UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DORIS L. SASSOWER,

Plaintiff-Appellant,

-against-

Hon. GUY MANGANO, PRESIDING JUSTICE OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, and the ASSOCIATE JUSTICES THEREOF, GARY CASELLA and EDWARD SUMBER, Chief Counsel and Chairman, respectively, of the GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, GRIEVANCE COMMITTEE FOR NINTH JUDICIAL DISTRICT, Does 1-20, being present members thereof, MAX GALFUNT, being a Special Referee, and G. OLIVER KOPPELL, Attorney General of the State of New York, all in their official and personal capacities,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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# BRIEF FOR DEFENDANTS-APPELLEES

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# BRIEF FOR DEFENDANTS-APPELLEES

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## Preliminary Statement

This brief is submitted on behalf of defendants-appellees the Honorable Guy Mangano, Presiding Justice of the Appellate Division, Second Department, and the Associate Justices thereof, as well as Gary Casella and Edward Sumber, Chief Counsel and Chairman, respectively, of the Grievance Committee for the Ninth

Judicial District, the Grievance Committee for the Ninth Judicial District (the "Grievance Committee") and its present members, Special Referee Max Galfunt, and G. Oliver Koppell, former Attorney General of the State of New York (collectively "defendants"). Plaintiff-appellant Doris Sassower ("plaintiff" or "Sassower") appeals from a judgment of the United States District Court for the Southern District of New York dated May 24, 1996 (Sprizzo, J.), which granted defendants summary judgment and denied plaintiff's cross-motions for a preliminary injunction, summary judgment, and reconsideration. (A.2,3).[1]

For the reasons set forth below the district court's judgment should be affirmed.

**Counter-Statement of Appellate and Subject Matter Jurisdiction**

Plaintiff appeals from the judgment of the district court, dated May 24, 1996, dismissing the complaint. The federal district court lacked subject matter jurisdiction to hear plaintiff's claims based on Rooker-Feldman and collateral estoppel. Jurisdiction before the court below was predicated on 28 U.S.C. §§ 2201, 2202, as well as 28 U.S.C. §§ 1331, 1343(3); 42 U.S.C. 1983 and 1985(3), and by the First, Fifth, and Fourteenth Amendments of the United States Constitution. Jurisdiction of the Court of Appeals for the Second Circuit was invoked under 28 U.S.C. § 1291.

[1] "A." refers to plaintiff's appendix, which she describes as "Record on Appeal."

## Questions Presented For Review

1. Did the district court properly rule that it had no subject matter jurisdiction under the Rooker-Feldman doctrine where plaintiff's suit effectively sought to overrule earlier state court determinations?

2. Did the district court properly rule that plaintiff's constitutional claims were barred by res judicata where plaintiff could have, and in fact did, litigate her claims through the New York State appellate courts and ultimately to the United States Supreme Court?

3. Did the district court properly rule that plaintiff's suit against the defendants in their official capacities was barred by the Eleventh Amendment and that defendants were otherwise immune from plaintiff's claims against them in their personal capacities?

4. Did the district court properly exercise its discretion to decline to exercise pendant jurisdiction over plaintiff's state claim for intentional infliction of emotional distress?

5. Did the district court properly deny plaintiff's motion for recusal?

## Statement of the Case

### A. The Disciplinary Petitions Filed Against Sassower And Her Suspension From The Practice Of Law

In 1955, plaintiff was admitted to the New York State bar. In 1987 and 1988, two of her former clients filed complaints

against her with the Grievance Committee relating to fee disputes (A.36). On July 31, 1989, the Grievance Committee filed a report with the Second Department in relation to the complaints (A.36) and, on December 14, 1989, it authorized the prosecution of a disciplinary proceeding against her (A.39, 40). Subsequently, on February 6, 1990, the Grievance Committee issued a disciplinary petition against Sassower (the "February 1990 petition"), which was personally served on her on February 8, 1990. (A.40).

On May 8, 1990, pursuant to 22 N.Y.C.R.R. § 691.13(b)(1), the Grievance Committee filed an order to show cause with the Second Department seeking a court-ordered medical examination of Sassower to determine whether she was mentally capable of practicing law (A.42). Plaintiff filed a cross-motion to dismiss in opposition to the Grievance Committee's application (A.211-213, 373-374). On October 18, 1990, the Second Department granted the Grievance Committee's motion and ordered Sassower to be examined by a qualified medical expert (A.50, 51). She failed to comply with that order (A.50, 51).

