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COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF LARRY HALLOCK,
Appellant.

NO. 74

IN THE MATTER OF MARY MALERBA,
Appellant.

NO. 75

20 Eagle Street
Albany, New York
November 16, 2021

Before:

ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

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Official Court Transcriber



1 JUDGE FAHEY: Good afternoon, everyone. I'm
2 Judge Eugene Fahey. Judges DiFiore and Rivera are recused
3 in this action.

4 Counselor, do you want to reserve some time?

5 MS. SCALISE: Yes, Your Honor. Your Honor - - -

6 JUDGE FAHEY: Three minutes?

7 MS. SCALISE: Main argument, seven minutes; three
8 minutes for rebuttal.

9 JUDGE FAHEY: Whenever you're ready.

10 MS. SCALISE: Thank you, Your Honor.

11 Good afternoon. May it please the court and
12 counsel. My name is Deborah Scalise. Along with my
13 colleague Annette Hasapidis, we're here on behalf of Larry
14 Hallock and Mary Malerba.

15 This case is about issues of fundamental fairness
16 and due process. Every party in every case in every court
17 of the United States is entitled, in our system of
18 jurisprudence, to know what the allegations are against
19 them.

20 JUDGE GARCIA: Counsel?

21 MS. SCALISE: Yes?

22 JUDGE GARCIA: Over here. Sorry. It's a little
23 hard with the masks, but you - - - I - - - I understand
24 your argument. Let's assume, and I know you dispute this,
25 but let's just assume for my hypothetical that there was -



1 - - that a finding of dishonesty was supported in the
2 record, but the same charges, the same violations that were
3 admitted to, but the finding of dishonesty is clearly
4 supported by the record. In your view, would that be a due
5 process violation?

6 MS. SCALISE: Yes.

7 JUDGE GARCIA: Why?

8 MS. SCALISE: The reason being that there was
9 never a dishonesty finding - - -

10 JUDGE GARCIA: No, no, but let's assume - - -

11 MS. SCALISE: Oh, you're assuming. Okay.

12 JUDGE GARCIA: Yeah.

13 MS. SCALISE: So okay. Judge Castel, in this
14 record - - -

15 JUDGE GARCIA: No, but let's assume there was a
16 dishonesty finding. Would it be a due process violation?

17 MS. SCALISE: Well, the problem we have here and
18 - - - let me just add, if you don't mind, to your
19 hypothetical. We started in one court; we then went to the
20 Southern District Grievances, okay.

21 JUDGE GARCIA: Yeah.

22 MS. SCALISE: And they rely - - - our court - - -
23 the Appellate Division relied on what happened in the
24 Southern District Grievances.

25 JUDGE GARCIA: No, I - - - I understand. My - -



1 - I guess I'm not articulating this well. But I - - - I
2 think what I'm trying to get at is, assume there was a
3 basis for finding dishonest conduct here. And I know you
4 dispute that. But just assume, in my hypothetical, there
5 was. It seems to me your argument would be the same,
6 because you would be arguing, but you weren't charged with
7 dishonest conduct. That seems to be the - - - the basis of
8 your argument.

9 MS. SCALISE: Yes, you do need notice and the
10 opportunity to be heard.

11 JUDGE GARCIA: But why wouldn't that just fall
12 within 8.4, conduct unbecoming, for want of a better phrase
13 here.

14 MS. SCALISE: Okay, so conduct that adversely
15 reflects on the fitness to practice - - -

16 JUDGE GARCIA: Doesn't dishonesty adversely
17 reflect on - - -

18 MS. SCALISE: Well, under 8.4, if you were to
19 take a look at Smolyar's decision, he was actually charged
20 with three violations in addition to 8.4(h): (a), (b), and
21 (c). A and B are dishonesty charges, and they have to have
22 intent, okay. C is an administration of justice charge.
23 The only way our court could get to dishonesty on the part
24 of these lawyers was if he - - - he had - - - they had been
25 charged with that. They were not in the instrument - - -



1 JUDGE GARCIA: No, but let's just say there was a
2 finding in there. They - - - for some reason they admitted
3 4, but there's a sufficient basis to find dishonesty. What
4 I'm - - - what I'm getting at is, it seems to me the
5 problem here isn't so much you were - - - you know, found
6 to have violated a rule that wasn't charged. It seems to
7 me the problem is, in this view of your view of it, there's
8 a finding underlying a penalty that isn't supported by the
9 record.

10 MS. SCALISE: That's part of it. But the real
11 issue is you had two separate proceedings with two separate
12 respondents. You had Mr. Smolyar, who had a confidential
13 collateral proceeding, where he had the opportunity to
14 present litigation and testified.

15 You later have this proceeding on a reciprocal
16 discipline with our clients, who applied pursuant to the
17 reciprocal discipline rule, based on the Southern District
18 of New York's findings. The Southern District of New
19 York's findings - - - and I'm sure, Judge, that you're
20 familiar with this because you used to appear there, the
21 Grievance Committee there is made up of judges, okay, who
22 sit and review the record, just like the Appellate Division
23 does for our Grievance Committee. The difference being is
24 the judges actually decide, you know, whether to go along
25 with it.



1 So there was a censure for each of our clients,
2 and that censure, if you take a look at it, does not allege
3 any 8.4 violation, except for H, which is the adversely
4 affects.

