned the apartment, he did not live there. The superintendent gave respondent's purported cell phone number to the investigator who left numerous telephone messages for the respondent without receiving any response. On September 21, 2010, the Committee

sent a letter to the 305 Madison Avenue address informing respondent of the efforts to serve him with a subpoena and warning him that a failure to cooperate constituted professional misconduct under 22 NYCRR 603.4(e)(1)(i).

The Committee wrote to respondent at his new address in Rhode Island on December 9, 2010. On December 30, 2010, respondent wrote the Committee, but did not address the Committee's attempts to locate him or suggest a date for his deposition. Rather, he stated, "[i]f you are still wasting your time and money on the alleged complaint of that deadbeat perjurer, Edward Chalpin,' here is more reading material," and attached a copy of Judge Kaplan's decision in the Hendrix litigation. [*4]

On January 7, 2011, the Committee wrote respondent, reminding him of the $10,488.53 judgment he had failed to satisfy; that an attorney can be suspended for failure to pay a client's judgment against him; that respondent had still not appeared for a deposition and, if he did not comply within 20 days, the Committee would seek his suspension. On January 14, 2011, respondent replied, stating that he did not know of any judgment that was entered against him and requesting a copy of the judgment, notice of entry and proof of service.

Pursuant to respondent's request, on January 27, 2011, the Committee sent respondent a copy of Judge Oing's October 27, 2008 order confirming PPX's arbitration award; the February 11, 2009 Civil Court judgment for $10,488.53 in favor of PPX against respondent, and the Appellate Term's May 5, 2009 order affirming Judge Oing's order. The Committee wrote further that if respondent did not provide proof within 20 days that he had satisfied the judgment, the Committee would move for his suspension.

According to the Committee, to date, respondent has not satisfied the judgment or explained to the Committee why he has not complied with its requests.

The Committee alleges that respondent's repeated failure to cooperate fully with the Committee's investigation, including hindering service of a judicial subpoena "evinces a shocking disregard for the judicial system ... [that] can only be interpreted as a deliberate and willful attempt to impede the Committee's investigation" and warrants his suspension pursuant to 22 NYCRR 603.4(e)(1)(i) (*Matter of Mager*, 282 AD2d 88, 91-92 [2001];

Matter of Spiegler, 33 AD3d 187 [2006]). Further, although it is unclear when respondent moved to Rhode Island, and the Committee did not learn of his new Rhode Island address until December 2010, respondent did not update his OCA registration to reflect the change until March 2011, in violation of Judiciary Law § 468-a(2).

The Committee avers that another ground for an interim suspension is the uncontested evidence that respondent failed to satisfy his former client PPX International, Inc.'s judgment for $10,488.53. Respondent's "willful failure or refusal to pay money owed to a client, which debt is demonstrated by an admission, a judgment, or other clear and convincing evidence" also supports immediate suspension (22 NYCRR 603.4[e][1][iv]) (*see Matter of Stewart*, 50 AD3d 247 [2008]; *Matter of Singer*, 301 AD2d 336 [2002]; *Matter of Muraskin*, 286 AD2d 186 [2001]).

This Court has held repeatedly that misconduct similar to respondent's immediately threatens the public interest and warrants an interim suspension.

Accordingly, the motion is granted, and respondent is suspended from the practice of law pursuant to 22 NYCRR 603.4(e)(1)(i) and (iv), effective immediately, and until such time as disciplinary matters pending before the Committee have been concluded, and until further order of this Court.

All concur.

Order filed.

(July 14, 2011)

Mazzarelli, J.P., Andrias, Moskowitz, Richter, and Abdus-Salaam, JJ.

Respondent suspended from the practice of law in the State of New York, effective the date hereof, until such time as disciplinary matters pending before the Committee have been concluded and until further order of this Court. Opinion Per Curiam. All concur.

Return to Decision List

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JEFF MURPHREY
BOARD CERTIFIED-PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

September 26, 2008

Dale G. Markland
Markland Hanley LLP
2200 Ross Avenue, Suite 4100W
Dallas, TX 75201

Via Facsimile

Re: Cause No. 2006-81245; *Saychana Buoy, Individually and as Representative of the Estate of Andrew Buoy, Deceased, and as Next Friend of Karina Buoy, Matthew Buoy and Buoy Child, Unborn, and Koeung Buoy v. Idealease of Houston, Limited, Texas Truck Centers of Houston, Texas Truck Centers of Houston d/b/a Idealease of Houston, Texas Truck Centers, Inc., Idealease Management, LLC, Houston Distributing Company, Inc. and Russell H. Nettles*; In the 190th Judicial District Court of Harris County, Texas

Dear Dale:

I am sorry that a hurricane hit Houston.

I am sorry that I had no power or water at my house as a result of the hurricane.

I am sorry that I had to extend my stay out of state because of the hurricane.

I am sorry that CenterPoint Engery did not bend more quickly to your desires and restore power to my home so that I could return to it sooner.

I am sorry that upon returning to my home on Monday, September 22, 2008, I discovered a roughly 50 ft. x 6 ft. swath of human excrement, used condoms, and all the other niceties that come with a raw sewage leak in one's backyard which drains into one of the main bayous in Houston.

I am sorry that I had to threaten City of Houston officials with lawsuits and local news exposure in order to get them to even agree to meet with me about cleaning up the problem.

I am sorry that these city officials chose a date that interfered with our deposition and gave me no other options.

I am sorry that the Houston Public Works Department had to use a fire hose to blow human feces out of my yard on the day our deposition was scheduled.

I am sorry that the city required my presence at the debacle noted immediately above. And, I am sorry that this debacle managed to uproot some more of my trees.

I am sorry that your office communicated that you would only "agree" to my rescheduling the deposition if we agreed to pay your travel expenses. I am also sorry they did not mention anything about attorney's fees in their voicemail. I am especially sorry that your associate, after I had agreed to pay your reasonable travel expenses, decided to put in writing that while the deposition was cancelled, it was "unilaterally cancelled," and that you did not "agree" to the cancellation. I am sorry that you either went back on your word or, more likely, just do not have a word.

I am sorry that you think the judge should be involved in this matter. I wonder if the judge will be sorry about that, too.

I am sorry that you are the only lawyer in this case that consistently goes out of his way to be unaccommodating and unprofessional with the other lawyers. I am sorry you are from Dallas.