Thereafter, on January 25, 1991, the Grievance Committee filed another order to show cause seeking Sassower's immediate suspension from the practice of law for her failure to comply with the October 18, 1990 order (A.48, 50, 51). On January 28, 1991, plaintiff filed a show cause order of her own in opposition to the Grievance Committee's application and for further relief (A.217-219, 366-367). Pursuant to 22 N.Y.C.R.R. § 691.13(b)(1), the Second Department granted the Grievance Committee's motion on June

14, 1991, thereby suspending Sassower's license to practice law pending her compliance with the medical examination order (the "June 1991 suspension order") (A.48, 50, 51).

Approximately one year later, on April 9, 1992, the Grievance Committee issued sua sponte a supplemental petition against Sassower alleging professional misconduct in two previous cases (the "April 1992 supplemental petition") (A.60). Following the supplemental petition the Grievance Committee issued a second disciplinary petition against Sassower on January 28, 1993, arising from five charges the Grievance Committee filed sua sponte (the "January 1993 petition") (A.67). Sometime between January 28, 1993 and February 22, 1993, Sassower was served with notice of the January, 1993 petition (A.67-68).

On March 25, 1993, the Grievance Committee issued a third disciplinary petition based on additional allegations of professional misconduct (the "March 1993 petition") (A.69). Sassower was served with that petition on March 30, 1993.[2]

## B. Sassower's Prior Challenges To The Disciplinary Petitions

On February 22, 1993, Sassower moved to vacate the January 1993 petition for lack of personal jurisdiction (A.68), and on April 14, 1993, Sassower moved to vacate the March 1993 petition for the same reason and because of improper service of process (A.70, 72).

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[2] Sassower claims that the Grievance Committee failed to personally serve her with notice of the January, 1993 and March, 1993 petitions, as required by Judiciary Law § 90(6) (A.67, 68).

The Second Department denied plaintiff's motions to vacate the petitions on May 24, 1993 (A.72), and on June 14, 1993, Sassower moved to reargue/renew (A.72). Sassower also moved the Second Department to dismiss the April 1992 supplemental petition, as well as the February 1990 petition, on the ground that both failed to comply with the provisions of Judiciary Law § 90 and 22 N.Y.C.R.R. §§ 691.4(e)(4), (f), and (h) (A.62, 63).

On November 19, 1993, plaintiff against moved for dismissal/summary judgment of the three disciplinary petitions against her, dated February 6, 1990, January 28, 1993, and March 25, 1993. She also sought discovery of the Grievance Committee's "ex parte" reports, dated July 31, 1989, July 8, 1992, and December 17, 1992; and the appointment of a special referee to investigate and report as to "plaintiff's complaints of prosecutorial and judicial misconduct in connection with all of the disciplinary proceedings against her." (A.77). Plaintiff's dismissal/summary judgment motion additionally sought transfer to another judicial department. (A.77).

The Second Department, by order dated January 28, 1994, denied the dismissal/summary judgment motion (A.80, 81).

**C. Sassower's Prior Challenges To The June 1991 Suspension Order**

Sassower moved by order to show cause for vacatur or modification of the Second Department's June, 1991 suspension order and for a temporary restraining order on the ground that the suspension of her license was "unauthorized and excessive punish-

ment for her attorney's legitimate legal challenge to [the] October 18, 1990 Order." (A.52). The Second Department denied her motion on July 15, 1991 (A.52).

Sassower then moved for leave to appeal to the New York State Court of Appeals (the "Court of Appeals") on the grounds, inter alia, that the Second Department had failed to comply with the requirements of 22 N.Y.C.R.R. § 691.4 and related case law, thereby depriving her of her constitutional right to due process (A. 54, 55). On September 10, 1991, the Court of Appeals denied plaintiff's motion for leave to appeal (A.57).

Nine months later, plaintiff moved to vacate the June 1991 suspension order on the ground that the holding in In re Russakoff, 79 N.Y.2d 520 (1992), required the Second Department hold a post-suspension hearing and to make factual findings on the record (A.62). On July 31, 1992, the Second Department denied this motion and all other relief Sassower requested (A.64). Sassower then moved to appeal as of right to the Court of Appeals with respect to the June, 1991 suspension order on the ground that her constitutional right to equal protection had been denied (A.64, 65). By order dated November 18, 1992, the Court of Appeals dismissed Sassower's appeal for lack of finality (A.65).

