UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MILTON LEVIN,

Plaintiff,

-against-

FRANK A. GULOTTA, etc., et al.,

Defendants.

74 C 1668

(J.B.W.)

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PLAINTIFF'S OPENING BRIEF TO THE THREE-JUDGE COURT

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TABLE OF ABBREVIATIONS AND REFERENCES

The following abbreviations and references are used in the Brief:

App.	Plaintiff's Appendix to the Three-Judge Court, submitted simultaneously herewith, followed by the specific appendix or appendices being referenced.
Ex. A	Exhibit A to the Complaint: Report and Findings of Justice Morton B. Silberman in the disciplinary proceeding against plaintiff Levin, followed by the page number or numbers being referenced.
Ex. B	Exhibit B to the Complaint: Decision and Suspension Order of the Appellate Division, Second Department.
Ex. C	Exhibit C to the Complaint: Decision of the Court of Appeals denying appeal to Levin.
Tr.	Official transcript of the proceedings before Justice Silberman, followed by the page number or numbers being referenced.
New York Attorney-Disciplinary Statute	N.Y. Judiciary Law § 90, subdvs. 2, 3, 6 and 8.

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PLAINTIFF'S OPENING BRIEF TO THE THREE-JUDGE COURT

> "I do believe that an injustice has been done to [Milton Levin] in subjecting him to the rigors of the within disciplinary proceeding. . . .
>
> [Levin's] testimony before me was candid and credible. A thorough analysis of the evidence leads me to the conclusion that the charges against [Levin] are supported by little more than conjecture and surmise." (Ex. A, at 63; emphasis added).

So ruled the only judge to hold a hearing, assess credibility, or make written findings in the New York State attorney disciplinary proceeding against plaintiff Milton Levin.

The same judge (Morton B. Silberman, J.S.C.) censured the chief witness against Levin for suppression of evidence (Tr. 1051), and found Levin "innocent of the two charges preferred against him" (Ex. A, at 65).

One year later, Milton Levin was ordered suspended from the practice of law in New York.

The suspension order was issued by the Appellate Division (Second Department) of the New York Supreme Court, which sat as the statutory trier-of-fact in the proceeding against Levin. Justice Silberman was only its designated referee. However, unlike Justice Silberman, the Appellate Division acted in Levin's case without hearing the testimony, viewing the parties, observing the confrontation of the witnesses, listening to arguments of counsel, rendering a written statement of the evidence it relied on, or making written findings of fact.

The Appellate Division was authorized to so act by the New York Attorney-Disciplinary Statute. And, also pursuant to that Statute, Levin was denied an appeal as of right from the Appellate Division's adverse determination and suspension order against him.

Justice Silberman was correct: Milton Levin has been the victim of an "injustice" -- an injustice ordained by statute. We seek to remedy that injustice in this Court.

Preliminary Statement

Plaintiff has moved for a preliminary injunction against enforcement of the New York Attorney-Disciplinary Statute (sometimes hereinafter, "Statute"). There are no issues of fact.

Instead, this motion raises only the legal question of whether a State statute that authorizes punishment without hearing, punishment without evidence, punishment without explanation, and punishment without review for only one group of citizens, can be permitted to stand under the Constitution.

We submit that it cannot; and we ask this Court to so rule by declaring the New York Attorney-Disciplinary Statute unconstitutional.

The task plaintiff asks this Court to perform is a demanding one, but indispensable within the framework of a federal system. For, as the Second Circuit has recently reminded, in Salem Inn, Inc. v. Louis J. Frank, 501 F.2d 18, 22 (2d Cir. 1974):

> ". . .[W]e cannot ignore that lower federal courts are the 'primary and powerful reliance for vindicating every right given by the Constitution, the laws and treaties of the United States.' Steffel v. Thompson, [94 S.Ct. at 1218] (emphasis original), quoting Frankfurter & Landis, The Business of the Supreme Court 65 (1928)."

To vindicate the rights of New York attorneys to due process and equal protection, the State's Attorney-Disciplinary Statute should be struck down. Such relief, however, is not nearly so drastic as the abuse and injustice it would cure.

It would not require a major upheaval in the State's method of disciplining attorneys. Instead, it would call only for the introduction of minimal procedural safeguards, which are already required and in existence in New York for everyone but attorneys.

Nor would such relief lower the standard of conduct to which New York attorneys are held. Plaintiff's quarrel is not with the standard governing his professional conduct, but with the New York statutory procedure by which that standard is enforced.

Put simply: The New York Attorney-Disciplinary Statute is bad law -- unfair, unwarranted and unconstitutional.

It empowers the trier-of-fact in an attorney disciplinary proceeding to render an adverse decision and impose severe punishment without explaining its actions in any written statement and without hearing any of the evidence, even in cases (such as Levin's) where the credibility of the parties and witnesses is critical to the outcome and where he who hears the evidence finds the accused attorney not guilty. This denies due process.

Further, under the Statute the State denies to attorneys, unlike all other New York litigants, an appeal as of right

of the failure to give attorneys a full and fair hearing before the trier-of-fact, it also denies due process.

The State of New York, we submit, has no rational reason to place attorneys under such substantial procedural disabilities or to consign attorneys to second-class citizenship, beyond the shelter of constitutional guarantees. We recognize that the special place of lawyers in our legal system justifies the most careful scrutiny of their conduct and integrity. We also recognize that the State may properly delegate the enforcement of attorney discipline to the judiciary. But, as the Supreme Court stated in Johnson v. Avery, 393 U.S. 483, 490 n.11 (1969):

> ". . .[T]he power of the State to control the practice of law cannot be exercised so as to abrogate federally protected rights."