Very truly yours,

Jeff Murphrey

JM/kj
enclosure
1949/11869

cc:	Glen W. Wilkerson	*Via Facsimile*
	Larry P. Boyd	*Via Facsimile*
	Wade Reese	*Via Facsimile*
	Peter Blute	*Via Facsimile*
	Kent Adams	*Via Facsimile*
	W. Scott Red, Jr.	*Via Facsimile*
	Randy Fairless	*Via Facsimile*
	Larry Ottoway	*Via Facsimile*
	Thomas Bullion	*Via Facsimile*

From: Nick Mooney [nick.mooney@bromagenlaw.com]
Sent: Thursday, August 14, 2008 9:46 PM
To: 'Kurt D. Mitchell J.D.'
Cc: lisa@bromagenlaw.com; 'Aldo Bolliger'
Subject: RE: Craig v. VW

This is the most horrifying email I have ever read -- the fact that you are married means that there truly is someone for everyone, even a short / hairless jerk !!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization !!!

Nicholas F. Mooney, Esquire
Bromagen & Rathet, P.A.
201 E. Kennedy Blvd.
Suite 500
Tampa, FL 33602

From: Kurt D. Mitchell J.D. [kmitchell@mblawgroup.com]
Sent: Tuesday, October 14, 2008 3:51 PM
To: 'Nick Mooney'; 'Aldo Bolliger'
Cc: 'Jessica Affortunato'; lroberts@mblawgroup.com
Subject: RE: Brownell v. VW

Aldo:

This guy is an absolute ass clown and what he is not going to use his retarded son with 300+ surgeries (must look just like Mooney so they must be all plastic surgeries) to get out of the trial? I can see already your Honor my retarded son is having surgery for the 301st time so there is no way I can try the case I need a continuance. Absolute joke and ass clown. If this is what a 20 year attorney looks like, then I feel sorry for the profession. Yea, that is exactly what I want to do go watch a jester perform at the Court. How pathetic of a life must you have to run around every day talking about how great a trial attorney you are. Especially, when everybody can see you are an ass clown. After all if I am running around to hearings after 20 years lying to courts and using my time to send childish emails to a third-year attorney, the last thing I am going to do is run around saying what a great attorney I am. This guy has to go home every night and get absolutely plastered to keep from blowing his huge bulbous head off. Alright, enough about the ass clown. Later.

Kurt D. Mitchell J.D.
licensed in Fl. Pa and D.C.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 502006 CA 004966 XXXX MB AG

BOYD LENKERSDORF and
MARY LENKERSDORF, his wife,

Plaintiffs,

-vs-

MICHAEL SORRENTINO,
WILLIE CLARKE and LEILA CLARKE,

Defendants.
_____/

PLAINTIFFS' MOTION TO COMPEL DEFENSE COUNSEL TO WEAR APPROPRIATE SHOES AT TRIAL

Plaintiff moves the Court for relief as follows:

1. This is an action alleging personal injuries to Plaintiff, BOYD LENKERSDORF as a result of a car collision which occurred on December 18, 2002.

2. Trial is set to begin on June 15, 2009.

3. It is well known in the legal community that Michael Robb, Esquire wears shoes with holes in the soles when he is in trial.

4. Upon reasonable belief, Plaintiff believes that Mr. Robb wears these shoes as a ruse to impress the jury and make them believe that Mr. Robb is humble and simple without sophistication.

5. Throughout the discovery of this case, Mr. Robb's clear strategy has been to attack the credibility of the Plaintiff and his counsel by suggesting that Plaintiff is faking his injuries and exaggerating his claims and demanding more compensation then he deserves because Plaintiff is greedy.

6. Part of this strategy is to present Mr. Robb and his client as modest individuals who are so frugal that Mr. Robb has to wear shoes with holes in the soles. Mr. Robb is known to stand at sidebar with one foot crossed casually beside the other so that the holes in his shoes are readily apparent to the jury who are intently watching all counsel and the Court at that moment.

7. Then, during argument and throughout the case Mr. Robb throws out statements like "I'm just a simple lawyer" with the obvious suggestion that Plaintiff's counsel and the Plaintiff are not as sincere and down to earth as Mr. Robb.

8. Mr. Robb should be required to wear shoes without holes in the soles at trial to avoid the unfair prejudice suggested by this conduct.

WHEREFORE, Plaintiff prays this honorable court granted the relief herein requested.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail to Vivian M. Knapp, Esquire, Law Offices of Vivian Knapp, 1450 Centrepark Blvd., Suite 250, West Palm Beach, Florida 33401, and Michael A. Robb, Esq., Clark, Robb, Mason, Coulombe & Buschman, Building 3 – Suite 207, 7501 Wiles Road, Coral Springs, FL 33067 on this 12th day of June, 2009.

Larrieux & Bone, P.L.
550 S. Quadrille Blvd, Suite 200
West Palm Beach, FL 33401
Direct Dial: (561) 832-6434
Facsimile: (561) 832-9445

By: _____
Bill Bone, Esquire
Florida Bar No. 437549

MOTION TO COMPEL STATE'S
ATTORNEY TO DROP HIS ACCENT

NOW COMES the defendant, in the above styled and numbered cause, and through his attorney of record, moves the Court to order the State's prosecuting attorney to quit using his accent. Counsel has reason to believe that the State's attorney is merely emphasizing his accent to curry favor with female jurors. Frankly, it really hurts defendant's case. The State's attorney has been a prosecutor in Texas long enough that he should be ordered to wear boots and speak like a proper Texan

Respectfully submitted,

CHRISTOPHER M. GUNTER
State Bar No. [redacted]
ALAN BENNETT
State Bar No. [redacted]
MERIL "GENE" ANTHES, JR.
State Bar No. [redacted]
Gunter & Bennett, P.C.

No. D1-DC-09[redacted]

THE STATE OF TEXAS	§	IN THE 167TH JUDICIAL
VS.	§	DISTRICT COURT OF
[redacted]	§	TRAVIS COUNTY, TEXAS

STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES THE STATE OF TEXAS, by and through M[redacted] P[redacted], Assistant District Attorney of Travis County, Texas, and responds to Defendant's Motion to Compel State's Attorney to Drop His Accent (hereinafter the "Motion").

