UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MILTON LEVIN,		
Plaintiff,	:	74 C 1668
-against-	:	(J.B.W.)
FRANK A. GULOTTA, etc., et al.,	:	
Defendants.	:	

PLAINTIFF LEVIN'S SUPPLEMENTARY BRIEF
TO THE THREE-JUDGE COURT

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
ATTORNEYS AND COUNSELLORS AT LAW
345 PARK AVENUE, NEW YORK, N.Y. 10022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

MILTON LEVIN, :

Plaintiff, : 74 C 1668

-against- : (J.B.W.)

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

Defendants. :

- x

PLAINTIFF LEVIN'S SUPPLEMENTARY BRIEF
TO THE THREE-JUDGE COURT

We attach hereto excerpts from plaintiff Levin's brief to the New York Court of Appeals in support of his motion for leave to appeal in the State disciplinary proceeding. These excerpts contain Levin's argument that there was no evidence to support the charge concerning the boat document (the only charge on which the Appellate Division disagreed with its referee and found guilt).

We also attach a copy of the boat document itself, as exhibited to the Court of Appeals in Levin's brief.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Plaintiff

March 12, 1975

ARGUMENT

I

There is no evidence to support the charge concerning the boat document.

No court has ever made a single finding of fact to support the boat document charge. Justice Silberman's report, which surveilled the record and cited from the testimony and exhibits in discussing each conclusion, did not find a single fact or any evidence that could support the charge. If, because of the peculiar nature of a disciplinary proceeding and the Appellate Division's arbitrary action, Justice Silberman's findings now don't count, then there have been no findings of fact whatsoever with respect to the boat document charge, since the Appellate Division made none of its own.

As a matter of law, we submit, Mr. Levin need go no further to carry his burden on this motion. To prevail in this Court Mr. Levin must demonstrate that there is no evidence to support the charge. The record demonstrates that now. Mr. Levin is not required in addition to combat

what Justice Silberman termed "conjecture," "suspicion," or "surmise."[10]

Nevertheless, to eliminate all doubt, we discuss in detail below the evidence concerning the boat document. Our discussion shows, we submit, that nothing was ever established to justify the Appellate Division's action on the boat document.

II

The evidence shows only that the boat document was not false.

A. The boat document, on its face, could not have accomplished the alleged deception.

The boat document shows on its face an agreement, dated March 6, 1967, by which D'Auria resold to Gruber a 50% interest in a Chris Craft boat that Gruber had previously sold to D'Auria in full. In consideration for the resale, Gruber agreed to release D'Auria from the original $35,000 promissory note he had tendered in payment for the boat, of which $10,000 had already been paid; and Gruber also agreed to extend credit to D'Auria for the then $5,000 remaining to be paid on the partnership interest. The admittedly back-dated boat document was prepared in

10. The Appellate Division's failure to state the grounds of its decision presents serious difficulties for this Court as well, as noted by the United States Supreme Court in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *United States,* 275 U.S. 404, 414 (1928):

> "Where the trial court omits to state the grounds of its decision, the appellate court is denied an important aid in the consideration of the case; and the defeated party is often unable to determine whether the case presents a question worthy of consideration by the appellate court. Thus, both the litigants and this Court are subjected to unnecessary labor."

August 1970, before Levin or Gruber had been approached by D'Auria inquiry investigators and at a time when the only allegations concerning D'Auria were those in the *Newsday* articles—which made no mention of Levin, Gruber, or of any transactions between them and D'Auria.

Petitioner charges that the boat document was contrived to disguise the payment of an additional legal fee by Levin and Gruber to D'Auria. But, on its face, *the boat document conveyed nothing to D'Auria.* Therefore, it is impossible that it could have accomplished the deception alleged by the petitioner.

The only document introduced in evidence that memorialized the conveyance of any interest in the boat *to* D'Auria was a registered letter from D'Auria to Levin, as Gruber's counsel, dated June 8, 1966 and postmarked June 10, 1966.[11] With this letter, D'Auria transmitted his promissory note in the amount of $35,000, the original purchase price for a full interest in the boat (224, 319, 329-33, 638).

