Keep for files

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THE WHITE HOUSE

WASHINGTON

March 19, 1993

Peggy Fields
225 West 83rd Street
Number 6-F
New York, NY 10024

Dear Ms. Fields,

Thank you for your letter and packet introducing Mr. Howard Wieder. I will be happy to bring it to Mrs. Clinton's attention.

With kind regards,

Sincerely yours,

Margaret

Margaret A. Williams
Assistant to the President
and Chief of Staff to
the First Lady

PEGGY FIELDS
225 WEST 83RD STREET #6-F
NEW YORK, NEW YORK 10024
(212) 595-4113

thanks for writing

March 3, 1993

Ms. Margaret Williams
Chief of Staff to
Ms. Hillary Rodham Clinton
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Ms. Williams:

I am writing to you to acquaint you with a person who exemplifies the same sensitive feel for lawyer ethics and social, legal, economic, and moral reform as do President and Mrs. Clinton: Mr. Howard Wieder, a 39 year old attorney.

On December 22, 1992, the New York Court of Appeals, our State's highest court, issued its landmark decision in <u>Wieder</u> v. <u>Skala</u>, the first of its kind in our nation's history. Much has been written about Mr. Wieder by people who write far better than I do, so I am simply enclosing copies of numerous press clippings and a copy of the decision in the <u>Wieder</u> case.

I know of few people who have this kind of love of law and passion for justice. Mr. Wieder has a personal courage and tenacity that are very rare, having fought for over five years to change the law, at great personal sacrifice.

In a world where there is so much bad news, I guess I just would love to see ordinary people who are doing extra ordinary things recognized in some way. Knowing of Mrs. Hillary Rodham Clinton's own passion for justice and for correcting society's ills, I thought I should bring Mr. Wieder to your attention. If you, in turn, see fit to bring it to Mrs. Clinton's attention, that would be great.

I leave it in your hands and thank you for taking the time to read this letter and the enclosures.

Sincerely,

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cc: Senator Daniel Patrick Moynihan

Original incoming
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Give to HRC

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To dispatch

Vol. 13, No. 4
February 15, 1993

LAWYERS ALERT

The NATIONAL EDITION of Lawyers Weekly Publications

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page 13

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Settlements

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Employment Law

Union Worker Sues Employer In Tort 11

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Motorist Crashes Into Cow; State Liable 12

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The New York court said that the duty to comply with the state bar's ethical rules (including reporting misconduct by fellow attorneys) is an "implied-in-law" condition of the plaintiff's employment. Since the lawyer was fired in violation of this condition, he can sue for breach of contract.

Fired lawyer — and plaintiff — Howard Wieder looks over files pertaining to his case.

Pathological Liar

The plaintiff discovered that a fellow associate, who was handling a real estate transaction for him, had lied about the matter. When he confronted two of the firm's senior partners, they acknowledged that the associate was a "pathological liar." The associate himself admitted committing malpractice with regard to the plaintiff and a number of the firm's clients.

The plaintiff insisted that the partners report the associate to the state bar's disciplinary committee, and eventually met with the committee himself to discuss the matter. The firm responded by firing the plaintiff.

"In any hiring of an attorney as an associate to practice law with a firm," the court said, "there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession."

Because reporting other lawyers' misconduct is "essential to the survival of the profession," and a lawyer who fails to do so could himself be disciplined or disbarred, the court held that the expectation that an attorney would report a colleague's fraudulent behavior is so basic that it doesn't need to be expressly negotiated to be a part of the employment contract.

"Insisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship," the court said.

It distinguished this case from two earlier ones in which financial managers were *not* allowed to sue after they were fired for whistle-blowing. The court found that the "unique characteristics of the legal profession [*i.e.*, its ethical rules] make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to [their] corporate employers."

In-House Counsel

Lawsuits brought by in-house counsel involve different issues, with the courts usually focusing on the traditional right of a client to fire an attorney at will, and the possibility that an attorney who "blows the whistle" on a corporate employer may violate the attorney-client privilege.

In *Nordling* v. *Northern States Power Co.*, 478 N.W.2d 498 (1991), the Minnesota Supreme Court allowed an in-house counsel to bring a common-law wrongful discharge suit, saying it was not precluded by the attorney-client privilege.

But in *Balla* v. *Gambro, Inc.*, 584 N.E.2d 104 (1991), the Illinois Supreme Court refused to allow an in-house lawyer to sue after he was fired for reporting his company's sale of defective dialysis machines to the FDA. "It would be inappropriate for the employer/client to bear the economic costs and burdens of their in-house counsel's adhering to their ethical obligations," the court said.

The court in *Willy* v. *Coastal Corp.*, 647 F.Supp. 116 (S.D. Texas 1986), *rev'd in part on other grounds*, 855 F.2d 1160 (5th Cir. 1988), said in-house counsel whose employers engage in illegal conduct cannot use the "public policy" exception to the at-will employment rule.

New York Court of Appeals. Wieder v. Skala, No. 256. December 22, 1992. Lawyers Alert No. 9027342 (14 pages). To order a copy of the opinion, call 800-933-5594.

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ON THE COVER:
Law firms respond to hard times.

ILLUSTRATION BY GRACE DE VITO
ABAJ PHOTO BY CHRISTOPHER FITZGERALD

JOURNAL

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Whistleblower Wins Appeal

N.Y. court rules attorney can't be fired for reporting dishonest colleague

Lawyers who blow the whistle on unethical colleagues are more honored in theory than in practice. After all, whistleblowers shake up the status quo and cause problems. Still, as George Bernard Shaw once observed, "All progress depends on the unreasonable man."

Howard Wieder, a Manhattan attorney and determined whistleblower, won a major victory in the New York Court of Appeals on Dec. 22 after a five-year trek through the state's court system. The state's high court, in the first decision of its kind in the United States, held 5-0 that lawyers who follow the requirements of the professional disciplinary rules and report dishonest colleagues cannot be fired in retaliation.

The decision represented a break from past rulings in which the court declined to protect corporate whistleblowing employees, said Seth Rosner, chair of the ABA Standing Committee on Professionalism. "I think it demonstrates that this court is concerned about lawyer discipline," he said.

Legal ethics professors, virtually all of whom had supported Wieder's position, were exhilarated by the court's decision, which reversed two lower court rulings.

"This opinion is the first volley in an effort to extend protection for lawyers who may suffer retribution when they comply with their ethical obligations," predicted Stephen Gillers, a professor at New York University School of Law.

Wieder, a 39-year-old commercial litigator, started as an associate with the New York City firm of Feder, Kaszovitz, Isaacson, Weber and Skala in 1986. While working at the firm, another associate, Larry Lubin, was assigned to handle the closing for Wieder's $340,000 apartment. Wieder alleges that Lubin never did the work and engaged in a pattern of misconduct, including the forging of firm checks.

From the point he made those discoveries, said Wieder, he implored the firm's partners to report Lubin's conduct. "I told the partners day by day for three months that they had an obligation to inform the state bar disciplinary committee," he recalled.

The firm saw the situation otherwise. "This was not some kind of a Watergate situation," said partner Murray Skala. "This was a dispute between two associates in a firm." But finally, with Wieder's prodding, the firm reported Lubin in December 1987 to the disciplinary authorities. Wieder was fired in March 1988.

Wieder, not easily discouraged, filed suit against his former law firm and Lubin. "I'm the first-born child of two sole survivors of the Holocaust," he said. "That fact is part of the historical mix in my background that motivates my quest for justice."

Howard Wieder: Being a child of Holocaust survivors "motivates my quest for justice."

Wieder noted in his case that under New York law, as in most states, a lawyer has a duty to report information that "raises a substantial question as to another lawyer's honesty, trustworthiness or fitness."

The case took a toll on Wieder, who is now a lawyer with Harvis, Trien & Beck in Manhattan. He was unemployed for nine months and spent $150,000 on the litigation. He was fortunate, though, to receive substantial pro bono help on appeal from a well-known mother-and-son legal team: David Vladeck, acting director of the Public Citizen Litigation Group, and New York employment lawyer Judith Vladeck.

Officers of the Court

In December, Wieder's gamble paid off. The New York Court of Appeals held that the right of employers to fire employees at will for nondiscriminatory reasons did not apply to lawyers who had a duty to report wrongdoing. "Associates are, to be sure, employees of the firm but they remain independent officers of the court, responsible in a broader public sense for their professional obligations," wrote Judge Stewart Hancock Jr. The judges remanded Wieder's case for trial.

The opinion, which legal experts believe will prove persuasive to other state courts, removes a powerful incentive for lawyers to keep colleagues' wrongdoing secret. "Until now, lawyers faced a Hobson's choice," said David Vladeck. "They could either report and face economic retaliation, or they could remain silent and face disbarment."

Wieder's former law firm, which denies that it fired him in retaliation for his whistleblowing, disagrees with the court's opinion. Said Skala: "We have a mechanism in place for the policing of attorneys through the disciplinary committee. I have trouble understanding why a law firm can fire a secretary at will but can't fire a lawyer in that situation."

But ethics specialists disagree. "The idea that you don't squeal or rat on another lawyer is an ethic for the schoolyard or the alley, and not for a learned profession that exists for the public interest," said Professor Monroe Freedman of the Hofstra University School of Law.

Leonard Gross, a professor of legal ethics at Southern Illinois University School of Law in Carbondale, Ill., saw the Wieder case as a teaching tool. At the invitation of Gross, who filed an amicus brief in support of Wieder with 11 other ethics and labor law professors, Wieder spoke with the teacher's 60-student professional responsibility course by conference call. Said Gross, "I wanted my class to know that there's more to practice of law than making money."

—*Andrea Sachs*

ABAJ/LAUREN SHAY

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THE **NEW YORK NEWSDAY INTERVIEW** WITH **HAL LIEBERMAN**

Holding Lawyers to the Letter of the Law

Newsday / Richard Lee

BAR TENDER

Hal Lieberman is chief counsel to the state Disciplinary Committee office that handles complaints of attorney misconduct in Manhattan and the Bronx. Shaun Assael spoke with him for New York Newsday.

Q. Last month, New York's Court of Appeals ruled that whistle-blower laws must protect lawyers who are fired because they reveal attorney misconduct. What does the ruling say about the way the legal profession regulates itself?

A. There is a provision in the Lawyer's Code of Professional Responsibility that requires lawyers to report the conduct of other lawyers if they have knowledge of misconduct. The simple truth of the matter, though, is that this is often ignored. Lawyers don't like to do it. So the Court of Appeals apparently felt a need to emphasize the importance of this as a policy matter.

Q. The case revolved around attorney Howard Weider, who charged that he had been fired from his law firm for reporting the wrongdoing of a colleague. Are there many Howard Weiders?

A. It's hard to say, but there are increasing instances of lawyers coming forward. I believe it's because of several recent cases in which lawyers have been disciplined for not reporting [malfeasance]. For instance, the Illinois Supreme Court suspended an attorney for failing to report the fact that a predecessor lawyer had apparently misappropriated his client's funds. The court was quite exercised. Subsequently, there was a well-publicized case in New York City that involved the failure of attorneys Michael Dowd and Albert Pennisi to report certain lawyers who were involved in the Parking Violations Bureau scandal. That failure was a significant factor in their suspension. As a result, lawyers are more aware of their obligations today.

Q. What trend is your office charting?

A. In 1992 we saw an increase of about 20 percent in the overall number of complaints filed against lawyers. We went from 2,800 in 1991 to about 3,200 last year. Out of that, about 75 to 85 cases resulted in public discipline, meaning censure, suspension or disbarment. That is nearly twice what it was in 1991. This doesn't mean serious misconduct is twice what it was a year ago. It simply means that change in this office has enabled us to increase our productivity. The figures for private discipline — which is to say, letters of caution, admonition or reprimands — run between 150 and 200 cases a year. That's been a constant figure for the last several years.

Q. Who complains more, lawyers or the public?

A. My guess would be that [lawyers' complaints account for] no more than 10 percent overall, but it might even be lower.

Q. Does that trouble you?

A. No. Sometimes lawyers' complaints against one another are motivated by a desire to gain an edge in litigation, so they use the disciplinary committee for leverage. You have to take lawyers' complaints with a grain of salt. What troubles me is that we don't get more complaints from judges. I think judges are generally objective, neutral people who would be in the best position to actually observe lawyer misconduct, and would have much less at stake.

Q. What's typical lawyer misconduct?

A. Neglect of client matters and misappropriation of client funds. We've recently had major cases involving large sums of money. These are horror stories because we're talking about widows and orphans. Thank goodness for the Lawyer's Fund for Client Protection in Albany, which compensates victims of fraud. Lawyers pay for it out of their [registration fee] dues and don't get enough credit for doing so. Other professions don't have anything like it.

Q. Have you thought about attaching the guilty party's assets to provide restitution to the victim?

A. Every time we file charges, we include language which permits the court to enter a money judgment. That can be used by the victim or the Lawyer's Fund to go into court to execute that judgment.

Q. What are the most common misperceptions the public has about what you do?

A. What the public misperceives is at the extremes. Either they think the disciplinary committee doesn't do anything at all and it's a waste of time to file a complaint, or that if they file a complaint the lawyer will end up in Rikers Island. But there are some realistic concerns that we don't do enough. If the rules were changed, maybe we could do more. Take fee disputes, which we see a lot. If there was a mandatory fee arbitration mechanism, that could solve a lot of people's problems when they feel they've been overcharged. Right now, there is no meaningful remedy we can provide.

The New York Times

NEW YORK, WEDNESDAY, DECEMBER 23, 1992

New York Court Shields Lawyers Who Report Dishonest Colleagues

By DAVID MARGOLICK

New York State's highest court ruled yesterday that law firms cannot dismiss lawyers for doing what their professional disciplinary rules require — blowing the whistle on a dishonest colleague.

The court, the State Court of Appeals, has almost uniformly protected the rights of employers to dismiss almost any worker for almost any reason, at least when anti-discrimination laws do not apply. But given the role of lawyers as self-regulated officers of the court, the court held, in a 5-to-0 decision, that the rights of law firms must be read more narrowly.

The requirement that lawyers with evidence casting substantial doubt on "another lawyer's honesty, trustworthiness or fitness" inform disciplinary authorities is an implicit part of his employment contract with a law firm, the court held. When a firm discharges a lawyer for making such a report, it held, that firm can be sued for breach of contract.

'Survival of the Profession'

Writing for the court, Judge Stewart F. Hancock Jr. said that no lawyer should have to choose between discharge for following the Code of Professional Responsibility or disbarment or suspension for failing to do so. He called the reporting requirement "nothing less than essential to the survival of the profession."

The ruling, which reversed two lower court decisions, came in the case of Howard L. Wieder, a lawyer who claims his former law firm, Feder, Kaszovitz, Isaacson, Weber & Skala of Manhattan, dismissed him five years ago for insisting it report a dishonest colleague to disciplinary authorities. With the court's decision yesterday, Mr. Wieder's lawsuit may now proceed to trial.

By protecting whistle-blowing lawyers against retaliatory discharge, the decision, apparently the first of its kind in the country, could compel the bar to police itself and weed out miscreants more conscientiously.

The decision also marked the court's

Continued on Page B4, Column 1

AT A1,
COL. 2

Court Backs Lawyers Who Report Dishonesty

Continued From Page A1

Marilynn K. Yee/The New York Times

Howard L. Wieder, a lawyer, claims his former law firm, Feder, Kaszovitz, Isaacson, Weber & Skala of Manhattan, dismissed him five years ago for insisting it report a dishonest colleague to disciplinary authorities. He looked over files relating to his lawsuit against the firm in 1989.

most dramatic incursion to date into what has been, at least in New York, the largely sacrosanct right of employers to choose and lose employees at will. Those protections on the books in the state, for instance, for civil servants reporting official malfeasance, are there by statute, not court decision.

Twice before, the court has explicitly declined to protect whistle-blowers, claiming that, as it once said, "such a significant change in our law is best left to the Legislature."

Those decisions, the court noted, involved financial managers in large corporations, who are "intrinsically different" from lawyers, because lawyers are not just employees of law firms but also court officers, "responsible in a broader public sense for their professional obligations."

Ramifications Unclear

"Insisting that as an associate in their employ, plaintiff must act unethically and in violation of one of the primary rules," Judge Hancock wrote, "amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship."

Former Chief Judge Sol Wachtler, who heard the case when it was argued in October but who resigned in November after his arrest on extortion charges, did not participate in the decision. Nor did the court's newest member, Judge George Bundy Smith.

Wayne Outten of Lankenau, Kovner & Bickford, an employment law specialist who unsuccessfully represented another whistle-blower before the court, said the decision marked the first time the court has recognized that the right of employers to dismiss employees at will was subject to any implied limitations. Its potential ramifications, he said, were "hard to figure."

"It could be limited to associates in law firms, but it could be applied to other professions, such as doctors, nurses and accountants," he said. "Now that the door has been opened, it's unclear what claims and employees the courts will allow in."

As it has in the past, the court declined to recognize a more general right of employees to sue for "abusive discharge," a cause of action in several other states, despite what the court called the "persuasive" arguments and "compelling" circumstances of Mr. Wieder's case.

Law firms, fearing the loss of clients, bad publicity or higher insurance premiums, have often been hard on any whistle-blowers.

"Study after study nationwide reflects that lawyers don't report misconduct by other lawyers," said Mr. Wieder's lawyer, David Vladeck of Public Citizen Litigation Group in Washington, D.C. "This decision basically opens the door for lawyers to fulfill their ethical and moral duty."

Lawyers at Feder, Kaszovitz have denied that Mr. Wieder's discharge was retaliatory. Gabriel Kaszovitz, a partner at the firm, said he welcomed the chance to try the case.

But by reading the parties' expectations into an employment contract, he said, the court had opened "a big barn door" for lawsuits.

Wrongdoing Acknowledged

In 1986 Mr. Wieder retained another lawyer in his firm, Larry Lubin, to handle the closing of his condominium. Mr. Lubin, he later charged, neglected his duties, then misled him to cover up that neglect. When Mr. Wieder complained to partners at Feder, Kaszovitz, he said, the firm made light of his experience.

Mr. Lubin subsequently acknowledged wrongdoing, and the firm reported him to the Departmental Disciplinary Committee of the Appellate Division of State Supreme Court in December 1987, three months after Mr. Wieder's complaint. The complaint was ultimately dismissed. So, too, was Mr. Wieder, in March 1988.

Mr. Wieder contends that the dismissal was retaliatory. The firm maintains that it dismissed him for his "poor work habits, unacceptable performance, inability to work with others and poor attitude."

The 39-year-old Mr. Wieder, now a lawyer with the Manhattan firm of Harvis, Trien & Beck, said he was "delighted" by the ruling, but said his whistle-blowing days were over.

"I've been portrayed as crazed, eccentric and litigation-prone, I was unemployed for nine months, I've gone into massive debt," he said. "Even with this decision, any lawyer who pressures his or her law firm to do the right thing will still have to pay an immense price. But now maybe the travail will be considerably lighter than what I've had to face."

THE NATIONAL
LAW JOURNAL
The Weekly Newspaper for the Profession
VOL. 15—NO. 20 PRICE $3.00 MONDAY, JANUARY 18, 1993

Help Wanted

THE ASSOCIATE who says he was fired for pushing his former firm to report ethics violations is in search of lawyers.

In the wake of the New York Court of Appeals' Dec. 22 landmark ruling creating protection for whistle-blowing attorneys, **Howard L. Wieder** of New York's **Harvis, Trien & Beck** is preparing for trial, alleging wrongful termination by New York's **Feder, Kaszovitz, Isaacson, Weber & Skala.** He is assisted so far by **Jeremiah S. Gutman** of New York's **Levy, Gutman, Goldberg & Kaplan.** Public Citizen Litigation Group's **David Vladeck,** who handled the appeal, believes he will find help because the ruling changed the law, adding, "Howard has a very good chance of prevailing at trial." But Feder Kaszovitz's **Gabriel Kaszovitz** downplays those chances, saying, "Right now they're only allegations." —*Andrew Blum*

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WHISTLE-BLOWING LAWYERS PROTECTED
TIMES UNION (AL) - WEDNESDAY December 23, 1992
By: Associated Press
Edition: Two Star Section: Capital Region Page: B2
Word Count: 173

TEXT:
ALBANY - Lawyers should not have to choose between being fired for whistle-blowing on a dishonest colleague and facing disbarment or suspension for failing to do so, the state's highest court ruled Tuesday.

It's implicit in a lawyer's employment contract with a law firm that he inform disiplinary authorities of evidence casting substantial doubt on "another lawyer's honesty, trustworthiness or fitness," the Court of Appeals held in a 5-0 decision.

When a firm discharges a lawyer for making such a report, that firm can be sued for breach of contract, the court held in a decision that apparently is the first of its kind in the country.

Judge Stewart Hancock Jr., writing for the court, called the reporting requirement "nothing less than essential to the survival of the profession."

