

Disciplinary Rule 1-102(A)(7): New York Court of Appeals Broadens Scope of Rule to Include Attorney Criticism of the Judiciary

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eliminate the temptation of the requesting party to alter his or her testimony to conform to the film,³⁷ and the uncertainty concerning the contents of the films will ensure truthfulness.³⁸ From the plaintiff's perspective, he or she is benefitted by having the time to test the films prior to trial and thus protect against manipulative film-making, or similar chicanery.³⁹

Richard W. Viola

CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rule 1-102(A)(7): New York Court of Appeals broadens scope of rule to include attorney criticism of the judiciary

New York's Code of Professional Responsibility (the "Code")¹ has been viewed by the courts as the guidepost in determining the bounds of lawyers' professional conduct.² The Code's disciplinary

³⁷ *Id.* at 612.

³⁸ *See* *Snead v. American Export-Isbrandtsen Lines*, 59 F.R.D. 148, 150 (E.D. Pa. 1973).

³⁹ *Id.*

¹ *See* N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY (McKinney 1990) [hereinafter CODE]. "The Code . . . points the way [for] the aspiring [attorneys] and provides standards by which to judge the transgressor." *Id.* pmb. at 354-55; *see also* N.Y.S.B.A. THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY pmb. at 1 (1990) [hereinafter LAWYER'S CODE]. The Code was first promulgated by the American Bar Association in 1969 and adopted by the New York State Bar Association in 1970 as its official code of ethics. *See* N.Y. JUD. LAW app. at 351 (McKinney 1975). In 1983, the American Bar Association drafted rules of professional conduct. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]. Although the Model Rules were never adopted by the New York Bar, they did serve as the basis for major revisions in the 1970 Code. *See* LAWYER'S CODE, *supra*, letter insert from the President of the New York State Bar Ass'n, dated September, 1990. These revisions were ultimately adopted by the four judicial departments of the Appellate Division of State Supreme Court, and promulgated as joint rules of the appellate divisions effective September 1, 1990. *See* N.Y. JUD. LAW app. at 108 (McKinney Supp. 1992). The disciplinary committees of the appellate divisions are responsible for the supervision of attorney conduct and the establishment of standards by which to review such conduct. N.Y. JUD. LAW § 90(2) (McKinney 1983); *see also* *Grunberg v. Feller*, 132 Misc. 2d 738, 741, 505 N.Y.S.2d 515, 517 (N.Y.C. Civ. Ct. N.Y. County 1986) (disciplinary committees of appellate divisions are proper forums for complaints involving attorney misconduct).

² *See In re Hof*, 102 A.D.2d 591, 596, 478 N.Y.S.2d 39, 42 (2d Dep't 1984) ("The disciplinary rules and ethical considerations set down in the Code of Professional Responsibility . . . represent the acknowledged standards of the profession . . ."). The Code consists of Canons, which represent general principles of professional conduct expected of attorneys, Ethical Considerations, which are aspirational and outline the objectives of the profession

rules set forth the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."³ Disciplinary Rule ("DR") 1-102(A)(7) (formerly DR 1-102(A)(6)),⁴ provides that a lawyer shall not engage in any "conduct that adversely reflects on the lawyer's fitness to practice law."⁵ Courts have employed this language to reprimand attorneys for, inter alia, conversion and commingling a client's funds,⁶ forging a client's name,⁷

and Disciplinary Rules, which are mandatory rules binding on all New York attorneys. See *LAWYER'S CODE*, *supra* note 1, at 2.

