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Unusual In Banc Hearing Sparks Lively Questioning

BY DEBORAH PINES

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IN A RARE in banc rehearing, Second Circuit judges yesterday engaged in a spirited review of a September 1994 panel ruling that struck down court-ordered 15-foot buffer zones and limits on "counseling" by anti-abortion protesters outside several upstate abortion clinics.

Twelve of the 15 judges present joined sometimes-heated questioning of Vincent P. McCarthy, a lawyer for abortion protesters who characterized the limits as overly broad restrictions on free speech, and Lucinda M. Finley, a lawyer for abortion rights advocates, who called the limits necessary to protect health and safety.

The most pointed questions came from Judge Thomas J. Meskill, who had written the 2-1 panel ruling under reconsideration, *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 92-7302, and James L. Oakes, who wrote the dissent.

The majority ruling, which was joined in by Judge Frank X. Altimari, held unconstitutional two provisions of a multi-faceted 1990 Western District injunction on abortion protesters outside clinics in Rochester and Buffalo. The provisions bar demonstrating within a 15-foot buffer zone

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doesn't it still permit two counselors" to approach within that range unless rebuffed?

"Yes," Mr. McCarthy conceded.

An in banc rehearing offers lawyers an interim appellate step to challenge a decision of a three-judge circuit panel before an appeal to the U.S. Supreme Court. The rehearing includes all 13 active circuit judges and members of the original panel who wish to participate.

While more commonly used in other circuits, in recent years the Second Circuit has held only one or two in bancs a year. Last year, it held none. Because authority for a rehearing requires a majority vote of the circuit judges, it typically foreshadows an upset of the original panel ruling.

Clash of Ideas

Although questioning yesterday seemed tougher on Mr. McCarthy, of McCarthy & Secola in New Milford, Conn., several judges also pressed Ms. Finley, a professor at the State University of New York at Buffalo Law School, on whether the challenged injunction was vague, overly broad or inconsistent with a June 1994 U.S. Supreme Court ruling permitting a 36-foot buffer zone around a Melbourne, Fla. abortion clinic, *Madsen v. Women's Health Center*, 114 S.Ct. 2516.

Judge Roger J. Miner, for instance, asked if the requirement of buffer zones "in the vicinity" of the clinics was too vague to be enforced. Judge John M. Walker asked if the injunction's requirement that counseling stop when it is "unwanted" requires a protester to be "a mind reader."

Ms. Finley defended both provisions noting, for instance, that barring the unwanted conduct "in the vicinity" of the clinics has meant barring protests which impede access to a clinic even if that protest starts a block away when a protester sticks to a patient "like a burr and stalks them and follows them to a clinic."

In the most politically charged moment, Judge Meskill prefaced a hypothetical question by noting that while the clinics are advocating a woman's right to choose, Operation Rescue protesters are championing "the right to choose life."