Two years later, in October 1994, pursuant to 28 U.S.C. § 1257(a), Sassower filed a petition for certiorari in the United States Supreme Court to review the June 1991 suspension order, which had become final when the New York Court of Appeals denied

leave to appeal.[3] See Cert. Pet'n. at 1. Sassower sought a writ of certiorari on the grounds that: (1) 22 N.Y.C.R.R. § 691.4 is unconstitutional on its face and as applied, (2) New York Judiciary Law § 90 is unconstitutional in failing to provide for a post-suspension hearing, and (3) the Second Department applied the statutory disciplinary provisions in an unconstitutional manner. See id. at 16-25. Her petition for certiorari further states that "the constitutional issues were raised in the Appellate Division, Second Department, the originating court in this proceeding." Id. at A-89, n.1. On May 15, 1995, the Supreme Court denied Sassower's petition. See Sassower v. Mangano, 115 S.Ct. 1961 (1995).

### D. Sassower's Collateral Challenges To The Disciplinary Proceedings Under Article 78 Of The New York Civil Practice Law & Rules

On April 28, 1993, plaintiff brought an Article 78 proceeding against the Honorable Guy Mangano, as Presiding Justice of the Second Department, the Honorable Max Galfunt, as Special Referee, and Messrs. Edward Sumber and Gary Casella, as Chairman and Chief Counsel respectively of the Grievance Committee for the Ninth Judicial District. She sought to stay prosecution of the disciplinary proceedings under the February 6, 1990 petition and to transfer the matter to another department (A.70, 71). In her Article 78 proceeding, Sassower claimed that the defendants failed

[3] In her petition for a writ of certiorari, Sassower appears to appeal from the New York Court of Appeals decisions denying leave to directly appeal the June, 1991 suspension order, and also the dismissal of her Article 78 proceeding.

to comply with jurisdictional pre-petition procedures under 22 N.Y. C.R.R. § 691.4(e) and (f). Id. Defendants moved to dismiss on the grounds of failure to state a claim and the statute of limitations. (A.71); See Sassower's petition for a Writ of Certiorari filed as Sassower Exh. 2A ("Cert. Pet'n.") at A-20. On July 2, 1993, Sassower cross-moved to amend her Article 78 petition to plead an alleged "pattern of abusive and harassing conduct" by the defendants. Compl. ¶ 173. By order dated September 20, 1993, the Second Department denied Sassower's June 14, 1993 reargument/renewal motion, granted the defendants' motion to dismiss the Article 78 petition "on the merits," and denied Sassower's relief requested in her cross-motion. Id. ¶¶ 182, 183, 185; Cert. Pet'n. at A-21.

On January 24, 1994, Sassower appealed the Second Department's dismissal of her Article 78 petition and the denial of her cross-motion on the grounds that: (1) the Second Department acted in a fraudulent and criminal manner, (2) the Second Department improperly reviewed its own conduct in an Article 78 proceeding against it, and (3) the "open-ended interim suspension orders and the disciplinary mechanism" violated her rights to due process, equal protection and free speech. Id. ¶ 198; Cert. Pet'n, at A-93 to A-94.

By decision dated May 12, 1994, the Court of Appeals dismissed plaintiff's appeal taken from defendant Second Department's dismissal of the Article 78 proceeding and denial of her cross-motion for lack of finality and upon the ground that no substantial

constitutional question was directly involved. (A.82, 83). On September 29, 1994, the Court of Appeals denied Sassower's motion to reargue its May 12, 1994 order. See Cert. Pet'n. at A-23.

## E. Sassower's District Court Action

On June 20, 1994, plaintiff filed her action in the United States District Court for the Southern District of New York, under 42 U.S.C. § 1983. She claimed that defendants conspired to deprive her of her constitutional rights for their various roles in the prosecution and adjudication of the disciplinary petitions lodged against her, which led to her suspension from the practice of law (A.23-32). Plaintiff sought a declaration that "the June 14, 1991 order suspending Plaintiff from the practice of law [is] a legal nullity and such other and further equitable relief as may be just and proper ...," along with compensatory and punitive damages, attorney's fees, and costs (A.92).

Plaintiff pleaded four causes of action: (1) declaratory relief that 22 N.Y.C.R.R. §§ 691.4(l)(1) and 691.2 are unconstitutional on their face and as applied (A.83-87); (2) damages based on defendants' violation of her constitutional rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1988 (A.88-90); (3) damages based on defendants' conspiracy to deprive plaintiff of her constitutional rights and professional license to practice law under 42 U.S.C. § 1983(3) (A.90-91); (4) damages based on defendants' intentional infliction of emotional distress (A.91-93).

