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'S OPPOSITION AND REPLY
BRIEF TO THE THREE-JUDGE COURT

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

Page

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'S OPPOSITION AND REPLY
BRIEF TO THE THREE-JUDGE COURT

We submit this brief in opposition to the defendants' motion to dismiss the complaint and vacate the temporary restraining order entered by Judge Weinstein. We also submit this brief in further support of plaintiff's application for injunctive and declaratory relief.*

---

*The following abbreviations are used in referring to the Briefs before the Court:

"Def. Br." refers to the defendants' Joint Brief in Support of their Motion to Dismiss.

"Am. Br." refers to the Amicus Curiae Brief in Support of Defendants' Motion and in Opposition to Plaintiff's Application.

"L. Br." refers to plaintiff Levin's Opening Brief to the Three-Judge Court.

Argument

I

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND TO VACATE THE TRO SHOULD BE DENIED

We labor under some difficulty in responding to defendants' motion, because the grounds therefor are scarcely discussed in defendants' brief -- with most of the "discussion" contained in cryptic footnotes.

To the extent that the defendants' position can be fathomed, it is based on a deliberate distortion of plaintiff Levin's position and on a tortured construction of the law.

In the following sections of this brief, we hope to set matters straight.

A. This Court Has Jurisdiction

1. The Defendants Are Not Immune From This Suit for Injunctive and Declaratory Relief Under 42 U.S.C. § 1983.

Defendants argue that they are not subject to the jurisdiction of this Court because the Appellate Division is not a "person" within the meaning of 42 U.S.C. § 1983, citing

Zuckerman v. Appellate Division, 421 F.2d 625 (2d Cir. 1970). (Def. Br. 21 n.).* The defendants are wrong.

First, whatever the vitality of Zuckerman, it has expressly been restricted by subsequent decisions to cases in which the Appellate Division is sued as a body. Where, as here, the Justices and Clerk of the Appellate Division are sued as individuals, Zuckerman does not apply and the federal court has jurisdiction over the defendants. Erdmann v. Stevens, 458 F.2d 1205, 1208 (2d Cir.), cert. denied, 409 U.S. 889 (1972) (and see Lumbard, J., concurring, 458 F.2d at 214 n.5). Accord, Law Students Civil Rights Research Council v. Wadmond, 299 F. Supp. 117, 123-24 (S.D.N.Y. 1969) (three-judge court), aff'd on other grds., 401 U.S. 154 (1971).

Second, it is settled in this circuit, and elsewhere, that, despite whatever immunity State judges may enjoy from suits for money damages (Pierson v. Ray, 386 U.S. 547 (1967)), they enjoy no such immunity from suits, such as Levin's, for injunctive relief under § 1983. This rule recently was set forth, without reservation, in a case

---

*Although the defendants assert that this "has been the consistent position of the Attorney General," the fact is that the same Attorney General did not press this point on the appeal to the Supreme Court in a case strikingly similar to ours, Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 158 n.9 (1971). We discuss Law Students in further detail below.

relied on by the defendants here for other propositions, Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974).

In Javits, as here, a § 1983 suit was brought against the Justices and Clerk of the Appellate Division alleging, inter alia, that various aspects of the New York attorney disciplinary procedure were unconstitutional.* Judge MacMahon rejected the defendants' contention that they were immune from suit under § 1983, holding (382 F. Supp. at 136):

> ". . .[I]n this circuit, at least, state judges are not immune from suits for injunctive relief under § 1983, and since plaintiffs seek only injunctive and declaratory relief, we reject defendants' immunity argument."

Accord, Law Students Civil Rights Research Council v. Wadmond, supra; Wallace v. McDonald, 369 F. Supp. 180, 188 (E.D.N.Y. 1973); Littleton v. Berbling, 468 F.2d 389, 395-408 (7th Cir. 1972), rev'd on other grounds sub nom. O'Shea v. Littleton, 414 U.S. 488 (1974); Koen v. Long, 302 F. Supp. 1383, 1389 (E.D. Mo. 1969), aff'd per curiam, 428 F.2d 876 (8th Cir. 1970), cert. denied, 401 U.S. 923 (1971); Jacobson v. Schaefer, 441 F.2d

---

*Although the plaintiffs in Javits waged a constitutional attack on the disciplinary procedure, their grounds therefor were different than those asserted by plaintiff Levin (see L. Br. at 24).