The ruling reversed two lower-court decisions in the case of HOWARD WIEDER , a lawyer who claims that his former Manhattan law firm, Feder, Kaszovitz, Isaacson, Weber & Skala, dismissed him five years ago for insisting that it report a dishonest colleague to authorities.

w York Law Journal

NCH AND BAR SINCE 1888

—NO. 121 NEW YORK, WEDNESDAY, DECEMBER 23, 1992 PRICE $2.50

Attorney Wins Trial on Firing

Duty of Ethical Conduct Implied in Employment Relationship

BY GARY SPENCER

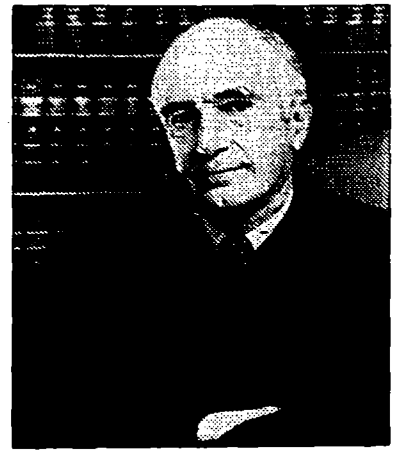
ALBANY — Establishing special protection for whistle-blowing attorneys, the Court of Appeals ruled yesterday that the Code of Professional Responsibility imposes an implied duty of good faith in employment agreements among lawyers that limits a firm's right to fire associates at will.

The 5-0 ruling reinstated a breach of contract claim Manhattan lawyer Howard L. Wieder had filed against the firm of Feder, Kaszovitz, Isaacson, Weber & Skala, which he claims fired him in 1988 for insisting that it report the misconduct of another associate to disciplinary officials.

"We agree with plaintiff," the Court said in an opinion by Judge Stewart F. Hancock Jr., "that in any hiring of an attorney as an associate to practice law with a firm there is an implied understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession." *Wieder v. Skala*, No. 256.

Supreme Court and the Appellate Division, First Department had dismissed Mr. Wieder's breach of contract and wrongful discharge claims based on New York's long-standing employment at will doctrine, which they said permitted the firm to fire him for any reason or for no reason. They found no exception for whistle-blowers.

The City Bar's Committee on Professional Responsibility and more than a dozen legal ethics and labor law authorities from around the country urged the Court in amicus briefs to recognize an exception for attorneys fired "for complying with their ethical obligations" under the code to report wrongdoing by lawyers to disciplinary authorities. They said the lower court rulings would deter reporting by exposing attorneys to retaliatory dismissal.



Judge Hancock

The Court rejected Mr. Wieder's ar-

Continued on page 2, column 6

Appeals Court Highlights

The State Court of Appeals yesterday:

■ **Unanimously adopted** a rule to protect attorneys who report professional misconduct from retaliatory firing, finding an implied obligation in employment agreements among lawyers to practice law in compliance with ethical rules and standards.

Trial for Attorney

Continued from page 1, column 6

gument that the public policy underlying the mandatory reporting rule provides a basis for his wrongful discharge claim. "While the arguments are persuasive and the circumstances here compelling," it said, "we have consistently held that 'significant alteration of employment relationships . . . is best left to the Legislature.' "

'Distinct Relationship'

But on the breach of contract claim, it said the "distinctive relationship between a law firm and a lawyer" distinguished the case from prior decisions in which it refused to find exceptions to the employment at will doctrine.

"Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations," it said. "Practically speaking, plaintiff's duties and responsibilities as a lawyer and as an associate of the firm were so closely linked as to be incapable of separation."

The rule of professional conduct involved in *Wieder* is DR 1-103(A), which requires attorneys to report potential violations by other attorneys that relate to their "honesty, trustworthiness or fitness" to practice.

The Court said the rule "is critical to the unique function of self-regulation belonging to the legal profession," and observed that failure to comply can result in sanctions. It said the firm's alleged conduct placed Mr. Wieder "in the position of having to choose between continued employment and his own potential suspension and disbarment."

The decision does not mean all provisions of the code "should be deemed incorporated as an implied in law term in every contractual relationship between or among lawyers," the Court said. But it described DR 1-103(A) as a "core Disciplinary Rule" which requires an "implied obligation of good faith and fair dealing."

"Insisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship," the Court said.

Mr. Wieder was represented by Washington D.C. attorney David C. Vladeck of the Public Citizen Litigation Group. The firm defended itself, with Gabriel Kaszovitz arguing before the Court.

THE WALL STREET JOURNAL.

WEDNESDAY, DECEMBER 23, 1992 PRINCETON, NEW JERSEY

LAW

Job Protection Is Won by Lawyer In Case About Co-Worker's Ethics

By EDWARD FELSENTHAL
And ARTHUR S. HAYES
Staff Reporters of THE WALL STREET JOURNAL

A young lawyer, besting his elders in court, won job protection for law-firm associates who raise ethical concerns about the actions of other lawyers in their firm.

In an opinion issued yesterday, New York's highest court said a one-time associate who was fired after reporting a co-worker's alleged violation of ethical rules could sue his former firm over his dismissal. The decision is believed by lawyers to be the first by any state appeals court to allow a law-firm associate to bring such a claim.

The court declined to apply to law firms the usual state rule allowing employers to fire their non-union employees for any reason and at any time. The "employment-at-will" doctrine doesn't govern the case, the court wrote, because of the implied understanding "that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of profession." As in most states, New York's ethical rules for lawyers require members of the bar to report violations by other members.

"Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations," the court said.

The plaintiff in the case, Howard L. Wieder, contends that the Manhattan law firm Feder, Kaszovitz, Isaacson, Weber & Skala fired him in March 1988 after he discussed the co-worker's alleged violations with disciplinary authorities. The co-worker, also an associate at the firm, had been assigned to represent Mr. Wieder in a personal legal matter and had committed fraud and several acts of legal malpractice, Mr. Wieder alleges.

The firm had argued that under New York law it has the right to fire Mr. Wieder, and a lower-court judge agreed, dismissing the case. Responding to the appeals court's decision to overrule the lower court, legal-ethics specialist Stephen Gillers, of New York University law school, said that "it's a blue-ribbon day for the New York Court of Appeals." He added that the decision "gives muscle to the associate to stand up to the partner who insists on doing wrong."

Although New York law gives little protection to whistle-blowers in other industries, the court said the ethics rule requiring lawyers to report violations by their peers "is critical to the unique function of self-regulation belonging to the legal profession."

Gabriel Kaszovitz, a partner at Feder Kaszovitz, criticized the decision for "fundamentally changing the law" and altering "the at-will doctrine by court rule rather than legislative enactment."

Mr. Kaszovitz said the firm itself reported the ethical violations that Mr. Wieder had discovered and that Mr. Wieder was fired not because of his whistle-blowing but because of "improper handling" of his job. "We have no problem with one employee lodging complaints against another employee," Mr. Kaszovitz said.

Mr. Wieder, who is now an associate at another Manhattan law firm, says he has an additional case pending against Manufacturer's Hanover Trust Co., where he worked as a lawyer after leaving Feder Kaszovitz. He contends the company fired him in February 1991 after the Feder Kaszovitz case received some high-profile news coverage.

In addition to the free legal work Mr. Wieder has received from the Washington civil-rights group Public Citizen and from Judith Vladeck, a New York employment lawyer, the 39-year-old lawyer says he has spent more than $100,000 of his own money for legal fees in the Feder Kaszovitz case. He also says he spent thousands of dollars preparing and mailing letters to lawyers, professors and bar groups seeking support for his lawsuit.

Because of the appeals court's decision, the case will now go back to a trial court to determine whether, in fact, he was fired because of his whistle-blowing. No trial date has been set.

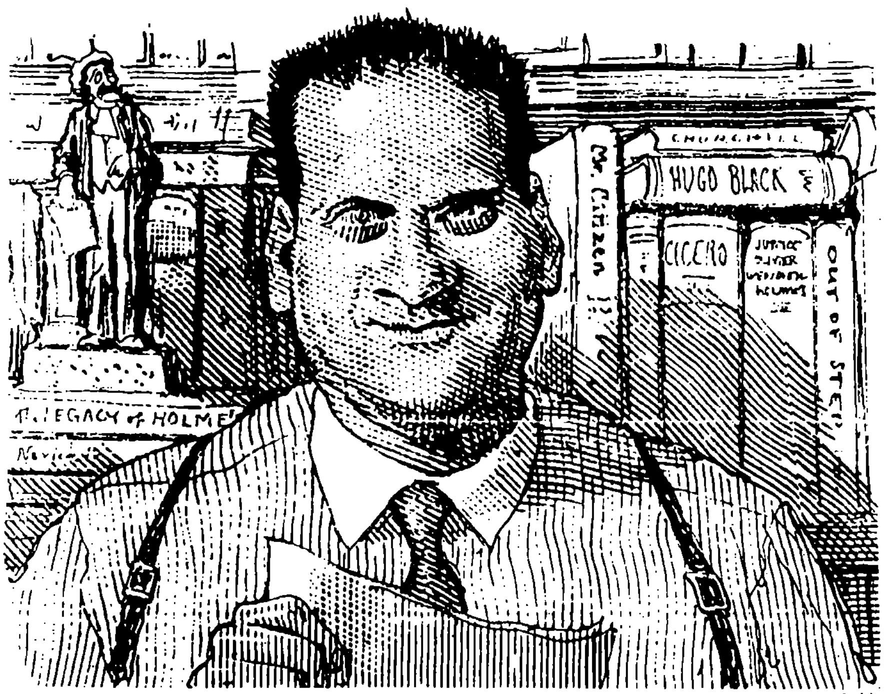
AT B6,
COL. 4

The New York Times

NEW YORK, FRIDAY, MARCH 15, 1991

At the Bar | David Margolick

A crusader's issue: What should be done when a whistle-blower in a legal firm is dismissed?



Drawing by Elliott Banfield

Howard Wieder's crusade to make lawyers more honest snuck into Albany last week, two years and at least $100,000 in out-of-pocket expenses after it began. Soon, New York's highest court, the Court of Appeals, will decide whether to take on Mr. Wieder's case, and thereby enter the legal and moral thickets it represents.

Authorities on legal ethics are closely watching. So too, perhaps, are the photocopying and paper pulp industries, A.T.&T., the United States Postal Service and other enterprises Mr. Wieder has been subsidizing.

Whistle-blowers, to paraphrase F. Scott Fitzgerald, are very different from you and me. And in his obsession for his cause, the 37-year-old Mr. Wieder is extreme even by whistle-blower standards.

In September 1987 Mr. Wieder, a lawyer at the Manhattan firm of Feder, Kaszovitz, Isaacson, Weber & Skala, told the partners that the lawyer they had supplied for his house-closing had acted unethically, and should be reported to disciplinary officials. Under the Code of Professional Responsibility, lawyers must disclose misconduct by peers; they can lose their licenses if they don't.

But instead of following his recommendation, Mr. Wieder said, the firm dismissed him. He has filed suit, charging wrongful discharge.

The firm has called the charges "the product of an unstable and depraved personality," even though the lawyer at issue later conceded that Mr. Wieder's accusations were accurate. But whom you believe hasn't mattered, at least not yet.

In August 1989 Acting Justice Edward H. Lehner of State Supreme Court in Manhattan ruled that laws authorizing employers to dismiss employees at will apply to lawyers, too. Last November the Appellate Division unanimously upheld that ruling. Now Mr. Wieder has gone to the Court of Appeals.

He argues that lawyers, unlike other workers, must blow the whistle when they see wrongdoing in the profession. Further, he argues, because lawyers are officers of the court, the courts and not the Legislature can regulate the terms of their employment and exempt them from dismissal for whistle-blowing.

Mr. Wieder has become a familiar figure at Tower Copy, an Upper West Side store whose machines have duplicated the legal materials and letters — elaborate, handwritten affairs up to 35 pages long, filled with references to Emile Zola, Dietrich Bonhoeffer, Winston Churchill and Benjamin Cardozo — with which he deluges those whose support he seeks.

He has become a fixture at the philatelic window of the Vanderbilt Station post office, where he has cleaned out the supply of Chief Justice John Marshall commemorative stamps and done his part to keep the first-class rate from rising beyond 29 cents.

Recipients of the Wieder file include Senators Daniel Patrick Moynihan and Alfonse M. D'Amato; Justices William J. Brennan Jr. and Lewis F. Powell Jr. of the United States Supreme Court and President Bush.

Mr. Wieder said he now owes his trial lawyer, Jeremiah Gutman of New York, some $30,000. To defray those costs, Mr. Wieder plans to nominate himself for the first annual Rolaids Relief Hero Award, a $25,000 jackpot earmarked for "an unsung individual or group who improves the quality of life in a community."

His financial picture grew more bleak last month when, a day after an article on his case appeared in the magazine Manhattan Lawyer, he was dismissed from his post as vice president and counsel at the Manufacturers Hanover Trust Company — though whether out of dissatisfaction with him or distaste for his conspicuous crusading is not clear.

But Mr. Wieder has enlisted allies to file friends-of-the-court briefs for him, including the New York City Bar Association's Committee on Professional Responsibility and 11 experts in ethics and labor law, including Leonard Gross of Southern Illinois University, Charles W. Wolfram of Cornell, and Clyde W. Summers of the University of Pennsylvania.

"If the decision of the Appellate Division is not reviewed, what shall I tell my students who plan to practice in New York?" Mr. Summers, an authority on labor law, asked in an affidavit submitted to the Court of Appeals. "Shall I warn them not to report misconduct lest they lose their jobs? Shall I tell them that the Court of Appeals does not care?"

To Mr. Gross, an ethics specialist, as to many of those he deals with, Howard Wieder is exasperating, endearing, and, ultimately, convincing. "I enjoy talking with Howard, even though I can't always get him off the phone," he said. "He is monomaniacal on seeing that justice is done. That's not necessarily a bad thing, because it requires a Don Quixote to be willing to buck the establishment."

THE NATIONAL LAW JOURNAL, Nov. 2, 1992, at 8, col. 1

The Dangers Of Upholding Legal Ethics

BY ANDREW BLUM
National Law Journal Staff Reporter

ALBANY, N.Y. — In another life, Howard L. Wieder might have been an ombudsman, but in this one he's a noodge. His persistence in pushing his former law firm to report an ethics violation got him fired, he says.

Since being fired in 1988, the associate has been equally persistent in pursuing and publicizing his lawsuit against the firm, even to the point of showing up unannounced at a newspaper office — this one, in fact — as an article about him and his case was being prepared for publication.

At first, Mr. Wieder may have come across as merely eccentric. But now, armed with the amicus support of 13 ethics and labor law experts and the Association of the Bar of the City of New York, the case of Mr. Wieder, who prodded the firm to report the violations of another associate, has taken on added significance. The issue came before the Court of Appeals here Oct. 21 as the state's highest court heard his appeal of lower court rulings quashing his complaint. *Wieder v. Skala*, 88/17278.

As the arguments began before a six-judge panel in the ornate courtroom, Mr. Wieder, a tall, beefy man, sat in the first row of the spectator section, across from a fireplace on the side of the room. (The seventh jurist, Judge George B. Smith, recused himself from the case.)

The plaintiffs say the case is the first in New York — and possibly in any jurisdiction — to raise the question of whether the at-will doctrine bars a suit by a lawyer fired because he insisted the firm comply with ethics reporting requirements.

Mr. Wieder, formerly of New York's Feder, Kaszovitz, Isaacson, Weber & Skala, is seeking $500,000 in damages, alleging that his dismissal stemmed from his repeated prodding at the firm to report what he said were ethics violations by fellow associate Larry A. Lubin. The firm has denied the allegations.

According to the complaint, Mr. Lubin did some real estate legal work for Mr. Wieder on the purchase of a condominium, and while performing those duties made false statements about his mortgage. The statements ended up costing Mr. Wieder $27,000, and he asked the firm to report the incident to disciplinary officials.

The firm first refused to do so but then relented, the suit said. Only later was Mr. Wieder fired. The suit, whose allegations include wrongful discharge, was partly dismissed in August 1989 by a trial court, which said that no "statutory or public policy exception" to the New York state employment-at-will doctrine protects attorneys from discharge. Mr. Wieder appealed, but the Appellate Division affirmed the trial court in November 1990. (NLJ, 6-18-90.)

Mr. Wieder is represented by David C. Vladeck of Washington, D.C.'s Public Citizen Litigation Group and his mother, Judith P. Vladeck of New York's Vladeck, Waldman, Elias & Engelhard P.C. Mr. Vladeck said their client wants vindication. In the plaintiffs' brief to the Court of Appeals, Mr. Wieder's lawyers said it was wrong for the lower courts to say that all regulatory power over lawyers rests with the legislature.

"The regulation of lawyers in New York has historically been the sole province of the judiciary, and, especially here, where the integrity of the judicial process is at stake, there is no reason why this court should defer to the legislature," the brief said. "To ensure that lawyers are not deterred from reporting

EXHIBIT A
BLOWING THE WHISTLE

dishonest and corrupt members of the bar, this court should hold that firms that fire lawyers who report ethics violations may be sued for wrongful discharge."

And, the plaintiffs warn, denying the claim of Mr. Wieder would portend ominously in New York. "Law firms intent on concealing misconduct can simply make it known that anyone who files a report with the disciplinary committee, or even suggests that reporting it is in order, will be discharged summarily," the brief said. "Indeed, if the decision below is affirmed, firms will not even have to make explicit threats, as were made here to scare off Wieder."

At the arguments, Mr. Vladeck said attorneys such as Mr. Wieder should be given leeway because they face "a special burden" of ethical responsibility. Under questioning by Judge Judith S. Kaye, Mr. Vladeck said the law differed from other professions because it is "regulated by the courts, not the legislature."

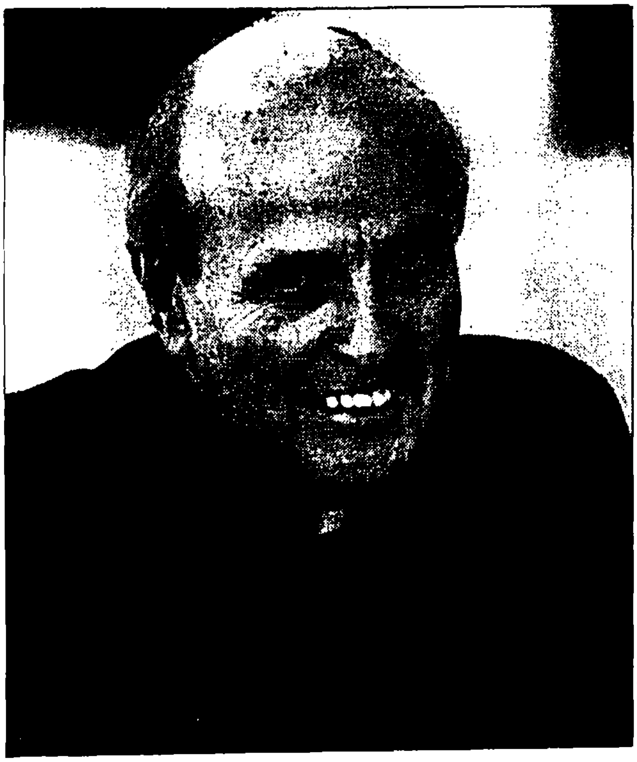
The defense brief, signed by four attorneys at the firm — Gabriel Kaszovitz, Murray L. Skala, Jay D. Lukowski and Bruce Robins — said the plaintiff's contentions did not amount to much. "This case is not unique; it is another in a long line of cases in which self-proclaimed 'whistle-blowers' have attempted to circumvent the well-established at-will employment doctrine to create a non-statutory cause of action for wrongful discharge," the firm said.

Those named individually in the suit are Messrs. Skala and Kaszovitz as well as Alvin M. Feder, Marcel Weber, Leonard A. Isaacson, Richard J. Gottlied and Mr. Lubin, who is no longer with the firm. Feder Kaszovitz and the named lawyers "categorically deny plaintiffs' claim that his employment was terminated in retaliation for insisting that the defendants report Lubin's misconduct...To the contrary, plaintiff was terminated for cause, which was wholly unrelated to Lubin."

The defense also mentions that it was not alone in being sued by Mr. Wieder. In one case, he is said to have sued the management of his condominium building, alleging defamation, that among things "harmed [him] in his...ability to attract a mate." He also sued his subsequent employer, Chemical Bank, for firing him, the defense said. *Wieder v. Adler*, 26359/90 (Sup. Ct., N.Y. Co.); *Wieder v. Chemical Bank*, 6726/92 (Sup. Ct., N.Y. Co.).

The plaintiffs, in their reply brief, say that bringing up Mr. Wieder's other suits is unfair. "Respondents attempt to portray Wieder as litigation prone and eccentric by citing isolated (and highly edited) snippets from complaints Mr. Wieder has filed in two other cases," the brief said. "In point of fact...both related to the difficulties Wieder has had...since his discharge from Feder Kaszovitz. If anything, these cases underscore the difficulty that a lawyer who has been fired by his firm has in trying to reclaim his good standing in the profession." (Mr. Wieder, a New York University School of Law graduate, now works for New York's Harvis, Trien & Beck.)

