UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MILTON LEVIN,

Plaintiff,

-against- : 74 C 1668

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

Defendants.

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JULIUS GERZOF, also known as JULIUS M. GERZOF,

Plaintiff,

-against- : 74 C 1684

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

Defendants.

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JOINT BRIEF IN SUPPORT OF MOTION TO DISMISS

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TABLE OF CONTENTS

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

The two above actions are now pending before a statutory three-judge court convened by order of District Judge Weinstein. The same court (Moore, C.J., Weinstein, D.J., Neaher, D.J.), will hear the actions challenging the state court suspensions of the plaintiff attorneys together with a third action, prior in time, Mildner v. Gulotta, 74 Civ. 1101 (E.D.N.Y.). Both of the instant plaintiffs have been suspended

by the Appellate Division, Second Department from the practice of law in the State courts of New York for a period of three years. The complaints both allege jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343 and several other federal statutes, not pertinent.

Facts and Prior Proceedings

A. Milton Levin

The amended complaint (74 C 1668) herein alleges that plaintiff is an attorney in New York, although his income is derived primarily from his real estate business.

In 1970, Mr. Levin submitted certain documents, including one purporting to transfer a boat to a Justice D'Auria, backdated to March 6, 1967, and gave certain testimony to an official investigation concerning D'Auria conducted by the Hon. Charles W. Froessel, for the Appellate Division. Initially, Mr. Levin was contacted by investigators for the inquiry, and, so far as is relevant herein, gave what was described in later charges, presented to the Hon. Morton B. Silberman, as referee to hear and report, as "knowingly made, devised and prepared false physical evidence and caused the same to be submitted to the aforesaid official inquiry ... with intent to obstruct and pervert the due course of said inquiry. The fabricated evidence prepared by the respondent (Levin) ...

consisted of ... (d) a false document relating to a 45-foot Chris Craft boat transferred to D'Auria which document was backdated to March 6, 1967." (Complaint, Exh. "A", pp. 45-46).

After Referee Silberman* heard testimony, he reported on the boat document at pp. 57-63. At p. 61, it was found, and Levin testified, that he gave investigators (Anderson and McGinley) for the D'Auria inquiry a document described in (d) above bearing the date March 6, 1967. It is also undisputed, p. 59, this document was prepared in July, 1970, after Levin learned of D'Auria's problems. In particular, the report stated (Exh. "A", p. 61):

*We will refer to Morton B. Silberman throughout this memorandum as "Referee." While he is a Justice of the Supreme Court, he never acted as such in hearing evidence and reporting to the Appellate Division, Second Department. The constant references to "Justice" Silberman in plaintiff Levin's brief, culminating page 28 in describing him as "the only judge..." is a misrepresentation of his role in the proceeding. Referee Silberman was only that -- appointed by the Appellate Division, as an arm of that court, to hear and report his recommendations. Another is found at p. 41 of the Levin brief -- that Justice Silberman was the only "judge" in the case. Obviously the implication is that Referee Silberman decided the proceeding, which he did not and could not. Another implication is that the motion to confirm the referee's report was an appeal, which it was not.

> "Levin testified that they also inquired about the boat transaction, and that he showed them both boat documents, i.e., the original registered letter agreement of June 8, 1966 and the subsequent agreement bearing date March 6, 1967, and gave them copies of those documents. Levin testified that no questions were asked at this meeting of November 2, 1970 concerning the dating of these documents (652-654). Levin testified that the following day he received a call from Anderson requesting the originals of these documents, and he advised that since these documents would have to be returned when the loan was repaid by D'Auria that he believed that he should have a subpoena duces tecum in order for him to deliver such documents to the Inquiry. Levin testified that the following day a subpoena was delivered to him and that he then mailed the originals of the documents to the Inquiry (656-657)."

There was no dispute that Levin did not disclose the fact of backdating the document when submitting the boat document on November 2, 1970. There was a dispute as to full disclosure at a later meeting with investigators on November 13, 1970 (Exh. "A", p. 62):

"Petitioner does not dispute that at the meeting of November 13, 1970 that Levin told Anderson and Lipman that the deed and the note were back-dated and the reasons therefor. Petitioner does dispute that Levin disclosed at that meeting that the revised boat agreement occurred when Levin testified at the Froessel Inquiry on November 23, 1970 (768; Froessel minutes, p. 1014). Levin, in his testimony at the within hearing, stated that he made full disclosure regarding all three documents at the meeting of November 13, 1970 (659-661)."

