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In re Holtzman: Free Speech or Professional Misconduct?

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In re HOLTZMAN: FREE SPEECH OR PROFESSIONAL MISCONDUCT?

David W. Wright*

> Membership in the bar is a privilege burdened with conditions. [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court and, like the court itself, an instrument or agency to advance the ends of justice.[1]

INTRODUCTION

On December 1, 1987, then District Attorney of Kings County, New York, Elizabeth Holtzman, released a letter to the press accusing Judge Irving Levine of humiliating and demeaning a rape victim during a non-jury trial before him.[2] More specifically, Ms. Holtzman asserted, without ever having seen the trial transcript, that Judge Levine asked the rape victim to get down on her knees and reenact her rape.[3] This sparked a series of

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1. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Cardozo, J.).

2. *In re* Holtzman, 78 N.Y.2d 184, 188, 577 N.E.2d 30, 31, 573 N.Y.S.2d 39, 40, *cert. denied*, 112 S. Ct. 648 (1991).

3. *Id.* at 188-89, 577 N.E.2d at 31, 573 N.Y.S.2d at 40. The letter stated:

> 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 knees as

proceedings which may have established, in New York State at least, the limits on attorney criticism of judges.[4]

On June 8, 1988, the New York State Grievance Committee for the Tenth Judicial District, composed of sixteen attorneys and four lay people, voted to issue Ms. Holtzman a private Letter of Admonition[5] for her violation of DR 8-102(B), which states: "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer," and DR 1-102(A)(5) and (6), which 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."[6] Subsequently, Ms. Holtzman exercised her right to a hearing before a three member subcommittee which reported back to the full committee.[7] The

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everyone stood and watched. In making the victim assume the position she was forced to take when she was sexually assaulted, Judge Levine profoundly degraded, humiliated and demeaned her.

Id.

4. *In re* Bevans, 225 A.D. 427, 430, 233 N.Y.S. 439, 443 (3d Dep't 1929). In *Bevans*, the court wrote:

> Judicial officers, as we have said, are not immune from suit or criticism; but like every one else, they are protected against scandalous charges. To make a public false and malicious attack on a judicial officer is more than an offense against him individually; it is an offense against the dignity and integrity of the courts and of our judicial system. It may bring discredit upon the administration of justice amongst citizens who have no way of determining the truth of the charges. It tends to impair the respect and authority of the court.

Id. See also infra note 32.

5. A Letter of Admonition is discipline imposed without a hearing. 22 N.Y. COMP. CODES R. & REGS. § 691.6(a) (1991).

6. *Holtzman*, 78 N.Y.2d at 189, 577 N.E.2d at 31, 573 N.Y.S.2d at 41; *see* N.Y. JUD. LAW APP., CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102(A)(5) & (6), DR 8-102(B) (McKinney 1992 & Supp. 1993) (DR 1-102(A)(6) is now DR 1-102(A)(7) pursuant to a 1990 amendment to the Code of Professional Responsibility).

7. *Holtzman*, 78 N.Y.2d at 189-90, 577 N.E.2d at 31, 573 N.Y.S.2d at 41. The charge before the subcommittee that was at issue in the court of appeals stated that the basis for the allegations of Holtzman's misconduct was

> [the]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

full committee voted to issue Ms. Holtzman a private Letter of Reprimand dated October 19, 1989.[8] Subsequently, Ms. Holtzman exercised her right to appeal to the appellate division,[9] second department and the Letter of Reprimand was upheld.[10] Finally, Ms. Holtzman appealed to the New York State Court of Appeals to vacate the Letter of Reprimand, claiming that it was a violation of her right to free speech,[11] and asserting that the disciplinary rules under which she was charged were void for vagueness.[12] The court of appeals, in an unanimous per curiam

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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 Courts' Administrative Judge as well as the Commission on Judicial Conduct . . . .

Id.

8. *Id.* at 190, 577 N.E.2d at 31, 573 N.Y.S.2d at 41. A Letter of Reprimand is discipline imposed after a hearing. 22 N.Y. COMP. CODES R. & REGS. § 691.6(a) (1991). Neither a Letter of Admonition nor a Letter of Reprimand rise to the level of a public censure, suspension or disbarment, but they are the highest level of discipline that can be imposed by the Grievance Committee. *Id.* at § 691.2.

9. 22 N.Y. COMP. CODES R. & REGS. § 691.6(a). It states in relevant part:

A reprimand is discipline imposed after a hearing . . . . In cases in which a reprimand is issued, the attorney to whom such reprimand is issued, may within 30 days of the issuance of the reprimand, petition this court to vacate the reprimand. Upon such petition this court may consider the entire record and may vacate the reprimand or impose such other discipline as the record may warrant.

Id.

10. *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 31, 573 N.Y.S.2d at 41. Because of the sensitive nature of attorney disciplinary proceedings, this opinion was not published.

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

12. *Id.* at 190, 577 N.E.2d at 31, 573 N.Y.S.2d at 41. The void for vagueness doctrine is most frequently invoked in challenges to criminal statutes. Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 909 (1992). Within that forum, the Supreme Court has explained the doctrine's basic tenet and rationale by procaliming that "[t]he constitutional requirement of definiteness is violated by

decision, affirmed the appellate division's denial of the motion to vacate the Letter of Reprimand.[13] The court, however, decided to only address Ms. Holtzman's violation of DR 1-102(A)(6) and did not discuss DR 1-102(A)(5) or DR 8-102(B).[14] This Article discusses the application of all three rules in other cases, as well as their possible application to the *Holtzman* case. Part I of this Article discusses cases that may be interpreted as violations of DR 1-102(A)(5) and (6) and DR 8-102(B) as well as how they compare to the *Holtzman* decision. This part covers United States Supreme Court, New York State court and other state court cases