Returning to the central issue in the case, the 10-attorney Feder Kaszovitz said professional guidelines are clear. "That attorneys should conduct themselves ethically is not in dispute. It is equally clear that under public policy articulated by the legislature...allegations of attorney misconduct should not, in the first instance, be exposed to public scrutiny."



Jon Crispin

SILENCE: Upholding the lower court 'will inhibit young associates...in speaking their minds on issues of legal ethics,' Prof. Robert Drinan wrote.

AMICI: Prof. Charles W. Wolfram of Cornell Law School is one of 13 ethics and labor law professors who joined in support of Howard L. Wieder.

Arguing for the firm in court, Mr. Kaszovitz said there is, of course, nothing wrong with the duty to report. But when asked if dismissing Mr. Wieder's case would be tantamount to condoning an ethics violation, he said, "No. There is an enforcement procedure in place." He added: "There is a flaw in the argument by the appellant and the amici." But when pressed by Judge Kaye on whether there was agreement that the situation was unique, Mr. Kaszovitz said, "I concede that." Later, he said allowing Mr. Wieder's cause of action will not necessarily make things better: "This can cause a lot of mischief."

The 13 ethics and labor law professors in Mr. Wieder's corner as amici are Leonard Gross of Southern Illinois University School of Law, Charles W. Wolfram of Cornell Law School, Ronald D. Rotunda of the University of Illinois College of Law, W. William Hodes of the University of Indiana School of Law, L. Harold Levinson of Vanderbilt University School of Law, Richard L. Abel of UCLA School of Law, Theodore J. Schneyer of the University of Arizona College of Law, David Luban of the University of Maryland School of Law, Deborah L. Rhode of Stanford Law School, former Congressman Robert F. Drinan of Georgetown University Law Center, Clyde W. Summers of the University of Pennsylvania Law School, Gary Minda of Brooklyn Law School and Matthew W. Finkin of the University of Illinois College of Law.

Said Professor Jacobs in her portion of the amicus brief: "The issues implicated by this appeal are ones that this court has not addressed. Nor have these issues received adequate attention in other states. A decision by New York's highest court would be of assistance to all jurisdictions that seek to ensure greater professional responsibility among practicing attorneys."

Added Professor Drinan: "As a professor intimately involved in the problems of legal ethics — especially those experienced by younger lawyers — I feel that the existence of the decision involved here as a precedent will inhibit young associates in law firms in their aspirations to be courageous in speaking their minds on issues of legal ethics within law firms."

And Professor Summers said he won't know what to tell his students if the lower court decision stands. After all, he noted, for 49 years he has taught law students it is their duty to uphold professonal integrity. "If the decision...is not reviewed...what shall I tell my students who plan to practice in New York? Shall I warn them not to report misconduct lest they lose their jobs? Shall I tell them the Court of Appeals does not care?"

The New York bar association's Committee on Professional Responsibility said the problem presented by the case is that an attorney reporting misconduct is unprotected from retaliation for complying with professional standards. "The lawyer would then have the Hobson's choice of facing discipline for failure to report misconduct, or the loss of a job for reporting misconduct," the brief said. "In today's legal market, the loss of a job could be tantamount to the loss of a legal career; few attorneys are likely to comply with their ethical obligations in the face of such economic coercion."

A ruling is expected around the first of the year.

SECOND CLASS

SPECIAL SECTION: COMMERCIAL REAL ESTATE PAGES 37–43

MANHATTAN LAWYER

VOL. 4, NO. 2 ■ THE MONTHLY NEWSPAPER FOR THE NEW YORK LEGAL COMMUNITY ■ MARCH 1991

INSIDE

Your Ethics Or Your Job!

Howard Wieder claims he shouldn't have been fired for snitching on a fellow associate. So far, the courts won't hear his case.

By CAROLINE V. CLARKE

Howard Wieder is no ordinary plaintiff. For one thing, he's a lawyer. He's wanted to be one since age four or five and traces his aspirations to a tragic family history: His mother's four brothers, all lawyers, died in Nazi concentration camps. His father—a Holocaust survivor—had to abandon his law studies when the war broke out. Wieder adopted his father's broken dream.

Little did he realize where that dream would lead. Rather than making his mark as a gifted scholar like his idols Benjamin Cardozo, Louis Brandeis, and Oliver Wendell Holmes, Wieder, 37, has made a dubious name for himself as a whistle-blower.

Wieder has brought disciplinary complaints against the five name partners of his former firm, 12-lawyer Feder, Kaszovitz, Isaacson, Weber & Skala. Wieder maintains he was fired for insisting that Feder, Kaszovitz report a fellow associate to the disciplinary authorities, an action the firm begrudgingly undertook in December 1987.

"All I did was what I am ethically bound to do," Wieder says. For that, he makes no apologies.

His ensuing suit has become more a crusade than a case. Stripped to its essentials, *Wieder* v. *Skala* is a retaliatory discharge case. But Wieder's allegations in the suit raise a question of first impression that could affect every lawyer in the state: Is there a cause of action for a lawyer who claims he was fired for complying with his ethical obligation to report another attorney's professional misconduct to disciplinary authorities?

Thus far, much to the chagrin of several eminent law professors and bar association officials who have submitted *amicus* briefs in support of Wieder, the response has been no. Following setbacks at the state Supreme Court and Appellate Division levels, Wieder is exercising his final option. At press time, he was helping his lawyers prepare a motion to be filed directly with the state Court of Appeals.

A RULE WITH NO BITE

In pursuing his case in the lower courts, Wieder has been stymied by New York's at-will employment doctrine, a judge-made law holding that, in the absence of an agreement specifying terms of employment, an employee can be fired at any time for any non-discriminatory reason.

Unless the Court of Appeals makes an exception to the doctrine, say Wieder's lawyers and the ethics and labor law experts who support his case, the so-called snitch rule will have no bite. This rule, which is contained in the state's version of the American Bar Association Model Code, requires lawyers to report the misconduct of other lawyers to disciplinary authorities. Lawyers already find the idea of reporting the improprieties of another member of the bar highly distasteful, says Leonard Gross, a legal ethics professor at Southern Illinois University School of Law who filed an *amicus* brief on Wieder's behalf. The Wieder case, as it stands, threatens to make it even more so.

"I really can't think of a case that is more important, most obviously for young lawyers in law firms, but really for all lawyers," says Charles Wolfram, a Cornell University School of Law ethics specialist and another *amicus*. "It's a question of whether a law firm has the ability to sweep bad dealings under the carpet and not be called to task for it."

Wolfram, who has been discussing the Wieder case with his students, says that one of their most common fears is what to do if a senior partner says to ignore what seems like an ethical breach. The Wieder decisions are not easing that fear, he says.

David Vladeck of Washington, D.C.'s Public Citizen Litigation Group, lead

Howard Wieder: "All I did was what I am ethically bound to do."

counsel for Wieder's appeal, hopes that is about to change. "The message the lower courts have given is unequivocal, and that is that lawyers who report [other lawyers] are fair game for reprisal," Vladeck says. "Is that a conscionable message for the courts to send? I believe the Court of Appeals will say, 'No, it is not.' "

TO SNITCH OR NOT TO SNITCH?

The facts behind *Wieder* v. *Skala* are the source of bitter dispute. This much the two sides agree upon: Feder, Kaszovitz, a general practice firm located in the garment district, recruited Wieder from Gold, Farrell & Marks in June 1986. Wieder, a 1978 New York University School of Law graduate, was brought in as a litigation associate. His work received mixed but generally good reviews—Wieder has kept the memos to prove it.

In March 1987 Wieder decided to purchase a $339,000 West Side condominium and asked the firm to handle the matter. The partners agreed to donate the time of real estate associate Larry Lubin. From April through September 1987 Lubin discussed the transaction with Wieder several times, assuring him that he had secured a mortgage at a favorable interest rate. Lubin even proposed an elaborate design for the two-bedroom apartment. Wieder says he regarded that extra effort as "icing on the

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Your Ethics Or Your Job!

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cake. If a lawyer has done this, as the client, you figure everything else has been attended to, everything else is under control."

But just days before Wieder expected to close the deal, he learned that Lubin had been lying. There was no mortgage; Lubin had not even spoken with the Citibank loan officer with whom he claimed to be in frequent contact. Wieder says he salvaged the purchase at a penalty of roughly $27,000 in extra financing costs.

Here is where the stories diverge. Wieder claims that when he told the partners about Lubin's misconduct in September 1987, they acknowledged an awareness of, in Wieder's words, Lubin's "pathology of lying." Name partners Gabriel Kaszovitz and Murray Skala even acknowledged that Lubin had mishandled some other client matters as well, according to Wieder. When Wieder insisted that the partners report Lubin to the disciplinary authorities, they said that they wanted to "hold off" that option, Wieder says.

Kaszovitz claims that is "absolutely untrue." He says the partners didn't learn until "months later" that Lubin had deceived at least three other clients and had signed firm checks for small amounts without authorization. The partners obtained a handwritten confession from Lubin on November 23, 1987, detailing his misconduct.

According to Kaszovitz, the partners consulted with Michael Gentile (who was chief counsel of the Departmental Disciplinary Committee, First Department, and an acquaintance of name partner Skala) and Paul, Weiss, Rifkind, Wharton & Garrison partner Martin London (who was a disciplinary committee member) and asked whether it was absolutely necessary to report Lubin at all. On December 16, 1987—three months after Wieder first told partners of his unfortunate experience with Lubin—the firm reported Lubin to the committee.

"We had a concern that reporting Mr. Lubin's conduct to the disciplinary committee might end his legal career," Kaszovitz says. Hal Lieberman, the committee's current chief counsel, refuses to comment on the status of the disciplinary charges against Lubin.

"THE MOST UNETHICAL PEOPLE I'VE EVER MET"

Lubin, who left the firm in December 1987, did not return calls seeking comment. But in court documents filed in October 1990 in response to Wieder's suit, Lubin says he submitted the written confession under threats from Skala.

In a June 1989 letter to Lieberman, Kaszovitz says merely that he and Skala "insisted" on Lubin's written admission. They then gave him $10,000 in severance pay. That same month Wieder discovered that the firm had ordered new stationery—with his name omitted. But it was not until three months later, in March 1988, that he was fired. Wieder claims Feder, Kaszovitz dumped him as soon as he completed a major litigation assignment in retaliation for his insistence that the firm report Lubin. Kaszovitz says that Wieder was fired for poor work habits and an inability to get along with colleagues and staff, among other things.

Wieder, who since April 1988 has been vice-president and counsel at a major Manhattan bank, says he holds no grudge against Lubin, although he continues to pursue malpractice claims against him and Feder, Kaszovitz in state Supreme Court. "I don't think Lubin did this for any monetary benefit," says Wieder. "I think he's a very sick person. That's why reporting his misconduct is so important."

Wieder claims, however, that Lubin and Feder, Kaszovitz are trying to wear him down financially and force him to drop the case. Wieder says he already owes $25,000 to trial lawyer Jeremiah Gutman of Levy, Gutman, Goldberg & Kaplan.

Feder, Kaszovitz's name partners "are the most unethical people I've ever met," says Wieder, who is seeking to have them disbarred for firing him, for failing to make restitution for Lubin's actions, and for their "vexatious defense" of Wieder's suit, among other things. After leaving the firm, Wieder filed disciplinary charges against Lubin and Jay Lukowski, the Feder, Kaszovitz associate who is representing the partners.

Wieder's ill-will is reciprocated in full. In Kaszovitz's June 1989 letter to disciplinary chief Lieberman, he describes Wieder's suit as "the product of an unstable mind that cannot itself distinguish the difference between ethical and unethical conduct."

"One of the problems I've always had with Wieder's argument, aside from the fact that it's wholly untrue, is that he's a lawyer too," Kaszovitz says in an interview. "He has the same ethical responsibility I do. He should have just reported [Lubin's handling of the closing] himself."

Wieder's response: "I did."

"A SNOWBALL'S CHANCE IN HELL"

So far, the courts' reaction to this saga has been uniformly hands-off. Without ever making a finding of fact, acting state Supreme Court Justice Edward Lehner in August 1989 dismissed Wieder's retaliatory discharge claims, citing the at-will employment doctrine, but left intact his malpractice claims against Lubin and Feder, Kaszovitz. And, in November 1990, a four-judge appellate division panel unanimously affirmed the lower court's decision without explanation. In January the appellate division denied a motion for leave to appeal to the Court of Appeals.

This means Wieder's only remaining chance lies in going directly to the Court of Appeals. It also means that the courts so far have said that even if Wieder's factual allegations are true—that he was fired for adhering to the code of professional responsibility—he has no recourse and his old firm is not to be held accountable.

Wieder's *pro bono* lawyers—David Vladeck and Alan Morrison from Public Citizen, and Laura Schnell and Judith Vladeck (David Vladeck's mother), both of Vladeck, Waldman, Elias & Engelhard—say they are not surprised that the lower courts did not accept their assertion that the snitch rule poses a public policy exception to the at-will employment doctrine.

David Vladeck, whose organization was founded as the litigation arm of Ralph Nader's consumer groups, says the lower courts' decisions have placed lawyers "in an extraordinarily tight vise." His fear is that the Court of Appeals could further tighten that vise by deferring to the state legislature, shifting jurisdiction over lawyer conduct from the courts and lawyers themselves.

Fordham Law School ethics professor Daniel Capra's *amicus* brief, submitted on behalf of the Committee of Professional Responsibility of the Association of the Bar of the City of New York, says that the court's traditional reason for deference to the legislature on other matters of employment does not exist in Wieder's case. "Unlike other employment relationships, which are controlled by the Legislature, the relationship between attorneys, and indeed the conduct of attorneys in general, is regulated not by the Legislature but by the courts."

Says Wieder: "When I was admitted to the bar, I took that oath in a courtroom, not in the well of the state legislature. If I'm an officer of the court, to whom do I turn when I have been a victim of people who violate the code of professional ethics? I turn to the courts."

While Wieder—who spends night-owl hours and thousands of dollars preparing mountains of material to send to potential supporters—has had significant success at swaying influential legal scholars and organizations to his side, he has also endured some failures. Many of Wieder's numerous pleas for support to bar groups and firms—including Shearman & Sterling and Washington, D.C.'s Steptoe & Johnson—went unanswered or were rejected. The New York State Bar Association declined to support Wieder's motion, saying it did not fall within its narrow guidelines for filing *amicus* briefs. The New York State Women's Bar Association declined support too, citing other commitments.

Marjorie Gross, chair of the Ethics Committee of the New York County Lawyers Association, wrote Wieder declining to file an *amicus* and telling him precisely what he did not want to hear: "We have discussed whether a more appropriate response by our committee would be to propose legislation."

Such a bill, Wieder says, "would have a snowball's chance in hell. Besides it's not the legislators responsibility to clean up the law business. It's not even mine. It's the judges.' "

A LIP-SERVICE SYSTEM

"We have to realize two things," says Ronald Rotunda, an ethics professor at the University of Illinois College of Law who joined professor Gross's *amicus* brief. "First of all, the rules of ethics are actually law. For lawyers, they should be [perceived no differently than] the rules of evidence or the rules of criminal procedure. And, as far as the at-will doctrine is concerned, if you're a tenant at-will you're allowed to be evicted, but not because you reported a housing violation."

Fordham professor Capra says that he agrees with Rotunda in principle but adds that it's not so simple: "The fact is that in [New York] the disciplinary rules don't have the force of law."

Jonathan Lerner, chairman of Skadden, Arps, Slate, Meagher & Flom's ethics committee, says he supports self-regulation but doesn't believe that new laws or exceptions to current ones are needed to make that system work. Lawyers with knowledge of another lawyer's questionable trustworthiness, fitness, or honesty who don't report such problems face the possibility of losing their license to practice. Defense lawyer Michael Dowd, for example, was recently suspended for five years for precisely that reason ["Blowing The Whistle," November 1990]. The threat of suspension or disbarment, Lerner says, should weigh heavily against the threat of losing a single job. Furthermore, Lerner adds, "Anyone who thinks they may be fired for reporting an ethical wrong ought to leave that firm anyway. It speaks volumes about the kind of firm you're with."

"There aren't that many brave people in the world," counters professor Gross.

David Vladeck says he is optimistic that Wieder's case will be remanded for trial by the Court of Appeals. If Wieder can get that far, Vladeck says, "it will be clear that Howard was fired only because he forced [Feder, Kaszovitz partners] to confront their ethical responsibility." However, Vladeck adds, "Even if he wins the case, he will have lost a lot."

Wieder is bracing for whatever comes. "I'm proud of what I've done," he says. "Even if I lose, I want to tell you what a great winner I am—I really showed that I could wage a good battle."

"But in terms of making a mark in the legal profession," Wieder adds, "if I don't prevail, young lawyers will never come forward. No one will." ■

The New York Times

 NEW YORK, MONDAY, NOVEMBER 13, 1989

Lawyer Says His Dismissal Was for Being Too Ethical

By DAVID MARGOLICK

With rare exceptions, employees in New York can be dismissed for just about anything and have no legal recourse. But now, a Manhattan lawyer is asking whether it was legal for his firm to dismiss him for what he says his profession ethically demands: blowing the whistle on a colleague he says was dishonest.

The lawyer, Howard L. Wieder, sought disciplinary measures against another lawyer in his firm. Mr. Wieder says the colleague deceived him while representing him in the purchase of a condominium. Mr. Wieder says his firm first ignored the matter, then, after filing a complaint belatedly and begrudgingly with state disciplinary authorities, dismissed him for pressuring it to make the complaint.

Mr. Wieder's case is the first to pit the right of New York employers to dismiss workers for all but constitutionally or contractually impermissible reasons against the legal profession's ethical dictates. "The courts send a mixed signal to lawyers," said Stephen Gillers, an authority on legal ethics at the New York University Law School. "On the one hand they say, 'You must report misbehavior by other lawyers, on pain of losing your license.' Then, when lawyers do what the courts demand and they're fired for it, the courts tell them to scram."

The New York Times/Marilyn K. Yee

Howard L. Wieder, a lawyer who says he was dismissed for exposing a colleague.

More an Obsession Than a Case

To Mr. Wieder, 36 years old and a graduate of N. Y. U. Law School, the dispute is more an obsession than a case. He says he has spent more than $19,000 on the matter, very nearly the sum he says he lost because of his colleague's deceit.

The colleague was handling Mr. Wieder's apartment closing and assured him he had procured a mortgage at a favorable rate, Mr. Wieder said, when there was no mortgage. Mr. Wieder said it was this that he wanted reported to the disciplinary board.

That apartment, at 225 West 83d Street, bears all of the earmarks of Mr. Wieder's crusade. Two years after moving in, bare bulbs still hang where fancy fixtures should be. The study is strewn with legal briefs, law review reprints, photocopies, computer printouts, correspondence. Though Mr. Wieder says he can no longer afford to eat out, his refrigerator is empty except for containers of cottage cheese and cans of Diet Pepsi.

Mr. Wieder has a lawyer but does much of

Continued From Page B1

the legal work himself, turning out elaborate briefs and long handwritten memos, replete with references to Jeremiah and Job, David and Goliath. The citations run the gamut from Sir Walter Scott to Cardozo, Emerson, Camus, Ibsen, Ogden Nash and Louis Nizer.

He is seeking at least half a million dollars in damages, but insists the money is secondary. His first priority is to make new law, or at least salvage his faith in the legal profession. In his house, he says, lawyers were considered demigods. Four of his uncles — from Tarnow, Poland, with the last name of Mandelbaum — were lawyers; all were killed by the Nazis.

"Other lawyers tell me, 'Howard, move on with your life.' 'You're just asking for grief.' 'There are other worthwhile causes,'" he said. "But I can't think of a more worthwhile cause than getting lawyers to be ethical. I'm considered the maverick for doing what the legal profession is obligated to do."

Mr. Wieder faces several hurdles. Lawyers at his former firm — Feder, Kaszovitz, Isaacson, Weber & Skala — say they dismissed him for his "poor work habits, unacceptable performance, inability to work with others and poor attitude," and not for whistle-blowing. In court papers, the firm calls his suit "a barrage of filthy, unsubstantiated allegations" and "the product of an unstable mind and a depraved personality."

There are other factual problems. In a statement submitted to Feder, Kaszovitz partners, the lawyer who represented Mr. Wieder in his condominium closing, Larry Lubin of Manhattan, confessed to unethical conduct, including deceiving Mr. Wieder about his mortgage application. Mr. Lubin now says the firm coerced that confession, a charge the firm denies.

Mr. Wieder also faces institutional barriers, like the long-cherished freedom of law firms to hire and dismiss lawyers as they please. For this reason, he said, several bar groups have declined to help him.