There is absolutely no question about the authenticity or veracity of the June 1966 letter. It was not charged as false in the petition; and it proved unassailable at trial.

Petitioner's conduct at trial with respect to the June 1966 letter is worth noting, for it demonstrates the merit in Justice Silberman's general finding that this proceeding was a witchhunt, based on conjecture, and resulting in an injustice.

---

11. That document was introduced in evidence at the hearing as Petitioner's Exhibit 103. It is attached to our moving papers as Exhibit F.

During his cross-examination of Gruber, petitioner attempted to suggest that the June 1966 letter might be a later construct stuck into a registered mail envelope from some unrelated correspondence (299-333). Petitioner's ploy fizzled, however, when we produced an unopened envelope postmarked June 11, 1966, addressed to Gruber, which had remained unopened in Gruber's boat files during the intervening years.[12] The envelope was opened by Justice Silberman in the courtroom and found to contain an exact copy of the registered letter of June 8, 1966, as well as a letter concerning the mechanical condition of the boat at the time of purchase (L. Exs. C, C-1, C-2, C-3).[13] Accordingly, all doubt was erased (if any legitimate doubt ever existed) that the June 1966 letter memorializing the sale of the boat to D'Auria was authentic.

Since the June 8, 1966 letter establishes that the only boat conveyance *to* D'Auria was a sale and not a disguised payment of a fee, the conjecture that, in 1970, Mr. Levin tried to cover up, through the boat document, a perfectly legitimate, documented transaction—in which he was not even involved—is inherently incredible.

Nevertheless, if we still must fight the suspicion that the entire boat transaction was designed to cover up payment of a legal fee to D'Auria, the suspected deception must have taken place in June 1966, at the time of the original conveyance of the boat to D'Auria. Of course, the only

12. Gruber's boat files had been shunted to the basement of his offices in the course of two moves. The unopened envelope was not found until after these proceedings had begun.

13. "L. Ex." refers to an exhibit introduced by respondent Levin at trial. "P. Ex." refers to an exhibit introduced by the petitioner.

evidence about the transaction as of June 1966 is that the conveyance was a *sale* to D'Auria. Moreover, at the time, Levin himself had never even met D'Auria; D'Auria was three years away from becoming a judge; his work on the zoning application, for which the boat conveyance was supposedly a fee, had not even begun; and both the *Newsday* articles and the Froessel inquiry were three years in the future. And, the June 1966 transaction was accompanied by the transfer *from* D'Auria to Gruber of a $35,000 promissory note, which, had Gruber died or even negotiated, would have obligated D'Auria without recourse. Thus, the June 1966 sale could not have been anything other than what the evidence showed it to be: a sale.

B. Other documentary evidence attests to the validity of the boat document.

We have already noted the impact of the June 1966 letter on the conjecture that the boat document was meant to disguise a fee. Other documentary evidence at trial had a similar impact in debunking petitioner's charge.

For example, the only official document showing D'Auria's financial interest in the boat after the March 6, 1967 resale of a 50% interest (memorialized in the boat document) was a personal financial statement, dated May 24, 1968, prepared by an independent CPA (P. Ex. 125). That document shows D'Auria claiming a $15,000 equity interest in the boat—or, precisely the value of his partnership interest as stated in the boat document. Since the financial statement was prepared for use by D'Auria in seeking credit, it follows that it would have been to D'Auria's advantage to maximize his interest in the boat.

That D'Auria claimed an interest of only $15,000 in a boat concededly worth over $30,000 demonstrates that he did not have any greater interest—in other words, that he had no interest greater than that stated in the boat document.