Defendant's Motion should be denied for several independent reasons, as follows:

1. The Doctrine of "Unclean Hands." It is well known around the courthouse that Christopher Gunter is from Hackensack, New Jersey. Despite this, he adopts a slow, lazy drawl when speaking to juries and pretends to be from Texas. If he can, we can.
2. The Doctrine of "Necessary Englishness." The State admits that an English accent helps with juries. However, given that the Prosecutor in question also (a) has a Ukrainian law degree, (b) has no clue what he's doing, and (c) sometimes forgets his pants, an English accent is the only advantage the State has when he's trying a case. His accent is, therefore, legally "necessary."
3. Defendant's Motion is moot. The Prosecutor in question has already acceded to one of the Defendant's concerns: he wears cowboy boots. Further, he refrains from several other acts of Limey-ness, which the Court should take into account. First, he has ceased the practice of serving tea and crumpets to the jury panel during voir dire (tea service is now reserved for jury deliberation). Second, he only wears his wig when the jury is out of the room; and third, he has yet to challenge defense counsel to a duel (though he admits to putting stale cucumber sandwiches into Alan Bennett's briefcase).

IN CONCLUSION, Defendant's Motion should be denied because (1) he's ***totally*** a hypocrite, (2) I wanna, and (3) he can't make me.

By: [redacted]
Assistant District Attorney
Travis County, Texas

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November 20, 2010

Hammer Time

The New Jersey Disciplinary Review Board has **ordered** a suspension of three months conditioned on proof of fitness of an attorney who had "left obscene and threatening messages on a former client's answering machine and later threw a hammer through the client's closed living room window." The attorney did not file an answer to the bar complaint.

The underlying case involved the defense of a consumer fraud action. Judgment was entered against the client and no appeal was taken. When the judgment was executed three years later, the client claimed surprise and asserted that the attorney should have appealed.

That evening, the attorney met with the client at the client's home. The attorney "appeared intoxicated and acted in a belligerent manner toward [the client], but left without incident." Three phone messages were left at 2 am the next morning. The hammer throw was an hour later. The client "peered through the broken window just in time to see [the attorney] drive off."

The attorney pled guilty to a petty criminal charge.

in 2008, the attorney reached an agreement in lieu of discipline that included restitution for the window, that he attend AA meetings and a letter of apology to the client. He failed to report compliance with the conditions but later stated that his alcoholism and depression had prevented him from doing so. The board here rejected charges that his non-compliance constituted a failure to

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Bar Admission and Discipline

• NOBC, National Organization of Bar Counsel
• APRL, The Association of Professional Responsibility Lawyers
• National Conference of Bar Examiners
• Halt

cooperate with ethics authorities or was prejudicial to the administration of justice.

The attorney must submit proof of fitness to practice by a mental health professional approved by the Office of Attorney Ethics. (Mike Frisch)

November 20, 2010 in Bar Discipline & Process | Permalink

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257 A.D.2d 326, 690 N.Y.S.2d
245, 1999 N.Y. Slip Op. 04715

In the Matter of Philip J. Dinhofer, an Attorney, Respondent. Departmental Disciplinary Committee for the First Judicial Department, Petitioner.

Supreme Court, Appellate Division,
First Department, New York
May 20, 1999

CITE TITLE AS: Matter of Dinhofer

SUMMARY

Disciplinary proceedings instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the Bar on June 22, 1983, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

HEADNOTE

Attorney and Client--Disciplinary Proceedings
Respondent attorney, who was publicly censured by the United States District Court based upon statements he made during a telephone conference with a Federal Judge, including calling the Judge "corrupt", is suspended from the practice of law in New York for a period of three months (22 NYCRR 603.3).

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Attorneys at Law, §§ 38, 39, 46, 51, 114.

Carmody-Wait 2d, Officers of Court §§ 3:179, 3:205, 3:217, 3:224.

22 NYCRR 603.3.

NY Jur 2d, Attorneys at Law, §§ 301, 382, 383, 400, 401.

ANNOTATION REFERENCES

See ALR Index under Attorney or Assistance of Attorney; Discipline and Disciplinary Actions.

APPEARANCES OF COUNSEL

Naomi F. Goldstein of counsel (*Thomas J. Cahill,* attorney), for petitioner.

Richard Godosky of counsel (*Godosky & Gentile, P. C.*), for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent, Philip J. Dinhofer, was admitted to practice as **327* an attorney in the State of New York on June 22, 1983 by the Appellate Division, Second Department. He is also admitted to practice before the United States District Court, Southern District of New York. At all times relevant herein, respondent maintained an office for the practice of law within the First Judicial Department.

The Departmental Disciplinary Committee moves pursuant to 22 NYCRR 603.3 for an order publicly censuring respondent predicated upon similar discipline issued by the United States District Court, Southern District of New York, or, in the alternative, sanctioning respondent as this Court deems appropriate.

By an order dated November 2, 1998, the Southern District publicly censured respondent for calling a Judge "corrupt" during a telephone status conference in which respondent appeared on behalf of his client. The Committee on Grievances for the Southern District had charged respondent with violating Code of Professional Responsibility DR 1-102 (A) (5) and (8) and DR 7-106 (C) (6) (22 NYCRR 1200.3, 1200.37), based upon statements he made during a telephone conference with the Hon. Loretta Preska on April 7, 1997. Respondent admitted to the violations of the Code in his answer to the complaint. On April 23, 1998, a hearing was held before a Panel solely on the issue of the appropriate sanction. The Panel's report recommended public censure and further recommended that respondent be required to withdraw as counsel for plaintiff, notwithstanding the fact that he had apologized to Judge Preska. Subsequently, the report was adopted by the Federal court, and resulted in the aforementioned order.

Respondent has no defense under 22 NYCRR 603.3 (c). In answering the instant petition, respondent admits to the misconduct, does not assert any defenses, and joins in the Committee's request that he be publicly censured.

Notwithstanding respondent's admissions, we find that a three-month suspension is an appropriate sanction. The

record reflects that comments made by respondent were derogatory, undignified and inexcusable. The transcript of the conversation indicates that respondent made the following statements, among others to the court:

a. "This is rampant corruption. I don't know what else to say. This is a sham."

b. "This is blatantly corrupt. You are sticking it to me every way you can." *328

c. "I'm not rude to them [a reference to the court's staff], I'm rude to you, because I think you deserve it. You are corrupt and you stink. That's my honest opinion, and I will tell you to your face."