Hence, the power to regulate and enforce attorney discipline does not include the power to trample on an attorney's constitutional rights. But New York has exercised precisely such unlawful power through the Attorney-Disciplinary Statute -- and the vice of its exercise is perhaps nowhere better demonstrated than in the case of Milton Levin. For Levin was ordered suspended, pursuant to the Statute, after the only judge who held a hearing

or wrote an explanation of his decision found nothing but "conjecture and surmise" to support any of the charges against Levin, censured the chief witness against Levin, condemned the disciplinary proceeding as an "injustice," and found Levin not guilty.

A State statutory scheme that leads to such results is clearly wrong. No valid State interest can justify it. The Constitution does not permit it.

Accordingly, we ask this Court to grant Milton Levin the relief he seeks, enjoining enforcement of the New York Attorney-Disciplinary Statute and declaring it unconstitutional, null and void.

Nature of the Action

This is a civil rights action in which plaintiff seeks a declaration that the New York Attorney-Disciplinary Statute is constitutionally infirm in that it denies the due process and equal protection guaranteed by the 14th Amendment to the United States Constitution.* Plaintiff also seeks interlocutory and permanent injunctive relief against enforcement

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*The full text of the Statute is reprinted at App. A.

of the Statute, including an order issued pursuant thereto suspending him from the practice of law for three years ("suspension order").

If the suspension order is enforced, plaintiff will suffer immediate, irreparable injury -- not the least of which will be the destruction of a professional reputation he has earned over a lifetime. On the other hand, no injury whatsoever could be sustained by the public or any other party if enforcement of the suspension order is enjoined pending determination of the substantial constitutional questions raised in this action.* And Judge Weinstein has recognized these factors in previously entering a temporary restraining order herein pursuant to 28 U.S.C. § 2284(3).

The Parties

Plaintiff Milton Levin is a 67 year old attorney, admitted to the New York Bar in 1934. He resides and works in Nassau County, New York, which is within the territorial

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*As discussed more fully below, the charge leading to the suspension order did not relate to any continuing course of conduct. Instead, it related solely to plaintiff's submission of one piece of documentary evidence to a State judicial inquiry in 1970. Moreover, plaintiff has been a member of the bar for over 40 years with an otherwise unblemished record.

jurisdiction of both this Court and of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

The individual defendants are the Presiding Justice, Associate Justices and Clerk of the Appellate Division, Second Department (hereinafter collectively, "Second Department" or "Appellate Division"). They are named individually and in their official State capacities. By law, they are responsible for the enforcement and administration of the New York Attorney-Disciplinary Statute in those counties of the State of New York comprising the Second Judicial Department.

Statement of Facts and Prior Proceedings*

To help the Court appreciate the magnitude of the injustice worked by the New York Attorney-Disciplinary Statute, we now review, in summary form, its precise operation in the case of Milton Levin.

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*Unless otherwise indicated, the facts set forth in this section of the brief are taken from the referee's report to the Second Department (Ex. A). The Second Department made no written fact findings of its own. Nor did the New York Court of Appeals render an opinion.

Background of the Levin
Disciplinary Proceeding

Plaintiff Levin has practiced law in Nassau County, but has derived his livelihood primarily from a real estate partnership with his brother-in-law, Maurice Gruber, operated under the name of Max Gruber Associates ("Gruber Associates"). Since his admission to the New York Bar over 40 years ago, Levin has had an unblemished record and has never been the subject of any criminal complaint or disciplinary proceeding, except for the proceeding at issue in this action.

The State disciplinary proceeding against Levin was formally instituted on April 8, 1972 in the Second Department. It stemmed from a 1970 Second Department inquiry into the activities of someone else, former State Supreme Court Justice Michael M. D'Auria -- a man Levin had met only once prior to 1970.

The D'Auria investigation had been sparked by articles appearing in July 1970 in Newsday, a Long Island newspaper, which neither mentioned nor alluded to Levin, Gruber, or any transaction between them and D'Auria. Instead, the articles focused on charges by a Plainview, L.I. couple that D'Auria had improperly sought legal fees while on the bench. By order dated July 15, 1970 the Second Department directed that a preliminary inquiry be conducted by Hon. Charles W. Froessel

to investigate the charges ("Froessel inquiry").

While Levin had only met D'Auria once by the time of the inquiry, and had never developed a social relationship with him, Gruber had been a friend of D'Auria for over 15 years, their friendship strengthened by a common interest in boating. D'Auria's law firm had been retained by Gruber -- before D'Auria's election to the bench -- on both personal and business matters, particularly on zoning applications.*

In November 1970, three investigators on the Froessel staff met with Levin at his office to discuss certain transactions between Gruber and D'Auria. They also subpoenaed certain documents relating to those transactions, which Levin promptly produced. Altogether, Levin had only two meetings with the Froessel investigators, both of which were in November 1970. Near the end of the same month, Levin appeared, without counsel, and gave testimony before the Froessel inquiry.

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*D'Auria's firm was only one of several outside law firms periodically retained by Gruber on zoning matters. Fees for professional services rendered on such matters by D'Auria's firm and others to Gruber Associates were invariably on a contingent basis.

The Charges in the Disciplinary Proceeding

There were two charges against Levin, both based on his testimony and submission of documents to the Froessel inquiry. They were contained in a petition that was filed nearly two years after the inquiry had completed its work, in April 1972.

Regarding Levin's testimony, the petition charged that Levin had testified falsely when he stated that $30,000 in bonds transferred to D'Auria in 1967 was a loan, whereas the petition alleged that it was really a part payment of a legal fee to D'Auria rendered in connection with a zoning application in Plainview, New York ("Plainview zoning application").