In an attempt to find some shred of evidence that would support his suspicions about the boat document, petitioner, in the Appellate Division, referred to a check, introduced in evidence (P. Ex. 44), dated February 27, 1967, in the amount of $10,000, supposedly sent by D'Auria to Gruber. This check contained on its reverse side the following notation made by D'Auria: "Payment in full, 45-foot Chris Craft." Petitioner argued to the Appellate Division, deceptively, that this notation proved that $10,000 was the only consideration ever contemplated in payment for the boat.

What the petitioner omitted to tell the Appellate Division is that the February check was *never received by Gruber* and was never accepted in payment (321-23, 827-28). Moreover, petitioner also omitted to inform the Appellate Division that a second check from D'Auria in the same amount, *without any notation on its face or even on D'Auria's check stub*, was sent by D'Auria a week later, on March 3, 1967, and accepted by Gruber as *part* payment *for* the 50% interest in the boat (P. Exs. 49, 50). When the February check finally arrived at Gruber's office, it was returned to D'Auria, who voided it (322-24, 828-31).

C. There was no additional legal fee paid to D'Auria.

As discussed above, Justice Silberman found (and the Appellate Division apparently agreed) that there was no additional legal fee paid by Levin or Gruber to D'Auria's law firm aside from the agreed upon, and openly acknowledged, fee of $20,000 (Ex. A, at 54). The $20,000 fee was meant originally to cover D'Auria's legal services on a zoning matter known as the Plainview application, which began in or about July 1966 (24, 28, 59, 66-67, 69, 310-11, 604, 614-16, 620-21, 627-30, 692-93).

Throughout the proceedings, the petitioner contended that the true fee for the Plainview application was about $60,000, which Levin (for some unknown reason) sought to hide from the Froessel inquiry by submitting false documents and giving false testimony.

If there is anything left of this charge, it is only because of the Appellate Division's one-sentence disagreement with Justice Silberman on the boat document. A review of the evidence discloses, however, that there has never been anything to the charge, as Justice Silberman found.

In 1966, D'Auria's firm was retained to represent Gruber Associates in two separate zoning matters. One, known as the Syosset application, was vigorously opposed by organized resident groups and, after almost three years of study by the town, was finally denied in December 1968. Because D'Auria undertook zoning matters only on a contingency basis, no fee was ever paid for the unsuccessful Syosset application. The other was the Plainview application. In sharp contrast to Syosset, the Plainview applica-

tion faced only minimal opposition, since the land was situated in a non-residential area and since the zoning sought by Gruber Associates was desired by the town to increase its tax revenues. Justice Silberman found that this application "was practically assured from the outset" (Ex. A, at 54)—indeed, it was granted in about one year's time (27, 71, 188-89, 306, 606-13, 914-15).

Petitioner's conjecture that a $60,000 fee was paid for the Plainview application—which would have amounted to about $1,000 per acre of land involved—was not only incredible on its face, but it was refuted by every piece of evidence introduced at the trial in connection with the issue. To avoid burdening the Court with additional prose, the evidence may be summarized as follows:

1. As Justice Silberman found, even the acknowledged fee of $20,000 for Plainview "would seem to be a most substantial one and disproportionate to the services rendered" (Ex. A, at 54)—indeed, the evidence showed that it was the highest fee ever obtained by the D'Auria firm on any zoning matter (557-58, 862, 993).

2. The only zoning expert to testify at trial (Julius Schwartz, Esq.), a neutral witness who has specialized in Nassau County zoning law for over 15 years, said that a fee of not more than $300 per acre (or an aggregate of $18,900) would have been appropriate given the virtually unopposed Plainview application. And that is precisely the fee paid for Plainview by Gruber Associates[14] (66-69, 973, 974-75).

14. The $20,000 fee was not paid entirely for D'Auria's professional services on the Plainview application. It also included other legal services rendered by D'Auria's firm to Gruber Associates from January 19, 1966 through August 19, 1967 (69, 310-11).

partnership federal income tax returns of Levin or Gruber, or in the returns of any of the entities in which they are interested, for any legal fees paid to D'Auria or his firm in any sum other than the sum of $20,000 (620-21, 627-30; L. Ex. P.). Since, in 1966, Mr. Levin was in the 55% tax bracket, by paying the alleged additional fee to D'Auria through transfer of a boat, as petitioner suggests, Levin was foregoing a $17,500 tax benefit. No evidence was introduced to show why Levin would have sought to forego such a substantial tax benefit. None exists.