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a criminal statute that fails to give a person of ordinary intelligence unfair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reaonably understand to be proscribed." United States v. Harris, 347 U.S. 612, 617 (1954). With respect to civil statutes, however, the Court has stated that "[t]he standards of certainty in statutes punishing for offenses is higher than those depending primarily on civil sanctions for enforcement." Winters v. New York, 333 U.S. 507, 515 (1948). Where the void for vagueness doctrine is invoked against a civil statute, the staute will be declared void only "where 'the exaction of obedience to [the] rule or standard . . . [is] so vague and indefinite as really to be no rule or standard at all.'" Boutilier v. INS, 387 U.S. 118, 123 (1967) (quoting Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 238 (1925)). The *Holtzman* court rejected the contention that DR 1-102(A)(6) was unconstitutionally vague, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 42, by stating that "[b]road ethical standards governing professional conduct are permissible and indeed often necessary." *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42. Noting that rendering such broad language impermissibly vague would frustrate the promulgation of general guidelines, the court announced that within the realm of legal ethics, "the guiding principle must be whether a reasonable attorney familiar with the Code and its ethical structures, would have notice of what conduct is proscribed." *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42. For additional information on the void for vagueness doctrine and its applicability in criminal and civil forums, see Gregory E. Maggs, *Reducing The Cost of Statutory Ambigiuty: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. L.J. ON LEGIS. 123 (1992); Mark A. Richards, Comment, *The Void-for-Vagueness Doctrine In* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.: *Revision or Misapplication?*, 34 HASTINGS L.J. 1273 (1983); Jeffrey I. Tilden, Note, *Big Mama Rag: An Inquiry Into Vagueness*, 67 VA. L. REV. 1543 (1981).

13. *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 31, 573 N.Y.S.2d at 41.

14. *Id.*

that are relevant to this issue. Part II discusses whether DR 1-102(A)(5) and (6) and DR 8-102(B), as and if applied in *Holtzman*, unconstitutionally infringe upon an attorney's right to free speech under the Federal and New York State Constitutions. Finally, in part III, this Articles concludes that Ms. Holtzman's conduct was deserving of the Letter of Reprimand and her speech was not protected under the Federal or New York State Constitutions.

I. VIOLATION OF DR 1-102(A)(5) AND (6) AND DR 8-102(B)

A. The United States Supreme Court Cases

Although the Supreme Court has not addressed a case of attorney misconduct pursuant to DR 1-102(A)(5) or (6) or DR 8-102(B) specifically,[15] the Court has addressed cases with somewhat similar factual situations. In *In re Sawyer*[16] and *In re Snyder*,[17] the Court never reached the constitutional issues, but rather, decided the cases on their specific facts.[18]

In *Sawyer*, the attorney involved was representing a defendant in a Smith Act[19] trial and spoke out publicly, in a general fashion, against the fairness of such a proceeding.[20] Not once did

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15. As far back as 1871, the Supreme Court has been concerned with attorneys criticizing judges. In *Bradley v. Fisher*, the Court addressed accusations by the defense counsel of John H. Suratt, one of the accused murderers of Abraham Lincoln, against the presiding judge of the trial. 80 U.S. 335, 344 (1871). The Court declared that attorneys had a duty to "abstain[] out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." *Id.* at 355.

16. 360 U.S. 622 (1959).

17. 472 U.S. 634 (1985).

18. *Sawyer*, 360 U.S. at 627; *Snyder*, 472 U.S. at 642.

19. 18 U.S.C. § 2385 (1988) (providing for fines, and/or imprisonment, and ineligibility for employment by the federal government, for the knowing or willful advocation of the overthrow of government).

20. *Sawyer*, 360 U.S. at 627-28 n.4. The lawyer said, "[t]here's 'no such thing as a fair trial in a Smith Act case' . . . [because] '[a]ll rules of evidence

the attorney mention a specific judge. Yet, the Bar Association of Hawaii charged the attorney with impugning the judicial integrity of the presiding judge.[21] Ultimately, the Court of Appeals for the Ninth Circuit affirmed the territorial supreme court's determination that the attorney should be suspended for one year.[22] Justice Brennan, writing for the majority of the Supreme Court, found that there was no evidence to support the Bar Association's charges within the transcript of the attorney's speech.[23] He concluded that "there is no support for any further factual inference than that [the attorney] was voicing strong criticism of Smith Act cases . . . and not a reflection in any wise upon [the judge] personally or his conduct of the trial."[24] Justice Brennan's decision plainly sets out that attorneys are free to criticize the law generally and such criticisms cannot be likened to an attack on a particular judge.[25]

In *Snyder*, the Court was presented with similar facts. An attorney wrote a letter to a district court judge that harshly criticized the administration of the Criminal Justice Act[26] which provided attorney's fees for assigned counsel.[27] This letter was viewed as a complete disrespect for the federal courts and the judicial system. As a result, the attorney was suspended from the practice of law in the federal courts in the Eighth Circuit for six months.[28] The Supreme Court held that the suspension should be

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have to be scrapped or the government can't make a case. . . . [The government] just make[s] up the rules as [it] go[es] along.'" *Id.*

21. *Id.* at 624-25.

22. *In re* Sawyer, 260 F.2d 189, 203 (9th Cir. 1958), *rev'd*, 360 U.S. 622 (1959).

23. *Sawyer*, 360 U.S. at 628.

24. *Id.*

25. *Id.* at 631-32.

26. 18 U.S.C. § 3006A(d)(3) (1982).