127, 130 (7th Cir. 1971); and Mills v. Larson, 56 F.R.D. 63, 67-68 (W.D. Pa. 1972).*

Accordingly, in this § 1983 action, in which plaintiff Levin seeks only injunctive and declaratory relief, this Court has jurisdiction over the individual Justices and Clerk of the Appellate Division, Second Department.

2. This Action Challenges the Constitutionality of a State Statute and Not the Disposition of an Individual Case by the State Courts.

The defendants attempt to distinguish Erdmann and Law Students on the ground that "both involved threatened preliminary administrative actions in bar admission and disciplinary procedure" while Levin's case is "really [an] attempt to have a federal court sit in review of the actions of the Appellate Division, Second Department, in

---

*While the Supreme Court has yet to rule definitively on whether State judges enjoy blanket immunity from injunctive suits under § 1983, its decisions that touch upon the area suggest strongly that no such immunity exists. See Ex parte Virginia, 100 U.S. (10 Otto) 339, 346-49 (1880). Cf. Hadnott v. Amos, 394 U.S. 358 (1969). See also, Ex parte Young, 209 U.S. 123 (1908). Moreover, as the three-judge court recognized in Law Students, supra, 299 F. Supp. at 123, the rationale for giving State judges immunity from damage suits does not apply to suits seeking injunctive relief under the Civil Rights Act.

finding professional misconduct" (Def. Br. 21 n. and 18). This argument ignores not only the facts and holdings of Erdmann and Law Students, but plaintiff Levin's position in this case.

Plaintiff Levin's amended complaint and opening brief make clear that his attack is on the constitutionality of a State statute. It is difficult to understand how Levin's challenge to the Statute for denying attorneys an appeal as of right on all questions in a State disciplinary proceeding could be deemed (as the defendants pretend) "really" a collateral attack on the judicial disposition of an individual case. Obviously, it is no such thing.

Unlike the plaintiffs in the cases cited, without discussion, by the defendants (Def. Br. 19-21), plaintiff Levin has not asked this federal court (in any of his claims) to review any judicial conduct or rulings in the State disciplinary proceeding against him (such as, for example, evidentiary rulings or rulings on questions of law). Rather, he has asked that the statutory procedure, on its face or as applied, be declared unconstitutional.

He has sued these defendants as the State officers charged with administering and enforcing the challenged

Statute in New York State's Second Judicial Department; and he has sought an injunction restraining the defendants from enforcing that Statute. This was precisely the relief sought against the same defendants with respect to the same State statute (N.Y. Judiciary Law § 90) in Law Students. And, contrary to defendants' contention, the actual holding of the three-judge court on this point in Law Students was "that the Appellate Division judges may be enjoined from enforcing an unconstitutional statute." Sostre v. Rockefeller, 312 F. Supp. 863, 878 n.11 (S.D.N.Y. 1970), modified on other grds., 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972).

The three-judge court in Law Students expressly recognized that, to hold otherwise -- in cases where the State has entrusted enforcement of a statute to the judiciary -- "would be to leave without a remedy a significant class of the deprivations of federal rights under color of state law that Congress intended the federal courts to redress under 42 U.S.C. § 1983 and 28 U.S.C. § 1343" (299 F. Supp. at 124).