³ See *CODE*, *supra* note 1, Preliminary Statement at 355-56. The vast number of possible situations involving misconduct led the drafters of the Code to provide that attorney discipline may rest on the general principles espoused in the Disciplinary Rules. *Id.*; see also *In re Lewis*, 159 A.D.2d 854, 860, 553 N.Y.S.2d 861, 863 (3d Dep't) (attorney disbarred for converting client funds), *appeal denied*, 76 N.Y.2d 783, 559 N.E.2d 674, 559 N.Y.S.2d 980 (1990); *In re Harris*, 139 A.D.2d 253, 256, 531 N.Y.S.2d 270, 272 (1st Dep't 1988) (attorney received two-year suspension based on violations of DR 1-102(A)(4), DR 1-102(A)(5), and DR 1-102(A)(6)); *In re Weichert*, 40 A.D.2d 261, 263, 339 N.Y.S.2d 750, 753-54 (4th Dep't) (violation of escrow agreement basis for disbarment under DR 1-102(A)(4) and DR 7-102(A)(3)), *appeal denied*, 33 N.Y.2d 514, 301 N.E.2d 869, 348 N.Y.S.2d 1025 (1973); *People v. Doe*, 98 Misc. 2d 805, 809, 414 N.Y.S.2d 617, 621 (Nassau County Ct. 1979) (discussing disciplinary rules regarding attorney's representation of multiple clients).

The drafters made no attempt to prescribe the penalties for every potential violation of the rules, but noted that the Canons and Ethical Considerations could provide interpretive guidance. See *CODE*, *supra* note 1, Preliminary Statement at 356. For example, in *In re Cohen*, 139 A.D.2d 221, 224, 530 N.Y.S.2d 830, 832 (1st Dep't 1988), the court refused to declare DR 1-102(A)(6)[now (7)] unconstitutionally vague, stating that "[DR 1-102(A)(6)] does not exist in a vacuum. [Rather,] [i]t must be read in conjunction with the other [rules] and the ethical strictures of the Code . . ." *Id.*

Courts have recognized that although the Code and its provisions are not given statutory status, they represent the traditional and acknowledged standards of the legal profession and thus should be complied with and enforced. See *In re Weinstock*, 40 N.Y.2d 1, 6, 351 N.E.2d 647, 649, 386 N.Y.S.2d 1, 3 (1976); *Hof*, 102 A.D.2d at 596, 478 N.Y.S.2d at 42; *Grunberg*, 132 Misc. 2d at 741, 505 N.Y.S.2d at 517.

Disciplinary sanctions include disbarment, suspension, reprimand, and censure, and have been deemed necessary to protect the public, to deter unfavorable, repetitive conduct, and to uphold the integrity of the Bar and Bench. See N.Y. JUD. LAW § 90(2) (McKinney 1983); *In re Kasdan*, 164 A.D.2d 90, 92, 561 N.Y.S.2d 222, 223 (1st Dep't 1990) (purpose of disciplinary proceeding is to protect public); *In re Malone*, 105 A.D.2d 455, 460, 480 N.Y.S.2d 603, 607 (3d Dep't 1984) (proceeding aimed at protecting public, deterring similar conduct and preserving reputation of Bar); *In re Rotwein*, 20 A.D.2d 428, 429, 247 N.Y.S.2d 775, 777 (1st Dep't 1964) (purpose of disciplinary proceeding to protect public from "ministrations of the unfit").

⁴ In 1990, the Code of Professional Responsibility was amended, and DR 1-102(A)(6) became DR 1-102(A)(7).

⁵ See *CODE*, *supra* note 1, DR 1-102(A)(7).

⁶ See *In re Grubart*, 164 A.D.2d 144, 146, 561 N.Y.S.2d 169, 171 (1st Dep't 1990), *appeal denied*, 77 N.Y.2d 803, 569 N.E.2d 874, 568 N.Y.S.2d 15 (1991); *In re Hardy*, 172 A.D.2d 866, 866-69, 568 N.Y.S.2d 463, 464-65 (3d Dep't 1991); *In re Altschuler*, 139 A.D.2d 311, 313, 531 N.Y.S.2d 91, 92 (1st Dep't 1988).