## F. The District Court Decision

The district court granted summary judgment in favor of defendants on the grounds that it lacked subject matter jurisdiction under the Rooker-Feldman doctrine. It also found that plaintiff's constitutional claims were barred by res judicata, and that defendants were immune from suit either by reason of the Eleventh Amendment or because of judicial, quasi-judicial, and prosecutorial immunity. The court also declined to exercise pendant jurisdiction over plaintiff's state court intentional infliction of emotional distress claim.

Explaining the Rooker-Feldman doctrine, the district court stated, "[i]t is well established that a federal district court is one of original, and not appellate, jurisdiction and therefore has no subject matter jurisdiction to review state court decisions." (A.14).

Applying this doctrine to the facts in this case the court held:

> Sassower challenged the June 1991 suspension order directly in the Second Department and collaterally in the Article 78 proceeding. Thereafter, Sassower pressed both her statutory and constitutional challenges to the June 1991 suspension order and to the New York State bar disciplinary rules upon which they were issued, in the state appellate courts and ultimately in the Supreme Court. Indeed, Sassower raised all of the claims asserted herein in the state court and in her petition for a writ of certiorari...
>
> ***
>
> Because in the instant case all of the claims asserted here, including the general challeng-

> es to the constitutionality of the statutory scheme, were raised and denied in the state proceedings ... Sassower's constitutional challenge to the state bar disciplinary rules are inextricably intertwined with her particular case. See Feldman 460 U.S. at 475.

(A.15).

As to the applicable immunities, the court held that: (1) defendant Justices were judicially immune because "Sassower has alleged no basis upon which a fact finder could rationally infer that defendant... [Justices] acted outside their proper jurisdictional capacities in adjudicating Sassower's disciplinary petition and claims raised in relation thereto, let alone that they acted in the 'clear absence of all jurisdiction,' citing Stump, 435 U.S. at 356-57; see also Pierson, 386 U.S. at 554; (2) defendants Galfunt, Casella, Sumber, and the members of the disciplinary committee were immune based on quasi-judicial immunity (A.19); (3) and the defendant Attorney General enjoyed absolute prosecutorial immunity (A.19). The district court also held that with respect to plaintiff's suit against defendants in their official capacity, the suit was barred by the Eleventh Amendment (A.20).

## Standard Of Review

This Court reviews "de novo a district court's grant of summary judgment." Mortise v. United States, 102 F.3d 693, 695 (2d Cir.1996)(citations omitted). The standard for review of a determination that the court lacks subject matter jurisdiction under the Rooker-Feldman doctrine is also de novo. Moccio v. New York State Office of Court Administration, 95 F.3d 195, 198 (2d

Cir.1996). Summary judgment should be granted when, viewing all the evidence in a light most favorable to the nonmoving party, there is no genuine issue of fact. Id.; see also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

## ARGUMENT

### POINT I

### THE DISTRICT COURT PROPERLY RULED THAT IT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS UNDER THE ROOKER-FELDMAN DOCTRINE

By her action, plaintiff, in effect, asked a federal district court to overturn state court orders suspending her license to practice law, and denying her various challenges to that suspension. Because a federal court may not sit as an appellate tribunal to review state court proceedings, the district court properly found that it lacked subject matter jurisdiction, and dismissed the complaint.

Under our federal system, the jurisdiction of the federal district courts is "strictly original." Thus, under Article III of the Constitution and the judiciary laws establishing their jurisdiction the district courts have no authority to sit as appellate tribunals over state courts.

In Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983), the Supreme Court established that a federal district court lacks subject matter jurisdiction to review state

court judicial proceedings, except for review on an application for a writ of habeas corpus. See Texaco Inc. v. Penzoil Co., 784 F.2d 1133, 1142 & n.6 (2d Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987). Federal review of state court decisions can be obtained only in the Supreme Court pursuant to 28 U.S.C. § 1257. This rule has become known as the "Rooker-Feldman doctrine". See Feldman, 460 U.S. at 476; Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296 (1970); Texaco, 784 F.2d at 1142.

This Court has recently reiterated that under the Rooker-Feldman doctrine, "federal district courts lack jurisdiction to review state court decisions whether final or interlocutory in nature." Gentner v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995). See also Moccio v. New York State Office of Court Administration, 95 F.3d 195 (2d Cir. 1996); Richardson v. District of Columbia Court of Appeals, 83 F.3d 1513 (D.C. Cir. 1996); Odom v. Columbia University, 906 F. Supp. 188, 196 (S.D.N.Y. 1995).