With respect to Levin's production of documents, the petition charged that four admittedly back-dated documents -- a deed, a blank acknowledgement thereto, a promissory note, and a document relating to a 45-foot Chris-Craft boat ("boat document") -- were false and submitted deliberately to obstruct the inquiry. According to the petitioner, the four documents were all allegedly fabricated to cover up the same alleged additional legal fee to D'Auria on the Plainview zoning application about which Levin was charged with testifying falsely.

As discussed more fully below, the referee was later to find, after a lengthy hearing, that none of the testimony or documents involved was false; and the Second Department would thereafter affirm its referee as to all of these findings, except with respect to the boat document. But the Second Department has never explained how it reached such a decision -- especially when all the allegedly false evidence was allegedly designed to cover up the same alleged additional legal fee (on the Plainview zoning application), and when the referee expressly found (in portions of his report apparently affirmed by the Second Department) that there was no such additional legal fee.

Nor did the Second Department ever observe any of the parties or witnesses in the proceeding, although credibility was key to the case and although the referee (who did observe the parties and witnesses) expressly resolved all credibility issues in Levin's favor.

Conduct of the Disciplinary Proceeding

On November 17, 1971, pursuant to the Statute, the Second Department appointed a petitioner pro se, Solomon A. Klein, Esq. ("petitioner") to institute and prosecute the disciplinary proceeding against Levin. As noted, on April 18, 1972

petitioner filed a petition in the Second Department reciting the charges against Levin. By order dated October 24, 1972, the Second Department then appointed Hon. Morton B. Silberman, a Justice of the New York Supreme Court, as a referee to hear and report to it on those charges.

Justice Silberman conducted ten days of hearing between December 11, 1972 and January 18, 1973. Eleven witnesses testified, producing 1,072 pages of transcript and 91 exhibits. In addition, Justice Silberman considered post trial memoranda submitted on behalf of the parties, and heard oral argument of counsel. He then acquitted Levin on all counts.

Justice Silberman's Report:
Injustice Perceived

On September 4, 1973, Justice Silberman filed with the Second Department a lengthy and comprehensive written report of his findings, completely exonerating Levin on all charges in every respect. He concluded, on the basis of "a thorough analysis of the evidence," that the charges were "supported by little more than conjecture and surmise;" and he condemned the disciplinary proceeding as an "injustice" to Levin (Ex. A, at 63-64).

Justice Silberman (himself a former State prosecutor) found that there was no evidence to sustain the false testimony charge, but that it was based upon "conjecture and suspicion" (Ex. A, at 54). In ruling on this charge, Justice Silberman also expressly found that there was "no evidence to support petitioner's conjecture that a fee" in excess of the amount always acknowledged by Levin had been paid to D'Auria for legal services on the Plainview zoning application:

> "There is no evidence to support petitioner's conjecture that a fee of about $50,000 (rather than about $20,000) was paid by Gruber and Levin to D'Auria for the services rendered on the successful application for the re-zoning of the Plainview property. Considering that this was a re-zoning desired by the Town, and considering that there was no opposition to the application, even a fee of $20,000 paid would seem to be a most substantial one and disproportionate to the services rendered. A fee of $50,000 would be far in excess of any reasonable fee for the services rendered on this re-zoning application which was practically assured from the outset." (Ex. A, at 54; emphasis added).

After considering the false document charge in great detail, Justice Silberman concluded that there was no evidence to support it, and that, indeed, the purported evidence concerning the charge was "wholly insufficient" to support the notion that any of the "documents were prepared with the intent to obstruct and pervert the [Froessel] inquiry" (Ex.

A, at 63). This followed, of course, from the finding that the alleged additional Plainview fee (which the documents supposedly masked) simply did not exist.

Justice Silberman's Credibility Findings and Censure of Petitioner's Chief Witness

The credibility of the parties and witnesses was critical to a resolution of the charges against Levin. After a "lengthy hearing," during which he "had an extensive opportunity to closely observe" the parties and witnesses, Justice Silberman resolved the credibility issues wholly in Levin's favor. He wrote:

> "I was impressed with his [Levin's] background and his demeanor. His testimony before me was candid and credible. A thorough analysis of the evidence leads me to the conclusion that the charges against [Levin] are supported by little more than conjecture and surmise." (Ex. A, at 63).

In contrast, he noted the inconsistency in the testimony of the two Froessel investigators who testified at the hearing, Arnold Anderson and Patrick McGinley (Ex. A, at 60-61).

Moreover, during the hearing, Justice Silberman censured the petitioner's chief witness, Bertram Corin, for himself suppressing a document in this very proceeding -- yet the petitioner relied solely on Corin's testimony to prove

the most crucial element of his case against Levin: The alleged existence of an additional legal fee on the Plainview zoning application, which Levin allegedly sought to cover up through false documents and testimony. Petitioner admitted his sole reliance on Corin in his brief in opposition to Levin's motion for leave to appeal to the New York Court of Appeals.

Aside from his suppression of evidence, Corin was a most unreliable witness. He came to the hearing with an axe to grind: He had been asked to resign his membership in D'Auria's law firm after he was caught dipping into the firm's till to "borrow" $1,000. In his testimony, Corin admitted "borrowing" the money without authority; he also admitted to having once attempted to collect a $2,000 fee in a case from which he had previously withdrawn and expressly waived any right to compensation (Tr. 577-78, 998-1005).