27. *In re* Snyder, 472 U.S. 634, 637 (1985). The letter stated that the attorney was "appalled by the amount of money the federal court pays for indigent defense work" and complained that attorneys "have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work." *Id.*

28. *In re* Snyder, 734 F.2d 334, 337 (8th Cir. 1984), *rev'd*, 472 U.S. 634 (1985). The attorney refused to apologize or retract his statement. *Id.* The court found his disrespect for the court of appeals demonstrated that he was not

reversed because the attorney's conduct did not rise to the level of misconduct warranting a suspension.[29] The Court stated that it did "not consider a lawyer's criticism of the administration of [an] Act . . . as cause for discipline or suspension."[30] Both of these decisions stand for the proposition that broad, general attacks on laws, or administration of the laws, are not punishable as attorney misconduct.

The differences between these cases and the *Holtzman* case are glaring. In *Holtzman*, assertions of specific, factual charges of misconduct were made against a named judge. Ms. Holtzman was not merely criticizing the law or the administration of a particular law, as in *Sawyer* and *Snyder*, respectively, but was asserting very severe accusations of misconduct against Judge Levine. Thus, *Sawyer* and *Snyder* rest upon very different factual bases than *Holtzman*. Still, the language of *Sawyer* clearly indicates that the Court would uphold a charge of misconduct which did reflect upon the judge personally.

B. New York State Cases

Until now, in New York State, there has never been a case in which DR 1-102(A)(5) or (6) or DR 8-102(B) has been applied or interpreted in an attorney speech case. There have been several pre-Code of Professional Responsibility[31] cases that have dealt with attorneys criticizing judges,[32] one of which was *Baker v.*

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fit to practice law in the federal courts. *Id.* It is interesting to note that the attorney was disciplined in spite of the appellate court's acknowledgment that the attorney brought to light concerns about the administration of the Criminal Justice Act that had merit, *id.* at 339, and as a result of his complaint, the court instituted a study of the administration of the Act. *Id.* at 339-40.

29. *Snyder*, 472 U.S. at 647.

30. *Id.* at 646.

31. The Code of Professional Responsibility was adopted in New York in 1970.

32. In *In re* Bevans, the court explained the concern with attorney criticism of the judiciary:

> A man guilty of [scandalous utterances] is dangerous in any walk of life and is especially so when he occupies the responsible position of an attorney upon whose good faith, truthfulness, sense of propriety, and ethical standards both courts and litigants are entitled to rely. The acts

Monroe County Bar Ass'n.[33] In *Baker,* an attorney was suspended for six months because he accused a surrogate of prejudice, unfairness, and intimidation.[34] The court found that the attorney made these statements with the knowledge that they were false.[35] Similarly, in *In re Greenfield,*[36] an attorney was suspended for three years for making admittedly false accusations of misconduct against a judge and a county clerk.[37] Even the attorney's explanation that he had acted in good faith upon false

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> and the attitude of [the lawyer] are clearly indicative of professional misconduct and illustrative of a mind barren of conceptions of ethics. The conclusion follows that he is unfit to engage further in the practice of law he has an awkward sense of the duties and responsibilities of his office as attorney and counselor at law.

225 A.D. 427, 431, 233 N.Y.S. 439, 444 (3d Dep't 1929) (citations omitted). In *In re Knight,* the court explained that if such accusations were tolerated,

> the honor of judicial officers would be exposed to the malice or rage of disappointed attorneys whose evil inclinations, anger, or passion would seek its gratification. Unfortunately, perhaps, there are in our profession, a few who chafe under an adverse decision, and indulge in utterances which they are only too happy to retract in cooler moments.

264 A.D. 106, 111, 34 N.Y.S.2d 810, 814 (1st Dep't 1942), *cert. denied,* 320 U.S. 798 (1943).

33. 34 A.D.2d 229, 311 N.Y.S.2d 70 (4th Dep't 1970), *aff'd,* 28 N.Y.2d 979, 272 N.E.2d 337, 323 N.Y.S.2d 837, *cert. denied,* 404 U.S. 915 (1971); *see also In re* Knight, 264 A.D. at 112, 34 N.Y.S.2d at 815 (attorney disbarred for accusing judges and other public officials of corruption and dishonesty); *In re* Bevans, 225 A.D. at 431, 233 N.Y.S. at 443 (attorney suspended for one year for accusing certain judges of conspiracy); *In re* Markewich, 192 A.D. 243, 250, 182 N.Y.S. 653, 660 (1st Dep't 1920) (assistant district attorney censured for speech in which he accused judge of dishonesty); *In re* Rockmore, 127 A.D. 499, 111 N.Y.S. 879 (1st Dep't 1908) (attorney suspended for six months because he attacked the integrity of a judge in official court papers).

34. *Baker,* 34 A.D.2d at 231, 233, 311 N.Y.S.2d at 74. In this case, the attorney was sanctioned for claiming that the "'surrogate's conduct of the trial was highly prejudicial and unfair to the executor', 'The Surrogate apparently tried to intimidate the executor putting in his case . . . .'" *Id.* at 232, 311 N.Y.S.2d at 73.

35. *Id.*

36. 24 A.D.2d 651, 262 N.Y.S.2d 349 (2d Dep't 1965).

37. *Id.* at 652, 262 N.Y.S.2d at 351.

information did not operate to save him from professional discipline.[38]

Clearly, both of these cases would reach a similar outcome today under the Code's prohibition contained in DR 8-102(B). DR 8-102(B) prohibits "knowingly . . . false accusations" and in *Baker* and *Greenfield* the statements were found to have been made with knowledge of their falsity.[39]

The only post-Code of Professional Responsibility case involving attorney criticism of judges is *Justices of the Appellate Division, First Department v. Erdmann.*[40] In *Erdmann*, an attorney made broad, outrageous, and disrespectful statements about the law, judges in general, and the judicial system.[41] The *Life* magazine article entitled "I Have Nothing To Do With Justice," contained statements such as: "[t]here are so few judges who just judge . . . and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams."[42] The court held that: "[w]ithout more, isolated instances of disrespect for the law, Judges and courts expressed in vulgar and insulting words or other incivility, uttered, written or committed outside the precincts of a court are not subject to professional discipline."[43] DR 1-102(A)(5) and (6), as well as DR 8-102(B), were not even applied, and in my opinion, correctly so. The statements ranged from the sublime to the ridiculous, and by any stretch of the imagination could not have been viewed as accusations of misconduct on the part of any particular judge. Additionally, it would be difficult to classify these words as "knowingly false," since they amounted to mere absurd hyperbole intended to attract attention.