While the Rooker-Feldman doctrine is based on a federal district court's subject matter jurisdiction, it closely parallels the doctrines of claim and issue preclusion. Indeed, this Court stated in Moccio, 95 F.3d 199-200, that "where a federal plaintiff had an opportunity to litigate a claim in a state proceeding ..., subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under the principles of preclusion." This Court also reasoned that "[i]f the precise claims raised in a state court proceeding are raised in the

subsequent federal proceeding, Rooker-Feldman plainly will bar the action." Moccio, 95 F.3d at 198-199. As demonstrated in Point II, intra, plaintiff's challenges to her discipline and suspension were raised and decided in her various motions, an Article 78 proceeding, and state court appeals, including a petition for certiorari to the United States Supreme Court. Thus, her complaint is also barred under the doctrines of collateral estoppel and res judicata.

While Rooker-Feldman does not prevent federal district courts from hearing general challenges to state statutes or rules and regulations, they cannot entertain challenges to specific state court determinations involving such statutes, rules and regulations or any claims "inextricably intertwined" with the state court's determination. "'Inextricably intertwined' means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding (as either a plaintiff or a defendant in that proceeding), subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under the principles of preclusion." Moccio, 95 F.3d at 200. See, supra. Moreover, "the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." Texaco, 481 U.S. at 25, 107 S.Ct. at 1533 (Marshall, J., concurring).

In this case plaintiff's challenge to New York state disciplinary statutes, and the rules and regulations governing attorneys, do not fall within the general-challenge exception,

since plaintiff already made these challenges in state court and they actually were decided. Moccio, 95 F.3d at 198-199. Furthermore, Sassower's constitutional arguments would require a federal court to reverse the state courts' orders already rendered against her. This a federal district court may not do.

## POINT II

### PLAINTIFF'S CLAIMS WERE BARRED BY THE DOCTRINES OF ISSUE AND CLAIM PRECLUSION

The doctrines of res judicata and collateral estoppel serve the "dual purpose[s] of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979). Under 28 U.S.C. § 1738, federal courts must give the same preclusive effect to state court judgments as the judgment would receive in the courts of the rendering state. Migra v. Warren City School Board of Education, 465 U.S. 75, 80-81 (1984); Kremer v. Chemical Construction Corp., 456 U.S. 461, 466-85 (1983); Allen v. McCurry, 449 U.S. 90, 96-97 (1980). Accordingly, if under New York law, plaintiff would be precluded from re-litigating her claims in state court, she cannot pursue them in federal court.

Here, the district court correctly found that plaintiff's constitutional claims were barred by res judicata. Liona Corp. v. PCH Associates, 949 F.2d 585, 594 (2d Cir. 1991)(where claims were raised, or could have been raised in a prior proceeding involving the same parties or their privies, resulting in a judgment on the

merits, they are barred by res judicata); see also Winters v. Lavine, 574 F.2d 46, 57 (2d Cir. 1978).

All of Sassower's claims were exhaustively raised and rejected in state court. Therefore they were barred here. Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973), cert denied, 416 U.S. 906 (1974). Plaintiff challenged the constitutionality of the June, 1991 suspension order and the disciplinary statutes, rules and regulations, through the New York State courts and in the United States Supreme Court. The New York State Court of Appeals' dismissal of her January 24, 1993 appeal on the ground that no substantial constitutional question was involved was a final adjudication on the merits. Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 521 (2d Cir.), cert. denied, 434 U.S. 834 (1977); McCune v. Frank, 521 F.2d 1152, 1155 (2d Cir. 1975); Olitt v. Murphy, 453 F. Supp. 354, 359 (S.D.N.Y.), aff'd, 591 F.2d 1331 (2d Cir. 1978), cert. denied, 444 U.S. 825 (1979).

Alternatively, her claims were barred by collateral estoppel, which, under New York law, forecloses re-litigation of an issue if (1) the issue sought to be precluded is identical to the issue necessarily decided in a prior action; and (2) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the point. See, e.g., Giakoumelos v. Coughlin, 88 F.3d 56, 59 (2d Cir.1996); Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455-56 (1985); Ryan v. New York Telephone Co., 62 N.Y.2d 494, 500-01 (1984); Schwartz v. Public Administrator, 24

N.Y.2d 65, 71 (1969). These requirements were satisfied in this case.