5 JUDGE GARCIA: And - - - and I understand that.
6 I - - - I just - - - it - - - it's just how I'm trying to
7 fit your allegation of what's wrong here, your - - - your
8 argument about what's wrong here within a framework I - - -
9 I can kind of understand because to me, it seems more as,
10 if this - - - if what you're saying is accurate, if there's
11 no basis for a finding of dishonesty, the way the Appellate
12 Division, to me, seemed to use that finding was to enhance
13 the penalty. It wasn't to find that you violated another,
14 you know - - - the - - - the case from the Supreme Court
15 where they added a violation later or - - - you know, it
16 was used as a penalty enhancer.

17 MS. SCALISE: Well, but - - -

18 JUDGE GARCIA: And to me, if there's an
19 aggravator in the record, then they would have said, oh,
20 look at what happened in the Southern District, admitted
21 conduct, even though that doesn't fit neatly within the
22 first three violations, but it doesn't reflect very well on
23 a lawyer appearing in federal court or any court, why
24 couldn't they use that without a due process violation?
25 You've admitted the conduct.



1 The problem here is, you're arguing you've - - -
2 they're using something you have not admitted that isn't in
3 the record, but they were using it to enhance a penalty.

4 MS. SCALISE: Yes, but even in enhancing a
5 penalty, a respondent should have notice. Any attorney
6 should have notice, or even a judge for that matter, of
7 what they're being charged with. Here, the Appellate
8 Division relies on Smolyar, who, if you read Judge Castel's
9 opinion, he was the original fact finder, is repeatedly
10 called a liar, a lone wolf. He's the one who submitted the
11 original affidavit. And there's a footnote by Judge
12 Castel, which says, there are some differences that are so
13 great, I'll leave it for the grievance authorities.

14 JUDGE GARCIA: Did they ever do that, though?

15 MS. SCALISE: They did not do an investigation.
16 They did not do an investigation. What happened was,
17 pursuant to the rule, and if we take a - - -

18 JUDGE GARCIA: That's okay.

19 MS. SCALISE: - - - look at the rule, it just
20 says that, "The respondent may file an affidavit stating
21 defenses to the imposition of discipline and raising any
22 mitigating factors." They filed their affidavit. They
23 followed the procedure. They did not have a hearing. The
24 Appellate Division and the Grievance Committee could have
25 expanded upon that by saying, we want an investigation



1 because there's so many inconsistencies in the record, and
2 we want to know who's being honest.

3 JUDGE GARCIA: And they never did that, right?

4 MS. SCALISE: They never did that. The Grievance
5 Committee did not amend its pleadings. They had a very
6 terse pleading based on the Grievance Committee for the
7 Southern District, and there's nothing in either of those
8 that mention any dishonesty allegation. The only way you
9 get to the dishonesty allegation is by coupling Smolyar,
10 which is mentioned, okay, with this.

11 Now, if you hold up Smolyar's case and the
12 charges that he was charged with in the Southern District
13 Grievance Committee, you have those violations. My clients
14 do not. The - - - their violations lie in a failure to
15 supervise. That's - - - lies in neglect; it does not lie
16 in dishonesty, which is an intentional venal act. An
17 intentional venal act, such as they were alleged to have
18 committed, and there is some incorrect factual basis that
19 the Appellate Division came to, requires intent and
20 knowledge.

21 Justice Castel said, based on this record, there
22 is insufficient knowledge, and I cannot say that these
23 lawyers acted dishonesty, okay, or intentionally, but I'm
24 going to sanction the law firm. You then take that record,
25 and you could take a look at the pages of the record in his



1 proceedings. He lays out all of the different things that
2 Mr. Smolyar misrepresented to the court repeatedly. And
3 somehow - - -

4 JUDGE CANNATARO: Ms. Scalise, I - - - I just
5 want to interrupt before - - - before you sit. I - - - I
6 have a little bit of a concern with the conclusion that the
7 only place these findings can come from is the Smolyar
8 mitigation hearing simply because, just analyzing the text
9 of the Appellate Division's findings, I noticed that it
10 tracks almost word-for-word language that appears in the
11 Grievance Committee's decision and order.

12 So it - - - it - - - it makes me wonder whether,
13 in fact, the Appellate Division is getting this from
14 Smolyar, as you claim, or they're just parroting language
15 from - - - from the Grievance order.

16 MS. SCALISE: So they specifically reference the
17 language. If you were to hold up Smolyar's decision and
18 the language from the Grievance Committee in the Southern
19 District on Smolyar, and you hold up the decisions from Ms.
20 - - - Mr. Hallock and Ms. Malerba, there's no mention of
21 the charges of 8.4(a), (b), and (c). There's no mirror
22 image of that. The charges that were alleged and the
23 censure that was found is based on 8.4(h), as well as the
24 failure to supervise rules.

25 JUDGE WILSON: But I think Judge Can - - - I



1 think Judge - - -

2 MS. SCALISE: Under a failure to supervise - - -

3 JUDGE WILSON: I think Judge Cannataro is asking
4 something a little bit different or maybe - - - maybe not,
5 but let me try and ask it this way. Can you point to any
6 fact that is in the decision of the Appellate Division that
7 is not in - - - that - - - that must have come from
8 Smolyar?

9 MS. SCALISE: Yes.

10 JUDGE WILSON: Any fact?

11 MS. SCALISE: Yes. So with respect to Ms.
12 Malerba, and give me just a moment to find my page, okay.
13 There's nothing in Judge Castel's order or in the Southern
14 District order that implicates her involvement in the
15 attorney's affidavit. Okay. So you have three different
16 affidavits. You have the Luscier affidavit, you have the
17 attorney's affidavit, and then you have a subsequent
18 affidavit, which Mr. Smolyar retracts some of his first
19 things, and then another affidavit, where he retracts that.
20 And the last two affidavits by Mr. Smolyar were with the
21 benefit of counsel.