⁷ See *In re Young*, 168 A.D.2d 26, 27, 572 N.Y.S.2d 224, 225 (4th Dep't 1991).

engaging in conduct aimed at benefiting the attorney's personal interests,⁸ neglecting legal matters,⁹ testifying falsely,¹⁰ pleading guilty to criminal charges,¹¹ and engaging in activity that gives an appearance of impropriety.¹² Recently, in *In re Holtzman*,¹³ the New York Court of Appeals broadened the scope of DR 1-102(A)(7) by disciplining an attorney for publicly disclosing false and unsubstantiated allegations against a judge.¹⁴

The petitioner in *Holtzman*, former District Attorney Elizabeth Holtzman, disseminated a letter to the press accusing Judge Irving Levine of having engaged in acts of professional impropriety during a criminal trial involving charges of sexual misconduct.¹⁵ Holtzman contended that the judge asked the victim to reenact, on the floor of his robing room and in front of other witnesses, the position she was in when the alleged sexual assault took place.¹⁶

⁸ See *In re Wolfe*, 146 A.D.2d 234, 235, 542 N.Y.S.2d 898, 899 (4th Dep't 1989) (attorney disbarred for agreeing to pay former mayor in return for city-sponsored work); *In re Resseguie*, 138 A.D.2d 887, 890, 526 N.Y.S.2d 863, 865 (3d Dep't 1988) (attorney advice to client affected by own financial interests); *In re Oliver*, 142 A.D.2d 831, 834, 530 N.Y.S.2d 890, 892 (3d Dep't 1988) (attorney counselled elderly client to invest in speculative investments in which attorney had financial stake).

⁹ See *In re Johnson*, 168 A.D.2d 193, 194, 572 N.Y.S.2d 223, 224 (4th Dep't 1991) (attorney failed to perform agreed legal services); *In re Pollack*, 142 A.D.2d 386, 388, 536 N.Y.S.2d 437, 438 (1st Dep't 1989) (failure to wind up estate diligently constituted neglect); *In re Anderson*, 137 A.D.2d 233, 235-36, 528 N.Y.S.2d 742, 743-44 (4th Dep't 1988) (lawyer failed to carry out client instructions).

¹⁰ See *In re Harris*, 139 A.D.2d 253, 256, 531 N.Y.S.2d 270, 271 (1st Dep't 1988) (attorney testified falsely regarding receipt of subpoena).

¹¹ See *In re Williams*, 105 A.D.2d 974, 975, 481 N.Y.S.2d 530, 531 (3d Dep't 1984) (guilty plea to unlawful conduct adversely affects ability to practice); *In re Higgins*, 105 A.D.2d 462, 463, 480 N.Y.S.2d 257, 257-58 (3d Dep't 1984) (conviction for possession of marijuana reflects poorly on profession).

¹² See *Oliver*, 142 A.D.2d at 834, 530 N.Y.S.2d at 892 (attorney's conduct gave clear appearance of impropriety and violated DR 1-102(A)(6) [now (7)]); *In re Wehringer*, 135 A.D.2d 279, 282, 525 N.Y.S.2d 604, 605 (1st Dep't) (multiple violations reflected adversely on attorney's fitness to practice), *cert. denied*, 488 U.S. 988 (1988); *In re Sherbunt*, 134 A.D.2d 723, 725, 520 N.Y.S.2d 885, 888 (3d Dep't 1987) (circumstances surrounding loan and gift by elderly client to attorney gave appearance of impropriety).

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

¹⁴ *Id.* at 191-92, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

¹⁵ *Id.* at 188, 577 N.E.2d at 31, 573 N.Y.S.2d at 40. The letter originally was addressed to the Committee to Implement Recommendations of the New York State Task Force on Women in the Courts, but subsequently was disseminated to the public by the petitioner in conjunction with a "news alert." *Id.* at 189, 577 N.E.2d at 31-32, 573 N.Y.S.2d at 40-41.

¹⁶ *Id.* at 188-89, 577 N.E.2d at 31, 573 N.Y.S.2d at 40. The letter described the incident as follows:

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

Unwilling to delay the public release of her statement until the trial minutes had been procured,¹⁷ Holtzman based her allegations solely on a description of the incident in an interoffice memorandum prepared by a newly admitted trial assistant.¹⁸ Following the disclosure, an administrative judge of the New York City Criminal Court conducted an investigation regarding the truth of Holtzman's charges and concluded that her claim of judicial misconduct lacked evidentiary support.¹⁹ The matter was thereafter submitted to the Grievance Committee for the Tenth Judicial District to determine whether Holtzman's actions constituted a violation of the Code.²⁰ A Letter of Admonition was issued²¹ following the Grievance Committee's finding that the petitioner violated DR 8-102(B),²² DR 1-102(A)(5)²³ and DR 1-102(A)(6)[now (7)],²⁴ as well as Ethical Consideration ("EC") 8-6 of the Code.²⁵

In response to the Admonition, the petitioner requested and was granted a subcommittee hearing.²⁶ The subcommittee formally charged Holtzman with misconduct pursuant to DR 8-102(B), DR 1-102(A)(5), and DR 1-102(A)(6)[now (7)].²⁷ After the hearing, the subcommittee determined that the petitioner's disclosure to the

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 degraded, humiliated and demeaned her.