While respondent has no other disciplinary record, such conduct adversely impinges upon respondent's fitness to practice law and requires more than public censure.

Accordingly, the Committee's petition for reciprocal discipline should be granted to the extent of suspending respondent from the practice of law for a period of three months.

Ellerin, P. J., Sullivan, Williams, Lerner and Saxe, JJ., concur. Petition granted to the extent of suspending respondent from the practice of law in the State of New York for a period of three months, effective June 21, 1999. *329

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78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39

In the Matter of Elizabeth Holtzman, an Attorney, Appellant. Grievance Committee for the Tenth Judicial District, Respondent.

Court of Appeals of New York
Argued May 29, 1991;
Decided July 1, 1991

CITE TITLE AS: Matter of Holtzman

SUMMARY

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 17, 1990, which (1) denied a motion by petitioner attorney to vacate a Letter of Reprimand issued by respondent Grievance Committee for the Tenth Judicial District, and (2) modified the Letter of Reprimand to reflect that it was based only upon the charge that petitioner, as District Attorney of Kings County, made public accusations of misconduct against a Judge without first determining the merits of the accusations in violation of Code of Professional Responsibility DR 8-102 and 1-102 (A) (6).

HEADNOTES

Appeal--Court of Appeals--Matters Reviewable--Factual Finding in Attorney Disciplinary Proceeding

(1) In an attorney disciplinary proceeding, the factual finding that petitioner attorney's accusations of judicial misconduct against a Judge were false is binding on the Court of Appeals where the charge that petitioner violated the Code of Professional Responsibility based upon her making such false accusations was sustained by the Disciplinary Committee and upheld by the Appellate Division, and the factual finding of falsity is supported by the record.

Attorney and Client--Disciplinary Proceedings--Conduct Reflecting Adversely on Fitness to Practice Law--Vagueness of Disciplinary Rule--False Charge of Misconduct against Judge

(2) Petitioner's conduct, as the District Attorney of Kings County, in publicly disseminating a letter falsely charging a Judge with judicial misconduct in relation to an incident that allegedly occurred in the course of a criminal trial, without any support other than the interoffice memoranda of a newly admitted trial assistant, reflected adversely on her fitness to practice law and, therefore, was properly the subject of disciplinary action under DR 1-102 (A) (6) (now DR 1-102 [A] [7]). The broad standard of DR 1-102 (A) (6), which provides that a lawyer shall not "[e]ngage in any other conduct that adversely reflects on [the lawyer's] fitness to practice law", is not impermissibly vague. The guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed. Petitioner was plainly on notice that her conduct in this case, involving public dissemination of a specific accusation of improper judicial conduct under the circumstances described, could be held to reflect adversely on her fitness to practice law. Petitioner knew or should have known that such attacks are unwarranted and unprofessional, **185* serve to bring the Bench and Bar into disrepute, and tend to undermine public confidence in the judicial system.

Attorney and Client--Disciplinary Proceedings--Public Dissemination of False Accusation of Misconduct by Judge--Applicability of "Constitutional Malice" Standard

(3) In an attorney disciplinary proceeding, the "constitutional malice" standard *(New York Times Co. v Sullivan,* 376 US 254) does not extend to petitioner's conduct, as District Attorney of Kings County, in publicly disseminating a false accusation of judicial misconduct by a Judge in the course of a criminal trial. Such a standard would be wholly at odds with the policy underlying the rules governing professional responsibility, which seeks to establish a minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. In order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard of what a reasonable attorney would do in similar circumstances. It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Attorneys at Law, §§ 44, 45.

Judiciary Law, Appx, Code of Professional Responsibility DR 1- 102 (A) (6), (7).

NY Jur 2d, Attorneys at Law, §22.

ANNOTATION REFERENCES

See Index to Annotations under Attorney or Assistance of Attorney; Discipline and Disciplinary Actions; Prosecuting Attorney.

POINTS OF COUNSEL

Norman Redlich, Robert B. Mazur and *George T. Conway III* for appellant.

I. District Attorney Holtzman's public statements about Judge Levine were fully protected by the free speech provisions of the Federal and State Constitutions. *(Abrams v United States,* 250 US 616; *Chapadeau v Utica Observer-Dispatch,* 38 NY2d 196; *Matter of Baker,* 34 AD2d 229, 28 NY2d 977, *cert denied sub nom. Baker v Monroe County Bar Assn.,* 404 US 915; *Matter of Justices of App. Div. v Erdmann,* 39 AD2d 223, 33 NY2d 559; *Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369, 434 US 969; *Garrison v Louisiana,* 379 US 64; *Bates v State Bar of Ariz.,* 433 US 350; *Matter of von Wiegen,* 63 NY2d 163, *cert denied sub nom. Committee on Professional Stds. v Von Wiegen,* 472 US 1007; *Matter of Koffler,* 51 NY2d 140, *cert denied sub nom. Joint Bar* ***186** *Assn. Grievance Comm. v Koffler,* 450 US 1026; *Bridges v California,* 314 US 252.)

II. DR 1-102 (A) (5), (6) and 8-102 (B), if applied to discipline Holtzman for her public accusation against Judge Levine, are unconstitutionally vague and overbroad. *(Joseph Burstyn, Inc. v Wilson,* 343 US 495; *Rosenfeld v New Jersey,* 408 US 901; *People v Bright,* 71 NY2d 376; *Smith v Goguen,* 415 US 566; *Hirschkop v Snead,* 594 F2d 356.)

III. District Attorney Holtzman's public accusations against Judge Levine did not violate DR 8-102 (B) or 1-102 (A) (5), (6). *(Matter of Markfield v Association of Bar of City of N. Y.,* 49 AD2d 516, 37 NY2d 794; *In re Sawyer,* 360 US 622; *Chicago Council of Lawyers v Bauer,* 522 F2d 242, *cert denied sub nom. Cunningham v Chicago Council of Lawyers,* 427 US 912; *Sanders v Winship,* 57 NY2d 391; *People v Lawrence,* 64 NY2d 200; *Matter of Prospect v Cohalan,* 109 AD2d 210, 65 NY2d 867; *Martin v Merola,* 389 F Supp 323. 532 F2d 191; *Barr v Matteo,* 360 US 564; *Scott v Flowers,* 910 F2d 201.)