D. Petitioner's chief witness on the alleged fee was censured at trial.

The only testimony petitioner elicited to even suggest the existence of an additional fee came from a man who had a grudge against D'Auria and who was censured at trial by Justice Silberman for suppressing evidence: Bertram Corin, one of D'Auria's law partners. Since Corin is a special case, and since petitioner's temerity in using him as a witness illustrates the lengths to which petitioner went to find support for his conjecture, we give special attention to Corin's role at the hearing.

Corin testified that there was an established "rule of thumb" for computing almost every legal fee for zoning matters in Nassau County, regardless of their difficulty: $1,000 per acre. Using the Corin "rule of thumb," the petitioner calculated that the anticipated fee for the Plainview application—one of the easiest zoning applications any lawyer ever handled—must have been $60,000. But

Corin's "rule of thumb" proved to be a "rule" known only to Corin—for it developed on cross-examination that Corin's opinion was based, not on his knowledge of the practice of any other attorneys in Nassau County, and not even on any knowledge of D'Auria's practice, but only on his own personal belief. Indeed, Corin admitted that he had *no knowledge* of the practice of any other attorneys. And finally, he even conceded that the $20,000 admittedly paid to D'Auria's firm for the Plainview application was the highest fee, by $10,000, that he, or any partnership with which he was associated, had ever received (993-95).

Corin, thus, took back his own testimony. In any event, his testimony was inherently incredible, totally without probative value; it was rejected and categorically refuted by the zoning expert (557-58, 967-68, 994-95).

But there is more. Corin's credibility as a witness was totally destroyed when he confessed, in open court, to suppressing a piece of documentary evidence throughout the course of the inquiry until after his appearance on the stand before Justice Silberman, and even until after the scheduled hearings before Justice Silberman had closed. Corin's action produced a stern censure from Justice Silberman:

> "There is no question and I will state for the record that I find that 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" (1051).

In addition, Corin had an axe to grind against D'Auria. He was asked to leave D'Auria's firm when he was caught dipping into the firm's till to "borrow" $1,000. In his testimony, Corin admitted "borrowing" the money without authority and then proceeded to make a series of remarkable, contradictory statements 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]."

To top off his extraordinary appearance on the witness stand, Corin 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 (577-78, 998-1005).

Certainly Corin's totally discredited testimony is not evidence. There is no other testimony in the record that a $60,000 fee was anticipated on the Plainview application. Ronald DeVito, another of D'Auria's former partners, testified that he had been told by D'Auria of a $60,000 fee some time in 1966 or 1967, but he could not say whether it was in connection with the Plainview application or the abortive Syosset application, whose extraordinary difficulty, in con-

trast to the virtually effortless Plainview application, would have warranted such an unusually high fee (157-59). DeVito's confusion is understandable in view of the chronological overlap of the two applications.

Similarly, the documentary evidence admittedly suppressed by Corin (handwritten notes by D'Auria mentioning an anticipated $60,000 from Gruber) was completely silent as to which zoning application it related. Petitioner likes to surmise that the document suppressed by his witness must have referred to the Plainview application; but surmise is not evidence (145-46, 157-59; P. Ex. 116).

Thus, petitioner's theory that Mr. Levin fabricated the boat document to cover up an additional legal fee to D'Auria was disproved by his own evidence and every other piece of evidence introduced at the trial. If there was no fee, then not even the petitioner contended that the boat document was false.

E. The backdating of the boat document was disclosed and fully testified to at the inquiry.

The only other conceivable basis upon which the Appellate Division might have distinguished the boat document from the other backdated documents is the petitioner's allegation that the backdating of the boat document, unlike the other documents, was not disclosed to the Froessel investigators. Justice Silberman, who heard all of the evidence on this point, found otherwise:

> "I find that he did make full disclosure of the history of these documents and the reasons for the backdating at the second interview on November 13, 1970.