Id. (alterations in original).

¹⁷ *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42. Holtzman issued the news releases, ignoring her staff's concerns regarding the ethical implications of publicly disclosing such accusations without the trial minutes. *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41. Administrative Judge Robert Keating directed the investigation and submitted it to then Chief Administrative Judge Albert M. Rosenblatt. *Id.*

²⁰ *Id.*

²¹ *Id.* A Letter of Admonition represents the committee's conclusion that professional misconduct occurred. See [1985] 22 N.Y.C.R.R. § 691.6(a).

²² See *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41; see also CODE, *supra* note 1, DR 8-102(B). The latter rule provides that "[a] lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer." *Id.*

²³ See *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41; see also CODE, *supra* note 1, DR 1-102(A)(5) ("A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice.").

²⁴ See *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

²⁵ See *id.* at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41; see also CODE, *supra* note 1, EC 8-6 (discussing lawyer's duty to "protest earnestly against the appointment or election of those who are unsuited for the bench").

²⁶ See *Holtzman*, 78 N.Y.2d at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

²⁷ *Id.*

media prior to obtaining the trial minutes, coupled with her failure to speak to other witnesses allegedly present during the incident, demonstrated her unfitness to practice law.²⁸ Pursuant to the subcommittee's findings, the full Grievance Committee issued a Letter of Reprimand,²⁹ concluding that the petitioner's conduct was both "prejudicial to the administration of justice and adversely reflect[ed] on [her] fitness to practice law," thereby violating DR 1-102(A)(5) and DR 1-102(A)(6)[now (7)] of the Code.³⁰

The petitioner commenced judicial proceedings in the Appellate Division, Second Department, seeking to vacate the Letter of Reprimand.³¹ The appellate division rejected the petitioner's claim, concluding that the record sustained the committee's findings that the petitioner violated DR 8-102(B) and DR 1-102(A)(6)[now (7)].³² Thereafter, the petitioner appealed, asserting that (1) her conduct did not violate a specific disciplinary rule, (2) DR 1-102(A)(6)[now (7)] is impermissibly vague, and (3) her allegations should be afforded First Amendment protection.³³

The New York Court of Appeals affirmed the appellate division's decision in a per curiam opinion.³⁴ The court, however, expressly limited its ruling to the petitioner's violation of DR 1-102(A)(6)[now (7)].³⁵ Addressing petitioner's first assertion, the *Holtzman* court stated that the Code warrants somewhat broad

²⁸ *Id.* at 189-90, 577 N.E.2d at 32, 573 N.Y.S.2d at 41. The subcommittee served the petitioner with three formal charges of misconduct. *Id.* The first charge alleged the petitioner's unfitness to practice law by focusing on the petitioner's public disclosure "(1) prior to obtaining the minutes of the criminal trial, (2) without . . . speak[ing] with . . . person[s] 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 . . . and [that] the matter would be investigated . . ." *Id.* The second charge concerned the petitioner's subsequent videotaping of the complaining witness' statement and its release to the media. *Id.* at 189, 577 N.E.2d at 32, 573 N.Y.S.2d at 41. The third charge involved a subsequent press release in which *Holtzman* stated that she knew of other accusations of misconduct by Judge Levine. *Id.*

²⁹ *Id.* at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41. The subcommittee makes factual findings and reports them to the full committee. *See* [1987] 22 N.Y.C.R.R. § 691.4(h). A letter of reprimand may be issued after a full committee hearing. *See* [1985] 22 N.Y.C.R.R. § 691.6(a).