IV. The procedures in this matter deprived Holtzman of due process of law. *(In re Ruffalo,* 390 US 544; *Willner v Committee on Character,* 373 US 96; *Matter of Lowcher v New York City Teacher's Retirement Sys.,* 54 NY2d 373; *Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.,* 75 NY2d 158; *Cinderella Career & Finishing Schools v Federal Trade Commn.,* 425 F2d 583; *American Cyanamid Co. v Federal Trade Commn.,* 363 F2d 757; *Trans World Airlines v Civil Aeronautics Bd.,* 254 F2d 90; *Stein v Mutuel Clerks' Guild,* 384 F Supp 444, 560 F2d 486; *Camero v United States,* 375 F2d 777; *Razatos v Colorado Supreme Ct.,* 746 F2d 1429, 471 US 1016.)

Grace D. Moran, Frank A. Finnerty, Jr., and *Chris McDonough* for respondent.

I. The court below properly found that appellant's actions constituted attorney misconduct. *(Niesig v Team I,* 76 NY2d 363; *Matter of Weinstock,* 40 NY2d 1; *Matter of Cohen,* 139 AD2d 221; *Matter of Greenfield,* 24 AD2d 651.)

II. Neither the First Amendment to the United States Constitution nor New York's Constitution bars the courts from determining that appellant's conduct constituted professional misconduct or from privately reprimanding her for such conduct. *(New York Times Co. v Sullivan,* 376 US 254; *Chapadeau v Utica Observer- Dispatch,* 38 NY2d 196; *Matter of Baker,* 28 NY2d 977, *cert denied sub nom. Baker v Monroe County Bar Assn.,* 404 US 915; *Matter of Justices of App. Div. v Erdmann,* 33 NY2d 559; *Immuno, AG. v Moor-Jankowski,* 77 NY2d 235.)

III. Appellant was not denied due process. *(Friedman v State* ***187** *of New York,* 24 NY2d 528, 397 US 317; *Halleck v Berliner,* 427 F Supp 1225; *Anonymous Town Justice v State of New York Commn. on Judicial Conduct,* 96 Misc 2d 541; *Withrow v Larkin,* 421 US 35; *Trade Commn. v Cement Inst.,* 333 US 683; *Pangburn v Civil Aeronautics Bd.,* 311 F2d 349; *Mathews v Eldridge,* 424 US 319.)

IV. DR 8-102 (B) and 1- 102 (A) (6), as applied, are neither void for vagueness nor overbroad. *(People v Dietze,* 75 NY2d 47; *People v Bright,* 71 NY2d 376; *Niesig v Team I,* 76 NY2d 363; *Matter of Cohen,* 139 AD2d 221; *Foley & Co. v Vanderbilt,* 523 F2d 1357; *Parker v Levy,* 417 US 733; *Friedman v State of New York,* 24 NY2d 528; *Sarisohn v Appellate Div. Second Dept.,* 265 F Supp 455, *Ex parte Secombe,* 19 How [60 US] 9.)

Burt Neuborne, Arthur Eisenberg, Alison Wetherfield and *Ruth Jones* for the New York Civil Liberties Union and another, *amici curiae.*

I. The charge that petitioner "made public accusations against a Judge without first determining the certainty of the merits of the accusations" does not constitute a disciplinary offense in New York State. *(Matter of Justices of App. Div. v Erdmann,* 33 NY2d 559.)

II. New York may not require lawyers to be "certain" before they level public criticism at a Judge. Any such requirement would violate the Free Speech Clauses of the New York and the Federal Constitutions. *(Stump v Sparkman,* 435 US 349; *Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369; *Bridges v California,* 314 US 252; *Pennekamp v Florida,* 328 US 331;

Craig v Harney, 331 US 367; *In re Sawyer,* 360 US 622; *Wood v Georgia,* 370 US 375; *Garrison v Louisiana,* 379 US 64; *Matter of Markfield v Association of Bar of City of N. Y.,* 49 AD2d 516, 37 NY2d 794; *Shapero v Kentucky Bar Assn.,* 486 US 466.)

III. The application of DR 1-102 (A) (6) to petitioner's expressive activity violates the First Amendment prohibition against vague enactments. *(N. A. A. C. P. v Button,* 371 US 415; *Papachristou v City of Jacksonville,* 405 US 156; *Grayned v City of Rockford,* 408 US 104; *Shuttlesworth v Birmingham,* 382 US 87; *Thornhill v Alabama,* 310 US 88; *Airport Commrs. v Jews for Jesus,* 482 US 569; *Speiser v Randall,* 357 US 513; *Gooding v Wilson,* 405 US 518; *Chicago Council of Lawyers v Bauer,* 522 F2d 242; *Hirschkop v Snead,* 594 F2d 356.)

IV. Punishing petitioner for her criticism will inhibit important discussion affecting the judiciary's treatment of women and minorities. *(Matter of Newsday, Inc. v Sise,* 71 NY2d 146.)

Daniel J. Capra for the Committee on Professional Responsibility **188* of the Association of the Bar of the City of New York, *amicus curiae.*

I. DR 8-102 applies only to knowingly false statements, and cannot be used to punish speech merely because the lawyer makes an accusation without certainty of its truth. *(In re Grievance Comm. of U. S. Dist. Ct.,* 847 F2d 57.)

II. The catch-all provisions of DR 1-102 (A) (5) and (6) should not be used to punish speech that is permitted by DR 8-102. *(Matter of Samuels,* 127 AD2d 85; *Matter of Williams,* 105 AD2d 974; *Matter of Altschuler,* 139 AD2d 311; *Matter of Harris,* 139 AD2d 253; *Matter of Cohen,* 139 AD2d 221; *Matter of Capoccia,* 144 AD2d 231.)

III. Lawyers are uniquely qualified to inform the public about the legal system, and should not be sanctioned for doing so in the absence of knowing falsity.

OPINION OF THE COURT

Per Curiam.

Petitioner brought this proceeding pursuant to 22 NYCRR 691.6 (a) to vacate a Letter of Reprimand issued by the Grievance Committee for the Tenth Judicial District.