A conclusion of the referee was (Exh. "A", p. 63).

"At the very worst Levin did not voluntarily make disclosure of the back-dating on the first interview by the investigators on November 2, 1970."

While Referee Silberman thought the evidence insufficient* to sustain the charge (Exh. "A", p. 63), the Appellate Division obviously concluded otherwise. On the several motions to confirm and disaffirm the referee's report, the Appellate Division found one portion of the first charge sustained by the evidence, 45 A D 2d 455 (2d Dept. 1974).

*This is contrary to plaintiff Levin's assertion (Brief, p. 14) that "there was no evidence to support it..."

As to this portion of the first charges, it stated (Exh. "B", p. 68):

> "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. The reporting Justice's findings with respect to the remainder of the first charge and with respect to the second charge are confirmed."

In so doing, the Appellate Division was exercising its undoubted discretionary power to confirm, disaffirm or modify a referee's report in any particular.

Thereafter, Mr. Levin sought leave to appeal the Appellate Division's ruling from the Court of Appeals and same was denied (Am. Compl., ¶ 20). Apparently, Mr. Levin contends he raised constitutional issues in seeking leave to appeal (Am. Compl. ¶ 20). It is paradoxical, with Mr. Levin's expert counsel, that he did not appeal as of right, CPLR § 5601(b)(1), if this matter really raised constitutional questions, although now the complaint as amended (¶ 20) now states an appeal as of right was claimed.

Thereafter, plaintiff Levin instituted the instant action purporting to challenge the constitutionality of the Appellate Division's disciplinary procedures (denial of appeal as of right, alleged alteration of referee's findings). This is partly predicated on the companion case, Mildner v. Gulotta (E.D.N.Y., 74 Civ. 1101), wherein a three-judge court was convened, on the sole issue of lack of right to appeal as of right.

Mr. Levin has obtained from this federal court a stay of his suspension from practice by the State Appellate Division. This is pending determination by this Court of the motions now before the Court, 28 U.S.C. §§ 2281, 2284.

B. Julius Gerzof

The amended complaint (74 C 1684) herein also alleges that plaintiff is an attorney in New York. He too was involved in the D'Auria investigation by Hon. Charles Froessel. Charges of professional misconduct were also lodged against him. After hearing before the same referee, Hon. Morton Silberman, as in the Levin matter, charges were sustained and confirmed by the Appellate Division, Second Department, 45 A D 2d 450 (2d Dept. 1974). Therein it was stated:

> "Specification (1) is that on May 19, 1970 and May 24, 1970 the respondent [Gerzof] solicited and advised two other attorneys to reduce their legal fee on a zoning application so as to make available a sum of money to be used improperly to assure the granting of the applications. Specification (2) is that the respondent, as a witness under oath at the Froessel inquiry falsely denied that he had committed the aforesaid act."

These were the offenses sustained and Mr. Gerzof was suspended as an attorney for three years.

Thereafter Mr. Gerzof moved for leave to appeal to the Court of Appeals which was denied by both courts. Mr. Gerzof instituted suit in this federal court wherein he too has obtained a stay of his suspension.

C. Violation of full faith and credit U.S. Const. Art. 4, § 1

The stay granted heretofore sets aside an order of a state court and appears clearly to violate the "full faith and credit" clause of the U.S. Constitution, Art. 4, §1. Franklin National Bank v. Krakow, 295 F. Supp. 910, 916 (D.C. Cir. 1969) citing Huron Holding Corp.v. Lincoln Mine Operating Co, 312 U.S. 183 (1941)and Davis v. Davis, 305 U.S. 32 (1938).

The plaintiffs both attack the judgment of the Appellate Division, although there is no claim that the Appellate Division lacked jurisdiction over plaintiffs, attorneys licensed to practice law by that Court in the State of New York.

Questions Presented

1. Does the lack of an appeal as of right in attorney disciplinary procedures offend equal protection of the laws as guaranteed in the Fourteenth Amendment to the United States Constitution?