The court of appeals, in its decision to uphold the Letter of Reprimand against Ms. Holtzman, did nothing in violation of stare decisis. The court, in applying 1-102(A)(6) to Ms.

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38. *Id.* at 652, 262 N.Y.S.2d at 350.

39. *Baker*, 34 A.D.2d at 231, 233, 311 N.Y.S.2d at 74; *Greenfield*, 24 A.D.2d at 652, 262 N.Y.S.2d at 351.

40. 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973).

41. *Id.* at 559, 301 N.E.2d at 427, 347 N.Y.S.2d at 441.

42. *Id.* at 560, 301 N.E.2d at 427, 347 N.Y.S.2d at 441-42.

43. *Id.* at 559, 301 N.E.2d at 427, 347 N.Y.S.2d at 441.

Holtzman's accusations against Judge Levine, stated that they were bound by the appellate division's finding that the accusations were false.[44] Under DR 1-102(A)(6), the court opined that the proper standard to be applied was "whether a reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct [would be] proscribed."[45] The court then found that Ms. Holtzman "was plainly on notice that her conduct in this case, involving public dissemination of a specific accusation of improper judicial conduct . . . could be held to reflect adversely on her fitness to practice law."[46] The court went on to describe Ms. Holtzman's rejection of the advice of her staff to wait until the trial minutes could be reviewed before going public with the accusations.[47] Further, although the court never cited to *Erdmann*, the court did distinguish general criticism from false accusations of specific wrongdoing.[48] Therefore, the court realized the significant differences between *Holtzman* and *Erdmann* and allowed both cases to stand apart from each other.

In fact, Ms. Holtzman's statements are more analogous to *Baker*[49] and *Greenfield*[50] in which both attorneys received suspensions.[51] All relate to specific judges and included rather scathing remarks. The only difference is that in *Baker* and *Greenfield* the statements were knowingly false,[52] whereas in Ms. Holtzman's case, because of her failure to inquire, she did not have actual knowledge of the truth or falsity of the

44. *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32-33, 573 N.Y.S.2d at 41-42.

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

46. *Id.*

47. *Id.*

48. *Id.*

49. 34 A.D.2d 229, 311 N.Y.S.2d 70 (4th Dep't 1970).

50. 24 A.D.2d 651, 262 N.Y.S.2d 349 (2d Dep't 1965).

51. *Baker*, 34 A.D.2d at 233, 311 N.Y.S.2d at 74; *Greenfield*, 24 A.D.2d at 652, 262 N.Y.S.2d at 351.

52. *Baker*, 34 A.D.2d at 231, 233, 311 N.Y.S.2d at 74; *Greenfield*, 24 A.D.2d at 652, 262 N.Y.S.2d at 351.

accusations.[53] It would seem that *Baker* and *Greenfield* fit a DR 8-102(B) analysis, as would *Holtzman*. In fact, the court, in its reasoning, stated that Ms. Holtzman "knew or should have known that such attacks [were] unwarranted and unprofessional . . . ."[54] It is possible that the court of appeals could have applied DR 8-102(B)'s "knowingly false" provision to Ms. Holtzman's conduct. The court, however, chose only to apply DR 1-102(A)(6), and in doing so, left open the interpretation to be given to DR 8-102(B). Therefore, an inquiry into other state court decisions is necessary to interpret DR 8-102(B). Although New York courts have not interpreted DR 1-102(A)(5), several other states have applied this rule to attorney speech.[55]

C. Other State Court Decisions

The court of appeals, in its discretion, chose to only apply DR 1-102(A)(6) to Ms. Holtzman's conduct.[56] Other state courts, however, have applied DR 1-102(A)(5) to attorney speech. In the

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53. *Holtzman*, 78 N.Y.2d at 188-89, 577 N.E.2d at 31, 573 N.Y.S.2d at 40.

54. *Id.*

55. *See, e.g.*, Disciplinary Matter of Vollintine, 673 P.2d 755, 764 (Alaska 1984) (rejecting claim that imposition of discipline violates right of free speech); *In re* Riley, 691 P.2d 695, 703 (Ariz. 1984) ("A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics."); *In re* Anderson, 795 P.2d 64, 67 (Kan. 1990) (affirming prior rulings that free speech may not be invoked to protect against attorney discipline); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (holding that exercise of free speech rights is circumscribed by professional disciplinary rules).