The disclosure that Corin had suppressed evidence completed the destruction of his credibility. He confessed, in open court, to suppressing a piece of documentary evidence throughout the course of the original Froessel inquiry (in 1970) until after his original appearance on the stand before Justice Silberman (in 1973), and even until after the scheduled hearings

before Justice Silberman had closed. To make matters worse, Corin then attempted to justify his unlawful conduct. Justice Silberman would have no part of it. He censured Corin from the bench:

> "There is no question and I will state for the record that I find the witness was absolutely wrong in withholding this document. His reasoning makes no sense to me. In the same breath he says he was reluctant to produce it because he didn't want to hurt Mr. D'Auria and at the same time he says that he thought that the document was of no consequence. Now, that just doesn't make any sense.
>
> "It wasn't for you, Mr. Corin, to decide what was of consequence or not. You know very well that one of the serious issues in this case involved fees received by the D'Auria firm and what was expected to be received by them and you should have produced this document when you first appeared herein January 9th. You certainly were wrong in not doing so and I don't accept your reasons for it" (Tr. 1051).

Such were the straws on which the case against Levin was constructed, and which led Justice Silberman to condemn the proceeding as an "injustice." The "injustice" was then to be compounded by the Second Department.

The Second Department's Partial Disaffirmance and Suspension Order: Injustice Compounded

Almost six months after Justice Silberman filed his report, the petitioner moved the Second Department, on

February 21, 1974, to disaffirm. Levin cross-moved, on April 4, 1974, to confirm. Levin requested an opportunity for oral argument, but the request was ignored.*

On September 9, 1974, the Second Department entered a summary decision, affirming Justice Silberman's report in all respects except as to that portion of the false document charge involving the boat document. As to that one portion, the Second Department disaffirmed in one conclusory sentence:

> "In our opinion, contrary to the report, the first charge, insofar as it relates to a document dated March 6, 1967 involving the transfer of a Chris-Craft boat, was sustained by the evidence." (Ex. B).

On the basis of its one-sentence partial disaffirmance, the Second Department ordered that the 67-year old Levin be suspended from the practice of law for three years. It gave absolutely no explanation for its imposition of such a crushing sanction.

The Denial of any Appeal: Injustice Complete

Under the State statutory scheme, attorney Levin, unlike all other New York litigants, had no appeal as of right

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*The request was embodied in a letter to the Second Department from Levin's counsel, dated April 4, 1974.

from the Second Department's decision on all questions of fact and law.

Accordingly, on October 21, 1974, Levin moved the New York Court of Appeals for permission to appeal and for a stay of the suspension order pending determination of his motion. Levin also claimed that he was entitled to an appeal as of right on the constitutional questions raised by his case.

On November 20, 1974, the Court of Appeals (Rabin, J. taking no part) denied, without opinion, Levin's motion for permission to appeal. Nor did it grant Levin any appeal as of right. (Ex. C).

Thereafter, Levin commenced this action. On December 2, 1974, he moved for a temporary restraining order, preliminary injunction, and for the convening of a three-judge federal district court. Judge Weinstein entered a temporary restraining order on December 16, 1974, and, on the same day, directed that a three-judge federal district court be convened to hear this matter.

On January 23, 1975, plaintiff filed an Amended Complaint. The defendants have yet to serve an Answer.

Argument

I

THE NEW YORK ATTORNEY-DISCIPLINARY STATUTE IS UNCONSTITUTIONAL

A. Denial of Appellate Review to Attorneys

Perhaps the clearest constitutional infirmity of the New York Attorney-Disciplinary Statute is that it is discriminatory legislation of the most invidious sort and violates the Equal Protection Clause of the 14th Amendment. Through it, the State discriminates between New York lawyers and all other New York litigants -- denying only to New York lawyers an appeal as of right on all questions of law or fact.

Denial of such appellate review to New York attorneys also violates due process, since the Statute does not afford attorneys an opportunity for a full and fair hearing in the court of first instance (as we discuss in Sections B, C and D infra). In such circumstances, the Supreme Court has ruled that provision for an appeal is not a matter of State grace, but of constitutional right.

We now consider these points in further detail.

1. Denial of Equal Protection

The Supreme Court has held that, once a State legislature provides for an appellate process, it may not deny an appeal to a selected class of litigants on an arbitrary or capricious basis, Lindsey v. Normet, 405 U.S. 56, 77 (1972):

> "When an appeal is afforded. . .it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."

Accord, Matter of Brown, 439 F.2d 47, 51 (3rd Cir. 1971) (en banc).

In New York, the State legislature has provided that all litigants -- criminal and civil -- other than attorneys have at least one appeal as of right, on all questions of law and fact, from the decision of the trier-of-fact. (In App. C, we set forth a complete analysis of the opportunities for appellate review as of right under New York law.)

Under the New York Attorney-Disciplinary Statute, the Appellate Division is the court of original jurisdiction, or trier-of-fact, in attorney disciplinary proceedings. It does not sit, or review its referee's report, as an appellate tribunal. See Cohen and Karger, Powers of the New York Court of Appeals § 108, at 452 (1951). But, pursuant to the Statute,

an attorney has no appeal as of right from the Appellate Division to the Court of Appeals (the only available appellate tribunal) on all questions of law and fact. (See App. A and B).

The disciplined attorney can apply for permission to appeal to the Court of Appeals. But this is plainly insufficient to eliminate the equal protection problem for at least two reasons: First, no other New York litigants have to apply for permission to appeal; they have at least one appeal, on all questions, as of right. Second, even if the attorney's motion for permission to appeal is granted, the scope of review under the Statute is expressly limited to questions of law -- whereas all other litigants have a right to at least one review on all questions, both of law and fact.*

We recognize that equal protection does not bar the State from making reasonable classifications among citizens. But there is no rational State policy served by denying attorneys the right to a review of orders which strip away their licenses, their livelihoods and their reputations.

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*Hence, even if the Court of Appeals decides to review the attorney's case, it must nevertheless sustain the Appellate Division's finding of guilt if there is any evidence to support it -- even if only the proverbial scintilla. See Matter of Goodman, 199 N.Y. 143, 92 N.E. 211 (1910).