Section 90 of the State Judiciary Law is an integrated code, governing the practice of law in New York.

ciplinary proceeding; the suit was against individual Appellate Division Justices and Clerk, in the same capacity as they are sued here; and the Second Circuit expressly upheld jurisdiction over the defendants on the authority of Law Students (458 F.2d at 1207-1208).*

The State of New York could not (as the defendants would have it) immunize one of its statutes against any

---

*The complaint in Erdmann was nevertheless dismissed on the authority of Younger v. Harris, 401 U.S. 37 (1971), since plaintiff was seeking to enjoin trial of the pending State disciplinary proceeding against him (458 F.2d 1208-1212). That problem, of course, does not exist in our case since the trial of the State proceeding against Levin has been concluded. In any event, it is not clear that Younger v. Harris would bar Mr. Erdmann's suit today, in light of the subsequent decision of the Supreme Court in Mitchum v. Foster, 407 U.S. 225 (1972) (holding that § 1983 is an "Act of Congress" that comes within the "expressly authorized" exception to the anti-injunction statute, 28 U.S.C. § 2283).

challenge under the Civil Rights Act simply by delegating enforcement of that statute to State judges rather than to other State officials. As the three-judge court stated in Law Students (299 F. Supp. at 123):

> "We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by those who are."

Plaintiff Levin's action seeks "to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act." This Court has jurisdiction to hear it.

B. Plaintiff Levin's § 1983 Suit Is Not Barred by Principles of Res Judicata, Collateral Estoppel, Waiver or Comity.

The thrust of defendants' argument on this point (Def. Br. 20 and n., 28 and n.) seems to be that plaintiff Levin is improperly seeking to relitigate constitutional questions that were previously raised and decided (or that might have been raised) in the course of the State proceedings. For this argument, the defendants rely primarily on

Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974). But here again, the defendants have misconstrued the law as well as the proceedings in Levin's case.

The simple fact is that the constitutional questions now before this Court were neither raised nor decided in the State proceedings against Levin.

No constitutional questions were raised before the referee or the Appellate Division. The constitutional issues Levin asserted in his motion to the New York Court of Appeals for leave to appeal did not challenge the constitutionality of the Statute itself; and the issue relating to the statutory denial of appeals on all questions to attorneys was not raised at all.

Moreover, there was no adjudication of any of the issues raised by Levin -- for it is settled that a denial by the New York Court of Appeals of a motion for leave to appeal (such as the denial in Levin's case) is discretionary and is in no sense equivalent to a decision on the merits. Matter of Marchant v. Meade-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929), reargument denied, 253 N.Y. 534, 171 N.E. 770, appeal dismissed, 282 U.S. 808

(1930). See also Cohen and Karger, Powers of the New York Court of Appeals § 82 at 356 (rev. ed. 1951).*

The situation in Tang was entirely different. There, the plaintiff-attorney sought a federal determination of precisely the same questions that he had previously sought and received a determination on from the State court.

Thus, after being denied admission to the New York bar for failure to meet the residence requirements, Mr. Tang commenced a State court action challenging the constitutionality of the requirements. (487 F.2d at 140-41 and 141 n.2). After the Appellate Division decided against him, Mr. Tang commenced a § 1983 action in the federal court, raising the exact questions he had asserted in his unsuccessful State action -- indeed, he conceded the identity of issues in oral argument before

---

*In his motion for leave to appeal, Levin also claimed that he was entitled to an appeal as of right on the constitutional issues he asserted, pursuant to CPLR 5601(b). The failure of the Court of Appeals to give him such an appeal was no more an adjudication of those constitutional issues than the denial of leave to appeal. At best, it was only a determination that the constitutional issues Levin asserted were not necessarily involved in the decision of his case. See Javits v. Stevens, supra, 382 F. Supp. at 142, and cases and authority cited therein.

the Second Circuit (487 F.2d at 141). The district court dismissed Tang's complaint, and the Second Circuit (2-1) affirmed, stating:

> "It would seem to follow a fortiori that the direct suit against the state judiciary raising the very same issues [as those raised in Mr. Tang's state action] should be dismissed if the principle of comity is to have any meaning. Not only is the practice bizarre but the affront to the state legal system is blunt and unnecessary. The appellant was not dragged into the state court, he freely sought that forum." (487 F.2d at 143; emphasis added).