2. As to Levin, does the failure of the Appellate Division to confirm the referee's report, in all particulars, raise a substantial federal question?

3. As to Gerzof, does the failure of the Appellate Division to grant a motion to reopen the hearings for "newly discovered evidence" or the quantum of proof under New York Law, raise a substantial question?

State Constitution and Statutes Involved

New York Constitution

Art. 6, § 3 [Jurisdiction of the court of appeals]:

"a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record or original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As or right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such

an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The lesiglature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision."

New York Judiciary Law § 90

* * *

(2) The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission

for any misrepresentation or suppression of any information in connection with the application for admission to practice."

* * *

(8) Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therein, subject to the limitations prescribed by article six, section seven of the constitution of this state."*

POINT I

THE LACK OF AN APPEAL AS OF RIGHT TO THE COURT OF APPEALS FROM THE SUSPENSION HEREIN DOES NOT DENY PLAINTIFFS EQUAL PROTECTION OF THE LAWS, OR DUE PROCESS.

The failure of New York law to afford plaintiffs an appeal as of right to the State Court of Appeals, except in certain specified instances not pertinent herein**, fails to

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* Const. Art. 6, § 3.

**The State Constitution, Art. 6, § 3(b)(1) provides appeals, as of right, where constitutional issues are "directly involved..." There are indications that plaintiffs raised constitutional issues in State Court. Levin Amended Comp., ¶ 20.

raise a substantial federal question as to equal protection of the laws, Fourteenth Amendment to the United States Constitution. Nor is due process violated by lack of a statutory appeal as of right for lawyers, as opposed to other professionals licensed by the State of New York.

Authoritative on this point is Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974).* Although appeals cannot be granted to some litigants and capriciously denied to others without violating the Equal Protection Clause, Javits v. Stevens notes, this does not mean that different classes of people are required to be treated alike. It has long been established that different classes of professionals may be regulated in different ways. Semler v. Board of Dental Examiners, 294 U.S. 608 (1935). The legal profession traditionally has been regulated by the Courts specifically the Appellate Division; and in New York, the other professions have historically been regulated by the State Department of Education, through its Board of Regents. The fact that Article 78 proceedings which originate in the Supreme Court, provide a convenient machinery for reviewing disciplinary

*While confirmance of referee's finding by the Appellate Division may be a distinction or a factual difference between Javits as opposed to Levin's case, it is factually the same as Gerzof's. We do not believe a discretionary act of the Appellate Division -- i.e., confirming or not a referee's findings -- can raise to a constitutional objection, or support an assumption the result should be different in the instant actions, as that obtained in Javits.

determinations in the other professions does not make the same reviewing method either appropriate or necessary in the process of reviewing disciplinary proceedings of lawyers instituted before the Courts. See Pordum v. Board of Regents of the State of New York, 491 F. 2d 1281 (2d Cir. 1974). In that case, the Second Circuit recognized, in another context (491 F. 2d at p. 1286):

> "This argument relies upon an assumption of an equivalence between the teaching profession and the professions regulated by sections 6509, which include message, landscape artchitecture, and podiatry. But the teaching profession differs from these other professions in many respects, including the special vulnerability of the client population, the high duty of care owed by the state to that group, and the unique responsibility which the state has to provide an effective system of education. These distinctions justify the legislative determination that different treatment with respect to the disciplining of the different professionals is required. Williamson v. Lee Optical Co., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955)."

Under a tripartite system of the government, in which the Courts depend so completely upon the legal professions for its functioning, the wisdom of the Legislature in entrusting their discipline solely to the Courts themselves can hardly be questioned. Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955). As Justice Douglas stated in the Williamson case (348 U.S. at p. 489):

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. Texas, 310 U.S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Semler v. Dental Examiners, 294 U.S. 608. The legislation may select one phase of one field and apply a remedy there, neglecting the others. A.F. of L. v. American Sash Co., 335 U.S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here."