³⁰ *Holtzman*, 78 N.Y.2d at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41. No reference was made to DR 8-102(B). *Id.*

³¹ *Id.*

³² *Id.* The appellate division ratified the committee's findings of fact, and agreed that such findings constituted violations of DR 8-102(B) and DR 1-102(A)(6). *Id.*

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

³⁴ *Id.* at 190, 577 N.E.2d at 32, 573 N.Y.S.2d at 41.

³⁵ *Id.*

language because of the virtual impossibility of defining every conceivable professional abuse.³⁶ In addition, the court refused to declare the rule unconstitutionally vague, stating that to do so would undermine the Code's effectiveness as an ethical guideline for the legal community.³⁷ To render the broad language meaningful, the court held that a "reasonable attorney" standard must be applied to determine the appropriateness of a lawyer's professional conduct.³⁸ The court stated 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."³⁹ In applying this standard, the *Holtzman* court determined that the petitioner had notice that her public disclosure of specific false and unsupported accusations would diminish public confidence in the judicial system and reflect poorly on her fitness to practice law which makes her actions a violation of DR 1-102(A)(6)[now (7)].⁴⁰

Finally, the *Holtzman* court declined to extend First Amendment protection to disciplinary proceedings.⁴¹ In addressing the free-speech issue, the court refused to apply the *New York Times Co. v. Sullivan*⁴² standard of actual malice to disciplinary proceedings sanctioning speech critical of judicial officials.⁴³ The court distinguished such proceedings from defamation actions, which are subject to the *New York Times* standard, by focusing on the nature of the relief sought.⁴⁴ The court explained that defamation actions redress reputational injury, whereas disciplinary proceedings safeguard professional conduct and preserve the orderly adminis-

³⁶ *Id.* at 190-91, 577 N.E.2d at 33, 573 N.Y.S.2d at 42. The *Lawyer's Code* attempts to resolve this impossibility with the following language:

[C]onduct that does not appear to violate the express terms of any Disciplinary Rule nevertheless may be found by an enforcing agency to be the subject of discipline on the basis of a general principle illustrated by a Disciplinary Rule or on the basis of an accepted common law principle applicable to lawyers.

LAWYER'S CODE, *supra* note 1, Preliminary Statement at 2.

³⁷ *Holtzman*, 78 N.Y.2d at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

³⁸ *Id.* at 191, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

³⁹ *Id.*

⁴⁰ *Id.* at 191-92, 577 N.E.2d at 33, 573 N.Y.S.2d at 42.

⁴¹ *Id.* at 192, 577 N.E.2d at 33-34, 573 N.Y.S.2d at 42-43.

⁴² 376 U.S. 254 (1964).

⁴³ See *Holtzman*, 78 N.Y.2d at 192, 577 N.E.2d at 34, 573 N.Y.S.2d at 43. In support of its rejection of petitioner's First Amendment claim, the court noted that neither it nor the United States Supreme Court had ever applied the "constitutional malice" standard to disciplinary proceedings. *Id.*; see also *infra* note 51 (elaborating *New York Times* standard).

⁴⁴ See *Holtzman*, 78 N.Y.2d at 192, 577 N.E.2d at 34, 573 N.Y.S.2d at 43.

tration of the judicial system.⁴⁶ Thus, in *Holtzman*, the court held that the *New York Times* actual malice standard is inapplicable because it "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."⁴⁶

The *Holtzman* decision illustrated the first instance in which a New York court employed DR 1-102(A)(6)[now (7)] to rebuke an attorney for criticizing a judge outside of court proceedings.⁴⁷

⁴⁶ *Id.* (citations omitted).

⁴⁶ See *Holtzman*, 78 N.Y.2d at 192, 577 N.E.2d at 33-34, 573 N.Y.S.2d at 43. In adopting an objective standard, the court rejected the actual malice standard which focuses upon the knowledge of the specific individual. *Id.* The *Holtzman* court reasoned that a subjective standard would invalidate the Code by rendering any language non-censurable because of the difficulty in proving knowledge. *Id.* The court recognized that unlike libel cases, disciplinary proceedings involve injury to society as a whole rather than to the judge as an individual and that a subjective standard would not work to preserve 'a fair, impartial judicial system, and the system of justice as it has evolved for generations.' *Id.* (citation omitted).