The State may seek to justify such denial by pointing to the special relationship between courts and lawyers. But that relationship provides no justification for depriving attorneys of minimal procedural safeguards. Appellate review is not a catalyst of unethical or unlawful conduct. And New York recognizes that for everyone but lawyers.

The State may also argue that attorney disciplinary proceedings are not of the same class as ordinary civil or criminal litigations. Even if that were true, equal protection would still be denied -- for the State gives to all other New York professionals (aside from lawyers) a right to at least one judicial review of a disciplinary determination against them -- and the scope of that review embraces all questions of law, including the substantiality of the evidence. (This we show in App. C and D.)

Finally, the State may seek to rely on Judge MacMahon's decision in Javits v. Stevens, 382 F. Supp. 131 (1974). Such reliance would be misplaced. There, Judge MacMahon was confronted with a different situation. His ruling -- that the circumscribed appellate procedure in New York attorney disciplinary proceedings is not unconstitutional -- was entered in a case where the Appellate Division had affirmed the findings of its

designated referee in the attorney disciplinary proceeding (382 F. Supp. at 134). Hence, in Javits, unlike here, the findings of the one who heard the evidence, and who entered a written decision, prevailed. This is a critical distinction from Levin's case, in which the findings of the one who heard were summarily rejected by the Appellate Division, without further hearing and without explanation. It is a distinction that Judge Weinstein recently recognized in his decision granting a three-judge court in a companion case to Levin's, Mildner v. Gulotta, et al., 74 C 1101 (E.D.N.Y., dated October 23, 1974).

Second, the attorney in Javits presented Judge MacMahon with a different question than Levin raises here. As Judge MacMahon put it, the claim in Javits was that

> ". . .[T]he failure of the Legislature to make Article 78 proceedings available to attorneys, as well as other professionals, [is] a violation of the equal protection clause." (382 F. Supp. at 140).

Judge MacMahon held that it was not (id. at 141).

But plaintiff Levin's claim is far different. He does not demand Article 78 proceedings for attorneys. Nor does he contend that some body other than the courts be responsible for disciplining attorneys. Instead, plaintiff Levin submits that the failure to provide an appellate review as of right for

attorneys, on all questions of law and fact, from the tribunal of original jurisdiction -- whatever that tribunal is -- violates equal protection, for no other New York litigant (professional or non-professional) suffers the same disability.

Thus, Judge MacMahon's decision lacks precedential weight in Levin's case. Indeed, even if his decision could be read to imply a broad finding of no equal protection violation, his statements to that effect would be dictum at best -- for, among other things, Judge MacMahon had no jurisdiction to decide the constitutionality of the New York Attorney-Disciplinary Statute. He was sitting as one judge. But such a question could only be resolved by a three-judge federal district court and is, therefore, before this Court for that very purpose.

This Court should find that New York's failure to accord attorneys an appeal as of right from an adverse decision by the trier-of-fact, on questions of law and fact, violates equal protection, and therefore, renders the New York Attorney-Disciplinary Statute unconstitutional.

2. Denial of Due Process

Levin's right to appellate review on all questions in an attorney disciplinary proceeding is not derived solely from the Equal Protection Clause. The Due Process Clause

guarantees it as well.

While it is generally true that due process does not require a State to provide litigants with appellate review -- the same is not true where, as here, the State has failed to provide for a full and fair hearing in the court of original jurisdiction. As the Supreme Court stated in Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 80 (1929):

> "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." (emphasis added).

Accord, Lindsey v. Normet, supra, 405 U.S. at 56.

The cases establishing the proposition that "appeal is a matter of grace, not right. . .also assume that the thwarted appellant has been accorded one fair hearing." States Marine Lines, Inc. v. Federal Maritime Comm'n., 376 F.2d 230, 241 n.25 (D.C. Cir. 1967).

However, as we show in the following sections of this brief, New York does not afford accused attorneys at least "one fair hearing" by the tribunal of first instance in a disciplinary proceeding, for that tribunal (the Appellate Division) may (and did in Levin's case) discipline without ever hearing testimony

or arguments of counsel, without ever observing the witnesses or parties, and without ever explaining the reasons for its decision.

This is particularly egregious in cases such as Levin's -- where credibility is critical to outcome, where the referee resolves the credibility issues in the attorney's favor, and where the Appellate Division then summarily rejects the referee's findings and determination. In such cases, the accused attorney has anything but a full and fair hearing in the court of first instance.

Thus, in such cases, the 14th Amendment requires the State to give the attorney the process due him through appellate review. The State of New York, however, has not done so. Therefore, the New York Attorney-Disciplinary Statute must fall.

B. Denial of a Full and Fair Hearing

In the disciplinary proceeding against him, Milton Levin was constitutionally entitled to confront the adverse witnesses before the actual trier-of-fact, and to have the trier-of-fact pass upon demeanor. This he was denied by the New York Attorney-Disciplinary Statute, which permitted the Appellate Division to suspend him from practice without observing a single witness or hearing a stitch of argument.

The vice of this procedure in Levin's case is dramatic:

The petitioner had no documentary evidence to establish the crucial elements of his charges. Everything turned on the credibility of the witnesses -- particularly on the credibility of Levin himself. Justice Silberman was the only judge to see the witnesses and to pass on their demeanor. After a lengthy hearing, he found Levin "candid and credible" in all respects, expressly resolved all conflicts of testimony in Levin's favor, and concluded that Levin was not guilty. (Ex. A, at 63-64). At that point, no other tribunal could reasonably or fairly substitute its own view for Justice Silberman's, after doing no more than reading a cold record. Yet the Appellate Division did just that; and thereby, the only hearing Levin had was rendered meaningless.