56. *Holtzman*, 78 N.Y.2d at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42. Other state courts have applied this particular rule to attorney speech with varied results. *See, e.g.*, Louisiana State Bar Ass'n v. Karst, 428 So. 2d 406, 410 (La. 1983) (holding that public accusations against a named judge were "groundless and irresponsible behavior . . . [which] reflects adversely upon [the attorney's] fitness to practice law"); *but see* State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958, 969 (Okla. 1988) (holding that DR 1-102(A)(6) cannot be applied to speech before a court).

majority of cases applying DR 1-102(A)(5), the attorneys were involved in ongoing trials or a series of proceedings which would be prejudiced by the attorney's accusations against the presiding judge.[57] Other courts find that attorneys who are candidates for public office,[58] or who engage in a particular pattern or practice,[59] may be disciplined under DR 1-102(A)(5) for conduct prejudicial to the administration of justice. Still other courts apply DR 1-102(A)(5) to attorney misconduct involving false accusations against a judge, regardless of any ongoing proceeding, candidacy for office, or pattern and practice.[60]

Although the court of appeals in *Holtzman* did not apply DR 1-102(A)(5) to Ms. Holtzman's conduct, the court may have intimated its application by stating that one factor leading to Ms. Holtzman's discipline was that her statements were "aimed at a named Judge who presided over a number of cases prosecuted by her office."[61] Implicit in this statement was that Ms. Holtzman's accusations could have caused considerable friction between Judge Levine and Ms. Holtzman's assistants appearing before him. Therefore, the statements Ms. Holtzman made may have been prejudicial to the administration of justice.

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57. *See In re* Hinds, 449 A.2d 483, 500 (N.J. 1982) (holding that DR 1-102(A)(5) "would come into play when the attorney is not particularly or specially connected with or involved in a pending matter"); State Bar v. Semaan, 508 S.W.2d 429, 434 (Tex. Ct. App.) (court holding that isolated instances of criticism in form of opinion are not subject to DR 1-102(A)(5)), *writ ref'd n.r.e.* (1974); State v. Nelson, 504 P.2d 211, 215 (Kan. 1972) (statements made by attorney after close of his disciplinary case could not have been "harrassment or intimidation" for the purpose of violating DR 1-102(A)(5)).

58. *See, e.g.*, *In re* Johnson, 729 P.2d 1175, 1182 (Kan. 1986) (false statements made against candidate for county attorney by opponent were prejudicial to the administration of justice and a violation of DR 1-102(A)(5)).

59. *See, e.g.*, Committee on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 277 (W. Va. 1991) (attorney who engaged in series of false accusations of conspiracy against a named judge suspended for three months).

60. *See, e.g.*, Ramsey v. Board of Prof. Resp., 771 S.W.2d 116, 122 (Tenn. 1989) (citing *In re* Hickey, 259 S.W. 417, 430 (Tenn. 1923)).

61. *Holtzman*, 78 N.Y.2d at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

Additionally, there are a number of cases from other jurisdictions that have interpreted DR 8-102(B) as being applicable in cases factually similar to *Holtzman*.[62] In *Louisiana State Bar v. Karst*,[63] the court looked at EC 8-6 to provide a basis for interpreting DR 8-102(B).[64] EC 8-6, in pertinent part, provides:

> While a lawyer as a citizen has a right to criticize . . . officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.[65]

From this, the court derived the theory that where an attorney knew or should have known that the accusations were false, his or her mere subjective belief in the truth would not be enough.[66] In *Karst*, the attorney stated that a particular judge was dishonest, corrupt, and engaged in fraud.[67] Apparently, the attorney was suffering from psychological problems at the time, and he genuinely believed in the truth of his accusations.[68] The court suspended the attorney from the practice of law for one year based on his "unwarranted . . . conduct and its prejudicial effect on the legal profession."[69]

Similarly, in *Kentucky Bar Ass'n v. Heleringer*,[70] the highest court in Kentucky applied a similar standard to an attorney who

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62. *See* Nebraska State Bar Ass'n v. Michaelis, 316 N.W.2d 46, 54 (Neb. 1982) (attorney disbarred for violating DR 8-102(B) by making statements he knew or should have known to be false); *In re* Lacey, 284 N.W.2d 250, 255 (S.D. 1979) (attorney censured under DR 8-102(B) for accusing a judge of being "crooked"); State v. Nelson, 504 P.2d 211, 217 (Kan. 1972) (attorney not disciplined because statements attacked courts in general rather than a specific judge).

63. 428 So. 2d 406 (La. 1983).

64. *Id.* at 409.

65. N.Y. JUD. LAW APP., CODE OF PROFESSIONAL RESPONSIBILITY, EC 8-6 (McKinney 1992 & Supp. 1993).

66. *Karst*, 428 So.2d at 409.

67. *Id.* at 408.

68. *Id.*

69. *Id.* at 411.

70. 602 S.W.2d 165 (Ky. Ct. App. 1980).

falsely accused a judge of "highly unethical and grossly unfair" behavior.[71] In applying DR 8-102(B), the court stated that the attorney "knew or should have known" that the accusations were unwarranted, that such "conduct tend[ed] to bring the bench and bar into disrepute," and further, if the attorney "had reason to believe in good faith that" the conduct occurred, there was a proper forum in place for those accusations.[72]

Referring to the Ethical Considerations (ECs) for interpretive guidance is far from creative reasoning on the part of these courts. In fact, the Code's Preliminary Statement mandates that the enforcing agency should look to the ECs when applying the Disciplinary Rules.[73]

Once again, the court of appeals, in *Holtzman*, declined to apply DR 8-102(B) to Ms. Holtzman's conduct, but used some of the same language as the *Heleringer* court, which did apply DR 8-102(B). The court stated that Ms. Holtzman "knew or should have known that such attacks [we]re unwarranted and unprofessional, serve[d] to bring the Bench and Bar into disrepute, and tend[ed] to undermine public confidence in the judicial system."[74]

The *Holtzman* case, just as *Karst* and *Heleringer*, is an extremely fact specific case. Both sides argued that their version of the facts was correct. What is absolutely clear is that Ms. Holtzman published her severe accusations about Judge Levine's alleged misconduct without waiting for the trial transcript to confirm her belief.[75] Subsequent to publication, it became abundantly clear that it was not the judge who had asked the rape victim to reenact her rape, rather it was the defense counsel who had made the request.[76] Additionally, an independent

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71. *Id.* at 167.