Carried to its logical extreme, plaintiffs' argument would suggest to this Court that they, like the members of all other professions, would be entitled to have the Board of Regents (as it does elsewhere) conduct the disciplinary proceedings of attorneys. However, New York Judiciary Law, § 90, provides for discipline of lawyers by the Appellate Division, the same governmental agency which admits them to practice. As observed in the Javits case, supra, at 141, the "intimate and delicate relationship between courts and lawyers has long justified the judiciary's careful scrutiny of the integrity and qualifications of those who practice before it." See Theard v. United States, 354 U.S. 278, 281 (1957); Erdmann v. Stevens, 458 F. 2d 1205 (2d Cir.), cert. denied 409 U.S. 889 (1972).

Plaintiff Levin's attempt, Brief, p. 25, to rob the Javits decision of its precedential effect as to the constitutionality of not providing an appeal herein to the Court of Appeals must fail. It rests on the fallacious assumption that only a three-judge court, 28 U.S.C. §§ 2281, 2284, can declare a state statute unconstitutional. This is wrong. Any federal court can. A single judge cannot issue an injunction against its operation. Rosario v. Rockefeller, 458 F. 2d 649 (2d Cir., 1972) at 651, ftn. 2 (and cases cited therein), affd. 410 U.S. 752 (1973). Even Judge MacMahon sitting as one judge could have declared the statute unconstitutional and especially in Javits, as no injunctive relief was necessary since the attorney in question was deceased.

And as equal protection is not violated by lack of automatic appeal, due process does not require a State to provide a right to appellate review, even in a criminal case. See Javits v. Stevens, supra at 140. In support of this proposition, that opinion cites Ortwein v. Schwab, 410 U.S. 656, 660 (1973); Lindsey v. Normet, 405 U.S. 56, 77 (1972);* Griffin v. Illinois, 351 U.S. 12, 18 (1956) and McKane v. Durston, 153

*Mr. Gerzof's discussion (Br. pp. 19-30) of denying appeals to indigents, has no relevance to the appellate procedures provided in New York which are not based on ability to pay. Even so, fees for appeal are not forbidden. Ortwein v. Schwab, supra.

U.S. 684, 687-688 (1894).

Lack of a state statute to cover a situation does not mean equal protection is violated. Cf. Fidell v. Board of Elections, 343 F. Supp. 913 (E.D.N.Y.), affd. 409 U.S. 972 (1972).

The plaintiffs also fail to take cognizance of the fact that attorneys, as well as all other licensed professionals and litigants in general are subject to the same Constitution and statute as to their right to appeal to the Court of Appeals. Access to a court of last resort is, almost universally, limited so that it not be burdened with frivolous appeals.

POINT II

PLAINTIFFS CANNOT REVIEW STATE COURT FINDINGS IN THE GUISE OF FEDERAL CIVIL RIGHTS ACTIONS.

Although the plaintiffs purport to be challenging New York Judiciary Law § 90, their complaints and briefs show that they really are attempt to have a federal court sit in review of the actions of the Appellate Division, Second Department, in finding professional misconduct and imposing three-year suspensions.

It has uniformly been held that the federal courts cannot review and set aside a disciplinary order of a state court barring an attorney from practicing law in the courts of that state. Ginger v. Circuit Court, 372 F. 2d 621, 624 (6th Cir. 1967), cert. denied; 387 U.S. 935. Review of such orders is only by a petition for a writ of certiorari to the Supreme Court. Refusal to receive certain evidence and unlawful discipline does not support federal jurisdiction, Gately v. Sutton, 310 F. 2d 107 (10th Cir. 1962); See also, Jones v. Hulse, 267 F. Supp. 37 (E.D. Mo. 1967), affd. 391 F. 2d 198 (8th Cir. 1968), cert. denied, 393 U.S. 889; Kay v. Florida Bar, 323 F. Supp. 1149 (S.D. Fla 1971).*

The Supreme Court has clearly said as to attorney discipline, it does have power to review "the action of the state court of last resort - a power which we do not possess -." Selling v. Radford, 243 U.S. 46, 50 (1961). It is only on disbarment proceedings in the federal courts, that a federal court even looks at procedures in the state disbarment. Selling at 51, Theard v. United States, supra, 354 U.S. at 282.

The plaintiffs present before this Court an extended discussion of their misconduct in an attempt to "remedy that injustice in this Court." (Levin brief, p. 2). This is not the purpose of the federal court and it should not allow such

*Footnote on next page.