Due process does not allow such an arbitrary procedure. At the very least, it requires a meaningful hearing. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This requirement is strictly enforced in criminal cases, U.S. ex rel. Graham v. Mancusi, 457 F.2d 463, 469 (2d Cir. 1972), and the Supreme Court has characterized attorney disciplinary proceedings as being "of a quasi-criminal nature." In Re Ruffalo, 390 U.S. 544, 551 (1968). This is because the possible sanctions in such proceedings are just as devastating

and punishing as those in criminal actions: Destruction of professional reputation and loss of livelihood. As the Second Circuit held in Erdmann v. Stevens, 458 F.2d 1205, 1209-10 (2d Cir. 1972):

> ". . .[I]n our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding. . . . [D]isciplinary measures against an attonrey, while posing a threat to incarceration only in cases of contempt, may threaten another serious punishment -- loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions. . . ."*

Accordingly, in attorney disciplinary proceedings, just as in criminal actions, the State may not punish without affording the accused attorney full procedural due process of law. See In Re Ming, 469 F.2d 1352, 1355 (7th Cir. 1972). This includes, at the very least, a hearing by and before the tribunal with the power to decide and punish. Indeed, the Supreme Court has found such a hearing to be an important "trial right" without which such fundamental due process guarantees as confrontation and a fair hearing would be devoid of substance. Barber v. Page, 390 U.S. 719, 720, 725-26 (1968), and Berger v. California, 393 U.S. 314, 315 (1969). See also Williams v. Maryland, 375 F. Supp. 745, 756-57 (D. Md. 1974).

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*See also Justice Silberman's Report: "The charges against [Levin] are of a most serious nature. In effect, he stands charged with criminal conduct." (Ex. A, at 63).

The constitutional requirement makes good sense. The credibility of witnesses frequently plays an important role in resolving charges. It did so in Levin's case. The practical importance of demeanor evidence as an aid to determining credibility is self-evident. And of course, demeanor can only be judged by seeing the witnesses. As Judge Learned Hand wrote in Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952):

> "It is true that the carriage, behavior, bearing, manner and appearance of a witness -- in short, his 'demeanor' -- is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

Judge Hand was surely right. Unless a witness' testimony is so inherently improbable or inconsistent, or so contradicted by objective, documentary evidence as to be

incredible as a matter of law,* a conflict between such testimony and other testimony cannot reasonable be resolved by the trier-of-fact looking at a paper record -- it requires looking at the witness and judging their credibility.

By giving the triers-of-fact in disciplinary proceedings the power to decide and punish without the responsibility to hear, the New York Attorney-Disciplinary Statute denies due process. It should be struck down.

C. Denial of a Written Statement of the Evidence Relied on by the Trier-of-Fact and the Reasons for its Decision

The Statute has yet another fatal defect: It permits the Appellate Division to discipline an attorney without saying why.

Thus, in Levin's case the Second Department ruled and directed a severe punishment without furnishing any written statement of the reasons for its decision or the evidence it relied on.

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*As we discuss infra, Bertram Corin's testimony in the proceeding against Levin was precisely such testimony -- i.e., "incredible as a matter of law." Corin's testimony was contradicted by every other item of evidence in the record and was replete with internal contradictions and improbabilities. The transcript itself is sufficient to demonstrate Corin's low regard for the truth: It shows that, at the hearing, he confessed to suppressing evidence, gave an absurd explanation in an effort to justify his unlawful conduct, and received a stern censure from Justice Silberman. (Tr. 1051).

It simply disaffirmed the detailed, written findings of Justice Silberman, as to one portion of one charge, in a one-sentence, summary ruling. It made no written findings of fact, pointed to no evidence supporting its determination or requiring any conclusion different from the one reached by Justice Silberman, and suggested nothing in the record to sustain a finding of guilt -- in short, it gave no explanation whatsoever for its adverse decision or its crushing sanction.

This strikes at the very heart of due process: It is fundamentally unfair to the accused attorney himself. It promotes arbitrariness by the decision-maker, or at least makes detection of arbitrary conduct more difficult in any review of the decision. Minimal due process requires that a decision-maker confine itself to the record, to the legal evidence adduced at the hearing, to the applicable rules of law, and to a sound exercise of discretion. But without any written statement from the decision-maker, there is no way to be certain that these requirements are met. And in Levin's case, there is strong reason to believe that they were not.

For example, Justice Silberman concluded that there was nothing but "conjecture and surmise" to support any of the charges against Levin, including the charge relating to the boat document. He based this conclusion on a penetrating review of all the evidence

introduced at the hearing, which he then embodied in a written report. His report makes it clear that he carefully deliberated on everything from the direct evidence, to the circumstantial evidence, to the inferences that might reasonably be drawn from the evidence. What the Appellate Division did in the face of all this, however, remains a mystery. How it took the "conjecture and surmise" detailed by Justice Silberman and transformed it into evidence requiring a devastating punishment has never been explained. All we have from the Appellate Division is its one-sentence disagreement.

Further, the Appellate Division's decision is internally inconsistent, thus giving further cause to suspect its validity. As we discussed earlier, all of the charges against Levin related to the same alleged cover-up of the same alleged additional legal fee on the Plainview zoning application. All of the documents at issue, including the boat document, were supposedly fabricated by Levin to mask the payment of that additional fee. While the Appellate Division agreed with this charge as to the boat document, at the same time it affirmed Justice Silberman's findings favorable to Levin on everything else, apparently including his finding that there was no additional fee on the Plainview zoning application. But if there was no such fee, then, according to the petitioner's own theory, there was nothing for Levin to cover-up, and thus no basis for concluding

that any of the documents, including the boat document, was false.