⁴⁷ See Jay C. Carlisle, *Panel Analyzes Sanctions, Admission Requirements*, N.Y.L.J., Oct. 15, 1991, at S-30, ("Prior to the *Holtzman* decision there was no reported New York case invoking DR [1-102(A)(7)] in this context.")

New York courts have disciplined attorneys for making false and unsupported accusations against judges since long before the adoption of the Code. See, e.g., *In re Greenfield*, 24 A.D.2d 651, 652, 262 N.Y.S.2d 349, 351 (2d Dep't 1965). In *Greenfield*, an attorney was suspended for writing letters to a judge which falsely accused him of professional misconduct. *Id.* at 651, 262 N.Y.S.2d at 349. In sustaining the charges of unprofessional conduct, the court acknowledged that judges are not immune from criticism, but reasoned that such false accusations can only impair the dignity of the court and administration of justice. *Id.* at 652, 262 N.Y.S.2d at 350 (citations omitted); *In re Bevans*, 225 A.D. 427, 431, 233 N.Y.S. 439, 443 (3d Dep't 1929). In *Bevans*, an attorney was suspended for making unfounded accusations regarding judicial involvement in a conspiracy aimed at violating the law and preventing proper prosecutions of crimes. See *id.* at 428, 233 N.Y.S. at 440. But see, e.g., *In re Murray*, 11 N.Y.S. 336, 336 (Sup. Ct. Gen. T. 1st Dep't 1890) (allegations of judicial misconduct "should not be entertained . . . except upon the most impressive evidence").

Following New York's adoption of the Code, it appears there are only two reported cases concerning attorney criticism of the judiciary outside a court proceeding. See *In re Baker*, 34 A.D.2d 229, 233, 311 N.Y.S.2d 70, 74 (4th Dep't 1970), *aff'd*, 28 N.Y.2d 977, 272 N.E.2d 337, 323 N.Y.S.2d 837, *cert. denied*, 404 U.S. 915 (1971); Justices of the App. Div. v. Erdmann, 33 N.Y.2d 559, 559-60, 301 N.E.2d 426, 427, 347 N.Y.S.2d 441, 441 (1973). In *Baker*, the New York Court of Appeals affirmed a decision disciplining an attorney for submitting affidavits "containing unwarranted and irresponsible attacks upon the integrity of both the law firm and the Surrogate of Monroe County." *Baker*, 28 N.Y.2d at 977, 272 N.E.2d at 337, 323 N.Y.S.2d at 837. In *Erdmann*, however, the court, without referring to the Code, refused to discipline an attorney for stating that judges were "whores who became madams" because the statements were not censurable. *Erdmann*, 33 N.Y.2d at 559-60, 301 N.E.2d at 427, 347 N.Y.S.2d at 442. Like the *Holtzman* court, the *Erdmann* court gave scant direction to attorneys who wish to express criticism of the judiciary, stating that "[p]erhaps persistent or general courses of conduct, even if parading as criticism, which are degrading to the law, the Bar and the courts, and are irrelevant or grossly excessive, would present a different issue." *Id.* at 559, 301 N.E.2d at 427, 347 N.Y.S.2d at 441. However, in *In*

Rather than limiting the "catch-all" language of subsection (6)[now (7)],⁴⁸ the *Holtzman* court liberally construed the rule to cover a wide spectrum of attorney conduct.⁴⁹ It is submitted, however, that the court failed to articulate sufficient guidelines with respect to what type of conduct would negatively reflect attorneys' fitness to practice law pursuant to DR 1-102(A)(6)[now (7)]. As a result, attorneys contemplating public disclosure of judicial misconduct are left with little guidance to determine whether their actions will subject them to discipline.⁵⁰