Biggest Obstacle: the Law

His most formidable obstacle, however, is the law. Even Mr. Wieder concedes that New York's whistle-blowing statute, which protects people fired for disclosing "substantial and specific danger to the public health or safety," does not apply in his case. Nor have the New York courts proven sympathetic to discharged workers, no matter how lofty their motives.

Given their ethical obligations and responsibilities as officers of the court, Mr. Wieder argues, lawyers should enjoy greater protection from dismissal than others. Feder, Kaszovitz counters that a lawyer should be treated no differently from anyone else. Last August, Acting Justice Edward H. Lehner of State Supreme Court in Manhattan agreed, dismissing Mr. Wieder's wrongful discharge claim. Even if Mr. Wieder's charges were correct, the judge ruled, they were not grounds for legal action.

Mr. Wieder is appealing that decision. "I'd love not to be, I guess the word is 'obsessed,' about the case," he said. "But the law is supposed to be a noble calling, not just about stuffing your wallet."

Mr. Wieder arrived at Feder, Kaszovitz, a nine-person firm at 450 Seventh Avenue, in June 1986. At the time, he recalled in an interview, a partner at the firm, Murray Skala, told him that if he were a "workhorse" with "unbridled moral and emotional commitment," he could become a partner in two years and earn money beyond his "wildest expectations."

A Two-Bedroom Condominium

In March 1987, Mr. Wieder, who had been living with his father in Flushing, Queens, decided to buy a two-bedroom, $339,000 condominium at the Bromley, on the Upper West Side, and asked the firm to handle the transaction. It agreed to do so for free, Mr. Wieder says, because of his record for hard work, and assigned the matter to Mr. Lubin.

Mr. Lubin helped with the negotiations, proposed design layouts and, Mr. Wieder said, claimed to have gotten a mortgage commitment from Citibank. But that September, only a few days before the closing date, Mr. Wieder said, he learned that no mortgage existed, and that Mr. Lubin had not even spoken to the loan officer involved for several months. The purchase went forward, but only after expensive refinancing.

Immediately, Mr. Wieder complained about Mr. Lubin to his superiors, who, he says in court papers, had disparaging things to say about Mr. Lubin. "'Oh, yes, Howard, we knew that Larry had a pathology, but he's never exercised it to the magnitude that he's done with you,'" Mr. Wieder said one of the partners, Gabriel Kaszovitz, told him. Mr. Kaszovitz denied making such a statement.

A few days later, Mr. Wieder said, Mr. Lubin acknowledged his deceit, explaining that he felt pressured to produce results. But though the firm said it would reimburse Mr. Wieder for his losses, it refused to report Mr. Lubin to the Departmental Disciplinary Committee of the Appellate Division of State Supreme Court in Manhattan. In fact, Mr. Wieder says, the firm gave Mr. Lubin additional assignments.

Urged to Have Rachmones

In October, over lunch at Lou G. Siegel's, a garment district restaurant, Mr. Wieder invoked a biblical metaphor with Marcel Weber, another

> 'I'd love not to be, I guess the word is obsessed.'

Feder, Kaszovitz partner. "If Jeremiah were to see how you and your partners were keeping this quiet, he'd be spinning in his grave," he said. According to Mr. Wieder, Mr. Weber conceded that Mr. Lubin had problems, but urged Mr. Wieder to have "rachmones" — the Yiddish word for pity — for Mr. Lubin. "How about rachmones for his victims and future victims?" Mr. Wieder responded.

In November, Mr. Lubin admitted in the written statement to firm partners that he had misled several clients, including Mr. Wieder, and that he had signed firm checks without authorization. "Mr. Skala advised me that I couldn't leave and that I wouldn't get another job if I didn't prepare such a statement," Mr. Lubin now claims in court papers. "I viewed the requested statement as my ticket out." He left Feder, Kaszovitz on Dec. 4, 1987, and now practices at Esanu, Katsky, Korins & Siger in Manhattan.

After Mr. Lubin's departure, Feder, Kaszovitz partners consulted counsel and reported Mr. Lubin to the Departmental Disciplinary Committee on Dec. 16, three months after Mr. Wieder's original complaint. It nonetheless urged leniency for Mr. Lubin, whom it described as "competent" and "hard-working."

The case is pending, as are complaints Mr. Wieder has filed against the Feder, Kaszovitz partners. Mr. Lubin's lawyer, Jack Babchik, called the case "a misunderstanding" and declined to comment further.

Mr. Wieder remained at Feder, Kaszovitz, but his days were numbered. The firm, he said discovered, had ordered 1988 diaries for every lawyer but him, and had ordered new stationery with his name deleted from the letterhead. He was kept on until March 1988, shortly after he had completed a major brief.

"I was very naïve," Mr. Wieder, who is now a lawyer at a bank, said of the experience. "In the last couple of years I've received a Ph.D. in life."

Dilemmas

Legal ethics look good on paper—but they don't do much good if that's where they stay

BY ROSEMARY HAROLD

Blase cynicism is a trait I have long struggled to affect. Even before law school, it impressed me as useful armor to carry into adulthood. In law practice, it probably is essential. But occasionally something causes me to drop my affectation, and I become capable of the sort of outrage children feel upon first learning that grownups lie and get away with it.

The Howard Wieder case got to me. The primary issue doesn't involve lies, exactly, though the facts are in more than the usual rancorous dispute for a wrongful discharge case. It centers on legal ethics—more specifically, on legal ethics' lack of clout when it counts.

Stripped of all detail, the situation boils down to this: Wieder claims he was fired from his job at a Manhattan law firm because he forced the partners to report another associate's wrongdoing to bar disciplinary authorities. Instead of reprimanding the transgressor, Wieder says, the firm partners attacked him for raising the issue.

A partner in the firm calls Wieder's allegation "ridiculous." And the New York state trial judge who dismissed Wieder's claim said, in effect, "So what? Even if everything you claim is true, your lawyer bosses can fire you anyway."

It's that last bit that steams me. I don't purport to know the true story behind Wieder's dismissal. Neither does anyone else, because the court never got as far as fact evaluation. But the judge's conception of the dispute—what I perceive it to be, based on reading his opinion—is something I can speak to. At best, it is obtuse and shortsighted. At worst, it calculatedly deflects the threat that lawyer ethics codes pose to law firms' efficient generation of income—in other words, making a lot of fast money.

The facts under dispute are good "L.A. Law" material. Wieder, not by was recruited to join the firm of Fede Kaszovitz, Isaacson, Weber & Skala in 1986. His notes on the recruitment pitch—Wieder is the type to file such things away—indicate that he was enticed with early partnership and money beyond his "wildest expectations" so long as he worked with "unbridled moral and emotional commitment."

In 1987, Wieder decided to move into a $339,000 Upper West Side condominium apartment. Feder, Kaszovitz assigned another associate, a real estate specialist, to handle the transaction. The associate proposed a design layout but did little legal work, while representing to Wieder that he had obtained a mortgage at a good interest rate. Wieder discovered the deception just days before the closing and managed to save the deal at considerable refinancing cost.

When Wieder reported the situation to the firm partners, he was shocked, he said, when they refused to report the associate to the city's Departmental Disciplinary Committee. The partners also admitted knowing about the associate's "pathology," which had surfaced to a lesser extent in other client dealings, according to Wieder.

Name partner Gabriel Kaszov denies such an exchange took p He said the firm was unaware th associate mishandled client mat til months later, when the signed a written statement how he misled three othe addition to Wieder and

Illustration by Greg Buske

checks without authorization.

After angry exchanges about the firm's offer to compensate Wieder for his losses and its duty to report the infractions, Wieder himself filed a disciplinary complaint against the associate in November 1987. He withdrew it the same day, he explained later, because it referred to corroboration from a third associate, who hoped to stay out of the fray. Wieder continued to press the partners to report the associate.

The next month, Wieder discovered the firm ordered new stationery without his name on the letterhead. After consulting outside counsel, Feder, Kaszovitz also filed a disciplinary complaint against the real estate associate.

By that time, Wieder's tenure at the firm was in its final phase. He claims Feder, Kaszovitz kept him on the payroll only long enough for him to finish an important filing in a litigation case. Kaszovitz declines to discuss the details, maintaining that Wieder was terminated "for cause."

You can read the *Wieder v. Skala* opinion for yourself at 544 N.Y.S.2d 971. The case is now on appeal. Wieder based his wrongful discharge claim on the premise that as a member of the New York bar, he was required under the state's Code of Professional Responsibility to report ethical violations by other attorneys. Therefore, he reasoned, an employer could not legally fire him just because he fulfilled his professional duty.

The court held otherwise. It sidestepped addressing whether the existence of legal ethics codes makes a lawyer's job something different than a hamburger slinger's and a law firm something more than an oak-paneled McDonald's. "[T]he principles to be applied in this case are no different from those applied to any other at-will employee," Judge Edward Lehner wrote.

The judge rejected the argument that the court-approved state ethics code supported a "public policy" exception to the state's tough at-will employment doctrine—a doctrine which itself is a judge-made body of law. Whistleblowers in any occupation get little protection in New York.

Okay, if the ethics code isn't an embodiment of public policy or a governmental directive akin to a statute, what is it? To adopt the New York City vernacular, is it just chopped liver? Just window-dressing to mollify clients? Just another burden on law student schedules serving mainly to provide more career options for professors?

The rational retort, I am told, is that lawyer discipline is a universe unto itself. If attorneys act unethically, the profession's self-regulatory system will investigate and punish them, separate from the rest of society.

Even were I to ignore the overburdened, understaffed working conditions in most bar counsel offices, that response is no answer here. The Wieder case is about the bedrock of that separate system: obtaining the reports to be investigated.

"The fairest way to rationalize this opinion is to note that the judge believed he could not create an exception absent some indication of the 'public safety' being jeopardized," said Leonard Gross, a legal ethics professor at Southern Illinois University. Following classic separation-of-powers theory, Judge Lehner punted to the New York legislature.

But as Gross politely points out in the amicus brief he submitted for the appeal, the irony is that lawyer regulation is traditionally regarded as a court function. Judges, not elected legislators, approve the imposition of duties under the legal ethics rules. Judges decide how lawyers should behave toward clients, courts, and one another—and in New York, at least, judges leave lawyers without a safety net.

If I sound personally upset by all this, it's because I can see myself being caught in Wieder's position someday. I'll be an associate at a law firm soon. I figure I'll see some ethics rules bent, and like most of us, I'll probably overlook them. But if I see some ethics rules actively and knowingly flouted, what then? If the firm doesn't act ethically to correct internal abuses, will I have the backbone to risk my job for a principle? To risk disdain or ridicule from colleagues, who will dismiss me as a fanatic? To risk a silent blackball from other firms, who won't hire a troublemaker, no matter how ethically upright they may be?

I can't honestly say I would emulate Wieder. He estimates he has already gone $30,000 into debt for the sake of a crusade. Whether his facts are right or wrong, that is a stunning commitment, and I doubt I am that dedicated, even though I work on a legal ethics journal and serve on a school professional responsibility committee. I hate Judge Lehner's decision most for forcing me to admit that.

Charles Wolfram, author of the leading legal ethics treatise, suspects law students will find the Wieder case a "matter of deep interest" both as a symbol and as a signal of life to come. Wolfram signed on to Gross' amicus brief, an immediate credibility boost for Wieder.

"The message the case sends to new lawyers is one of intimidation," Wolfram says. "It suggest that a very hostile firm environment awaits associates, where rocking the boat will gain you nothing."

Arguably that's not news. Most of my friends and acquaintances at law school don't take legal ethics very seriously, and those outside the profession guffaw at the "oxymoron." Yet coverage of the Wieder case—which has made the *New York Times*, as well as specialized legal periodicals—blackens the image still further.

"That, as much as anything, may be why Howard may win eventually," Gross said. "From a public relations standpoint, the decision is horrible."

David Vladek, of Public Citizen, and his mother, Judith Vladek, a labor law specialist, are handling the appeal pro bono, but Wieder does much of the research work himself. He also spends time and money on mailings to journalists and ethics experts, trying to drum up legal support and publicity.

He takes comfort in a vision of making history as a test case, dramatically changing associates' working lives. "I intend to break that circle of silence," he said. "Maybé because I am the son of Holocaust survivors, I am especially sensitive to issues of silence. I figured if I wasn't going to take on this case, who would? It's a matter of self-respect.

"I'm not a martyr like my parents. I'm a fighter, I go in to win."

Still Wieder admits that as the dispute first developed, he grew depressed under supervisors and colleagues' "harrassment." The disciplinary system in New York City did not back up his claims. Bar prosecutors have not pressed for sanctions, despite the associate's written statement about wrongdoing. The associate, who left Feder, Kaszovitz, later claimed in court papers that he signed the letter under duress in order to obtain a good recommendation for jobs elsewhere. He is now working at another Manhattan firm.

Wieder maintains that he would have pursued the same righteous course even if he had not been one of the burned clients. Taking him at his word, I still wouldn't be bothered if self-interest had added extra heat. Directed through the right channels, self-interest is a good thing. What haunts me is the feeling that obsession is what such missions really require.

Despite everything, Wieder is more optimistic than I am that a decision in his favor will encourage more associates to report misdeeds in their own firms. To me, the practical disincentives have all but strangled the rule, even if employment law would support it. Wieder recognizes that "it's an American tradition: Don't be a snitch."

The idea that associates or partners would report infractions and jeopardize their own economic self-interest is simply not credible. Who would lay his firm open to a malpractice suit, unless authorities learned of the misdeeds through alternate channels or the scandal was so big that it threatened to break in public anyway?

Kaszovitz shrugged off my question about whether the real estate associate's written statement had prompted other clients to sue the firm. "The whole thing was a tempest in a teapot."

He agreed that the lawyer's ethical duty to report is "an awkward rule. But that doesn't mean it's a bad rule; it doesn't mean you shouldn't obey it."

Still, Kaszovitz doesn't want the New York law to protect lawyer whistleblowers. "As an employer, I don't look kindly on it, and for a good reason—every remedy fashioned to right a wrong creates another problem," he said. "It's a worthy concept in the abstract, but it leaves employers open to spurious charges" in practice. "It would create such inefficiency in the operation of the law firm if we had to go through a hearing every time" a lawyer was fired.

Wolfram and Gross both doubt that a reversal in Wieder's case "would open Pandora's box," as Gross said. "But it would be a wedge in there, and law firms won't be particularly happy about it."

As it now stands, the New York precedent is "unfortunate" for two reasons beyond its direct holding, Wolfram says. Both points concern ethics awareness and, to a certain degree, the way that pride and the traditional power relationship dividing seasoned lawyers and beginners stifles two-way discussion on many fronts.

"First, young lawyers have something to tell the profession simply because the beginners are new, young, and idealistic. Old-timers, like my generation, need to listen to them—not always to follow what they say, but at least to hear those insights," Wolfram said.

"Second, the new generation is much better educated in professional responsibility than old-timers, generally. Recent law graduates are better able to spot the issues in everyday practice. They still will have to do research to answer the hard questions, of course, but they at least raise them." ■

Contributing editor Rosemary Harold is a fourth-year evening student at Georgetown University Law Center.

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OUTSIDE COUNSEL

By Gary Minda

The Whistleblower Law

IF THERE IS one area of New York's employment law that has received the most publicity and ridicule it is *whistleblowing*. A growing number New York citizens are coming to realize the very serious dilemma now faced by New York's at-will employees who "blow the whistle" on their employer for engaging in improper and illegal practices.

In 1984, Governor Cuomo signed into law the Retaliatory Personnel Action by Employers Law, commonly known as New York's Whistleblower Statute.[1] This statute was intended to provide a measure of protection to public and private employees who blow the whistle on certain public and safety employer practices.

In creating an express statutory exception to the employment at-will rule, the legislation was thought to be necessary to encourage public revelations of illegal practices by protecting whistleblowing employees who make such practices known to proper authorities.

Unfortunately, New York's Whistleblower statute fails in *every* respect to provide the protection whistleblowing employees deserve.[2]

As currently drafted, New York's statute protects only those employees who refuse to follow an employer's instructions to violate the law, or who disclose to governmental agencies or courts an employer's *violation* of a law, rule, or regulation that "present[s] a substantial and specific danger to the public health or safety."[3] Moreover, the employee must establish that he or she "reasonably believes" that "specific" violations creating "substantial" danger to the public health or safety have or will occur.[4] The employee must have a factual basis for believing that the employer's acts are illegal; otherwise the court may determine the claim was filed "without basis in law or fact."[5]

Finally, the statute provides that the employee must, as a condition precedent for bringing a legal action, first bring the alleged illegal practice to the attention of a supervisor of the employer to allow the employer "a reasonable opportunity to correct

Continued on page 2, column 3

p. 2, col 3

OUTSIDE COUNSEL

The Whistleblower Law

Continued from page 1, column 2

such activity, policy or practice."[6]

New York's Whistleblower statute is far too limited in that it fails to address illegal conduct other than that involving health and safety. The statute actually chills whistleblowing by penalizing those employees who honestly believe the employer has violated a legal standard but who may lack a reasonable belief in fact. Indeed, the statute has a perverse attorney fee provision that provides that "[a] court, in its discretion, may also order that reasonable attorneys' fees and court costs and disbursement be awarded to an *employer* if the court determines that an action brought by an employee ... was *without basis in fact*."[7]

The reporting requirement of the statute may set in motion the process by which the employer finds pretextual reasons to discharge the whistleblower.[8] Finally, the statute is silent on the question of whether it extends protection to employees who are required to participate in public investigation or inquiries of illegal conduct or practices.

Recent Decisions

In 1989, there were a number of Appellate and lower court decisions illustrating what is wrong with this law. In *Remba v. Federation Employment and Guidance Service*,[9] the plaintiff alleged that she was discharged because of her objection to, and refusal to participate in, her employer's alleged scheme to fraudulently bill New York City for services never performed.

The Appellate Division panel, First Department, held 3-1, that the plaintiff was not entitled to relief under the Whistleblower statute because her allegations of fraudulent billing failed to create a "substantial and specific danger to the public health or safety."[10]

Justice Betty W. Ellerin dissented, arguing that the plaintiff should have been afforded an opportunity to establish, through discovery, a relationship between the violation of alleged law and the interest in which the statute protects.[11] In her view, the plaintiff's allegations involved illegal and harmful acts directed against the City government, and thus "affect[s] the interests of the public and may well be construed as adversely affecting the public health and safety within the statutory context."[12]

In a unanimous memorandum opinion in *Kern v. DePaul Health Services Inc.*,[13] the Appellate Division, Fourth Department, upheld a decision of the Supreme Court, Monroe County, dismissing an employee's claim under the Whistleblower statute involving what should have been the clearest case for protection.[14] In *Kern*, a part-time resident aide at a residence for mentally handicapped individuals discovered a male resident engaging in sexual intercourse with a female resident under circumstances that appeared, in her mind, to be rape.[15] The plaintiff reported the matter to the district attorney's office and was then terminated by the hospital for whistleblowing. The plaintiff sought recovery under §740 of the Whistleblower statute.[16]

Danger to Public

The lower court granted the hospital's motion for summary judgment, finding that no actual violation of law, rule or regulation had been established, thus rejecting the plaintiff's belief to the contrary.[17] The court indicated that even if an actual violation had been established, it would fail to raise to the level of creating a "substantial and specific danger to the public health or safety."[18] The Appellate Division affirmed on the latter ground, agreeing that while "defendants' alleged wrongdoing may have presented a danger to the health or safety of the individual patient, [it] did not threaten the health or safety of the public at large."[19]

What the Appellate Division failed to consider in *Kern* was the possibility that the whistleblower may have served the public interest in alerting hospital officials to serious security problems involving the well-being of all patients at the hospital. The alleged rape of a mental patient under the custodial care of a mental hospital threatens the health and safety of patients and the public at large because we expect the institution to provide a safe environment for patient care. The whistleblowing in *Kern* thus had a direct and immediate nexus to public health and safety because the conditions responsible for allowing the alleged rape directly and substantially affect the welfare of other patients and the general public.

In a case recently reported in the *New York Times*,[20] *Weider v. Feder, Kaszovitz, Issacson, Weber and Skala*,[21] a lawyer alleged that he was wrongfully discharged by his law firm because of his insistence that a former associate's breach of fiduciary duty and violations of the Code of Professional Responsibility be reported to the Disciplinary Committee.[22] The plaintiff alleged that his former law associate deceived him while representing him in the purchase of a condominium and that his law firm ignored the matter.[23] When he filed an ethics complaint about the incident, the plaintiff alleged that he was dismissed for whistleblowing.[24] The Supreme Court, New York County, dismissed plaintiff's action for reasons that are especially troubling.

Novel Issue

According to the opinion of Justice Lehner, plaintiff's case raised an issue of first impression: "[W]hether a law firm may terminate the employment of an associate-employee without penalty where termination is motivated by the employee's efforts to have the firm comply [with] a disciplinary rule."[25] While acknowledging that plaintiff's complaint raised a novel issue, Justice Lehner concluded that the case was essentially a run-of-the-mill case covered by New York's general rule in employment at-will rule.[26] Since the plaintiff was an at-will employee he was subject to dismissal at any time, for any reason. The court was able to skirt the ethical question raised under the Code of Professional Responsibility by finding that those issues were essentially irrelevant to the court's analysis under the employment at-will rule. The employment at-will blindfold was thus used by the court as an excuse for ignoring a serious ethical question — the professional ethics of a law firm to discharge a lawyer for performing his ethical duties as required by his profession.