72. *Id.* at 168.

73. N.Y. JUD. LAW APP., PRELIMINARY STATEMENT OF THE CODE OF PROFESSIONAL RESPONSIBILITY (McKinney 1992 & Supp. 1993).

74. *Holtzman*, 78 N.Y.2d at 191, 577 N.E.2d at 33, 573 N.Y.S 2d at 42.

75. Brief for Respondent at 20 (citing Appellant's appendix at A817-18), *Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991).

76. *Id.* at 23.

investigation by the Keating Committee[77] reported that Ms. Holtzman's accusations were false.[78]

There is little doubt that Ms. Holtzman subjectively believed in the validity of her accusations.[79] However, if the logical interpretation of DR 8-102(B) is used, as in *Karst* and *Heleringer*, this belief should not shield Ms. Holtzman, or any other attorney, from appropriate discipline. It is quite clear that Ms. Holtzman could have, and should have, known the truth. However, in reality, she did not want to discover the truth. In fact, all of Ms. Holtzman's top advisors felt that she should have waited for the trial transcripts before releasing anything to the press.[80] Ms. Holtzman did not wait, and therefore, DR 8-102(B) was violated.

II. CONSTITUTIONALITY OF DR 1-102(A)(5) AND (6) AND DR 8-102(B)

Ms. Holtzman, in point one of the brief for Appellant, argued that her statements about Judge Levine were protected speech

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77. *Id.* at 24 (discussing Judge Keating's investigation).

78. *Id.* at 25.

79. In fact, even after the court of appeals held that the accusations were false, and the United States Supreme Court denied certiorari, Ms. Holtzman still asserts that her accusations were true. Linda Greenhouse, *Holtzman Bid to Reverse Judicial Reprimand Fails*, N.Y. TIMES, Dec. 10, 1991, at B3 col. 2. Gary Spencer, *Reprimand of Holtzman Upheld*, N.Y. L.J., July 2, 1991, at 1. Perhaps Ms. Holtzman's continued assertion in her subjective belief in the truth of the statements would be laid to rest if she had read this quote from *Farber*:

> There is courage and then there is pointless stupidity. No matter what evidence shows, respondent never admits that he is wrong. Indeed, sincere personal belief will, in the sweet bye and bye, be an absolute defense when we all stand before the pearly gates on that great day of judgment, but it is not a defense here when respondent's deficient sense of reality inflicts untold misery upon particular individuals and damage upon the legal system in general.

.Committee on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 285 (W. Va. 1991).

80. Brief for Respondent, *supra* note 75, at 15-17.

under the Federal and New York State Constitutions.[81] The argument was that article I, section 8 of the New York Constitution[82] was "at least as protective of speech as"[83] the Federal Constitution's protection announced in *New York Times v. Sullivan*.[84] The appellant's brief went on to cite New York cases that have held that the state's standard is more protective of speech than the First Amendment's standard.[85] Nevertheless, there is no New York case that has applied this concept to attorney discipline.

New York Times v. Sullivan involved a defamation suit instituted by a public official to recover damages for false statements published to impugn his official conduct.[86] The famous test enunciated provided that public officials could not recover damages for defamation unless they could 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

81. Brief for Appellant at 25, *Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39 (1991).

82. Article I, section 8 of the New York Constitution states in pertinent part: "Every citizen may freely speak, write and publish his statements on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . . ." N.Y. CONST. art. I, § 8.

83. Brief for Appellant, *supra* note 81, at 31. The United States Constitution, First Amendment, states in part: "Congress shall make no law . . . abridging the freedom of speech or the press." U.S. CONST. amend. I, cl. 3. The First Amendment applies to the states through the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925); Stromberg v. California, 283 U.S. 359 (1931).

84. 376 U.S. 254, 269 (1964) (constitutional protections for speech and press fashioned to assure unfettered interchange of ideas).

85. *See* People *ex rel.* Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 503 N.E.2d 492, 495, 510 N.Y.S.2d 844, 847 (court struck down public health law that called for closure of adult bookstore because of illegal sexual acts as violative of New York Constitution after law was upheld by Supreme Court on First Amendment challenge), *on remand from* 478 U.S. 697 (1986); People v. P.J. Video, Inc., 68 N.Y.2d 296, 309, 501 N.E.2d 556, 564, 508 N.Y.S.2d 907, 915 (1986) (state constitution is more stringent when search and seizure is concerned).

86. *New York Times*, 376 U.S. at 256-62.

with reckless disregard of whether it was false or not."[87] The Appellant's brief called for this actual malice standard to apply to attorney criticism cases and relied on several other state cases that have held a *New York Times* type of standard to be applicable.[88]

The Appellant's brief also pointed to *Garrison v. Louisiana*[89] as further proof that *New York Times* was applicable.[90] *Garrison* involved a district attorney's conviction under a criminal libel law for attacking eight justices of a district court.[91] The United States Supreme Court held that there was no distinction between civil defamation and criminal defamation.[92] The Court held that the *New York Times* test applied and that the conviction could not be sustained when taken in that light.[93]

The New York Court of Appeals in *Holtzman* specifically declined to extend "constitutional malice" protection to attorney discipline since the Supreme Court of the United States has not done so.[94] The implication was that if the Supreme Court applied the *New York Times* standard to attorney discipline so too would the New York State Court of Appeals. The Supreme Court has to

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87. *Id.* at 279-80.

88. *See* Committee on Legal Ethics v. Douglas, 370 S.E.2d 325, 336 (W. Va.) (court seems to imply that *New York Times* is the appropriate standard), *cert. denied*, 493 U.S. 964 (1988); Ramirez v. State Bar, 619 P.2d 399, 406 (Cal. 1980) (attorney accusations of misconduct against judge *could* be protected speech under *New York Times* test although not protected in this case); State Bar v. Semaan, 508 S.W.2d 429, 434 (Tex. Ct. App.) (attorney statements against judge were protected speech under *New York Times*), *writ ref'd n.r.e.* (1974).