Furthermore, the court's broad interpretation of DR 1-102(A)(6)[now (7)] not only proscribes constitutionally unprotected speech, such as knowingly false or reckless statements, but also prohibits some constitutionally protected speech, such as false statements made in good faith.⁵¹ Consequently, the *Holtzman* de-

re Abbott, 167 A.D.2d 617, 618, 563 N.Y.S.2d 848, 850 (3d Dep't 1990), an attorney was disciplined under DR 1-102(A)(6) [now (7)] and DR 8-102(B) for writing letters to judges accusing them of professional misconduct. *Id.* at 618-19, 563 N.Y.S.2d at 849-50. The decision is distinguishable from *Holtzman* in that the *Abbott* court premised the discipline upon the attorney's "making false and unsupported allegations in court proceedings." *Id.* The fact that court proceedings are in progress has permitted encroachment of First Amendment rights. *See, e.g.,* *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2743-45 (1991) (attorney's free speech right is "extremely circumscribed" during judicial proceeding).

The full extent of the degree to which attorneys have been disciplined by the various grievance committees is unknown because all letters issued by a committee disciplining an attorney are private and therefore confidential. *See* [1985] 22 N.Y.C.R.R. §§ 691.4(j) and 691.6(c); *see also* Hal R. Lieberman, *Informal Discipline: Toll To Upgrade Ethics Part I; Admonitions*, N.Y.L.J., Mar. 22, 1991, at 1. According to the article, at least one attorney was reproached for using insulting and derogatory language towards an opposing counsel. *Id.*

⁴⁸ *See* ABA/BNA, *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT*, § 101:602-610 (1987) [hereinafter *LAWYERS' MANUAL*] (discussing broad application of DR 1-102(A)(6) [now (7)]).

⁴⁹ *See* Carlisle, *supra* note 47, at S-30. The author explained, quoting the *Holtzman* decision, that the court expanded subsection (6)[now (7)] by interpreting the "fitness" language of subsection (6)[now (7)] to prohibit "false allegation[s] of specific wrongdoing" against a judge that tends to diminish the public's confidence in the judiciary and disgrace the profession. *Id.*

⁵⁰ *Id.* at S-30. Carlisle further noted that the court's decision was so broad that it will be impossible for an attorney to know in advance whether the rule will be invoked. *Id.*

⁵¹ *See id.*; *see also* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (imposing higher standard of "constitutional malice" in defamation action brought against public official). In *New York Times*, the Supreme Court held that those who publicly criticize public officials within the scope of their official conduct will be afforded First Amendment protection if the statements were made with a good faith belief of truth. *Id.* at 279-80. No protection will be given, however, if the speech was made with actual or constitutional malice, that is, that the publication was made with the knowledge of falsity or with reckless disregard of truth. *Id.* Courts have not clearly defined "reckless disregard." *See* *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) ("reckless disregard" must be determined on case-by-case basis).

The *Holtzman* court followed a number of out-of-state decisions in refusing to label the

cision subjects attorneys to the risk of discipline by leaving uncertain the extent to which practitioners must investigate the merits of their charges prior to public dissemination.⁵² It is submitted that this lack of guidance, coupled with New York's apparent willingness to discipline attorneys for criticizing judges,⁵³ will deter lawyers from fulfilling their duty to reveal professional misconduct.⁵⁴

New York practitioners should be aware that state courts will not tolerate public criticism of members of the judiciary that turns out to be false, regardless of the attorney's state of mind. The court's decision to discipline Holtzman, in an effort to maintain the integrity of the legal profession, was undoubtedly correct on the facts of the case. However, there is a danger that the decision will have a chilling effect on valid criticism of the judiciary by

disciplining of an attorney for criticizing a judge a First Amendment issue. *See, e.g., In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979) (professional misconduct action not protected by First Amendment like law of defamation), *cert. denied*, 444 U.S. 1077 (1980); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 322 (Minn.) (same), *cert. denied*, *Graham v. Weruz*, 111 S. Ct. 67 (1990); *In re Westfall*, 808 S.W.2d 829, 836 (Mo. 1991) (en banc) (same), *cert. denied*, 112 S. Ct. 648 (1991). *But see In re Hinds*, 449 A.2d 483, 497 (N.J. 1982) (stating that conduct in question is speech protected under First Amendment and should rarely be limited). *See generally* Sandra M. Molley, Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 NOTRE DAME L. REV. 489, 499-501 (1981) (discussing need to afford attorneys full First Amendment protection); *see also* LAWYERS' MANUAL, *supra* note 48, § 101:602-610 (discussing historical treatment of attorney criticism of judiciary).