First, the issues in plaintiff's state court challenges, which culminated in her petition for certiorari to the United States Supreme Court, are identical to the issues in this federal court challenge. In her petition for certiorari, which was prepared by retained counsel, plaintiff framed the issues as follows:

> Whether New York's attorney disciplinary law is unconstitutional, as written and as applied:
>
> > 1. where an attorney can be immediately, indefinitely, and unconditionally suspended from the practice of law by an interim order, without findings, reasons, notice of charges, a pre-suspension hearing, or a post-suspension hearing for nearly four years;
> >
> > 2. where a disciplined attorney has no absolute right of judicial review, either by direct appeal or by the codified common law writs;
> >
> > 3. where adjudicative and prosecutorial functions are wholly under the control of the courts, enabling them to retaliate against attorneys who are judicial whistle-blowers;
> >
> > 4. where disciplinary proceedings: (a) do not comply with the court's own disciplinary rules; (b) are commenced by ex parte applications, without notice or opportunity to be heard; (c) deny the accused attorney all discovery rights, including access to the very documents on which the proceedings purport to be based; (d) do not rest on sworn complaints; (e) do not rest on an accusatory instrument or are asserted "on information and belief", not based on any probable cause finding of guilt.

(A.304). Thus, contained within the petition are the very arguments and challenges plaintiff makes in her current federal

district court complaint. The certiorari petition references the litany of orders regarding her discipline in state court (A.362-429), and it also contains plaintiff's arguments regarding the constitutionality of New York's disciplinary statutes, rules, and regulations (A.326-342).

In state court, and all the way to the United States Supreme Court, plaintiff exhaustively challenged, both directly and collaterally, the disciplinary petitions lodged against her, and her suspension from the practice of law. Accordingly, the issues sought to be precluded here, namely plaintiff's discipline and suspension from the practice of law, are identical to the issues which were already litigated and decided in state court.

Once the proponent of collateral estoppel establishes that the identical issue was actually litigated and decided, the burden shifts to the opponent to demonstrate the absence of a full and fair opportunity to litigate the issue. Schwartz v. Public Administrator, 24 N.Y.2d at 73. In this case, plaintiff cannot possibly argue that she did not have a full and fair opportunity in state court to litigate her discipline and her suspension. With respect to the disciplinary proceedings, plaintiff could have presented her challenges in the underlying disciplinary proceedings, or by way of a motion to confirm, or reject a referee's report. With respect to her suspension, plaintiff could have opposed, and in fact, did oppose the Grievance Committee's application to determine her incapacity from continuing to practice law, and her suspension based on her failure to comply with the

order that she submit to a medical examination. In opposition to the Grievance Committee's May 8, 1990 show cause order that plaintiff submit to a medical examination, plaintiff opposed with a cross-motion to dismiss (A.211-213, 373-374). In opposition to the Grievance Committee's January 25, 1991 show cause order that plaintiff be suspended for failing to comply with the order that she submit to a medical examination, plaintiff filed her own show cause order on January 28, 1991 (A.217-219, 366-367). Plaintiff also challenged her discipline and suspension with various other motions, and collaterally attacked it under CPLR § 7801 et seq., eventually petitioning the United States Supreme Court for certiorari. See (A.303-439). Unquestionably, therefore, plaintiff had a full and fair opportunity to litigate her claims.

## POINT III

**PLAINTIFF'S CLAIMS FOR DAMAGES UNDER 42 USC § 1983 WERE PROPERLY DISMISSED BECAUSE THE ELEVENTH AMENDMENT BARS SUIT AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITY; DEFENDANTS ALSO ARE IMMUNE FROM PLAINTIFF'S SUIT IN THEIR PERSONAL CAPACITIES**

### A. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution bars suit against the State of New York in federal court, regardless of the relief sought, unless the State consents to be sued or Congress enacts legislation overriding the State's Eleventh Amendment immunity. Papasan v. Allain, 478 U.S. 265, 276, 106 S. Ct. 2932, 2939 (1986); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 907 (1921). The

Eleventh Amendment similarly bars suit against State agencies. See, e.g., Owens v. Coughlin, 561 F. Supp. 426, 428 (S.D.N.Y. 1983) (Eleventh Amendment required dismissal of suit brought against the New York State Department of Correctional Services).

"This law has been held to apply regardless of whether the relief sought is equitable or legal in nature." De La Nueces v. United States, 780 F. Supp. 216, 217 (S.D.N.Y. 1992) (citations omitted) (action against New York State seeking to compel it to reinstate a particular grocery store to the food stamp program was barred by the Eleventh Amendment).