The distinction between Tang and Levin's case is self-evident. Mr. Levin did not commence any action prior to this federal suit challenging the constitutionality of the New York Attorney-Disciplinary Statute. Nor has he received a decision from any State court on the merits of his constitutional challenge.

In commencing this federal action after he had been denied leave to appeal, Mr. Levin did precisely what the Tang majority, and § 1983, said he could do: He selected a federal, instead of a state, forum in which to litigate his federal rights (see 487 F.2d at 141). Accordingly, the disciplinary decision in the State proceeding against Levin raises no bar to the litigation of his constitutional claims in this federal suit.

Nor is such a bar raised by the fact that, theoretically, the constitutional questions Levin now presents "might have been" litigated in the State proceedings. This follows from the settled rule that the federal remedy under § 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961). The "decisions are legion to the effect that exhaustion is not required in § 1983 cases." Sugar v. Curtis Circulation Co., 377 F. Supp. 1055, 1059 (S.D.N.Y. 1974). Thus, as the Second Circuit recently held in Lombard v. Board of Education of City of New York, 502 F.2d 631, 635 (2d Cir. 1974):

> "To apply res judicata to a remedy which 'need not be first sought and refused' in the state court, and which actually was not sought would be to overrule the essence of Monroe v. Pape and Lane v. Wilson, 307 U.S. 268, 274, 59 S. Ct. 872, 83 L. Ed. 1281 (1939)."

Lombard is square authority for rejecting the res judicata (or estoppel) and comity claims the defendants make here. In that case, a dismissed teacher unsuccessfully prosecuted two Article 78 proceedings in the state courts, during which he never specifically raised any constitutional issue (502 F.2d at 633-35). Thereafter, he

instituted a § 1983 action, claiming that he had been denied procedural due process in his dismissal as a teacher. The defendants argued that Mr. Lombard's constitutional claims were barred because he "should have raised them in [the] state proceedings" (502 F.2d at 635). The Second Circuit disagreed -- expressly suggesting that no doctrine of waiver, or claim preclusion, should be applied to issues of procedural due process arising under § 1983 (502 F.2d at 635-37).

Hence, to follow the defendants' argument in Levin's case would be to flout governing case law and to emasculate the federal remedy provided by § 1983. It would also be to deny Levin a hearing in any court on the substantial constitutional questions raised in his amended complaint. That is undoubtedly what the defendants would like to achieve. But that is not the consequence that the legal doctrines of repose are intended to produce -- they aim at keeping a plaintiff from two days in court, not at denying him one.

C. The TRO Entered in This Case Does Not Violate "Full Faith and Credit" and Should be Continued.

Defendants argue that the TRO heretofore entered by Judge Weinstein, restraining enforcement of the suspension

order against Levin, violates "full faith and credit" (Def. Br. 8-9). While stating the general rule, that federal courts are obliged to give full faith and credit to state court proceedings, the defendants ignore the exception, which applies in Levin's case. As stated by the Court of Appeals in Batiste v. Furnco Construction Corp., 503 F.2d 447, 450 (7th Cir. 1974):

> ". . .[F]ull faith and credit implemented by federal statute (28 U.S.C. § 1738) is the means by which state adjudications are made res judicata. Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1184 (3rd Cir. 1972). And 'other well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738.' American Mannex Corporation v. Rozands, 462 F.2d 688, 690 (5th Cir. 1972), cert. den., 409 U.S. 1040, 93 S.Ct. 524, 34 L. Ed.2d 489." (emphasis added).*

In Batiste, the Court of Appeals found that there "is a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII [of the Civil Rights Act]" (503 F.2d 450). Accordingly, notwithstanding

---

*28 U.S.C. § 1738 provides, in pertinent part, that State judicial proceedings "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State. . . ."

the fact that the State of Illinois would have afforded res judicata to the State administrative determination against the plaintiffs in Batiste, the Seventh Circuit declined to give full faith and credit to the State determination (id.).