> I find that he testified fully concerning same when he appeared as a witness at the Froessel Inquiry on November 23, 1970. I find the evidence to be wholly insufficient to support the charge that these documents were prepared with the intent to obstruct and pervert the Inquiry." (Ex. A, at 63).

Justice Silberman's findings are confirmed by the record. The only testimony contradicting respondent's assertion that he voluntarily disclosed the backdating of all documents, including the boat document, at the November 2, 1970 meeting with the investigators was offered by Anderson, one of the two investigators present at the meeting (286-88, 659-663, 774-775).

Anderson's credibility was destroyed during the course of his testimony, which was given without benefit of any notes or memoranda, and which included demonstrably false statements. Not only did he admit to having been coached extensively immediately before taking the stand, but his testimony was contradicted in several material respects by his fellow investigator, McGinley. For example, while Anderson testified that there had been no discussion concerning the backdating of the boat document at the first meeting on November 2, McGinley testified that Anderson had asked about *all* the documents at that meeting (391, 414-422, 430).

Even more incriminating was Anderson's false testimony that he was unaware of the existence or whereabouts of any contemporary notes or memoranda that might have refreshed his recollection. McGinley stated that he had personally informed Anderson of the availability of his notes only a month earlier, and that Anderson had expressly

declined to consult them (400, 405, 470, 471). Moreover, Anderson's testimony that Levin disclosed the backdating of three documents but concealed the backdating of a fourth contemporaneous document is inherently incredible on its face.

Justice Silberman took note of the inconsistencies in Anderson's testimony. He also took note, after "an extensive opportunity to closely observe Mr. Levin," that respondent's testimony was "candid and credible." Having weighed the relative credibility of the two witnesses, Justice Silberman believed Levin, and concluded that the backdating of the boat document was voluntarily disclosed (Ex. A, at 60-61, 63).

Where, as here, the "real issue" in a disciplinary proceeding is the credibility of the principal witnesses, the conclusions of the "Official Referee," especially so experienced a jurist (and former Assistant District Attorney) as Justice Silberman, is entitled to the greatest weight:

> "The learned Official Referee has had extensive and various experience as a lawyer and Justice of the Supreme Court at Trial Term and in the Appellate Division. He has had the opportunity of observing the witnesses and determining the value of their testimony. His views are entitled to serious consideration."

In re Gondelman, 258 App. Div. 1085, 18 N.Y.S.2d 52, 53 (2d Dept. 1940), *aff'd*, 285 N.Y. 624 (1941). See also *In re Michaelson*, 283 App. Div. 281, 127 N.Y.S.2d 437 (1st Dept. 1954).

The recent case of *In re Kahn*, 38 A.D.2d 115, 328 N.Y.S. 2d 87 (1st Dept.), *aff'd*, 31 N.Y.2d 752 (1972), proves the

rule. In that case the respondent attorney had been convicted by a jury in federal court of a criminal conspiracy to obstruct justice, and sentenced to two years in prison. As a result, the respondent was first suspended from practice and then disbarred following an undefended hearing. The respondent subsequently appeared and indicated a desire to defend her disbarment, whereupon the disbarment order was vacated and the charge referred to a Referee.

On the basis of his judgment concerning the relative credibility of the respondent and the principal adverse witnesses at the criminal trial, the Referee acquitted the respondent of the most serious charges against her.