Moreover, not only may plaintiff not sue the State, but the facts and circumstances pleaded in the complaint must be carefully reviewed to determine if individually named state officials are merely nominal parties. If that is the case, the action must similarly be dismissed because the State is the real party in interest and the action is barred by the Eleventh Amendment. Scheuer v. Rhodes, 416 U.S. 232, 237, 94 S. Ct. 1683, 1687 (1964); Ford Motor Co. v. Department of Treasury of the State of Indiana, 323 U.S. 459, 65 S. Ct. 347 (1945); In re New York, 256 U.S. 490, 500, 41 S. Ct. 588, 590 (1921); Edelman v. Jordan, 415 U.S. 651, 662, 94 S. Ct. 1347, 1356, rehearing denied, 416 U.S. 1000, 94 S. Ct. 2414 (1974).

In the present case, plaintiff's complaint alleges that the defendants are being sued in their official capacities. It is well established, however, that "[a] suit seeking money damages from a State official in his official capacity is ... barred by the

Eleventh Amendment ... " Allah v. Commissioner of Department of Correctional Services, 448 F. Supp. 1123, 1125 (N.D.N.Y. 1978), citing, Edelman v. Jordan, 415 U.S. 651 (1974). See also Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921, 93 S. Ct. 1552 (1973). While many factors are considered in determining if an individual defendant is a sham party, the litmus test has consistently been the "source of recovery." Trotman v. Palisades Interstate Park Commission, 557 F.2d 35, 38 (2d Cir. 1978). If the suit for damages is brought against a state official acting in his official capacity, the suit is barred by the Eleventh Amendment because the source of recovery for potential damages would be the state treasury, and the suit, therefore, is one against the state. Edelman, 451 U.S. at 675, Trotman, 557 F.2d at 38. Here, it was evident from reading the complaint, that the plaintiff sued the defendants in their official capacities, and accordingly, the complaint was properly dismissed under the Eleventh Amendment.

Moreover, there was no subject matter jurisdiction over plaintiff's claim for monetary relief. In Will v. Michigan Department of State Police, 491 U.S. 58 (1989), the Supreme Court concluded that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" and no action for money damages against them may lie. Will, 491 U.S. at 71. Here, it is clear that this action is against State officials acting in their various official capacities, namely, members of the disciplinary committee making complaints against an attorney, a hearing

officer, conducting hearings over disciplinary proceedings, Appellate Justices rendering orders regarding the disciplinary proceedings, and the State Attorney General, whose office defended the state officials. Therefore, to the extent that plaintiff's 42 U.S.C. § 1983 claim was for compensatory damages it was properly dismissed.

B. Absolute Immunity

In addition to their Eleventh Amendment immunity the defendants in this case enjoyed either absolute judicial or prosecutorial immunity or quasi-judicial immunity which barred plaintiff's claims against them in their personal capacities.

1. Defendant Justices and Special Referee

It is well-established that a judge is absolutely immune from suit for acts done in the exercise of his or her judicial function, even where these acts are in excess of jurisdiction, or are alleged to have been done maliciously or in bad faith. Indeed, "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as the Supreme Court recognized when it adopted the doctrine in Bradley v. Fisher, 13 Wall. 335 (1872)." Pierson v. Ray, 386 U.S. 547, 553-554 (1967). See also Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 288 (1991) ("[J]udicial immunity is not overcome by allegations of bad faith or malice..."); Stump v. Sparkman, 435 U.S. 349, 355-56 (1978).

The only prerequisites to judicial immunity are that the judge not act in the "clear absence of all jurisdiction" and that he be performing a judicial act or one which is judicial in nature. Stump v. Sparkman, supra, 435 U.S. at 356-357; Pierson v. Ray, supra, 386 U.S. at 554-54.

New York Judiciary law § 90(2) provides the statutory authority for the Appellate Division to suspend any attorney engaged in professional misconduct from the practice of law, and to hear related challenges (A.18). Thus, as the district court below found "[a]s a result, Sassower has alleged no basis upon which a fact finder could rationally infer that defendant Judge Mangano and the associate justices of the Second Department acted outside their proper jurisdictional capacities in adjudicating Sassower's disciplinary petition and claims raised in relation thereto, let alone that they acted in the 'clear absence of all jurisdiction.'" (A.18-19) (quoting Stump, 435 U.S. at 356-57; see also Pierson, 386 U.S. at 554). In addition, absolute immunity bars Sassower's claims against administrative officials, like the defendant Special Referee, performing discretionary acts of a judicial nature. See Cleavinger v. Saxner, 474 U.S. 193, 200 (1985); Butz v. Economou, 438 U.S. 478, 513 (1978); Oliva v. Heller, 839 F.2d 37, 39 (2d Cir. 1988).