Similarly here, there is "a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims" under § 1983 of the Civil Rights Act. Section 1983 is broad remedial legislation, "which should be interpreted with sufficient liberality to fulfill its purpose of providing a federal remedy in a federal court in protection of a federal right." Birnbaum v. Trussell, 371 F.2d 672, 676 (2d Cir. 1966). To the extent the federal policy underlying full faith and credit, as implemented by 28 U.S.C. § 1738, competes with the federal policy underlying the protection of civil rights, as implemented by § 1983, the latter must take precedence.

This conclusion is reinforced by the recent decision of the Supreme Court in Mitchum v. Foster, 407 U.S. 225 (1972), which held that § 1983 is an "Act of Congress" that comes within the "expressly authorized" exception to the anti-injunction statute, 22 U.S.C. § 2283, so as to permit

a federal court in a § 1983 suit to grant an injunction to stay a proceeding pending in a State court. Mitchum, we submit, is sound authority for the TRO in Levin's case.

The defendants do not deny that enforcement of the suspension order would inflict irreparable injury on the 67-year old Mr. Levin. Nor do they contend that they, the public, or anyone else can be harmed if the suspension order is not enforced until this Court has an opportunity to resolve the constitutional claims. Hence, there is absolutely no justification for permitting enforcement of the suspension order at this point -- especially since the damage to Levin's reputation, which would plainly result from enforcement, could probably not be remedied even if this Court should ultimately uphold Levin's claims on the merits.

If this Court were powerless to protect plaintiff Levin while he litigates his constitutional claims in this Court, then the remedy afforded by § 1983 would be illusory indeed. The Supreme Court, with good reason, has refused to allow that result (particularly through its decision in Mitchum v. Foster). The defendants should not be able to force it here. The TRO, thus, should be continued.

II

THE NEW YORK ATTORNEY-DISCIPLINARY STATUTE IS UNCONSTITUTIONAL

A. Denial of Appellate Review to Attorneys

1. Denial of Equal Protection

The defendants begin their answer on this issue by arguing with themselves. We never said, as they suggest, that attorneys are constitutionally entitled to Article 78 proceedings or that State courts may not be entrusted with enforcing attorney discipline. In fact, we specifically disavowed any such contentions (see L. Br. 5, 24-25; compare Def. Br. 14-16).*

Plaintiff Levin's equal protection claim is based on the failure of the State to give attorneys the same rights to review of initial disciplinary decisions against them as it gives to all other New Yorkers. This claim would be satisfied if the State gave attorneys at least one appeal as of right, on all questions, from the tribunal of original jurisdiction in disciplinary proceedings -- whatever that tribunal is.**

---

*Indeed, we distinguished the equal protection holding in Javits v. Stevens, supra, in part, on the ground that the plaintiffs there, unlike Levin, based their equal protection argument on the failure of the State to provide Article 78 proceedings for attorneys (L. Br. 24-25).

**In this connection, as a result of misconstruing our opening brief, the defendants have actually supported plaintiff Levin's position. Thus, they assert, as we have argued, that a motion before the Appellate Division to confirm or disaffirm a referee's report in an attorney disciplinary proceeding is not an appeal (Def. Br. 3 n; compare L. Br. 21). We agree. In fact, that is the source of the problem -- since the Appellate Division does not sit as an appellate tribunal in an attorney disciplinary proceeding, a failure to provide an appeal from the Appellate Division's decision means no appeal at all.

The defendants suggest nothing to justify the State's denial of such appellate rights only to attorneys. Instead, they contend that plaintiff Levin's argument, "carried to its logical extreme," would mean stripping the courts of their power over attorney discipline and vesting such power in the "Board of Regents" (Def. Br. 16). They are wrong. The equal protection problem could be resolved without taking any power away from the courts:

For example, the Statute could be amended to designate as statutory trier-of-fact the judge who now acts only as "referee."* Or, the New York Supreme Courts themselves (as opposed to their Appellate Divisions) could be made the tribunals of original jurisdiction -- as they already are in most other judicial proceedings. In either event, the Appellate Division would then sit in its usual capacity as a court of review, with the same scope of review already afforded to other New York litigants.