The court also concluded that plaintiff's complaint could not be construed to raise a claim under New York's Whistleblower statute because the ethical violation alleged by the plaintiff failed to create a substantial and specific danger to the public health and safety.[27] The court noted, however, that plaintiff did not specifically raise a whistleblowing claim under the statute.[28] The court suggested that such a claim was not specifically raised by plaintiff's complaint since if such claim had been made the claimant might face the possibility of attorneys' fees being awarded to the employer if the court should subsequently determine that the action was brought without basis in law or fact.[29]

Clearly, the plaintiff in *Weider* was caught in one huge *Catch-22*. If he had refused to report an ethical violation of another lawyer, he could have been subject to possible disciplinary action by the Bar. In reporting the violation, however, he was subject to dismissal by his employer. In seeking protection under the Whistleblower statute, the court alerts him to the possibility that he may have to pay the attorneys' fees of his employer as well as absorb his own costs. Meanwhile, as the *Times* article has reported, the plaintiff "faces institutional barriers, like the long-cherished freedom of law firms to hire and dismiss lawyers as they please.[30]

Law's Chilling Effect

What these cases illustrate is that there is much that is wrong with New York's Whistleblower statute. New York's Whistleblower law should promote, not chill, ethics and honesty in government and lawful behavior at the workplace. Government corruption and ethical violations of those who have the public trust should be exposed by anyone who has the opportunity and advantage to learn of such things. New York's Whistleblower law should not send a conflicting message; that whistleblowing is to be encouraged, but whistleblowers may be penalized by taking advantage of the legislation if it is subsequently determined that a reasonable mistake of fact was made. New York's Whistleblower law should also extend its protection to employees who reveal any abuse of fiduciary position, gross mismanagement, ethical or legal violation of their employer even if the subject matter does not directly affect the public health and safety.

Indeed, New York's Whistleblower statute is a mere shadow of the whistleblower statutes in other states.[31] In California,[32] and New Jersey,[33] there is protection from retaliatory discharge whenever the employee has *reasonable belief* that an employer has violated the law; while in Michigan,[34] Connecticut,[35] and Maine,[36] an employee who blows the whistle on the employer need only demonstrate a real or suspected belief that a law was violated. Moreover, these statutes are not limited to the issues of public health and safety. Employees may report a violation of any law, rule or regulation affecting the public's interest. Unlike New York, these states encourage employees to come forward and reveal their employer's illegal activities whether or not they involve public health or safety. When New York's law is compared to similar statutes in other states, it becomes apparent that the New York Whistleblower legislation provides merely the illusion of protection.

A committee of New York State Law Revision Commission, the New York's Attorney General's legislative program, and others have advocated legislative proposals for broadening New York's Whistleblower law, and legislation has been introduced in the Senate and the Assembly. While legislative reform should be applauded and supported, it may make more sense for legislative reformers and drafters to instead consider the case for a general unjust dismissal statute for New York. Even if New York's Whistleblower statute is broadened, it would still fail to cover those employees who are unjustly dismissed for reasons other than whistleblowing. In 1987, Montana gave proper consideration to the problem of wrongful discharge and enacted a statute that covers both unjust dismissals as well as dismissals in violation of public policy.[37] Several other states concerned about the problems of wrongful discharge are likely to follow Montana's lead. There is no reason why New York cannot do the same.

(1) N.Y. Lab. Law §740; see also N.Y. Civ. Serv Law §75-b (McKinney 1983 & Supp. 1989) (prohibits retaliatory action by public employers).
(2) See Minda & Raab. *Time For An Unjust Dismissal Statute*, 54 Brooklyn L. Rev. 1137, at 1182-7 (1989).
(3) See N.Y. Lab. Law §§740(2)(a), (b) & (c); see also N.Y. Civ. Serv. Law §75-b(2)(a)(i).
(4) N.Y. Lab. Law §740(6).
(5) Id.
(6) N.Y. Lab. Law 740(3).
(7) Id. (emphasis added).
(8) See Minda & Raab, *Uniust Dismissal Statute*, supra note 1, at 1185.
(9) 149 App. Div. 2d 131, 545 NYS2d 140 (1st Dept. 1989). For a similar case reaching the same result as *Remba*, see *Vella v. United Cerebral Palsy of N.Y. City*, 141 Misc2d 976 (Sup.Ct. N.Y. Co. 1988).
(10) Id., at pp. 142, 149 App. Div. 2d at 133.
(11) Id., at 146, 149 App. Div. 2d at 140.
(12) Id.
(13) 544 NYS2d 252 (4th Dept. 1989).
(14) *Kern v. DePaul Mental Health Services Inc.*, 139 Misc2d 970, 529 NYS2d 265 (Sup.Ct. Monroe Cty. 1988).
(15) 139 Misc2d at 971, 529 NYS2d at 266.
(16) Id.
(17) Id., at 973, 529 NYS2d at 267.
(18) Id.
(19) 544 NYS2d at 253.
(20) See Margolick, *Lawyer Says His Case Pits Ethics v. Right to Dismiss*, B1 (Nov. 13, 1989). See also *Associate Loses Suit Challenging Firing By Firm. New York Law Journal*, vol. 202, No. 33, p 1 (Aug. 17, 1989).
(21) 544 NYS2d 971 (Sup. 1989).
(22) Id., at 972.
(23) Id.
(24) Id.
(25) Id., at 972.
(26) Id.
(27) Id., at 973.
(28) Id.
(29) Id.

(30) *Lawyer Says His Case Pits Ethics v. Right to Dismiss*, supra note 20, at B4.

(31) See Minda & Raab, *Unjust Dismissal Statute*, supra note 1, at 1186-7.

(32) See Cal Lab. Code sect. 1102.5(a), (b) (West Supp. 1987).

(33) See *Conscientious Employee Protection Act*, N.J. Stat. §34:19-1 (West 1988).

(34) See Mich. Comp. Laws Ann. §15:362 (West 1981 & Supp. 1988).

(35) See Conn. Stat. Ann. §31-51 m (West 1987 & Supp. 1988).

(36) See Me. Rev. Stat. Ann. tit. 26, §§831-840 (West 1988).

(37) See Mont. Code Ann. §39-2-905 (1987). See also Minda & Raab, *Unjust Dismissal Statute*, supra note 1, at 1187, n.185, 1191-2.

Gary Minda *is a Professor of Law at Brooklyn Law School.*

Associate Sues Firm in Flap Over Discharge

BY ANDREW BLUM
National Law Journal Staff Reporter

NEW YORK — In an unusual case, a former associate at a law firm here is king $500,000 in damages from his ex-employer for firing him in a dispute over a colleague's conduct.

Howard L. Wieder, formerly with Feder, Kaszovitz, Isaacson, Weber & Skala, was fired in 1988, allegedly beca he continually prodded the firm to report ethics code violations he said were perpetrated by fellow associate Larry A. Lubin.

r. Lubin had done some real estate work for Mr. Wieder and in the course of it, Mr. Wieder said, his colleague made some false statements about Mr. Wieder's mortgage, which the fired attorney said cost him $27,000. Mr. Wieder asked the firm to report the matter to disciplinary authorities.

After first refusing to do so, the firm finally reported the matter, but later fired Mr. Wieder, according to Mr. Wieder. His suit, claiming among other things, wrongful discharge, was partly dismissed last August by a trial court, but he appealed to reinstate it.

"What he's seeking is vindication," said Mr. Wieder's attorney, David C. Vladeck of the Washington, D.C.-based Public Citizen Litigation Group, whose co-counsel is his mother, Judith P. Vladeck of New York's Vladeck, Waldman, Elias & Engelhard P.C.

Firm Denies Allegations

The lower court ruled that no "statutory or public policy exception" to the state's employment-at-will doctrine protects attorneys from discharge. But the plaintiff's appellate briefs argued that, "New York cannot require attorneys to...report violations only to say that the dominant policy goal that compelled their reporting is too insubstantial to safeguard them from reprisal. If the disciplinary rules are to be a sword to combat wrongdoing, they must also be a shield for the messenger."

Feder Kaszovitz's Gabriel Kaszovitz said the firm denies the allegations, which he said are "totally without merit."

Mr. Lubin, who no longer works at Feder Kaszovitz, was unavailable for comment.

His lawyer, Jack Babchik of New York's Bergadano Zichello & Babchik, declined to comment.

Hal Lieberman, chief counsel to the State Disciplinary Committee for the First Department, said he was unable to discuss disciplinary matters.

Supporting his appeal are ethics experts Prof. Leonard Gross of Southern Illinois University Law School and Prof. Charles W. Wolfram of Cornell Law School.

In an amicus brief, the professors said, "this cause of action is important in order to protect the public from incompetent lawyers, and to maintain public confidence in the integrity of the legal system."

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BAR SINCE 1888
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Associate Loses Suit Challenging Firing by Firm

BY CERISSE ANDERSON

A LAW FIRM associate's attempt to get the firm to report another associate to the Appellate Division's Disciplinary Committee for alleged ethics violations does not create a public policy exception to an employer's right to terminate employment at will, a State Supreme Court justice has ruled.

The decision is on page 17, column 6.

The associate, who claimed he was fired in March 1988 for his repeated insistence that his colleague be reported for his breach of fiduciary duty and violations of the Code of Professional Responsibility, was no different from any other at-will employee, said Acting Justice Edward H. Lehner in *Wieder v. Skala*, filed last week in New York County, IA Part 22.

Justice Lehner dismissed Howard L. Wieder's wrongful-discharge claims against the Manhattan firm, Feder, Kaszovitz, Isaacson, Weber & Skala. Mr. Wieder's suit also includes actions for legal malpractice, fraud and breach of contract against the firm, its individual partners and his former colleague Larry A. Lubin. Mr. Lubin also is no longer with the firm.

While both were employed by the firm, Mr. Lubin represented Mr. Wieder in a condominium apartment purchase. Mr. Wieder alleged Mr. Lubin misrepresented facts to him in that transaction and engaged in a broader course of conduct of lying to clients on other matters.

He said yesterday he intended to appeal Justice Lehner's decision.

Mr. Wieder had argued that the public policy of protecting against improper activities by attorneys should be an exception to the general rule in New York that an employer has the right to terminate an employment at will at any time.

But Justice Lehner noted the Court of Appeals had declined to create a public policy exception to

Continued on page 2, column 1

Associate Loses Lawsuit on Firing

Continued from page 1, column 6

the employment-at-will doctrine in two previous cases involving allegations of tax fraud and improper financial reporting by large public corporations.

The Court of Appeals stated in one of the decisions, *Sabetay v. Sterling Drug Inc.*, 69 NY2d 329, that "alteration of the employment relationships ... is best left to the legislature ... because stability and predictability in contractual affairs is a highly desirable jurisprudential value." The court noted the Legislature has enacted various statutes prohibiting employers from firing employees in certain circumstances.

Justice Lehner specifically found that the so-called "Whistleblowers Law," Labor Law §740, which forbids retaliatory action by employers, did not apply to Mr. Wieder's case. First, Mr. Wieder had not specifically claimed a violation of the law in his pleading, and second, the law is limited to situtations involving public health or safety.

"(T)he alleged refusal of the law firm to report Lubin to the Disciplinary Committee cannot be said to be an 'activity, policy or practice of the employer ... which ... presents a substantial and specific danger to the public health or safety," he wrote.

Mr. Wieder was represented by Paul D. Wexler of Bragar & Wexler. Feder, Kaszovitz, Isaacson, Weber & Skala appeared pro se by Jay D. Lukowski. Mr. Lubin's counsel was Bergadano, Zichello & Babchik.

NEW YORK COUNTY

SUPREME COURT

IA PART 22

Justice Lehner

WIEDER v. SKALA—Defendant Feder, Kaszovitz, Isaacson, Weber & Skala, a law firm, has moved (i) to dismiss the fourth and fifth causes of action of the complaint pursuant to CPLR 3211 (a) 7, and (ii) for a more definite statement pursuant to CPLR 3024 (a). The latter request for relief was withdrawn at oral argument.

Co-defendant Lubin, a former associate of the firm, has cross-moved to (i) strike prejudicial matter, and (ii) to seal the file pursuant to Judiciary Law §90(10). The former request was withdrawn, and the latter is denied as there is no basis to seal where the only grounds asserted relate to the fact that said defendant is being charged with legal malpractice on a matter he handled for plaintiff, a fellow associate.

In the fourth and fifth causes of action, plaintiff claims he was wrongfully discharged by the firm because of his "insistence that Lubin's breaches of fiduciary duty and violations of the Code of Professional Responsibility be reported to the Disciplinary Committee of the Appellate Division."

In opposing the application to dismiss, plaintiff suggests that the issue of "whether a law firm may terminate the employment of an associate-employee without penalty where termination is motivated by the employee's efforts to have the firm comply with a disciplinary rule" is one of first impression in this state. Although that may be true, the principles to be applied in this case are no different from those applied to any other at will employee.

The general rule in employment at will cases was summarized as follows in Murphy v. American Home Products Corporation (58 N.Y.2d 293, 1983) at p. 305:

"In sum, under New York law as it now stands, absent a constitutionally impermissible purpose, or statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired."

Plaintiff argues that the public policy of protecting against improper activities by attorneys is an exception to the foregoing, and cites Waldman v. Englishtown Sportswear, Ltd. (92 A.D.2d 833, 1st Dept 1983) in support of that proposition. In that case decided on March 29, 1983 (the very same day as the date of the decision in Murphy), the Appellate Division stated, with respect to an employee at will (p. 835), that "no cause lies for wrongful or abusive discharge absent a showing by plaintiffs that the discharge was in violation of public policy." However, as noted above, the Court of Appeals in Murphy did not find any "public Policy" exception in its ruling on wrongful discharge claims even though the plaintiff therein alleged he Uncovered "at least $50 million in illegal account manipulations of secret pension reserves which improperly inflated the company's growth in income," and that his dismissal for refusing to engage in improper accounting improprieties was "contrary to public policy." (supra, p. 298)

In Sabetay v. Sterling Drug, Inc. (69 N.Y.2d 329, 1987), although the plaintiff-employee claimed he was discharged because he "blew the whistle" by reporting tax avoidance schemes to his supervisor, the court dismissed his claim on the authority of Murphy.

Thus, although these two Court of Appeals decisions involved claims of tax avoidance and improper financial reporting by large corporations with public shareholders, the court has declined to adopt an exception based on general concepts of public policy, and has indicated that:

". . . alteration of employment relationships . . . is best left to the Legislature . . . because stability and predictability in contractual affairs is a highly desirable jurisdictional value. Indeed, the Legislature has responded to this appropriate sensitivity by enacting numerous protections against abusive discharge and by prohibiting employers from discharging at will employees for reasons contrary to public policy (see, Judiciary Law, §519; Executive Law §296 (1)(e); Labor Law §§215, 740; Civil Service Law §756-b)." (Sabetay v. Sterling Drug, Inc., supra, at p. 336-337).

One of the statutes referred to by the court, section 740 of the Labor Law, is relied upon by plaintiff herein even though he acknowledges that it "is not directly applicable to this case." (p. 15 of plaintiff's memorandum of law) That section was adopted by the legislature in 1984 (ch. 660), the year after the Murphy decision, and provides in section 2 thereof that:

"An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety.

The court finds said section inapplicable to this case.

First, plaintiff has not asserted a violation thereof in his pleading. Knowing whether a plaintiff claims a violation of this statute is important because if such a claim were made the claimant would face the possibility, pursuant to subdivision 6 of the section, of attorneys' fees being awarded to the employer "if the court determines that an action brought by an employee under this section was without basis in law or fact." Second, the alleged refusal of the law firm to report Lubin to the Disciplinary Committee cannot be said to be an "activity, policy or practice of the employer-...which...presents a substantial and specific danger to the public health or safety."

Thus since this "Whistleblowers Law" is not applicable to the facts of this case, and plaintiff has not pleaded facts to come within the exception set forth in Weiner v. McGraw-Hill, Inc. (57 N.Y.2d 458, 1982), the rules governing the causes of action for wrongful discharge are those set forth in Murphy. Accordingly, since under the facts pleaded herein; the law firm had the right to terminate plaintiff, the fourth and fifth clauses of action are dismissed.

This constitutes the order of the court.

DAVID A. PATERSON
SENATOR 29TH DISTRICT

THE SENATE
STATE OF NEW YORK

PLEASE REPLY TO:

☐ DISTRICT OFFICE
ADAM CLAYTON POWELL
STATE OFFICE BUILDING
163 WEST 125TH STREET
SUITE 932
NEW YORK, N.Y. 10027
(212) 870-8500
FAX (212) 678-0001

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January 15, 1993

Howard Weider
225 West 83rd Street # 6-E
New York, NY 10024-4955

Dear Mr. Weider:

Congratulations on your victory in the courts with your fight for whistleblower protection. I thank you for informing me of your success with this issue, one I strongly support. I will continue to advocate for whistleblower protection against the unjust discharge of a lawyer or any other employee who reports the improper conduct of a colleague.

Once again, congratulations and I wish you continued success in your future endeavors.

Sincerely,

David A. Paterson

DAP/nb

COURT TV
COURTROOM TELEVISION NETWORK

July 24, 1992

Mr. Howard Weider
Attorney at Law
225 West 83d Street, Unit 6-E
New York, N. Y. 10024

Dear Mr. Wieder:

Thank you for sending me the briefs concerning your case. I know about it through the New York Times, and I am impressed with the arguments being made on your behalf.

If you have had an opportunity to watch Court TV, you probably know that we do not have a place in our format for a discussion of a professional/legal/ethical issue such as this. For the most part, we cover actual courtroom trials, and we would not have an opportunity to take up this matter, unless it could be related to a trial which was being televised on Court TV. Thus far we have not had an opportunity to cover a trial of this type, but if we do, I will remember you and your letter.

Good luck with your appeal.

Very sincerely,

Fred Graham

Fred Graham
Chief Anchor and Managing Editor

600 Third Avenue, New York, NY 10016
Phone: (212) 973-2800 • Fax: (212) 973-3355

STEPTOE & JOHNSON

ATTORNEYS AT LAW

PHOENIX, ARIZONA
CITIBANK TOWER

TELEPHONE: (602) 266-6810
FACSIMILE: (602) 274-1970

1330 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036-1795

(202) 429-3000
FACSIMILE: (202) 429-9204
TELEX: 89-2503

STEPTOE & JOHNSON INTERNATIONAL
AFFILIATE IN MOSCOW, RUSSIA

TELEPHONE: (011-7-502) 220-2220

ROBERT E. JORDAN, III
(202) 429-6290

January 4, 1993

Howard L. Wieder, Esquire
225 West 83rd Street
No. 6E
New York, New York 10024

Dear Howard:

News of your spectacular victory in the Court of Appeals came while I was vacationing over the holiday season, and I was excited to pick up the New York Times and the Wall Street Journal and read of your success.

Congratulations to you and to the team that has represented you in this long effort. You have established a precedent and principle of surpassing importance, and your name in the caption of the case will go down in history.

I am sure that recent events make 1993 look like a much better year than those than have transpired recently. I wish you the very best as you move from your tremendous victory to further vindication.

Best regards,

Bob Jordan

State of New York
Court of Appeals

1 No. 256
Howard L. Wieder,
Appellant,
v.
Murray L. Skala, et al.,
Respondents,
and Larry A. Lubin,
Defendant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

David C. Vladeck, for appellant.
Gabriel Kaszovitz, for respondents.
Professor Gross, et al.; and Committee on Professional Responsibility for the Association of the Bar of the City of New York, *amici curiae*.

HANCOCK, J.:

Plaintiff, a member of the bar, has sued his former employer, a law firm. He claims he was wrongfully discharged as an associate because of his insistence that the firm comply with the governing disciplinary rules by reporting professional misconduct allegedly committed by another associate. The question presented is whether plaintiff has stated a claim for relief either for breach of contract or for the tort of wrongful discharge in violation of this State's public policy. The lower courts have dismissed both causes of action on motion as legally insufficient under CPLR 3211(a)(7) on the strength of New York's employment at will doctrine. For reasons which follow, we modify the order and reinstate plaintiff's cause of action for breach of contract.

I.