The charge of misconduct that is relevant to this appeal was based on the public release by petitioner, then District Attorney of Kings County, * of a letter charging Judge Irving Levine with judicial misconduct in relation to an incident that allegedly occurred in the course of a trial on criminal charges of sexual misconduct (Penal Law § 130.20), and was reported to her some six weeks later. Specifically, petitioner's letter stated that:

"Judge Levine asked the Assistant District Attorney, defense counsel, defendant, court officer and court reporter to join him in the robing room, where the judge then asked the victim to get down on the floor and show the position she was in when she was being sexually assaulted. ... [T]he victim reluctantly got down on her hands and knees as everyone stood and watched. In making the victim assume the position she was forced to take when she was sexually assaulted, Judge Levine **189* profoundly degraded, humiliated and demeaned her."

The letter, addressed to Judge Kathryn McDonald as Chair of the Committee to Implement Recommendations of the New York State Task Force on Women in the Courts, was publicly disseminated after petitioner's office issued a "news alert" to the media.

Following a dispute over the truth of the accusations, Robert Keating, as Administrative Judge of the New York City Criminal Court, conducted an investigation into the allegations of judicial misconduct. His report, dated December 22, 1987, concluded that petitioner's accusations were not supported by the evidence. Upon receipt of the report, Albert M. Rosenblatt, then Chief Administrative Judge, referred the matter to the Grievance Committee for inquiry as to whether petitioner had violated the Code of Professional Responsibility.

Some six months later, the Grievance Committee sent petitioner a private Letter of Admonition in which it stated that "the totality of the circumstances presented by this matter require that you be admonished for your conduct." Petitioner's misconduct, the Committee concluded, violated DR 8-102 (B), DR 1-102 (A) (5), (6) and EC 8-6 of the Code of Professional Responsibility.

In July 1988, after petitioner requested a subcommittee hearing pursuant to 22 NYCRR 691.6 (a), she was served with three formal charges of misconduct under DR 8-102 (B) and 1-102 (A) (5) and (6). Charge 1 alleged that petitioner had engaged in conduct that adversely reflected on her fitness to practice law in releasing a false accusation of misconduct against Judge Levine. Charge 2 related to petitioner's subsequent videotaping of the complaining witness's statement under oath, and release of the audio portion of the tape to the media, despite her knowledge that the complainant would be a necessary witness in other investigations. Charge 3 related to a later press release in which petitioner stated that she had knowledge of other

allegations of misconduct involving the Judge, thereby further demeaning him. Only Charge 1 is in issue on this appeal.

The conduct set forth in Charge 1, allegedly demonstrating petitioner's unfitness to practice law, included release of the letter to the media (1) prior to obtaining the minutes of the criminal trial, (2) without making any effort to speak with court officers, the court reporter, defense counsel or any other **190* person present during the alleged misconduct, (3) without meeting with or discussing the incident with the trial assistant who reported it, and (4) with the knowledge that Judge Levine was being transferred out of the Criminal Court, and the matter would be investigated by the Court's Administrative Judge as well as the Commission on Judicial Conduct (to which the petitioner had complained).

After hearings, the subcommittee submitted its findings to the full Grievance Committee. The Committee sustained the first and third charges and issued petitioner a Letter of Reprimand, which was also private (22 NYCRR 691.6 [a]). The letter, dated October 19, 1989, stated that the Committee sustained Charges 1 and 3, and concluded that petitioner's conduct was "prejudicial to the administration of justice and adversely reflects on [her] fitness to practice law in violation of DR 1-102 (A) (5) and (6) of the Code of Professional Responsibility." No mention was made of DR 8-102 (B).

Petitioner then brought this proceeding seeking to vacate the Letter of Reprimand. The Appellate Division concluded that the record supported the Committee's findings as to Charge 1, more specifically that petitioner's conduct violated DR 8-102 and 1-102 (A) (6). We now affirm, agreeing with both the Grievance Committee and the Appellate Division that petitioner's conduct violated DR 1-102 (A) (6), and we reach no other question.

Petitioner relies primarily on two arguments. First, she asserts that the allegations concerning Judge Levine's conduct were true or at least not demonstrably false. Second, petitioner asserts that her conduct violates no specific disciplinary rule and further that DR 1-102 (A) (6), if applicable, is unconstitutionally vague. These contentions are without merit.

(1) The factual basis of Charge 1 is that petitioner made false accusations against the Judge. This charge was sustained by the Committee and upheld by the Appellate Division, and the factual finding of falsity (which is supported by the record) is therefore binding on us.

As for the contention that petitioner's conduct did not violate any provision of the Code, DR 1-102 (A) (6) (now DR 1-102 [A] [7]) provides that a lawyer shall not "[e]ngage in any other conduct that adversely reflects on [the lawyer's] fitness to practice law." As far back as 1856, the Supreme Court acknowledged that "it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an **191* attorney or counsellor ought to be removed" *(Ex parte Secombe,* 19 How [60 US] 9, 14). Broad standards governing professional conduct are permissible and indeed often necessary *(see, In re Charges of Unprofessional Conduct Against N.P.,* 361 NW2d 386, 395 [Minn], *appeal dismissed* 474 US 976).

Such standards are set forth in Canon 1 and particularly in DR 1-102. An earlier draft of the Code listed "conduct degrading to the legal profession" as a basis for a finding of misconduct under DR 1-102, but this provision was replaced by the "fitness" language of DR 1-102 (A) (6) and the "prejudicial to the administration of justice" standard of DR 1-102 (A) (5) *(see,* Annotated Code of Professional Responsibility, Textual and Historical Notes, at 12). The drafters of the Code refined the provisions to provide attorneys with proper ethical guidelines. Were we to find such language impermissibly vague, attempts to promulgate general guidelines such as DR 1-102 (A) (6) would be futile.

Rather than an absolute prohibition on broad standards, the guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed *(see, Committee on Professional Ethics & Conduct v Durham,* 279 NW2d 280, 283-284 [Iowa]; *see also, In re Ruffalo,* 390 US 544, 554-555 [White, J., concurring]; *Matter of Cohen,* 139 AD2d 221).

