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Freedom of Speech and the Press

In re Holtzman[459]
(decided July 1, 1991)

The petitioner, Elizabeth Holtzman, claimed that the letter of reprimand she received for publicly accusing Judge Irving Levine of severe judicial misconduct violated her right of free speech under the Federal[460] and New York State Constitutions,[461] and that the particular disciplinary rules, DR 1-102(A)(5), (6) and DR 8-102(b), under which she was charged were void for vagueness.[462] The court of appeals, in a *per curiam* decision, held that petitioner's conduct violated DR 1-102(A)(6),[463] that the disciplinary rule was not unconstitutionally void for vagueness,[464] and that the application of the disciplinary rule was not a violation of Holtzman's right to free speech under either the Federal Constitution or the New York State Constitution.[465]

On December 1, 1987, Elizabeth Holtzman, then District Attorney of Kings County, New York, released a letter to the press that accused Judge Levine of humiliating and demeaning a rape victim during a non-jury trial before him.[466] Holtzman'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 profoundly de-

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459. 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, *cert. denied*, 112 S. Ct. 648 (1991).

460. U.S. CONST. amend. I.

461. N.Y. CONST. art. I, § 8.

462. *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

463. *Id.*; DR 1-102(A)(6) is now DR 1-102(A)(7) pursuant to a 1990 amendment to the Code of Professional Responsibility. *See* N.Y. JUD. LAW APP. DR 1-102(A)(7) (McKinney 1975 & Supp. 1992).

464. *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

465. *Id.* at 192, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

466. *Id.* at 188-89, 577 N.E.2d at 31, 573 N.Y.S.2d at 40.

graded, humiliated and demeaned her.[467]

Robert Keating, Administrative Judge of the New York City Criminal Court, conducted an investigation of the accusations made by Holtzman against Judge Levine.[468] He found that the accusations were not supported by the evidence and referred the matter to the New York State Grievance Committee for the Tenth Judicial District to investigate Holtzman's possible violation of the Code of Professional Responsibility.[469]

Six months later, the Committee voted to issue Holtzman a private letter of admonition for her violation of DR 8-102(B), and DR 8-102(A)(5) and (6). DR 8-102(B) states that "[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."[470] DR 1-102(A)(5) and (6) state respectively that "a lawyer shall not: . . . (5) engage in conduct that is prejudicial to the administration of justice; and (6) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."[471] In July 1988, Holtzman exercised her right to a subcommittee hearing and was served with formal charges.[472] Charge one, the only charge on appeal, contained allegations of Holtzman's unfitness to practice law.[473] The charge against Elizabeth Holtzman alleged that she:

> [R]elease[d] . . . 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 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 . . . .[474]

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467. *Id.*
468. *Id.* at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.
469. *Id.*
470. N. Y. JUD. LAW APP. DR 8-102(b) (McKinney 1975 & Supp. 1992).
471. *Id.* DR 1-102(A)(5)-(6).
472. *Holtzman*, 78 N.Y.2d at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.
473. *Id.*
474. *Id.* at 189-90, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

After the hearing, the subcommittee reported back to the full committee, which voted to issue Holtzman a private letter of reprimand for her violation of DR 1-102(A)(5) and (6) but failed to mention DR 8-102(B).[475] Holtzman then appealed to the appellate division, second department, which upheld the letter of reprimand based upon DR 1-102(A)(6) and DR 8-102(B).[476] The court of appeals stated that "we [agree] with both the Grievance Committee and the Appellate Division that [Holtzman's] conduct violated DR 1-102(A)(6) and we reach no other question."[477]

First, the court stated that because the charge that Holtzman's accusations were false "was sustained by the Committee and upheld by the Appellate Division,"[478] that finding of falsity was binding. The court then addressed Holtzman's contention that her conduct did not violate any disciplinary rule and her contention that the rules under which she was charged were void for vagueness. The court began its analysis by stating that "'it is difficult, if not impossible, to enumerate and define, with precision, every offense for which an attorney or counselor ought to be removed.'"[479] The court further stated that broad standards are permissible and often necessary. These broad standards are found in DR 1-102. More specifically, the court noted that DR 1-102(A)(5) and (6) were refined by the drafters of the Code of Professional Responsibility in order "to provide attorneys with proper ethical guidelines."[480] The court refused to find broad language such as that in DR 1-102(A)(6) impermissibly vague.

The court determined that "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."[481] Based on that standard, the court concluded that petitioner was "plainly on notice that her conduct . . . could . . .

475. *Id.* at 190, 577 N.E.2d at 33, 573 N.Y.S.2d at 41.

476. *Id.*

477. *Id.* at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

478. *Id.* at 190, 577 N.E.2d at 32-33, 573 N.Y.S.2d at 41-42.

479. *Id.* at 190-91, 577 N.E.2d at 33, 573 N.Y.S.2d at 42 (quoting *Ex parte* Secombe, 60 U.S. 9, 14 (1856)).

480. *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

481. *Id.*

reflect adversely on her fitness to practice law,"[482] as DR 1-102(a)(6) provides. In support of this conclusion, the court noted that Holtzman's own staff had advised her to delay the publication of the letter until they were able to review the trial minutes. The court also noted that Holtzman's accusations were "made without any support other than the interoffice memoranda of a newly admitted trial assistant."[483] Based on those facts, the court found that "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."[484]

The court, expressly declining to apply DR 8-102(B), held that petitioner's conduct violated DR 1-102(A)(6).[485] The court failed to mention or apply DR 1-102(A)(5) to Holtzman's conduct.