In the complaint, which must be accepted as true on a dismissal motion under CPLR 3211(a)(7), plaintiff alleges that he was a commercial litigation attorney associated with defendant law firm from June 16, 1986 until March 18, 1988. In early 1987, plaintiff requested that the law firm represent him in the purchase of a condominium apartment. The firm agreed and assigned a fellow associate (L.L.) "to do 'everything that needs to be done'". For several months, L.L. neglected plaintiff's real estate transaction and, to conceal his neglect, made several "false and fraudulent material misrepresentations". In September 1987, when plaintiff learned of L.L.'s neglect and false statements, he advised two of the firm's senior partners. They conceded that the firm was aware "that [L.L.] was a pathological liar and that [L.L.] had previously lied to [members of the firm] regarding the status of other pending legal matters". When plaintiff confronted L.L., he acknowledged that he had lied about the real estate transaction and later admitted in writing that he had committed "several acts of legal malpractice and fraud and deceit upon plaintiff and several other clients of the firm".

The complaint further alleges that, after plaintiff asked the firm partners to report L.L.'s misconduct to the Appellate Division Disciplinary Committee as required under DR 1-103(A) of the Code of Professional Responsibility,[1] they declined to act. Later, in an effort to dissuade plaintiff from making the report himself, the partners told him that they would reimburse his losses. Plaintiff nonetheless met with the Committee "to discuss the entire matter", but he withdrew his complaint "because the [f]irm had indicated that it would fire plaintiff if he reported [L.L.'s] misconduct". Ultimately, as a result of plaintiff's insistence, in December 1987 the firm made a report concerning L.L.'s "numerous misrepresentations and [acts of] malpractice against clients of the [f]irm and acts of forgery of checks drawn on the [f]irm's account". Thereafter, two partners "continuously berated plaintiff for having caused them to report [the] misconduct". The firm nevertheless continued to employ plaintiff "because he was in charge of handling the most important litigation in the [f]irm". Plaintiff was fired in March 1988, a few days after he filed motion papers in that important case.

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[1] DR 1-103(A) provides:

> A lawyer possessing knowledge, not protected as a confidence or secret, of a violation of DR 1-103 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Plaintiff claims in his lawsuit that defendants wrongfully discharged him as a result of his insistence that L.L.'s misconduct be reported as required by DR 1-103(A). In the fourth cause of action, he alleges that the firm's termination constituted a breach of the employment relationship. In the fifth cause of action, he claims that his discharge was in violation of public policy and constituted a tort for which he seeks compensatory and punitive damages.

Defendants moved to dismiss the fourth and fifth causes of action as legally insufficient pursuant to CPLR 3211(a)(7). Supreme Court granted defendants' motion because his employment relationship was at-will, holding:

> since [the] "Whistleblowers Law" [Labor Law § 740] is not applicable to the facts of this case, and plaintiff has not pleaded facts to come within the exception set forth in Weiner v McGraw-Hill (57 NY2d 458), the rules governing the causes of action for wrongful discharge are those set forth in Murphy [v American Home Products Corp. (58 NY2d 293)]. Accordingly, since under the facts pleaded herein, the law firm had the right to terminate plaintiff, the fourth and fifth causes of action are dismissed.

The Appellate Division affirmed. It also concluded that plaintiff failed to state a cause of action because, as an at-will employee, the firm could terminate him without cause. This Court granted leave to appeal.

II

We discuss first whether, notwithstanding our firmly established employment at will doctrine, plaintiff has stated a legal claim for breach of contract in the fourth cause of action. The answer requires a review of the three cases in which that doctrine is fully explained.

The employment at will doctrine is a judicially created common-law rule "that where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason" (Murphy v American Home Prod., 58 NY2d 293, 300-301 [citing Martin v New York Life Ins. Co., 148 NY 117]). In Murphy, this Court dismissed the claim of an employee who alleged he had been discharged in bad faith in retaliation for his disclosure of accounting improprieties. In so doing, we expressly declined to follow other jurisdictions in adopting the tort-based abusive discharge cause of action for imposing "liability on employers where employees have been discharged for disclosing illegal activities on the part of their employers", being of the view "that such a significant change in our law is best left to the Legislature" (id. at 301).

With respect to the contract cause of action asserted in Murphy, the Court held that plaintiff had not shown evidence of any express agreement limiting the employer's unfettered right to fire the employee. For this reason, the Court distinguished Weiner v McGraw-Hill, Inc. (57 NY2d 458), where such an express limitation had been found in language in the employer's personnel handbook. Finally, in Murphy, the Court rejected the argument that plaintiff's discharge for disclosing improprieties violated a legally implied obligation in the employment contract requiring the employer to deal fairly and in good faith with the employee, explaining:

> No New York case upholding any such broad proposition is cited to us by plaintiff (or identified by our dissenting colleague), and we know of none. New York does recognize that in appropriate circumstances an obligation of good faith and fair dealing on the part of a party to a contract may be implied and, if implied will be enforced (e.g., Wood v Duff-Gordon, 222 NY 88; Pernet v. Peabody Eng. Corp., 20 AD2d 781). In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship. Thus, in the case now before us, plaintiff's employment was at will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination (id. at 304-305 [emphasis added]).

Four years after Murphy, the Court decided Sabetay v Sterling Drug (69 NY2d 329). There, the Court dismissed the complaint of an employee who claimed he was fired for "blowing the whistle" and refusing to engage in improper and unethical activities. As in Murphy, the Court found no basis for an express limitation on the employer's right to discharge an at-will employee and, adhering to Murphy as a precedent, declined to base any such limitation on an implied-in-law obligation of dealing fairly and in good faith with its employee.

Not surprisingly, defendants' position here with respect to plaintiff's breach of contract cause of action is simple and direct, i.e., that: (1) as in Murphy and Sabetay, plaintiff has shown no factual basis for an express limitation on the right to terminate of the type upheld in Weiner; and (2) Murphy and Sabetay rule out any basis for contractual relief under an obligation implied-in-law. We agree that plaintiff's complaint does not contain allegations that could come within the Weiner exception for express contractual limitations (see, Weiner v McGraw-Hill, supra, at 465). As to an implied-in-law duty, however, a different analysis and other considerations pertain.

In arguing that the law imposes no implied duty which would curtail their unlimited right to terminate the employment contract, defendants rely on the holding in Murphy that "[n]o obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship * * * [and] it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination" (58 NY2d 293, at 304-305; accord, Sabetay, supra, at 335-336). The decisions in Murphy and Sabetay, however, are not controlling here.

As plaintiff points out, his employment as a lawyer to render professional services as an associate with a law firm differs in several respects from the employments in Murphy and

Sabetay. The plaintiffs in those cases were in the financial departments of their employers, both large companies. Although they performed accounting services, they did so in furtherance of their primary line responsibilities as part of corporate management. In contrast, plaintiff's performance of professional services for the firm's clients as a duly admitted member of the bar was at the very core and, indeed, the only purpose of his association with defendants. Associates are, to be sure, employees of the firm but they remain independent officers of the court reponsible in a broader public sense for their professional obligations. Practically speaking, plaintiff's duties and responsibilities as a lawyer and as an associate of the firm were so closely linked as to be incapable of separation. It is in this distinctive relationship between a law firm and a lawyer hired as an associate that plaintiff finds the implied-in-law obligation on which he founds his claim.

We agree with plaintiff that in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct, plaintiff contends, would subvert the central professional purpose of his relationship with the firm -- the lawful and ethical practice of law.

The particular rule of professional conduct implicated here (DR 1-103[A]), it must be noted, is critical to the unique function of self-regulation belonging to the legal profession. Although the bar admission requirements provide some safeguards against the enrollment of unethical applicants, the Legislature has delegated the responsibility for maintaining the standards of ethics and competence to the Departments of the Appellate Division (see, Judiciary Law § 90 [2]; and see, e.g., Rules of App Div, 1st Dept, 22 NYCRR 603.2). To assure that the legal profession fulfills its responsibility of self-regulation, DR 1-103(A) places upon each lawyer and judge the duty to report to the Disciplinary Committee of the Appellate Division any potential violations of the Disciplinary Rules that raise a "substantial question as to another lawyer's honesty, trustworthiness, or fitness in other respects". Indeed, one commentator has that noted, "[t]he reporting requirement is nothing less than essential to the survival of the profession" (Gentile, Professional Responsibility, NYLJ, Oct. 23, 1984, at 1, col. 1; see also, Olsson, Reporting Peer Misconduct: Lip Service to Ethical Standards is Not Enough, 31 Arizona L. Rev. 657, 658-659).[2]

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[2] see also, Matter of Rowe (___ NY2d ___ [decided 11-18-92] ["The Code of Professional Responsibility * * * observes that lawyers play a critical role in sustaining the rule of law and * *

Moreover, as plaintiff points out, failure to comply with the reporting requirement may result in suspension or disbarment (see, e.g., In re Dowd, 160 AD2d 78). Thus, by insisting that plaintiff disregard DR 1-103(A) defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position of having to choose between continued employment and his own potential suspension and disbarment. We agree with plaintiff that these unique characteristics of the legal profession in respect to this core Disciplinary Rule make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to the corporate employers in Murphy and Sabetay. The critical question is whether this distinction calls for a different rule regarding the implied obligation of good faith and fair dealing from that applied in Murphy and Sabetay. We believe that it does in this case, but we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied in law term in every contractual relationship between or among lawyers.

It is the law that in "every contract there is an

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* the courts are charged with the responsibility of insisting that lawyers exercise the highest standards of ethical conduct * * *. Conduct which tends to reflect adversely on the legal profession as a whole and to undermine public confidence in the Bar warrants disciplinary action"]).

implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part" (Patterson v Meyerhoffer, 204 NY 96, 100; see, e.g., Arc Elec. Constr. Co. v Fuller Co., 24 NY2d 91, 103-104; Wakefield v Northern Telecom, Inc., 769 F2d 109, 112, modified 813 F2d 535). The idea is simply that when A and B agree that B will do something it is understood that A will not prevent B from doing it. The concept is rooted in notions of common sense and fairness (see, Farnsworth, The Law of the Contract, § 7.16, at 307). "What courts are doing [when an omitted term is implied]", Professor Corbin explains, "whether calling the process 'implication' of promises, or interpreting the requirements of 'good faith', as the current fashion may be, is but a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations" (Corbin, On Contracts, § 570, at 411).

Just such fundamental understanding, though unexpressed, was inherent in the relationship between plaintiff and defendant law firm (see also, Wakefield v Northern Telecom, Inc., 769 F2d 109, 112, supra ["Implied contractual obligations may coexist with express provisions which seemingly negate them where common expectations or the relationship of the parties as structured by the contract so dictate" (emphasis added)]). Defendants, a firm of lawyers, hired plaintiff to practice law and this objective was the only basis for the employment relationship. Intrinsic to this relationship, of course, was the unstated but essential compact that in conducting the firm's legal pracice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession. Insisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship.

From the foregoing, it is evident that both Murphy and Sabetay are markedly different. The defendants in those cases were large manufacturing concerns -- not law firms engaged with their employee in a common professional enterprise, as here. In neither Murphy nor Sabetay was the plaintiff required to act in a way that subverted the core purpose of the employment. The company rules underlying the firing of Murphy and Sabetay were not, as in this case, general rules of conduct and ethical standards governing both plaintiff and defendants in carrying out the sole aim of their joint enterprise, the practice of their profession (see, Judiciary Law § 90[2]; and see e.g., Rules of App Div, 1st Dept, 22 NYCRR 603.2). Unlike Murphy and Sabetay, giving effect to an implied understanding -- that in their common endeavor of providing legal services plaintiff and the firm would comply with the governing rules and standards and that the firm would not act in any way to impede or discourage plaintiff's compliance-- would be "in aid and furtherance of [the central purpose] of the agreement of the parties" (Murphy, supra, at 304). Thus, the case is distinguishable from Murphy and Sabetay where giving effect to the implied obligation would have been "inconsistent with" and "destructive of" an elemental term in the agreement (id. at 304-305). We conclude, therefore, that plaintiff has stated a valid claim for breach of contract based on an implied-in-law obligation in his relationship with defendants.

III.

Plaintiff argues, moreover, citing our decision in Cohen v Lord, Day & Lord[3] (75 NY2d 95, 101), that the dictates of public policy in DR 1-103(A) have such force as to warrant our ~~recognition of the tort of abusive discharge~~ pleaded in the fifth cause of action. While the arguments are persuasive and the circumstances here compelling, we have consistently held that "significant alteration of employment relationships, such as the plaintiff ~~urges, is best left to the~~ Legislature" (Sabetay, supra, at 336 [citing Murphy, supra, at 301-302]). We believe ~~that the same rationale applies here~~. In 1984, the Legislature

[3] In Cohen, the Court held that a term in a law firm partnership agreement which conditions payment of earned but uncollected partnership revenues upon a withdrawing partner's refraining from practicing law in competition with the firm restricts the practice of law in violation of DR 2-108(A) and is, therefore, unenforceable as against public policy.

enacted a "Whistleblower" statute (Labor Law § 740, added L 1984, ch 660 § 2). We have noted that, although the present "statute has been criticized by commentators for not affording sufficient safeguards against retaliatory discharge (see, Minda and Raab, Time for an Unjust Dismissal Statute in New York, 54 Brooklyn L Rev 1137, 1138, 1182-1187; Dworkin and Near, Whistleblowing Statutes: Are They Working?, 25 Amer Bus LJ 241, 253 [1987]), any additional protection must come from the Legislature" (Remba v Federation Employment and Guidance Service, 76 NY2d 801, 803).

Accordingly, the judgment appealed from and the order of the Appellate Division brought up for review should be modified, with costs to plaintiff, by denying defendant's motion to dismiss the fourth cause of action and, as so modified, affirmed.

* * * * * * * * * * * * * * * * *

Judgment appealed from and order of the Appellate Division brought up for review modified, with costs to plaintiff, by denying defendant's motion to dismiss the fourth cause of action and, as so modified, affirmed. Opinion by Judge Hancock. Acting Chief Judge Simons and Judges Kaye, Titone and Bellacosa concur. Judge Smith took no part.

Decided December 22, 1992

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------------------------------------x

HOWARD L. WIEDER,

Plaintiff,

- against -

MURRAY L. SKALA, GABRIEL KASZOVITZ, ALVIN M. FEDER, MARCEL WEBER, LEONARD A. ISAACSON, RICHARD J. GOTTLIEB, individually and doing business as FEDER, KASZOVITZ, ISAACSON, WEBER SKALA, and LARRY A. LUBIN,

Defendants.

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Index No. 17278/88

PLAINTIFF REQUESTS ORAL ARGUMENT

Assigned To: Justice Lehner

I.A.S. Part 12

NOTICE OF MOTION TO AMEND COMPLAINT WITH SUPPLEMENTAL CAUSE OFACTION,STRIKE AFFIRMATIVE DEFENSES, STRIKE NOTICE OF DEPOSITION, QUASH SUBPOENA, AND STRIKE DEMAND FOR BILL OF PARTICULARS

Preliminary Conference Not Held

TAKE NOTICE, that on the annexed affidavits of JEREMIAH S. GUTMAN, ESQ., and EUGENE N. HARLEY, ESQ., sworn to on January 29, 1993, and the Exhibits annexed thereto and upon all the prior pleadings and papers herein, the undersigned will move this Court at the Motion Support Office Courtroom (Room 130) on the 17th day of February, 1993, at 9:30 A.M., or as soon thereafter as counsel can be heard, for an order permitting the service of the Amended and Supplemental Complaint annexed to the moving papers, the striking of the Second and Third Affirmative Defenses of Defendants' Answer, and the quashing of the subpoena served upon Chemical Bank, and the striking of a Notice of Deposition of Chemical Bank, and the striking of a demand for bill of particulars served by the Skala Defendants, and for such other relief as may be proper.

PLEASE TAKE NOTICE, pursuant to CPLR 2214(b), that answering papers, if any, are to be served at least seven days prior to the return date.

PLEASE TAKE NOTICE that counsel for Plaintiff request oral argument on this motion.

Dated: New York, New York
January 29, 1993

Yours, etc.,

LEVY, GUTMAN, GOLDBERG & KAPLAN
Attorneys for Plaintiff
275 Seventh Avenue - Suite 1776
New York, New York 10001
(212) 807-9733

TO:

Feder, Kaszovitz, Isaacson,
Weber & Skala
Defendants pro se and for
the Partners of that firm
450 Seventh Avenue
New York, New York 10123

Bergadano, Zichello & Babchik
Attorneys for Defendant Lubin
420 Lexington Avenue
New York, New York 10170

Meryl R. Kaynard, Esq.
Assistant General Counsel
Legal Department
Chemical Bank
380 Madison Avenue - 9th Floor
New York, New York 10017-2591

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X

HOWARD L. WIEDER,

Index No.: 17278/88

Plaintiff,

- against -

MURRAY L. SKALA, GABRIEL KASZOVITZ ALVIN M. FEDER, MARCEL WEBER, LEONARD A. ISAACSON, RICHARD J. GOTTLIEB individually and doing business as FEDER, KASZOVITZ, ISAACSON, WEBER & SKALA, and LARRY A. LUBIN,

AFFIDAVIT

Defendants.
--X

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

Eugene N. Harley, being duly sworn, deposes and says:

1. I am an attorney in the firm of Levy, Gutman, Goldberg & Kaplan, attorneys for the Plaintiff herein. I make this affidavit in support of the within motion to, among other things, strike the Feder Kaszovitz Defendant's demand for a Bill of Particulars.

2. On Tuesday January 26, 1993, I spoke with Jay Lukowski, Esq. of the Feder Kaszovitz firm and requested that he withdraw the demand for a Bill of Particulars on the grounds stated in this motion, including that the complaint was five years old, three days of Plaintiff's deposition had been held, that there was no need for such particulars, and that the demand was

harassing and duplicative.

3. Mr. Lukowski insisted that his firm had the right to such particulars and a need for them.

4. Deponent submits that a good faith effort was made to resolve this disclosure dispute but that the effort was unavailing.

Eugene N. Harley
EUGENE N. HARLEY

Sworn to before me this
27 day of January, 1993

JEREMIAH S. GUTMAN
Notary Public, State of New York
Qualified in Westchester County
No. 60-6709850
Commission Expires Feb 28, 1993

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HOWARD L. WIEDER,

Plaintiff,

- against -

MURRAY L. SKALA, GABRIEL KASZOVITZ, ALVIN M. FEDER, MARCEL WEBER, LEONARD A. ISAACSON, RICHARD J. GOTTLIEB, individually and doing business as FEDER, KASZOVITZ, ISAACSON, WEBER & SKALA, and LARRY A. LUBIN,

Defendants.

Index No. 17278/88

Hon. Edward H. Lehner

I.A.S. Part 12

AFFIDAVIT IN SUPPORT OF MOTION TO AMEND COMPLAINT AND FOR OTHER RELIEF

State of New York)
) ss.:
County of New York)

JEREMIAH S. GUTMAN, being duly sworn, deposes and says:

1. I am a member of Levy, Gutman, Goldberg & Kaplan, attorneys for the Plaintiff Howard L. Wieder.

2. I am fully familiar with all of the facts and the procedural history of this case. I submit this affidavit in support of Plaintiff's motion seeking:

a) to supplement the Complaint, pursuant to CPLR 3025 (b), to add a fifth cause of action for libel per se;

b) to strike the second and third affirmative defenses of the Skala Defendants pursuant to CPLR 3211(b), alleging removal of firm papers and unclean hands on the grounds that the purported defenses are not stated, and have no merit, and are not affirmative defenses to the fourth cause of action for breach of contract;

c) to provide order relief, pursuant to CPLR 3122, striking the Skala Defendants' discovery notices for production of documents and an examination before trial addressed to Chemical Bank, on the grounds that the notices are irrelevant to issues to be tried and that Defendants have failed to comply with the Plaintiff's discovery notices and vacating the Defendants' demand for a bill of particulars, as calling for evidentiary material and as being duplicative.

THE RECENT PROCEDURAL HISTORY

3. While this case was being appealed, the Defendants have subjected the Plaintiff and his witnesses to numerous days of examinations before trial. On the first three causes of action of the verified amended complaint, annexed as Exhibit A, the Defendants took Plaintiff's deposition for <u>three</u> full days. The Defendants also deposed three witnesses of Plaintiff: Aaron Frager, C.P.A. and Edward Feuer, C.P.A., two accountants who performed services for Plaintiff, and Steven Klein, Esq., the attorney who represented Plaintiff on the refinancing of his mortgage.

4. The Plaintiff, in 1989, served Defendants with deposition notices and a Judicial Subpoena upon Elizabeth Urban, a nonparty witness. The deposition notices and subpoena are annexed as Exhibit B. Although, I asked the Defendants, during six days of Plaintiff's deposition and those of his witnesses to set dates for Defendants' examination before trial, they ignored my requests and the deposition notices and judicial subpoena.

5. The New York Court of Appeals reinstated the Fourth Cause of Action of Plaintiff's Amended Verified Complaint (Exhibit A). The decision of the New York Court of Appeals is annexed as Exhibit C. Significantly, the Court of Appeals referred to the "persuasive" and "compelling" circumstances of Plaintiff's case. See Exhibit C, p. 13.

THE MOTION TO SUPPLEMENT THE COMPLAINT

6. Plaintiff seeks leave of this Court to supplement the complaint to assert a cause of action against the Skala Defendants for libel per se. The Proposed Supplemental Complaint containing that cause of action is annexed as Exhibit E.