*Mackay v. Nesbete, 412 F. 2d 846 (9th Cir. 1969), cert. denied 396 U. S. 960:

> "Language in Theard v. United States, 354 U.S. 278 (1957)...support the rule that orders of a state court relating to the admission, discipline and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court."

See also Jones v. Hulse, 391 F. 2d 198, (8th Cir. 1968), cert. denied 393 U.S. 889. [Clark v. State of Washington, 366 F. 2d 678 (9th Cir. 1966).]

a maneuver to have it review a state court decision.*

Due process was never intended to interfere with the power of adjudication of state courts in administering the process provided by the law of the state. Howard v. Kentucky, 200 U.S. 164, 173 (1906). The Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial errors. Beck v. Washington, 369 U.S. 541, 554-555 (1962). The Legislature has preformed its duty by entrusting attorney discipline to the Appellate Division. The State does not violate any constitutional obligation because one of its courts, acting within the latters' undoubted jurisdiction, makes an erroneous decision.

* Such a direct action against the state judiciary raising the same issues was called "bizarre" and an "affront to the state legal system." Tang v. Appellate Division, supra, 487 F. 2d at 143 (2d Cir. 1973). Furthermore res judicata should apply. Tang, Hays, J. concurring at 143. The plaintiffs here of course had available to them an application to the U.S. Supreme Court.

None of the above is to concede the Appellate Division decisions to discipline Levin and Gerzof were wrong. Rather it is stated to show that it is none of the federal court's concern whether the state court was wrong or right. However, as follows, we will briefly show the errors of plaintiffs commit in even attempting to show the Appellate Division was wrong.*

* It has been the consistent position of the Attorney General that the Appellate Division is not a "person" within the meaning of the Civil Rights Act, 42 U.S.C. § 1983 and is therefore not subject to the jurisdiction of this Court. Zuckerman v. Appellate Division, 421 F. 2d 625, 626 (2d Cir. 1970). The mere naming of the constituent justices and clerk does not in any wise act to confer jurisdiction. Although Erdmann v. Stevins, supra, 458 F. 2d at 1207-1208, would appear to the contrary, it really is not. Erdmann relied on Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117, 123 (S.D.N.Y. 1969), affd. on other gds. 401 U.S. 154 (1971). Both involved threatened preliminary administrative actions in bar admission and disciplinary procedure. As Law Students noted at 123:

> "Plaintiffs do not challenge a state courts disposition of an individual case, but attack as 'over, broad and vague regulations of expression,..."

In the instant actions plaintiffs do attack state court dispositions wherein the court acted as a body, not as individuals. Zuckerman, supra, should apply because it was the same type of after-the-fact colleteral attack.

POINT III

NO SUBSTANTIAL CONSTITUTIONAL ISSUE IS RAISED AS TO THE APPELLATE DIVISION'S MODIFICATION OF THE REFEREE'S REPORT AS TO LEVIN

Plaintiff Levin advances an argument that somehow the Appellate Division could not modify the referee's report without holding further hearings or writing a fuller decision. While facially appealing (as Levin was completely exonerated by the Referee), it flows from a fundamental misapprehension of the judicial process, as opposed to the administrative process. It also rests on a subtle shifting of the referee's findings of "no evidence" on the false testimony charge (Brief, p. 14, Compl., Exh. "A", p. 54) to the referee's conclusion of "insufficient evidence" on the backdating of documents (Compl., Exh. "A", p. 63). While the plaintiff's attorney can argue the evidence (actually an improper inquiry at this time), they should not be allowed to misstate the referee's legal conclusions.

That the referee, Morton B. Silberman happens to be a Justice of the Supreme Court, he was not acting as such when he was designated to serve as referee to "hear and report" in Levin's (and Gerzof's) disciplinary proceedings. As such, Silberman was acting as an arm of the Appellate Division. He acts pursuant to CPLR 4320. In this function, his position was akin to that of a master in federal court appointed pursuant to Rule 53, Federal Rules of Civil Procedure. If we look at a master's power, we see that his report is not final. Rule 53(e)(2). In federal court, a master's findings of fact will be accepted unless clearly erroneous, but there is no requirement the court must accept the referee's conclusions of law. It is the trial court which must make the final determination of all the issues. D.M.W. Contracting Co. v. Stolz, 158 F. 2d 405, 407 (D.C. Cir. 1946), cert. denied 330 U.S. 839. A master's findings of fact in the nature of conclusions or inferences will not be given any great weight since the court is in as good a position to make or draw them as the master. Stubbs v. Fulton Nat. Bank of Atlanta, 146 F. 2d 4558, 560 (5th Cir. 1945), cert. denied 325 U.S. 864.* Within its original