22 So basically, Ms. Malerba was not asked by the
23 court to address the attorney's affidavit, because it was
24 Mr. Hallock, who prepared that, suggested to Mr. Smolyar,
25 this is what you could possibly say, and then Mr. Smolyar



1 signed it. He was the only one who knew the actual facts
2 of what had happened in that affidavit.

3 Mr. - - - there is inconsistencies in the emails
4 and I think Judge Castel eff - - - you know, drops a
5 footnote. Mr. Hallock's emails are dated the 22nd, and Mr.
6 Smolyar's are dated the 25th, so someone altered an email.
7 So there is an inconsistency there. But more importantly,
8 in the decision by the Appellate Division, they say that
9 Ms. Malerba participated in the creation of that affidavit,
10 and she did not.

11 JUDGE CANNATARO: But here's the thing. And I -
12 - - and I think Judge Wilson understands the nature of my
13 question. If you go to the very first page of the
14 Grievance Committee decision, it uses those exact same
15 words, that - - - and I'm talking about the Malerba
16 decision, not - - - not Smolyar -- that Malerba created - -
17 - assisted in the submission of a sham affidavit on behalf
18 of her client, failed to supervise an attorney who drafted
19 it, and then assisted in submitting to the courts a letter
20 that contained false statements.

21 Now, I realize that that is not a factual
22 finding. I realize that that's a recitation of an order to
23 show cause.

24 MS. SCALISE: That's correct.

25 JUDGE CANNATARO: However, it just strikes me as



1 interesting that the language tracks practically word-for-
2 word from this language in the Grievance Committee's
3 decision to the findings of the Appellate Division. And it
4 makes me wonder whether it is indeed the case, as you say,
5 the only place this could have come from, the Appellate
6 Division, is the Smolyar hearing.

7 MS. SCALISE: Yes. So what - - - what - - - on
8 the Malerba's decision, if you take a look at the language
9 at page 8 of the opinion, okay, it says, "Based on the
10 foregoing, we find the imposition of reciprocal discipline
11 is warranted. Not only did Respondent assist in the
12 submission of the Luscier affidavit, but she subsequently
13 assisted in the submission of a second filing to cover up
14 the fraudulent filing. Although less culpable" and so on.
15 Here's the bottom line. She did not assist in that filing.
16 That was Mr. Hallock suggesting to Mr. Smolyar, and Mr.
17 Hallock filed that.

18 Thereafter, she was asked by the court to explain
19 the inconsistencies when Mr. Smolyar retracted things, and
20 that's where she gets involved. So they make a mistake of
21 fact, and she gets a six-month suspension based on that.

22 And by the way, if you read through Judge
23 Castel's opinion, the Southern District Grievance Committee
24 opinion, our clients consistently maintain that they knew
25 nothing about Smolyar's initial Luscier affidavit. He then



1 admitted on cross-examination by the Grievance Committee
2 that no one told him to do it that way. He decided to do
3 it that way, a unilateral decision. How can they be
4 possibly sanctioned for doing something dishonest that they
5 did not know about? He's the one who's called the liar.
6 He's the lone wolf actor. He's repeatedly - - - if you
7 look at Judge Castel's decision it's replete with all the
8 things he did wrong. He's got a 54(h) violation. He's got
9 a Rule 11 violation.

10 JUDGE FAHEY: Let - - - let me ask - - -

11 MS. SCALISE: And then - - -

12 JUDGE FAHEY: - - - let me ask you this, because
13 your time's almost up.

14 MS. SCALISE: Yes.

15 JUDGE FAHEY: If we did remit, is it - - - it
16 seems to me that the remedy you're asking for is not a
17 remittal, but an actual change of the finding. Is that
18 correct?

19 MS. SCALISE: Yes, we would ask that you dismiss
20 the dishonesty charges.

21 JUDGE FAHEY: Okay.

22 MS. SCALISE: And that under the case of Dondi,
23 which is a 1984 case, which is the last time that this
24 court had a due process violation. And it - - - it's
25 analogous because of the number of years that this has gone



1 on. We'd - - - we'd also state that it would be equitable
2 under the circumstances to dismiss the charge of
3 dishonesty. Ms. Malerba is back to practice. That's not
4 the issue. Mr. Hallock is still suspended. He's awaiting
5 a hearing at the Grievance Committee for his reinstatement.
6 He had a one-year suspension; it is unopposed, and he still
7 is not reinstated.

8 JUDGE FAHEY: Okay.

9 MS. SCALISE: So we - - -

10 JUDGE SINGAS: Can I just ask you, Ms. Scalise?

11 MS. SCALISE: Yes.

12 JUDGE SINGAS: How do we - - - you're asking us
13 to find a due process violation.

14 MS. SCALISE: Yes.

15 JUDGE SINGAS: But how do we do that without
16 explicit references to facts outside the record?
17 Explicitly.

18 MS. SCALISE: Unfortunately, you can't answer
19 something that you don't know about. So if you're not
20 charged with something -- and we have a whole section in
21 our brief of all the things that would have been
22 questioned, but you don't even have to go that far. You
23 can go into Judge Castel's opinion. He's the original
24 factfinder. He was there. He saw what happened. And he
25 tells you all of the inconsistencies and he tells the



1 court, I'm not going to resolve some of these, and I can't
2 because my record is insufficient, but it's there for the
3 future grievance investigation.