Ignoring this, the opposition proceeds to argue that attorneys and other professionals are not in fact treated unequally (Am. Br. 6-12). In sum, the opposition attempts here

---

*Provision for a referee "to determine" (as opposed to a referee simply "to report") already exists in New York law, CPLR §§ 4001, 4301. Compare CPLR 4320. The decision of such a referee stands "as the decision of a court," CPLR 4319, and is reviewable on appeal as all other court decisions in New York. See CPLR 5016(c), and 4 Weinstein-Korn-Miller, New York Civil Practice ¶ 4319.01, at 43-50, and ¶¶ 4301.01, 4301.05, 4318.04 (1973).

to limit the equal protection class to professionals, and then to equate what other professionals receive through Article 78 proceedings with what attorneys receive from the Appellate Division in disciplinary proceedings. But the equation is invalid.

First, the opposition suggests no rational reason for discriminating between attorneys and other litigants (professional or not). Once the State chose to subject accused attorneys to the judicial process, equal protection required it to give those attorneys the same appellate rights as it gives to all others subject to the judicial process.

Second, even limiting the class solely to "professionals," the argument fails -- for other professionals, unlike attorneys, are guaranteed at least one independent judicial review of initial decisions against them. This is accomplished through Article 78 proceedings, in which the review afforded by the Appellate Division is akin to ordinary judicial appellate review.* See Cohen and Karger, Powers of

---

*The amicus brief (at 7-8) attempts to denigrate the Article 78 review by calling it "limited" -- although its scope embraces all questions of law and the substantial evidence test as to facts (see L. Br. App. C). Nevertheless, whether "limited" or not, it is a review, as of right, that attorneys do not have. Further, its scope is not nearly so "limited" as the scope applied if an attorney succeeds in obtaining leave to appeal: There, the Court of Appeals will affirm the adverse decision unless there is no evidence to support it (see L. Br. 22). This makes even the limited opportunity for review available to attorneys more imaginary than real.

the New York Court of Appeals § 51, at 233 (rev. ed. 1951). The State then gives non-attorney professionals an opportunity for yet another appeal as of right to the New York Court of Appeals. Id.; see also CPLR 5601.

Such plain discrimination by the State against attorneys cannot be justified by the fact that "other professionals do not have immediate recourse to a court of law in their disciplinary proceedings" (Am. Br. 6). There is no reason to believe that initial determinations in non-attorney cases, rendered after a full due process hearing, are any more prone to error than initial judicial decisions in attorney cases.*

Nor was the State required to place attorney discipline in judicial hands in the first instance. The State made that decision for itself; it could not then use that decision to justify depriving attorneys of the same rights of review it grants to all other professionals. The special relationship between courts and counsel may justify entrusting attorney discipline to the judiciary, but it does not justify giving attorneys fewer rights than their peers in other professions.

---

*In fact, there is reason to believe just the opposite in New York where, under the Statute, the State has empowered one body (the Appellate Division) to act simultaneously as the accused attorney's grand jury, prosecutor, petit jury, judge and virtual court of last resort.

The defendants' remaining arguments are similarly meritless. They rely on the holding in Javits v. Stevens, supra, but cannot escape the distinctions between that case and Levin's discussed in our opening brief (at 23-25).*

Similarly, they misread the Statute, asserting 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." (Def. Br. 18).

But the New York Attorney-Disciplinary Statute expressly deprives attorneys of the appellate rights that would otherwise be available to them under the State Constitution and implementing statute (i.e., CPLR 5601). (See L. Br. App. A and B.)

Ironically, in making this final argument the defendants support our point: The State of New York has no apparent or rational reason for denying to attorneys what it gives to everyone else under its general laws. Unequal treatment by the

---

*Indeed, in attempting to avoid one of these distinctions, the defendants misrepresent Javits. They argue that the single district judge in Javits had jurisdiction to pass on the constitutionality of the Statute "as no injunctive relief was necessary. . ." (Def. Br. 17). But in fact, the plaintiffs in Javits sought "only injunctive and declaratory relief" (382 F. Supp. at 136; emphasis added).