*A court cannot, without the consent of the parties, refer the whole case to a master for final decision. Kimberly v. Arms, 129 U.S. 512, 524 (1889). See also 5A Moore's Federal Practice, § 53.06.

jurisdiction the Supreme Court follows the same procedure. Supreme Court Rules, Rule 9(a) (Procedure in Original Actions). Are plaintiffs suggesting the Supreme Court's procedures are unconstitutional?

In the instant case of Levin, the Appellate Division did not modify the evidence or facts found by the referee, it simply drew different inferences or conclusions as to guilt on one specification of one charge. As to Gerzof, it confirmed the Referee's report.

In the above regard, the Appellate Division need not go into a lengthy exposition of its reasoning. It simply saw the evidence as sustaining the first charge on submission of a backdated transfer of a boat to an official investigation. The referee could conclude this was innocent, but his view was not final. The amended complaint, ¶ "26", admits "reports of Referees... are advisory to, and not binding upon, the Appellate Division." The respondent therein, Mr. Levin, acquired no vested interest in the Referee's conclusion. It had to be confirmed by the Appellate Division, which, in its discretion, refused to do so.

POINT IV

DUE PROCESS WAS PROVIDED IN ALL RESPECTS AND THE APPELLATE DIVISION NEED NOT EXPLAIN ITS REASONING.

Plaintiffs, Levin and Gerzof, without ever considering the protracted nature of the hearings before the Referee and the motions to confirm and disaffirm the Referee's finding, claim they were denied due process. This is specious. They cannot deny they were served with charges, that they testified and had an opportunity to cross-examine witnesses. Further the record and the Referee's report and recommendations were placed before the Appellate Division. Both petitioner and respondents in the disciplinary proceeding had the opportunity and did make the usual motions supported by extensive papers. To claim plaintiffs did not receive due process demeans the painstaking procedures followed by the Appellate Division, leading up to the suspension orders.

Obviously the Appellate Division cannot hear all the numerous attorney disciplinary proceeding. Of necessity they must be referred to Referees. Furthermore that it does not write an extended decision on the motions to confirm or disaffirm the reports does not deny due process. When warranted a fuller decision is written as in the companion Matter of D'Auria, 45 A D 2d 451 (2d Dept. 1974).*

* At 454 there if reference to the back-dating of the boat document as to D'Auria.

A. The difference between the administrative and legal process

As stated in 1 Am Jur 2d, Administrative Law § 16:

> "Under the legal system by statute creates rights, imposes duties, and lays down rules of conduct; the courts declare such rights or duties in specific instances presented to them by and at the initiative of litigants, incidentally passing upon the power of the legislature to act as it did, but without trespassing on the legislative domain.
>
> "Under the administrative system, the legislature may lay down a broad general policy as its objective to be attained through an administrative agency which, within the statutory framework, implements and particularizes the broad general policy by the enactment of building rules or regulations, which it may alter, amend, or revoke, at least within limits, which, on its own initiative or on complaint made, investigates and declares in specific instances the existence of rights or duties under the statute or its own regulations; which investigates to see that the statute and regulations are complied with or to discover violations of the statute or regulations, and which accuses violators and renders them subject to further investigation or trial, often before the same administrative agency which established guilt or innocence of the alleged violation. The action of the administrative agency generally is subject to limited judicial review in the courts to see that the law is complied with, without trespassing on the domain in part court, and in part an executive or enforcing body, and this review, to certain extent, is capable of being expanded or contracted as may suit the govermental action binding individuals takes place without, or prior to, resort to the court." (ftn. omitted)

Due process may require a statement of reasons by an administrative body for the determination, Golberg v. Kelly, 397 U.S. 254, 269 (1970), because this demonstrates to the courts that the agency has acted legally within its limits.