4 And Judge Castel, by the way, was a member of the
5 disciplinary committee in the First Department before he
6 became a judge, and then he was the head of the Grievance
7 Committee in the Southern District. So he's very familiar
8 with how these things work. And I think that that footnote
9 is very important for you to understand because he's
10 saying, there's so many inconsistencies that I can't
11 resolve, and I am just going to sanction the law firm
12 because I don't know that they have knowledge; it's
13 insufficient. So he's saying, you need more to look at
14 this. There's too many things that I can't figure out.

15 And yet, the Committee did not do that, and the
16 court did not do that. The Committee can regularly
17 supplement charges. They don't have to just go on the
18 reciprocal discipline. If you take a look at the record
19 that is here, they said, based on what is before the
20 Grievance Committee for the Southern District, they should
21 be reciprocally disciplined. They did not add anything
22 about dishonesty. They said, based on the underlying
23 record from the Southern District.

24 There is nothing that says, we think you were
25 dishonest, and answer for it. It would be a simple thing



1 to amend, and if the court felt that there was some
2 inconsistency, instead of using the Smolyar decision, which
3 is a separate disciplinary proceeding that is confidential,
4 they could have sua sponte held onto Smolyar because the
5 cases were pending at the same time and decided who was
6 telling the truth, okay. They could have shot it back, and
7 I - - - I've seen this happen in other cases, where they
8 could say, we don't think so - - -

9 JUDGE GARCIA: But I thought the Smolyar - - -

10 MS. SCALISE: - - - amend your pleadings - - -

11 JUDGE GARCIA: I'm sorry. I thought the Smolyar
12 Appellate Division decision came out, I think, before the
13 orders to show cause - - -

14 MS. SCALISE: That's correct.

15 JUDGE GARCIA: - - - in the Southern District
16 Grievance, so don't you think the Appellate Division has an
17 obligation to protect the consumer, the public in New York,
18 that they're going to wait for the Grievance Committee in
19 the Southern District to do that?

20 MS. SCALISE: Well, that may be correct, but
21 that's not what happened. They could have sua sponte
22 opened a proceeding based on Smolyar. They waited for the
23 Southern - - -

24 JUDGE GARCIA: Yeah, but I thought you just said,
25 like, they should have waited on Smolyar.



1 MS. SCALISE: Well, once Smolyar's opinion is,
2 you know, there, okay. What they did in when they created
3 the Smolyar were a lot of conclusions about what our
4 clients did, and they weren't there to defend them or
5 explain them, right?

6 I don't know that there's any case law anywhere
7 else where you can have a decision in one case, where the
8 people were not given notice, or opportunity to be heard,
9 or to cross-examine, or credibility examined, and make that
10 like a collateral estoppel in the second case, and find
11 that these people did more than was actually was found in
12 two federal proceedings.

13 And that's where the due process violation lies
14 because they never got to say, we don't agree. The Smolyar
15 decision comes to conclusions about our clients that were
16 not even in the record. They just assumed that Ms. Malerba
17 participated in things, and because they - - - I think you
18 said it best, Judge, you said, didn't they want to do this
19 for sanction? But that's not enough.

20 If you're going to sanction an attorney, and
21 you're going to take their license and their livelihood
22 away -- and by the way, an attorney's word is their bond.
23 When you say that an attorney is dishonest, it's out there
24 in the public forever. This is something that is really
25 important for you to understand. There's a scarlet letter



1 on my clients, branding them that they're dishonest, and
2 they never got the - - - the time to dispute that. That is
3 inherently unfair.

4 That is a violation of due process, and we ask
5 respectfully that you dismiss the dishonesty charge, that
6 you remand it back to the Appellate Division, and that you
7 allow Mr. Hallock to re - - - get reinstated immediately
8 based on the Dondi case because of what happened being so
9 inherently unfair and a due process issue.

10 And you may be concerned, what - - - what about
11 what happens after this? It is so rare to have a due
12 process violation like this. The last time it happened was
13 1984.

14 JUDGE FAHEY: Okay.

15 MS. SCALISE: It's 2021.

16 JUDGE FAHEY: We have it. Thank - - - thank you.

17 MS. SCALISE: Thank you very much.

18 JUDGE FAHEY: Thank you. Counsel, whenever
19 you're ready.

20 MS. KUGLER: Good afternoon. May it please the
21 court, my name is Rona Kugler, and I represent the New York
22 State Grievance Committee for the Tenth Judicial District.

23 The Appellate Division here properly imposed
24 reciprocal discipline. There was no due vio - - - no - - -
25 no due process violation here, Your Honor, and there was no



1 finding or charge of dishonesty for the - - -

2 JUDGE GARCIA: But there was a finding of
3 dishonesty as to Malerba. I mean, it says it in the
4 opinion. It says - - - let me find - - - it says, "We find
5 the respondent's dishonest conduct merits suspension." How
6 is that not a finding of dishonesty?

7 MS. KUGLER: Your Honor, I'm going to direct the
8 court right now to Rule 5.1(d)(2)(ii) - - -

9 JUDGE GARCIA: Yeah, it's vicarious liability.
10 But this implies direct dishonesty. It doesn't seem to say
11 you were vicar - - - third-party liability for the
12 dishonesty of someone else. This says, her dishonesty. I
13 - - - I think you can argue that the Hallock one says that
14 because they phrased it differently: dishonest conduct by
15 an attorney. But when you read the two side-by-side, and
16 you clearly see with Malerba they're saying she engaged in
17 dishonest conduct, and that was not as bad as what Hallock
18 did, I think the inference is pretty strong that he - - -
19 he found that he engaged in - - - the Appellate Division
20 found he engaged in dishonest conduct also.