Here, the sole basis for plaintiff's claims against defendant Second Department and defendant Galfunt is the way in which they rendered decisions in plaintiff's state court litigation. There is no indication in the complaint that these defen-

dants were proceeding in the clear absence of all jurisdiction. Accordingly, plaintiff's claim for damages against them was barred.

2. **Grievance Bar Committee Members**

The quasi-judicial immunity extends to state bar committee members Casella, Sumber and the members of the Grievance Committee, because state bar disciplinary proceedings are clearly judicial in nature, see Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 433-34 (1982); Klapper v. Guria, 582 N.Y.S.2d 892, 895 (N.Y. Sup. Ct. 1992)(quasi-judicial immunity bars action against counsel to state bar disciplinary committee and its members for prosecution and adjudication of disciplinary petition).

3. **Attorney General**

The defendant Attorney General, as advocate for the state, was entitled to absolute prosecutorial immunity, regardless of his motives. Thus, even if, as plaintiff alleges, and for argument's sake only, the Attorney General had conspired to maliciously prosecute the disciplinary petitions against her, her claims against him would nevertheless be properly dismissed. See, e.g., Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Imbler v. Pachtman, 424 U.S. 409 (1976).

Having dismissed all of Sassower's federal claims, the district court properly exercised its discretion and declined to exercise pendent jurisdiction over her state claim for intentional infliction of emotional distress. United Mine Workers of America v.

Gibbs, 383 U.S. 715, 726-27 (1966); Diamond v. Am-Law Publishing Corp., 745 F.2d 142, 148 (2d Cir. 1984).

## POINT IV

### THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR RECUSAL

One day prior to the oral argument of all outstanding motions, plaintiff filed a motion for recusal pursuant to 28 U.S.C. §§ 144 and 455. Plaintiff claimed, without any factual support, that the district court had a personal bias against her. The court denied the motion both because it was untimely, and because it was meritless, since it demonstrated at best only that she was dissatisfied with the court's rulings. Plaintiff then sought reconsideration claiming that the court's conduct was "maliciously calculated to injure" her. The reconsideration motion was based on the claim that the court had imposed a short deadline on her to file her motions. Even though it had also imposed the same deadline on the defendants. The district court also denied the motion for reconsideration.

Manifestly, both of the district court's denials were correct. The standard for recusal under 28 U.S.C. § 455(a) is whether a person knowing and understanding all of the facts and circumstances could reasonably question the court's impartiality. See, e.g., In re Drexel Burnam Lambert, 861 F.2d 1307, 1309 (2d Cir. 1988), reh'g denied en banc, 869 F.2d 116 (2d Cir.), cert. denied, 490 U.S. 1102 (1989). "'Judicial rulings alone ... almost never constitute valid basis for a bias or partiality motion' and

'can only in the rarest circumstances evidence the degree of favoritism or antagonism required.'" In Re International Business Machines Corp., 45 F.3d 641, 644 (2d Cir.1995)(quoting Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147 (1994). Recusal motion must be "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." Apple v. Jewish Hospital and Medical Center, 829 F.2d 326, 333 (2d Cir. 1987). A recusal motion is "committed to the sound discretion of the district court," and "the issue on appeal is whether the court abused its discretion." United States v. Lovaglia, 954 F.2d 811, 815 (2d Cir. 1992).

Here, Plaintiff's arguments that Judge Sprizzo should have recused himself for bias is without merit. First, plaintiff's application is untimely. Plaintiff filed her complaint on June 20, 1994, and her recusal motion was made on October 26, 1995, one day prior to oral argument on all outstanding motions. Second, plaintiff's argument that Judge Sprizzo manifested a bias against her is, at most, a dissatisfaction with the court's rulings, and is otherwise factually unsupported. For example, the deadlines for all outstanding motions that was imposed on plaintiff were also imposed on defendants. Accordingly, plaintiff's recusal arguments lack merit.

## CONCLUSION

**FOR ALL THE FOREGOING REASONS, THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED**

Dated: New York, New York
March 4, 1997

Respectfully submitted,

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