The court then addressed Holtzman's contention that her conduct was protected as free speech under the "actual malice" standard as set down in *New York Times v. Sullivan*.[486] Although not mentioned in the case, Holtzman argued that the New York State Constitution would protect her speech, even if the United States Constitution did not.[487] The test from *New York Times* is that a public official cannot recover damages for defamation unless he or she can prove, first, that the statement was false, and second, that it was published with "'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[488] The New York Court of Appeals, however, stated that "[n]either this Court nor the Supreme Court has ever extended the [actual malice] standard to lawyer discipline and we decline to do so here."[489]

The court reasoned that the utilization of the *New York Times*

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482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.* at 192, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

486. 376 U.S. 254 (1964).

487. Brief for Petitioner-Appellant at 31-32, *In re* Holtzman, 78 N.Y.2d. 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, *cert. denied*, 112 S. Ct. 648 (1991).

488. *New York Times*, 376 U.S. at 279-80.

489. *Holtzman*, 78 N.Y.2d at 192, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

standard in lawyer discipline cases would enable attorneys to make reckless and irresponsible accusations as long as they did not "entertain serious doubts as to their truth."[490] This result "would be wholly at odds"[491] with the underlying policy of the Code of Professional Responsibility. Additionally, the court distinguished defamation cases from attorney discipline cases by characterizing an attorney's misconduct as a wrong against society, rather than as a wrong against an individual. Therefore, falsely accusing a judge of misconduct may not only harm the judge individually, but may also have a negative effect on the administration of justice as a whole, as well as call into question the attorney's judgment.[492]

Rather than extend the more protective *New York Times* standard to attorney discipline cases, the court opted for a less protective objective standard. The court stated that "[i]n 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."[493] Under this standard, it is the objective reasonableness of the belief in the truth of the statement, not the attorney's particular belief, that is considered. Therefore, based on this standard, Holtzman's conduct violated the Code of Professional Responsibility.[494]

The most recent United States Supreme Court decision involving attorney discipline is *Gentile v. State Bar of Nevada*.[495] Although the attorney in the *Gentile* case was charged under a completely different disciplinary rule than Holtzman, the opinion

490. *Id.*

491. *Id.*

492. *Id.* (citing *In re* Terry, 394 N.E.2d 94, 95 (Ind. 1979), *cert. denied,* 444 U.S. 1077 (1980)).

493. *Id.* at 192-93, 577 N.E.2d at 34, 573 N.Y.S.2d at 43 (citing Louisiana State Bar Ass'n v. Karst, 428 So. 2d 406, 409 (La. 1983)).

494. *Id.*

495. 111 S. Ct. 2720 (1991); *see also In re* Snyder, 472 U.S. 634, 637-38 (1985) (the chief judge of the circuit stated that petitioner's letter was "totally disrespectful to the federal courts and to the judicial system," and that unless petitioner apologized, the court would issue an order directing petitioner to show cause why he should not be suspended from practice).

did address the issue of attorney speech. A plurality of the Court found that the Nevada rule prohibiting attorney statements that may prejudice an ongoing trial was void for vagueness.[496] Justice Rehnquist wrote the opinion for the Court on the free speech issue. The Chief Justice balanced the attorney's First Amendment rights against the state's interest in regulating attorney conduct. The Court held that the right to a fair trial outweighs an attorney's First Amendment rights.[497]

Other state courts have addressed cases similar to *Holtzman* with varied results on the free speech issue. In New Jersey, a clear and present danger standard is applied.[498] In California, the *New York Times* standard was found to be appropriate in attorney speech cases.[499] Kentucky and Missouri, however, treat attorney speech exactly the same way as the court of appeals did in *Holtzman,* and apply a reasonable attorney standard.[500]

It appears that the Supreme Court would hold that the societal interests involved in a case like *Holtzman* outweigh the attorney's First Amendment rights.[501] In fact, the Court has not shown any desire to change the result achieved in cases like *Holtzman* and *In re Westfall.*[502] Therefore, for the immediate future, the law in New York is that an attorney must act reasonably when accusing a judge of misconduct.

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496. *Gentile,* 111 S. Ct. at 2732.

497. *Id.* at 2745.

498. *See In re* Hinds, 449 A.2d 483 (N.J. 1982).

499. *See* Ramirez v. State Bar of California, 619 P.2d 399 (Cal. 1980).

500. *See In re* Westfall, 808 S.W.2d 829 (Mo.), *cert. denied,* 112 S. Ct. 648 (1991); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165 (Ky. 1980), *cert. denied,* 449 U.S. 1101 (1981).

501. *See* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982) ("The ultimate object of such control is the 'protection of the public . . . .'"); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (stating that "as part of their power to protect the public health, safety and other valid interests [states] have broad powers to establish standards for licensing practitioners and regulating the practice of professions.").

502. *See In re* Westfall, 808 S.W.2d 829 (Mo.), *cert. denied,* 112 S. Ct. 648 (1991). In *Westfall,* the court held that an attorney's televised statements alleging purposeful dishonest conduct on behalf of a judge were sanctionable. *Id.* at 838. The court applied a reasonable attorney standard. *Id.* at 836.