21 So where is the finding of dishonest conduct by
22 Malerba supported in the record?

23 MS. KUGLER: Your Honor, I - - - I'm going to
24 direct you to - - - I know you're saying not to address the
25 vicarious liability, but I - - - I say that that's exactly



1 what we have here.

2 JUDGE GARCIA: Do you think when I say somebody
3 is dishonest, has engaged in dishonest conduct, that seems
4 to me strongly -- and this is attorney discipline. I mean,
5 it is true; this is out there. This is the record of this
6 attorney. This is her disciplinary record. When you say
7 you've engaged in dishonest conduct, shouldn't you then
8 really be careful to be saying you are responsible for the
9 dishonest conduct of someone else because of the rule? I
10 mean, that seems to me a very different conclusion.

11 MS. KUGLER: Well, Your Honor, two things. First
12 of all, Ms. Malerba did admit to violating the rules, all
13 four of these charges, 5.1(b), and (d), and 8.4.

14 But you know, even beyond that, I - - - I know
15 what you're saying, but the statute, and the - - - the
16 court precedent. For example, I'm going to direct the
17 court to Matter of Schwartz. The court said that they are
18 personally liable, as though they had engaged in this
19 conduct of the attorney that they were supervising.

20 JUDGE FAHEY: Well, is it - - - is it - - - I - -
21 - I thought the Appellate Division asserted that Malerba
22 subsequently assisted in the submission of a second filing
23 to cover up the fraudulent filing. All right. Are you
24 saying that that is factually correct?

25 MS. KUGLER: What I'm saying, Your Honor, is - -



1 -

2 JUDGE FAHEY: Well, I'd like you to answer my
3 question. Is that factually correct? Did she assist in
4 the submission of a second filing to cover up a fraudulent
5 filing?

6 MS. KUGLER: I would say the record supports
7 that, Your Honor. And I would say it because if we looked
8 at the facts of what happened when the second filing was
9 made to the court, at that point, Judge Castel told Mr.
10 Hallock - - -

11 JUDGE FAHEY: Um-hum.

12 MS. KUGLER: - - - that he needed to submit an
13 affidavit regarding what had happened and that what
14 happened is, he said in his declarations to the court, that
15 he had that point reached out and consulted with Ms.
16 Malerba, as - - - as - - - in - - - in relation to what had
17 happened there.

18 JUDGE FAHEY: All right. Let - - - let me ask
19 another question, then. I understand your answer is yes;
20 you're saying the record supports that.

21 MS. KUGLER: Yes.

22 JUDGE FAHEY: The second question is, is the
23 Smolyar attorney affidavit. Did Malerba have any
24 involvement in the submission or - - - or the preparation
25 of that affidavit?



1 MS. KUGLER: As far as this record goes, there's
2 no indication of what involvement she had. Obviously,
3 she's very different than Mr. Hallock's involvement having
4 drafted - - -

5 JUDGE FAHEY: I just - - - I just want you to
6 answer my question. Did - - - did she have a - - - do you
7 think that the record shows that, and where should I look,
8 to say that she had some involvement in the - - - in the
9 preparation or submission of Malerba's attorney affidavit.

10 MS. KUGLER: Her involvement, Your Honor, was the
11 fact that she knew at that time what was going on, that she
12 had an obligation by these rules to try to mitigate any
13 problems at that point, where that would be involved in - -
14 - contacting Mr. Smolyar and consulting with Mr. Hallock
15 before an affidavit that was fraught with inaccuracies was
16 submitted to the court.

17 JUDGE SINGAS: Ms. Kugler, though, doesn't the
18 District Court, they find that there was no venal intent
19 here. So how does the record then become so expansive to
20 include that dishonest conduct, if not for the Smolyar
21 separate hearing?

22 MS. KUGLER: Well - - -

23 JUDGE SINGAS: Like, how - - - how does that
24 expansion of the record happen?

25 MS. KUGLER: Your Honor, I submit that the record



1 was not submitted - - - expanded here at all. What
2 happened is, you had a situation where the rules that they
3 admitted to and that they were found having violated show
4 that you don't have to have knowledge, no actual knowledge
5 needed, no intent, Your Honor. They have the same intent,
6 the same responsibility as the attorney that they are
7 supervising.

8 JUDGE CANNATARO: But counsel, that's the essence
9 of vicarious liability, and to, I don't know - - - it gets
10 us right back to where Judge Garcia was. You have to take
11 this language out of the Appellate Division findings, and
12 imbue it with meaning far beyond everyday vocabulary and
13 usage to see vicarious liability. I mean, the statement
14 is, "We find that Respondent Malerba's dishonest conduct
15 merits suspension." I mean, that doesn't sound like the
16 language of vicarious responsibility for another person's
17 actions. Does it?

18 MS. KUGLER: When you read what happened in
19 connection with the rules, yes, it does, Your Honor.

20 JUDGE WILSON: So can I ask you a couple of
21 procedural things? On - - - on a - - - on a reciprocal
22 discipline proceeding, can you expand the record without
23 notice?

24 MS. KUGLER: No, Your Honor. The record is what
25 we had at the Foreign Jurisdiction - - -



1 JUDGE WILSON: I'm not asking what you did. Can
2 you do that? Or do you have - - - would you agree that if
3 you were going to expand the record, you have to provide
4 notice, or at least start a whole new proceeding and not -
5 - - not treat it as reciprocal at this point?

6 MS. KUGLER: Yes, if you were going to expand the
7 record, you would need to provide notice. That's correct,
8 Your Honor.