7. Specifically, in an interview to the Wall Street Journal, Defendant Gabriel Kaszovitz, acting on behalf of all Skala Defendants and authorized to act on their behalf, alleged that Plaintiff, a practicing lawyer, incompetently, and "improperly handled" work, and intimated that the alleged defamatory conclusion was based on facts in Kaszovitz's and the Skala Defendants' sole possession. The Wall Street Journal of December 23, 1992, (Exhibit D) stated:

> Gabriel Kaszovitz, a partner at Feder Kaszovitz, criticized the decision for "fundamentally changing the law" and altering "the at-will doctrine by court rule rather than legislative enactment."
>
> Mr. Kaszovitz said the firm itself reported the ethical violations that Mr. Wieder had discovered and that Mr. Wieder was fired not because of his whistle-blowing but because of "improper handling"

> <u>of his job.</u> "We have no problem with one employee lodging complaints against another employee," Mr. Kaszovitz said. Exhibit D (Emphasis added).

8. Mr. Kaszovitz's criticism of the Court of Appeals is not the subject of grievance by Plaintiff since it is admittedly a protected expression of his and the Defendants' First Amendment and New York Constitutional freedoms. But his charging falsely that the Plaintiff was fired for "'improper handling' of his job" (Exhibit D) is not so protected.

9. The Appellate Division, First Department, in <u>Bingham</u> v. <u>Struve</u>, N.Y.L.J., Dec. 16, 1992, at 21, col. 3 (Dec. 8, 1992), stated:

> Defendant's attempt to continue her offending communications as protected free speech under the First Amendment and its New York State Constitution analogue, Article One, Section Eight, must fail. Constitutional free speech protections are intended to encourage "debate on public issues [that is] uninhibited, robust, and wide open" (<u>New York Times Co.</u> v. <u>Sullivan</u>, 376 U.S. 254, 270). Distinctions are drawn where, as here, the defamatory speech does not advance such societal interests and, indeed, concerns a private individual (<u>Gertz</u> v. <u>Robert Welch, Inc.</u>, 418 U.S. 323, 344). Moreover, these protections are not absolute (<u>Nebraska Press Association</u> v. <u>Stuart</u>, 427 U.S. 539, 570). As noted in <u>Gitlow</u> v. <u>State of New York</u>, 268 U.S. 652, 666, "the freedom of speech . . . secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose." (<u>See also Angel</u> v. <u>Levittown Union Free School District No. 5</u>, 171 A.D.2d 770, 772).

<u>Bingham</u>, <u>supra</u>, N.Y.L.J., Dec. 16, 1992, at 23, cols. 5-6.

10. Even an expression of opinion is actionable where the expression gives rise to an inference that there were undisclosed facts which justified the opinion. Steinhilber v. Alphonse, 68 N.Y.2d 283, 289-90, 508 N.Y.S.2d 901, 904 (1986); Mittleman v. Witous, 35 Ill. 2d 220, 552 N.E.2d 973 (1989). See also Roberts v. Cunningham, N.Y.L.J., March 27, 1992, at 21, col. 5 (Sup. Ct. N.Y. County) (Shainswit, J.) ("Defendant also urges that the falsehood was simply a narrative of facts by her, and is therefore not actionable. However, this position only adds sting to the alleged slander, and bolsters the claim.").

11. The false statements made by Defendant Kaszovitz, who knew of the falsity of and concerning the Plaintiff, injure him in his trade, business, and profession.

12. "[A]ttorneys' livelihoods depend in large part on their reputation for success and integrity, both with their peers and within the universe of potential clients." Elizabeth Thornburg, "Rethinking Work Product," 77 Va. L. Rev. 1515, 1527 (1991). See Halperin v. Salvan, 117 A.D.2d 544, 499 N.Y.S.2d 55, 58 (1st Dept. 1986) (statements charging attorney with conspiracy to commit fraud and usury were libelous per se); Kraushaar v. LaVin, 181 Misc. 508, 42 N.Y.S.2d 857 (Sup. Ct. Queens County 1943) (oral statements that a certain lawyer was "unethical" were slanderous per se, as impugning his fitness to continue practice of his profession and tending directly to prejudice or injure him

in his professional capacity); Ernest P. Seelman, The Law of Libel and Slander in the State of New York pp. 13, 15 & n.91 (1941), and Seelman, Id., pp. 294-295 (1933-59 Accumulative Supplement) (cases of defamation per se of attorneys); 43 N.Y. Jur. 2d "Defamation and Privacy" § 35, at 544-46 (1985) ("Utterances concerning an attorney which, on their face, are in their ordinary meaning susceptible of such a construction as would tend to injure him in that capacity are libelous per se. . . . [T]o render words spoken or written of an attorney actionable per se as being injurious to him professionally, they must impute incompetency, dishonesty, or misconduct incompatible with the proper conduct of his profession. Slanderous or libelous language used with respect to the conduct of an attorney in a particular case is actionable per se where the natural and plain import of the words is such that they impute to the attorney lack of general professional ability, skill, and character.") (footnote references omitted). See also Rand v. New York Times Co., 75 A.D.2d 417, 424, 430 N.Y.S.2d 271, 275 (1st Dept. 1980) ("[A]n individual may not escape liability when a defamatory statement he makes is forseeably republished.").

13. Defendant Kaszovitz cannot be taken seriously in urging that Plaintiff should mitigate his damages by finding work at higher compensation while he deems himself free to allege that the Plaintiff attorney "improperly handled" his work. Such defamation per se is actionable without proof of special damages.

14. This defamation by Kaszovitz is now spread across the sheets of the Wall Street Journal, and available to every potential legal employer and judicial screening panel by electronic research transmissions in both Nexis and the Dow Jones file of Westlaw. Moreover, Kaszovitz acted with sheer malice. In court filings to the Court of Appeals, Kaszovitz and the Defendants attempted to portray the Plaintiff as eccentric and litigation prone. See National Law Journal article of November 2, 1992, at 8, annexed as Exhibit F. That expression by Kaszovitz (Exhibit F) contained in a court pleading, while morally indefensible, may be legally privileged, but the statement by Kaszovitz directly to The Wall Street Journal stating that Plaintiff "improperly handled" his job (Exhibit D) stands on a completely different footing, is not protected by any form of privilege, and is actionable.

15. CPLR 3025(b) provides:

> b) **Amendments and supplemental pleadings by leave.** A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. (Emphasis added).

Under CPLR 3025(b), a court may grant leave to amend pleadings "at any time," and, generally, leave to amend "shall be freely given," absent prejudice resulting directly from the delay.

16. In the present case, the Defendants are not prejudiced by the supplemental pleading (Exhibit E). The basis for the pleading (Exhibit D) first became actionable on December 23, 1992. The Defendants have not taken Plaintiff's deposition on the Fourth Cause of Action and are therefore not prejudiced. As Justice Shainswit recently stated in Wieder v. Adler, Index No. 26359/90 (Sup. Ct. N.Y. County), in permitting Plaintiff to amend his pleading to assert two additional causes of actions:

> Defendants have shown no prejudice from either of the proposed amendments. The Ninth Cause of Action is based on Plaintiff's personal knowledge, supported by an affidavit. Examinations before trial are presently being held, allowing Defendants ample opportunity to discover the facts underlying this new claim.

Exhibit G, p. 3. Accord Sabol & Rice, Inc. v. Poughkeepsie Galleria Co., 175 A.D.2d 555, 556, 572 N.Y.S.2d 811, 813 (3d Dept. 1991) ("[Defendant] does not claim nor do we find that any prejudice will result from the amendment, particularly since discovery has not yet been completed."). Under these circumstances, and particularly in view of the great harm to Plaintiff's career and reputation, leave to amend or supplement pleadings, should be liberally granted. See Bielawski v. Edgewater Recreation, Inc., 177 A.D.2d 1060, 578 N.Y.S.2d 301 (4th Dept. 1991); Esposito v. Billings, 103 A.D.2d 956, 479 N.Y.S.2d 572 (3d Dept. 1984) (leave to amend complaint properly granted in libel action); Hauser v. Harcourt Brace Jovanovich, Inc., 140 Misc. 2d 82, 530 N.Y.S.2d 431 (Sup. Ct. N.Y. County 1988).

17. Finally, to deny leave to serve the supplemental cause of action based on subsequently occurring events would not serve the interests of judicial economy. Specifically, if leave were denied, the Plaintiff would be compelled to commence a new action against the Defendants to raise the recent defamation per se, occurring on December 23, 1992, while filing a motion to consolidate the new action with the instant action. Judicial economy would not thereby be served.

18. Accordingly, it is respectfully submitted that the proper result is to grant the present motion for leave to serve the supplemental pleading.

THE SECOND AND THIRD AFFIRMATIVE DEFENSES SHOULD BE STRICKEN

19. The Defendants have served an Answer to the Amended Complaint (Exhibit H), raising three affirmative defenses to the Fourth Cause of Action. In Exhibit H, Defendants state that the Fourth Cause of Action is barred by:

a) the doctrine of collateral estoppel [Exhibit H, p. 5];

b) an alleged "conversion" contending that the "defendant [Sic] removed from the firm's offices original [Sic] and/or copies of documents which were the property of the firm." [Exhibit H, p. 6];

and

c) an "unclean hands" defense, alleging, bereft of facts, that "Plaintiff has engaged in a course of unethical conduct which precludes him from obtaining affirmative relief." [Exhibit H, p.6].

20. Plaintiff moves to strike the Second and Third Affirmative Defenses to the Fourth Cause of Action. CPLR 3211(b) states:

> A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

As to the First Affirmative Defense, it is opaque and Plaintiff is demanding particulars thereof which, when received and evaluated, may form the basis for a later motion to dismiss it.

21. Regarding the Second Affirmative Defense, alleging conversion, it is impossible to comprehend how the safeguarding of evidence can possibly stand as an "affirmative defense" to a breach of contract cause of action now sustained by the Court of Appeals.

22. On September 7, 1990, Plaintiff, during the second of three days of deposition testimony, elaborated that he had made copies of documents that he stumbled upon, lying in plain view. The pertinent portion of Plaintiff's sworn testimony is annexed as Exhibit I and is specifically incorporated by reference. Specifically, Plaintiff testified:

Question by [Mr. Lukowski]:

> Okay.
>
> Do you recall whether you took the documents at the same time?

Answer [by Mr. Wieder]:

No, I didn't take them.

I went to make a photocopy of them.

Q. Do you remember if you photocopied them at the same time?

A. Yes, I did a lot of them.

* * *

Q. Mr. Wieder, at the time you removed Exhibit O through S from Mr. Kaszovitz's desk, whether that was one occasion or another occasion, did you ask for Mr. Kaszovitz's permission?

MR. GUTMAN: Object to the form of the question.

A. I didn't remove documents, I photocopied them and made preserved evidence.

Exhibit I, pages 214 and 219.

23. The fact that Plaintiff copied pertinent documents, like Defendant Lubin's written confession and copies of Plaintiff's own writing samples, is perfectly permissible. Indeed, the preservation of evidence is legal and proper. <u>See</u>, <u>e.g.</u>, <u>Mayer</u> v. <u>Morgan Stanley & Co.</u>, 703 F. Supp. 249, 255 (S.D.N.Y. 1988) (employer's complaint alleging that former employee was wrongfully keeping documents he took with him when he left the firm, to help establish his claims in breach of contract action, failed to state a claim for <u>prima facie</u> tort, absent an allegation of special damages); <u>State</u> v. <u>Riley</u>, 216 N.J. Super. 383, 523 A.2d 1089 (1987); <u>Committee on Professional Ethics</u> v. <u>Hanson</u>, 244 N.W.2d 822, 823 (Iowa 1976) (respondent's fellow partners reviewed and turned over to authorities

respondent's legal files and illicit drugs found in his office).

24. As made clear in Mayer, 703 F. Supp. at 255, a contention by an employer that an employee kept copies of documents to substantiate a claim may not be maintained. The Defendants are aware of this holding since their original answer raises these facts as a counterclaim against the Plaintiff, and now, without having secured leave of this Court as is required, have re-styled their frivolous counterclaim as a frivolous defense.

25. Under CPLR 3211(b), as the Appellate Division, First Department stated in Leonard v. Leonard, 31 A.D.2d 620, 296 N.Y.S.2d 375 (1968),

> "[I]f the moving party properly challenges the factual basis of the defenses it is incumbent on the party asserting the defense to come forward with such evidence as will raise an issue as to the facts pleaded." 31 A.D.2d at 620, 296 N.Y.S.2d at 375.

Accord Greenblatt v. Johannssen, 80 Misc. 2d 436, 437, 363 N.Y.S.2d 203, 204 (Sup. Ct. Suffolk County 1974) (Lazer, J.) ("The standard by which this motion must be decided is whether the defendants actually have a defense not whether they have actually stated one.").

26. Defendants have not suffered any prejudice or injury by the preservation of documentary evidence from their would be spoliation other than the fact that they now have limited

maneuverability to mislead and deceive this Court and the jury. No client of the firm is hurt by the Plaintiff keeping copies of his publicly-filed motion papers and briefs. These documents are not confidential and had been publicly filed with the Courts.

27. Courts, moreover, will examine the relations of professionals based on the "custom and practice" in the profession or industry. Melendez v. Hospital for Joint Diseases Orthopedic Institute, 179 A.D.2d 610, 579 N.Y.S.2d 74 (1st Dept. 1992). See B.M. Heede, Inc. v. Roberts, 303 N.Y. 385, 390 (1952); Edison v. Viva International, Ltd., 70 A.D.2d 379, 383, 421 N.Y.S.2d 203, 205 (1st Dept. 1979).

28. This Court can take judicial notice that in the legal profession, in applying for positions as a lawyer or a judge, important weight is given to representative writing samples as an indication of the candidate's writing and legal research abilities. In addition to this Court taking judicial notice, the need of a prospective employer for writing samples is discussed in several cases. See, e.g., Brown v. United States Department of the Navy, 1987 U.S. Dist. Lexis 13263, 49 Fair Empl. Prac. Cas. (BNA) 185; 44 Empl. Prac. Dec. (CCH) P 37,477 (D.D.C. 1987) ("Showalter needed to know if he could rely on the plaintiff's application as an accurate measure of his writing ability."); Pridemore v. Legal Aid Society, 625 F. Supp. 1171, 1172 (S.D. Ohio 1985); Murray v. District of Columbia, 34 Fair Empl. Prac.

Cas. (BNA) 644 (D.D.C. 1983); Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465, 467, 541 N.E.2d 984 (1989) (screening committee deliberated on the writing samples which the invited candidates submitted).

29. Equally frivolous is the Third Affirmative "unclean hands" Defense (Exhibit H, p. 6). The Fourth Cause of Action is for breach of contract, as sustained by the Court of Appeals. It is an action at law for breach of contract and for legal damages resulting therefrom, including all lost income and revenue that Plaintiff would have earned at the Defendant law firm, as a partner, had the Defendants not frustrated the contract. Unclean hands, however, is an equitable defense, under hornbook law, and may not be asserted in an action at law for damages. 55 N.Y. Jur. 2d "Equity" §§ 117-132 (1986).

30. More important, Plaintiff has testified (Exhibit I) that he sought to preserve documents and evidence. See Exhibit I, pp. 214 and 219. His photocopying of documents represented the lawful exercise of healthy self-interest. Had Plaintiff not taken such precautionary measures, he would have been truly vulnerable to the firms's new attempt to portray Plaintiff as being an incompetent lawyer and its earlier and still maintained stance that Plaintiff has "an unstable mind" and a "depraved personality," as Defendants alleged in Court papers. See New York Times, Nov. 13, 1989. On this important point, it is well

established:

> "An unclean hands defense will fall where the party's conduct is neither inequitable nor unconscionable, but was instead generally motivated by a legitimate desire to protect such party's interests."

55 N.Y. Jur. 2d "Equity" § 119, at 552 (1986) (footnote reference omitted).

THIS COURT SHOULD GRANT A PROTECTIVE ORDER
AGAINST DEFENDANTS' ABUSIVE DISCOVERY DEVICES

31. Defendants have willfully ignored a Judicial Subpoena and notices to take their deposition. See Exhibit B. Instead, on simple fraud malpractice claims, they have taken six days of depositions of Plaintiff and his witnesses.

32. Defendants have served a notice to take the deposition of Chemical Bank (Exhibit J). The Plaintiff requests a protective order. The Court of Appeals has now framed the issue for trial whether or not "defendants wrongfully discharged [Plaintiff] as a result of his insistence that [Defendant Larry Lubin's] misconduct be reported as required by DR 1-103 (A)." Exhibit C, p. 4. Inquiries into Plaintiff's subsequent employment and his litigation with Chemical Bank are irrelevant and immaterial to the issues to be resolved at the trial.

33. The fact that Defendants issue such a notice speaks volumes especially since the Bank attempted to pressure Plaintiff into withdrawing his action against the Defendants, following this Court's order dismissing the Fourth Cause of Action.

34. The Court should know that a similar, if not substantially identical issue, is now before Justice Carmen B. Ciparick in IAS Part 15 of this Court in the case of Wieder v. Chemical Bank, Index Number 6726 of 1992. Among the issues before Justice Ciparick in that case is the propriety and the consequences of the production of Plaintiff's personnel records at Chemical Bank and its predecessor, Manufacturers Hanover Trust Co. A subpoena had been served upon Chemical Bank in form substantially similar to the subpoena now served upon Chemical Bank by the Skala Defendants in this action. The Bank, without notice to Plaintiff, produced pursuant to that subpoena in the case of Wieder v. Adler the very file and documents which the Skala Defendants now seek to have disclosed to them in this case. The propriety of that disclosure and the consequences for Chemical Bank of having produced Plaintiff's personnel records, including medical files, in the Adler action is now the subject of consideration by Justice Ciparick. Should this Court decide not completely to quash the subpoena to Chemical Bank, it is respectfully suggested that this Court await the determination by Justice Ciparick on the now pending motion of Defendants in that action to dismiss the Complaint, including the cause of action for having released Plaintiff's personnel records in violation of Plaintiff's rights, including Plaintiff's right to privacy.

35. It is respectfully submitted that the records sought in the Chemical subpoena are entirely irrelevant to the proceedings

in this case, and that the subpoena for their disclosure should be in its entirety quashed. At least, however, to avoid any possibility of inconsistent rulings by this Part of the Court and Justice Ciparick in the Chemical Bank case, decision on this issue should be delayed by this Court until the already briefed motion before Justice Ciparick has been decided.

36. The Defendants' demand for a bill of particulars (Exhibit K) should also be stricken. Plaintiff has already served a lengthy bill of particulars. See Plaintiff's Bill of Particulars, dated April 27, 1990, annexed as Exhibit L. Both Lubin's counsel and the Defendant law firm received copies of Plaintiff's detailed Bill. See Exhibit L, p. 11. The obvious nature of this second demand is to harass the Plaintiff. Second, this second demand (Exhibit K) calls for evidentiary material, which is not the purpose of a bill of particulars, and much of which has been supplied during Plaintiff's deposition. Finally, it is beyond comprehension that from the beginning of this action in August, 1988, six days of depositions of Plaintiff and his witnesses, and after several years of appeals, the Defendants need a bill of particulars to flesh out the Verified Amended Complaint.

37. Plaintiff should not be required to sift through the transcripts of his deposition to determine whether each and every item requested by the Feder Kaszovitz Defendants has been

furnished. Rather, it is the Feder Kaszovitz Defendants who should be required to edit their demand and trim it so that it requests particulars only on those items in Plaintiff's Complaint which need clarification at this stage of the litigation. Accordingly, the demand for a bill of particulars (Exhibit K) should similarly be stricken.

38. CPLR 3103(a), governing protective orders aimed at preventing abuse of discovery devices, states:

> The court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

See David D. Siegel New York Practice § 353 (2d ed. 1991).

39. We have unsuccessfully attempted to secure consent of Defendants to the discovery relief requested. See accompanying affidavit of Eugene N. Harley, Esq.

40. This Court should grant Plaintiff's motion by:

(A) permitting service of the supplemental pleading;

(B) striking the Second and Third Affirmative Defenses of Defendants' Answer;

(C) granting a protective order:

(1) striking Defendants' Notice of Deposition of Chemical Bank;

(2) quashing the subpoena to Chemical Bank to produce documents;

(3) striking the Skala Defendants' demand for a bill of particulars; and

(D) granting to Plaintiff such other relief as is appropriate.

JEREMIAH S. GUTMAN

Sworn to before me, this
29th day of January, 1993

Notary Public

Notary Public [illegible]
No. [illegible]
Qualified in [illegible] County
Commission Expires [illegible] 30, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

- X

HOWARD L. WIEDER,

Plaintiff,

-against-

MURRAY L. SKALA, GABRIEL KASZOVITZ, ALVIN M. FEDER, MARCEL WEBER, LEONARD A. ISAACSON, RICHARD J. GOTTLIEB, individually and doing business as FEDER, KASZOVITZ, ISAACSON, WEBER & SKALA, and LARRY A. LUBIN,

Defendants.