⁵² *See* Carlisle, *supra* note 47, at S-30 (stating that "lawyer[s] who [are] certain of the truth of [their] allegations, but who may be mistaken, [are] completely without any guidelines").

⁵³ *See supra* note 47 (cases discussing New York courts' historical willingness to impose discipline upon attorneys for making false accusations against judges).

⁵⁴ *See* CODE, *supra* note 1, DR 1-103(B). Disciplinary Rule 1-103(B) provides: "A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges." *Id.* In addition, EC 1-4 states that in order to maintain the integrity of the profession, attorneys should voluntarily reveal violations of other lawyers to the proper officials. *Id.* EC 1-4. Furthermore, although EC 8-6 provides that attorneys have a right to criticize judges publicly, it warns them to be sure of their claims and to avoid lessening the public confidence in the profession. *Id.* EC 8-6; *see also* *People v. Doe*, 98 Misc. 2d 805, 809, 414 N.Y.S.2d 617, 621 (Nassau County Ct. 1979) ("When the propriety of professional conduct is questioned, any member of the Bar who is aware of the facts which give rise to the issue is duty bound to present the matter to the proper forum . . ." (citation omitted)).

members of the bar. This would have the ironic result of impeding the very objective the disciplinary rules seek to achieve.

Daniela V. Zenone

PENAL LAW

Penal Law section 245.00: New York Court of Appeals holds that sexual activity in a parked vehicle is not a per se violation of the public lewdness statute

The New York statute prohibiting public lewdness¹ has historically been broadly construed.² In determining whether a particular

¹ N.Y. PENAL LAW § 245.00 (McKinney 1989). The statute provides that "[a] person is guilty of public lewdness when he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act (a) in a public place, or (b) in private premises under circumstances in which he may readily be observed from either a public place or from other private premises, and with intent that he be so observed." *Id.*

Section 245.00 was part of an overall revision of the Penal Law based on recommendations by the Temporary Commission on Revision of the Penal Law and Criminal Code, which reorganized specific offenses and grouped like offenses together. The section replaced § 1140, which provided that "a person is guilty of public lewdness when, in a public place, he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act." N.Y. PENAL LAW § 1140 (McKinney 1967). "[T]he statute was amended. . . to make it clear that lewd conduct in a public place where it is reasonable to assume the actor intends to be observed by the general public" as well as "lewd conduct in a private place when the actor can and intends to be observed from a public place or other private premises constituted the crime of public lewdness." N.Y. PENAL LAW § 245.00 commentary at 296 (McKinney 1989).

Section 245.00 has been challenged numerous times as being unconstitutionally vague, however, these challenges have been rejected. *See People v. Darryl M.*, 123 Misc. 2d 723, 726-27, 475 N.Y.S.2d 704, 709 (N.Y.C. Crim. Ct. N.Y. County 1984) (gravamen of § 245.00 is "lewd public behavior" and not simply exposure of private or intimate parts of body); *People v. Sullivan*, 87 Misc. 2d 254, 254, 383 N.Y.S.2d 791, 792 (Sup. Ct. App. T. 9th Dep't and 10th Dep't 1976) (section 245.00 not void for vagueness). *See generally* Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1539 (1964) (discussing sex offenses in Penal Law).

² *See People v. Gilbert*, 72 Misc. 2d 75, 76, 338 N.Y.S.2d 457, 459 (N.Y.C. Crim. Ct. Kings County 1972). To constitute a violation of the public lewdness statute, the defendant must have committed the allegedly lewd acts in a "public place." *See id.* In determining whether such conduct took place in public, New York courts have defined the term quite liberally. One of the earliest cases involving public lewdness was *People v. Bixby*, 4 Hun 636 (1875). In *Bixby*, the court held that a room in a house of prostitution where women exposed themselves in the presence of men was a "public place," despite the fact that the doors, windows, and shutters of the house were closed. *Id.* The defendants were found guilty of indecent exposure "in a public place." *Id.* Although later cases stated that the statute should be narrowly and strictly construed, these cases held that § 1140 prohibited exposure