9 JUDGE WILSON: Okay. And - - - and if you were
10 going to sort of evaluate additional charges that the
11 original jurisdiction hadn't considered, you would have to
12 provide notice or start a different proceeding?

13 MS. KUGLER: Yes, they - - - exactly, that is the
14 essence of due process. They would need notice.

15 JUDGE WILSON: Okay. And what about if you were
16 going to just enhance a penalty for something? Would you
17 need notice there or no, in your view?

18 MS. KUGLER: No, Your Honor, because what happens
19 here is the Appellate Division has the right, the
20 authority, to exercise its discretion in determining what a
21 proper sanction is, and Your Honor - - -

22 JUDGE WILSON: And it's not - - - not bound by
23 the federal court's determination of what - - - on the same
24 record, I assume.

25 MS. KUGLER: No, it - - - it is absolutely not.



1 It is required or authorized to not only give a sanction
2 that is consistent with its precedent, but I'm also going
3 to say that the appellate court here, New York State, where
4 the appellants live and practice law, have a greater
5 interest in the sanctions than the foreign jurisdiction,
6 because this is where they practice; this is where their -
7 - - their lives are.

8 And here, in the other jurisdiction, I want to
9 point out, Your Honor, that the stakes were different,
10 because Ms. Malerba was not admitted in the Southern
11 District in the federal court, and Mr. Hallock, who was
12 admitted, was permitted to voluntarily resign
13 simultaneously with the imposition of censure there.

14 JUDGE WILSON: And was the legal - - -

15 JUDGE CANNATARO: I'm - - - I'm still - - -

16 JUDGE WILSON: I'm sorry. Was the legal standard
17 for the sanctions imposed by the federal court under Rule
18 11 and the inherent power of the court and Section, if I
19 remember it right, 1837 maybe? It was - - - that is - - -
20 it's - - - it's - - - they're operating under a different
21 set of standards. Is that - - - legal standards. Is that
22 fair?

23 MS. KUGLER: Yes, Your Honor.

24 JUDGE GARCIA: Counsel, what's our standard of
25 review of the penalty?



1 MS. KUGLER: Oh. Well, Your Honor, this court
2 should not be - - - precedent says should not be
3 substituting its judgment for the Appellate Division, as
4 long as the Appellate Division did not - - - exercised
5 proper discretion.

6 JUDGE GARCIA: So it's an abuse-of-discretion
7 standard.

8 MS. KUGLER: Yes, Your Honor.

9 JUDGE GARCIA: So my - - - what I was asking your
10 opponent here, if there's some finding supporting the
11 penalty, is that an abuse - - - that isn't supported by the
12 record, is that an abuse of discretion? I'm just asking as
13 a general matter, not in this case, not the specific
14 finding here, but if there is a finding used by the court
15 to support a penalty, would that be an abuse - - - and it's
16 not supported by the record, would that be an abuse of
17 discretion?

18 MS. KUGLER: If there's a finding that was not
19 supported by record? Yes, Your Honor, because then the
20 court would have gone beyond. Yes, Your Honor.

21 JUDGE GARCIA: Okay.

22 MS. KUGLER: Okay. But of course, Your Honor,
23 that's not what happened here.

24 JUDGE GARCIA: I know you dispute that.

25 MS. KUGLER: Okay. All right.



1 In addition, I - - -

2 JUDGE FAHEY: No, you go ahead.

3 MS. KUGLER: Did you have a question, Your Honor?

4 JUDGE FAHEY: No, I'm fine. You go ahead.

5 MS. KUGLER: Okay. In addition, I just want to
6 point out that the sanctions imposed here were consistent
7 with New York State precedent. I'm sure you've seen in my
8 cases in my brief, there were a number of cases here where
9 similar conduct garnered the same sanctions, six-month and
10 one-year suspensions, for conduct where someone had forged
11 documents, falsely swore - - - or signatures as genuine,
12 and submitted them to the court. I have several cases such
13 as Glotz - - - Matter of Glotzer.

14 JUDGE SINGAS: But those cases are for knowing
15 and intentional misconduct, correct?

16 MS. KUGLER: Your Honor, I - - - if I recall
17 correctly, I believe that at least one of them was the - -
18 - the supervision of one of their attorneys. So it wasn't
19 just their own conduct, it was the respondent in the
20 matter. I'm not sure which case it is right now, but not
21 all of them, Your Honor.

22 JUDGE CANNATARO: Somewhat related to that last
23 question, it seems as if, in general, and maybe you can
24 educate me about the exceptions, that the suspension remedy
25 seems to apply when there are multiple instances of this



1 kind of misbehavior, whereas censure seems to be the - - -
2 the more normal penalty for one-off conduct. And this is,
3 as far as we know, a situation involving one-off conduct.
4 So does that - - - you know, does that seem - - - would
5 that rise to the level of abuse of discretion? I - - -

6 MS. KUGLER: Well, Your Honor, this may have been
7 one case, but there were two situations here of what had
8 happened. There was the initial false filing of the
9 affidavit of the client, and then there was a subsequent
10 cover-up, so I want to say that was actually two
11 situations, where false information was submitted to the
12 court.

13 In addition, it - - - it - - - it would not be
14 abuse of discretion because it is in the general range.
15 Each of these cases are very fact specific when we look at
16 the decisions of the other matters. And the facts here
17 would support that it would not be an abuse of discretion.
18 It's in the reasonable means - - - set of range of
19 sanctions that the court has given.

20 JUDGE FAHEY: Okay.

21 MS. KUGLER: We're not talking about, like, a
22 seven-year suspension or disbarment. They're - - - they're
23 very close, and it's very consistent.