- X

Index No.: 17278/88

VERIFIED AMENDED COMPLAINT

Plaintiff, Howard L. Wieder, by his attorneys Bragar & Wexler, P.C., for his Amended Complaint against the defendants, alleges as follows:

1. Plaintiff is a resident of the State of New York and an attorney admitted to practice in the State of New York. During the period from June 16, 1986 through March 18, 1988, plaintiff was associated with the law firm of Feder, Kaszovitz, Isaacson, Weber & Skala, and practiced solely in the area of commercial litigation.

2. Defendants Murray L. Skala ("Skala"), Gabriel Kaszovitz ("Kaszovitz"), Alvin M. Feder ("Feder"), Marcel Weber ("Weber"), and Leonard A. Isaacson ("Isaacson") are residents of the State of New York and are attorneys admitted to practice law in the State of New York. Defendant Richard J. Gottlieb

("Gottlieb") is a resident of the State of New Jersey and is an attorney admitted to practice law in the State of New York.

3. Defendants Skala, Kaszovitz, Feder, Weber, Gottlieb and Isaacson, individually and collectively, are engaged in the practice of law, doing business as "Feder, Kaszovitz, Isaacson, Weber & Skala", with offices at 450 Seventh Avenue, New York, New York 10123.

4. Defendant Larry A. Lubin ("Lubin") is a resident of the State of New Jersey and is an attorney admitted to practice law in the State of New York.

5. Defendants Skala, Kaszovitz, Feder, Weber, Gottlieb and Isaacson, individually, and doing business collectively as "Feder, Kaszovitz, Isaacson, Weber & Skala" (the "Firm"), employed Lubin as an attorney. Lubin, who was associated with the Firm from August, 1984, until on or about December 7, 1987, practiced principally in the field of real estate. Lubin also worked for the Firm during the summer of 1983, as a summer associate while still a law student.

6. During March, 1987, plaintiff expressed to the Firm his desire to enter into an agreement for the purchase of a two bedroom condominium unit, No. 6-E, in a building known as "The Bromley," located at 225 West 83rd Street, New York, New York 10024 (the "Condominium").

7. Plaintiff requested of both defendants Kaszovitz and Skala whether the Firm would represent him in the transaction for the Condominium.

8. Both defendants Kaszovitz and Skala, who, at all relevant times, were acting for themselves and as authorized agents on behalf of the Firm and the other defendants, agreed to represent plaintiff, and instructed Lubin to do "everything that needs to be done" in connection with the representation of plaintiff in the purchase of the Condominium.

The Misrepresentation

9. Commencing during or about April, 1987, and continuing throughout the entire period through September, 1987, Lubin, during his association with the Firm, made the following false and fraudulent material representations to plaintiff, knowing the same to be false and fraudulent when made:

(a) Lubin falsely advised plaintiff that he had secured on plaintiff's behalf a thirty (30) year mortgage from Citibank, N.A. ("Citibank"), at a fixed rate of ten and three-quarters percent (10 3/4%);

(b) Lubin falsely advised plaintiff that the loan officer at Citibank in charge of the mortgage for plaintiff was Ms. Liz Urban ("Urban") and that he was in constant communication with Urban from April through September, 1987.

When plaintiff requested to speak to Ms. Urban, Lubin repeatedly admonished plaintiff not to do so, stating that "everything was under control";

(c) Lubin falsely advised plaintiff that he had obtained from the Sponsor of the Condominium, at the plaintiff's specific instance, an agreement that both bathrooms of the Condominium would be installed with a Glissade mirror containing a certain lighting effect;

(d) Lubin falsely advised plaintiff that he had obtained from the Sponsor of the Condominium an agreement that all closets within the Condominium would be double-tiered; and

(e) During or about August, 1987, Lubin falsely advised plaintiff that (i) he had received an extension of the mortgage commitment, and (ii) the renewal commitment did not change the terms of the mortgage commitment that was, as Lubin falsely maintained, locked in at a rate of ten and three-quarters percent (10 3/4%), and was valid and still in force and effect.

10. Plaintiff, to his detriment, reasonably relied on all of the misrepresentations contained in paragraph 9, and suffered damage thereby. Specifically, plaintiff was obliged to undertake, at significant expense, a refinance of the mortgage in an effort to mitigate his damages. Moreover, plaintiff had to purchase double-tiered closets and Glissade mirrors that Lubin falsely promised were forthcoming from the Sponsor. (A schedule of damages incurred, and expected to be incurred, as a result of the fraud, deceit and malpractice is annexed as Exhibit A).

11. A few days before the scheduled closing on September 21, 1987, plaintiff spoke with Urban, the individual who Lubin was quoting extensively as the Citibank loan officer for plaintiff's mortgage and the person who Lubin stated had guaranteed the locked-in rate. Urban informed plaintiff that she had never heard of plaintiff prior to plaintiff's telephone call, let alone worked on his mortgage application. Urban stated that the last time she had heard from Lubin was "many, many months ago." Thus, Lubin's elaborate descriptions of conversations that he allegedly had had with Urban concerning plaintiff's mortgage were false.

12. On or about September, 1987, plaintiff learned that Lubin lied about obtaining a thirty-year fixed mortgage at 10 3/4% and that he had, contrary to his misrepresentations, failed to obtain an extension of the mortgage, which had expired the month before. Plaintiff then immediately telephoned the

Sponsor of the Condominium, whose representative informed plaintiff that Lubin had not requested the Glissade mirrors or the double-tiered closets, as he told plaintiff, and that Lubin had acquiesced to installations that were contrary to plaintiff's specific requests.

The Attempted Cover-Up

13. On the same day, plaintiff advised both defendants Skala and Kaszovitz of his conversation with Urban. Kaszovitz told plaintiff that he and other members of the Firm were aware that Lubin was a pathological liar and that Lubin had previously lied to him regarding the status of other pending legal matters.

14. After plaintiff's conversation with Kaszovitz, defendant Skala confirmed Kaszovitz's statements.

15. In or about September, 1987, in the presence of plaintiff and defendant Skala, Lubin admitted that he had lied to plaintiff regarding every aspect of the status of the Condominium transaction, including all of the items stated in paragraph 9 above.

16. Moreover, Lubin admitted his deception of, and malpractice against, plaintiff in a writing. In a handwritten document, dated November 23, 1987, Lubin admitted to the commission of several acts of legal malpractice and fraud and deceit upon plaintiff and several other clients of the Firm. (A copy of the letter is annexed hereto as Exhibit B.)

17. In the same letter, Lubin admitted to acts of deception and malpractice against several other clients of the Firm.

18. During October through November, 1987, plaintiff told the Firm's partners that they would have to report Lubin's misconduct to the Disciplinary Committee of the Appellate Division, First Department ("DDC"). In an effort to avoid reporting Lubin to the DDC, both Skala and Weber repeatedly requested plaintiff to state his damages and stated that they "would see to it that they were paid." Skala assured plaintiff that plaintiff "would be made whole." Skala and Weber also stated that they would demand the money, in turn, from Lubin.

19. However, plaintiff continued to insist that the matter be reported to the DDC. On November 17, 1987, plaintiff met with a staff attorney and investigator of the DDC to discuss the entire matter. However, because the Firm had indicated that it would fire plaintiff if he reported Lubin's misconduct, plaintiff withdrew the complaint.

20. Finally, as a result of plaintiff's repeated requests that the defendants were obliged to report Lubin's conduct to the DDC, the firm by letter dated December 16, 1987, informed the DDC of Lubin's numerous misrepresentations and malpractice against clients of the Firm and acts of forgery of checks drawn on the Firm's account. The letter also informed the DDC that Lubin had indemnified the Firm and plaintiff and

referred to Lubin's letter to the defendants, dated November 23, 1987.

21. During the months of December, 1987, and January, February and March, 1988, Weber and Skala continuously berated plaintiff for having caused them to report Lubin's misconduct to the DDC. Nevertheless, it continued plaintiff in its employ because he was in charge of handling the most important litigation in the Firm. Within a few days after plaintiff filed an important set of motion papers in the case, on or about March 18, 1988, plaintiff was fired by the Firm.

AS AND FOR A FIRST CAUSE OF ACTION

22. In or about April, 1988, plaintiff applied for a refinancing of his condominium unit at the specific behest of his former employers, defendants Skala, Kaszovitz and Weber and the Firm. They told plaintiff that, upon the refinance they would pay for all damages incurred by plaintiff, including, but not limited to, all closing costs for the refinancing (i.e., closing points, prepayment penalties to Citibank, N.A., and attorneys fees), and the costs of the closets and the Glissade mirrors. In reliance on these statements, on June 11, 1988, plaintiff refinanced his condominium unit with Manufacturers Hanover Trust Company.

23. But for the legal malpractice of the Firm and defendant Lubin, plaintiff would not have been forced into the

predicament of having to undertake a costly mortgage refinance and to incur the expenses listed in Exhibit A.

24. The defendants are thus liable for malpractice in the sum of $26,646 plus interest.

AS AND FOR THE SECOND CAUSE OF ACTION

25. Plaintiff repeats and realleges paragraph 1 through 24, as though fully set forth herein.

26. The defendant Firm and defendant Lubin breached their agreement to reimburse plaintiff for the damages incurred by their legal malpractice and are thus liable to plaintiff in the sum of $26,646 plus interest.

AS AND FOR THE THIRD CAUSE OF ACTION

27. Plaintiff repeats and realleges paragraphs 1 through 24, and 26, as though fully set forth herein.

28. As stated above, defendants made numerous material misrepresentations to plaintiff that they knew or should have known were false. Plaintiff relied upon such misrepresentations in refinancing his condominium unit.

29. As a result of these misrepresentations, plaintiff has suffered damages in the amount of $26,646 plus interest. Pursuant to Section 487 of the New York Judiciary Law which punishes deceitful conduct by attorneys, this amount should be trebled.

AS AND FOR A FOURTH CAUSE OF ACTION

30. Plaintiff repeats and realleges paragraph 1 through 24, 26, 28 and 29, as though fully set forth herein.

31. When plaintiff was first employed by the Firm in June, 1986, he was advised that if he left his position with Gold, Farrell & Marks and accepted a position with the Firm, he would become the Firm's commercial litigation specialist and, in the normal course of events, be considered for partnership in the Firm within two years. He was also told that his continued tenure in the Firm would be based solely upon his competence as an attorney and that he would not be terminated except for lapses in professional competence or judgment.

32. In reliance on these representations, plaintiff accepted a position with the Firm. During his tenure with the Firm, plaintiff performed his services as an associate attorney in an exemplary fashion. However, because of plaintiff's insistence that Lubin's breaches of fiduciary duty and violations of the Code of Professional Responsibility be reported to the DDC, Wieder was denied a partnership in the Firm and his employment was terminated.

33. The Firm's action in terminating Wieder represents a breach of the Firm's obligation to Wieder of continued employment based upon competence. As a result of the termination, plaintiff's career and future earnings have been

damaged in an amount which cannot be ascertained with precision at this time, but is at least $250,000.

AS AND FOR A FIFTH CAUSE OF ACTION

34. Plaintiff repeats and realleges paragraphs 1 through 24, 26, 28-29 and 31-33, as though fully set forth herein.

35. The Firm's action in terminating plaintiff for seeking to perform the ethical standards of the legal profession represents a violation of the public policy of the State of New York. As a result of the Firm's actions, plaintiff is entitled to compensatory damages in an amount which cannot be ascertained with precision, but is at least $250,000.

36. Plaintiff is also entitled to his attorneys' fees and expenses incurred in this action. In addition, because the Firm's actions were performed with malice and without justification or excuse, plaintiff is entitled to additional punitive damages in the sum of $250,000.

WHEREFORE, plaintiff demands judgment against defendants as follows:

(a) against all defendants, jointly and severally, on the first and second cause of action, for relief in the amount of $26,646.00 plus interest;

(b) against all defendants, jointly and severally, on the third cause of action, for compensatory damages in the amount of $26,646.00, to be trebled pursuant to § 487 of the New York Judiciary Law;

(c) against defendant Firm on the fourth cause of action for compensatory damages in an amount which cannot be ascertained with precision, but is at least $250,000;

(d) against defendant Firm, on the fifth cause of action, compensatory damages in an amount which cannot be ascertained with precision, but is at least $250,000, and punitive damages in the sum of $250,000, plus reasonable attorney's fees and legal expenses; and

(e) on all causes of action, for interest, costs, disbursements, attorneys fees, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 17, 1989

Yours, etc.

BRAGAR & WEXLER, P.C.
Attorneys for Plaintiff
900 Third Avenue
New York, New York 10022
(212) 308-5858

Of Counsel:

Howard L. Wieder, Esq.

V E R I F I C A T I O N

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

I am the plaintiff in the within action. I have read the foregoing complaint and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and, as to those matters, I believe them to be true.

Howard L. Wieder

HOWARD L. WIEDER

Sworn to before me this
17th day of April, 1989

Paul D. Wexler

Notary Public

PAUL D. WEXLER
Notary Public, State of New York
No. 31-4520766
Qualified in New York County
Commission Expires August 31, 19 90

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HOWARD L. WIEDER, Plaintiff, - against - MURRAY L. SKALA, GABRIEL KASZOVITZ, ALVIN M. FEDER, MARCEL WEBER, LEONARD A. ISAACSON, RICHARD J. GOTTLIEB, individually and doing business as FEDER, KASZOVITZ, ISAACSON, WEBER & SKALA, and LARRY A. LUBIN, Defendants.	Index No. 17278/88 **VERIFIED ANSWER TO AMENDED COMPLAINT (FOURTH CAUSE OF ACTION)**

Defendants Murray L. Skala, Gabriel Kaszovitz, Alvin M. Feder, Marcel Weber, Leonard A. Isaacson, Richard J. Gottlieb, individually and doing business as FEDER, KASZOVITZ, ISAACSON, WEBER & SKALA, answer the amended complaint as follows:

1. Deny knowledge or information sufficient to form a belief with respect to allegation contained in paragraph 1 of the amended complaint except admit that plaintiff was associated with the law firm of Feder, Kaszovitz, Isaacson, Weber & Skala ("the Firm") from on or about June 16, 1986 through on or about March 18, 1988 and that he practiced in the area of commercial litigation.

2. Admit the allegations contained in paragraph 2 of the amended complaint.

3. Admit the allegations contained in paragraph 3 of the amended complaint.

4. Deny knowledge or information sufficient to form a belief with respect to allegations contained in paragraph 4 of the amended complaint.

5. Deny the allegations contained in paragraph 5 of the amended complaint except admit that the firm employed Lubin as an associate from in or about August 1984 to on or about December 7, 1987 and that Lubin also worked for the firm as a "summer associate" during the summer of 1983, while he was a law student.

6. Deny the allegations of paragraph 6 of the amended complaint, except admit that, in or around March 1987, plaintiff expressed an interest in purchasing a condominium apartment.

7. Deny each and every allegation contained in paragraph 7 of the amended complaint.

8. Deny each and every allegation contained in paragraph 8 of the amended complaint, except admit that the Firm offered plaintiff Lubin,s assistance in connection with plaintiff,s purchase of a condominium unit.

9. Deny knowledge or information sufficient to form a belief with respect to allegations contained in paragraph 9 of the amended complaint.

10. Deny each and every allegation contained in paragraph 10 of the amended complaint.

11. Deny knowledge or information sufficient to form a belief with respect to allegations contained in paragraph 11 of the amended complaint.

12. Deny knowledge or information sufficient to form a belief with respect to allegations contained in paragraph 12 of the amended complaint.

13. Deny each and every allegation contained in paragraph 13 of the amended complaint except admit that at some point in time plaintiff advised defendant Kaszovitz of his alleged conversation with Urban.

14. Deny each and every allegation contained in paragraph 14 of the amended complaint.

15. Deny each and every allegation contained in paragraph 15 of the amended complaint.

16. Deny each and every allegation contained in paragraph 16 of the amended complaint except admit that Lubin prepared and signed the handwritten document annexed to the amended complaint as Exhibit "B" and respectfully refer the Court to that document for its terms and effect.

17. Deny each and every allegation contained in paragraph 17 of the amended complaint except admit that Lubin prepared and signed the handwritten document annexed to the amended complaint as Exhibit "B" and respectfully refer the Court to that document for its terms and effect.

18. Deny each and every allegation contained in paragraph 18 of the amended complaint except admit that plaintiff was told that if Lubin,s actions caused plaintiff to suffer any monetary damage, that plaintiff would be made whole and that the Firm would, in turn, seek indemnification from Lubin.

19. Deny each and every allegation contained in paragraph 19 of the amended complaint except deny knowledge or information sufficient to form a belief with respect to the allegation that, on November 17, 1987, plaintiff met with a staff attorney and investigator of the DDC.

20. Deny each and every allegation contained in paragraph 20 of the amended complaint excepts admit that the Firm filed with the DDC a confidential report with respect to Lubin.

21. Deny each and every allegation contained in paragraph 21 of the amended complaint except admit that on or about March 18, 1988, shortly after litigation papers were served, plaintiff was fired by the Firm.

22. Deny each and every allegation contained in paragraph 22 of the amended complaint.

23. Deny each and every allegation contained in paragraph 23 of the amended complaint.

24. Deny each and every allegation contained in paragraph 24 of the amended complaint.

25. With respect to the allegations contained in paragraph 25 of the amended complaint, repeat and reallege the responses to paragraph 1 through 24 as though set forth fully herein.

26. Deny each and every allegation contained in paragraph 26 of the amended complaint.

27. With respect to the allegations contained in paragraph 27 of the amended complaint, repeat and reallege the

responses to paragraph 1 through 24 and 26 as though set forth fully herein.

28. Deny each and every allegation contained in paragraph 28 of the amended complaint.

29. Deny each and every allegation contained in paragraph 29 of the amended complaint.

30. With respect to the allegations contained in paragraph 30 of the amended complaint, repeat and reallege the responses to paragraphs 1 through 24, 26, 28 and 29, as though fully set forth herein.

31. Deny each and every allegation contained in paragraph 31 of the amended complaint, except admit that plaintiff was employed by the Firm as an associate primarily engaged in commercial litigation.

32. Deny the allegations contained in paragraph 32 of the amended complaint.

33. Deny the allegations contained in paragraph 33 of the amended complaint.

34. Defendants are not responding to paragraphs 34 through 36 of the amended complaint because the Fifth Cause of Action has been dismissed.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

35. The Fourth Cause of Action is barred by the doctrine of collateral estoppel.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

36. Upon information and belief, defendant removed from the firm's offices original and/or copies of documents which were the property of the Firm, and documents which were the property of the Firm's clients.

37. The removal of such documents was done without the consent or knowledge of the defendants and their clients.

38. Plaintiff's action constitutes a conversion.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

39. Defendants repeat and reallege the allegations contained in paragraphs 36 through 38 of this Answer as though set forth fully herein.

40. Plaintiff has engaged in a course of unethical conduct which precludes him from obtaining affirmative relief.

WHEREFORE, defendants demand judgment against plaintiff dismissing the Fourth Cause of Action, and for such other and further relief as the court may deem just and proper.

Dated: New York, New York
January 14, 1993

FEDER, KASZOVITZ, ISAACSON,
WEBER & SKALA
Attorneys Pro Se
450 Seventh Avenue
New York, New York 10123
(212) 239-4610

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALVIN M. FEDER, being duly sworn, deposes and says:

I am one of the defendants in the within action; I have read the foregoing answer and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

ALVIN M. FEDER

Sworn to before me this
15th day of January, 1993

Notary Public

JAY D. LUKOWSKI
Notary Public, State of New York
No. 01LU4611398
Qualified in Kings County
Commission Expires Jan. 31, 1994

Index No. Year 19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HOWARD L. WIEDER,

Plaintiff,

- against -

MURRAY L. SKALA, GABRIEL KASZOVITZ, ALVIN M. FEDER, MARCEL WEBER, LEONARD A. ISAACSON, RICHARD J. GOTTLIEB, individually and doing business as FEDER, KASZOVITZ, ISAACSON, WEBER & SKALA,

Defendants.

VERIFIED ANSWER TO AMENDED COMPLAINT (FOURTH CAUSE OF ACTION)

FEDER, KASZOVITZ, ISAACSON, WEBER & SKALA
Attorneys for Defendants Pro Se

Office and Post Office Address, Telephone
450 Seventh Avenue
NEW YORK, N. Y. 10123
239-4610

To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

Attorney(s) for

Sir:—Please take notice
☐ NOTICE OF ENTRY
that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19
☐ NOTICE OF SETTLEMENT
that an order of which the within is a true copy will be presented for settlement to the HON. one of the judges of the within named court, at
on 19 at M.

Dated,

Yours, etc.

FEDER, KASZOVITZ, ISAACSON, WEBER & SKALA
Attorneys for

To

Office and Post Office Address