(2) Applying this standard, petitioner was plainly on notice that her conduct in this case, involving public dissemination of a specific accusation of improper judicial conduct under the circumstances described, could be held to reflect adversely on her fitness to practice law. Indeed, her staff, including the person assigned the task of looking into the ethical implications of release to the press, counseled her to delay publication until the trial minutes were received.

Petitioner's act was not generalized criticism but rather release to the media of a false allegation of specific wrongdoing, made without any support other than the interoffice memoranda of a newly admitted trial assistant, aimed at a named Judge who had presided over a number of cases prosecuted by her office *(see, Matter of Terry,* 271 Ind

499,502-503, 394 NE2d 94, 95-96, *cert denied* 444 US 1077). Petitioner knew or should have known that such attacks are unwarranted and unprofessional, serve to bring the Bench and Bar into disrepute, and tend to undermine public confidence in the judicial system *(see, Matter of Bevans,* 225 App Div 427, 431). **192*

Therefore, petitioner's conduct was properly the subject of disciplinary action under DR 1-102 (A) (6), and it is of no consequence that she might be charged with violating DR 8-102 (B) based on this same course of conduct *(see, In re Huffman,* 289 Ore 515, 522, 614 P2d 586, 589; *Committee on Professional Ethics & Conduct v Durham,* 279 NW2d, at 285, *supra; Matter of Terry,* 271 Ind, at 501, 394 NE2d, at 94, *supra).* Indeed, in the present case there are factors that distinguish petitioner's conduct from that prohibited under DR 8-102 (B)--most notably, release of the false charges to the media-- and make it particularly relevant to her fitness to practice law.

(3) Petitioner contends that her conduct would not be actionable under the "constitutional malice" standard enunciated by the Supreme Court in *New York Times Co. v Sullivan* (376 US 254). Neither this Court nor the Supreme Court has ever extended the *Sullivan* standard to lawyer discipline and we decline to do so here.

Accepting petitioner's argument would immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth *(see, St. Amant v Thompson,* 390 US 727, 731; *Trails West v Wolff,* 32 NY2d 207, 219). Such a standard would be wholly at odds with the policy underlying the rules governing professional responsibility, which seeks to establish a "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." (Code of Professional Responsibility, Preliminary Statement.)

Unlike defamation cases, "[p]rofessional misconduct, although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations." *(Matter of Terry,* 271 Ind, at 502, 394 NE2d, at 95, *supra.)* It follows that the issue raised when an attorney makes public a false accusation of wrongdoing by a Judge is not whether the target of the false attack has been harmed in reputation; the issue is whether that criticism adversely affects the administration of justice and adversely reflects on the attorney's judgment and, consequentially, her ability to practice law *(see, In re Disciplinary Action Against Graham,* 453 NW2d 313, 322 [Minn], *cert denied* ___ US ___, 111 S Ct 67).

In order to adequately protect the public interest and maintain **193* the integrity of the judicial system, there must be an objective standard of what a reasonable attorney would do in similar circumstances *(see, Louisiana State Bar Assn. v Karst,* 428 So 2d 406, 409 [La]). It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative.

Petitioner's course of conduct satisfies any standard other than "constitutional malice," and therefore Charge 1 must be sustained.

We have examined petitioner's remaining contentions and conclude that they are without merit.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Judges Simons, Kaye, Alexander, Titone, Hancock, Jr., and Bellacosa concur in Per Curiam opinion; Chief Judge Wachtler taking no part.
Order affirmed, without costs. **194*

Footnotes

* Although all proceedings conducted by the Grievance Committee were kept confidential and the decision of the Appellate Division was not published *(see,* 22 NYCRR 691.4 [j]), petitioner has expressly waived any right to confidentiality on this appeal.

912 So.2d 871
Supreme Court of Mississippi.

The MISSISSIPPI BAR
v.
Chokwe LUMUMBA.

No. 2003-BA-02418-SCT. March 17, 2005.

Synopsis

Background: In attorney disciplinary proceedings, Complaint Tribunal imposed public reprimand. State bar appealed, and attorney cross-appealed.

Holdings: The Supreme Court, Smith, C.J., held that:
1 as matter of apparent first impression, attorney's comments to trial court regarding attorney's willingness to "pay for justice" amounted to conduct intended to disrupt a tribunal;
2 such comments amounted to attempt to influence judge by unlawful means;
3 such language, and attorney's offer to give trial judge advice on "how to get along better with other lawyers in the future," amounted to conduct prejudicial to administration of justice;
4 attorney's statement to newspaper reporter amounted to conduct prejudicial to administration of justice and connected to ongoing judicial proceeding;
5 First Amendment protections did not extent to comments at issue;
6 comments to trial court and newspaper reporter were made with willful, reckless disregard as to their truth concerning judge's qualifications and integrity; and
7 attorney's conduct warranted six-month suspension from practice of law.

Attorney suspended.

Graves, J., dissented with opinion.

Dickinson, J., concurred in part and dissented in part, with opinion.

See also, 868 So.2d 1018.

West Headnotes (20)

1 **Attorney and Client** ⇐ Jurisdiction of Courts

Supreme Court has exclusive jurisdiction over all matters pertaining to attorney discipline, and is the ultimate judge of matters arising under the Rules of Discipline for the state bar.

2 **Attorney and Client** ⇐ Review

Upon appeal in an attorney disciplinary proceeding, the Supreme Court reviews the entire record and the conclusions of the complaint tribunal de novo. State Bar Discipline Rule 9.

3 **Attorney and Client** ⇐ Review

Attorney and Client ⇐ Discretion

In an attorney disciplinary proceeding, the Supreme Court may impose sanctions of either more or less severity than those imposed by the complaint tribunal, although deference may be given to the tribunal's findings because of its opportunity to observe the demeanor and attitude of the witnesses.

4 **Attorney and Client** ⇐ Weight and sufficiency

In order to be subject to discipline, an attorney must be shown by clear and convincing evidence to have violated a rule of professional conduct.

5 **Attorney and Client** ⇐ Deception of court or obstruction of administration of justice

Attorney's comments to trial court, at hearing on motion to recuse in criminal case, to effect that "if we've got to pay for justice around here, I will pay for justice[]" and "I've paid other judges to try to get justice, pay you, too, if that's what is necessary[,]" amounted to "conduct intended to disrupt a tribunal" within scope of applicable disciplinary rule, where attorney's contentions that his comments were intended merely to "make a record" for appellate review of his client's criminal case, and that trial court was attempting to prohibit him from making such record, were not supported by record of criminal proceeding. Rules of Prof.Conduct, Rule 3.5(c).