24 JUDGE FAHEY: Thank - - - thank you, Counselor.

25 MS. KUGLER: Oh, thank you, Your Honor.



1 JUDGE FAHEY: All right.

2 You got three minutes now.

3 MS. SCALISE: Thank you, Your Honor.

4 There was a question posed, and I'm - - - I
5 apologize, because of the mask, I don't know who posed it.

6 JUDGE FAHEY: It's okay.

7 MS. SCALISE: But one of the - - - the issue was,
8 you know, based on these facts, can we reach this. Based
9 on these facts, you cannot reach this because there was not
10 a dishonesty finding by Judge Castel or by the Southern
11 District. The only way you can reach this is if you rely
12 on what Mr. Smolyar did, and Judge Castel's record is
13 replete with all of the inconsistencies, and what he says -
14 - - and most of his record is dedicated to all the things
15 that Smolyar did wrong. The only way that our Appellate
16 Division could have gotten to the conclusions about our
17 clients, was to do what they did, was relying on - - -

18 JUDGE GARCIA: Well, the truth that you're - - -
19 you're - - -

20 MS. SCALISE: - - - the facts of the Smolyar case
21 - - -

22 JUDGE GARCIA: - - - you're lumping that a lot
23 together - - -

24 MS. SCALISE: Um-hum.

25 JUDGE GARCIA: - - - because the - - - the



1 Southern District, Judge Castel went beyond the lone wolf.
2 In fact, he says, you're not being sectioned as a law firm,
3 which is what he could do, because you have a lone wolf;
4 it's because you've done these other things.

5 Now, I take your point; it doesn't rest in
6 dishonesty. But it wasn't that you had a lone wolf
7 employee. I mean, some of the things he found were you
8 could have discovered this conduct - - - again, all part of
9 the charges that were levied, but - - - that you admitted
10 to, but, you know, look you found one, and that was just
11 because of this; you didn't check with the client once you
12 knew there was a problem. All of those things Judge Castel
13 lays out, so I think it's somewhat inaccurate to say, at
14 least to Hallock, that it was because they had a lone wolf
15 employee. It - - - it went beyond that. And I think - - -

16 MS. SCALISE: And I - - -

17 JUDGE GARCIA: - - - that underlies the charges
18 here, which are very serious.

19 MS. SCALISE: And I agree with that, except that
20 that lone wolf was the person who provided information
21 again and again to the court, which it then came out to be
22 untrue, which he then retracted again. Our clients were
23 the ones who figured out that he had done this before and
24 tell the court about this. He then gets credited by the
25 Appellate Division, and the Appellate Division in Smolyar's



1 decision takes for granted everything that he says and says
2 things about our clients. There are two separate
3 proceedings.

4 If the Appellate Division could have done this
5 without Smolyar's findings, and by the way, it was the same
6 panel a year later, they would have done so. The record -
7 - - what you're talking about, the things that happened,
8 they lie in negligence and neglect. There was no intent to
9 mislead, because the reliance was on Smolyar. So when Mr.
10 Hallock spoke to Mr. Smolyar in order to draft an affidavit
11 for him, it was based on information that Mr. Smolyar gave,
12 okay. The information that he, you know, put - - - imparts
13 in the record, and that the court relies on, is inaccurate
14 and our clients never got a chance to dispute that.

15 The Committee - - -

16 JUDGE GARCIA: Well, I take your argument.

17 MS. SCALISE: Yes.

18 JUDGE GARCIA: My only point was, I think there
19 is a difference in the district court opinion between
20 you're liable because you had a lone wolf, and what Judge
21 Castel actually - - -

22 MS. SCALISE: And - - - and I - - -

23 JUDGE GARCIA: - - - based the sanction of the
24 firm on, which was conduct beyond that, which I think went
25 to (d)(ii), which was you should have known, you had an



1 opportunity to do something at the time, and it was very
2 easy for you to find the other example later, but you
3 should have really done more originally.

4 MS. SCALISE: But - - -

5 JUDGE GARCIA: That's how I think Judge Castel's
6 findings.

7 MS. SCALISE: And - - - and - - -

8 JUDGE GARCIA: And again, I take your point that
9 that is not dishonesty. But I think it goes well beyond, I
10 just had a rogue employee who I failed to supervise.

11 MS. SCALISE: But what the court says at page 68
12 of - - - of Ms. Malerba is this, "While the record before
13 the court is not sufficient to support a finding of actual
14 knowledge on the part of Mr. Hallock of the falsity of the
15 attorney's affidavit" - - - and by the way, that's
16 affidavit number 2 - - - "the record also does not support
17 a finding there are exceptional circumstances that warrant
18 exempting the law firm for joint responsibility."

19 But joint responsibility for what happened does
20 not mean that they had knowledge that it was false, okay.
21 You are taking a quantum leap that relying on an employee
22 who gives them information that is incorrect, okay. That
23 does not mean that Mr. Hallock intentionally tried to
24 mislead the court.

25 Unfortunately, if you take a look at the



1 timeline, things happen in a very short time period, and as
2 they, you know, unfolded, what you hear is, first, you
3 know, the false affidavit, the client testifies, I didn't
4 sign this. Mr. Hallock did speak to the client and said,
5 you had your affidavit, and she said yes. He puts this in
6 the record; he puts it in the record with Judge Castel; he
7 puts it in the record in the Southern District.