These examples illustrate the vice in a statutory disciplinary procedure that empowers the decision-maker to punish without explanation. It also illustrates the wisdom of requiring at least some written statement of findings by the decision-maker. As the Second Circuit observed in Russo v. Central School District No. 1, 469 F.2d 623, 628 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973):

> "Findings that are nothing but cold rhetoric, couched in extraordinarily broad and general terms, and stripped of underlying analysis or justification or an accompanying memorandum or opinion shedding some light on the reasoning employed, invite closer scrutiny, especially when the case concerns fundamental constitutional freedoms."

Hence, to prevent the possibility of abuse and to facilitate meaningful appellate review, the courts have held due process to require a written statement by the decision-maker as to the evidence it relied on and the reasons for its decision. Two recent Supreme Court decisions make this plain.

The landmark decision was Goldberg v. Kelly, 397 U.S. 254 (1970), which required a State to afford a welfare recipient minimal due process before terminating his welfare benefits. The Court held that minimal due process included a written statement:

> "Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. . .to demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on. . .though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." (397 U.S. at 269).

More recently, the Supreme Court ruled, in Morrissey v. Brewer, 408 U.S. 471 (1972), that a parolee has a right to a hearing before revocation of parole. The Court held that the hearing should take place in two stages, a preliminary hearing to determine "probable cause" to believe a parole violation has been committed, and then a formal revocation hearing to finally adjudicate the charge. The Court required a written statement of the reasons for the action taken at each stage of the hearing:

> "Our task is limited to deciding the minimum requirements of due process. They include. . .a written statement of the factfinders as to the evidence relied on and the reasons for revoking parole." (408 U.S. at 489; emphasis added).

The Goldberg and Morrissey principle has been extended by the lower courts to include a right to a written opinion when parole is denied, U.S. ex rel. Johnson v. Chairman, N.Y. State Board of Parole, 363 F. Supp. 416 (E.D.N.Y. 1973); Solari v.

Vincent (2d Dept. Jan. 20, 1974), N.Y.L.J., Feb. 3, 1975, at 1, col. 7; the right of government employees to a written statement of the reasons prior to involuntary termination of employment, Miller v. Iowa State ASCS Comm., 374 F. Supp. 415 (S.D. Iowa 1974); and the right of teachers to written findings stating the reasons for their not being rehired by school boards, Thomas v. Ward, 374 F. Supp. 206 (M.D.N.C. 1974).

The interests at stake in an attorney disciplinary proceeding -- a lawyer's reputation and livelihood -- are at least as important as the interests involved in the Goldberg and Morrissey type proceedings. Similarly, the potential for abuse is equally present.

The State may argue that our reliance on the above cases is misplaced, for they arose in the context of administrative law. But this is not a valid distinction. It cannot be, for example, that the State may disbar an attorney (and ruin him for life) with less care and less due process than a school board may dismiss a teacher. In short, it cannot be that an attorney is a lesser citizen, with lesser rights than everyone else, including everyone from teachers to parolees.*

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*See Spevack v. Klein, supra, 385 U.S. at 516:

"[L]awyers also enjoy first-class citizenship."

Further, decision by fiat is repugnant to due process whether the decision is rendered by an administrative or judicial tribunal. As Judge Jerome Frank so aptly stated in United States v. Forness, 125 F.2d 928, 942 (2d Cir. 1942):

> "The judiciary proerply holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards."*

Finally, written findings are as necessary to proper appellate review of judicial decisions as they are to review of administrative decisions. See United States v. Livingston, 459 F.2d 797, 798 (3rd Cir. 1972) and Lemelson v. Kellogg Co., 440 F.2d 986, 988 (2d Cir. 1971), and cases cited therein. See also Russo v. Central School District No. 1, supra, 469 F.2d at 628-29, Gold v. Nyquist, 43 A.D.2d 617, 618, 349 N.Y.S.2d 165, 167-68 (3rd Dept. 1973), and Solari v. Vincent, supra. The failure of the New York Attorney-Disciplinary Statute to provide for written findings effectively thwarts whatever opportunity -- however

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*Canon 19 of the Judicial Ethics agrees:

> "In disposing of controverted cases a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law."

limited -- the attorney has for appellate review.*

Thus, it matters not that the disciplinary decision against the attorney in the first instance is rendered by a court rather than an administrative tribunal. The need to insure fairness, and the potential for abuse, are precisely the same.

Recently, the Supreme Court declared, in Goss v. Lopez, 43 U.S.L.W. 4181, 4184 (U.S. Jan. 22, 1975), that:

> "'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the clause must be satisfied. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Board of Regents v. Roth, supra, at 573."

In attorney disciplinary proceedings, no less than an attorney's "good name, reputation, honor, [and] integrity" are "at stake because of what the government is doing to him." Hence, in such proceedings at least "the minimal requirements" of the due process clause "must be satisfied." These, we submit, include a written statement of findings and evidence by the decision-maker. Since the New York Attorney-Disciplinary Statute empowers the decision-maker to punish without satisfying this requirement, it is unconstitutional.

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*And if this Court agrees that attorneys should have an appeal as of right on all questions of law and fact in a disciplinary proceeding, then the need for a written statement is manifest. Appellate review cannot be effective in its absence.

D. The New York Attorney-Disciplinary Statute was Applied to Suspend Levin on the Basis of No Evidence

The petitioner had nothing other than Bertram Corin's testimony to establish the most crucial element of the charges against Levin: The existence of an alleged additional legal fee from Levin's partnership to D'Auria on the Plainview zoning application. But Corin's testimony, as we have seen (supra, at 15-17) was unworthy of belief. Not only was his testimony inherently incredible,* but he was rebuked by Justice Silberman for suppressing evidence (after he had the temerity to attempt to justify his unlawful behavior).