Plaintiff Levin recognized this is a due process requirement of administrative law and procedure, but attempts to transfer it to judicial decisions by citing several cases with have no application to the instant case which involves due process, not court procedure.

Thus citation of federal appealate cases such as United States v. Lexington, 459 F. 2d 797 (3rd Cir. 1972), Lemelson v. Kellogg Co., 440 F. 2d 986 (2d Cir. 1971) is irrelevant. The pretense that these cases stand for some constitutional mandate that a court set forth the reasons for making its decision is absurd. The former involves failure to comply with Rule 23(c) Fed. R. Crim. Proc., and the letter, Rule 52(a) Fed. R. Civ. Proc., as does Russo v. Central School Dist. No. 1, 469 F. 2d 623, 628 (2d Cir. 1972), cert. denied 411 U.S. 932. They cannot stand for the proposition that federal rules of criminal and civil procedure are incorporated by the United States Constitution into the decision-making process of the Appellate Division, or any other court of the State of New York for that matter.

In essence, the plaintiffs' brief (both Levin and Gerzof) direct themselves to lengthy discussion of evidence and legal conclusions which have no place in the federal court as to state attorney disciplinary matters. These are not matters which the New York Court of Appeals will concern itself with. Matter of Kaufmann, 245 N.Y. 423, 432 (1927). The federal courts, and in particular this Circuit, has been reluctant to interfere with Appellate Division attorney disciplinary procedures. Erdmann v. Stevens, supra, 487 F. 2d at 1210. See also Tang v. Appellate Division, 487 F. 2d 138, 143 (2d Cir. 1973)(the Court of Appeals has been "chary of intrusion into the relation between the state and those who seek license to practice in its courts.").*

The Supreme Court has recently said on administrative proceedings, in Wood v. Strickland, ___U.S.___, 43 U.S.L.W. 4293, 4299 (2-25-75) that ". . .§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or its proper construction of School regulations." As much also applies to court attorney discipline.

* Tang also stands for the proposition that a "district court lacks jurisdiction to review state court determinations of federal constitutional questions. . .", 487 F. 2d at 141; citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

Mr. Gerzof's complaint has no merit. It is totally vague on how his constitutional rights are in any way involved. He cannot even point to the Appellate Division disagreeing with the referee. We cannot discern what evidence was "newly discovered" or what relevance it has to the charge. Obviously, the Appellate Division had discretion to deny such an application. If every discretionary state judicial act warranted federal court interference or review, the latter could be hard pressed to attend to its normal duties. We have already noted that a refusal to receive evidence in a state disbarment proceeding does not give a federal court jurisdiction. Gately v. Sutton, supra, 310 F. 2d at 108.

Once again it would appear that plaintiff (Gerzof) is seeking to have the federal courts review evidence in a state court disciplinary matter, and review procedural rulings under the guise of denial of constitutional rights. If such subterfuges are entertained, the Appellate Division cannot function in this vital area. The stay against the suspensions is an improper intrusion and failure to give a state court judgment full faith and credit as required by the United States Constitution, Art. 4, § 1.

By way of comparison, in habeas corpus proceedings, the federal court will not inquire into the weight or sufficiency of evidence to sustain a conviction or review errors

of law. Atkins v. Beto, 462 F. 2d 802 (5th Cir. 1972); Hendricks v. Swenson, 456 F. 2d 503 (8th Cir. 1972); Young v. State of Alabama, 443 F. 2d 854 (5th Cir. 1971), cert. denied 405 U.S. 976.

POINT V

NO STATE STATUTE'S OPERATION IS SOUGHT TO BE ENJOINED BY THESE ACTIONS.

The plaintiffs have proceeded in a tortured manner to ask this Court to strike down N.Y. Judiciary Law § 90 because it allowed the Appellate Division to impose suspensions on them. If every state court acting pursuant to statute is to have its decisions reviewed by federal courts on the claim the statute allowed an erroneous result, then no statute is secure. Plaintiffs are attacking a result, in fact a state court judgment, not a state statute. As to the State Constitution, it provides a uniform standard of appeal to the Court of Appeals. Plaintiffs have not met it.

CONCLUSION

THE COMPLAINTS SHOULD BE DISMISSED.

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Respectfully submitted,

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