The Appellate Division disaffirmed the Referee's findings. Although acknowledging that the Referee's judgment on matters of credibility was entitled to serious consideration (328 N.Y.S.2d at 90), the court nonetheless found that under the extraordinary circumstance of that case, the Referee's findings on the issue of credibility had to be disaffirmed:

> "The basis assigned by the Referee for believing respondent was that he disbelieved Hedges, both husband and wife, *whose trial testimony he only read,* for several reasons. He found that Mrs. Hedges 'parrotted' her husband's testimony, and this persuaded him that she had fabricated her corroboration. *It does not seem that this speculation should prevail over the findings of the triers of the fact—the members of the jury—who had actually seen and heard these witnesses,* and who made their findings according to the standard of 'beyond a reasonable doubt,' far more stringent than the standard of 'fair preponderance'

> applicable at a disciplinary hearing." 328 N.Y.S.2d at 92 (emphasis added, citations omitted).

The court took pains to point out that its disaffirmance of the Referee's judgment of credibility was a rare exception to the rule:

> "We, too, accept Power v. Falk, 15 A.D.2d 216, 218, 222 N.Y.S.2d 216, 263 as authority for the sound rule that the case is rare where a reviewing court should cast aside a hearing officer's judgment as to credibility, but this case is the one which proves existence of the rule." (328 N.Y.S.2d at 96.)

None of the extraordinary circumstances present in the *Kahn* case to justify the Appellate Division's disaffirmance are present here. No earlier tribunal, with the benefit of the presence of all the witnesses, found Corin or Anderson more credible than Levin by a stricter standard than that governing Justice Silberman. If anything, the Appellate Division in our case is in the position of the Referee in the *Kahn* case, reversing an earlier court's judgment of credibility on the basis of a bare reading of the transcript.

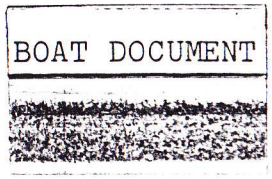
BOAT DOCUMENT

EXHIBIT E

Boat Document

465 South Oyster Bay Road
Plainview, New York
March 6th, 1967

I Michael M. D'Auria, do hereby acknowledge as follows:

1. The receipt of a promissory note in the sum of $35,000.00, delivered to me by Maurice Gruber, to whom I originally gave said note as security for the purchase of his 1960 Cris Craft 45 foot boat. This note has been delivered to me in view of my payment to the said Maurice Gruber of the sum of Ten Thousand dollars toward payment for said boat.

2. I do hereby acknowledge that I owe to the said Maurice Gruber, the sum of Five Thousand ($5,000.00) dollars as a balance due and owing for said boat under the terms of this agreement made this date.

3. I do hereby acknowledge that hereafter the said Maurice Gruber owns one-half of the subject boat, now known as the "JANIE LEE" which boat shall remain registered in my name. However, he shall be entitled to its use *only* during weekdays (Monday through Thursday) except: (a) when I shall advise him that he may use it on weekends, or (b) he takes up to a two week vacation on said boat for a two week period that shall be mutually agreed to, or (c) when I shall advise him that I shall be using said boat for a two week vacation, which date I shall

advise him of at least thirty days in advance of the start of said vacation. The said Maurice Gruber shall not, under any circumstances, disclose to any person at the Huntington Yacht Club that he is a part owner of said boat. I, on the other hand, will advise the Yacht Club dockmaster that Maurice Gruber may pick up the keys to said boat at any time and is authorized to take it off its mooring.

4. In view of the fact that I have maintained this boat, etc., for some time and will continue to do so without reimbursement from Maurice Gruber, it is understood that: (a) Gruber waives all past interest on the original $35,000.00 to date, and (b) Gruber waives Future interest on the $5,000.00 still remaining unpaid to him for my one-half share of said boat. In view of my future maintenance of said boat without contribution by Gruber or liability on his part in any way, Gruber agrees that my one-half interest in said boat has been purchased for the total sum of $15,000.00, and not one-half of the promissory note of $35,000.00, which is now cancelled and null and void.

5. In case of a sale of said boat, each of us shall be entitled to one-half of the proceeds, but each shall have the right of "First Refusal" at the price offered before the boat is sold. Proceeds of insurance loss payments shall also be split equally.

6. This agreement shall be binding upon the heirs, representatives and assigns of both Gruber and D'Auria.

/s/ Michael D'Auria

/s/ Maurice B. Gruber