Hence, Corin's testimony on any matter constituted no evidence. This is so by virtue of the well-recognized rule holding such palpably unreliable and untrustworthy testimony incredible as a matter of law. As the Supreme Court stated in Quock Ting v. United States, 140 U.S. 417, 420-21 (1891):

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*Consider, for example, Corin's contradictory testimony about his views on the importance of money:

> "I have never been concerned about money."
> "All money is important. All fees are important."
> "Certain monies are not [important]." (Tr. 577-78, 998-1005).

These words come from a man, who as discussed earlier, also admitted to having once attempted to collect a $2,000 fee in a care from which he had previously withdrawn and expressly waived any right to compensation (id.).

> "There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story."

Accord, Todd Shipyards Corp. v. United States, 61 F. Supp. 846, 847 (E.D.N.Y. 1945), 30 Am. Jur. 2d Evidence § 1085, at 237-38 (1967), 65 N.Y. Jur. Witnesses § 91, at 254 (1969) and cases cited therein.

The 14th Amendment will not tolerate punishment based on testimony that is incredible as a matter of law -- for due process forbids punishment on the basis of no evidence. Thus, the Supreme Court, in Douglas v. Buder, 412 U.S. 430, 432 (1973), reversed a revocation of probation because the record

> ". . .was so totally devoid of evidentary support as to be invalid under the Due Process Clause of the 14th Amendment."

See Vachon v. New Hampshire, 414 U.S. 478, 480 (1974):

> "'It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged. . .violate[s] due process', Harris v. United States, 404 U.S. 1232, 1233 (1971). (Douglas, J., in chambers)."

And see Thompson v. Louisville, 362 U.S. 199, 206 (1960).

This Court need not take our word for the lack of any "relevant evidence as to [the] crucial element[s]" of the charges against Levin. Instead, it may look to the findings of the only judge who observed the parties and witnesses or who made written findings of fact (Justice Silberman):

> "There is no evidence to support petitioner's conjecture that a fee of about $50,000 (rather than about $20,000) was paid by Gruber and Levin to D'Auria for the services rendered on the successful application for the re-zoning of the Plainview property." (Ex. A, at 54; emphasis added).
>
> . . .
>
> "[Levin's] testimony before me was candid and credible. A thorough analysis of the evidence leads me to the conclusion that the charges against respondent [Levin] are supported by little more than conjecture and surmise." (Ex. A, at 63; emphasis added).

To sum up: Since establishing the existence of the alleged additional Plainview fee was crucial to the charges against Levin, since there was nothing other than Corin's testimony to prove the existence of that fee, and since Corin's testimony was increcible as a matter of law -- there was no evidence to support a finding against Levin on any charge in the petition. Yet the Second Department has ordered Levin suspended from practice.

This unjust result is a function of the generally arbitrary conduct authorized by the New York Attorney-Disciplinary Statute, which we have discussed in previous sections of this brief.

In any event, the deprivation of an attorney's license on the basis of no legally congnizable evidence is precisely the kind of arbitrary and capricious action condemned by the 14th Amendment. A State statute, which, as applied, leads to that result must be struck down.

II

A PRELIMINARY INJUNCTION SHOULD BE GRANTED; THE TEMPORARY RESTRAINING ORDER ENTERED BY JUDGE WEINSTEIN SHOULD BE CONTINUED

A preliminary injunction or temporary restraining order should be granted when either of two circumstances prevails: When plaintiff shows (1) "probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973) (emphasis in the original). Accord, Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 866 (2d Cir.), cert. denied, 43 U.S.L.W. 3213 (U.S. Oct. 15, 1974).

While it is necessary to satisfy only one of these alternative tests, Levin's case meets them both.

A. Plaintiff Will Suffer Irreparable Injury and the Balance of Hardship Tips Decidedly Towards Him

The immediate, irreparable injury faced by plaintiff has been discussed above: He faces professional ruin and the destruction of a lifetime reputation. These injuries could not be repaired even if this Court ultimately upheld plaintiff's claims. As the Court stated in In Re Lincoln, 283 P. 965 (Cal. Dist. Ct. App. 1929):

> "There is no asset to be possessed by the lawyer so dear or so valuable as his known character, or reputation for honesty, integrity and sincerity of purpose. When it is wrongfully assailed, he is damaged, not only in the finer sensibilities, but also in a financial measure impossible to accurately estimate."

See also, Erdmann v. Stevens, 458 F.2d 1205, 1210 (2d Cir. 1972).

In contrast, the defendants cannot be harmed by temporary injunctive relief. The only effect of such relief would be to delay plaintiff's suspension from practice until after the federal court has an opportunity to judge his claims. There is no reason why the suspension cannot be withheld until that time. As discussed above, the disciplinary charge against plaintiff does not relate to any continuing course of conduct; nor do his professional activities (which are confined principally

to operation of his real estate partnership) pose any threat of public harm.

In short, the balance of the equities in this case is decidedly in plaintiff's favor.

B. Plaintiff's Case Raises "Sufficiently Serious Questions" and Plaintiff is Likely to Prevail on the Merits

Plaintiff's objections to the New York Attorney-Disciplinary Statute are so plain, we submit, that he is likely to prevail on the merits -- but in any event, he has raised at least such "sufficiently serious questions going to the merits to make them a fair ground for litigation" and so to warrant temporary injunctive relief. Sonesta International Hotels Corp. v. Wellington Associates, supra, 483 F.2d at 250.

* * *

For these reasons, a preliminary injunction should be granted, and the temporary restraining order entered by Judge Weinstein herein should be continued.

Conclusion

Plaintiff's motion should be granted.

Respectfully submitted,

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Dated: February 10, 1974.

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