89. 379 U.S. 64 (1964).

90. Brief for Appellant, *supra* note 81, at 28.

91. *Garrison*, 379 U.S. at 64-66.

92. *Id.* at 67.

93. *Id.* at 79. For cases upholding the applicability of the *New York Times* standard and holding that derogatory statements against judges are protected by the First Amendment unless made with knowledge of falsification or reckless disregard of truth or falsity, at least for utterances made outside of judicial proceedings see Eisenberg v. Boardman, 302 F. Supp. 1360, 1364 (W.D. Wis. 1969); State Bar v. Semaan, 508 S.W.2d 429, 434 (Tex. Ct. App.), *writ ref'd n.r.e.* (1974).

94. *Holtzman*, 78 N.Y.2d at 192, 577 N.E.2d at 33-34, 573 N.Y.S.2d at 42-43.

date shown no signs of any intention to do this. The Court denied writ of certiorari to the *Holtzman* case[95] and a similar case,[96] both asking for a *New York Times* standard to be applied.

There are states, however, that find the *New York Times* defamation test to be wholly inapplicable. An Indiana case, *In re Terry*,[97] eloquently discussed the distinct differences between defamation actions and attorney discipline by stating:

> The respondent is charged with professional misconduct, not defamation. The societal interests protected by these two bodies of law are not identical. Defamation is a wrong directed against an individual and the remedy is a personal redress of the wrong . . . . Professional misconduct . . . is [a wrong] against society as a whole.[98]

Likewise, in *In re Graham*,[99] the Supreme Court of Minnesota held that the *Times* standard was inapplicable and that the more appropriate standard was an objective one that depended on what a "reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances."[100] Therefore, based on this standard, the attorney in *Graham* was suspended for sixty days for accusing a judge of severe misconduct.[101]

The New York Court of Appeals, in fact, cited to *Terry* and *Graham* in rejecting the defamation standard.[102] The court stated that "the issue is whether [the false accusation] adversely affects the administration of justice and adversely reflects on the attorney's judgment and consequently, her ability to practice

95. 112 S. Ct. 648 (1991).

96. *In re* Westfall, 112 S. Ct. 648 (1991). Commenators have noted the effect of these various standards: "Today as far as the right of lawyers . . . the First Amendment means many things in many states." Marcia Chambers, *Bar Sanctions Lawyers Who Fault Judges*, NAT'L L.J., Nov. 25, 1991, at 13.

97. 394 N.E.2d 94 (Ind. 1979), *cert. denied*, 444 U.S. 1077 (1980).

98. *Id.* at 95.

99. 453 N.W.2d 313 (Minn.), *reinstated, In re* Reinstatement of Graham, 459 N.W.2d 706 (Minn.), *cert. denied*, 111 S. Ct. 67 (1990).

100. *Id.* at 322.

101. *Id.* at 325. Mr. Graham was reinstated the following August, five months later. *In re* Reinstatement of Graham, 459 N.W.2d 706 (Minn. 1990).

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

law."[103] Based on the objective "reasonable attorney" standard applied in *Graham* and adopted by the court in *Holtzman*, the court held that Ms. Holtzman's conduct would not be protected from discipline.

A "reasonable attorney, considered in light of all his/her professional functions," would not "under similar circumstances" release unfounded harsh accusations of misconduct by a specific judge without proof. There was no emergency in this case, and even assuming, *arguendo*, that an emergency existed, a reasonable District Attorney with all of Ms. Holtzman's professional functions would not publish such statements without *any* evidence.

The final question in this case is whether the objective standard, as used in *Graham*, can pass constitutional muster. In *Gentile v. State Bar of Nevada*,[104] the most recent Supreme Court case involving attorney speech, a plurality of the Court reversed a letter of reprimand given to an attorney based on statements that allegedly prejudiced a trial.[105] The Court held that the rule the attorney was charged with was void for vagueness.[106] In the free speech portion of the decision, Chief Justice Rehnquist determined that the attorney's right to free speech was not violated by the disciplinary rule.[107] The Chief Justice wrote that "[w]hen a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question."[108] The Court went on to hold that the right to a fair trial outweighs the attorney's right to free speech.[109] Additionally, the Court found that the rule applied was narrowly tailored to protecting the integrity of the trial since it was limited

103. *Id.*
104. 111 S. Ct. 2720 (1991).
105. *Id.* at 2732.
106. *Id.*
107. *Id.* at 2745.
108. *Id.* (Rehnquist, C.J., concurring).
109. *Id.* (Rehnquist, C.J., concurring).

to speech that had a substantial likelihood of prejudicing the trial.[110]

Although Chief Justice Rehnquist did not specifically say he was applying a "strict scrutiny" analysis, the fact that he used a "narrowly tailored" analysis implies that he intended to apply "strict scrutiny."[111] Therefore, instead of a merely legitimate state interest, there must be a more substantial, maybe even compelling, interest.[112] The *Holtzman* court stated that the state interest involved was to "protect the public interest and maintain the integrity of the judicial system . . . ."[113] The Supreme Court has held that such interests were substantial and possibly compelling.[114]

In the most recent state court decision on this issue, the Supreme Court of Missouri held that the state had a "substantial" interest "in [the] administration of justice through a fair and impartial judiciary."[115] In *In re Westfall,* a district attorney was charged with essentially the same conduct as in *Holtzman.*[116] The

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110. *Id.* (Rehnquist, C.J., concurring).