State, without justification, is precisely what equal protection is designed to prevent.

2. Denial of Due Process

We demonstrated in our opening brief (at 25-27) that the denial of appellate rights to attorneys also violates due process. The defendants' argument is completely unresponsive on this point.

They simply state the general rule that due process does not ordinarily require a state to provide appellate review for its litigants (Am. Br. 10-12). We agree. But this does not answer our proposition -- namely, that where, as here, the State has failed to provide for a full and fair hearing in the court of first instance, due process does impose a requirement of appellate review. Since the New York Attorney-Disciplinary Statute does not satisfy this requirement (at least as the Statute is applied in cases such as Levin's, where credibility is crucial and the Appellate Division rules without ever seeing the witnesses), it is unconstitutional.

B. Denial of a Full and Fair Hearing

The defendants have no answer to the authority cited in our opening brief for the proposition that due process requires, in attorney disciplinary proceedings, a hearing before

the statutory trier-of-fact. (Compare L. Br. 27-31 with Def. Br. 23-25.) Instead, they simply refer to the use of masters in federal courts, contending that the Appellate Division may use a referee in an attorney disciplinary proceeding just as a federal court uses a master in a civil action (Def. Br. 23-24).

An attorney disciplinary proceeding, however, is not a "civil" action, but is "quasi-criminal" in nature (see L. Br. 28-29). Masters are not used to hear criminal cases, for in such cases, "the one who decides must hear." U.S. ex rel. Graham v. Mancusi, 457 F.2d 463, 469 (2d Cir. 1972).

Further, at least in cases where credibility is crucial to outcome and where only the master (or referee) has observed the witnesses, the court is not in as good a position as its master (or referee) to draw conclusions or inferences from the evidence. Adding to this the severity of the possible punishment in attorney disciplinary proceedings, due process is not satisfied in such proceedings by having the court assess credibility solely through a printed transcript.

In this connection, let us consider one of the evidentiary disputes in Levin's case, to which the defendants themselves refer (Def. Br. 4-5), i.e., the dispute as to whether Levin disclosed at his second meeting with the Froessel investigators (on November 13, 1970) that the boat document (which

the Appellate Division found false) had been back-dated (Ex. A, at 62).* Levin testified that he made such disclosure. The Froessel investigator (Mr. Anderson) testified that Levin had not. There was no documentary or other objective evidence to resolve this dispute. Its outcome depended on which witness was believed. The referee believed Levin and resolved the dispute in his favor:

> "I find that [Levin] did make full disclosure of the history of these documents [regarding the boat document] and the reasons for the back-dating at the second interview on November 13, 1970" (Ex. A, at 63).

The referee made this judgment after "an extensive opportunity to closely observe [Levin]" and the other witnesses (Ex. A, at 63). The Appellate Division, however, observed no one, and so was not in "as good a position" when it disaffirmed the referee as to the boat document. Levin was thereby denied due process, for the trier of his fate, acting pursuant to the Statute, never saw the demeanor or the confrontation of the witnesses.

The defendants' suggestion that it would be impractical for the Appellate Division to hear attorney disciplinary proceedings

---

*We should note that, contrary to the misstatement in defendants' brief (at 22), neither the boat document nor any of the other documents involved in Levin's case were alleged to be false because they were back-dated. However, evidence of when the back-dating was disclosed was offered on the issue of Levin's intent in preparing and submitting the documents to the Froessel inquiry.

is irrelevant (Def. Br. 25). The practical difficulty of enforcing constitutional rights is no justification for denying them. For example, practical concerns did not deter the Supreme Court recently from insuring the rights of students to notice and a hearing prior to short suspension from high school. Goss v. Lopez, 43 U.S.L.W. 4181 (U.S. Jan. 22, 1975). Cf. Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

Also, the defendants' practical problem could easily be solved by amending the Statute (as we suggested earlier) to make the referee the statutory trier-of-fact, thus leaving the Appellate Division to perform its usual function as an appellate tribunal. This would have the virtue of correcting two constitutional infirmities in the Statute: It would provide for a full and fair hearing in the court of first instance and for an appeal as of right on all questions from the initial decision.