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MR. LUMUMBA: I have another application here, Judge. The Court has denied my right to call the jurors in order to talk about the outside influences. What I would do at this time is make an application for a continuance of this motion for a new trial and for instructions to the prosecutor to provide me with the location and addresses of two people who have to do with some of the outside influences, and, there's no rule prohibiting them from testifying as to whether people know them, and, it's really no rule prohibiting a juror from testifying whether they know people, even after the verdict.

But, in any event, one would be Eric Freeman, and, the other one would be who is, interestingly enough, no longer in jail as we found out, and secondly would be Mr. Britt. So, we would be requesting that we get this information and that the hearing be continued for a sufficient amount of time for us to bring these witnesses forward to see if, in fact, as we have alleged, they have information which is helpful to the determination of this motion or any other motion which might be properly brought under the context of this motion for a new trial.

THE COURT: I am going to overrule your motion. There must be some finality to these cases. What that is, it appears to me to be entirely a fishing matter, so the final order of this Court is your motion for a new trial is overruled.

MR. LUMUMBA: Well, Judge this-

THE COURT: No additional hearing will be heard regarding your motion for new trial.

MR. LUMUMBA: Just for the record, Your Honor, it's a little more-it's a little less than a fishing expedition ... In fact it is very focused and direct. But, the Court's resolution of the motion is not to be unexpected, given the Court's demeanor during the entire trial.

THE COURT: What do you mean by that?

MR. LUMUMBA: What I mean is that the Court didn't handle the trial fairly, is not handling the motion fairly.

THE COURT: Well, you make it very difficult to work with, Mr. Lumumba. I think I gave you a fair trial, and, certainly, anything that I did before the jury, nothing that I did-

MR. LUMUMBA: Well, let me say this Judge.

THE COURT: Just a minute, now. I'm-

MR. LUMUMBA: I have-

THE COURT: You just-

MR. LUMUMBA:-another-

*880 THE COURT:-wait just a minute.

MR. LUMUMBA: I have another-

THE COURT: I'm the Judge of this Court-

MR. LUMUMBA: I have another issue. I just want you to know I have another issue.

THE COURT: I want you to know this hearing is now over with and-

MR. LUMUMBA: Can I ask-

THE COURT: And there will be nothing else to be made of record.

MR. LUMUMBA: Can I address another issue? You don't want to hear it? You don't want the Court to hear it? It's another issue. It's not what we talked about.

THE COURT: All right. Go ahead.

MR. LUMUMBA: And, what I'm doing is offering this to you, so you can, perhaps, get along better with other lawyers in the future.

THE COURT: Well, don't you worry about-

MR. LUMUMBA: Okay. Can I finish?

THE COURT:-how I get along with lawyers.

MR. LUMUMBA: Can I finish, please?

THE COURT: You worry about how you get along with Courts.

MR. LUMUMBA: Can I finish, please?

THE COURT: No.

MR. LUMUMBA: Judge-

THE COURT: Remove him from the Courtroom.

MR. LUMUMBA: Are you going to have-

THE COURT: I am going to have you removed-

MR. LUMUMBA:-your henchmen throw me out, Judge?

THE COURT: Until you show some respect to the Court-

MR. LUMUMBA: I'm trying to show you some respect.

THE COURT: Will you remove him from the Courtroom?

MR. LUMUMBA: **That's the way you've handled it the whole Court. I'm proud to be thrown out of your Courtroom.**

THE COURT: All right. Just a minute. That will cost you three hundred dollars, Mr. Lumumba. Now if you want to continue-

MR. LUMUMBA: **Look, Judge, if we've got to pay for justice around here, I will pay for-**

THE COURT:-I will exercise my discretion-

MR. LUMUMBA:-justice.

THE COURT:-regarding a jail sentence.

MR. LUMUMBA: **I've paid other judges to try to get justice, pay you, too, if that's what is necessary.**

THE COURT: It will cost you $500.00. You will serve three days in the County Jail. You will start serving it immediately, for contempt of Court.

MR. LUMUMBA: No problem. Are you going to feed me? I can't get my bag?

THE COURT: Court is in recess.

(Emphasis added).

REDACTED

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MR. KRINSKY'S ethics-based defense litigation practice focuses on:

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- ***Federal & State Criminal Defense Matters***, including: defending clients against law-enforcement actions such as claims of securities fraud, antitrust, investment advisory fraud, health care fraud, tax issues, money laundering, RICO, and narcotics trafficking, among others; helping conduct internal investigations; addressing compliance issues; and responding to regulatory inquiries.

- ***Art Law Ethics & Litigation Matters***, including: allegations of business fraud; art-related disputes; fraudulent transactions; provenance and authenticity; fraudulent inducement to sell; and sales tax evasion.

MR. KRINSKY is a frequent lecturer on topics involving ethics in litigation, personal and professional responsibility and academic integrity, including at: the N.Y. State Judicial Institute; the Appellate Divisions, First and Second Judicial Departments; the N.Y. State Bar Association; the N.Y. City Bar; the N.Y. County Lawyers' Association; the N.Y. State Academy of Trial Lawyers; the N.Y. State Trial Lawyers Association; the Practicing Law Institute; the Bay Ridge Lawyers Association; the Queens County Bar Association; Sotheby's Institute of Art; and law schools such as Brooklyn Law School, Columbia Law School and Fordham Law School.

MR. KRINSKY serves as the *Chair* of the Ethics Committee of the Entertainment, Arts & Sports Law Section of the N.Y. State Bar Association; and the *Chair* of the Committee on Professional Discipline of the N.Y. County Lawyers' Association. Mr. Krinsky serves on the Board of Advisors of the N.Y. County Lawyers' Association Institute of Legal Ethics; and is a Member of the Institute's Task Force to advise on the "ABA Commission on Ethics 20/20." Mr. Krinsky is also a Member of: the Brooklyn Bar Association; the N.Y. State Bar Association's Committee on Attorney Professionalism; the N.Y. City Bar Association's Professional Responsibility Committee; and the N.Y. County Lawyers' Committee on Professional Ethics.