8 So, you know, consistently, he's explaining why -
9 - -

10 JUDGE GARCIA: I'm sorry. I - - - just could we
11 go back to that?

12 MS. SCALISE: - - - he did or did not do what he
13 - - -

14 JUDGE GARCIA: I'm - - - I'm sorry. That point
15 where he shows it to the client.

16 MS. SCALISE: Yes.

17 JUDGE GARCIA: I thought the point there was she
18 didn't say anything.

19 MS. SCALISE: That's not correct.

20 JUDGE GARCIA: Not that she said I signed it.

21 MS. SCALISE: So there were two different things,
22 okay. He was prepping the client for trial. And in - - -
23 it's in the record. And he showed it to her, and she
24 didn't deny that it was hers.

25 JUDGE GARCIA: She didn't say anything.



1 MS. SCALISE: Well, she - - - basically, she said
2 okay. And then when she was asked at trial, she's
3 referring to the affidavit that you give for HIPAA forms,
4 you know, and - - - and that's what Ms. Malerba explained
5 later. The affidavit they had - - - and by the way, Judge
6 Castel does not credit Mr. Smolyar's saying that Ms.
7 Malerba told him that there were these affidavits and she
8 had authorization to note - - - you know, to sign and
9 notarize things on her behalf. He does not credit that,
10 okay.

11 So what happens is, he does this unilaterally,
12 and he admits in his Grievance Committee cross-examination
13 that no one told him to do it. He just did it, okay. So
14 on cross-examination in his hearing, he admits that. How
15 does that then come to the point where he was told to do
16 that? That's inaccurate. He unilaterally decided to put
17 that in.

18 When you then - - - Mr. Hallock, and put yourself
19 in his shoes, at the hearing or the trial, she thinks it's
20 one thing, and then it turns out to be another thing. In
21 order for Mr. Hallock to prepare suggestive language for
22 Smolyar, he had to talk to Smolyar to figure out what
23 happened. And that's when he learned what had happened.
24 And he consistently explains that, you know, that it was a
25 misapprehension on her part, because she was thinking about



1 the one affidavit, and you know, for permission for the
2 HIPAAs, and Ms. Malerba explained that as well. And Judge
3 Castel says, Smolyar's experienced. He knew the
4 difference; he didn't - - - he didn't have to sign that
5 affidavit. He knew what was wrong.

6 JUDGE FAHEY: Okay.

7 MS. SCALISE: And that's the point.

8 JUDGE FAHEY: Your - - - your light's on now, so
9 why don't you wrap it up.

10 MS. SCALISE: Thank you very much.

11 JUDGE FAHEY: Take a second and wrap it up.

12 MS. SCALISE: Okay.

13 So to conclude this, and if you'll give me just a
14 moment?

15 JUDGE FAHEY: Sure.

16 MS. SCALISE: This matter was unprecedented. The
17 practice of the Appellate Division should not be condoned
18 or countenanced. Our clients were suspended and served
19 their time and then some. Mr. Hallock is still suspended.
20 The public interests have been served in this case. What
21 is the public interest? They're to know that there was
22 misconduct. What was the misconduct? The failure to
23 supervise someone who did something wrong. And to discover
24 - - - you're right, Judge Garcia, that he had done it
25 wrong. But that's a should have known, not what they knew.



1 And dishonesty lies in intentional acts, okay.

2 So the remedy is to vacate the determination of
3 dishonesty, to dismiss any further proceedings against Mr.
4 Hallock, and there's no reason to remit only to the effect
5 that doing so would unnecessarily continue to punish my
6 client for something that he never had the ability to
7 defend, and - - - and she never had an ability to defend,
8 based on the record of the fact finder.

9 Even Judge Castel did not find they had knowledge
10 of what happened. Insufficient knowledge - - - his
11 statement is that the - - - he was going to sanction the
12 law firm, because the law firm should have known. But
13 these two individual lawyers - - - there's a quantum leap
14 that they're dishonest based on what Smolyar said and did.

15 That is unacceptable because he - - - he - - -
16 they had no ability to be in his proceeding. And they had
17 no ability to challenge what happened in his proceeding.
18 Now, that may have resulted, if they had had a dishonesty
19 charge, in inconsistent findings. But what the Appellate
20 Division could have done then, if they found, and they gave
21 our clients a hearing, they could have brought subsequent
22 charges against Mr. Smolyar if they thought that he was
23 dishonest, instead of my clients, and - - - because you
24 can't lie in a disciplinary committee and - - - committee
25 proceeding, and there's no statute of limitations or



1 laches.

2 But here, they made a determination. They wanted
3 to just stick with the facts that they found in Smolyar.
4 They then used them against our client in a separate
5 proceeding, which was inherently unfair, and violated their
6 due process because they had no notice that they did
7 anything dishonest. They had initially allegations of
8 that, but what Judge Castel found and what the Southern
9 District found does not lie in dishonesty.

10 Someone said vicarious liability. There's
11 vicarious liability, but that doesn't mean you knew about
12 it. You might be liable because you were supposed to
13 supervise. It does not mean that there was knowledge, and
14 that's what's really important to understand here.

15 So to not give them their due process and to
16 later wake up one day, and there's a decision by the
17 Appellate Division labeling you as dishonest, giving you
18 your scarlet letter, ruining your reputation, is inherently
19 unfair, and therefore, we seek the dismissal of the
20 dishonesty charge and the recommendation based on Dondi
21 that Mr. Hallock be reinstated immediately.

22 And I thank you very much for your time and
23 consideration of this case.

24 JUDGE FAHEY: Thank you, ma'am.

25 (Court is adjourned)



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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Hallock, No. 74, and Matter of Malerba, No. 75 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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