111. *Id.* Strict scrutiny will be applied when a statute operates to infringe upon an individual's exercise of a fundamental right. Those rights independently guaranteed by the Constitution are deemed fundamental rights. Where strict scrutiny analysis is applied by the Supreme Court, the statute will only be upheld where the state can show a compelling governmental interest and that the statute has been narrowly tailored to achieve such an end. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); NOWAK & ROTUNDA, CONSTITUTIONAL LAW 575 (4th. ed. 1991).

112. *Gentile,* 111 S. Ct. at 2745.

113. *Holtzman,* 78 N.Y.2d at 192-93, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

114. *See* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982) (the state "has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice"); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) ("[T]he States have a compelling interest in the practice of professions within their boundaries . . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice.").

115. *In re* Westfall, 808 S.W.2d 829, 836 (Mo. 1991).

116. *Id.* at 831-32; *see supra* notes 2-3 and accompanying text. It would be well to note that the Code adopted by Missouri is the ABA Model Rules of

pellucid opinion stood for the proposition that attorneys have the right to criticize the judicial system, but the state's interest in preserving the integrity of the system and the public's confidence in the system must outweigh the attorney's right to free speech.[117] Since the state interest involved in *Holtzman* was compelling, or at least substantial, the standard applied must be narrowly tailored to those interests.[118] The court, in *Holtzman*, chose to apply a reasonable attorney standard to attorney speech, and therefore, limited violations to what a reasonable attorney would do under similar circumstances.[119] Thus, where an attorney's statements falsely accuse a judge, who is the most visible representative of our system of justice, the attorney's rights of free speech may be abridged in favor of the state's right of protecting the judiciary from unwarranted attacks which serve to do nothing but erode the public's confidence in the system.

Lawyers are sworn to uphold the judicial system upon their admission to the bar.[120] Lawyers, as a part of that system, who place their own interests above those of the system as a whole, have violated their oath of office. Ms. Holtzman placed her interests before the interests of the system when she circumvented the appropriate channels to lodge her accusations.[121] Therefore, the state can validly restrict Ms. Holtzman's right to free speech since the greater good of the system is involved.

CONCLUSION

The New York Court of Appeals, and now the Supreme Court of the United States, have refused to apply or interpret DR 1-102(A)(5) and 8-102(B). As a result, the issues analyzed in this Note remain unresolved. Although there is a wide divergence of

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Professional Conduct, and Rule 8.2(a) of that Code includes a "reckless disregard" standard. *See Westfall*, 808 S.W.2d at 832.

117. *Westfall*, 808 S.W.2d at 836.

118. *See id.* at 835-36.

119. *Holtzman*, 78 N.Y.2d at 193, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

120. *See* N.Y. JUD. LAW art. 15, § 466 (McKinney 1989) (attorney's oath of office).

121. *See* N.Y. CONST. art. 13, § 1 (constitutional oath of office); *see also supra* note 114.

decisional law involving DR 1-102(A)(5), it is clear that in any case where the administration of justice may be prejudiced, DR 1-102(A)(5) can be applied. Additionally, DR 8-102(B) should be applied to attorney accusations against judges when a reasonable attorney knew or should have known that the accusations were false.

Since the *Holtzman* decision, there has been considerable clamor among members of the bar as to the decision's effect on attorney speech. Most of the criticism of the decision is aimed at its "chilling effect" or trammeling of attorney rights of free speech.[122] That argument, however, ignores the fact that attorneys have never had the right to falsely accuse a named judge of specific instances of wrongdoing either in the United States generally or in the State of New York.[123] Therefore, nothing has been chilled or trammeled. Attorneys may still criticize the courts generally and, truly, they are in the best position to do so. Moreover, attorneys may still, as all citizens may, criticize a judge individually for specific wrongdoing as long as they act reasonably and do not falsely accuse the judge. The court of appeals did nothing to change these rights.

As a district attorney in one of the most active systems in the country, Ms. Holtzman should have known better than to race to the press with insupportable accusations. A careful reading of the Code would have informed even the most inexperienced attorney

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122. *See* Thomas F. Liotti, *Lawyers and the First Amendment: Mutually Exclusive Terms?*, N.Y. L.J., Dec. 30, 1991, at 2; *see also* Jay C. Carlisle, *Annual Review of the Court of Appeals: Panel Analyzes Sanctions, Admission Requirements*, N.Y. L.J., Oct. 15, 1991, at S-9; Gary Spencer, *Reprimand of Holtzman Upheld*, N.Y. L.J., July 2, 1991, at 1, col. 5 (quoting Arthur Eisenberg of the New York Civil Liberties Union as stating that the court's decision will "curtail speech that might otherwise be protected by the First Amendment").

123. *See* Bradley v. Fisher, 80 U.S. 335, 355 (1871) ("[T]he obligation which attorneys impliedly assume . . . [is] to maintain at all times the respect due to courts of justice and judicial officers."); People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470, 162 N.E. 487, 489 (1928) ("membership in the bar is a privilege burdened with conditions"); *In re* Markewich, 192 A.D. 243, 248, 182 N.Y.S. 653, 656 (1st Dep't 1920) (censuring attorney for "offensive, unfounded, and improper" comments regarding a judge).

that specific, false accusations against a named sitting judge would subject the speaker to some kind of discipline.[124] At a time when public perception of attorneys, judges, and the judicial system is at its lowest ebb, an attorney, especially a district attorney, should do everything in his or her power to increase public trust in the legal system. Ms. Holtzman's conduct only served to perpetuate the fear and distrust that the public has cultivated.

124. *See contra* Jeanne D. Dodd, *The First Amendment and Attorney Discipline for Criticism of the Judiciary: Let the Lawyer Beware*, 15 N. KY. L. REV. 129, 152 (1988) (arguing that attorney speech should be treated as political speech and given greater protection).