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

Predictably, the defendants responded to our arguments on this point solely by contending that the requirement of a written decision applies only to administrative determinations (Def. Br. 25-27). We anticipated that argument, and so answered it, in our opening brief (at 36-38).

We add here only that the defendants have misconstrued the reason we cited cases such as United States v. Livingston, 459 F.2d 797 (3rd Cir. 1972), et al. (L. Br. 37). We did not suggest that those cases held due process to require a written statement from a court. They did not have to -- because, as the defendants point out, the federal civil and criminal rules already require federal courts to render such written statements. See Rule 23(c), Fed. R. Crim. P. and Rule 52(a), Fed. R. Civ. P.

We introduced the cases to show the rationale for the requirement, i.e., to provide a check on arbitrary conduct by decision-makers, to avoid decision by fiat, and to insure proper appellate review. Where administrative law did not itself impose the requirement, the Supreme Court did so on due process grounds (see L. Br. 34-36). In so doing, the Court did not focus on the nature of the tribunal, but on the interests at stake in the proceedings.

The interests at stake in an attorney disciplinary proceeding -- a lawyer's reputation and livelihood -- are significant indeed, and command obedience to the same due process requirement.

713 (1962); and Law Students, supra, 299 F. Supp. at 127-29.

To the extent that any of Levin's claims can be said to challenge the constitutionality of the Statute "as applied" (and certainly this could not be said as to the claim concerning statutory denial of appellate rights), such a challenge must also be heard by a three-judge court. See, e.g., Idlewild Bon Voyage Liquor Corp. v. Epstein, supra; Dept. of Employment v. United States, 385 U.S. 355 (1966); and Query v. United States, 316 U.S. 486 (1942).

Finally, we respectfully call the Court's attention to the severe prejudice to plaintiff Levin, and the sheer waste of judicial time, that would follow if this three-judge court erroneously dissolved itself and returned the case to a single judge: The resulting order would be invalid for want of jurisdiction, "whereas the only consequence of erroneous retention of jurisdiction by the three-judge court is that the appeal should be taken to the Court of Appeals rather than to the Supreme Court." Law Students, supra, 299 F. Supp. at 129. See also Note, "The Three-Judge District Court: Scope and Procedure Under Section 2281," 77 HARV. L. REV. 299, 305 (1963).

Conclusion

For the foregoing reasons, and those set forth in our opening brief, the defendants' motion to dismiss should be denied; the temporary restraining order should be continued; the three-judge court should hear this case; and plaintiff Levin's application for injunctive and declaratory relief should be granted.

Respectfully submitted,

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

Simon H. Rifkind
Mark A. Belnick
Steven A. Coploff,

Of Counsel

March 7, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

MILTON LEVIN,

Plaintiff,

-against-

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

Defendants.

74 C 1668
(J.B.W.)

AFFIDAVIT OF SERVICE BY MAIL

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARK A. BELNICK, being sworn, states:

1. I am an attorney associated with the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for plaintiff in the above action.

2. On March 7, 1975, I served true copies of Plaintiff's Opposition and Reply Brief to the Three-Judge Court on the attorneys listed below, by depositing the same, enclosed in properly addressed and sealed postpaid envelopes, in a depository maintained by the United States Postal Service within the State of New York:

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the
State of New York
Attorney for Defendants
Attn: A. Seth Greenwald, Esq.
Two World Trade Center
New York, New York 10047

NICHOLAS C. COOPER, ESQ.
Chief Counsel
Judicial Inquiry on
Professional Conduct
16 Court Street
Brooklyn, New York 11241

Mark A. Belnick

Sworn to before me this

7th day of March, 1975.

Notary Public

CLARA A. LAURO
Notary Public, State of New York
No. 30-7443100
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1976